

FEDERAL COURT OF APPEAL

B E T W E E N:

VOLTAGE HOLDINGS, LLC

APPELLANT

- and -

DOE #1 *et al.*

(See Schedule 1 for List of Defendants)

RESPONDENTS

- and -

**SAMUELSON-GLUSHKO CANADIAN INTERNET POLICY
& PUBLIC INTEREST CLINIC**

INTERVENER

**MEMORANDUM OF FACT & LAW
SAMUELSON-GLUSHKO CANADIAN INTERNET POLICY & PUBLIC IN-
TEREST CLINIC**

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OVERVIEW

1. Judges wield power with an anxiety that they sanction wrong-doers, not innocents. Voltage's motion for default judgement placed this concern squarely before Justice Furlanetto. The only personal evidence Voltage Pictures LLC ("Voltage") tendered about these Defendants was that each had a contract for internet services. Voltage took no steps to obtain direct evidence of the Defendants' activities. Justice Furlanetto concluded that it would not be just in the circumstances to award judgement.

2. Voltage appeals Justice Furlanetto's decision. Voltage's complaints come down to two issues: the test for copyright infringement by authorization, and Justice Furlanetto's fact-finding exercise in the face of Voltage's paltry evidentiary record.

3. Voltage's theory of authorization called on Justice Furlanetto to overturn a Supreme Court decision and a century of statutory interpretation of the authorization right. Justice Furlanetto was correct to reject Voltage's adventurism.

4. These defendants were before the Court only because they were subscribers for internet accounts linked to allegedly infringing activity. Justice Furlanetto, declining to do the work Voltage was unwilling to do for itself, refused to draw the inference Voltage demanded that the subscribers were the infringers. This Court should not insert itself into Justice Furlanetto's fact-finding exercise.

PART I – STATEMENT OF FACTS

5. Voltage is a frequent plaintiff in mass copyright infringement lawsuits in Canada and around the world. This appeal stems from an action joining multiple anonymous internet subscribers, each alleged to infringe Voltage's copyright in a film, "Revolt" (the "Work"). Voltage sought default judgement against 30 of the 110 Defendants to that action. This motion "closes the loop" in Voltage's mass lawsuit: all other Defendants have either settled or had the action discontinued against them. Voltage's motion raises the prospect of establishing a low-cost litigation path, from Statement of Claim through Norwich Order through Default Judgement – and an award of statutory damages and costs – that will be followed by others.

6. The motion represented the first time a Federal Court judge has had the opportunity to opine on the merits of Voltage's aggressive theory of ISP subscriber liability for authorizing copyright infringement.

PART II – POINTS IN ISSUE

7. Did Justice Furlanetto:

- a. err in law by misidentifying the test for infringement by authorization;
- b. commit a palpable and overriding error in her application of the facts to the law of infringement by authorization in finding that Voltage had not met its burden;
- c. err in law by misapplying any “tactical burden”;
- d. commit a palpable and overriding error in refusing to exercise her discretion to draw an inference that the subscribers were in fact the uploaders identified;
- e. err in law by “hobbling” any future discovery Voltage might undertake?

PART III – STATEMENT OF SUBMISSIONS

A. Standard of Review

8. The standard of review on appeal is as set out in *Housen v Nikolaisen*.¹

B. *SOCAN v ESA* removes communication right infringement as an issue

9. **The SCC Decision** – The Supreme Court’s decision in *SOCAN v ESA* dispenses with Voltage’s pleading that the Defendants infringed Voltage’s s. 3(1)(f) communication rights.² The Court held that when a work is made available for on-demand streaming, s. 2.4(1.1) clarifies that the author’s communication right under s. 3(1)(f) applies.³ The Court stated that if a work is downloaded, the author’s reproduction right is engaged, and that if a work is made available for downloading, the author’s right to authorize reproductions is engaged. Offering a work for download through BitTorrent does not engage s. 3(1)(f) rights as pled by Voltage.

10. **Application** – Voltage did not properly plead nor adduce evidence that (1) the Work was made available for streaming,⁴ or (2) the Defendants have infringed any of Voltage’s reproduction rights by downloading a durable copy of the Work.⁵ In light of *ESA*, the only issue remaining is whether the subscriber is liable for directly or

¹ [2002 SCC 33](#) at paras [8](#), [10-18](#), [19-20](#), and [28](#); *Canada v South Yukon Forest Corporation*, [2012 FCA 165](#) at para [46](#).

² Voltage Amended Statement of Claim at para 44 [ASOC]; *Copyright Act*, [RSC 1985, c C-41](#), s [3\(1\)\(f\)](#) [Act].

