

FEDERAL COURT OF APPEAL

BETWEEN:

VOLTAGE HOLDINGS, LLC

FEDERAL COURT OF APPEAL COUR D'APPEL FÉDÉRALE	
FILED	Sep 23, 2022
D Rebecca Duong	
Appellant	
TORONTO, ON	7

- and -

DOE #1 et al.
(see Schedule 1 for list of Defendants)

Respondents

- and -

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

Intervener

VOLTAGE'S MEMORANDUM OF FACT AND LAW

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VOLTAGE'S MEMORANDUM OF FACT AND LAW

Overview

1. This is an appeal by the Appellant ("**Voltage**") of a dismissal of a default judgment motion for online copyright infringement. The Default Defendants were asserted to have distributed Voltage's film "Revolt" (the "**Work**") online through the BitTorrent protocol. They had been provided warning notices of infringement through the Notice and Notice system prior to being identified and sued.

2. Voltage has two theories of copyright infringement against the Default Defendants: (a) infringement by the Default Defendants making the Work available for download online ("**Direct Infringement**"); and (b) infringement by a Default Defendant who authorized the direct infringement of the Work by an unknown person by not responding to warning notices indicating the Work was

being infringed, and allowing the infringement to continue (“**Authorizing Infringement**”).

3. In the case of Direct Infringement, Voltage proved all that is technologically possible - i.e. the owner of the internet account where infringement occurred was a Default Defendant. Along with this evidence, Voltage relies in part on a “shifting of the tactical burden” or a negative inference to prove that the direct infringer was the account holder.

4. The Motion Judge held that unless further discovery was performed, or the Default Defendants again failed to participate in the action following a request for discovery, the onus of proof would not shift and negative inferences would not be drawn. This is an error in law as:

- (a) the evidence before the Court will be the same whether a Default Defendant fails to participate in the action 4 times or 5 times;
- (b) even if discovery takes place, Voltage is not obliged to put this information to the Court to its prejudice; and
- (c) in either case, Voltage has made out its case with the evidence available in a default proceeding.

5. In the case of Authorizing Infringement, the Motion Judge required further discovery of each Default Defendant to discern whether that Default Defendant had control over “those that actually uploaded the unauthorized content”, or required further lack of participation prior to drawing an adverse inference. The Motion Judge erred in law in adding to the test for online infringement in a default proceeding by requiring Voltage to prove the scope of control the Default Defendants had over the direct infringer.

[Reasons at para. 70](#), Appeal Book [AB], Tab 2, Page 48.

6. According to decisions of the Supreme Court of Canada and the Federal Court of Appeal, it is only necessary to establish that the internet subscriber (i.e. a Default Defendant) “possessed sufficient control over the use of his or her internet account and associated computers and internet devices such that they

authorized, sanctioned, approved or countenanced the infringements particularized” once notice of infringement had been brought to the attention of the account holder. Control over the direct infringer and the infringer’s activities is not part of the relevant legal test.

[62] While not necessary at the time of pleading, at the time of adjudication, *Salna* implies that the Plaintiff would have evidence to establish that the internet subscriber “possessed sufficient control over the use of his or her internet account and associated computers and internet devices such that they authorized, sanctioned, approved or countenanced the infringements particularized”

[Reasons at para. 62](#), AB, Tab 2, Page 44.

7. The Supreme Court of Canada in the *CAIP* (aka *SOCAN*) decision held that once notice of infringement is provided to a potential authorizer, the failure to respond to the notice by stopping the ongoing infringement may lead to a finding of authorization. This does not necessarily require control by the account subscriber over the direct infringer, but rather control over the means of infringement.

See *Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers*, 2004 SCC 45 at paras. 124–128 [CAIP], Voltage’s Book of Authorities [VBOA], Tab 3.

8. The evidence before the Court, which was uncontested, is that a normal internet user has the ability to change their WiFi password (or have their ISP do it for them), or take other simple steps to have the infringement cease. Voltage therefore proved that the internet account holder had control over his or her internet account and associated computers and internet devices such that they authorized the infringement (again, after receiving notice of infringement).

9. Due to failure of the Default Defendants to participate, Voltage cannot prove that anyone other than a Default Defendant used that Default Defendant’s internet account, nor can Voltage show the degree of control over users of the internet account at issue. Even if the test proposed by the Motion Judge is correct, performing discovery against a defaulted defendant (who has been given multiple chances to participate in the proceeding) is not likely to assist. As

with the Direct Infringement, the evidentiary onus has wrongly been shifted to Voltage to prove facts uniquely in the control of a Default Defendant.

10. The Default Defendants are the only persons who can stop the infringement. By not participating herein they are continuing to permit the infringements from occurring.

Parliament Deliberately Changed Copyright Law in Favour of Owners by Enacting the Notice and Notice Regime

11. All warning notices in this proceeding were sent through the Notice and Notice Regime. The Default Defendants were identified through the Notice and Notice Regime. This is the first case (to our knowledge) that deals with copyright infringement that has gone to a final judgement through the processes set out in the Notice and Notice Regime.

12. The deterrent effect of the Notice and Notice Regime is predicated on the subscriber taking action on receipt of a notice. That person is the only person who is capable of stopping online copyright infringement. Without the good faith of the subscriber, there is no deterrence.

[34] Deterring online copyright infringement entails notifying [the subscriber] because it is only *that* person who is capable of stopping continued online copyright infringement.

[35] [...] Where, for example, a parent or an employer receives notice, he or she may know or be able to determine who was using the IP address at the time of the alleged infringement and could take steps to discourage or halt continued copyright infringement [...]

[Rogers Communications Inc. v. Voltage Pictures, LLC, 2018 SCC 38 at paras. 34–35](#), emphasis in original [Rogers v. Voltage], VBOA, Tab 4.

13. Parliament intended the Notice and Notice Regime to be used as a new tool of copyright enforcement by copyright owners — something that would tip the balance towards the owners of copyright, who historically had not been provided with procedural remedies to counter the new reality of ubiquitous copyright infringement.

That first purpose — deterrence — is evident in the preamble to the *Copyright Modernization Act*, which states that the “Government of Canada is committed to enhancing the protection of copyright works or other subject-matter”. This purpose is echoed in the summary of the *Copyright Modernization Act*, which states that the Act is amended to “update the rights and protections of copyright owners to better address the challenges and opportunities of the Internet”.

