Federal Court  Cour fédérale

Date: 20191112

Docket: T-662-16

Citation: 2019 FC 1412

Ottawa, Ontario, November 12, 2019

PRESENT: Mr. Justice Boswell

PROPOSED CLASS PROCEEDING

BETWEEN:

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 NEVADA, LLC

Applicants

and

ROBERT SALNA, JAMES ROSE, AND
LOREDANA CERILLI, PROPOSED
REPRESENTATIVE RESPONDENTS ON
BEHALF OF A CLASS OF RESPONDENTS

Respondents

and

SAMUELSON-GLUSHKO CANADIAN INTERNET POLICY AND PUBLIC INTEREST CLINIC

Intervener

ORDER AND REASONS

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[1] The applicants -- namely 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 Nevada, LLC [collectively, Voltage] -- are film production companies who allege that their copyrights in several films have been infringed online. They claim that the respondents, and others like them, have engaged in illegal uploading and downloading of Voltage's films using peer-to-peer networks.

[2] Voltage has brought a motion for an order to certify its underlying application as a respondent class proceeding (a so-called "reverse class application") under Rules 334.14(2), 334.14(3) and 334.16 of the *Federal Courts Rules*, SOR/98-106, and on terms and conditions under Rule 334.17. According to Voltage, the grounds for this motion are threefold: (i) the amended notice of application discloses a reasonable cause of action; (ii) there is an identifiable class of two or more respondent persons; and (iii) the claims of the class members raise common issues of fact or law.

[3] The proposed representative respondents -- namely, Robert Salna, James Rose, and Loredana Cerilli (collectively, the respondents) -- say Voltage's proposed class application is not suitable for certification. According to them, if certified, the proposed reverse class proceeding will be inefficient, unfair, and unmanageable. The intervener, the Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic [CIPPIC], also says the proposed reverse class proceeding should not be certified.

[4] Part 5.1 of the *Federal Courts Rules* contains the Rules applicable to a class proceeding. Voltage desires to have this application certified as a class proceeding to facilitate enforcement of the copyrights in its films. Should this application be certified as a class proceeding? And if so, what form of order should the Court issue under Rule 334.17?

[5] For the reasons that follow, Voltage's amended motion for certification is dismissed.

I. Background

[6] It is unnecessary, for the purpose of these reasons, to summarize the rather lengthy procedural history of this proceeding, which has already been to the Supreme Court of Canada once. Suffice it to say, this history can be found in the following decisions: *Voltage Pictures, LLC v Doe*, 2016 FC 681; *Voltage Pictures, LLC v John Doe,* 2016 FC 881; *Voltage Pictures, LLC v John Doe*, 2017 FCA 97; *Voltage Pictures, LLC v. Salna*, 2017 FC 130; *Voltage Pictures, LLC v Salna,* 2017 FCA 221; *Rogers Communications Inc. v Voltage Pictures, LLC*, 2018 SCC 38 [*Rogers*]; and *Voltage Pictures, LLC v Salna*, 2019 FC 1047 (presently on appeal to the Federal Court of Appeal).

[7] In 2015, Voltage used a custom, forensic software product to identify online copyright infringements of its films through peer-to-peer networks using BitTorrent, a communication protocol for file sharing. A person who wishes to share a computer file with others saves that file in a computer folder. The BitTorrent software then offers that file for download to anyone who is using compatible BitTorrent software and who requests that particular file.

[8] Voltage alleges that the respondents committed three unlawful acts: (i) making a film available for download by means of a BitTorrent network offering the file for uploading, or actually uploading a film; (ii) advertising by way of the BitTorrent protocol that a film is available for download; and (iii) failing to take reasonable steps to ensure that the first and second unlawful acts did not take place in respect of an internet account controlled by an Internet Account Subscriber, and by doing so authorized such unlawful acts. Voltage defines an "Internet

Account Subscriber" or "internet subscriber" as a person who is contractually obligated to an internet service provider [ISP] to pay for internet services.

[9] Initially, Voltage sought to describe the class of respondents as being all natural persons residing in Canada who Voltage defines as either "Direct Infringers" or "Authorizing Infringers", or both. The respondents, as a proposed class, would fall into one or both of these categories of infringer. A Direct Infringer includes a person who has performed the first or second of the unlawful acts noted above, or who has unlawfully copied a film. An Authorizing Infringer includes a person, such as an internet subscriber, who has performed the third unlawful act noted above, or who has authorized an unlawful copy of a film.

[10] At the hearing of this motion and in its reply, Voltage clarified that the proposed class comprises Direct Infringers or Authorizing Infringers who are also internet account subscribers. In other words, every member of the proposed respondent class would be an internet account subscriber who an ISP identifies by virtue of the notice-and-notice regime or a *Norwich* order. Direct Infringers who are not internet account subscribers would not be part of the proposed class.

[11] The proposed class respondents would consist of those individuals whose internet accounts had been detected by Voltage's forensic software as offering to upload its films during a prior six-month period. Voltage chose six months because, under paragraph 41.26(1) (b) of the *Copyright Act*, RSC 1985, c C-42, an ISP is required to retain records enabling identification of

an internet account holder for six months following the day on which the account holder received notice of an alleged infringement.

[12] In 2015, Voltage identified internet protocol [IP] address 174.112.37.227 as offering for upload five of its films at various times. These films are:

	Title	Owner
1.	The Cobbler	Cobbler Nevada, LLC
2.	Pay the Ghost	PTG Nevada, LLC
3.	Good Kill	Clear Skies Nevada, LLC
4.	Fathers and Daughters	Fathers & Daughters Nevada, LLC
5.	American Heist	Glacier Films 1, LLC and Glacier Entertainment S.A.R.L. of Luxembourg

[13] Voltage then proceeded to obtain a *Norwich* order, which compelled Rogers Communications Inc. to disclose the identity of the subscriber with this IP address. The respondent Robert Salna was identified as the subscriber. Voltage says it chose this IP address from thousands of possible choices because the frequent samples of this address ensure reliability. Mr. Salna, in turn, claimed the tenants in his rental property performed the alleged unlawful activities. He identified the other two proposed representative respondents, James Rose and Loredana Cerilli, as the tenants who had access to his internet account during the relevant time.

[14] The respondents deny having committed the unlawful acts Voltage alleges. They claim to have no personal knowledge of anyone using Mr. Salna's internet connection to download

Voltage's films. They do not know if the internet connection has been compromised by other users, including family members, guests, and internet hackers.

[15] Mr. Salna provides internet access as part of the tenancies at his rental property in Richmond Hill, Ontario. In his capacity as a landlord, he says he never controlled or monitored his tenants' internet usage; and hence, he claims he does not know the nature of the online activities they engage in. Although the internet account is in his name, Mr. Salna denies having sufficient control over the use of this account and the associated internet devices used to access the internet.

[16] The respondents say they have no interest in participating in this reverse class proceeding. Given the choice, they would opt-out of this proceeding because they do not identify themselves as being part of the proposed class and have no incentive to voluntarily expend money on legal fees, and divert time and attention to defend Voltage's application.

[17] According to CIPPIC, Voltage admits that it does not know who uploaded the films or whether the respondents, or some other unknown third party, made the films available for upload. CIPPIC notes that, although ISPs assign IP addresses to devices on their networks, the assignment is subject to change. While a public facing IP is unique, it is not tied to any one device or individual. In CIPPIC's view, Voltage's only affiant, Mr. Benjamin Perino, admitted during cross-examination that an IP address cannot be associated with a particular individual as opposed to equipment such as an internet router. Mr. Perino further admitted that more evidence

would be required to identify an individual who carries out a particular internet activity associated with an IP address.

[18] According to CIPPIC, in certain circumstances it may be possible to trace traffic or behavior associated with an IP address to a particular individual, but it is not possible to impute copyright infringement by that individual. Associating an IP address with a particular internet activity does not identify the individual responsible for that activity. Such a determination requires examination of the actual wireless devices using an IP address at the relevant time.

II. The Evidence

[19] On a motion for certification, an applicant is required to file and serve (i) a notice of motion for certification of a proceeding as a class proceeding, and (ii) an affidavit in support of the motion, at least 14 days before the day set out in the notice for the hearing of the motion (Rule 334.15(1)). A proposed representative respondent is not required to file an affidavit under Rule 334.15(4) (*Tippett v Canada*, 2019 FC 869 at para 29 [*Tippett*]), but may do so at least five days before the hearing of the motion.

[20] Rule 334.15(5) prescribes the contents of the affidavit evidence. It stipulates that a person filing an affidavit on a motion for certification must set out:

> (a) the material facts on which the person intends to rely at the hearing of the motion;
>
> (b) that the person knows of no fact material to the motion that has not been disclosed in the person's affidavit; and
>
> (c) to the best of the person's knowledge, the number of members in the proposed class.