³ *Society of Composers, Authors and Music Publishers of Canada v Entertainment Software Association*, [2022 SCC 30](#) at paras [8-9](#), [102-103](#) [ESA].

⁴ *ESA*, *supra* note 3 at para [8](#).

⁵ *Théberge v Galerie d’Art du Petit Champlain inc.*, [2002 SCC 34](#) at paras [42](#) and [47](#).

indirectly authorizing the distant non-party downloader. Justice Furlanetto concluded that Voltage failed to show that the subscribers were infringing uploaders.⁶

C. Justice Furlanetto correctly applied the law of authorization

11. The meaning of “authorization” is a question of statutory interpretation: the provision is construed by considering its text, context, and purpose.⁷ Past decisions by this Court and the Supreme Court constrain available interpretations.⁸

12. The text, context, and purpose of s. 3(1)’s authorization provision converge on a single conclusion: Parliament intended liability for authorization only where the authorizer sanctioned, approved, and countenanced the infringing activity of another. Justice Furlanetto correctly rejected Voltage’s suggested wilful blindness standard.

(1) Authorization means “to sanction, approve, and countenance”

(a) CCH provides the textual meaning of “authorization”

13. Textual interpretation involves the literal construction of words, considering ordinary meaning.⁹ In *CCH*, the Supreme Court interpreted Parliament’s intent in enacting the authorization right. The Court definitively held that “authorize” means to “sanction, approve and countenance”, and that “countenance ... must be understood in its strongest dictionary meaning, namely, ‘[g]ive approval to; sanction, permit; favour, encourage’”.¹⁰ The Court cautioned that “a person does not authorize infringement by authorizing the mere use of equipment that could be used to infringe copyright.” One authorizing use of equipment enjoys a presumption that “a person who authorizes an activity does so only so far as it is in accordance with the law”. The Court stated that “[t]his presumption may be rebutted if it is shown that a certain relationship or degree of control existed between the alleged authorizer and the persons who committed the

⁶ *Voltage Holdings, LLC v Doe#1*, [2022 FC 827](#) at para [55](#) [*Reasons*].

⁷ *Rizzo & Rizzo Shoes Ltd (Re)*, [1998 CanLII 837 \(SCC\)](#), [1998] 1 SCR 27 at para [21](#); *R v Kirkpatrick*, [2022 SCC 33](#) at paras 130-131.

⁸ *Canada (Minister of Citizenship and Immigration) v Vavilov*, [2019 SCC 65](#) para [112](#).

⁹ Ruth Sullivan, *Statutory Interpretation* 3rd ed, (Toronto: Irwin Law, 2016) at 59 ([vlex justis](#)) [Sullivan].

¹⁰ *CCH Canadian Ltd v Law Society of Upper Canada*, [2004 SCC 13](#) at para [38](#) [*CCH*]; citing *The New Shorter Oxford English Dictionary* (1993), vol 1, at 526.

copyright infringement”.¹¹ Note that the alleged authorizer’s “control” is over the infringer, not the equipment. It is for the plaintiff to rebut this presumption with evidence.

(b) Contextual analysis excludes expansion of authorization

14. The context of a statutory provision addresses the implied intention of Parliament.¹² Contextual analysis may consider the purposes of the *Act*, its interpretive principles, the scheme of the *Act* as a whole, and particular relevant provisions.¹³ We will address three internal contexts of the *Act*: (1) its underlying rationale, (2) other relevant provisions, and (3) other intermediary liability provisions.

15. **(i) The Underlying Rationale of the Act** – The twin principles of balance and technological neutrality guide interpretation of the *Act*. The underlying rationale of the *Act* preserves the “balance between promoting the public interest in the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator...”¹⁴ “The principle of technological neutrality is recognition that, absent parliamentary intent to the contrary, the *Act* should not be interpreted or applied to favour or discriminate against any particular form of technology.”¹⁵ The balance should be preserved in the digital environment.¹⁶

16. Voltage seeks to replace *CCH*’s authorization standard with “wilful blindness”.¹⁷ The Supreme Court rejected this expansive standard on the basis of the balance principle: “the *Moorhouse* approach to authorization shifts the balance in copyright too far in favour of the owner’s rights and unnecessarily interferes with the proper use of copyrighted works for the good of society as a whole.”¹⁸

¹¹ *CCH*, *supra* note 10 at para 38.

¹² *Cophorne Holdings v The Queen*, [2011 SCC 63](#) at para 91 (general definition of contextual factors), [110](#) (underlying rationale of the Act); *Canada Post Corp v Canadian Union of Postal Workers*, [2019 SCC 67](#) at paras 50-53.