Rogers v. Voltage at [para. 23](#), VBOA, Tab 4.

14. The Motion Judge’s decision failed to take into account the Supreme Court of Canada’s holdings in *Rogers* when finding against Voltage, holding that Voltage’s proposed resolution “lowers the bar and tips the balance of the Act in favour of copyright owners”. The Motion Judge reviewably erred in not following Parliament’s intent for the use of the Notice and Notice Regime.

[Reasons at para. 67](#), AB, Tab 2, Page 47.

Part I — Facts

A. Background

15. The Appellant, Voltage Holdings, LLC (“**Voltage**”), is a movie production company. Voltage is the copyright owner of the film *Revolt* (the “Work”) and is the successor-in-title to POW Nevada, LLC, the original Plaintiff in this matter.

16. This action was brought by Statement of Claim dated March 15, 2018 by POW Nevada, LLC against multiple Defendants for online copyright infringement of the Work. Certain defendants did not defend the action (“**Default Defendants**”, set out on Schedule 2 of the Notice of Appeal, Tab 1 at Page 21 of the Appeal Book).

17. Originally anonymous, the Default Defendants were identified by their internet service providers in accordance with *Norwich* Orders, each dated December 3, 2018 (the “**Disclosure Orders**”, one for Bell Canada subscribers and one for Rogers subscribers). The name and address of each Default Defendant was also disclosed to POW Nevada, LLC and thereafter the Appellant in accordance with the Disclosure Orders. The Default Defendants

were identified as being the internet account subscriber on whose IP address infringement was detected. There is a protective order in the Federal Court preventing the disclosure of the names of the Defendants, who are referred to as “Doe” defendants and who are assigned a “Doe Number”.

B. Summary of Defendants’ Infringement

18. Voltage, through a contractor, detects persons who are ‘making available’ the Work (i.e. advertising the distribution of the Work) online. Prior to identifying and suing infringers, Voltage sends two warning notices to each Defendant through the Notice and Notice Regime.

Copyright Act, R.S.C. 1985, c. C-42, ss. [2.4\(1.1\)](#), [27\(1\)](#) and [ss. 41.25 and 41.26](#), VBOA, Tab 2.

Society of Composers, Authors and Music Publishers of Canada v. Entertainment Software Association, 2022 SCC 30 at paras. [75](#), [91–92](#), [95–97](#), [108](#), [111](#) [ESA], VBOA, Tab 5.

19. More precisely, in respect of each Default Defendant, the forensic software used by Voltage follows this procedure. The software:

- (a) detects a Default Defendant ‘making available’ the Work;
- (b) confirms the ‘making available’ by downloading specified portions of the Work;
- (c) sends a warning notice through the Notice and Notice Regime (“**First Notice**”);
- (d) receives confirmation from the Default Defendant’s ISP that the Default Defendant received the First Notice;
- (e) detects a second infringement at least seven days following the First Notice;
- (f) sends a further warning notice (the “**Second Notice**”) to the Default Defendant through the Notice and Notice Regime; and
- (g) receives confirmation from the Default Defendant’s ISP that the Default Defendant received the Second Notice.

See Affidavit of Benjamin Perino, Affirmed May 28, 2021 at paras. 22–31 [Perino Affidavit], Appeal Book [AB], Tab 4, Pages 204–205. Affidavit of Marnie MacDonald, Affirmed May 31, 2021 at paras. 10–13, AB, Tab 3, Pages 55–56.

20. Each Default Defendant was found by the Motion Judge to have been identified using this procedure.

Reasons at paras. [7–8](#), [32](#), AB, Tab 2, Pages 25–26, 32–33.

C. Default Motion and Decision

21. Voltage brought a motion for default judgment on May 31, 2021 (“**Default Motion**”). The Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic (“**CIPPIC**”) was granted leave to intervene, filed written submissions and presented oral arguments at the hearing of the Default Motion on November 29, 2021.

22. On June 6, 2022, the Honourable Madam Justice Furlanetto (the “**Motion Judge**”) issued the order for the Default Motion (2022 FC 827, the “**Order**” and its accompanying reasons being the “**Reasons**”). The Court found, *inter alia*, that:

- (a) Voltage is the owner of copyright in the Work ([para. 28](#));
- (b) all of the Default Defendants were properly served with the Statement of Claim and were in default ([para. 26](#));
- (c) the Default Defendants received the First and Second Notices and had knowledge of the infringing activity ([para. 69](#)); and
- (d) copyright was infringed at the time of the First and Second Notices ([paras. 32–33](#)).

23. The primary issue in the Default Motion was the proof of identity of the copyright infringer – who performed the infringement. Was it the subscriber, or was it an unknown person using the subscriber’s internet account. If it wasn’t the subscriber, did the subscriber have sufficient control over the unknown “true infringer” to constitute authorization of infringement.

24. The Court held that Voltage failed to adduced sufficient evidence to prove that:

- (a) the subscriber was the infringer (Direct Infringement); or

- (b) the subscriber had control over the “true infringer” (Authorizing infringement).

Reasons at paras. [56](#), [70](#), AB, Tab 2, Pages 41, 48.

25. There was no evidence of any person other than the subscriber using the subscriber’s internet account. In summary:

- (a) the identity of each Default Defendant was proven;
- (b) each Default Defendant was the internet subscriber; and
- (c) there was no evidence of any person other than the Default Defendant having access to the Default Defendant’s internet account.

Reasons at paras. [10](#), [51](#), AB, Tab 2, Pages 26, 39–40.

26. Technologically, it impossible to obtain any other information to identify infringers than what was done by Voltage.

Perino Affidavit at paras. 16–18, AB, Tab 4, Pages 203.

27. The uncontested evidence before the Motion Judge was that the subscriber may be (and often is) the individual who is utilizing the BitTorrent software to distribute files. In some cases many devices can be using the same internet account. In those cases, the subscriber would typically have knowledge of the family members who are using the account. Any Default Defendant could have easily taken action to prevent infringement by changing the Wi-Fi password, blacklisting unauthorized devices or even blocking the BitTorrent software.

