

Federal Court of Appeal



Cour d'appel fédérale

Date: 20250716

Docket: A-189-23

Citation: 2025 FCA 131

**CORAM: GLEASON J.A.
GOYETTE J.A.
BIRINGER J.A.**

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**

**Appellants
(Respondents by Cross-Appeal)**

and

**ROBERT SALNA, PROPOSED REPRESENTATIVE RESPONDENT ON
BEHALF OF A CLASS OF RESPONDENTS**

**Respondent
(Appellant by Cross-Appeal)**

and

**SAMUELSON-GLUSHKO CANADIAN INTERNET POLICY & PUBLIC
INTEREST CLINIC, BELL CANADA, COGECO CONNEXION INC.,
ROGERS COMMUNICATIONS CANADA INC., SASKTEL,
TELUS COMMUNICATIONS INC., and XPLORE INC.**

Intervenors

Heard at Toronto, Ontario, on October 29, 2024.

Judgment delivered at Ottawa, Ontario, on July 16, 2025.

REASONS FOR JUDGMENT BY:

GLEASON J.A.

CONCURRED IN BY:

GOYETTE J.A.

BIRINGER J.A.

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REASONS FOR JUDGMENT

GLEASON J.A.

[1] This is another in a series of appeals and cross-appeals involving the appellants' proposed reverse class proceeding in which they allege that their copyright in five films was violated when the films were downloaded and made available for sharing via an online peer-to-peer sharing platform known as BitTorrent.

[2] Reverse class actions are specifically provided for in three Canadian jurisdictions: see *Federal Courts Rules*, S.O.R./98-106, Rules 334.14(2), (3); *Class Proceedings Act, 1992*, S.O. 1992, c. 6, s. 4; *Class Proceedings Act*, S.N.S. 2007, c. 28, s. 5(2). And, in those jurisdictions, relatively few reverse class proceedings have been commenced. In the reverse class proceedings where certification has been granted, there were much smaller defendant or respondent classes than that initially proposed in this case: see e.g. *Chippewas of Sarnia Band v. Canada (Attorney General)* (1996), 137 D.L.R. (4th) 239, 1996 CanLII 8015 (Ont. Ct. (Gen. Div.)); *Berry v. Pulley* (2001), 197 D.L.R. (4th) 317, 2001 CanLII 28228 (Ont. Sup. Ct. J.) [*Berry*]; *Sutherland v. Hudson's Bay Co.* (2005), 74 O.R. (3d) 608, 2005 CanLII 63803 (Sup. Ct. J.); *Bernlohr v. Former Employees of Aveos Fleet Performance Inc.*, 2019 FC 837; *Bernlohr v. Former Employees of Aveos Fleet Performance Inc.*, 2021 FC 113; *Marcinkiewicz v. General Motors of Canada Co.*, 2022 ONSC 2180 [*Marcinkiewicz*]; *Brewers Retail v. Campbell*, 2022 ONSC 850, aff'd 2023 ONCA 534.

[3] In the order under appeal (*Voltage Pictures, LLC v. Salna*, 2023 FC 893 (*per* Fothergill J.) [*Voltage FC Certification Decision #2*]), the Federal Court dismissed (for the second time) the

appellants' motion to certify this proposed reverse class proceeding. In dismissing the motion for certification, the Federal Court awarded the respondent, Mr. Robert Salna, \$50,710 in costs.

[4] The Federal Court found that the appellants had not provided some basis in fact to conclude that Mr. Salna was a suitable representative respondent since the appellants' litigation plan failed to set out a workable method of advancing the proceeding on behalf of the proposed respondent class. The Federal Court reached this conclusion because it found that the appellants' proposal to use the notice-and-notice regime enshrined in the *Copyright Act*, R.S.C. 1985, c. C-42 to provide class members with notice of the class proceeding was contrary to subsection 41.25(3) of the *Copyright Act*. The Federal Court also noted that the appellants' litigation plan failed to make adequate provision for funding class counsel. Although the Federal Court dismissed the appellants' motion for certification, it granted them leave to reapply for certification once shortcomings in their litigation plan were addressed.

[5] The appellants appeal from the Federal Court's order and Mr. Salna cross-appeals from the portion of the order in which the Federal Court made its costs award. Mr. Salna also seeks to vary the Federal Court's order to provide that the appellants' motion for certification is dismissed without leave to amend, submitting that the Federal Court erred in finding some basis in fact to support the conclusion that the class proceeding was the preferable procedure for resolving the common questions proposed by the appellants.

[6] For the reasons that follow, I have concluded that the Federal Court erred in dismissing the appellants' motion for certification by reason of the flaws in their litigation plan. However, I

also conclude that the Federal Court's finding on preferable procedure should be set aside because there is no basis in fact for the conclusion that a class proceeding is the preferable procedure to determine the common questions proposed by the appellants. I also conclude that there is no basis to interfere with the Federal Court's costs order. Thus, I would dismiss the appeal, grant the cross-appeal in part, and vary the Federal Court's order to provide that the appellants' motion for certification is dismissed, without leave to reapply for certification. As I would find Mr. Salna largely successful before this Court, I would award him costs before this Court at the mid-point of Column IV of Tariff B to the *Federal Courts Rules*. I would make no costs award in respect of the interveners in accordance with the Order of this Court issued by Justice Woods on January 11, 2024. I would also amend the style of cause to delete the respondents, other than Mr. Salna, who were earlier removed as proposed representative respondents.

I. Background

[7] The notice-and-notice regime contained in the *Copyright Act* allows a copyright owner to require internet service providers (ISPs) and other digital service providers to forward notices to subscribers of a claimed online infringement of the owner's copyright in a work that subscribers share online. The notice-and-notice regime was adopted in 2012 via the *Copyright Modernization Act*, S.C. 2012, c. 20 as part of a suite of amendments to the *Copyright Act* which sought to modernize the Canadian copyright regime to, among other things, "address the challenges and opportunities of the Internet" (*Copyright Modernization Act*, Summary).

[8] Under the notice-and-notice provisions, set out in sections 41.25 to 41.27 of the *Copyright Act*, copyright holders who believe that their copyright in a work has been violated via an online sharing may send a notice of the claimed violation to the ISP or other digital service provider that operates the network over which the violation is alleged to have occurred. Upon receipt of the notice, the service provider is required to forward the notice to the subscriber of the account identified by the copyright owner as being the account used to allegedly violate their copyright. The service provider must also retain information about the subscriber for six months after receipt of the notice from the copyright holder, or if litigation is commenced in respect of the alleged violation, for one year from receipt of the notice from the copyright holder.

[9] Sections 41.25 and 41.26 of the *Copyright Act* are of particular relevance to this appeal. They provide (and at the times relevant to this appeal provided) as follows:

Notice of claimed infringement

41.25 (1) An owner of the copyright in a work or other subject-matter may send a notice of claimed infringement to a person who provides

- (a) the means, in the course of providing services related to the operation of the Internet or another digital network, of telecommunication through which the electronic location that is the subject of the claim of infringement is connected to the Internet or another digital network;
- (b) for the purpose set out in subsection 31.1(4), the digital memory that is used for the electronic location to which the

Avis de prétendue violation

41.25 (1) Le titulaire d'un droit d'auteur sur une œuvre ou tout autre objet du droit d'auteur peut envoyer un avis de prétendue violation à la personne qui fournit, selon le cas :

- a) dans le cadre de la prestation de services liés à l'exploitation d'Internet ou d'un autre réseau numérique, les moyens de télécommunication par lesquels l'emplacement électronique qui fait l'objet de la prétendue violation est connecté à Internet ou à tout autre réseau numérique;
- b) en vue du stockage visé au paragraphe 31.1(4), la mémoire numérique qui est utilisée pour l'emplacement électronique en

claim of infringement relates; or

(c) an information location tool as defined in subsection 41.27(5).

Form and content of notice

(2) A notice of claimed infringement shall be in writing in the form, if any, prescribed by regulation and shall

(a) state the claimant's name and address and any other particulars prescribed by regulation that enable communication with the claimant;

(b) identify the work or other subject-matter to which the claimed infringement relates;

(c) state the claimant's interest or right with respect to the copyright in the work or other subject-matter;

(d) specify the location data for the electronic location to which the claimed infringement relates;

(e) specify the infringement that is claimed;

(f) specify the date and time of the commission of the claimed infringement; and

(g) contain any other information that may be prescribed by regulation.

Prohibited content

(3) A notice of claimed infringement shall not contain

(a) an offer to settle the claimed infringement;

(b) a request or demand, made in relation to the claimed infringement, for payment or for personal information;

cause;

c) un outil de repérage au sens du paragraphe 41.27(5).

Forme de l'avis

(2) L'avis de prétendue violation est établi par écrit, en la forme éventuellement prévue par règlement, et, en outre :

a) précise les nom et adresse du demandeur et contient tout autre renseignement prévu par règlement qui permet la communication avec lui;

b) identifie l'œuvre ou l'autre objet du droit d'auteur auquel la prétendue violation se rapporte;

c) déclare les intérêts ou droits du demandeur à l'égard de l'œuvre ou de l'autre objet visé;

d) précise les données de localisation de l'emplacement électronique qui fait l'objet de la prétendue violation;

e) précise la prétendue violation;

f) précise la date et l'heure de la commission de la prétendue violation;

g) contient, le cas échéant, tout autre renseignement prévu par règlement.

Contenu interdit

(3) Toutefois, il ne peut contenir les éléments suivants :

a) une offre visant le règlement de la prétendue violation;

b) une demande ou exigence, relative à cette prétendue violation, visant le versement de paiements ou l'obtention de renseignements

(c) a reference, including by way of hyperlink, to such an offer, request or demand; and

(d) any other information that may be prescribed by regulation.

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 subsections 41.25(2) and (3) 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.

Fees related to notices

(2) The Minister may, by regulation, fix the maximum fee that a person

personnels;

c) un renvoi, notamment au moyen d'un hyperlien, à une telle offre, demande ou exigence;

d) tout autre renseignement prévu par règlement, le cas échéant.

Obligations

41.26 (1) La personne visée aux alinéas 41.25(1)a) ou b) qui reçoit un avis conforme aux paragraphes 41.25(2) et (3) 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.

Droits

(2) Le ministre peut, par règlement, fixer le montant maximal des droits

may charge for performing his or her obligations under subsection (1). If no maximum is fixed by regulation, the person may not charge any amount under that subsection.

Damages related to notices

(3) A claimant's only remedy against a person who fails to perform his or her obligations under subsection (1) is statutory damages in an amount that the court considers just, but not less than \$5,000 and not more than \$10,000.

Regulations — change of amounts

(4) The Governor in Council may, by regulation, increase or decrease the minimum or maximum amount of statutory damages set out in subsection (3).

qui peuvent être exigés pour les actes prévus au paragraphe (1). À défaut de règlement à cet effet, le montant de ces droits est nul.

Dommages-intérêts

(3) Le seul recours dont dispose le demandeur contre la personne qui n'exécute pas les obligations que lui impose le paragraphe (1) est le recouvrement des dommages-intérêts préétablis dont le montant est, selon ce que le tribunal estime équitable en l'occurrence, d'au moins 5 000 \$ et d'au plus 10 000 \$.

Règlement

(4) Le gouverneur en conseil peut, par règlement, changer les montants minimal et maximal des dommages-intérêts préétablis visés au paragraphe (3).

[10] No regulations have been passed under either paragraphs 41.25(2)(g) or 41.25(3)(d) of the *Copyright Act*.

[11] The appellants are motion picture production companies that form part of the Voltage Pictures film studio. In their application, they alleged that their copyright in the films *The Cobbler*, *Pay the Ghost*, *Good Kill*, *Fathers and Daughters*, and *American Heist* (the Works) was infringed by Mr. Salna and members of the proposed respondent class when BitTorrent was used at their Internet Protocol (IP) addresses to download some or all of the Works, with the result that the downloaded Works were offered for upload to other BitTorrent users.