¹³ Sullivan, *supra* note 9 at 51 ([vlex justis](#)).

¹⁴ *Théberge v Galerie d'Art du Petit Champlain inc*, [2002 SCC 34](#) at para 30.

¹⁵ *Canadian Broadcasting Corp v SODRAC 2003 Inc*, [2015 SCC 57](#) at para 66.

¹⁶ *Entertainment Software Association v Society of Composers, Authors and Music Publishers of Canada*, [2012 SCC 34](#) at para 8.

¹⁷ Voltage Memorandum at para 72.

¹⁸ *CCH*, *supra* note 10 at para 41 rejecting *Moorhouse v University of New South Wales*, [1976] RPC 151, [\(1974\) 3 ALR 1 \(QL\)](#) [*Moorhouse*].

17. Voltage’s wilful blindness standard would violate the principle of technological neutrality. Voltage would have this Court impose a different liability standard on Internet subscribers than that imposed in *CCH* on photocopier providers.

18. **(ii) Other Relevant Provisions** – Section 3(1) lies within the core rights that provide weight to the owners’ side of the copyright balance. Voltage seeks to expand a core owner right. Section 3 provides that copyright “means”, reflecting Parliament’s intention that s. 3 rights are exhaustive. Section 89 limits copyright to those rights in the *Act*. Expanding authorization by “re-interpreting” it a century after adoption violates this exhaustivity and shifts copyright’s balance “too far”.¹⁹ When Parliament intends to expand owners’ rights, it does so transparently by adding rights to s. 3.²⁰

19. **(iii) Intermediary Liability** – The *CMA* addressed vicarious liability for intermediaries for allegedly infringing internet-based activity but did so outside of s. 3’s core rights. Instead, Parliament crafted custom regimes for addressing s. 3 rights that involve (a) ISPs, (b) search location services, and (c) network services provided primarily for the purpose of enabling copyright infringement.²¹ Taken together, these provisions indicate that Parliament intended no change to the Supreme Court’s interpretation of the meaning of “authorize” in s. 3(1).

(c) Purposive analysis dismisses the wilful blindness standard

20. Consideration of the purpose of a statutory provision addresses Parliament’s presumed intent. This purpose may be construed outside of the four corners of the statute by looking at legislative evidence, such as Hansard, Committee minutes, and government publications. Judicial decisions offer persuasive evidence of purpose.²²

21. **(i) Consistent with Legislative History** – Canada adopted the authorization right in 1921 in the first Canadian *Copyright Act*.²³ The authorization provision simply

¹⁹ *CCH*, *supra* note 10 at para 41.

²⁰ *Copyright Modernization Act*, [SC 2012, c 20, s 4](#) (added the “distribution right” to s 3 as s 3(1)(j)) [*CMA*].

²¹ *Act*, *supra* note 2 ss [41.25-41.27](#), [27\(2.3\)](#).

²² Sullivan, *supra* note 9 at 259-260 ([vlex justis](#)).

²³ SC 1921, c 24.

adopts the language of the *Copyright Act 1911* (UK).²⁴ The legislative histories of both statutes disclose no special meaning for the authorization right.

22. **(ii) Consistent with Canadian Judicial History** – *CCH* is not a reinterpretation of the authorization right. It is consistent with and cites prior Canadian cases.²⁵

23. Subsequent Canadian cases have consistently applied *CCH*'s authorization standard. Voltage incorrectly suggests that *Salna*, *ESA*, and *CAIP* have modified *CCH*, permitting establishment of authorization through technological control.²⁶ *Salna* merely applied the motion to strike standard to permit Voltage to make the wilful blindness argument.²⁷ *ESA* provides a framework for compensation of owners when their work is downloaded or streamed. *ESA* in no way replaces *CCH*'s test of authorization.²⁸ *CAIP* deals with intermediary liability in the very particular case of internet service providers. It does not deal with authorization generally. Justice Binnie's comments relied upon by Voltage are *obiter* and opened a dialogue with Parliament to address ISP liability. They must be read in the context of the policy debate alive at the time as to the form of ISP responsibility Parliament might adopt. The Court references this debate in its discussion of foreign notice and takedown regimes.²⁹ Parliament rejected this approach, adopting instead the Notice and Notice scheme of the current *Act*. Parliament chose not to amend authorization.

24. **(iii) Consistent with UK Law** – *CCH*'s "sanction, approve and countenance" standard derives from UK courts' interpretation of the authorization provision of the U.K. *Copyright Act of 1911*: the leading Canadian cases relied upon by *CCH* all rely

²⁴ [6 Geo V, c 46](#).