Reasons at para. [51](#), [64](#), AB, Tab 2, Pages 39, 45–46, citing Perino Affidavit at paras 16–20, AB, Tab 4, Page 203.

Part II — Issues

28. The issues in this appear are the errors of the Motion Judge. The motion judge reviewably erred by:

Direct Infringement Errors:

- (a) finding that Voltage did not prove that each Default Defendant committed Direct Infringement, as the Motion Judge:
- (i) erred in law in interpreting and applying the laws of evidence regarding “tactical burdens” and negative inferences in default proceedings;
 - (ii) erred in law by requiring a “direct link” in the evidence between an internet subscriber and the infringing use, only determinable through discovery¹ of the Default Defendants; and
 - (iii) erred in law by requiring “sufficient steps” be taken by Voltage prior to an adverse inference being drawn against the Default Defendants due to their non-response to the Action – i.e. holding that only if the Default Defendants did not respond to a request for discovery could a negative inference be drawn.

Reasons at paras. [52–55](#), AB, Tab 2, Page 40.

Authorizing Infringement Errors:

- (b) finding that Voltage did not prove that each Default Defendant authorized copyright infringement as the Motion Judge;
- (i) erred in law by requiring proof of the relationship and extent of control over the “true infringer” as well as whether the subscriber had some ability to prevent infringing acts; and
 - (ii) erred in law by requiring that discovery be sought against the Default Defendants to prove the relationship between the Default Defendant and the “true infringer” prior to an adverse inference being drawn against the Default Defendants and any mitigation by the Default Defendants –

¹ for which leave is required to be sought, and contrary to current law, see *Federal Courts Rules*, [Rule 236\(1\)\(c\)](#), VBOA, Tab 1 and [Motorola Inc. v. Katz, 1998 CanLII 8198 \(FC\)](#), VBOA, Tab 12.

i.e. holding that only if the Default Defendants did not respond to a request for discovery could a negative inference be drawn.

Reasons at paras. [67–68](#), [70](#), AB, Tab 2, Pages 47–48.

Part III — Submissions

A. Standard of Review

29. The standard of review is the standard in *Housen v. Nikolaisen*.
[*Housen v. Nikolaisen*, 2002 SCC 33 at para. 33](#), VBOA, Tab 6.

B. Direct Infringement Issues

i. Legal error in interpreting and applying the laws of evidence regarding “tactical burdens” and negative inferences in default proceedings

30. The Motion Judge held that Voltage had proved, for each Default Defendant:

- (a) the Default Defendant’s identity;
- (b) that copyright infringement occurred;
- (c) by someone who used a Default Defendant’s internet account; and
- (d) that the Default Defendant was the relevant internet account subscriber.

Reasons at paras. [22](#), [32–33](#), AB, Tab 2, Pages 29–30, 32–33.

31. The Court held the only outstanding issue was whether the Default Defendants had committed the copyright infringement.

Reasons at para. [33](#), AB, Tab 2, Page 33.

32. This is a default proceeding. The only evidence was from Voltage. While it is well known that home internet accounts can be used by more than one person, it is speculation to hold that someone other than each Default Defendant had access to the Default Defendants’ internet account and used it. Voltage’s uncontested evidence was that a subscriber may be (and often is) the individual

who is utilizing the BitTorrent software to distribute files. Each Default Defendant presumably obtained the internet account to use it.

Reasons at para. [51](#), AB, Tab 2, Pages 39–40.

33. The uncontested evidence before the Motion Judge was that it was technologically impossible to prove more than what Voltage had proved. One can't "go behind" an IP address and determine what device used that IP address at a particular date and time (e.g. by MAC address) without access to information in the possession, power and control of a Default Defendant (e.g. router logs). Voltage would have to bring an *Anton Piller* order and seize a Default Defendants' internet equipment, phones, tablets, computers, Xboxes, etc. to get this information itself, which is clearly unreasonable.

Perino Affidavit at paras. 16–18, AB, Tab 4, Pages 203.

[Copyright Act, s. 38.1\(1\)\(b\)](#), VBOA, Tab 2.

34. In a normal case, once Voltage's case was made, the Default Defendant would then be in a position to provide exculpatory evidence under oath, including evidence of improper identification. In this case, however, the Default Defendants refused to participate in the action, after being provided at least 4 different opportunities to participate:

- (a) after the First Notice was sent, which would have allowed the Default Defendant to cease infringement without any penalty whatsoever;
- (b) after the Second Notice was sent, mitigating any damages or costs to Voltage for e.g. ISP or court fees;
- (c) after being served with the Statement of Claim in the action; or
- (d) after being sent a reminder of the Statement of Claim letter by regular mail.

Reasons at paras. [8](#), [20](#), [22](#), AB, Tab 2, Pages 26, 29–30.

35. The refusal by each Default Defendant to respond when given these four opportunities should result in an adverse inference being drawn – namely that

the Default Defendant committed the infringing acts. If this wasn't the case, they would have defended or responded to the warning notices at the very least.

36. Even without an adverse inference being drawn, Voltage has met its evidentiary burden and proven its case in these circumstances given that it has put forward all the evidence possible for identification, shifting the "tactical" burden of proof to each Default Defendant. The Motion Judge rejected the law of the shifting legal burden on the grounds that this did not apply to a Federal Court default judgment motion where the claim is deemed denied. This is an error of law.

Reasons at paras. [44–45](#), AB, Tab 2, Page 37.

If, however, the plaintiff has discharged that initial burden, the onus shifts to the defendant to call evidence to refute that which has been introduced by the plaintiff.

Halsbury's Laws of Canada (online), *Civil Procedure*, "Nature of the Burden: Trials: Evidence" (XI.5(2)) at HCV-231 "Burden of Proof" (2021 Reissue), VBOA, Tab 7.

In many cases, there are multiple factual and legal issues. Where there are several disputed facts or issues in a case, the persuasive (legal) burden in relation to different issues may be distributed between the parties. [...]

In civil proceedings, the persuasive (legal) burden of proof operates in a similar manner. In an action for assault and battery, the plaintiff must prove that there was an application of force to the victim, that the blow caused the injury, and the quantum of damages. However, the defendant has the persuasive burden in relation to a defence of justification and to prove that he or she used no more force than was necessary.

