

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE FEDERAL COURT OF APPEAL)

BETWEEN:

ROGERS COMMUNICATIONS INC.

APPLICANT
(Respondent)

-and-

VOLTAGE PICTURES, LLC, COBBLER NEVADA, LLC, PTG NEVADA, LLC, CLEAR SKIES NEVADA, LLC, GLACIER ENTERTAINMENT S.A.R.L. OF LUXEMBOURG, GLACIER FILMS 1, LLC and FATHERS & DAUGHTERS OF NEVADA, LLC

RESPONDENTS
(Appellants)

-and-

SAMUEL-GLUSHKO CANADIAN INTERNET POLICY & PUBLIC INTEREST CLINIC, BELL CANADA INC., CANADIAN NETWORK OPERATORS CONSORTIUM INC., COGECO INC., QUEBECOR MEDIA INC., SASKATCHEWAN TELECOMMUNICATIONS HOLDING CORPORATION, SHAW COMMUNICATIONS INC., TEKSAVVY SOLUTIONS INC., TELUS COMMUNICATIONS INC. AND XPLORNET COMMUNICATIONS INC.

INTERVENERS

REPLY FACTUM OF THE RESPONDENT TO THE FACTA OF THE INTERVENERS

(Pursuant to the Order of Madam Justice Karakatsanis dated March 23, 2018)

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and Xplornet Communications Inc.**

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PART I – OVERVIEW

1. These submissions are being delivered in response to the written submissions of CIPPIC¹ and the ISP Coalition.²
2. CIPPIC has attempted to improperly re-argue its position before the Motions Judge in this matter without appealing that aspect of the motion decision below, and without seeking leave to this Honourable Court. Further, it is improperly attempting to introduce “evidence” in this matter which is inaccurate, out-of-date and shielded from cross-examination or response. This new “evidence” should be ignored in its entirety.
3. The ISP Coalition’s arguments in the main merely repeat those of the Appellant. Their argument regarding what is required to be recorded in accordance with s. 41.26(1) of the *Copyright Act* is contrary to the principles of an equitable bill of discovery. The Respondents only seek discovery of what has been stored – they are not asking, and should not be required to compensate ISPs, for any work that the ISPs do to re-verify the already-accurate information stored in accordance with s. 41.26(1)(b) of the *Copyright Act*.

PART II – STATEMENT OF ARGUMENT

CIPPIC’S SUBMISSIONS ADDUCE IRRELEVANT AND IMPROPER “EVIDENCE”

4. CIPPIC’s argument is largely premised on American journal articles and jurisprudence generated in the context of, and in reference to, the US system under the *Digital Millennium Copyright Act* (“*DMCA*”). This reliance is not only improper but is also irrelevant.
5. Each of Rogers, the ISP Coalition, and CIPPIC make the point that the Notice and Notice Regime is a “made in Canada” solution that is distinct from the DMCA, and in particular, the notice and takedown rules.³ CIPPIC relies on outdated⁴ US journals as evidence applicable to

¹ Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic

² Bell Canada, Canadian Network Operators Consortium Inc., Cogeco Inc., Quebecor Media Inc., Saskatchewan Telecommunications Holding Corporation, Shaw Communications Inc., Teksavvy Solutions Inc., TELUS Communications Inc., and Xplornet Communications Inc.

³ See para. 21 of Rogers’ factum, para. 10 of the ISP Coalition’s factum and para. 18 of CIPPIC’s factum.

⁴ For example, see footnote 29 of CIPPIC’s factum where the 2006 article “Efficient Process or ‘Chilling Effects’” is cited.

the Canadian Notice and Notice Regime – e.g. that there are many false positive identifications.⁵ This is denied. This is neither the forum, nor the stage in the proceeding, to be advancing new facts, particularly as they are incapable of being tested, cross-examined or rebutted by Voltage a week before the hearing. CIPPIC’s evidence should be disregarded in its entirety and Voltage denies that such “evidence” is true or correct in any material way.⁶

AUTOMATION WILL NOT CAUSE PRIVACY BREACHES NOR WILL IT LEAD TO HIGHER RISK OF SAME

6. CIPPIC wrongly suggests automation of an ISPs’ retrieving a subscriber’s identity will increase the chance of a privacy breach.⁷ Rogers and other ISPs already automate the process of identifying hundreds of thousands of subscribers per week when notices are sent to subscribers. That technology, confirmed by Rogers to give accurate results,⁸ could and should be applied to the disclosure process. Manual review is not only cost prohibitive, given the millions of notices Rogers alone receives per year, but it is clearly not needed to correctly identify subscribers. ISPs deal with vast quantities of private personal information on a daily basis and are well-equipped to protect their subscribers’ identities. They should be presumed to be obeying privacy laws.

7. CIPPIC intervened at the motion stage in this proceeding with respect to many of the privacy matters contained in their written submissions. Despite this, it did not appeal the motion decision, nor did it seek leave to intervene at the Federal Court of Appeal. Much of CIPPIC’s arguments are collateral attacks on the Motions Judge’s findings. Had it wanted to challenge this decision, it should have appealed or sought leave to this Court to do so.

THE RECORDS TO BE RETAINED BY ISPs MUST PERMIT A COURT TO IDENTIFY THE SUBSCRIBER

8. The ISP Coalition argues that they need not identify, or verify the identity of, the subscriber at the notice stage.⁹ This is plainly incorrect. If ISPs do not accurately identify the

⁵ See para. 20 of CIPPIC’s factum.

⁶ For example, in para. 24 of its factum, CIPPIC provides “evidence” that the notice and notice system “works”. Millions of notices of infringement per year is hardly the sign of a system that is “working”.