²⁵ *CCH*, *supra* note 10 at para [38](#).

²⁶ Voltage Memorandum at para 67.

²⁷ *Salna v Voltage Pictures, LLC*, [2021 FCA 176](#) at para [77](#), [83](#) [*Salna*].

²⁸ *ESA*, *supra* note 3 at paras [104](#), [112](#).

²⁹ Voltage Memorandum at para 63; *Society of Composers, Authors and Music Publishers of Canada v Canadian Assn of Internet Providers*, [2004 SCC 45](#) at paras 124-126 [*CAIP*].

on the English Court of Appeals decision in *Falcon v. Famous Players Film Co.* for the meaning of “authorize”.³⁰ Subsequent U.K. cases have adopted this approach.³¹

25. **(iv) Consistent with Australian Law** – The only leading judicial authority invoking wilful blindness, the 1976 Australian *Moorhouse* decision, has been explicitly considered and rejected in Canada,³² the U.K.,³³ and even in Australia. The Australian courts have read down the statutory codification of *Moorhouse* and returned to the countenance standard of *Falcon*.³⁴

26. **(v) The Purpose of Authorization: Balanced Vicarious Liability** – The law recognizes that liability should fall on the shoulders of accessories to a wrong. Parliament implements this principle in copyright’s authorization right. Parliament is also concerned with unconstrained vicarious liability. Voltage’s wilful blindness standard burdens parties who themselves have done no wrong with supervisory and technological obligations inconsistent with copyright’s balance.

27. Justice Arnold and Prof. Davies suggest that accessory liability for infringement should rest on “principles of responsibility, culpability, and protecting rights”, but that “a balance needs to be struck when determining what constitutes “participation” or the appropriate “mental element”.³⁵ Liability for authorization under Canadian copyright law reflects this principled approach. *CCH* avoids extending liability with unanticipated consequences. In contrast, a wilful blindness standard:

- a. requires Canadians to police our neighbours’ communicative activities;
- b. chills expressive activity. A duty to cut off access to the Internet silences both lawful and infringing speech and blocks essential services;

³⁰ [1926] 2 KB 474, cited in *CCH* at para 38; *Muzak Corp v Composers, Authors, and Publishers Association of Canada*, [1953] 2 SCR 182 (CanLii) at 193; *De Tervagne v Belœil (Town)*, [1993] 3 FC 227 (QL) at paras 30-32.

³¹ *CBS Inc v Ames Records & Tapes Ltd.*, [1981] 2 All ER 812 (ChD) (QL) at 821 [Ames]; *CBS Songs Ltd v Amstrad Consumer Electronics plc*, [1988] 2 All ER 484 [Amstrad].

³² *CCH*, *supra* note 10 at para 41, rejecting *Moorhouse*, *supra* note 1810.

³³ *Amstrad*, *supra* note 31 at 493-494.

³⁴ *Roadshow Films Pty Ltd v iiNet Ltd*, 248 CLR 42 (WL) at para 125.

³⁵ Richard Arnold and Paul S Davies, “[Accessory liability for intellectual property infringement: the case of authorisation](#)” at 2.

- c. expands liability and imposes burdens on all entities that provide access, from residential consumers to educational institutions, libraries, and coffee shops;
- d. imposes an unrealistic technological solutionism that confuses the means of communication with allegedly infringing content. Copyright vests in particular content, not in “ports”, communicative protocols, or devices; and
- e. sets too broad a scope for liability and will deter innovation in services and products that have substantial non-infringing uses.³⁶

28. **(vi) Parliament has not signalled for an expansion of authorization** – Parliament’s objective in passing the *CMA* was to encourage copyright owners to embrace market-based solutions to the challenges of the Internet rather than to sue consumers.³⁷ Parliament did not craft an enforcement framework targeting small-scale, low-harm infringements. New Zealand and the United States offer just such models.³⁸ Instead, Parliament chose to enact an expedited notice scheme,³⁹ adopt litigation tools addressing “enablers” of infringement, and reduce non-commercial statutory damages.⁴⁰ Parliament further amended its notice scheme in 2018 to deter its use by “trolls”.⁴¹

29. Voltage asks this Court to do what Parliament chose not to do: reinterpret “authorize” in violation of the text, context, and purpose of the legislation. Voltage seeks a low-cost litigation mill for extracting settlements and default judgements.