Sopinka, Lederman & Bryant, *The Law of Evidence in Canada*, 6th ed (Toronto: LexisNexis Canada, 2022) at §3.14-3.15, VBOA, Tab 8.

37. The Motion Judge's reasoning conflates the deemed denial of the pleadings with the evidentiary requirements to prove the case. Rule 184(1) deems that factual allegations in a pleading are denied. This merely means that the pleadings themselves are not evidence. It does not mean that the law of evidence and evidentiary rules do not apply in a default proceeding. This would

effectively create a higher burden in a default judgment motion than at a defended trial, where unadmitted pleadings must be proven as well – but where tactical burden shifting occurs and is permitted.

***Dumais Estate v. Canada (Indigenous and Northern Affairs)*, 2020 FC 25 at para 42, VBOA, Tab 9.**

38. The persuasive (legal) burden refers to the onus of proof to prove facts or issues on the balance of probabilities. The persuasive (legal) burden may be distributed between the parties, depending on the issues to be tried and the facts supporting the issues. The tactical burden refers to the obligation to adduce evidence to respond to the other party's evidence:

In many contested actions, a party is obliged to adduce evidence as a matter of tactics and prudence. For instance, if the victim identifies the accused as the assailant who applied non-consensual force, the accused person runs a risk of an adverse determination in civil or criminal proceedings for an assault. As the strength of the proponent's case increases and in the absence of an explanation or some exculpatory circumstances arising from the evidence, the risk of an adverse determination also increases.

Sopinka, Lederman & Bryant: *The Law of Evidence in Canada*, 6th ed. (Toronto: LexisNexis Canada, 2022) at §3.57, see also §3.3, 3.8, 3.14–3.15, VBOA, Tab 8.

39. The *TekSavvy* decision of the Federal Court of Appeal held that the Court does not require rights holders to undertake investigations that are likely to be fruitless once reasonable investigations have been performed. Voltage has already obtained *Norwich* orders in this action, and has obtained all possible forensic evidence from those motions and its investigations.

[TekSavvy Solutions Inc. v. Bell Media Inc.](#), 2021 FCA 100 at para. 85 [TekSavvy], VBOA, Tab 10.

40. In *Trimble Solutions*, the Federal Court granted default judgment where forensic software detected infringement of computer software from the defendant's network, notwithstanding that it was impossible to know the identity of the user of the infringing software. As the Court noted:

While it is, from a practical perspective, impossible to know who was using the devices at the precise times indicated in each incident report, there is more than sufficient identifying information to

connect these devices with the individual and corporate Defendants. This includes the hostnames and usernames, as well as the e-mail addresses associated with these events, together with the geolocation evidence that connects the Wi-Fi locations for these events to the addresses of the individual and corporate Defendants. There is no doubt that the devices used for the infringing activities were under the control of the Defendants and located at their premises. That is sufficient (CCH at para 38).

[Trimble Solutions Corporation v. Quantum Dynamics Inc., 2021 FC 63 at para. 60, VBOA, Tab 11.](#)

41. The Default Defendants are the only known persons with access to and control over their internet accounts. There is no evidence to suggest anyone else had access to these internet accounts. It is their tactical burden to lead evidence to exculpate themselves, not Voltage's.

Reasons at paras. [32–33](#), AB, Tab 2, Pages 32–33.

ii. Legal error - requiring a "direct link" in the evidence between an internet subscriber and the infringing use that is only determinable through discovery.

42. There were no pleadings or evidence before the Court that anyone other than the Default Defendants had access to or ever used the internet accounts in issue. Despite this, the Motion Judge refused to conclude that the Default Defendants were responsible for the infringement unless there was a "direct link [...] between the internet subscriber and the alleged infringing use or sufficient steps taken for an adverse inference to be drawn against the internet subscriber".

Reasons at paras. [52](#), [55](#), [70](#), AB, Tab 2, Pages 40, 48.

43. It is a legal error to require discovery of the Default Defendants in order to prove a direct link between a Default Defendant and the infringing acts.

44. Requiring Voltage to bring a motion for leave to discover and then discover a Default Defendant to prove further identification of the "true infringer" is an error of law. Discovery of default defendants is not permitted to "flesh out" the evidence, nor to ascertain the names of other infringers.

Federal Courts Rules, [Rule 236\(1\)\(c\)](#), VBOA, Tab 1.

[Motorola Inc. v. Katz, 1998 CanLII 8198 \(FC\)](#), VBOA, Tab 12.

45. A party has discretion as to what answers from discovery of an adverse party, if any, it choose to introduce into evidence. Voltage would have no obligation to introduce any answers from the Default Defendants provided in discovery. There are many critical procedural fairness reasons for this:

the party who examines for discovery customarily has the absolute assurance that it cannot be used against him unless he seeks to make use of it.

...

This is an extremely important issue. We could in fact be deviating from the hearsay rule as well as other basic principles of the rules of evidence. It would impede the Court of its opportunity to assess the demeanor or credibility of a witness; the opposing party would be denied cross-examination and would be unable to challenge the testimony of someone providing particularly crucial evidence in a civil action.

Discovery evidence is never before the Court unless the examiner so chooses because it could contain misinformation that would otherwise never be presented to the Court.

Newfoundland Processing Ltd. v. "South Angela", 1995 CarswellNat 1796 at paras 7, 12–13 (FCTD) [*Newfoundland Processing*], VBOA, Tab 13.

[Federal Courts Rules, Rule 288](#), VBOA, Tab 1.

46. In any event, it is unlikely that the Default Defendants' discovery answers would advance the case before the Trial Court. The Motion Judge identified the following facts that could be answered through discovery:

- (a) nature of the system provided at the IP address;
- (b) how many devices the IP address services;
- (c) the type of interaction or control the IP owner has over those device and its users;
- (d) how many users there are; and
- (e) what if any steps were taken with respect to those users after the notices under the notice and notice regime were received.

However, none of these questions goes to the Motion Judge's perceived evidentiary deficiency: identifying who the direct infringer is. The only useful evidence would be if the Default Defendants admitted that they were the direct

infringer, which is unlikely. Most likely, any answers from the Default Defendants would be general denials or claimed lack of knowledge. Such answers bring the Court no closer to the truth.