[21] Rule 81(1) permits an affidavit filed on a motion to provide evidence that is not within the deponent's personal knowledge. This Rule does require, however, a statement as to the deponent's belief in the evidence (*Tippett* at para 19). The Supreme Court of Nova Scotia in *Sweetland v Glaxosmithkline Inc*, 2014 NSSC 216, stated the following about hearsay evidence on a certification motion:

> [13] A certification motion in a class proceeding is considered to be procedural and, therefore, hearsay evidence is permissible provided the deponent establishes the source and the witness' belief of the information.
>
> [14] The evidentiary onus on plaintiffs seeking certification of a class proceeding is not high. It is sufficient that they show "some basis in fact" for each of the certification requirements. Indeed, courts on certification motions are not expected to resolve conflicts in the evidence or engage in assessments of evidentiary weight.
>
> [15] The low threshold of proof required on a certification motion should not be equated with a relaxation of the requirements for admissibility of evidence. A certification motion, like any motion, can only be decided on evidence that is properly before the court. The motion record must comply with the rules of evidence. For procedural motions this includes hearsay, provided the source is identified and the witness is able to establish their belief in the information. These requirements allow the court to assess the credibility and reliability of the hearsay statements being offered.

A. *Voltage's Evidence*

[22] Voltage relies on evidence filed in the motion that resulted in a *Norwich* order identifying Mr. Salna as a proposed class representative. This evidence included the affidavit of Daniel Macek; he was a systems administrator at Maverickeye UG when he affirmed his affidavit in May 2016.

[23] Voltage also relies on the affidavit of Benjamin Perino dated June 3, 2019. Mr. Perino is the former chief executive officer and a senior developer at GuardaLey Ltd., a company that provides a data collection system to track and identify IP addresses using the BitTorrent protocol. GuardaLey licences this system to Maverickeye. In his affidavit, Mr. Perino agrees with the contents of Mr. Macek's affidavit and he adopts that affidavit as his own evidence with some minor modifications since he did not conduct the IP address searches.

(1) *The Macek Affidavit*

[24] In his affidavit, Mr. Macek details his knowledge and experience monitoring peer-to-peer internet networks to identify instances of copyright infringements of Voltage's film. He explains the process by which peer-to-peer networks distribute copyrighted works through the BitTorrent protocol, and describes the method he used to identify the IP address that was subsequently disclosed as that of Mr. Salna.

[25] According to Mr. Macek, BitTorrent is a popular peer-to-peer file sharing protocol, which enables the decentralized and simultaneous distribution of computer files over the internet. It does so by breaking a file into numerous small data packets, allowing internet subscribers to download data packets of copyrighted content from various sources while simultaneously uploading that content for download by others. Each data packet is identifiable by a unique "hash" number, which is created using a mathematical algorithm. Ultimately, an entire computer file is obtained by downloading all the required packets.

[26] Mr. Macek explains that an IP address is a unique numerical label assigned to every device connected to the internet. One of the core functions of an IP address is to allow data sent over the internet to be received by the intended recipient device. An ISP allocates an IP address to devices connected to its networks. ISPs are assigned blocks or ranges of IP addresses that can be found in publicly available databases on the internet.

[27] Mr. Macek states that it is possible to determine which ISP has been allocated a particular IP address at a particular date and time. Only an ISP, however, can correlate an IP address to the identity of a customer. He also states that, to his knowledge, this is the only method by which a customer can be reliably identified. He notes that sometimes an IP address is allocated to a customer for a long period of time. More frequently though, IP addresses change and are dynamically allocated by the ISP to a customer.

[28] According to Mr. Macek, an ISP can allocate an IP address to a WiFi router, a device that can connect to a number of other devices such as computers, telephones, and tablets, each of which could be used simultaneously by different individuals. Consequently, an IP address will not necessarily correspond to the internet activities of only one subscriber but may correspond to other individuals connecting to the router.

[29] Mr. Macek used forensic software specifically made to track peer-to-peer transfers of computer files. Given that the BitTorrent protocol is an open and shared network, he says it was simple to identify the IP address downloading a specific film. Mr. Macek collected three types of identifying information about the users offering to upload Voltage's films: (i) the IP address

assigned by an ISP to an uploader at the time of the scan (after a software-generated pause to ensure the IP address was reliable); (ii) the date and time when a film was made available for upload by the uploader in the form of a computer file; and (iii) the file's metadata, including the name and size of the computer file containing the film, as well as the BitTorrent hash number identifying the particular version of the film.

[30] In reviewing the file data, Mr. Macek identified IP address 174.112.37.227 as offering all five of Voltage's films for upload at various times. He states that he traced this IP address through an "ARIN" network search to Rogers Cable Communications Inc. A schedule to Mr. Macek's affidavit shows the file data collected on this IP address, including the times and dates on which the data was collected.

B. *The Respondent's Evidence*

(1) *The Salna Affidavits*

[31] Mr. Salna filed his first affidavit in connection with his motion for security for costs in 2017. Mr. Salna speaks to his lack of control, or knowledge, about his tenants alleged infringing activities. His second affidavit dated June 7, 2019 attaches the security for costs order and discusses opting out of the proposed class proceeding.

[32] In both affidavits, Mr. Salna expresses a lack of interest or desire in being a respondent in this proceeding. He claims not to identify as part of the class proposed by Voltage. He does not

want to spend legal fees, offer his time, or face repercussions at trial, and would like to opt-out and "simply remain on the side-lines" if he has the choice.

[33] In his first affidavit, Mr. Salna acknowledges the possibility that his current or previous tenants may have infringed Voltage's alleged copyrights, or that the impugned IP address may have been hijacked by another internet user. Mr. Salna claims he does not control or monitor his tenants' internet usage. He also claims he does not have sufficient control over his tenants' internet use or devices, that they have full control, and that he could not have known whether they or others conducted activities prohibited by the *Copyright Act*. He acknowledges that the internet account is registered to his name.

[34] Mr. Salna denies he has infringed Voltage's copyrights as alleged or at all.

(2) *The Rose Affidavit*

[35] James Rose rents one of Mr. Salna's apartments. In his affidavit dated June 10, 2019, Mr. Rose claims he has never seen Voltage's films, and that the last time he used any BitTorrent network was in 2014, before any of the films were released. He says he has never engaged in any unlawful acts as alleged by Voltage.

[36] Mr. Rose acknowledges that he has hosted overnight guests who have used the internet access in his apartment and they may have infringed Voltage's copyrights. He says, however, he did not witness any such infringement taking place. Mr. Rose asks that he be given the choice to opt-out of this proceeding as he is not part of any class proposed by Voltage.

(3) *The Cerilli Affidavit*

[37] Loredana Cerilli rented one of Mr. Salna's apartments for approximately five years, until August 2017. In her affidavit dated June 10, 2019, Ms. Cerilli states she and her children used the internet provided by Mr. Salna for the first year they lived at his apartment, but she switched to her own ISP in or around 2012 because Mr. Salna's ISP service was slow.

[38] Ms. Cerilli claims she has never seen any of Voltage's films, nor has she ever used a BitTorrent network. She says she never witnessed her children, their friends, or any visitors using a BitTorrent network or watching Voltage's films; though her children and their friends were sometimes at the apartment without her attendance.

[39] Ms. Cerilli also says that, given the choice, she would like to opt-out of the proposed class proceeding because she does not identify as a member of any class proposed by Voltage.

C. *The Intervener's Evidence*

(1) *The Lethbridge Affidavit*

[40] Professor Timothy Lethbridge is a professor of software engineering and computer science at the University of Ottawa. He also is a licensed professional engineer and registered information systems professional. In his affidavit dated on September 9, 2019 Professor Lethbridge explains the relationship between ISPs and IP address holders as follows:

> An IP address is a numerical identifier assigned to a network connection point of a device such as a router or a computer so as to

> allow other devices to communicate with it on the internet via Internet Protocol.
>
> Internet Service Providers ("ISPs") assign IP addresses to the routers that serve as the entry points to their customers' networks.
>
> Each ISP has a pool of IP addresses from which they can draw, and each assignment is subject to change.
>
> While an IP address for a device connected to the internet is unique, it is not necessarily associated with any one computer or with any one individual computer user. Where the device connected to the internet is a router like a wireless internet (WiFi) router, multiple users may connect to the internet using a single IP address on a variety of devices including desktop computers, laptops, mobile phones, tablets, music players (iPods), e-book readers, and, increasingly, multi-functional household appliances such as refrigerators, vacuum cleaners, washing machines, and smart home devices (e.g. Amazon's Alexa, Google Home).

[41] Professor Lethbridge emphasizes that it is difficult, if not impossible, to track the internet usage activities of individual devices connected to a shared internet connection, unless the person tracking has a high level of technical expertise and access to specialized software. He adds that:

> It is completely wrong to presume that a responsible ISP customer would have knowledge of who was using the particular internet account at a specifically identified date and time or would have the ability to know that. It would be impossible to conclude, based on the IP address alone, that any one individual was responsible for the internet activity associated with that IP address without additional evidence obtained by examining the actual computer(s) or other devices used by that individual.