[12] BitTorrent is a peer-to-peer file sharing protocol that allows for the decentralized simultaneous distribution of computer files over the internet. To describe how BitTorrent functions, I can do no better than cite the summary of my colleague, Justice Rennie, in *Salna v. Voltage Pictures, LLC*, 2021 FCA 176 [*Voltage FCA Certification Decision #1*], leave to appeal to SCC refused, 39895 (26 May 2022).

[13] At paragraphs 11–14 in *Voltage FCA Certification Decision #1*, Justice Rennie wrote as follows:

The users of each BitTorrent software are connected to each other. Once connected, each user downloads segments of the files available in small pieces, or data packets; the file may be analogized to a completed puzzle, and the packets, the pieces of the puzzle. Once downloaded, the data file can be uploaded for the download of other BitTorrent users, known as “peers”. In this way, the peers can download data packets, or pieces of the puzzle, from various sources while simultaneously uploading that content for download by others.

... Ultimately, an entire file can be obtained by downloading all the required packets from various peers. The peers from whom the downloader received the file and/or packets are considered “uploaders”. A particular uploader may provide to the downloader anything from only a small portion of the entire file to the entire file. However, it is rare for a downloader to receive an entire file from a single uploader. Eventually, the entire file, puzzle, or in this case, film, is assembled, piece by piece, bit by bit, for viewing.

In order for files to be added and become downloadable to other peers, at least one user who has a complete copy of the entire file in question must be connected. This user, or users, “seeds” the file for the rest of the peers. Once a peer downloads an entire file, they can also become a seeder of that file for other users.

Because BitTorrent is a file sharing protocol, once files are shared in the network, they are shared by all users. As such, uploading or offering to upload specific files or data packets can be done without a user’s knowledge and can occur whenever a BitTorrent user is connected to the Internet.

(citations to record omitted.)

[14] The appellants used forensic software to obtain the IP addresses of Mr. Salna and members of the proposed class. The appellants assert that their forensic software detected proposed class members' IP addresses as ones where BitTorrent was used to download some or all of the Works, which resulted in the downloaded Works being offered for upload to other BitTorrent users.

[15] An IP address is allocated by an ISP to the internet-connecting device of a subscriber and allows that device to connect to the internet. Each IP address is unique. However, devices like routers can share that internet connection (and, as a result, the corresponding IP address) with other devices, including cell phones, tablets, and computers. As such, many devices in a household may access the internet over a subscriber's IP address. These devices may include the cell phones of guests to whom the subscribers provide their Wi-Fi passwords.

[16] Even though the appellants have the IP addresses of the members of the proposed class, the appellants do not know who the subscribers associated with these addresses (other than Mr. Salna) are nor where they live. This sort of information would be maintained by the subscribers' ISP when the account is active and must be held by the subscribers' ISPs for six months if a notice is delivered by the copyright holder to the ISP under the notice-and-notice regime in the *Copyright Act*. By virtue of paragraph 41.26(b) of the *Copyright Act*, the retention period is extended by a further six months when litigation is commenced within six months following the date on which notice of the claimed infringement is provided by the ISP to the subscriber.

[17] In the instant case, the appellants alleged that Mr. Salna and members of the proposed class violated the appellants' copyright in the Works by: (1) making a Work available for download by means of the BitTorrent network by offering the file for uploading; (2) advertising by way of the BitTorrent protocol that a Work was available for download by each proposed Class member; and (3) failing to take reasonable, or any, steps to ensure that a person downloading a Work was authorized to do so by law. Only the first and third of these alleged violations are at issue in this appeal. In their certification materials, the appellants referred to the first and third of the alleged violations as "Unlawful Acts 1 and 3".

[18] The proposed class in the present case essentially consists 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 Pictures, LLC v. Salna*, 2019 FC 1412 [*Voltage FC Certification Decision #1*] at para. 11). Although the proposed class appears to have originally encompassed over 55,000 respondents, by the time of the second certification hearing before the Federal Court, numbers in the proposed class had shrunk to approximately 874. Also, by that date, Mr. Salna was the only remaining proposed representative respondent, with the other two named respondents having been removed as proposed representative respondents earlier in the proceedings: *Voltage FC Certification Decision #2* at para. 12.

[19] In their application, among other things, the appellants sought injunctive relief as well as statutory damages under paragraph 38.1(1)(b) of the *Copyright Act*. That provision caps statutory damages for an infringement undertaken for non-commercial purposes at \$5,000.

[20] The common questions proposed by the appellants were as follows:

Copyright Infringement

- (i) Are each of the Works original cinematographic works in which copyright subsists?
- (ii) Does the relevant Applicant own the copyright in the appropriate Works?
- (iii) Do the Unlawful Acts constitute copyright infringement e.g.:
 - a. acts that by the *Copyright Act* only the owner of the copyright has the right to do;
 - b. acts that are listed in paragraphs 27(2)(b) to (d) of the *Copyright Act* and that the Respondents knew or should have known infringes copyright; or
 - c. acts referred to in s. 27(2.3) of the *Copyright Act*.
- (iv) Do the Unlawful Acts constitute offering a Work by telecommunication contrary to the provisions of the *Copyright Act*?
- (v) Did any of the Applicants consent to or authorize any of the Unlawful Acts?
- (vi) Did the Internet Account Subscribers:
 - i. 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 as particularized in Unlawful Acts 1 or 2;
 - ii. require prior notice to be found liable for authorization. If notice is necessary, is notice by way of an agreement with their Internet Service Provider sufficient to engage their liability for the acts of the Direct Infringers, or is specific direct notice necessary?
 - iii. receive notice of infringement. If the Internet Account Subscribers were provided with notice, but they ignored such notice, does that constitute authorization of copyright infringement. Is willful blindness sufficient to constitute authorization of copyright infringement.

Defences

- (vii) Does the Class have any available defences to copyright infringement, including any defence based on fair dealing?

Relief

- (viii) What is an appropriate quantum of statutory damages available pursuant to section 38.1 of the *Copyright Act*;
- (ix) Is this an appropriate case for an injunction?

[21] Mr. Salna owns (or at the relevant times owned) three rental units in a property in Richmond Hill, where he provided internet access to his tenants. The appellants assert that their forensic software disclosed that all five of the Works had been downloaded and thereby offered for uploading via BitTorrent through Mr. Salna's IP address during the six months prior to the date the certification materials were filed. Mr. Salna deposed in one of the affidavits he filed that he has no knowledge of how this occurred and blamed his tenants or their guests for any possible infringement of the appellants' copyright in the Works.

[22] The appellants obtained contact information for Mr. Salna via a *Norwich* order. Named after the decision in *Norwich Pharmacal Co. v. Customs and Excise Commissioners*, [1974] A.C. 133 (H.L.), *Norwich* orders may be issued at the behest of a party, seeking to enforce its rights, to compel disclosure of information about alleged wrongdoers. To paraphrase the Supreme Court in *Rogers Communications Inc. v. Voltage Pictures, LLC*, 2018 SCC 38, [2018] 2 S.C.R. 643 [*Voltage SCC*], to obtain such an order, the applicant must show that: (1) they have a valid claim; (2) the holder of the information sought was in some way involved in the violation of the rights holder's rights; (3) the requested disclosure is the only practical means for the rights holder to obtain the information sought; (4) the rights holder will compensate the information holder for

reasonable costs associated with disclosing the information; and (5) the public interest in disclosure outweighs any legitimate privacy concerns: *Voltage SCC* at para. 18.

[23] In the final version of their proposed litigation plan (dated January 20, 2023), the appellants proposed that the notice under section 41.25 of the *Copyright Act* would be sent to known members of the respondent class after the proceeding was certified by the Federal Court. The appellants further proposed that, in addition to the matters set out in subsection 41.25(2) of the *Copyright Act*, the notices sent by the ISPs under the *Copyright Act* would provide known members of the respondent class with notice of the class proceeding, would contain a hyperlink to contact class counsel, and would notify them that to opt out of the class proceeding they would need to send an email to class counsel. The proposed notice also contained a request to send an email to class counsel, providing evidence that the alleged copyright infringement had ceased and details about the steps the class member had taken to mitigate their damages.

[24] The appellants' proposal contemplated that the identities of the recipients of these notices would at least initially remain anonymous and that they would be identified by a reference number to be generated by the ISPs. However, class members likely would have identified themselves (or at least provided an email address) to class counsel if they contacted class counsel, opted out of the class proceeding, or provided information about their mitigation efforts and cessation of allegedly infringing activities to class counsel. The appellants also proposed that the certification order would require the ISPs, at the option of the appellants, to retain contact information for class members until the final determination of the appellants' reverse class proceeding, including final decisions on any appeals. Under the appellants' proposal, the ISPs

would have been required to maintain records for much longer than the statutory retention period.

[25] The appellants accordingly sought to have the ISPs provide notice of the class proceeding to class members via the notice-and-notice regime in the *Copyright Act* and through that notice facilitate the opt-out process and communication with class counsel. Were this permitted, the appellants would have been able, at least for a time, to bypass the need for (and costs associated with) obtaining a *Norwich* order to disclose the identities and contact information for members in the proposed class other than Mr. Salna.

[26] The ISPs, who were granted leave to intervene in the certification motion by the Federal Court in the instant case, filed evidence detailing the burden they alleged the applicants' proposed litigation plan would have placed on them. This included the claimed need to design complex software databases or to adopt manual data retention policies as well as the possible requirement to respond to questions from subscribers, which the ISPs claimed could have led to customer loss.

II. Prior Relevant Decisions

[27] Before reviewing the Federal Court's reasons in the instant case, it is useful to outline several other decisions that are relevant to this appeal that were previously rendered in this proposed reverse class proceeding. It is also useful to review a decision of this Court that was rendered after the decision of the Federal Court in the instant case. That decision was made in the

context of a simplified action commenced by an entity related to the appellants against a class of defendants where similar copyright violations are alleged.

[28] I turn first to the prior decisions made in the present application.

A. *Rogers Communications Inc. v. Voltage Pictures, LLC*, 2018 SCC 38, [2018] 2 S.C.R. 643

[29] In *Voltage SCC*, the Supreme Court of Canada concluded that ISPs are entitled to be compensated for any work required to identify recipients of notices sent under section 41.26 of the *Copyright Act* for purposes of a *Norwich* order where the work in question goes beyond the tasks necessary for the ISPs to comply with the notice-and-notice provisions in the *Copyright Act*.

[30] The Supreme Court of Canada also noted that a copyright owner who wishes to sue a person alleged to have infringed copyright online must proceed by way of a *Norwich* order to obtain details about them and cannot use the notice-and-notice regime in the *Copyright Act* for this purpose. In this regard, Justice Brown, writing for the majority, stated at paragraph 24 of *Voltage SCC* that:

“[the] notice and notice [regime in the *Copyright Act*] is ... 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” [citing from the testimony of an ISP before the 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 ... **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.

(emphasis added.)

[31] I note that the version of the *Copyright Act* considered in *Voltage SCC* has since been amended. Notably, in 2018, Parliament added subsection 41.25(3) to the *Copyright Act*, which lists several matters that cannot be included in a notice of claimed infringement sent by a copyright owner to an ISP.

B. *Voltage Pictures, LLC v. Salna*, 2017 FCA 221

[32] The next case of relevance is the decision of this Court in *Voltage Pictures, LLC v. Salna*, 2017 FCA 221 [*Voltage FCA Security for Costs*], which dismissed an appeal from a decision of the Federal Court (*per* Boswell J.) granting Mr. Salna security for costs (*Voltage Pictures, LLC v. Salna*, 2017 FC 130).