⁷ Paras. 28 – 34 of CIPPIC’s factum.

⁸ Affidavit of Kristi Jackson sworn June 10, 2016, para. 23, Appellant’s Record, Tab 11, p. 121.

⁹ Factum of the ISP Coalition at para. 20.

subscriber prior to sending a notice, then there is no assurance that the proper subscriber is actually sent the notice as per s. 41.26(1)(a) of the *Copyright Act*. It is important that the correct subscriber be given notice as that can allow infringers to modify their behaviour or take action to mitigate damages. Without proper notice, a subscriber could, for example, distribute many more copies of a film and therefore be liable for far more damages than would be the case otherwise. Sending a notice has a myriad of legal effects, including making a subscriber liable for future copyright infringement by way of authorization of infringement.¹⁰

9. The ISP Coalition misinterprets s. 41.26(1)(b) of the *Copyright Act*. The English portion of the statute uses the term “retain records that will allow the identity of the [subscriber] to be determined” while the French portions uses the terminology “conserver [...] un registre permettant d’identifier [l’abonnée]”. Voltage submits that the term “un registre” (which in our submissions, in English, more specifically means “ledger” or “register”), when read with the English term “records”, indicates that Parliament intended that the ISP keep a specific record (or specific records) that is associated with the notice that triggered the retention obligation. The phrasing of s. 41.26(1)(b), set out in the table below, is also instructive. We note the repeated use of the term “registre” in the French version, which reinforces the point that a specific record (or specific records) must be kept to identify the subscriber.

English – 41.26(1)(b)	French – 41.26(1)(b)
“retain <u>records</u> that will allow the identity of the [subscriber] to be determined”	“conserver [...] <u>un registre</u> permettant d’identifier [l’abonnée] [...] conserver <u>le registre</u> pour une période d’un an suivant la date de la réception de l’avis [...]”

10. In particular, the repetition of “le registre” to refer to the earlier “un registre” in the provision can only mean that Parliament intended that the records being retained in accordance with this section are to be specific to the notice of infringement.

11. Recall that a *Norwich* order is an equitable bill of discovery, and that the information being produced is third-party discovery information. A *Norwich* order requests existing information and documents - it does not compel a third party to verify or re-verify such existing information. Voltage only seeks the identity information already stored by the ISP – it is not

¹⁰ See Voltage’s main factum at para. 20.

seeking stand-alone information or information that should not already have been stored by the ISP.

12. We submit that the object of the phrase “to be determined” / “permettant d’identifier” is therefore the general public, *i.e.* the Court, and not the ISP itself. If the information was not intelligible to the general public, when produced it would not fulfil the purpose of identifying the subscriber. Parliament intended for the recorded information to be used in litigation - that is why it must be retained for an extra six months if notice of litigation is provided to the ISP pursuant to s. 41.26(1)(b).

13. The ISP has to determine the subscriber’s identity prior to forwarding a notice pursuant to s. 41.26(1)(a) to such subscriber. If the obligation is interpreted as “retain records that will allow the identity of [the subscriber] to be determined by the ISP”, it would not only duplicate the identification process, but it would put the ISP in the position of having to explain how the information was obtained. Each ISP could store different information to its own liking.

14. Occam’s razor - *Entia non sunt multiplicanda praeter necessitatem* – holds that the simpler explanation is more likely to be true. A simpler, more straightforward reading of the provision is that it requires the ISP to store the personal information of its subscriber (*i.e.* name and physical address) so that, if requested, the subscriber could be identified by a legitimate claimant. This provides consistency across the industry and gives ISPs (and claimants) a clear understanding of what their obligations entail.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 20th day of April 2018



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STATUTORY PROVISIONS

Obligations related to notice

- **41.26 (1)** A person described in [paragraph 41.25\(1\)](#)(a) or (b) who receives a notice of claimed infringement that complies with [subsection 41.25\(2\)](#) shall, on being paid any fee that the person has lawfully charged for doing so,
 - **(a)** as soon as feasible forward the notice electronically to the person to whom the electronic location identified by the location data specified in the notice belongs and inform the claimant of its forwarding or, if applicable, of the reason why it was not possible to forward it; and
 - **(b)** retain records that will allow the identity of the person to whom the electronic location belongs to be determined, and do so for six months beginning on the day on which the notice of claimed infringement is received or, if the claimant commences proceedings relating to the claimed infringement and so notifies the person before the end of those six months, for one year after the day on which the person receives the notice of claimed infringement.

Obligations

- **41.26 (1)** La personne visée aux [alinéas 41.25\(1\)](#)a) ou b) qui reçoit un avis conforme au [paragraphe 41.25\(2\)](#) a l'obligation d'accomplir les actes ci-après, moyennant paiement des droits qu'elle peut exiger :
 - **a)** transmettre dès que possible par voie électronique une copie de l'avis à la personne à qui appartient l'emplacement électronique identifié par les données de localisation qui sont précisées dans l'avis et informer dès que possible le demandeur de cette transmission ou, le cas échéant, des raisons pour lesquelles elle n'a pas pu l'effectuer;
 - **b)** conserver, pour une période de six mois à compter de la date de réception de l'avis de prétendue violation, un registre permettant d'identifier la personne à qui appartient l'emplacement électronique et, dans le cas où, avant la fin de cette période, une procédure est engagée par le titulaire du droit d'auteur à l'égard de la prétendue violation et qu'elle en a reçu avis, conserver le registre pour une période d'un an suivant la date de la réception de l'avis de prétendue violation