[42] Professor Lethbridge claims Mr. Perino's characterization of BitTorrent does not match the reality of the software's use. According to Professor Lethbridge, there is no differentiation between downloading and uploading files to BitTorrent. He says users do not "consciously decide or act so as to offer the file for download or advertise that it is available for download,

because a core aspect of the BitTorrent protocol is that all files once shared are shared by all". Professor Lethbridge says uploading or offering to upload files can be done without a user's knowledge. He points out that where a BitTorrent user accesses the internet through an ISP customer's IP address, the ISP customer would be completely unaware of any offering to upload or uploading of files through their IP address.

(2) *The Kwan Affidavit*

[43] Johann Kwan is an articling student at CIPPIC in Ottawa. In his affidavit dated September 6, 2019, Mr. Kwan outlined his research concerning file-sharing lawsuits filed by Voltage. He found a pattern of "trolling" by Voltage in the United States, where it has filed some 96 cases since 2010, many against unnamed defendants. As Mr. Kwan explains:

> None of the cases filed by Voltage and its above-named associated entities in the American Federal Court system has proceeded to trial. All the cases are initially filed against a group of unnamed defendants. In some cases, courts have refused to permit joinder of unnamed defendants at the outset. In some cases, courts have permitted joinder of defendants during the discovery stage. Typically, the courts issue a subpoena against a third-party ISP to permit discovery of the identity of the unnamed defendants. Once the subpoena is issued, the plaintiffs are required to proceed individually against each defendant. The plaintiffs in the cases listed below have not proceeded against any individual defendant who has filed a defence. The plaintiffs in these cases either seek voluntary withdrawal, or file consent judgments, or proceed to default judgment where no defence is filed.

III. Analysis

A. *Overview*

[44] Voltage seeks certification of the underlying amended application as a class proceeding under Rules 334.14(2), 334.14(3) and 334.16, and on terms and conditions under Rule 334.17, with the proposed class being a class of respondents (as opposed to a plaintiff or applicant class).

[45] According to Voltage, certifying its application as a class proceeding will be more efficient in terms of time, money, and judicial resources than the alternative of naming thousands of respondents personally in separate proceedings. Voltage claims this choice of procedure would minimize the barriers to enforcement of what Voltage characterizes as "low-value infringements"; in that, the statutory damages regime for non-commercial infringements under the *Copyright Act* allows for damages of only $100 to $5,000, plus costs.

[46] Voltage contends that its application meets the conditions mandated under Rule 334.16(1). In Voltage's view, its application discloses a reasonable cause of action, there is an identifiable class of two or more respondent persons, and the claims of the class members raise common issues of fact or law.

[47] In the respondents' view, Voltage's proposed reverse class proceeding is not suitable for certification. If certified, the proceeding will be inefficient, unfair, and unmanageable. According to the respondents, Voltage has not identified a class of two or more persons, and it would be impossible for potential members to reasonably self-identify under the proposed class definition.

[48] Even if a class exists, the respondents claim there is a lack of commonality, and a class proceeding would neither prevent re-litigation of issues nor entail any savings by spreading expenses. At its core, the respondents say Voltage's application raises individual, not common, issues requiring a complex fact-finding process for each class member that would overwhelm the process. In the respondents' view, Voltage's litigation plan is practically unworkable and would imperil access to justice for the proposed class members.

[49] CIPPIC submits that the proposed reverse class proceeding should not be certified under Rule 334.16 because Voltage's application does not disclose a reasonable cause of action. In CIPPIC's view, there is no identifiable class of two or more persons with an objective class definition; there are no common issues that advance the litigation; and a reverse class proceeding is not the preferable procedure.

B. *General Principles Governing Class Proceedings*

[50] The purpose of class actions is threefold: namely, (i) facilitating access to justice; (ii) conserving judicial resources; and (iii) modifying harmful behaviors (*Western Canadian Shopping Centres Inc. v Dutton,* 2001 SCC 46 at paras 27 to 29 [*Dutton*]; *Hollick v Metropolitan Toronto (Municipality),* 2001 SCC 68 at paras 15, 16 and 25 [*Hollick*]). In *Hollick*, Chief Justice McLachlin (speaking for the Court) stated:

> [15] The [Ontario Class Proceedings] Act reflects an increasing recognition of the important advantages that the class action offers as a procedural tool....class actions provide three important advantages over a multiplicity of individual suits. First, by aggregating similar individual actions, class actions serve judicial economy by avoiding unnecessary duplication in fact-finding and legal analysis. Second, by distributing fixed litigation costs

> amongst a large number of class members, class actions improve access to justice by making economical the prosecution of claims that any one class member would find too costly to prosecute on his or her own. Third, class actions serve efficiency and justice by ensuring that actual and potential wrongdoers modify their behaviour to take full account of the harm they are causing, or might cause, to the public. … [Citations omitted]. In my view, it is essential therefore that courts not take an overly restrictive approach to the legislation, but rather interpret the Act in a way that gives full effect to the benefits foreseen by the drafters.

[51] A certification motion is a procedural matter. Its purpose is not to determine whether litigation can succeed, but how the litigation should proceed (*Sauer v Canada (Minister of Agriculture)*, [2008] OJ No 3419 at para 12). The onus is on the moving party to establish an evidentiary basis for certification (*Buffalo v Samson First Nation*, [2009] 4 FCR 3 at para 32; affirmed 2010 FCA 165 [*Buffalo Samson FCA*]). The criteria in Rule 334.16(1) are conjunctive, and if an applicant fails to meet any one of the five listed criteria, the certification motion must fail (*Buffalo Samson FCA* at para 3). The moving party must show some basis in fact for each of the certification requirements, apart from the requirement that the pleadings disclose a reasonable cause of action (*Hollick* at para 25).

C. *Reverse Class Proceedings*

[52] Voltage's submissions concentrate on Rule 334.16, which sets out the certification criteria, and on the jurisprudence interpreting this Rule.

[53] A reverse class proceeding is available in the Federal Court. A reverse class proceeding is a civil action brought against persons defending on behalf of a group of similarly situated persons. The objectives of reverse class actions are like those for plaintiff class actions: (i) the

conservation of judicial resources and private litigation costs; (ii) preventing re-litigation of the same issues; and (iii) spreading expenses and resolving common issues over many defendants or respondents (*Chippewas of Sarnia Band v Canada (AG)*, [1996] OJ No 2475 at para 16 [*Chippewas*]).

[54] Rule 334.14(2) enables a party to an action or application against two or more defendants or respondents to bring a motion for certification of the proceeding as a class proceeding and for the appointment of a representative defendant or respondent. Rule 334.14(3) states that Part 5.1 of the *Federal Courts Rules* applies, with any necessary modifications, to a defendant or respondent class proceeding.

[55] Under Rule 334.11, if no special provision is made in Part 5.1 relating to class actions and applications, the general *Federal Courts Rules* apply. Rule 334.16 sets out the certification conditions, the matters to be considered and, if applicable, the subclasses. Rule 334.17 sets out the contents of the order certifying a proceeding as a class proceeding.

[56] Rule 334.14(2), enabling certification of a respondent class proceeding and the appointment of a representative respondent, resulted from a series of discussions by the Federal Court Rules Committee between 1998 and 2000. These discussions culminated in the Committee's adoption of defendant class certification principles enacted in Ontario; namely, section 4 of the *Class Proceedings Act*, SO 1992, c 6 [*OCPA*], and US Federal Court Rule 23(a) (Canada, Federal Court Rules Committee, *Class Proceedings in the Federal Court of Canada - A Discussion Paper* (Ottawa: June 9, 2000) at p 3).

[57] Part 5.1 of the *Federal Courts Rules* does not define or delineate the scope of "necessary modifications" in the context of a defendant or respondent class proceeding. While there is no binding or guiding precedent interpreting Rules 334.14(2) and (3), the Federal Court of Appeal in *Canada v John Doe*, 2016 FCA 191 [*John Doe*], remarked that:

> [22] The conditions for certifying a class action are provided for at Rule 334.16 of the Rules. According to that provision, a class action proceeding shall be certified if the following conditions are met: (a) the pleadings disclose a reasonable cause of action, (b) there is an identifiable class of two or more persons, (c) the claims raise common questions of law or fact, (d) a class proceeding is the preferable procedure for just and efficient resolution of those common questions, and (e) there is a representative plaintiff who would fairly and adequately represent the interests of the class. These criteria are essentially the same ones applicable in provincial court proceedings in Ontario and British Columbia, such that the Federal Court's jurisprudence on certification relies substantially on Supreme Court cases arising in those provinces: *Buffalo v. Samson Cree Nation*, 2010 FCA 165, 405 N.R. 232, at para. 8.