Reasons at para. [50](#), AB, Tab 2, Page 39.

47. Requiring Voltage to seek leave and conduct discovery for default judgment creates significant additional work, and forces Voltage to incur additional costs for no practical benefit. In turn, this leads to a greater costs award against a Default Defendant, should Voltage ultimately be successful (and likely significant unrecoverable costs to Voltage for a default judgement that may be impossible to enforce or collect on). Aside from the single commercial infringer (Doe #103 – a motel), Voltage is seeking non-commercial statutory damages, which are capped at \$5000 for each Default Defendant, as well as costs and disbursements. Compelling a motion for leave and discovery is not proportionate to the amount in dispute and is not consistent with Rule 3(b).

MacDonald Affidavit at Exhibit “C”, AB, Tab 3C, Pages 70–71.
[Federal Courts Rules, Rule 3](#), VBOA, Tab 1.

48. While the Motion Judge established a process for Default Defendants who do not respond to the discovery request (i.e. an adverse inference in default judgment), the Reasons are silent on Default Defendants who provide unhelpful answers. Unless the Default Defendants admit culpability, none of the discovery answers are likely to be helpful.

49. However, the Reasons imply that an adverse inference would not be drawn if the Default Defendants were answer the discovery questions, even if the answers are unhelpful. This is an error of law.

Reasons at paras. [52](#), [55](#), [70](#), AB, Tab 2, Pages 40, 48.

50. Voltage is therefore being compelled to produce discovery as evidence to the Court (or at least the existence of discovery) against its own benefit. The Motion Judge has erred in law in so doing.

iii. Legal error - requiring "sufficient steps" be taken by Voltage prior to an adverse inference being drawn

51. There is no basis in law, and none cited by the Motion Judge, that requires Voltage to perform further procedural steps in a default proceeding prior to an adverse inference being drawn, when the facts before the court are the same prior to and subsequent to the extra procedural step.

52. The Default Defendants likely did not participate in the proceeding because their evidence is inculpatory – i.e. they were aware of the infringement (or did the infringement themselves). They may well feel that they will suffer no repercussion from their non-participation. It would undermine the Court's process if defendants can defeat a claim merely by not defending. The Court cannot encourage refusals to attorn to its jurisdiction. A defendant's default status in itself demands an adverse inference as to the evidence that would have been available had they participated in the process.

53. An adverse inference is a common sense logical inference that may be drawn from proven facts. It arises naturally as part of the fact-finding process and the evidence adduced.

Sopinka, Lederman & Bryant: *The Law of Evidence in Canada*, 6th ed. (Toronto: LexisNexis Canada, 2022) at §4.7–4.8, VBOA, Tab 8.

54. The Supreme Court of Canada discussed negative inferences in *Benhaim*, though it clarified that the trier of fact has discretion regarding whether to draw an adverse inference based on an evaluation of all of the evidence. A decision not to draw an adverse inference could be a palpable and overriding error. However, we submit that The Motion Judge made an error on an extricable legal principle by refusing to draw an adverse inference from the Default Defendants' default status, effectively making the defendants better off by refusing to attorn to the Court's jurisdiction and participate in the proceeding. On either standard of review, we submit the Motion Judge reviewably erred.

***Benhaim v. St-Germain*, 2016 SCC 48 at paras. [41–44](#), [52](#), VBOA, Tab 14.**

55. It is a well-established evidentiary rule that “very little affirmative evidence will be sufficient [to shift the burden of proof] where the facts lie almost entirely within the knowledge of the other side”.

***Snell v. Farrell*, [1990] 2 SCR 311 at 329**, VBOA, Tab 15, citing *Hollis v. Young* (1909) 1 K.B. 629 and *Cummings v. City of Vancouver* (1911), 1 W.W.R. 31 (BCCA).

56. In this case, Voltage’s uncontradicted evidence is that:
- (a) infringement occurred on the Default Defendants’ internet accounts;
 - (b) the Default Defendants’ ISPs identified each Default Defendant as the internet subscriber of the internet account;
 - (c) the Default Defendants are the only known persons with access to the internet accounts;
 - (d) the Default Defendants have received repeated notice of the infringement and these proceedings (in the form of two notices, service of the claim and a default reminder letter), but still have not participated in the proceeding; and
 - (e) the Default Defendants are the only ones with evidence as to who else—if anyone else—used their internet accounts at the times of the infringements.

Reasons at paras. [22](#), [33](#), [51](#), AB, Tab 2, Page 29–30, 33, 39–40.
Perino Affidavit at paras. 16–18, AB, Tab 4, Page 203.
MacDonald Affidavit at paras. 10–13, 15–16, 22, AB, Tab 3, Pages 55–58.

57. In light of these factual findings, an adverse inference arises that the Default Defendants are the direct infringers responsible for making available copies of the Work on the BitTorrent network. The Default Defendants are in possession of all further information regarding the infringements, but have not participated. Following the rule affirmed in Snell, Voltage has provided sufficient affirmative evidence, as it is the Default Defendants’ onus to lead evidence related to the facts exclusively within their knowledge, but they have not done so.

58. The Motion Judge's decision implies that the Motion Judge would have drawn an adverse inference had Voltage sought discovery and the Default Defendants not responded to the discovery requests. The Motion Judge's decision not to draw an adverse inference was based on an error in legal principle that discovery is required before an adverse inference may be drawn, and this Court may make the finding that the Motion Judge would have made, which is that the Default Defendants are the direct infringers.

59. Voltage could have obtained far more evidence had the Default Defendants participated in the proceeding – if they had participated, the Default Defendants would be witnesses at trial and subject to cross-examination under oath. A “guilty” Default Defendant would be exposed through the litigation process.

See e.g. *Federal Courts Rules*, Rules [183](#), [282](#), VBOA, Tab 1.

60. For the above reasons, Voltage is entitled to an adverse inference against the Default Defendants on the facts of this case, without any “further steps”.

C. Authorising Infringement Issues

i. Legal error - requiring proof of the relationship and extent of control over the "true infringer"

61. The Motion Judge made a legal error by applying the wrong test for authorization in the context of online infringement. The Motion Judge required that Voltage show a relationship with and control over the direct infringer to establish authorization. The law, by contrast, permits authorization to be determined with control over the equipment used for infringement, knowledge of the infringing activity and the ability to prevent the act of concern, in particular in online infringement cases.