[33] The Federal Court granted Mr. Salna security for costs in the amount of \$75,000, which the applicants were ordered to pay into Court. This Court upheld the Federal Court's security for costs order in *Voltage FCA Security for Costs* although on different reasoning. This Court concluded that it was possible that costs could eventually be awarded to Mr. Salna in respect of the appellants' motion for certification, if it were dismissed. Importantly, in so ruling, this Court made no finding as to whether a costs award would be appropriate, stating at paragraph 8, only that it was:

... entirely possible that, if he is successful, [Mr. Salna] **might** be awarded costs under Rule 334.39(1)(c). This paragraph allows for costs in respect of a certification motion, a class proceeding or an appeal arising from a class proceeding if “exceptional circumstances make it unjust to deprive the successful party of costs”. Such circumstances **could well be found to exist** in the present case, but that issue will not be addressed unless and until the Federal Court dismisses the certification motion.

(emphasis added.)

C. *Salna v. Voltage Pictures, LLC*, 2021 FCA 176

[34] The third relevant decision is *Voltage FCA Certification Decision #1*, where this Court overturned the prior dismissal of the appellants’ motion for certification in *Voltage FC Certification Decision #1*.

[35] There, this Court confirmed that the first three criteria necessary under Part 5.1 of the *Federal Courts Rules* for certification of this proceeding as a class proceeding were met by the appellants. These criteria required that: (1) the pleadings disclose a reasonable cause of action; (2) there was some basis in fact to conclude that there is an identifiable class of two or more respondents; and (3) there was some basis in fact to conclude that the proposed class proceeding raises common questions of fact or law. This Court remitted back to the Federal Court the issues of whether a reverse class proceeding was the preferable procedure for resolving the common questions (the fourth criterion for certification) and whether Mr. Salna was a suitable representative respondent (the fifth criterion for certification).

[36] In reaching its conclusion on the first criterion, this Court held that the portion of the appellants’ Amended Notice of Application that alleged what the appellants termed “direct”

infringement disclosed a reasonable cause of action. The actions that the appellants alleged constituted such infringement, which they termed Unlawful Act 1, consisted of “[m]aking a Work available for download by means of the BitTorrent network by offering the file for uploading”.

[37] This Court also concluded that the portion of the appellants’ Amended Notice of Application that alleged what the appellants termed “authorizing” infringement disclosed a reasonable cause of action. The actions that the appellants alleged constituted such infringement, which they termed Unlawful Act 3, consisted of “[f]ailing to take reasonable steps to ensure that Unlawful Acts 1 and 2 did not take place in respect of an internet account controlled by a subscriber and by doing so authorizing such Unlawful Acts”.

[38] However, this Court found that the portion of the appellants’ Amended Notice of Application that alleged what the appellants termed “secondary infringement” did not disclose a reasonable cause of action. The actions that the appellants alleged constituted such infringement, which they termed Unlawful Act 2, consisted of “advertising by way of the BitTorrent Protocol that a Work was available for download”. This Court determined that the appellants’ Amended Notice of Application failed to set out the necessary material facts to support the secondary infringement allegation.

[39] More specifically, this Court noted at paragraph 87 that, in accordance with the decision of the Supreme Court of Canada in *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13, [2004] 1 S.C.R. 339, the test for secondary infringement involves three elements: (1)

primary infringement occurred; (2) the secondary infringer knew or should have known they were dealing with an infringing item; and (3) the secondary infringer distributed, sold, or exposed for sale the infringing item. This Court concluded that the appellants had failed to plead the necessary material facts to support the requisite knowledge for secondary infringement.

[40] On the fourth criterion for certification of this proposed reverse class proceeding, namely, whether a class proceeding is the preferable procedure for the just and efficient resolution of the common questions, this Court held that the Federal Court had erred in *Voltage FC Certification Decision #1* in focussing on the shortcomings in the appellants' litigation plan in its preferability analysis. This Court noted that the preferability criterion requires a higher level, macro analysis of whether a class proceeding is a fair and efficient means of pursuing the litigation and whether it is preferable to another procedure. This Court further held that the Federal Court erred in failing to undertake the requisite analysis of comparing the desirability of resolving the common questions through a class proceeding as opposed to a multiplicity of individual actions. On this issue, this Court concluded that there was insufficient information in the record before it about the size and shape of the potential class to assess whether the proposed reverse class proceeding was the preferable procedure. As a result, this Court remitted the matter to the Federal Court for reconsideration of the preferability criterion.

[41] However, in discussing the preferability issue, this Court noted that the fact that there were a number of respondents, each potentially liable for a small amount of money, could lead one to conclude that a class proceeding was a fair and manageable method of advancing the claim. Justice Rennie, who wrote for the Court, held that similar principles apply in reverse class

proceedings as in proceedings instituted on behalf of a plaintiff class. He stated as follows at paragraph 115:

In circumstances such as these, where there are multiple respondents, each potentially liable for small amounts of money, a class action is a “fair, efficient and manageable method of advancing the claim” (*Wenham [v. Canada (Attorney General)]*, 2018 FCA 199], at paragraph 77). Class actions reduce the financial implications of mounting a defence for each class member through the sharing of counsel, expert witnesses and fees. This reduced financial burden can also alleviate the pressure on class members to settle prior to a determination of the matter on its merits.

[42] With respect to the fifth criterion for certification, that there be a suitable representative respondent, this Court held that the Federal Court erred in *Voltage FC Certification Decision #1* in finding Mr. Salna unsuitable. The Federal Court had held that Mr. Salna would have had little incentive for defending the class proceeding given the modest amount of a potential statutory damages award against him. This Court noted at paragraph 123 of *Voltage FCA Certification Decision #1* that the Federal Court’s reasoning “butt[ed] against the raison d’être of class proceedings, where it is ‘precisely when individual damage awards may be low that a class action becomes the preferable, and sometimes the only mechanism that truly ensures access to justice’” (citing *Canada v. John Doe*, 2016 FCA 191, 486 N.R. 223 at para. 65).

[43] This Court also held that the suitability of the proposed litigation plan put forward by the appellants raised factually suffused questions that deserved careful attention. This was particularly so in respect of fee arrangements and the potential for conflicts of interest and the use of opt-out mechanisms for class members to evade their share of fees (at para. 126). Given the connection between issues surrounding the proposed litigation plan and the assessment of

preferable procedure, this Court remitted to the Federal Court the assessment of the fifth criterion for certification of whether Mr. Salna was a suitable representative respondent.

[44] After determining that the fourth and fifth criteria for certification would be remitted to the Federal Court for reconsideration, this Court went on to discuss the use of the notice-and-notice regime in the *Copyright Act* proposed by the appellants as part of their litigation plan. This Court concluded that the Federal Court had erred in *Voltage FC Certification Decision #1* in finding that the proposed use of the notice-and-notice regime would overburden ISPs as there was no evidence to this effect. This Court added that, during the reconsideration to be undertaken by the Federal Court, it would be open to the ISPs to intervene and to put relevant evidence before the Federal Court about the burden the appellants' proposed litigation plan would cast on them.

[45] This Court also determined that the Federal Court erred in *Voltage FC Certification Decision #1* in concluding that Parliament did not intend that the notice-and-notice regime would be used in the fashion proposed by the appellants because the Federal Court failed to undertake any statutory interpretation analysis. As insufficient evidence and argument had been filed on the issue of whether the notice-and-notice regime could be used in the manner proposed by the appellants, this Court concluded that "the use to which Parliament intended section 41.26 [of the *Copyright Act*] to be put is an open question" (at para. 131). It remitted this issue, along with the others, to the Federal Court for reconsideration.

[46] In reaching this conclusion, Justice Rennie noted at paragraph 129 that the decision of the Supreme Court of Canada in *Voltage SCC*:

... was decided prior to the amendments to [subsection 41.25(3) of the *Copyright Act*] in 2018 [S.C. 2018, c. 27[s. 243]] when Parliament specified that notices should not include an offer to settle, a request or demand for payment or personal information, or a reference to any such offer, request, or demand (Bill C-86, *Budget Implementation Act, 2018, No. 2*, S.C. 2018, c. 27, [s. [243]]). At the same time, amendments which would confine the notice to a form prescribed by regulation were rejected on the basis that the scheme should be left open to develop “marketplace solutions” (*Order Fixing the Day that is Six Months after the Day on which this Order is published as the Day on which Certain Provisions of the Copyright Act Come into Force*, SI/2014-58, (C. Gaz. 2014 II 2121 (proclaimed in force 2 July 2014), at pages 2121–2122).

D. *Voltage Holdings, LLC v. Doe #1*, 2023 FCA 194

[47] I turn next to the decision of this Court in *Voltage Holdings, LLC v. Doe #1*, 2023 FCA 194 [*Voltage v. Doe FCA*], leave to appeal to SCC refused, 41026 (27 June 2024) which dismissed an appeal from the decision of the Federal Court (*per* Furlanetto, J.) in *Voltage Holdings, LLC v. Doe#1*, 2022 FC 827 [*Voltage v. Doe FC*]. There, the Federal Court dismissed a motion for default judgment brought by Voltage Holdings, LLC (Voltage).

[48] In that case, Voltage determined via its forensic software that BitTorrent had been used at a number of IP addresses to make the film *Revolt* available. Voltage delivered a notice of claimed infringement under the notice-and-notice regime in the *Copyright Act* to the ISPs, who, in turn, delivered warning notices to the subscribers associated with the relevant IP addresses. When a second instance of download occurred at some of the same IP addresses within seven days of the first, Voltage delivered a second notice of claimed infringement under the notice-

and-notice regime to the ISPs, who, in turn, delivered a second warning notice to the subscribers associated with those IP addresses.

[49] Unlike the instant case, in *Voltage v. Doe FC*, Voltage obtained *Norwich* orders to require the ISPs to disclose the identities and addresses of several of the respondents who had twice downloaded *Revolt* via BitTorrent. It then served these respondents with a statement of claim. In its claim, Voltage advanced claims similar to Unlawful Acts 1 and 3 alleged in the appellants' Notice of Application in the instant case. None of the respondents filed a statement of defence, and Voltage brought a motion for default judgment.

[50] The Federal Court dismissed that motion, finding that Voltage had not filed sufficient evidence to establish that the respondents were direct infringers because Voltage had only established that the respondents were internet subscribers and there was no evidence that the respondents had themselves used BitTorrent to download *Revolt*.

[51] The Federal Court likewise held that Voltage had not filed sufficient evidence to establish that the respondents had sufficient control over those who had used BitTorrent to download *Revolt* to have authorized infringement of the copyright in the film by offering it for uploading. The Federal Court rejected Voltage's theory of authorizing infringement, concluding that a warning in respect of the first download and the mere fact that a second one occurred at the same IP address within seven days was insufficient to establish the elements of the claim for authorizing infringement in the absence of evidence about the nature of the relationship between

the respondents and those who had undertaken the downloading and thus offered for uploading the unauthorized content.

[52] The Federal Court accordingly concluded that Voltage’s claim needed to proceed to discovery and dismissed the motion for default judgment.

[53] This determination was upheld by this Court in *Voltage v. Doe FCA*. There, this Court held that Voltage’s theory of authorizing infringement was inconsistent with the decision of the Supreme Court of Canada in *Society of Composers, Authors and Music Publishers of Canada v. Entertainment Software Association*, 2022 SCC 30, [2022] 2 S.C.R. 303 [ESA]. Justice Rennie, who again wrote for this Court, noted that *ESA* makes it clear that “authorization, in the context of online copyright infringement, is directed to and only possible in respect of those who make the copyrighted material available for downloading” (at para. 30).

[54] In so ruling, Justice Rennie distinguished the decision of this Court in *Voltage FCA Certification Decision #1*, finding that this Court had held only that the appellants had an arguable claim of authorizing infringement and not that authorizing infringement had been established. He also noted that *ESA*, which was decided after *Voltage FCA Certification Decision #1*, “establishes clear guidance as to the legal and evidentiary requirements of infringement in the context of online infringement” (at para. 85). He stated that “[p]osting a work online and inviting others to view it engages the author’s authorization right; however, sharing internet access after receiving notices of alleged infringement does nothing to the work in

question, and does not therefore engage any copyright interest granted to the author exclusively” (at para. 85 (emphasis in the original)).