30. Voltage relies on *Rogers* for the assertion that “[t]he deterrent effect of the Notice and Notice regime is predicated on the subscriber taking action on receipt of notice”.⁴²

³⁶ See Justice Breyer in *Metro-Goldwyn-Mayer Studios Inc v Grokster Ltd*, [545 US 913 \(2005\)](#) at 960; *Sony Corp of America v Universal City Studios Inc* [464 US 417 \(1984\)](#); Michael A. Carrier, “Copyright and Innovation: The Untold Story” [\(2012\) Wisc L Rev 891](#) for empirical evidence of the adverse effect of the doctrine of contributory infringement on innovation.

³⁷ Government of Canada, “[What the Copyright Modernization Act Says About Penalties and Remedies for Infringement](#)” (3 October 2011) [Canada].

³⁸ [Copyright \(Infringing File Sharing\) Regulations 2011](#) (SR 2011/252); [Copyright Alternative in Small-Claims Enforcement Act of 2020](#), 17 USC §§ 1501–1511.

³⁹ Government of Canada, “[What the Copyright Modernization Act Means for Internet Service Providers, Search Engines and Broadcasters](#)” (29 September 2011).

⁴⁰ Canada, *supra* note 37.

⁴¹ Hansard, [Comments of the Rt. Hon. David Lametti](#) (27 November 2018), p 24058.

⁴² Voltage’s Memorandum at para 76 relying on *Rogers Communications Inc v Voltage Pictures*, [2018 SCC 38](#) at para [34-35](#) [*Rogers*].

However, Voltage ignores its success in this action in obtaining cessations of infringements due to Notice and Notice’s deterrence effect.⁴³

31. Voltage argues that the regime’s purpose is as “a tool of enforcement, something that would tip the balance towards the owners of copyright.”⁴⁴ Voltage ignores Parliament’s dual purposes in enacting the regime; however the Supreme Court did not, holding in *Rogers*: “The notice and notice regime was enacted as part of the *CMA* to serve two complementary purposes: (1) to deter online copyright infringement; and (2) to balance the rights of interested parties.”⁴⁵

32. In 2018, Parliament further amended the regime to improve its balance by addressing abuses for purposes other than its intended, limited role.⁴⁶ Parliament intended the regime to balance the interests of consumers, ISPs, and copyright holders rather than to serve as a mere tool of copyright enforcement.

33. **(vii) Parliament did not intend to relieve copyright owners of the costs of enforcing their rights** – Copyright owners bear their enforcement costs. Voltage’s “wilful blindness” standard flips that rule by imposing on equipment providers a duty to police activities of others without any Parliamentary signal to do so.

(2) Internet subscribers do not authorize others’ infringements

34. Justice Furlanetto correctly identified and applied the test for authorization and found no evidence that any of the Defendants acted to “sanction, approve and countenance” the alleged infringement.⁴⁷ The Supreme Court has stated that “[a]uthorization is a question of fact that depends on the circumstances of each particular case”.⁴⁸ In the circumstances of Voltage’s particular case, Justice Furlanetto found that Voltage had failed to establish the facts necessary to make out an authorization claim. She made no palpable or overriding error in so doing.

⁴³ Affidavit of Marnie MacDonald, Affirmed May 31, 2021 at para 26, Appeal Book [AB], Tab 3. (A single notice deters 90% of recipients).

⁴⁴ Appellant’s Factum at paras 75-76, citing *Rogers* at paras [23](#), [34-35](#).

⁴⁵ *Rogers*, *supra* note 42 at para [22](#) (emphasis added) (citation omitted).

⁴⁶ Bill C-86, *The Budget Implementation Act*, 2018, No. 2, [SC 2018, c 27, s 243](#); Parliamentary Information and Research Service, [Legislative Summary of Bill C-86](#), 42nd Parl, 1st Sess.

⁴⁷ *Reasons*, *supra* note 6 at para [70](#).

⁴⁸ *CCH*, *supra* note 10 at para [38](#), citing *Ames*, *supra* note 31 at [823-24](#).

35. In the alternative, should this Court choose to adopt the wilful blindness standard “in the online context” as Voltage urges, Voltage would still fail to make its case due to its inadequate evidentiary record.

36. Voltage’s theory of “wilful blindness” requires three findings: (1) control over the equipment involved; (2) knowledge; and (3) the ability to prevent infringement.⁴⁹

37. **(1) Control over equipment** – Voltage’s evidence fails to establish that the Defendants exercised control over the devices used to upload portions of the Work. Voltage mischaracterizes Justice Furlanetto’s evidentiary findings when asserting “that Justice Furlanetto accepted that the Default Defendants could have set a password on Wi-Fi access, enabled a blacklist to ban specified devices, enabled a whitelist to only permit specified devices or block certain types of internet traffic like BitTorrent.”⁵⁰ The citations given merely state, without accepting, Voltage’s evidence.