Reasons at para. [68](#), AB, Tab 2, Page 47.
[CAIP at paras 126–128](#), VBOA, Tab 3.

62. The Motion Judge's requirement to demonstrate the exact nature of the relationship with the infringer is in conflict with this Court and the Supreme Court of Canada's jurisprudence on authorization.

63. The Supreme Court of Canada in *CAIP* held that a person may be liable for authorizing infringement if they have control over the infringement, have notice of the infringement, and fail to take remedial action promptly once so notified. This was in the context of internet service providers, but it is equally applicable for analogous reasons to online infringements where the internet subscriber has control over their internet account.

[CAIP at paras. 126–128](#), VBOA, Tab 3.

124 On this point the Board concluded as follows (at p. 458):

Even knowledge by an ISP that its facilities may be employed for infringing purposes does not make the ISP liable for authorizing the infringement if it does not purport to grant to the person committing the infringement a license or permission to infringe. An intermediary would have to sanction, approve or countenance more than the mere use of equipment that may be used for infringement. Moreover, an ISP is entitled to presume that its facilities will be used in accordance with law.

This conclusion is generally consistent with the decision of this Court in the *CCH* case, although I would point out that copyright liability may well attach if the activities of the Internet Service Provider cease to be content neutral, e.g. if it has notice that a content provider has posted infringing material on its system and fails to take remedial action.

125 Under the European E-Commerce Directive, access to cached information must be expeditiously curtailed when the Internet Service Provider becomes aware of infringing content. At that time, the information must be removed or access disabled at the original site (art. 13(1)(e)). Under the U.S. *Digital Millennium Copyright Act*, those who cache information are not liable where they act expeditiously to remove or disable access to material once notice is received that it infringes copyright (s. 512(b)(2)(E)). If the content provider disputes that the work is covered by copyright, the U.S. Act lays out a procedure for the resolution of that issue.

126 In the present appeal, the Federal Court of Appeal stated that, in the case of host servers, "an implicit authorization to communicate infringing material might be inferred from their failure to remove it

after they have been advised of its presence on the server and had a reasonable opportunity to take it down” (para. 160). Reference was made to *Apple Computer Inc. v. Mackintosh Computers Ltd.*, 1986 CanLII 6820 (FC), [1987] 1 F.C. 173, aff’d 1990 CanLII 119 (SCC), [1990] 2 S.C.R. 209, at pp. 211 and 208, citing *C.B.S. Inc. v. Ames Records & Tapes Ltd.*, [1982] 1 Ch. 91, at p. 110, i.e., an Internet Service Provider may attract liability for authorization because “. . . **indifference, exhibited by acts of commission or omission, may reach a degree from which authorisation or permission may be inferred. It is a question of fact in each case . . .**” See also *Godfrey v. Demon Internet Ltd.*, [1999] 4 All E.R. 342 (Q.B.).

64. In *Salna*, as cited by the Motion Judge, this Court held that authorization of infringement may be argued to occur in the case of online infringements if an internet subscriber possess sufficient control over the use of his or her internet account and associated computers and internet devices (even without notice). (i.e. *Salna* suggested that this claim was properly pleaded, and is arguable).

Reasons at para. 68, AB, Tab 2, Page 47.
[Salna v. Voltage Pictures, LLC, 2021 FCA 176 at para. 85 \[Salna\]](#),
 VBOA, Tab 16.

65. After the decision of the Motion Judge was rendered in this matter, the Supreme Court of Canada released its decision in *ESA*, in which the majority discussed the law of authorization in the online downloading context. The Supreme Court of Canada held that “authorization” did not require any pre-existing relationship between authorizer and direct infringer. Rather, in the case of downloading (which BitTorrent is), merely the “making available” of a work online was sufficient to “authorize” the download of that work and thus be an infringement of copyright (even if the download never took place).

Moreover, it is the act of posting that constitutes authorization. By doing so, a person invites anyone with Internet access to have the work communicated to them.

...

If a person makes a work available for downloading without authorization, that person infringes the copyright owner’s right to authorize reproductions.

[ESA at paras. 106–107](#), VBOA, Tab 5.

66. In the Supreme Court’s example, the authorizer (i.e. the person making the work available) and the direct infringer (i.e. the person requesting a copy of

the work) have no pre-existing relationship, nor do they have a relationship after the infringement. The two do not even know the other's true identity. Authorization is established through the technological relationship and control (i.e. through the online offer to make the work available) between otherwise anonymous individuals.

67. *CAIP*, *Salna* and *ESA* support that control for authorization may be established through technological control (e.g. controlling access to devices or an internet account), in particular once notice of infringement has been provided.

68. The Motion Judge accepted that:

- (a) someone using the Default Defendants' internet accounts infringed the work on two occasions;
- (b) the Default Defendants received two notices of the infringement;
- (c) the Default Defendants were served with the claim;
- (d) the Default Defendants received a reminder letter regarding their default status;
- (e) the Default Defendants did not defend the action;
- (f) there is no evidence that the Default Defendants took any steps to prevent the infringement; and
- (g) 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.

Reasons at paras. [22](#), [26](#), [32-33](#), [64](#), [69-70](#), AB, Tab 2, Pages 29-30, 31, 32-33, 45-46, 47-48.

Perino Affidavit at paras. 16-18, 20, AB, Tab 4, Page 203.

MacDonald Affidavit at paras. 10-13, 15-16, 22, AB, Tab 3, Pages 55-58.

69. These accepted facts lead inexorably to the conclusion that the Default Defendants authorized infringement of the Work. They have control over their internet account and are able, either directly or by being able to direct their ISP, to restrict access to that account - e.g. by changing the WiFi password or having

their ISP do it. In a normal case, the subscriber has control over the direct infringer through this technological control. It would be a Default Defendant's onus to prove that there was some other reason that the technological control would not be sufficient to stop the direct infringer (e.g. illness, mental capacity, etc.).