[55] This Court thus concluded that those who had used BitTorrent to make *Revolt* available for download had authorized infringement of Voltage’s copyright in the film, but the mere fact that the download was done over the respondents’ IP addresses was insufficient to establish that the respondents had authorized infringement. This Court accordingly held that the Federal Court did not err in dismissing Voltage’s motion for default judgment.

III. The Decision of the Federal Court in the Instant Case

[56] I turn next to outline the portions of the Federal Court’s decision in the instant case that are relevant to this appeal. As noted, this Court in *Voltage FCA Certification Decision #1* remitted to the Federal Court for redetermination the issues of whether the reverse class proceeding was the preferable procedure for deciding the common questions and of whether Mr. Salna was a suitable representative respondent.

[57] On the issue of preferable procedure, the Federal Court in the present case concluded that the appellants had established some basis in fact for the conclusion that a class proceeding was the preferable procedure to determine the common questions posed by the appellants. The Federal Court held that the proposed class proceeding “will permit the determination of common issues based upon a single set of pleadings” and that “the common issues will be decided on the basis of common evidence, including expert evidence” (at para. 37). The Federal Court further

held that the respondents could pool their resources to fund the defence and could advance a coordinated position with the assistance of class counsel, thereby reducing the risk of inconsistent judgments. It added that one advantage of the reverse class proceeding, as compared to individual applications, was that a class proceeding permitted the respondents to benefit from a higher degree of anonymity. The Federal Court further found that the requirement for the Court to approve any settlement was a major advantage of the class proceeding. It noted that the requirement for Court approval of settlements was “an important safeguard against ‘copyright trolling’, where respondents are pressured to settle unmeritorious claims under threat of significant litigation costs” (at para. 39).

[58] The Federal Court also held that Mr. Salna’s concerns about the risk that a myriad of individual issues might overwhelm the common issues and render the class proceeding unworkable was speculative. The Federal Court noted that Mr. Salna’s concerns had to be tempered in light of what was said by this Court in *Voltage FCA Certification Decision #1* at paragraphs 102–104, where Justice Rennie wrote as follows:

... While an overwhelmingly large number of individual fact assessments pose challenges to the management of a class action, these differences must be viewed through the lens of whether certifying the class will advance the three principal goals of class proceedings: judicial economy, behaviour modification, and access to justice (*AIC Limited v. Fischer*, 2013 SCC 69, [2013] 3 S.C.R. 949), at paragraph 22). Resolving even a single issue among many may achieve these goals, for example, by both eliminating the inconsistencies that can occur when different judges are asked to answer the same question as well as by reducing the judicial resources spent in analysing that single issue.

As such, I do not find speculative concern about misidentification or that there may be a number of potentially different factual scenarios persuasive. Second, flexibility is infused into the *Federal Courts Rules* class proceedings rules in that the Rules provide numerous avenues to resolve individual issues that may arise (*Brake v. Canada (Attorney General)*, 2019 FCA 274, [2020] 2 F.C.R. 638), at

paragraph 92). Options include the ability to create subclasses based on similar fact scenarios (subsection 334.16(3)) and the ability for a court-supervised individual assessment process (rule 334.26). Additionally, if the class proceeding does become unmanageable as it proceeds, the *Federal Courts Rules* allow for amendments to the pleadings or even decertification if the conditions for certification are no longer satisfied (rule 334.19).

The argument that the statutory remedies requested by Voltage will require an individual assessment ... receives the same answer.

[59] The Federal Court thus held that the fourth criterion for certification was met as the appellants had demonstrated some basis in fact for the conclusion that a class proceeding was the preferable procedure.

[60] On the other hand, the Federal Court found that the final criterion for certification was not met. Paragraph 334.16(1)(e) of the *Federal Courts Rules* sets out the fifth criterion for certification and provides:

Certification

Conditions

334.16 (1) Subject to subsection (3), a judge shall, by order, certify a proceeding as a class proceeding if

...

(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

Autorisation

Conditions

334.16 (1) Sous réserve du paragraphe (3), le juge autorise une instance comme recours collectif si les conditions suivantes sont réunies :

[...]

e) il existe un représentant demandeur qui :

(i) représenterait de façon équitable et adéquate les intérêts du groupe,

(ii) a élaboré un plan qui propose une méthode efficace pour poursuivre l'instance au nom du groupe et tenir les

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.

membres du groupe informés de son déroulement,

(iii) n'a pas de conflit d'intérêts avec d'autres membres du groupe en ce qui concerne les points de droit ou de fait communs,

(iv) communique un sommaire des conventions relatives aux honoraires et débours qui sont intervenues entre lui et l'avocat inscrit au dossier.

[61] The Federal Court noted that the costs of defending this proposed reverse class proceeding might be considerable. It stated that the funding of class counsel was “of paramount importance” and that failure to address funding issues in a litigation plan could prove fatal to certification (at para. 54). The Federal Court noted that inadequate provision was made in the appellants’ litigation plan for funding class counsel and that this needed to be addressed in any revised litigation plan the appellants might file.

[62] The Federal Court also determined that the proposed use of the notice-and-notice regime in the *Copyright Act*, set out in the appellants’ litigation plan, was contrary to subsection 41.25(3) of the *Copyright Act*. The Federal Court more specifically held that a “notice of claimed infringement”, within the meaning of the *Copyright Act*, must be given a limited meaning, noting that “[s]ubsection 41.25(2) prescribes what information a notice must contain, while s 41.26(1) draws a clear distinction between an anonymized notice of alleged infringement and subsequent litigation” (at para. 78). In reaching this conclusion, the Federal Court referred to statements made during debates before the House of Commons (“Bill C-11, An Act to amend the Copyright

Act”, 2nd reading, *House of Commons Debates*, 41-1, No. 78 (10 February 2012) at 5127 (Scott Armstrong)) to support the conclusion that “[d]ata retention is required only to create a record that ‘could be used if court proceedings were to follow at some time in the future’” (at para. 78).

[63] The Federal Court further noted that the notice-and-notice provisions in the *Copyright Act* do not impose a duty on ISPs to take active steps to stop or limit acts of infringement. It agreed with the ISPs that, if Parliament had intended to cast an obligation on ISPs to take active steps to stop or limit acts of infringement, it would have done so explicitly in the *Copyright Act*.

[64] The Federal Court further found unpersuasive the suggestion that this Court’s reference to “marketplace solutions” in paragraph 129 of *Voltage FCA Certification Decision #1* should be understood as an endorsement of the proposed use of the notice-and-notice regime suggested by the appellants in their litigation plan. On this point, the Federal Court concluded that it was unclear whether the reference to marketplace solutions was “to the content of notices issued pursuant to s 41.26 of the *Copyright Act*, or more generally to non-legislative solutions to suppress copyright infringement” and that “[i]n any event, innovative market-driven solutions cannot contravene the statutory provisions” (at para. 80).

[65] The Federal Court also held that the Supreme Court of Canada’s reasons in *Voltage SCC* led to the conclusion that the appellants could not use the notice-and notice regime in the manner they proposed. The Federal Court noted that in *Voltage SCC* the Supreme Court reviewed the legislative history of the notice-and-notice regime and concluded that “it was intended to serve two complementary purposes: (1) to deter online copyright infringement; and (2) to balance the

rights of interested parties” (at para. 81, citing *Voltage SCC* at para. 22). The Federal Court held that the use of the notice-and-notice regime proposed by the appellants in their litigation plan departed from the purposes identified by the Supreme Court in *Voltage SCC* and sought enforcement as opposed to deterrence. The Federal Court concluded that the Supreme Court of Canada had settled the issue through the mandatory language it used in paragraph 24 of *Voltage SCC*. The Federal Court stated at paragraph 83 that:

The Supreme Court’s language is mandatory: 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 ([*Voltage SCC*] at para 24). The statutory notice-and-notice regime has not displaced this requirement.

(emphasis in the original.)

[66] On the costs issue, the Federal Court held that *Voltage FCA Security for Costs* “clearly establishes this Court’s discretion to grant costs to a representative respondent in a reverse class action pursuant to Rule 334.39(1)(c) on the ground that the proceeding itself constitutes an exceptional circumstance” (at para. 100). It concluded that the exceptional circumstances of the case favoured an award of costs to Mr. Salna, but not on a solicitor-client basis. Instead, the Federal Court awarded Mr. Salna a lump sum in the all-inclusive amount of \$50,700, which was equivalent to approximately 50% of his fees and disbursements. In so holding, the Federal Court rejected Mr. Salna’s contention that he was a public interest litigant because his IP address had been used to upload all five of the Works.

IV. Issues

[67] The following issues arise in this appeal and cross-appeal:

1. Did the Federal Court err in finding that a “notice of claimed infringement”, in subsection 41.25(2) of the *Copyright Act*, is to be interpreted narrowly and that the proposed use of the notice-and-notice regime in the *Copyright Act* was contrary to subsection 41.25(3) of the *Copyright Act*?
2. Did the Federal Court err in finding that the appellants needed to make adequate provision for the funding of class counsel in their litigation plan?
3. Did the Federal Court err in dismissing the application for certification because the litigation plan was unworkable?
4. Did the Federal Court err in concluding a class action is the preferable procedure?
5. Did the Federal Court err in its costs award?
6. What award should be made with respect to the costs of this appeal and cross-appeal?

V. Analysis

[68] The standards of review in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 govern this appeal. Thus, questions of law are reviewable for correctness whereas questions of

fact or of mixed fact and law from which a legal issue may not be extricated are reviewable for palpable and overriding error: *Housen* at paras. 8 and 37; *Canada v. Greenwood*, 2021 FCA 186, [2021] 4 F.C.R. 635 [*Greenwood*] at para. 89, leave to appeal to SCC refused, 39885 (17 March 2022); *Canada (Attorney General) v. Nasogaluak*, 2023 FCA 61 [*Nasogaluak*] at para. 22, leave to appeal to SCC refused, 40734 (14 December 2023).

A. *Did the Federal Court err in finding that the “notice of claimed infringement” in subsection 41.25(2) of the Copyright Act, is to be interpreted narrowly and that the proposed use of the notice-and-notice regime in the Copyright Act was contrary to subsection 41.25(3) of the Copyright Act?*

[69] The issue of whether the Federal Court erred in finding that the “notice of claimed infringement” in subsection 41.25(2) of the *Copyright Act* is to be interpreted narrowly involves a question of statutory interpretation, a matter of law. The Federal Court’s conclusion on this point is accordingly reviewable for correctness. Its second determination, that the proposed use of the notice-and-notice regime in the *Copyright Act* was contrary to subsection 41.25(3) of the *Copyright Act*, involves both a question of law and a question of fact, reviewable under the palpable and overriding error standard. More specifically, characterizing what constitutes a “demand for payment”, within the meaning of subsection 41.25(3) of the *Copyright Act* involves a question of law, and characterization of the nature of the appellants’ proposed notice involves a question of fact.

[70] I turn first to the interpretation of subsection 41.25(2) of the *Copyright Act*. Like any statutory provision, subsection 41.25(2) is to be interpreted in accordance with the modern principle of statutory interpretation, which requires that the words of a statute be read “in their

entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament” (*Piekut v. Canada (National Revenue)*, 2025 SCC 13 at para. 42; *ESA* at para. 139, quoting *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653 at para. 117, which in turn cited *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, 1998 CanLII 837 at para. 21, and *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559 at para. 26, both quoting E. A. Driedger, *Construction of Statutes*, 2nd ed. (Toronto: Buttersworth, 1983) at 87). Thus, I must consider the text, context, and purpose of subsection 41.25(2) of the *Copyright Act*.