[58] In *Chippewas*, the Ontario Court of Justice observed that:

> [17] Defendant class actions have a long history in Anglo-American jurisprudence. Their origins are in the English Courts of Equity of the 18th and 19th century. They evolved as a means of providing plaintiffs with an enforceable remedy where it was otherwise impractical to secure the attendance of all potential defendants, while at the same time ensuring that those affected by the outcome of a lawsuit, although absent, were sufficiently protected. Adequate representation of absentee defendants was viewed as a sufficient substitute for the natural justice requirements of individual notice and the opportunity to be heard [Citations omitted].
>
> [18] *Hansberry v. Lee*...is one of the leading American cases to consider the circumstances in which absent persons will be bound by a judgment. In that case, the United States Supreme Court described the origins of the defendant class action in these terms at p. 118:
>
> > The class suit was an invention of equity to enable it to proceed to a decree in suits where the number of those

> interested in the subject of the litigation is so great that their joinder as parties in conformity to the usual rules of procedure is impractical. Courts are not infrequently called upon to proceed with causes in which the number of those interested in the litigation is so great as to make difficult or impossible the joinder of all because some are not within the jurisdiction or because their whereabouts is unknown or where if all were made parties to the suit its continued abatement by the death of some would prevent or unduly delay a decree. In such cases where the interests of those not joined are of the same class as the interest of those who are, and where it is considered that the latter fairly represent the former in the prosecution of the litigation of the issues in which all have a common interest, the court will proceed to a decree.

[59] The Court in *Chippewas* noted that Ontario was (in 1996) the only jurisdiction in Canada with a comprehensive class proceedings statute expressly authorizing a defendant's class proceeding in addition to the more common plaintiff class actions (para 25). The Court further noted that the *OCPA* is remedial legislation to be given a purposive interpretation in keeping with its goals of promoting judicial economy and access to the courts (para 26). In its view, section 4 of the *OCPA* did not require that all potential defendants be named prior to certification of the proceeding and it was not expressly confined to willing or consensual representative defendants (paras 45 and 46).

D. *Test for Certification*

[60] Rule 334.16 stipulates that a judge must certify a proceeding as a class proceeding if:

(a) the pleadings disclose a reasonable cause of action;

(b) there is an identifiable class of two or more persons;

> (c) the claims of the class members raise common questions of law or fact, whether or not those common questions predominate over questions affecting only individual members;
>
> (d) a class proceeding is the preferable procedure for the just and efficient resolution of the common questions of law or fact; and
>
> (e) there is a representative plaintiff or applicant who
>
> > (i) would fairly and adequately represent the interests of the class,
> >
> > (ii) has prepared a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members as to how the proceeding is progressing,
> >
> > (iii) does not have, on the common questions of law or fact, an interest that is in conflict with the interests of other class members, and
> >
> > (iv) provides a summary of any agreements respecting fees and disbursements between the representative plaintiff or applicant and the solicitor of record.

[61] According to Voltage, a proceeding must be certified as a class proceeding if each of the requirements stated in Rule 334.16 is fulfilled. In Voltage's view, certification of class proceedings is desirable as a general principle and undue burdens should not be raised to deny certification.

(1) *Do the Pleadings Disclose a Reasonable Cause of Action?*

[62] The first requirement to certify a proceeding as a class proceeding is that the pleadings disclose a reasonable cause of action. This is assessed on the same standard of proof which applies on a motion to dismiss an action or application; assuming all facts pleaded are true, this

requirement will be satisfied unless it is plain and obvious that the claim cannot succeed (*Pro-Sys Consultants Ltd. v Microsoft Corporation*, 2013 SCC 57 at para 63 [*Pro-Sys*]).

[63] According to Voltage, the threshold to meet the first requirement is low and it is unnecessary that it meet this in relation to all asserted causes of action. It is sufficient, Voltage says, that its pleadings disclose at least one valid cause of action.

[64] Voltage claims to have a reasonable cause of action against each of the Direct Infringers and Authorizing Infringers because they have distributed unauthorized copies of Voltage's films over the internet. Voltage also claims it is entitled to enforce its copyrights and that the cause of action against Direct Infringers is proper.

[65] Voltage asserts that, in certain circumstances, failing to take down infringing content once notified of the infringement could lead to a finding of copyright infringement through authorization. According to Voltage, authorizing copyright infringement constitutes a reasonable cause of action.

[66] Voltage adds that persons who have allowed others to use their internet accounts, who in turn committed copyright infringements, cannot be wilfully blind as to how their accounts were used. These persons have a legal obligation, Voltage claims, not to sit by and fail to be reasonably informed as to the use of their internet accounts.

[67] CIPPIC's position, which the respondents adopt and rely upon, is that Voltage has not pleaded the necessary facts to disclose a cause of action for any of the three alleged unlawful acts: namely, offering a film for download, secondary infringement in the films, and authorizing others to infringe copyrights in the films.

[68] According to CIPPIC, Voltage has not identified any respondent for its direct infringement claims. In CIPPIC's view, it is plain and obvious that Voltage's claims cannot succeed without an identifiable respondent. CIPPIC says Voltage has not provided a description of these persons and how they may be identified. CIPPIC notes that, although Voltage says its forensic software identified the proposed class members by an IP address located in Canada, Voltage acknowledges that an alleged Direct Infringer may not be the same individual as the person whose IP address Voltage identified.

[69] CIPPIC says Voltage has not pleaded the necessary facts for its "advertising the film for download" claim. In CIPPIC's view, without any material facts pleaded on a legal foundation under the *Copyright Act*, the claim of advertising the films for download by way of the BitTorrent protocol must fail. According to CIPPIC, this is not a recognized cause of action under the *Copyright Act*.

[70] CIPPIC maintains that Voltage has not pleaded the facts necessary to make out a case of secondary infringement under section 27(2) of the *Copyright Act.* It says the three elements that must be proven to establish secondary infringement are: (i) a primary infringement; (ii) a secondary infringer should have known that he or she was dealing with a product of

infringement; and (iii) the secondary infringer sold, distributed, or exposed for sale the infringing goods. According to CIPPIC, since Voltage has not pleaded any of these facts, it does not meet the plain and obvious test.

[71] CIPPIC notes that, in its amended notice of application and amended notice of motion, Voltage did not plead that: (i) there was a primary infringement of the films, which occurred before the alleged infringements were committed by members of the proposed class; (ii) the infringers knew they were dealing with a product of infringement; and (iii) the class members sold, rented, or distributed the films to prejudicially affect Voltage.

[72] CIPPIC argues that Voltage has not pleaded the facts necessary to disclose a claim of authorization under subsections 27(2.3) and 27(2.4) of the *Copyright Act*, which state that:

> **(2.3)** It is an infringement of copyright for a person, by means of the Internet or another digital network, to provide a service primarily for the purpose of enabling acts of copyright infringement if an actual infringement of copyright occurs by means of the Internet or another digital network as a result of the use of that service.
>
> **(2.4)** In determining whether a person has infringed copyright under subsection (2.3), the court may consider
>
> (a) whether the person expressly or implicitly marketed or promoted the service as one that could be used to enable acts of copyright infringement;
>
> (b) whether the person had knowledge that the service was used to enable a significant number of acts of copyright infringement;
>
> (c) whether the service has significant uses other than to enable acts of copyright infringement;
>
> (d) the person's ability, as part of providing the service, to limit acts of copyright infringement, and any action taken by the person to do so;

> (e) any benefits the person received as a result of enabling the acts of copyright infringement; and
>
> (f) the economic viability of the provision of the service if it were not used to enable acts of copyright infringement.

[73] According to CIPPIC, to establish a claim under subsection 27(2.3), the existence of at least some of the factors listed in subsection 27(2.4) must be pleaded and Voltage's pleadings are deficient in this regard. In CIPPIC's view, any claim of authorization must be based on the statutory factors set out in subsections 27(2.3) and 27(2.4). CIPPIC notes that in similar lawsuits in the United States, Voltage's authorization claim has been rejected.

(2) *The Pleadings Do Not Disclose a Reasonable Cause of Action.*

[74] As previously mentioned, the test at this stage is whether the pleadings disclose a reasonable cause of action, assuming that the facts as pleaded are true (*Pro-Sys* at para 63). The determination of whether a reasonable cause of action exists is based on the facts in Voltage's pleadings and not on the evidence Voltage adduced in support of the motion for certification (*Condon v Canada*, 2015 FCA 159 at para 15). The Supreme Court of Canada in *Hollick* held that a certification hearing does not involve an assessment of the merits of the claim; rather, it focuses on the form of the action in order to determine whether the action can appropriately go forward as a class proceeding (at para 16).

[75] Subsection 27(1) of the *Copyright Act* describes what is known as "primary infringement" (*Excellence Inc. v Kraft Canada Inc.*, 2007 SCC 37 at para 17 [*Excellence*]). It provides that it is an infringement of copyright for any person, without the copyright owner's

consent, to do anything that only the owner has the right to do under the *Copyright Act*. Section 3 of the *Copyright Act* sets out the catalogue of rights that a copyright owner possesses under the *Copyright Act*. These rights include the sole right to produce and reproduce copies of the copyrighted work, and to communicate the work to the public by telecommunication.