38. Voltage fails to provide satisfactory evidence that subscribers exercise substantial technological control over their modem. Voltage relies on the affidavit of Benjamin Perino for evidence of controls allegedly available to subscribers. Perino is not tendered as an expert and discloses no knowledge or expertise in network engineering or ISP operations. The affidavit claims that subscribers possess the skills required to make device and network configuration changes to restrict wi-fi access, change passwords, and block and selectively allow specific devices. The affidavit also claims that internet subscribers can selectively block certain types of internet traffic (*i.e.*, BitTorrent).⁵¹

39. Voltage provided no supporting evidence that consumer routers or modems have these capabilities. Voltage did not supply a list of devices provided by the ISPs in this action, or documentation highlighting device capabilities. Voltage provided no ISP FAQs or subscriber help files explaining how to make these configuration changes.⁵²

40. All of the technological controls suggested by Voltage, even if possible for the average subscriber, are both overbroad and not specific to the allegedly infringing content. Exercising these controls will block lawful communications.

⁴⁹ Voltage’s Memorandum at para 61.

⁵⁰ Voltage’s Memorandum at para 68, relying on the *Reasons* at para [64](#).

⁵¹ Affidavit of Benjamin Perino, Affirmed May 28, 2021 at paras 18, 20 [Perino Affidavit], AB, Tab 4; Voltage’s Memorandum at para 68.

⁵² Perino Affidavit at para 20.

41. Voltage wrongly relies on *Rogers* for support for the legal significance of these controls.⁵³ This passage speaks to the potential functionality of the Notice & Notice regime and has nothing whatsoever to do with authorization.

42. **Knowledge of the infringing activity** – While Justice Furlanetto inferred from the notices that subscribers had knowledge of the allegations,⁵⁴ there was no evidence that they understood or connected the claim to any action at their address.

43. **Ability to prevent the act of concern** – Voltage erroneously argues that Justice Furlanetto required Voltage to demonstrate the exact nature of the relationship between the subscriber and infringer.⁵⁵ Justice Furlanetto observed that there was no evidence of the “relationship” or steps the subscriber may have taken to stop the activity.⁵⁶ Voltage neither sought nor adduced any such evidence. To say the Defendants have “done nothing” is unfair. Voltage’s lack of evidence particularized to each subscriber and their actions is a deliberate tactical choice.

44. Authorization is a question of fact. The circumstances of Voltage’s case lack a factual record upon which Justice Furlanetto could draw the findings Voltage seeks. Justice Furlanetto committed no reviewable error in declining to find liability.

D. Justice Furlanetto correctly applied the law of evidentiary burdens

45. Justice Furlanetto correctly identified the burden on a plaintiff in a copyright action.⁵⁷ In a default proceeding all allegations in the statement of claim are taken as being denied.⁵⁸ The plaintiff bears the legal burden of proving its claims on a balance of probabilities with sufficiently clear, convincing, and cogent evidence.⁵⁹

46. Voltage wrongly argues that Justice Furlanetto erred by rejecting “the law of the shifting legal burden on the grounds that it did not apply” to a default motion.⁶⁰ Voltage points to no particular finding attributable to any such misapprehension. Voltage

⁵³ *Rogers*, *supra* note 42 at para [34](#); Voltage Memorandum at para 71.

⁵⁴ *Reasons*, *supra* note 6 at para [69](#).

⁵⁵ Voltage Memorandum at para 62.

⁵⁶ *Reasons*, *supra* note 6 at para [70](#).

⁵⁷ *Reasons*, *supra* note 6 at paras [35](#), [45](#).

⁵⁸ *Federal Courts Rules*, [SOR/98-106, s 184\(1\)](#) [Rules].

⁵⁹ *Reasons*, *supra* note 6 at para [45](#); *Tatuyou LLC v H2Ocean Inc*, [2020 FC 865](#) at paras [9](#), [25](#).

⁶⁰ Voltage Memorandum at para 36.

further argues that it has “met its evidentiary burden and proven its case... given that it has put forward all of the evidence possible for identification.”⁶¹ Voltage’s evidentiary burden requires not all the evidence it can put forward, but all of the evidence needed to meet its legal burden.

47. Voltage claims its evidence shifted “the tactical burden of proof”.⁶² The term “tactical burden” is misleading. “Tactical” burdens do not exist; their application is not a question of law.⁶³ Defendants bear no “tactical” burden, particularly where the plaintiff has failed to prove its case. The Supreme Court in *Snell* stated:

It is not strictly accurate to speak of the burden shifting to the defendant when what is meant is that evidence adduced by the plaintiff may result in an inference being drawn adverse to the defendant. Whether an inference is or is not drawn is a matter of weighing evidence.⁶⁴

Voltage’s misleading complaint about the “tactical burden” masks its real complaint: Voltage disagrees with Justice Furlanetto’s weighing of its meagre evidence and her refusal to infer into existence evidence Voltage did not adduce.