[71] I turn first to the text of subsection 41.25(2) of the *Copyright Act* and conclude that it and the text of related provisions indicate that subsection 41.25(2) of the *Copyright Act* is to be interpreted narrowly.

[72] It is useful to commence discussion of this issue by repeating subsection 41.25(2). It states:

Form and content of notice

41.25 (2) A notice of claimed infringement shall be in writing in the form, if any, prescribed by regulation and shall

- (a) state the claimant’s name and address and any other particulars prescribed by regulation that enable communication with the claimant;
- (b) identify the work or other subject-matter to which the claimed infringement relates;

Forme de l’avis

41.25 (2) L’avis de prétendue violation est établi par écrit, en la forme éventuellement prévue par règlement, et, en outre :

- a) précise les nom et adresse du demandeur et contient tout autre renseignement prévu par règlement qui permet la communication avec lui;
- b) identifie l’œuvre ou l’autre objet du droit d’auteur auquel la prétendue violation se rapporte;

- | | |
|---|--|
| <p>(c) state the claimant's interest or right with respect to the copyright in the work or other subject-matter;</p> <p>(d) specify the location data for the electronic location to which the claimed infringement relates;</p> <p>(e) specify the infringement that is claimed;</p> <p>(f) specify the date and time of the commission of the claimed infringement; and</p> <p>(g) contain any other information that may be prescribed by regulation.</p> | <p>c) déclare les intérêts ou droits du demandeur à l'égard de l'œuvre ou de l'autre objet visé;</p> <p>d) précise les données de localisation de l'emplacement électronique qui fait l'objet de la prétendue violation;</p> <p>e) précise la prétendue violation;</p> <p>f) précise la date et l'heure de la commission de la prétendue violation;</p> <p>g) contient, le cas échéant, tout autre renseignement prévu par règlement.</p> |
|---|--|

[73] The matters listed in subsection 41.25(2) of the *Copyright Act* are all particulars of an instance of claimed copyright infringement. This information would allow recipients of a notice to understand what is alleged to have occurred to provide them the opportunity to cease any infringing behaviour. Comparatively, the additional matters the appellants wish to include in their notice are entirely different in nature and are proposed for inclusion in the notice to facilitate the pursuit of the appellants' class proceeding against alleged infringers. The goal of the proceeding is to obtain damages from class members in addition to the other remedies listed in the Notice of Application.

[74] The fact that the matters the appellants wish to include in their notice are entirely different in character from the contents of the notice listed in subsection 41.25(2) of the *Copyright Act* tends to support the conclusion that a notice of claimed infringement ought not include a notice of a class proceeding like that proposed by the appellants.

[75] This conclusion is reinforced by paragraph 41.26(1)(b) of the *Copyright Act*, which contemplates that litigation will be commenced after a notice of claimed infringement is provided. Paragraph 41.26(1)(b) of the *Copyright Act* requires an ISP to retain the statutorily-mandated records 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 [ISP] before the end of those six months**, for one year after the day on which the [ISP] receives the notice of claimed infringement”. The reference to litigation being commenced before the end of the initial six-month period suggests that the first six-month period starts to run before the litigation commences and thus that litigation follows the notice provided under subsection 41.25(2) of the *Copyright Act*.

[76] The French text of paragraph 41.26(1)(b) of the *Copyright Act* supports this interpretation by also suggesting that litigation would only start after the notice is sent. The French text provides that the ISP is to retain the statutorily-mandated records for « une période de six mois à compter de la date de réception de l’avis de prétendue violation [...] 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 [que le fournisseur d’accès à internet] 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 ».

[77] This interpretation is consistent with the Supreme Court’s explanation of paragraph 41.26(1)(b) in *Voltage SCC*. After reiterating the requirement for a copyright owner to obtain a *Norwich* order to compel an ISP to disclose an alleged infringer’s identity, Justice Brown explained at paragraph 24 that:

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.

(emphasis added.)

[78] Thus, I conclude that the text of subsection 41.25(2) and of the related provision in paragraph 41.26(1)(b) of the *Copyright Act* support the conclusion that a “notice of claimed infringement” is to be interpreted narrowly and does not include a notice of a class proceeding like that proposed by the appellants.

[79] This conclusion is reinforced by the context of the notice-and-notice provisions in the *Copyright Act*.

[80] The first contextual point is that, in enacting the notice-and-notice regime in the *Copyright Modernization Act*, Parliament at the same time insulated ISPs from liability for authorization in section 31.1 of the *Copyright Act*. The intervener, the Samuelson-Glushko Canadian Internet Policy & Public Interest Clinic (CIPPIC), correctly notes that this signals Parliament's intent to limit the involvement of ISPs in copyright infringement litigation.

[81] Section 31.1 of the *Copyright Act* provides as follows:

Network Services

Network services

31.1 (1) A person who, in providing services related to the operation of the Internet or another digital network,

Services réseau

Services réseau

31.1 (1) La personne qui, dans le cadre de la prestation de services liés à l'exploitation d'Internet ou d'un autre

provides any means for the telecommunication or the reproduction of a work or other subject-matter through the Internet or that other network does not, solely by reason of providing those means, infringe copyright in that work or other subject-matter.

Incidental acts

(2) Subject to subsection (3), a person referred to in subsection (1) who caches the work or other subject-matter, or does any similar act in relation to it, to make the telecommunication more efficient does not, by virtue of that act alone, infringe copyright in the work or other subject-matter.

Conditions for application

(3) Subsection (2) does not apply unless the person, in respect of the work or other subject-matter,

- (a) does not modify it, other than for technical reasons;
- (b) ensures that any directions related to its caching or the doing of any similar act, as the case may be, that are specified in a manner consistent with industry practice by whoever made it available for telecommunication through the Internet or another digital network, and that lend themselves to automated reading and execution, are read and executed; and
- (c) does not interfere with the use of technology that is lawful and consistent with industry practice in order to obtain data on the use of

réseau numérique, fournit des moyens permettant la télécommunication ou la reproduction d'une œuvre ou de tout autre objet du droit d'auteur par l'intermédiaire d'Internet ou d'un autre réseau ne viole pas le droit d'auteur sur l'œuvre ou l'autre objet du seul fait qu'elle fournit ces moyens.

Acte lié

(2) Sous réserve du paragraphe (3), si la personne met l'œuvre ou l'autre objet du droit d'auteur en antémémoire ou effectue toute autre opération similaire à leur égard en vue de rendre la télécommunication plus efficace, elle ne viole pas le droit d'auteur sur l'œuvre ou l'autre objet du seul fait qu'elle accomplit un tel acte.

Conditions d'application

(3) Le paragraphe (2) ne s'applique que si la personne respecte les conditions ci-après en ce qui a trait à l'œuvre ou à l'autre objet du droit d'auteur :

- a) elle ne les modifie pas, sauf pour des raisons techniques;
- b) elle veille à ce que les directives relatives à leur mise en antémémoire ou à l'exécution à leur égard d'une opération similaire, selon le cas, qui ont été formulées, suivant les pratiques de l'industrie, par quiconque les a mis à disposition pour télécommunication par l'intermédiaire d'Internet ou d'un autre réseau numérique soient lues et exécutées automatiquement si elles s'y prêtent;
- c) elle n'entrave pas l'usage, à la fois licite et conforme aux pratiques de l'industrie, de la technologie pour l'obtention de données sur

the work or other subject-matter.

Hosting

(4) Subject to subsection (5), a person who, for the purpose of allowing the telecommunication of a work or other subject-matter through the Internet or another digital network, provides digital memory in which another person stores the work or other subject-matter does not, by virtue of that act alone, infringe copyright in the work or other subject-matter.

Condition for application

(5) Subsection (4) does not apply in respect of a work or other subject-matter if the person providing the digital memory knows of a decision of a court of competent jurisdiction to the effect that the person who has stored the work or other subject-matter in the digital memory infringes copyright by making the copy of the work or other subject-matter that is stored or by the way in which he or she uses the work or other subject-matter.

Exception

(6) Subsections (1), (2) and (4) do not apply in relation to an act that constitutes an infringement of copyright under subsection 27(2.3).

leur utilisation.

Stockage

(4) Sous réserve du paragraphe (5), quiconque fournit à une personne une mémoire numérique pour qu'elle y stocke une œuvre ou tout autre objet du droit d'auteur en vue de permettre leur télécommunication par l'intermédiaire d'Internet ou d'un autre réseau numérique ne viole pas le droit d'auteur sur l'œuvre ou l'autre objet du seul fait qu'il fournit cette mémoire.

Conditions d'application

(5) Le paragraphe (4) ne s'applique pas à l'égard d'une œuvre ou de tout autre objet du droit d'auteur si la personne qui fournit la mémoire numérique sait qu'un tribunal compétent a rendu une décision portant que la personne qui y a stocké l'œuvre ou l'autre objet viole le droit d'auteur du fait de leur reproduction ou en raison de la manière dont elle les utilise.

Exception

(6) Les paragraphes (1), (2) et (4) ne s'appliquent pas à l'égard des actes qui constituent une violation du droit d'auteur prévue au paragraphe 27(2.3).

[82] Subsection 27(2.3) of the *Copyright Act*, mentioned in subsection 31.1(6), reads as follows:

Infringement — provision of services

(2.3) It is an infringement of copyright

Violation relative aux fournisseurs de services

(2.3) Constitue une violation du droit

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.

d'auteur le fait pour une personne de fournir un service sur Internet ou tout autre réseau numérique principalement en vue de faciliter l'accomplissement d'actes qui constituent une violation du droit d'auteur, si une autre personne commet une telle violation sur Internet ou tout autre réseau numérique en utilisant ce service.

[83] I agree with CIPPIC that the insulation of ISPs from liability for authorization in section 31.1 of the *Copyright Act* supports the conclusion that a “notice of claimed infringement”, within the meaning of subsection 41.25(2) of the *Copyright Act*, is to be interpreted narrowly.

[84] This conclusion is further buttressed by the fact that, when Parliament wished to impose liability on ISPs in the *Copyright Modernization Act*, it clearly so provided in respect of enablement service providers in subsection 27(2.3) of the *Copyright Act*. Further, in paragraph 27(2.4)(d) of the *Copyright Act*, also enacted by the *Copyright Modernization Act*, Parliament provided that, in determining whether infringement under subsection 27(2.3) of the *Copyright Act* occurred, a court may consider “any action taken” by an ISP “to limit acts of copyright infringement”.

[85] In contrast, sections 41.25 and 41.26 of the *Copyright Act* contemplate no role for ISPs in copyright litigation beyond the retention of records for a prescribed period. Had Parliament intended to cast obligations on ISPs to provide notice of class proceedings, it seems to me that Parliament would have so provided, especially when one considers that, at the same time as it enacted sections 41.25 and 41.26 of the *Copyright Act*, it enacted other provisions that created liability for ISPs in respect of enablement.

[86] In addition to these provisions in the *Copyright Act* enacted at the same time as sections 41.25 and 41.26, another important contextual factor is the American legislation, the *Digital Millennium Copyright Act*, 17 U.S.C. § 512 (1998), which provides for a different regime, commonly called “notice-and-takedown”, under which ISPs are required “upon receiving notice of a claimed copyright infringement, to respond expeditiously by removing or blocking access to the material that is the subject of the claimed infringement” (*Voltage SCC* at para. 26). Parliament was aware of the American legislation when it adopted the *Copyright Modernization Act* and deliberately chose a notice-and-notice regime, which imposes lesser obligations on ISPs when compared to the American notice-and-takedown regime.

[87] Several comments, made in the House of Commons and before the Legislative Committee when the *Copyright Modernization Act* was being debated, provide contextual support for a narrow interpretation of “notice of claimed infringement” in subsection 41.25(2) of the *Copyright Act* and for the conclusion that such a notice cannot be aimed at a primarily litigation purpose, which would include a notice of a class proceeding like that proposed by the appellants.