[76] With respect to secondary infringement, the Supreme Court of Canada has held that three elements must be proven to establish this cause of action under subsection 27(2) of the *Copyright Act*: (i) a primary infringement; (ii) the secondary infringer should have known that he or she was dealing with a product of infringement; and (iii) the secondary infringer sold, distributed or exposed for sale the infringing good (*CCH Canadian Ltd. v Law Society of Upper Canada*, 2004 SCC 13 at para 81 [*CCH*]; *Excellence* at para 19).

[77] I agree with CIPPIC's submissions that Voltage's pleadings do not disclose a reasonable cause of action with respect to primary infringement. While Voltage alleges that its forensic software identified a direct infringement in Voltage's films, Voltage has failed to identify a Direct Infringer in its amended notice of application. Without an identifiable respondent, the action could not appropriately go forward as a class proceeding; thus, it is plain and obvious that Voltage's claims cannot succeed.

[78] In my view, Voltage's pleadings also do not disclose a reasonable cause of action with respect to internet subscribers who fall within the class of Authorizing Infringers or, for that matter, secondary infringers. Voltage asserts, based upon *obiter dicta* of Justice Binnie (speaking for the majority) in *Society of Composers, Authors & Music Publishers of Canada v. Canadian*

Association of Internet Providers, 2004 SCC 45 at paras 127 and 1287 [*SOCAN*], that an Authorizing Infringer cannot be willfully blind as to use of their internet account. According to Voltage, an Authorizing Infringer has a legal obligation to monitor the internet activity of those using their internet connection after receipt of a notice of alleged infringement under the "notice-and-notice" regime under the *Copyright Act*.

[79] Voltage's argument concerning Authorizing Infringers unjustifiably relies upon an overly broad reading of Justice Binnie's observations in *SOCAN*. The Supreme Court did not define "authorization" and its scope in *SOCAN*. Rather, it stated:

> [127] The knowledge that someone *might* be using neutral technology to violate copyright (as with the photocopier in the *CCH* case) is not necessarily sufficient to constitute authorization, which requires a demonstration that the defendant did "[g]ive approval to; sanction, permit; favour, encourage" (*CCH*, at para. 38) the infringing conduct. I agree that notice of infringing content, and a failure to respond by "taking it down" may in some circumstances lead to a finding of "authorization". However, that is not the issue before us. Much would depend on the specific circumstances. An overly quick inference of "authorization" would put the Internet Service Provider in the difficult position of judging whether the copyright objection is well founded, and to choose between contesting a copyright action or potentially breaching its contract with the content provider. A more effective remedy to address this potential issue would be the enactment by Parliament of a statutory "notice and take down" procedure as has been done in the European Community and the United States. [Emphasis in original; underline added]

[80] Voltage's claim that the respondents have offered a film for download cannot succeed in view of Professor Lethbridge's evidence that there is no differentiation between downloading and uploading files to BitTorrent, and that internet users do not consciously decide or act so as to offer a file for download or advertise that it is available for download. A core aspect of the

BitTorrent protocol is that all files, once shared, are shared by all, and this can be done without a user's knowledge. This evidence further makes it plain and obvious that Voltage's claim for secondary infringement of its films cannot succeed.

[81] I agree with CIPPIC that Voltage has not pleaded the necessary facts for its "advertising the work for download" claim. Without any material facts pleaded on a legal foundation under the *Copyright Act*, it is plain and obvious that the claim of advertising the films for download must fail. Voltage's claim -- that each member of the proposed class advertised by way of the BitTorrent protocol that a film was available for download -- is not a recognized cause of action under the *Copyright Act*.

(3) *Standard of Proof*

[82] The test for determining whether the pleadings disclose a reasonable cause of action should not be conflated with the "some basis in fact" standard of proof applicable to the other four certification requirements (*John Doe* at para 33). For each of the requirements of Rule 334.16 (other than whether the pleadings disclose a reasonable cause of action), the party seeking certification must show "some basis in fact" that these have been met (*Pro-Sys* at para 100). While evidence has a role to play in the certification process, this does not require evidence on a balance of probabilities or the resolution of conflicting facts and evidence (*Pro-Sys* at para 102).

[83] A motion for certification does not involve an assessment of the merits of the underlying proceeding. Rather, it focuses on the form of the action or application in order to determine whether it can appropriately go forward as a class proceeding. Each case must be decided on its

own facts (*Pro-Sys* at para 104). There must be sufficient facts to satisfy the certification criteria in Rule 334.16(1). Material facts must be pleaded in support of each cause of action alleged. Bare assertions of conclusions are insufficient and cannot support a cause of action (*John Doe* at para 33).

(4) *Is there an Identifiable Class?*

[84] Rule 334.16(1) (b) requires Voltage to show some basis in fact for a conclusion that two or more persons constitute an identifiable class. An identifiable class exists if: (i) it can be defined by objective criteria; (ii) it can be defined without reference to the merits of the action; (iii) there is a rational connection between the common issues and the proposed class definition; and (iv) it is capable of clear definition and not unlimited (*Hollick* at para 17).

[85] The parties disagree as to whether there is such a class.

(a) *Voltage's Submissions*

[86] Voltage claims its burden is not onerous since it is not required to show that everyone in the class shares the same interest in the resolution of the asserted common issues. According to Voltage, it only needs to show that the class is not unnecessarily broad.

[87] At the hearing of this motion and in its reply, Voltage clarified that the class members would only be a Direct Infringer or an Authorizing Infringer who is also an internet account subscriber. In other words, the respondent class would be limited to individuals who are internet

account subscribers who can be identified by an ISP. A Direct Infringer who is not an internet account subscriber would not be part of the class.

[88] Voltage says each member of the proposed class would be detected committing copyright infringement in the same manner; in that, their internet account offered to upload at least one of Voltage's films to the public without colour of right. Voltage equates the term "upload" to "distribute". According to Voltage, the class respondents would comprise individuals whose internet accounts had been detected by forensic software as offering to upload the films during a six-month period prior to delivery of a certification notice.

[89] Voltage says it will first use its forensic software to verify that each offer to distribute constitutes an unlawful act. Voltage then proposes to send to each known member of the proposed respondent class a certification notice through their ISPs' automated notice-and-notice system. Voltage claims the issues are identical for each proposed class member.

(b) *Respondents' Submissions*

[90] The respondents say Voltage's proposed class definition is not certifiable because it has failed to adduce evidence on potential class members. They maintain Voltage has failed to identify a single Direct Infringer among the proposed representative respondents, let alone the existence of a class of two or more persons who are either Direct Infringers or Authorizing Infringers. In the respondents' view, it would be futile to certify a class proceeding where there is no evidence of potential class members.

[91] The respondents further say a party seeking certification must identify the existence of actual class members and not simply potential class members. According to the respondents, Voltage has failed in this regard. Voltage's memorandum of fact and law refers to approximately 55,000 IP addresses that have offered to distribute its films through the BitTorrent protocol and approximately 2,000 unique IP addresses that have offered the films in the last six months. The respondents remark that Voltage has failed to adduce evidence to substantiate these claims. Voltage merely speculates, the respondents say, that the class will fall into one of the two proposed categories of infringers.

[92] The respondents point out that Voltage has identified only one IP address that allegedly made the films available for download; i.e., the one associated with Mr. Salna. The respondents claim Mr. Perino admitted on cross-examination that: (i) he does not know whether this IP address was connected to a router or whether, at any given time, a single device or multiple devices were using the IP address; (ii) it was possible multiple computers, mobile phones, or tablets were using the internet through this IP address; and (iii) he does not know the identity of the person who made the films available for upload and it could have been anyone using Mr. Salna's IP address.

[93] In the respondents' view, Voltage has not met the requirement that a class must be capable of clear definition by reference to objective criteria. According to the respondents, the class definition cannot be subject to, or depend upon, the merits of the proposed action; and it should also be limited in time. A clear definition of a class is critical, the respondents say,

because it identifies individuals entitled to notice and relief (if relief is awarded), and who would be bound by the judgement.

[94] The respondents maintain that there would be significant difficulty in determining class membership because the identity of the members would not be ascertainable without a complex fact-finding process and an in-depth examination of the merits of individual liability issues. In the respondents' view, Voltage's proposed class definition is neither clear nor objective.

[95] According to the respondents, whether an individual resides in Canada requires proposed class members to make subjective and legal conclusions, because the determination of residency is multi-factorial and the place where a person resides turns on the facts of each case. The respondents say the criteria to identify Direct Infringers or Authorizing Infringers are material issues to be determined at trial and are not ascertainable without reference to the merits of Voltage's claim.