70. Once the Default Defendants received a First Notice they had sufficient information to have the infringement cease, no matter who is doing it. Assume for example that an older internet account is set up with no WiFi password and the neighbours of a Default Defendant are (unknown to the Default Defendant) using the Default Defendant's WiFi. All the Default Defendant has to do to stop the infringement is change the WiFi password. Alternatively, take the example of a home internet account where a parent is the account holder, and one of their adult children is (again, unknown to the Default Defendant) unlawfully downloading movies. Once the First Notice is received, the parent can ask questions and stop the infringement in an ideal case. However, if e.g. the child is an adult and more sophisticated than the parent when it comes to the internet, the parent can have their ISP stop BitTorrent traffic by blocking the usual BitTorrent ports on the home router or blacklist devices that are using BitTorrent, and locking down the router with an administrator password. Control over the person infringing may be helpful, but it is not necessary to stop the infringement.

71. As the internet subscribers, it is only the Default Defendants who are "capable of stopping continued online copyright infringement". The Default Defendants are the persons with control over their internet accounts. In many cases, simply changing the Wi-Fi password can halt all piracy.

[Rogers v. Voltage at para. 34, VBOA, Tab 4.](#)

72. In this case, however, the Default Defendants were held by the Motion Judge to have had notice of infringement and done nothing. By doing so, they have permitted whoever is doing the direct infringement to continue infringing and distributing the Work to others. This is wilful blindness and is "a sufficient degree of indifference" that establishes authorization.

[ESA at para. 104](#), VBOA, Tab 5.

73. As the Supreme Court noted, where there is an existing relationship (e.g. parent or employer), the internet subscriber may be able to determine who was response and “take steps to discourage or halt continued copyright infringement”. Even where the direct infringer is not known, e.g. an unknown neighbour, the internet subscriber still “may be able, upon receiving notice, to take steps to secure its Internet account with its ISP against online copyright infringement in the future”.

[Rogers v. Voltage at para. 35](#), VBOA, Tab 4, cited by the Motion Judge at para. [63](#) of the Reasons, AB, Tab 2, Page 45.

74. The Default Defendants are the only persons able to stop the infringement. Through their control of their internet account, the Default Defendants can stop the direct infringer’s infringement. These Default Defendants are the “worst of the worst”, as only about 10% of infringers receive a second notice, and less than a third of the defendants in this action have defaulted. It is appropriate to grant default judgment where the Default Defendants have received extensive notice of the infringement and claim and the Default Defendants have chosen not to participate.

Reasons at [para. 11](#), AB, Tab 2, Pages 26–27.
MacDonald Affidavit at para. 26, AB, Tab 3, Page 59.

75. The Notice and Notice Regime was implemented to provide copyright owners with new tools to stop copyright infringement. Parliament intended the Notice and Notice Regime to be used as a tool of copyright enforcement — something that would tip the balance towards the owners of copyright, who historically had not been provided with procedural remedies to counter the new reality of ubiquitous copyright infringement. This regime targets the gatekeepers — the internet subscribers.

That first purpose — deterrence — is evident in the preamble to the Copyright Modernization Act, which states that the “Government of Canada is committed to enhancing the protection of copyright works or other subject-matter”. This purpose is echoed in the summary of the Copyright Modernization Act, which states that the Act is

amended to “update the rights and protections of copyright owners to better address the challenges and opportunities of the Internet”.

Rogers v. Voltage [at para. 23](#), VBOA, Tab 4.

76. The deterrent effect of the Notice and Notice Regime is predicated on the subscriber taking action on receipt of a notice. That person is the only person who is capable of stopping online copyright infringement. Without the good faith of the subscriber, there is no deterrence as no-one else can stop the infringement.

[34] Deterring online copyright infringement entails notifying [the subscriber] because it is only *that* person who is capable of stopping continued online copyright infringement.

[35] [...] Where, for example, a parent or an employer receives notice, he or she may know or be able to determine who was using the IP address at the time of the alleged infringement and could take steps to discourage or halt continued copyright infringement [...]

Rogers v. Voltage [at paras. 34–35](#), emphasis in original, VBOA, Tab 4.

77. If the subscriber does not act in good faith, or as in this case, does not act at all, infringement will continue and any deterrent effect will be lost. In fact, it may be that all an online infringer would have to do is not defend and they will never be stopped.

ii. Legal error - requiring that discovery be sought against the Default Defendants to prove (A) the relationship between the Default Defendant and the "true infringer" and (B) facts to assist the Default Defendant to prove mitigation of damages

78. The Motion Judge held that there was no evidence of, and therefore that Voltage had the obligation to prove, the following:

- (a) the nature of the relationship between the internet subscribers identified as Default Defendants and the direct infringers; and
- (b) what steps the Default Defendants have taken to prevent further infringement (i.e. mitigation by the Default Defendant).

Reasons [at para. 70](#), AB, Tab 2, Page 48.

79. The Motion Judge suggested that the lack of evidence on these issues could be proven by “some form of discovery” in order to “support a finding of authorization or allow and adverse interest to be drawn”.

80. As set out above in paras. 42–50, above, Voltage has no obligation to discover the Default Defendants or present discovery that is adverse to its interests. This could only be harmful to Voltage and is contrary to the adversarial litigation system.

81. In any event, determining the subscriber-infringer relationship is at best marginally relevant to the authorization. Setting aside the one commercial Default Defendant (a motel), the rest of the Default Defendants are individuals who we assume are normal internet subscribers (although they could be hardcore pirates – we don’t know).

82. The range of WiFi has an indoor range of 50m. Relative to a typical single detached house, it would be impossible for anyone more than about four houses away to pick up the Wi-Fi signal. For most households only people within the household would have a strong and reliable connection to the customer’s internet. The “usual suspects” who could be using their internet accounts would be their family members, possibly roommates or tenants, or possibly neighbours (in particular in apartments or condos).

Perino Affidavit at paras. 18–19, AB, Tab 4, Page 203.

83. Given this very limited range of potential “direct infringers” – which we have no evidence for given the lack of participation of the Default Defendants – determining this relationship does not add to the authorization argument. Any of the usual types of relationships would indicate that the Default Defendant would have control over the infringement and (although not required) the direct infringer. Worst case, the Default Defendants could cancel their internet accounts and require the direct infringers to get their own internet accounts (potentially keeping internet for themselves through their phones).