[88] In *Voltage SCC* at paragraph 24, Justice Brown adopted the explanation of the provisions offered by a representative of Rogers, when testifying before a Parliamentary Committee, that “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” (citing House of Commons, Legislative Committee on Bill C-32, *Evidence*, 40-3, No. 19 (22 March 2011) at 10).

[89] Members of multiple parties asserted their desire that the notice-and-notice regime not be weaponized to further questionable mass litigation practices, as seen in the United States: “Bill C-32, An Act to amend the Copyright Act”, 2nd reading, *House of Commons Debates*, 40-3, No. 92 (2 November 2010) at 5655, 5657, 5664, 5669–5670; “Bill C-11, An Act to amend the Copyright Act”, 2nd reading, *House of Commons Debates*, 41-1, No. 31 (18 October 2011) at 2109, 2114; “Bill C-11: An Act to amend the Copyright Act”, Report Stage, *House of Commons Debates*, 41-1, No. 123 (14 May 2012) at 7985.

[90] At paragraph 23 of *Voltage SCC*, the Supreme Court also noted the identification of a primarily deterrence purpose by the Government of Canada on its website: see “Notice and Notice Regime” (last modified 20 January 2015), online (pdf): *SCC Archive* <https://www.scc-csc.ca/cso-dce/2018SCC-CSC38_1_eng.pdf>. That site also distinguished a notice from a lawsuit:

The goal of the Notice and Notice regime is to discourage online infringement. Receiving a notice does not necessarily mean that you have in fact infringed copyright or that you will be sued for copyright infringement.

...

A notice of alleged infringement is separate from any lawsuit for copyright infringement. There is no legal obligation to pay any settlement offered by a copyright owner.

...

A copyright owner may decide to launch legal proceedings. Such proceedings may be launched regardless of whether the copyright owner has sent a notice under the regime. A court would then determine whether copyright infringement has in fact occurred.

[91] Finally, in terms of context, the addition of subsection 41.25(3) of the *Copyright Act* via the *Budget Implementation Act, 2018, No. 2*, S.C. 2018, c. 27, s. 243, supports a narrow reading of what constitutes a notice of claimed infringement in subsection 41.25(2) of the *Copyright Act*. Subsection 41.25(3) provides that a notice of claimed infringement may not contain offers to settle, requests or demands for personal information or payment, or a reference by hyperlink to such offers, requests, or demands. The addition of this limitation supports the conclusion that Parliament intended that a notice of claimed infringement be interpreted narrowly.

[92] In speaking to these amendments on behalf of the government, Mr. David Lametti explained these changes as follows:

Finally, on another note on the copyright file, we also, in the bill, strengthen our notice and notice regime to make sure that it is not abused by people pretending or claiming that there is a copyright infringement and that they should be paid a certain amount of money as a settlement offer.

We heard, in the context of notice and notice consultations through [the Standing Committee on Industry and Technology], good things about the notice and notice regime, as an initial response, to prevent abuse. It is the case that under notice and take-down regimes, copyright is asserted to take down content, even when the claim has nothing to do with copyright or the copyright is, in fact, legitimate. Our notice and notice regime will provide for a more standard form to prevent abuse in this context.

(“Bill c-86, A second Act to implement certain provisions of the budget tabled in Parliament on February 27, 2018 and other measures”, 2nd reading, *House of Common Debates*, 42-1, No. 350 (6 November 2018) at 23351.)

[93] In short, the context of the notice-and-notice regime demonstrates an intention to limit the involvement of ISPs to the initial delivery of a notice aimed at deterrence. Otherwise (unless they are ordered to proceed differently by a court), ISPs must only retain their records for a limited

period of time for identification purposes. This context does not suggest that a copyright owner who wishes to pursue enforcement against the suspected infringer could use the notice-and-notice regime as a litigation tool.

[94] Turning to purpose, as noted, the Supreme Court of Canada determined that the notice-and-notice regime “serve[s] two complementary purposes: (1) to deter online copyright infringement; and (2) to balance the rights of interested parties” (*Voltage SCC* at para. 22).

[95] In terms of deterrence, the Supreme Court held that the notice-and-notice regime was “not ... intended to embody a comprehensive framework by which instances of online copyright infringement could be eliminated altogether” (*Voltage SCC* at para. 24). Instead, as I previously explained, the Court identified the limited role of the notice-and-notice regime as only a “first step” in enforcement. More specifically, the record retention function provided by paragraph 41.26(1)(b) facilitates compliance with a *Norwich* order, which must be obtained to compel the ISP to disclose the identity of a person that a copyright owner wishes to pursue for copyright infringement: *Voltage SCC* at paras. 24, 45.

[96] I agree with the Federal Court that the notice proposed by the appellants goes well beyond deterring recipients from any further violation of the appellants’ copyright in the Works. Moreover, instead of merely facilitating the obtention of a *Norwich* order, under the appellants’ proposal, the notice-and-notice regime would be a necessary part of the process of obtaining damages and enforcing the appellant’s copyright, while avoiding the obligation to obtain a

Norwich order. This is not consistent with the purpose for which the notice-and-notice provisions were enacted.

[97] I therefore conclude that the Federal Court did not err in finding that a “notice of claimed infringement” in subsection 41.25(2) of the *Copyright Act* is to be interpreted narrowly and that such notice cannot include the sort of information about their proposed class proceeding that the appellants wished to include.

[98] I also see no error in the Federal Court’s determination that the appellants’ proposed notice ran afoul of subsection 41.25(3) of the *Copyright Act*. As noted, that provision prohibits any demand or request for personal information or payment, including by way of hyperlink, from being included in a notice of claimed infringement.

[99] The proposed notice is a request or demand for personal information. It tells proposed class members that they “should contact the respondent class lawyers to provide evidence of ceasing infringement by emailing them at [the email address for counsel] or by calling them at [the phone number for counsel]”. The notice further warns that “if you do not contact class counsel this may be used as evidence against you in court”. To comply with this request, putative class members would have to reveal personal information, if only their email addresses or telephone numbers. In all likelihood, class counsel would also want their names and additional contact information. As an aside, it is of no importance that the proposed notice requests that this information be directed toward class counsel rather than the appellants. It remains a prohibited demand or request for information due to what is contained in the appellants’ proposed notice.

[100] The appellants' proposed class proceeding is also in large part a request for payment of statutory damages. The description of the proceeding and inclusion of a hyperlink in the appellants' proposed notice, through which proposed class members would obtain a copy of the pleadings, in my view may well constitute "a request or demand ... for payment", within the meaning of subsection 41.25(3) of the *Copyright Act*.

[101] Thus, I agree with the Federal Court that the appellants' proposed notice that they wished to send through the notice-and-notice regime was contrary to subsection 41.25(3) of the *Copyright Act* as it requested or demanded information that subsection 41.25(3) provides cannot be sought in a notice sent under the notice-and-notice regime.

B. *Did the Federal Court err in finding that the appellants needed to make adequate provision for the funding of class counsel in their litigation plan?*

[102] Turning to the second issue, Rule 121 of the *Federal Courts Rules* provides that, unless the Court orders otherwise, a representative plaintiff (or applicant) and a representative defendant (or respondent) must be represented by a solicitor. Rule 121 provides:

Parties under legal disability or acting in representative capacity

121 Unless the Court in special circumstances orders otherwise, a party who is under a legal disability or who acts or seeks to act in a representative capacity, including in a representative proceeding or a class proceeding, shall be represented by a solicitor.

Partie n'ayant pas la capacité d'ester en justice ou agissant en qualité de représentant

121 La partie qui n'a pas la capacité d'ester en justice ou qui agit ou demande à agir en qualité de représentant, notamment dans une instance par représentation ou dans un recours collectif, se fait représenter par un avocat à moins que la Cour, en raison de circonstances particulières,

n'en ordonne autrement.

[103] In the present case, Mr. Salna retained counsel, who acted for him at each step of this proceeding and vigorously defended his interests: see *Voltage FC Certification Decision #2* at para. 53. However, we have no information about the funding arrangements between Mr. Salna and his lawyer since Mr. Salna did not file evidence about them: see *Voltage FC Certification Decision #2* at para. 110.

[104] As already noted, the Federal Court held that the appellants' litigation plan needed to make adequate provision for funding class counsel. With respect, I disagree with this holding for three reasons.

[105] First, in our adversarial system, it would be highly unusual for a plaintiff or applicant in litigation between private parties to make provision for payment of counsel for defendants or respondents, which could lead to inevitable conflicts of interest. In addition, were this required, it would be relatively easy for defendants or respondents to forestall the pursuit of a proceeding. As the appellants argued in their written submissions, if such an obligation existed, defendants or respondents might be "incentivized to not only refuse to pay for their own legal representation, but [also] to criticize every potential funding solution as being unworkable as a means of defeating the claims being made against them".

[106] Second, there is nothing in the *Federal Courts Rules* that requires plaintiffs in a proposed reverse class proceeding to address funding of counsel for the defendant or respondent class as part of their proposed litigation plan.

[107] Rules 334.14(2) and (3) allow for reverse class proceedings, providing the following:

Defendant or respondent class proceeding

334.14 (2) A party to an action or an application against two or more defendants or respondents may, at any time, bring a motion for the certification of the proceeding as a class proceeding and for the appointment of a representative defendant or respondent.

Necessary modifications

(3) This Part applies, with any necessary modifications, to a counterclaim referred to in subsection (1) and to a proceeding referred to in subsection (2).

Groupe de défendeurs

334.14 (2) Une partie à une action ou une demande introduite contre plusieurs défendeurs peut, en tout temps, présenter une requête en vue de faire autoriser l'instance comme recours collectif et de faire nommer un représentant défendeur.

Adaptations nécessaires

(3) La présente partie s'applique, avec les adaptations nécessaires, à la demande reconventionnelle visée au paragraphe (1) et à toute instance visée au paragraphe (2).

[108] Rule 334.16 addresses the criteria for certification of class proceedings and provides as follows:

Certification

Conditions

334.16 (1) Subject to subsection (3), a judge shall, by order, 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

Autorisation

Conditions

334.16 (1) Sous réserve du paragraphe (3), le juge autorise une instance comme recours collectif si les conditions suivantes sont réunies :

- a)** les actes de procédure révèlent une cause d'action valable;
- b)** il existe un groupe identifiable formé d'au moins deux personnes;
- c)** les réclamations des membres du groupe soulèvent des points de droit ou de fait communs, que ceux-ci prédominent ou non sur ceux qui ne concernent qu'un

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.

Matters to be considered

(2) All relevant matters shall be considered in a determination of whether a class proceeding is the preferable procedure for the just and efficient resolution of the common questions of law or fact, including whether

(a) the questions of law or fact common to the class members predominate over any questions affecting only individual members;

(b) a significant number of the

membre;

(d) le recours collectif est le meilleur moyen de régler, de façon juste et efficace, les points de droit ou de fait communs;

(e) il existe un représentant demandeur qui :

(i) représenterait de façon équitable et adéquate les intérêts du groupe,

(ii) a élaboré un plan qui propose une méthode efficace pour poursuivre l'instance au nom du groupe et tenir les membres du groupe informés de son déroulement,

(iii) n'a pas de conflit d'intérêts avec d'autres membres du groupe en ce qui concerne les points de droit ou de fait communs,

(iv) communique un sommaire des conventions relatives aux honoraires et débours qui sont intervenues entre lui et l'avocat inscrit au dossier.