[96] The respondents further say the definition of Direct Infringer would require proposed class members to make complex and technical assessments in self-identifying whether they have engaged in uploading or advertising a film. In the respondents' view, whether someone has unlawfully copied one of Voltage's films requires a legal determination, which would not be self-evident to laypersons in the proposed class and would make determining class membership unmanageable.

[97] According to the respondents, the definition of Authorizing Infringers requires potential class members to make subjective and legal conclusions as to whether they took reasonable steps to prevent unlawful acts or authorized an unlawful copy of one of Voltage's films. This is not ascertainable, the respondents claim, without an in-depth examination of the merits of Voltage's claim and a court determination.

(c) *Intervener's Submissions*

[98] CIPPIC adopts and relies upon the respondents' submissions as to whether there is an identifiable class.

(d) *Analysis*

[99] Voltage maintains that many of the concerns raised by the respondents and the intervener involve practical issues of identifying Direct Infringers who are also internet account subscribers. Voltage acknowledges that the process of identifying these individuals would require a further factual determination if they were not identified through a *Norwich* order as being the relevant account holder at a particular date and time.

[100] As mentioned above, Voltage clarified at the hearing of this matter and in its reply that the class members would only be Direct Infringers or Authorizing Infringers who are also internet subscribers and receive a notice of certification from their ISP. Infringers who do not receive a certification notice from their ISP would not, Voltage says, form part of the class and would not be subject to legal proceedings. A Direct Infringer who is not an internet account

subscriber would not be within the class, Voltage says, and would not be identified in a future *Norwich* order in this proceeding. Voltage claims this clarification resolves the vast majority of the concerns about whether there is an identifiable class.

[101] This clarification, however, undermines Voltage's application, at least in part, because, at the relevant time, neither Mr. Rose nor Ms. Cerilli was an internet account subscriber. If Mr. Rose and Ms. Cerilli were involved in copyright infringement (which they deny), they would not fall within the category of Direct Infringers because they were not internet account subscribers at the relevant time.

[102] The identifiable class criterion requires Voltage to show some basis in fact for a conclusion that there is an identifiable class of *two* or more persons. Only Mr. Salna possibly falls within the proposed class of Authorizing Infringers, and because he denies any direct infringement of Voltage's copyrights, he would not be a Direct Infringer.

[103] Voltage claims in its memorandum of fact and law to have found thousands of IP addresses (in addition to Mr. Salna's) offering to distribute its films through the BitTorrent protocol. However, as the respondents correctly point out, this information is not in evidence; it is merely footnoted in Voltage's memorandum of fact and law.

[104] Voltage's allegations (unsubstantiated in evidence) of being in possession of thousands of IP addresses that have allegedly infringed the copyrights in its films are, in my view, insufficient to constitute some basis in fact as to the actual existence of a class of two or more persons.

Although the threshold is low and the Court should not attempt to resolve conflicting facts and evidence at the certification stage, the Court is nonetheless required to assess whether there is some basis in fact for Voltage's claims.

[105] The Court in *Tippet* recently addressed this issue, where Justice Southcott observed that:

> [49] … In my view, there is a distinction between assessing the sufficiency of the evidence and resolving conflicts in the evidence. The former is very much within the mandate of the Court hearing a certification motion, and is required in order to determine whether the plaintiff has established some basis in fact for the certification requirements. The latter is typically not to be undertaken by the Court considering certification.
>
> [50] However, I would not necessarily conclude that a certification court can never engage in some limited weighing of the evidence relevant to whether the threshold has been met. Indeed, in *Fischer v IG Investment Management Ltd*, 2013 SCC 69 (CanLII) [*Fischer*] at para 43, the Supreme Court states that, at the certification stage, the court cannot engage in any detailed weighing of the evidence but should confine itself to whether there is some basis in the evidence to support the certification requirements [my emphasis]. I also note the caution in *Pro-Sys* at para 104 that there is limited utility in attempting to define "some basis in fact" in the abstract. In my view, it is unnecessary for me to make definitive pronouncements on whether or to what extent the Court can weigh evidence relevant to the certification requirements. Rather, it is clear that the examination of the evidence which the Defendant urges upon the Court in the case at hand extends beyond assessing its sufficiency and would represent a level of weighing and resolution of conflicts in the evidence that is not appropriate for a certification motion. [Emphasis in original]

[106] In my view, Voltage has failed to provide sufficient evidence about the actual existence of a class of two or more persons. At best, it has provided evidence of only one infringing IP address -- that of Mr. Salna. I agree with the respondents that determining class membership is not ascertainable without an in-depth examination of the merits of individual liability issues. As

both the Perino and Lethbridge affidavits show, the nexus between an IP address and the person responsible for copyright infringement is highly technical and difficult to assess without a consideration of the merits of individual liability issues.

[107] Mr. Perino's affidavit, Voltage's only evidence, states that it is not possible to identify the specific persons responsible for the unlawful acts alleged by Voltage. The Supreme Court in *Rogers* commented on the policy implications of accurately enforcing the notice-and-notice regime when it comes to identifying the correct IP address:

> [34] The deterrent purpose of the notice and notice regime also affirms the ISP's duty to correctly determine to whom the impugned IP address belonged at the time of the alleged infringement. Deterring online copyright infringement entails notifying *that* person, because it is only *that* person who is capable of stopping continued online copyright infringement.
>
> [35] I acknowledge that there will likely be instances in which the person who receives notice of a claimed copyright infringement will not in fact have illegally shared copyrighted content online. This might occur, for example, where one IP address, while registered to the person who receives notice of an infringement, is available for the use of a number of individuals at any given time. Even in such instances, however, accuracy is crucial. 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. Similarly, while institutions or businesses offering Internet access to the public may not know precisely who used their IP addresses to illegally share copyrighted works online, they may be able, upon receiving notice, to take steps to secure its Internet account with its ISP against online copyright infringement in the future. [Emphasis in original]

[108] The Supreme Court also noted in *Rogers* that accuracy should not be conflated with guilt:

> [41] It must be borne in mind that being associated with an IP address that is the subject of a notice under s. 41.26(1) (a) is not

> conclusive of guilt. As I have explained, the person to whom an IP address belonged at the time of an alleged infringement may not be the same person who has shared copyrighted content online. It is also possible that an error on the part of a copyright owner would result in the incorrect identification of an IP address as having been the source of online copyright infringement. Requiring an ISP to identify by name and physical address the person to whom the pertinent IP address belonged would, therefore, not only alter the balance which Parliament struck in legislating the notice and notice regime, but do so to the detriment of the privacy interests of persons, including innocent persons, receiving notice

[109] The Court is not required to weigh the evidence, or to resolve conflicts in the evidence, on a certification motion. However, it is required to consider whether Voltage has provided sufficient facts to determine whether there is an identifiable class of two or more persons. In my view, Voltage has not provided the material facts necessary to meet the "some basis in fact" threshold to show there is an identifiable class of two or more persons. Voltage's evidence contains bare assertions of conclusions which are insufficient to meet this certification criterion (*John Doe* at para 33).

(5) *Are there Common Questions?*

[110] Rule 334.16(1)(c) requires that Voltage demonstrate some basis in fact that the claims of the class members raise common questions of law or fact, regardless of whether those common questions predominate over questions affecting only individual members. The claims against the class members must share a substantial common ingredient to justify a class proceeding. The commonality question must be approached purposively.

[111] The underlying question is whether allowing the suit to proceed as a representative one will avoid duplication of fact-finding or legal analysis (*Dutton* at para 39; *SOCAN* at paras 124 to 126). The commonality requirement has been described as the central notion of a class proceeding; litigants with common concerns should be able to resolve them in a single central proceeding rather than through an inefficient multitude of repetitive proceedings (*Pro-Sys* at para 106).

[112] According to Voltage, the common question does not require an identical answer for all members of the class or for the answer to benefit each class member equally. In Voltage's view, all issues can be determined as common questions of law or fact and a single hearing on the merits can decide the questions fairly for all class members, with a safety valve existing for those who may truly have exceptional circumstances to opt-out.

[113] In its amended notice of motion, Voltage says the claims of the class members raise the following common issues of fact or law:

1. Is each of Voltage's films an original cinematographic work in which copyright subsists?

2. Does the relevant applicant own the copyright in the appropriate films?

3. Do the unlawful actions alleged by Voltage constitute copyright infringement?

4. Do the unlawful actions alleged by Voltage constitute offering a film by telecommunication contrary to the provisions of the *Copyright Act*?

5. Did any of the respondents consent to or authorize any of the unlawful actions alleged by Voltage?

6. Did the Internet Account Subscribers:

a) possess sufficient control over the use of their internet accounts and associated computers and internet devices such that they authorized, sanctioned, approved, or countenanced the infringements alleged by Voltage?

b) require prior notice to be found liable for authorization, and if notice is necessary, is notice by way of an agreement with an ISP sufficient to engage their liability for the acts of Direct Infringers or is specific direct notice necessary?

c) receive notice of infringement, and if they were provided with notice but ignored such notice, does that constitute authorization of copyright infringement and is willful blindness sufficient to constitute authorization of a copyright infringement?