48. Justice Furlanetto carefully weighed the evidence and declined to find Voltage’s evidence met its burden in two ways: (1) Voltage failed to connect the Defendants to infringing conduct, and (2) Voltage’s “thin evidence” presented a challenge to being able to conclude that infringement had occurred in each instance.⁶⁵ Voltage has not challenged this second conclusion. Its failure to do so alone is fatal to this appeal.

E. Justice Furlanetto properly refused to infer identity from an IP address

49. Voltage attempts to transform Justice Furlanetto’s fact-finding exercise of drawing factual inferences into a question of law.⁶⁶ In *Benhaim*, the Supreme Court emphasized that whether an inference should be drawn is a question of fact and deserves deference from a court of appeal.⁶⁷

⁶¹ *Ibid.*

⁶² *Ibid.*

⁶³ Sopinka, Lederman & Bryant, *The Law of Evidence in Canada*, 6th ed (Toronto: LexisNexis Canada, 2022) at [§3.58](#): Three Misleading Concepts: tactical burdens.

⁶⁴ *Snell v Farrell*, [\[1990\] 2 SCR 311](#) at 329-330 [*Snell*].

⁶⁵ *Reasons*, *supra* note 6 at paras [55](#), [57](#).

⁶⁶ Voltage Memorandum at para 58.

⁶⁷ *Benhaim v St-Germain*, [2016 SCC 48](#) at paras [50-52](#) [*Benhaim*].

50. Voltage argues that Justice Furlanetto ought to have drawn the inference that the subscriber and uploader were the same person. Voltage’s own evidence denies the conclusion: Voltage admits there may be many users of an IP address,⁶⁸ and the internet subscriber is not necessarily always a user (*e.g.*, landlord, apartment building owner, *etc.*). Justice Furlanetto evaluated the evidence, and committed no palpable and overriding error in refusing to draw the inference Voltage sought.

51. Voltage relies on *Trimble Solutions* in support of its contention that the identity of a defendant can be inferred from an IP address only. This decision stands for the opposite proposition. The Federal Court granted default judgment where forensic software detected infringement of computer software from the defendant’s network. The evidence included: the MAC address of the user’s device, the defendants’ business email addresses linked to the software, geolocation data identifying the defendant’s business and director’s home as locations of use, and admissions by the defendant of knowledge of his company using infringing copies of the software.⁶⁹

52. Voltage has not engaged in “reasonable efforts” to identify the Defendants.⁷⁰ Voltage points to *TekSavvy* to suggest that any further investigations into the identity of the actual infringers would be fruitless, and it need not undertake fruitless investigations.⁷¹ *TekSavvy* stands for the opposite proposition. There, the plaintiffs engaged in *diligent* investigations to identify defendants who made clear efforts to remain anonymous.⁷² These investigations went beyond those available to the plaintiffs through discovery mechanisms. Voltage did not engage in *any* investigations to identify the Defendants. In *TekSavvy* the Court found further investigations would be fruitless; here, Justice Furlanetto found that further discovery would be helpful.⁷³

⁶⁸ Voltage Memorandum at para 32.

⁶⁹ *Trimble Solutions Corporation v Quantum Dynamics Inc*, [2021 FC 63](#) at paras [16](#), [19-24](#), [27](#), and [59-60](#) [*Trimble Solutions*].

⁷⁰ *Joe Hand Promotions Inc v Social Major League Sports Bar & Grill*, [2009 FC 699](#) at paras [3-4](#).

⁷¹ Voltage Memorandum para 39; *TekSavvy Solutions Inc v Bell Media*, [2021 FCA 100](#) at para [85](#) [*TekSavvy*].

⁷² *TekSavvy*, *supra* note 71 at para [85](#).

⁷³ *Reasons*, *supra* note 6 at para [50](#); See also *ME2 Productions Inc v Doe*, [2019 FC 214](#) at paras [115-119](#), [126-129](#).