Facteurs pris en compte

(2) Pour décider si le recours collectif est le meilleur moyen de régler les points de droit ou de fait communs de façon juste et efficace, tous les facteurs pertinents sont pris en compte, notamment les suivants :

a) la prédominance des points de droit ou de fait communs sur ceux qui ne concernent que certains membres;

b) la proportion de membres du

members of the class have a valid interest in individually controlling the prosecution of separate proceedings;

(c) the class proceeding would involve claims that are or have been the subject of any other proceeding;

(d) other means of resolving the claims are less practical or less efficient; and

(e) the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means.

Subclasses

(3) If the judge determines that a class includes a subclass whose members have claims that raise common questions of law or fact that are not shared by all of the class members so that the protection of the interests of the subclass members requires that they be separately represented, the judge shall not certify the proceeding as a class proceeding unless there is a representative plaintiff or applicant who

(a) would fairly and adequately represent the interests of the subclass;

(b) has prepared a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the subclass and of notifying subclass members as to how the proceeding is progressing;

(c) does not have, on the common questions of law or fact for the subclass, an interest that is in conflict with the interests of other

groupe qui ont un intérêt légitime à poursuivre des instances séparées;

c) le fait que le recours collectif porte ou non sur des réclamations qui ont fait ou qui font l'objet d'autres instances;

d) l'aspect pratique ou l'efficacité moindres des autres moyens de régler les réclamations;

e) les difficultés accrues engendrées par la gestion du recours collectif par rapport à celles associées à la gestion d'autres mesures de redressement.

Sous-groupe

(3) Si le juge constate qu'il existe au sein du groupe un sous-groupe de membres dont les réclamations soulèvent des points de droit ou de fait communs que ne partagent pas tous les membres du groupe de sorte que la protection des intérêts des membres du sous-groupe exige qu'ils aient un représentant distinct, il n'autorise l'instance comme recours collectif que s'il existe un représentant demandeur qui :

a) représenterait de façon équitable et adéquate les intérêts du sous-groupe;

b) a élaboré un plan qui propose une méthode efficace pour poursuivre l'instance au nom du sous-groupe et tenir les membres de celui-ci informés de son déroulement;

c) n'a pas de conflit d'intérêts avec d'autres membres du sous-groupe en ce qui concerne les points de droit ou de fait communs;

subclass members; and

(d) provides a summary of any agreements respecting fees and disbursements between the representative plaintiff or applicant and the solicitor of record.

d) communique un sommaire des conventions relatives aux honoraires et débours qui sont intervenues entre lui et l'avocat inscrit au dossier.

[109] By virtue of Rule 334.14(3), the certification criteria in Rule 334.16 are subject to “necessary modification” in reverse class proceedings. In its “Class Proceedings in the Federal Court of Canada” (2000), Discussion Paper [*FC Rules Paper*], the Federal Courts Rules Committee noted that it was important that “the criteria for certification ... should apply only as appropriate to the certification of a defendant class” (at 35).

[110] A necessary modification to Rule 334.16(1)(e)(iv), which is written for a proceeding where there is a representative plaintiff, requires replacing the words “plaintiff or applicant” in a case like this with “defendant or respondent”.

[111] Where, like here, the proposed representative respondent or defendant has retained counsel, the burden of filing evidence about the funding arrangements should lie with them. It makes sense that it would be the proposed representative defendant or respondent, provided they appear through counsel, who would bear responsibility for disclosing funding arrangements with counsel because only the defendant or respondent would be aware of them. If a proposed defendant or respondent, who has appeared through counsel, fails to provide information about funding arrangements, the proposed defendant or respondent could be required by the Court to file evidence in respect of those arrangements.

[112] Third, in a reverse class proceeding, as opposed to a proceeding where a plaintiff or applicant class is proposed for certification, inadequate funding arrangements for class counsel should not be an absolute bar to certification. This is another necessary modification required for a reverse class proceeding.

[113] While inadequate funding arrangements for counsel may well forestall certification for a typical plaintiff class proceeding and perhaps prevent any application for certification being filed, it is unfair that inadequate funding for respondent or defence counsel would necessarily defeat certification in a reverse class proceeding in all cases. If the requirement to fund class counsel for the defence were a condition for certification, the requirement would allow recalcitrant defendants to defeat proceedings that otherwise merit certification, which is an untenable result. This is not unlike the caselaw that holds that a representative respondent that is capable of vigorously defending the class may be suitable despite not being a willing or consensual representative: see *Berry* at para. 52; *Marcinkiewicz* at paras. 186, 188.

[114] In a case where a proposed representative defendant or respondent has not retained counsel or has retained them only through to the disposition of the certification motion under a limited scope retainer arrangement, it is open to the Court to allow the case to proceed as a class proceeding without the proposed representative defendant or respondent being represented by counsel by virtue of Rule 121.

[115] That being said, the other criteria for certification remain a safeguard against the certification of unworkable defendant classes: *FC Rules Paper* at 35. If it is vital that the

proposed representative defendant or respondent be represented by counsel (as might be the case where the common questions raise complex issues) and there is no intervener like CIPPIC who is willing to provide submissions to the Court that advance the positions of the proposed defendant or respondent class, it would be open to the Court to refuse to certify the proceeding due to unworkability, provided the representative defendant or respondent establishes that it is impossible or fundamentally unfair for the members of the proposed class to fund representation and there is another workable procedure available to the plaintiff to advance the claim against members of the proposed respondent or defendant class. These sorts of issues are ones that should be addressed as part of the assessment of whether a class proceeding is the preferable procedure: *Voltage FCA Certification Decision #1* at para. 109; Michael A. Eizenga et al., *Class Actions Law and Practice*, 2nd ed (Toronto: LexisNexis Canada, 2008) (loose-leaf updated to Release 94 (May 2025)) (QL) at § 3.180.1.

[116] Before this Court, the respondent raised the difficulty in funding class counsel for this proceeding given the statutory cap on a defendant's liability (\$5,000 pursuant to paragraph 38.1(1)(b) of the *Copyright Act*). While the practical challenges of funding counsel may be very much alive in other similar proceedings, they simply do not arise in this case because Mr. Salna has benefitted from representation throughout and filed no evidence about his or the proposed class' ability to continue to fund representation.

[117] I accordingly conclude that the Federal Court erred in this case in suggesting that lack of an adequate funding arrangement for class counsel, might be a bar to certification.

C. *Did the Federal Court err in dismissing the application for certification because the litigation plan was unworkable?*

[118] I turn now to the third issue and conclude that, even though the proposed litigation plan was unworkable due to its proposed use of the notice-and-notice regime, it was improper for the Federal Court to have refused certification for this reason considering that the Federal Court decided that the litigation plan could be amended. By providing the appellants leave to reapply for certification with an amended litigation plan, the Federal Court accepted that it was possible to make the requisite amendments.

[119] As the appellants point out, alternate arrangements could have been made to provide notice to the proposed class other than through the notice-and-notice regime in the *Copyright Act*. The most obvious alternate arrangement would have been for the appellants to have obtained *Norwich* orders for disclosure of the identities and contact information for proposed class members. This would have allowed for service upon them of notice of the class proceeding.

[120] This Court has held that an error of law made in evaluating a litigation plan is a ground for intervention: see *Voltage FCA Certification Decision #1* at paras. 113–114. It has also held that it is an error of law to refuse certification based on inadequacies in a litigation plan that can be remedied. In *Wenham v. Canada (Attorney General)*, 2018 FCA 199 [*Wenham*], this Court overturned a Federal Court decision that refused certification in part because of an inadequate litigation plan that failed to address how the proceeding would deal with the limitation period issue and the evidentiary record. Justice Stratas, writing for the Court, stated at paragraph 103 that:

... the Federal Court overlooked that a litigation plan proposed in a certification motion is not cast in stone. Refusing to certify a litigation plan because of one alleged weakness is an error in law. A litigation plan is “a work in progress” and, in law, “whatever its flaws, it may be amended as the litigation proceeds”.

(citations omitted.)

[121] Justice Stratas cited in support *Cloud v. Canada (Attorney General)* (2004), 247 D.L.R. (4th) 667, 2004 CanLII 45444 (Ont. C.A.), in which Justice Goudge, writing for that Court, rejected that a flawed litigation plan can bar certification, explaining as follows:

[95] I do not agree that the appellants’ certification motion should fail on this basis. The litigation plan produced by the appellants is, like all litigation plans, something of a work in progress. It will undoubtedly have to be amended, particularly in light of the issues found to warrant a common trial. Any shortcomings due to its failure to provide for when limitations issues will be dealt with or how third-party claims are to be accommodated can be addressed under the supervision of the case management judge once the pleadings are complete. Most importantly, nothing in the litigation plan exposes weaknesses in the case as framed that undermine the conclusion that a class action is the preferable procedure.

[122] To similar effect, the authors of *Class Actions Law and Practice* explain that “[t]he judge and counsel can collaborate and develop a comprehensive plan by pre-trials, case management and actual trials in order to ensure the action proceeds efficiently” (at § 3.179). This Court in *Buffalo v. Samson Cree Nation*, 2010 FCA 165, 405 N.R. 232 at paragraph 12 similarly accepted that:

... in certification motions, and in the post-certification period, courts can be quite active and flexible because of the complex and dynamic nature of class proceedings: for example, they must always remain open to amendments to such matters as the class definition, the common issues and the representative plaintiff’s litigation plan, and they can play a key role in case management.

[123] Often, it is preferable for the parties to first attempt to negotiate a proposed litigation plan prior to presenting it through the case management process: see *McCrea v. Canada (Attorney General)*, 2015 FC 592 at paras. 445–446, rev’d on other grounds 2016 FCA 285; *Sweet v. Canada*, 2022 FC 1228 at para. 201. For example in *Papassay v. Ontario*, 2017 ONSC 2023, a decision cited by this Court in *Wenham* at paragraph 103, the Ontario Superior Court of Justice noted that, faced with a flawed litigation plan, courts should “await negotiations between the parties over notification and other aspects of the litigation plan” and, if the parties cannot agree, “they may return to court for directions” (*Papassay* at paras. 106–107).

[124] Moreover, even where a litigation plan is approved but new circumstances arise, the Federal Court may modify it as part of its management of proceedings: see e.g. *Brake v. Canada (Attorney General)*, 2019 FCA 274, [2020] 2 F.C.R. 638 [*Brake*] at paras. 102–103, citing *Federal Courts Rules*, Rule 3. As such, the adequacy of a litigation plan should be viewed “through the lens of the case management tools available to a judge post-certification” (*Jiang v. Vancouver City Savings Credit Union*, 2019 BCCA 149 at para. 62, leave to appeal to SCC refused, 38738 (14 November 2019)).

[125] I thus conclude that it was improper for the Federal Court to have refused certification based on the appellants’ proposed use of the notice-and-notice regime. Instead, the Court ought to have certified the proceeding or adjourned the certification motion to allow the parties to negotiate the notice issue and, thereafter, to have allowed the appellants to present an amended plan. If needed, the Court could have explored with the appellants whether they were willing to provide notice to proposed class members in a different fashion. Only if the appellants indicated

they were unwilling or unable to do so, would it have been open to the Federal Court to have dismissed the motion for certification or decertified the action. To be clear, the Federal Court possesses discretion in outlining the timing and expectations of a new litigation plan, including by conditionally certifying or adjourning prior to rendering its decision on certification. Nevertheless, it was not open to it in this case to simply refuse certification due to a flawed litigation plan when it at the same time recognized that amendments to the plan were possible.

D. *Did the Federal Court err in concluding that a class action is the preferable procedure?*

[126] In assessing whether a party seeking certification has established some basis in fact that a class proceeding is the preferable procedure for deciding the common questions, a motions judge is required to assess whether the party seeking certification has established some basis in fact that the proposed class proceeding is a fair, efficient, and manageable method of deciding the common questions and advancing the proceeding and whether it is preferable to other ways of resolving the claim.