7. Does the class have any available defences to copyright infringement, including any defence based on fair dealing?

8. What is an appropriate quantum of statutory damages available pursuant to section 38.1 of the *Copyright Act*;

9. Is this an appropriate case for an injunction?

[114] According to Voltage, questions one and two (copyright subsistence and copyright ownership) are common to each of the respondents with respect to at least one of the films. Although the answer to these questions will not be relevant to each of the respondents in the class, Voltage maintains that there is no requirement for the answers to the common questions to benefit all respondents equally.

[115] In the respondents' view, Voltage does not advance any common issues beyond questions one and two as stated above.

[116] Voltage claims questions three, four and five (whether the unlawful acts alleged by Voltage constitute infringement under the *Copyright Act*, and whether Voltage consented to such

acts) are legal questions based on the same factual matrix, common to all proposed class members, because the respondents' activities are essentially identical.

[117] The respondents argue that questions three, four and five are not common to all class members. These questions will not meaningfully advance resolution of the litigation for all members of the class because they may not arise against any given class member or resolve the claims against the respondents.

[118] Voltage submits that question six (whether internet account subscribers authorized the alleged unlawful acts, whether notice requirements were met, and whether the subscriber received notice of infringement) involves legal questions that are relevant to all Authorizing Infringers.

[119] The respondents claim question six is not a common issue and will be driven by findings of fact the Court will need to make with respect to each individual class member. According to the respondents, one of the essential elements of authorization is the degree of control a class respondent exercised over the persons who committed the infringement. In the respondents' view, whether an account holder received a notice of infringement or was wilfully blind is a question of fact for each individual.

[120] Voltage claims that question seven (whether the class has any available defences to copyright infringement) is a question of mixed fact and law.

[121] The respondents say question seven is a fact driven issue and it will fall to each individual class member to advance, where applicable, a defence based on his or her unique circumstances. According to the respondents, this is both unworkable and unfair to class members to make a blanket determination and rule out every conceivable defence.

[122] Voltage says the answers to questions eight and nine (quantum of damages and injunctive relief) may vary between different class respondents since the quantity and extent of infringing activities will vary. Voltage further says it intends to request the same quantum of statutory damages against each class respondent.

[123] The respondents say questions eight and nine are not common issues. In the respondents' view, Voltage's proposal for a "one size fits all" damages award would side-step the mandatory language in subsection 38.1(5) of the *Copyright Act*, which requires the Court to consider all the enumerated factors as they relate to each individual respondent. As to injunctive relief, the respondents note that such relief is equitable and discretionary, and it is a fact-driven assessment based on each individual class member's unique circumstances.

[124] CIPPIC adopts and relies upon the respondents' submissions on the issue of whether there are common issues of fact or law.

[125] I agree with the respondents that Voltage does not advance any common issues beyond questions one and two as stated above.

(6) *Is a Class Proceeding a Preferable Procedure?*

[126] Rule 334.16(1) (d) requires that a class proceeding is the preferable procedure for the just and efficient resolution of the common questions. In assessing this requirement, the Court must consider all relevant matters, including those expressly set out in Rule 334.16(2) (*Tippett* at para 80).

[127] The inquiry into whether a class proceeding is a preferable procedure focuses on whether it would be a fair, efficient, and manageable method of advancing the litigation. The Court should consider the degree to which resolution of the proposed common issues will resolve the dispute between the parties and the relative importance of the common and individual issues (*Hollick* at para 30).

[128] The Court must also consider whether other available means of resolving the claims are preferable or relatively advantageous over a class proceeding. This includes considering avenues of redress other than court actions (*AIC Limited v Fischer*, 2013 SCC 69 at paras 19 to 23).

[129] In Voltage's view, certification of the class is consistent with Parliament's intention behind enacting the notice-and-notice regime; namely, to allow copyright owners to protect and vindicate their rights as quickly, easily, and efficiently as possible, while ensuring fair treatment for ISPs and their subscribers.

[130] According to Voltage, certifying its application as a class proceeding would minimize the costs of all parties, reduce the strain on judicial resources, and ensure consistent factual and legal findings. Voltage states in its litigation plan that class respondents would have the right to opt-out of the class if they have unique issues to raise; Voltage says these individuals would be part of a case managed proceeding to determine their cases by way of a dispute resolution conference or group hearing as set out in its litigation plan.

[131] The respondents say a class proceeding is not a preferable procedure because Voltage's application predominantly raises individual issues, the resolution of which would require complex, individually tailored fact-findings for each proposed class member. In their view, no judicial economy or fairness would be achieved. According to the respondents, there may be no real advantage to achieve from a common issues trial and the application may be unmanageable as a class application. Even if it is manageable, the respondents contend that individual issue trials may be the preferable procedure if a class action would not achieve access to justice, behavior modification, and judicial economy.

[132] According to the respondents, all that Voltage can detect by deploying its forensic software is, essentially, dates, times, and IP addresses where infringement of the films may have taken place. The respondents claim there is no basis to know at any given time whether: (i) single or multiple devices were using an IP address; (ii) multiple computers, mobile phones, or tablets were using the internet, or who exactly uploaded the films; or (iii) it was the IP address holder, a visitor, a neighbor, or anyone else for that matter. In the respondents' view, this will be an individual issue to determine on a case-by-case basis. The respondents point out that Voltage

acknowledges in its memorandum of fact and law that, "(w) ho, exactly, is committing the infringement is part of the factual and technological matrix that will need to be determined at a hearing on the merits".

[133] The proposed representative respondents say a class proceeding is unworkable because there is no incentive for any of the potential class members to participate. They have each deposed that there is no reason to voluntarily expend money on legal fees, divert time and attention to defend these proceedings, or potentially face repercussions at trial. If an alleged class ultimately never materializes, nothing will have been achieved by certification of the amended application.

[134] According to CIPPIC, the proposed class proceeding would be inefficient because it would not advance the goals of class proceedings. CIPPIC claims that the access to justice concerns in the proposed reverse class proceeding arise from the perspective of the respondent class members, not Voltage. In CIPPIC's view, Voltage does not face any access to justice barriers in litigation against copyright infringers because it is well-resourced to initiate and prosecute proceedings in Canada and in other jurisdictions.

[135] CIPPIC says Voltage has chosen to limit the value of its claims by electing to claim only statutory damages under the *Copyright Act*. According to CIPPIC, Voltage chose statutory damages to reduce its own evidentiary burden, reduce its litigation costs, and increase the likelihood of mass settlement.

[136] CIPPIC states that the proposed reverse class proceeding significantly impairs access to justice for members of the proposed class. According to CIPPIC, the proposed class affects low-income groups disproportionately and targets internet subscribers who provide shared internet access to multiple users such as tenants, co-op residents, residential students, and public WiFi users. CIPPIC claims that certifying a reverse class proceeding will deter provision of free public WiFi because of the threat of liability for copyright infringement by individual users.

[137] In CIPPIC's view, reverse class proceedings do not carry the same incentive structure for behavior modification as in plaintiff class proceedings. CIPPIC says plaintiff class proceedings enable claim-aggregation, resulting in claims of significant value and creating a system for private enforcement of public harm caused by the behavior of corporate or government entities.

[138] Like the respondents, CIPPIC claims the proposed class proceeding would require multiple, individual fact-finding proceedings for each class member on almost every issue. CIPPIC notes that the factual context in which an internet subscriber may permit users to access the internet can vary widely from one class member to another. According to CIPPIC, the extent of control exercised by an internet subscriber over users of the internet connection would depend closely on the factual context in each instance. In CIPPIC's view, Voltage's claim against the class members depends entirely on individual-driven facts.

[139] With respect to the workability of Voltage's litigation plan, CIPPIC claims it does not sufficiently detail how the individual issues would be resolved apart form the common issues.

According to CIPPIC, Voltage's litigation plan presumes that all class members who do not opt-out would accept its claims of infringement or enter into a settlement.

[140] CIPPIC says Voltage is seeking to misuse the notice-and-notice regime as a litigation support service for delivery of a certification notice by ISPs. According to CIPPIC, the notice-and-notice provisions were not intended for this purpose, and the proposed use in Voltage's litigation plan places an onerous burden on ISPs and risks violating the privacy of internet subscribers. CIPPIC faults Voltage's litigation plan because it does not specify who would bear the costs of the ISPs' involvement.

[141] By seeking certification of a reverse class proceeding, CIPPIC claims Voltage seeks a "super-remedy": a mass prosecution unhinged from the substantive and procedural safeguards under the *Copyright Act* that protect individual internet users. According to CIPPIC, while Parliament prohibited speculative settlement offers in infringement notices, Voltage seeks to induce class members to settle through the threat of litigation in which they will not be fairly represented. CIPPIC says Parliament carefully delineated the facts and circumstances that, in a specific case, could lead to finding of authorization of infringement. In CIPPIC's view, Voltage seeks to recover damages based on a blanket claim against all the alleged Direct and Authorizing Infringers without having to prove any of the facts and circumstances delineated by Parliament.