53. The Supreme Court has instructed Voltage in this very matter. In *Rogers*, the Supreme Court interpreted the Notice and Notice provisions of the *Act* and observed that the individual who receives the notice of the copyright infringement may not have committed the infringement alleged and that “being associated with an IP address... is not conclusive of guilt”.⁷⁴

54. This skepticism to inferring identity from an IP address is consistent with fact finding and inference drawing in other legal contexts. The Supreme Court (*Spencer*)⁷⁵ and the Ontario Court of Appeal (*Ward, Viscomi*)⁷⁶ declined to infer identity from an IP address. Justice Furlanetto erroneously distinguished these cases on the basis of the criminal burden of proof and availability of search warrants.⁷⁷ She confused the legal burdens and remedies in criminal cases for the mundane realities of the exercise: these courts were all engaged in the task of finding facts and drawing inferences, and concluded that identity cannot be inferred from an IP address as a matter of reason and logic.⁷⁸ Justice Furlanetto, conducting the same exercise, reached the same conclusion.

55. Foreign file-sharing cases have similarly refused to infer identity based on evidence of IP address only. The Court of Appeal for the 9th Circuit in *Cobbler Nev LLC v Gonzales* held that one’s status as a registered subscriber of an IP address does not create a reasonable inference that one is also the infringer.⁷⁹ In the UK decision of *Media CAT Ltd v Adams & Ors*, Justice Birss held that identifying an ISP account owner does not establish that they were the person who committed an infringement.⁸⁰

56. Voltage wrongly argues that the Defendants’ defaults amounts to a refusal to attend to the Federal Court’s jurisdiction.⁸¹ The specific *Rules* addressing attornment have no application on these facts.⁸² Voltage’s argument is a transparent attempt to evade the standard of review for findings of fact of a motions judge.

⁷⁴ *Rogers*, *supra* note 42 at para [41](#), see also paras [22-25](#) and [35](#).

⁷⁵ *R v Spencer*, [2014 SCC 43](#) at paras [50](#), [57](#) [*Spencer*].

⁷⁶ *R v Ward*, [2012 ONCA 660](#) at para [18](#), [23](#) [*Ward*]; *United States v Viscomi*, [2015 ONCA 484](#) at paras [31-32](#) [*Viscomi*].

⁷⁷ *Reasons*, *supra* note 6 at paras [37-39](#).

⁷⁸ *Viscomi*, *supra* note 76 at paras [22](#) and [31](#).

⁷⁹ *Cobbler Nev LLC v Gonzales*, [901 F.3d. 1142L](#).

⁸⁰ *Media CAT Ltd v Adams & Ors*, [\[2011\] EWPC 6](#).

⁸¹ Voltage Memorandum at paras 52, 54.

⁸² *Rules*, *supra* note 58, [rule 208](#).

57. Voltage seeks an adverse inference drawn against the Defendants for failing to participate in the proceeding.⁸³ To do so would erroneously ignore Rule 184(1).

F. Justice Furlanetto did not err in assessing Voltage’s discovery options

58. Justice Furlanetto suggested avenues of proportionate discovery.⁸⁴ She did not hobble or restrict Voltage in any way from undertaking any particular form of discovery. Nor did she require discovery of Voltage; rather she required better evidence of Voltage and observed that discovery offered Voltage a route to obtain it. Voltage is able to bring a motion justifying the form of discovery it seeks.

59. Voltage’s evidentiary failings derive from its tactical decision to present no evidence beyond that obtained from its Norwich orders. Voltage refused to investigate beyond the contractual relationship between the ISPs and their subscribers. Voltage declined to connect the activity of which it complained to actual wrong-doers. There were two avenues of investigation available to it to do so.

60. First, Voltage could have undertaken independent investigations. The law requires evidence that connects defendants to the act complained of.⁸⁵

61. Second, Voltage could have availed itself of discovery *Rules* to connect uploaders to IP addresses. Voltage brought a Norwich motion to identify ISP subscribers associated with IP addresses. Voltage could have sought further evidence under the *Rules*, including 238 (Norwich motion targeting subscribers), 233 (non-party document production), 385(1) (case management discretionary orders), 223-232 and 295 (documentary discovery), 296 (written discovery questions), and 236(1)(c) (leave to obtain written or oral discovery of adverse parties in default).

62. Voltage’s failure to do any discovery contributes to the factual matrix underlying Justice Furlanetto’s findings. She made no palpable or overriding error in her analysis and was correct to reach the conclusions she did. She made no reviewable error.

PART IV – ORDER SOUGHT

63. CIPPIC seeks dismissal of this appeal and no order as to costs.

⁸³ Voltage Memorandum at para 52.

⁸⁴ *Reasons*, *supra* note 6 at para 50.

⁸⁵ *Trimble Solutions*, *supra* note 69 at paras 69-71; *Bell Media Inc v GoldTV.Biz*, 2019 FC 1432 at para 7 (“diligent investigation”), *aff’d TekSavvy*, *supra* note 71.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 28th day of October 2022.


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PART V – AUTHORITIES

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