[127] The motions judge is required to consider these issues through the prism of the tripartite goals of a class proceeding, namely, access to justice, judicial economy, and behaviour modification: *AIC Limited v. Fischer*, 2013 SCC 69, [2013] 3 S.C.R. 949 [*Fischer*] at paras. 22–23; *Hollick v. Toronto (City)*, 2001 SCC 68, [2001] 3 S.C.R. 158 at paras. 28–31; *Rumley v. British Columbia*, 2001 SCC 69, [2001] 3 S.C.R. 184 at paras. 35–39; *Brake* at paras. 85–87; *Greenwood* at para. 200, *Voltage FCA Certification Decision #1* at para. 105; *Nasogaluak* at para. 16.

[128] As stated in *Wenham* at paragraph 77:

- (a) the preferability requirement has two concepts at its core:
 - (i) first, whether the class proceeding would be a fair, efficient and manageable method of advancing the claim; and
 - (ii) second, whether the class proceeding would be preferable to other reasonably available means of resolving the claims of class members;
- (b) this determination requires an examination of the common issues in their context, taking into account the importance of the common issues in relation to the claim as a whole; and
- (c) the preferability requirement can be met even where there are substantial individual issues; the common issues need not predominate over individual issues.

[129] In the instant case, the other procedure to which the appellants' proposed class proceeding was compared was a series of individual applications. As noted, the Federal Court advanced several reasons as to why it considered the proposed class proceeding to be preferable to individual applications. All these reasons were valid ones.

[130] However, in undertaking its analysis, the Federal Court did not have the benefit of this Court's reasons in *Voltage v. Doe FCA*. It also appears that the parties did not draw the Court's attention to the decision of the Supreme Court in *ESA*. These cases directly impact the Federal Court's finding on preferable procedure.

[131] As discussed, in *Voltage v. Doe FCA*, this Court, relying on the decision of the Supreme Court in *ESA*, held that in order to establish infringement of copyright in the context of downloading or offering a work for uploading over the internet via BitTorrent (whether framed

as either direct or authorizing infringement), proof is required that the defendant or respondent was the individual who undertook the act of downloading or offering the work for uploading or had some degree of control over the person who committed the infringement. It is not enough that they are merely the subscriber of the account over which the infringement took place even if they have received a previous warning notice under the notice-and-notice regime.

[132] This holding has important consequences for the preferability analysis in this case. The key proposed common question that, absent the holdings in *Voltage v. Doe FCA* and *ESA*, could have supported a conclusion that a class proceeding was the preferable procedure was question vi. It asked:

(vi) Did the Internet Account Subscribers:

- i. 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 as particularized in Unlawful Acts 1 or 2;
- ii. require prior notice to be found liable for authorization. If notice is necessary, is notice by way of an agreement with their Internet Service Provider sufficient to engage their liability for the acts of the Direct Infringers, or is specific direct notice necessary?
- iii. receive notice of infringement. If the Internet Account Subscribers were provided with notice, but they ignored such notice, does that constitute authorization of copyright infringement. Is willful blindness sufficient to constitute authorization of copyright infringement.

[133] *ESA* and *Voltage v. Doe FCA* establish that the mere fact that a class member was an internet subscriber whose account was used to download the Works via BitTorrent is not enough

to establish infringement. Thus, to the extent that question vi may be answered commonly for class members, it must be answered in the negative.

[134] The other common questions proposed by the appellants do little to advance the action. Questions (i) and (ii) merely concern ownership of copyright in the Works, a matter that will not be in dispute. Similarly, there is no suggestion that the appellants consented to or authorized the Unlawful Acts, as asked by question (v). Question (iii) has been answered in general in *Voltage FCA Certification Decision #1* and does nothing to establish infringement by or liability for any member of the defendant class. Likewise, with question (iv). The remaining questions would not arise unless and until liability is established.

[135] Thus, none of the common questions would advance the proceeding in any meaningful way. Given this, I cannot see how there is any basis in fact to conclude that the proposed class proceeding is preferable to individual actions because the individual issues in this case swamp whatever common issues there might be. This is not merely a case of individual issues predominating over the common issues, which will not necessarily bar certification: see *Wenham* at para. 77; *Federal Court Rules*, Rule 334.16(2)(a). Rather, this is a case where the common issues have minimal importance in relation to the claim as a whole. For each subscriber, even if the application were certified as a class proceeding, it would still be necessary to determine exactly what each subscriber did with respect to the use of BitTorrent to download the Works before infringement and a basis for liability could be established. As such, a class action would do little to promote judicial economy or access to justice.

[136] These concerns are no longer speculative ones, as concluded by the Federal Court in the instant case in reliance on comments in *Voltage FCA Certification Decision #1*, given the subsequent decision of this Court in *Voltage v. Doe FCA*.

[137] A somewhat similar conclusion was recently reached by this Court in *Canada v. Stonechild*, 2025 FCA 105, where this Court overturned a certification order of the Federal Court largely because the common questions did little to advance the action. Writing for the majority, Justice Rennie stated at paragraph 34:

The certification judge failed to consider whether the questions of law or fact common to the class members predominate over any questions affecting only individual members as set out in Rule 334.16(2)(a). As the Ontario Court of Appeal concluded in *Bayens v. Kinross Gold Corporation*, 2014 ONCA 901 (Bayens), it is difficult to establish preferability where individualized inquiries and fact-finding are both necessary and unavoidable. In that case, the Court found that resolution of such questions did not lend itself to a class action, stating that, “the need for numerous individual inquiries undercuts the goal of judicial economy and could overwhelm the resolution of the common issues, producing an inefficient and unmanageable class proceeding” (*Bayens*, at para. 129).

[138] The appellants argue that the foregoing analysis is not open to this Court because Mr. Salna did not appeal from anything but the Federal Court’s disposition on costs in his Notice of Cross-Appeal. They also submit that the decisions in *Voltage v. Doe FCA* and *ESA* are relevant only to the issues of whether their Notice of Application met the first and third certification criteria of disclosing a viable cause of action and raising common questions, issues that were finally decided in their favour in *Voltage FCA Certification Decision #1*.

[139] I disagree with the appellants on these points.

[140] While Mr. Salna's Notice of Cross-Appeal is not drafted as clearly as it could have been, a review of it and of his Memorandum of Fact and Law makes it clear that he was seeking to vary the Federal Court's order to provide for the dismissal of the motion for certification, without leave to reapply for certification, because the decision in *Voltage v. Doe FCA* establishes that there is no basis in fact to conclude a class proceeding is the preferable procedure. The appellants were fully aware of this argument and the remedy Mr. Salna sought, and the issue was sufficiently addressed in Mr. Salna's Notice of Cross-Appeal to be before the Court.

[141] As concerns the relevance of the decisions in *Voltage v. Doe FCA* and *ESA*, the cases impact three of the criteria for certification, namely those of a viable cause of action, commonality of the questions, and preferable procedure. However, Mr. Salna did not ask this Court to reopen the cause of action and commonality criteria, so I make no comment on the application of *res judicata* or how this Court's analysis in *Voltage FCA Certification Decision #1* may have been different in light of the subsequent jurisprudence. For our purposes, it is sufficient to focus on the preferable procedure criterion.

[142] The preferable procedure analysis in essence asks how far a class proceeding would advance the proceeding by answering the common questions, and how many resources are saved in answering them commonly, as compared to what would happen if the proceeding were not certified and another method to answer the questions were employed: see *Brake* at paras. 85–86. Courts must adopt a practical cost-benefit approach, which includes a consideration of the impact of a class proceeding on class members, the defendants, and the court: *Fischer* at para. 21.

[143] Here, as noted, the common questions have minimal importance in relation to the claim as a whole and thus do virtually nothing to advance the claim. I therefore conclude that the Federal Court's conclusion on preferable procedure cannot stand.

E. *Did the Federal Court err in its costs award and what award should be made with respect to the costs of this appeal and cross-appeal?*

[144] I turn finally to the issue of costs. Contrary to what the Federal Court stated in this matter, in *Voltage FCA Security for Costs*, this Court did not decide that the fact that a proceeding was a reverse class proceeding constitutes an exceptional circumstance meriting an award of costs in favour of a successful defendant or respondent. Rather, in *Voltage FCA Security for Costs*, we stated only that the conclusion that this proceeding was an exceptional one meriting an award of costs might be reached.

[145] That said, I now decide that this proceeding does involve exceptional circumstances, given the nature of the claim made, the success of Mr. Salna here and below, the novel nature of the issues, and the amount of Mr. Salna's personal potential exposure for damages as compared to his costs.

[146] I also conclude that the amount awarded by the Federal Court was appropriate and agree that Mr. Salna is not a public interest litigant. I would therefore leave the Federal Court's costs award undisturbed.

[147] As concerns costs before this Court, a lesser amount than that awarded by the Federal Court is merited because much of the heavy lifting on the issues before this Court was done by the interveners. I would therefore award costs to Mr. Salna before this Court at the mid-point of Column IV of Tariff B to the *Federal Courts Rules*.

VI. Proposed Disposition

[148] I would accordingly dismiss this appeal, grant the cross-appeal in part, and vary the Federal Court's order to provide that the appellants' motion for certification is dismissed, without leave to reapply for certification. As I would find Mr. Salna largely successful before this Court, I would award him costs before this Court at the mid-point of Column IV of Tariff B to the *Federal Courts Rules*. I would make no costs award in respect of the interveners in accordance with the Order of this Court issued by Justice Woods on, January 11, 2024. Finally, I would amend the style of cause to name only Mr. Salna as respondent.

“Mary J.L. Gleason”

J.A.

“I agree.
Nathalie Goyette J.A.”

“I agree.
Monica Biringer J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-189-23

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, PROPOSED REPRESENTATIVE RESPONDENT ON BEHALF OF A CLASS OF RESPONDENTS AND SAMUELSON-GLUSHKO CANADIAN INTERNET POLICY & PUBLIC INTEREST CLINIC, BELL CANADA, COGECO CONNEXION INC., ROGERS COMMUNICATIONS CANADA INC., SASKTEL, TELUS COMMUNICATIONS INC., and XPLORE INC.

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: OCTOBER 29, 2024

REASONS FOR JUDGMENT BY: GLEASON J.A.

CONCURRED IN BY: GOYETTE J.A.
BIRINGER J.A.

DATED: JULY 16, 2025

APPEARANCES:

Kenneth R. Clark
Lawrence Veregin
Cynthia Zhang

FOR THE APPELLANTS
(RESPONDENTS BY CROSS-
APPEAL)
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

Sean N. Zeitz
Ian J. Klaiman

FOR THE RESPONDENT
(APPELLANT BY CROSS-
APPEAL)
ROBERT SALNA, PROPOSED
REPRESENTATIVE
RESPONDENT ON BEHALF OF A
CLASS OF RESPONDENTS

David Fewer

FOR THE INTERVENERS
SAMUELSON-GLUSHKO
CANADIAN INTERNET POLICY
& PUBLIC INTEREST CLINIC

Barry Sookman
Kendra Levasseur

BELL CANADA, COGECO
CONNEXION INC., ROGERS
COMMUNICATIONS CANADA
INC., SASKTEL, TELUS
COMMUNICATIONS INC., and
XPLORE INC.

SOLICITORS OF RECORD:

Aird & Berlis LLP
Toronto, Ontario

FOR THE APPELLANTS
(RESPONDENTS BY CROSS-
APPEAL)
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

Lipman, Zener & Waxman PC
Toronto, Ontario

FOR THE RESPONDENT
(APPELLANT BY CROSS-
APPEAL)

David A. Fewer
Ottawa, Ontario

McCarthy Tétrault LLP
Toronto, Ontario

ROBERT SALNA, PROPOSED
REPRESENTATIVE
RESPONDENT ON BEHALF OF A
CLASS OF RESPONDENTS

FOR THE INTERVENERS
SAMUELSON-GLUSHKO
CANADIAN INTERNET POLICY
& PUBLIC INTEREST CLINIC

BELL CANADA, COGECO
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