84. In respect of the requirement to determine whether a Default Defendant had taken steps to avoid infringement, we submit that this is a mitigation-type argument, namely whether the Default Defendant mitigated their liability (e.g. Voltage's damages) by doing something to halt the infringement. Note that the Default Defendants are not movie downloaders – they are movie distributors.

85. The forensic software detects the “giving away” or making available of the Work, not its download for a single viewing. A Default Defendant in this action, Doe 20, for example, was observed giving away / distributing the Work for a period of over 108 days / 3 months. This Default Defendant was estimated at having potentially having distributed over 3,240 copies of the work to others with a rough estimate of actual damages of \$54,000 (3240 copies at \$15 each).² And this is only for the dates that the forensic software detected – had the Default Defendant defended, much more infringement could potentially have been determined.

MacDonald Affidavit at paras. 29, 32, Exhibit “C”, AB, Tabs 3, 3C, Pages 59–61, 70–71.

Perino Affidavit at Exhibit “B”, AB, Tab 4B, Pages 225–227.

86. The issue of a Default Defendant's reduction of Voltage's damages is an affirmative defence by the Default Defendant on the quantum of damages. The onus is therefore on the Default Defendants to prove that they reduced or tried to reduce damage caused to Voltage. Compelling Voltage to discover on this issue implies that Voltage must submit this discovery against its own interest contrary to the adversarial litigation system. For the same reasons set out above in paras. 42–50, this is a legal error by the Motion Judge.

D. Ancillary Issue - the Motion Judge erred in hobbling Voltage's permitted discovery

87. In the event that the Motion Judge's decision on requiring discovery to be performed is upheld, we have the following submissions.

² Despite the high estimate of actual damages for this Default Defendant, Voltage is seeking \$4,750 in statutory damages and not its rough estimate of actual damages.

88. In the Reasons, while insisting that Voltage conduct discovery, the Motion Judge refused to allow discovery of electronic devices on the grounds that this would be invasive of privacy.

Reasons at [para. 50](#), AB, Tab 2, Page 39.

89. The Motion Judge erred in restricting Voltage's discovery. To the extent that Voltage must do discovery, Voltage is entitled to production of all relevant documents in the Default Defendants' possession, power or control, which includes electronic records and devices.

***Federal Courts Rules*, Rules [222](#), [223](#), [228](#), VBOA, Tab 1.**

90. Of all information that may be obtained through discovery, electronic records are by far the most likely to be reliable and probative. While a Default Defendant may have imperfect recollection of the events around the times of the infringements, the electronic records may reveal whether the devices had BitTorrent software or copies of the Work. This information would be very revealing as to the source of the infringement and the identity of the direct infringer. Any privacy concerns are addressed by the Confidentiality Order in the proceeding dated July 5, 2018.

91. It is procedurally unfair for the Court to simultaneously compel Voltage to conduct discovery of the Default Defendants and introduce their answers that have not be subject to cross-examination while restricting Voltage's ability to obtain relevant documents it is entitled to under the *Rules*. It seems that production of documents and follow-up investigations³ would also not be permitted.

³ For example, once router logs are available, these may show the MAC addresses used by devices that connected to the Router during the appropriate date and time. MAC addresses, unlike IP addresses, are uniquely assigned to specific devices. Follow-up questions would then be necessary to locate and examine these other devices, and determine what their MAC addresses are. Then, it would be necessary to follow up to see who was using a particular device at a particular date and time and potentially discover them. Alternatively, some BitTorrent software runs independently without an active operator. Discovery would then have to go to who installed the software on a particular device, or who used it, etc. None of this appears to be contemplated by the Motion Judge's decision.

92. The Court therefore reviewably erred in pre-emptively restricting Voltage's discovery rights.

Part IV — Order sought

93. Voltage seeks an order that:

- (a) the Order is reversed and default judgment is granted against each of the Default Defendants; and
- (b) the issue of the quantum of damages is remitted to the Federal Court for determination.

94. Given the unique circumstances of this appeal, it being a test case of sorts, and the principles of proportionality, Voltage does not seek any costs of this appeal.

ALL OF WHICH IS
RESPECTFULLY SUBMITTED
this 23rd day of September, 2022.

A handwritten signature in black ink, appearing to be 'K. Clark', written over a horizontal line.

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Part V — List of Authorities

Rules / Statutes

1. *Federal Courts Rules*, SOR/98-106, Rules 3, 183, 222, 223, 228, 236, 282, 288
2. *Copyright Act*, R.S.C. 1985, c. C-42, s. 2.4(1.1), 27(1), 38.1(1)(b), 41.25, 41.26

Authorities

3. [*Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers*, 2004 SCC 45](#)
4. [*Rogers Communications Inc. v. Voltage Pictures, LLC*, 2018 SCC 38](#)
5. [*Society of Composers, Authors and Music Publishers of Canada v. Entertainment Software Association*, 2022 SCC 30](#)
6. [*Housen v. Nikolaisen*, 2002 SCC 33](#)
7. Halsbury's Laws of Canada (online), *Civil Procedure*, "Nature of the Burden: Trials: Evidence" (XI.5(2))
8. Sopinka, Lederman & Bryant: *The Law of Evidence in Canada*, 6th ed. (Toronto: LexisNexis Canada, 2022)
9. [*Dumais Estate v. Canada \(Indigenous and Northern Affairs\)*, 2020 FC 25](#)
10. [*TekSavvy Solutions Inc. v. Bell Media Inc.*, 2021 FCA 100](#)
11. [*Trimble Solutions Corporation v. Quantum Dynamics Inc.*, 2021 FC 63](#)
12. [*Motorola Inc. v. Katz*, 1998 CanLII 8198](#)
13. *Newfoundland Processing Ltd. v. "South Angela"*, 1995 CarswellNat 1796 (FCTD)
14. [*Benhaim v. St-Germain*, 2016 SCC 48](#)
15. [*Snell v. Farrell*, \[1990\] 2 SCR 311](#)
16. [*Salna v. Voltage Pictures, LLC*, 2021 FCA 176](#)
17. [*CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13](#)

FEDERAL COURT OF APPEAL

BETWEEN:

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

**VOLTAGE'S MEMORANDUM OF FACT AND
LAW**

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