[142] CIPPIC says Voltage has failed to demonstrate that a class proceeding is the preferable procedure for the just and efficient resolution of common issues. CIPPIC suggests that at least two potential procedures are preferable to the proposed class proceeding: (i) discrete actions

against individual defendants joined pursuant to Rules 102 and 105; and (ii) the market-based approaches preferred by Parliament.

[143] In CIPPIC's view, joinder is preferable from the perspective of the respondents' interest in access to justice because joinder of actions preserves known procedural safeguards. CIPPIC notes that Rules 102 and 105 enable the Court to join two or more parties with the same representative together in one proceeding. This may be done, CIPPIC says, where there is a common question of fact or law, or the relief claimed arises from substantially the same facts or matter.

(7) *A Class Proceeding is not a preferable procedure.*

[144] Voltage's litigation plan is unmanageable for several reasons.

[145] First, I agree with the respondents and CIPPIC that a class proceeding is not the preferable procedure because Voltage's application predominantly raises individual issues within the proposed class. The resolution of these issues would require a complex, individually-tailored, fact-finding process for each potential class member. Consequently, judicial economy and fairness would not be achieved.

[146] Second, the plan relies mostly on public resources as a means to its end, which is private in nature. Voltage proposes a series of mechanisms for the respondent class to access legal representation. These options include relying on an intervener (such as CIPPIC), a court-

appointed *amicus curiae,* a request to the Class Proceedings Fund of Ontario, and crowdfunding platforms. None of these mechanisms is assured.

[147] Third, the plan depends, in large part, on the notice-and-notice regime. Relying upon this regime to facilitate a potentially large-scale class proceeding, which could affect thousands of Canadians, is unsustainable and would unfairly overburden ISPs.

[148] The notice-and-notice regime was enacted to serve two complementary purposes: to deter online copyright infringement and to balance the rights of interested parties, including copyright owners, internet users, and ISPs (*Rogers* at paras 22 and 23). It was not intended to establish a comprehensive framework by which instances of online infringement could be eliminated altogether. By relying on the notice-and-notice regime, Voltage is diverting Parliament's purpose and intention for its own purposes. The Supreme Court noted in *Rogers* that:

> [24] The notice and notice regime was not … intended to embody a comprehensive framework by which instances of online copyright infringement could be eliminated altogether. As a representative of Rogers explained before the House of Commons committee considering what would become of the *Copyright Modernization Act*, "notice and notice is not a silver bullet; it's just the first step in a process by which rights holders can go after those they allege are infringing. . . . Then the rights holder can use that when they decide to take that alleged infringer to court" (House of Commons, Legislative Committee on Bill C-32, Evidence, No. 19, 3rd Sess., 40th Parl., March 22, 2011, at p. 10). This is why, as I have explained, a copyright owner who wishes to sue a person alleged to have infringed copyright online must obtain a *Norwich* order to compel the ISP to disclose that person's identity. The statutory notice and notice regime has not displaced this requirement, but operates in tandem with it. This is affirmed by s. 41.26(1) (b), which contemplates that a copyright owner may sue a person who receives notice under the regime, and fixes the ISP's obligation to retain records which allow that person's identity to be determined for a period of time after such notice is received.

[149] In my view, joinder under Rules 102 and 105 is a preferable procedure to the proposed class proceeding. Voltage has not expressly addressed why a potential reverse class proceeding is preferable to joinder or consolidation.

[150] In addition, Voltage has not directly addressed the possibility or probability that all members of the proposed respondent class could opt-out if its application was certified as a class proceeding. In this regard, Voltage makes only a cursory statement in its reply to the effect that, if the proceeding is not certified, it will still proceed as a regular application against the respondents.

[151] This statement gives the Court little incentive to certify the proceeding as a class application. On the one hand, if the Court allows Voltage's motion, the certification may be futile because all respondents could opt-out. If, on the other hand, the Court refuses the motion, Voltage nonetheless intends to proceed with its claim against the respondents. Neither scenario prejudices Voltage with respect to access to justice, nor with its ability to enforce its copyrights.

(8) *Is there a Suitable Representative Respondent?*

[152] Voltage claims Mr. Salna's internet account was the sole account out of thousands that simultaneously offered for upload all the films. Mr. Salna blamed the alleged infringement on his tenants, who have denied responsibility.

[153] According to the respondents, courts have generally required that the representative share a common interest with other members of the class and an intention to prosecute the claim

vigorously. The respondents maintain that they are not suitable representatives because they do not have any common interest with other potential members of the class and have no appetite to advance a vigorous defence on behalf of class members.

[154] The consent or unwillingness of a defendant or respondent to be a representative in a reverse class proceeding is not a barrier to a motion for certification (*Chippewas* paras 45 and 46). The Ontario Court of Justice in *Chippewas* found that multiple representative defendants were appropriate because each representative had both the financial capacity and the incentive to defend the action with diligence and vigour.

[155] In this case, however, the proposed representative respondents, in view of their respective affidavits, lack the necessary incentive to defend the application with diligence and vigor.

IV. Conclusion

[156] Voltage's proposed reverse class proceeding should not be certified and, therefore, its motion for certification is dismissed. Voltage has failed to fulfill all of the requirements in Rule 334.16.

[157] Voltage has not met the low threshold requirement that the pleadings disclose a reasonable cause of action with respect to Authorizing Infringers who are internet subscribers. At best, it has established that questions one and two (copyright subsistence and copyright ownership) are common to each of the respondents with respect to at least one of the films.

[158] Voltage has not shown some basis in fact for a conclusion that there is an identifiable class of *two* of more persons. The proposed class definition excludes Mr. Rose and Ms. Cerilli since they were not internet subscribers at the relevant time.

[159] Voltage has provided only one IP address in evidence; namely, the IP address associated with Mr. Salna. The connection between this IP address and Mr. Salna's direct internet activities or alleged legal obligations concerning third parties are tenuous, at best, and would require an assessment on the merits.

[160] A class proceeding is not a preferable procedure for the just and efficient resolution of any common issues which may exist. The proposed proceeding would require multiple individual fact-findings for each class member on almost every issue. The factual context in which an internet subscriber may permit users to access his or her internet connection could vary widely from one class member to another.

[161] There are other available means of resolving Voltage's claims that are preferable; notably, joinder or consolidation.

[162] Voltage's litigation plan depends upon the notice-and-notice regime and places an additional burden on ISPs, something which was not contemplated by Parliament. Voltage seeks to appropriate the notice-and-notice regime as a litigation support service.

[163] The proposed class respondents lack the necessary incentive to defend the application with diligence and vigor.

[164] Lastly, the respondents note in their memorandum of fact and law that the style of cause is incorrect; in that, Loridana Cerrelli is named as a proposed representative respondent, when her actual name is Loredana Cerilli. Accordingly, the style of cause for this application is amended, with immediate effect, to replace the name Loridana Cerrelli with Loredana Cerilli.

A. *Costs*

[165] The respondents seek costs payable by Voltage on a full indemnity basis. They also seek release of the $75,000 posted by Voltage as security for costs pursuant to the order dated February 2, 2017, to the credit of their costs.

[166] CIPPIC does not seek costs and requests that no costs be awarded against it.

[167] The $75,000 posted as security for costs will not be released at this time given Voltage's stated intention to pursue the application regardless of whether it is certified.

[168] This motion was argued over two days. Costs in such amount as Voltage and the respondents may agree shall be payable by Voltage to the respondent within 20 days of the date of this order. If they are unable to agree as to the amount of costs, Voltage or the respondents may request an assessment of costs in accordance with the *Federal Courts Rules*.

ORDER in T-662-16

THIS COURT ORDERS that:

1. The Applicants' motion dated September 9, 2019 is dismissed;

2. The style of cause for this application is amended, with immediate effect, to replace the name Loridana Cerrelli with Loredana Cerilli; and

3. Costs in such amount as Voltage and the respondents may agree shall be payable by Voltage to the respondent within 20 days of the date of this order. If they are unable to agree as to the amount of costs, Voltage or the respondents may request an assessment of costs in accordance with the *Federal Courts Rules*.

"Keith M. Boswell"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-662-16
STYLE OF CAUSE:	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 NEVADA, LLC v ROBERT SALNA, JAMES ROSE, AND LOREDANA CERILLI, PROPOSED REPRESENTATIVE RESPONDENTS ON BEHALF OF A CLASS OF RESPONDENTS AND SAMUELSON-GLUSHKO CANADIAN INTERNET POLICY AND, PUBLIC INTEREST CLINIC
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	SEPTEMBER 23 AND 24, 2019
REASONS FOR ORDER:	BOSSWELL, J
DATED:	NOVEMBER 12, 2019

APPEARANCES:

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David Fewer	FOR THE INTERVENER

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