FEDERAL COURT OF APPEAL

PROPOSED CLASS PROCEEDING

B E T W E E N:

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, JAMES ROSE, and LORIDANA CERRELLI, PROPOSED REPRESENTATIVE RESPONDENTS ON BEHALF OF A CLASS OF RESPONDENTS

RESPONDENTS
(Appellants 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.

INTERVENERS

MEMORANDUM OF FACT AND LAW OF THE INTERVENER, THE SAMUELSON-GLUSHKO CANADIAN INTERNET POLICY & PUBLIC INTEREST CLINIC

Pursuant to Rules 109 and 369 of the Federal Court Rules

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Court File No. A-189-23

FEDERAL COURT OF APPEAL

PROPOSED CLASS PROCEEDING

B E T W E E N:

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

- and -

ROBERT SALNA, JAMES ROSE, and LORIDANA CERRELLI, PROPOSED REPRESENTATIVE RESPONDENTS ON BEHALF OF A CLASS OF RESPONDENTS

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.

INTERVENERS

MEMORANDUM OF FACT AND LAW

I. OVERVIEW

1. The Appellants (collectively, "Voltage") seek to overturn a decision of Justice Fothergill denying a motion seeking certification of a "reverse" class proceeding. The proposed respondent class comprises unnamed and in many cases unknowable individuals alleged to have infringed copyright. The proposed class members have not sought this remedy and do not even know that Voltage seeks to compel the formation of the class.

2. The class proceeding is both novel and potentially wide-ranging. It implicates interests beyond those of the parties to the proceeding, including the rights of Internet subscribers in Canada.

3. Voltage's claim hinges on infringement of the authorization right. Authorization liability is ill-suited to class litigation because it is inherently particularized and fact specific. In contrast, the particulars of every member of the proposed respondent class will be different. To address these issues, prosecution of the class litigation will require the creation of what in practice will become a judicially-crafted copyright small claims file-sharing tribunal – a creature not contemplated by Parliament.

4. Voltage's litigation plan for prosecuting its claim against present and future class members is unworkable.

    a. The particularized and fact-specific nature of authorization liability requires particularized and fact-specific defense strategies. Voltage offers no functional mechanism for providing class members with representation that will compensate defense counsel.

    b. The plan misuses the notice-and-notice regime as litigation support and raises privacy concerns that it cannot address.

5. CIPPIC is intricately linked with this proceeding – so much so that the CIPPIC has been mooted as potentially taking on the arguments of class counsel.[1]

II. FACTS

6. Voltage alleges that a large number of persons infringed or authorized the infringement of Voltage's copyright in its works through use of the BitTorrent file-sharing protocol.

7. Voltage alleges primary and secondary infringement by a proposed class of respondents. Voltage first brought an application for copyright infringement against numerous John Doe respondents identified only by their IP addresses. Upon obtaining a Norwich Order, Voltage identified Robert Salna as a proposed representative respondent.

8. **First Certification Motion Hearing** – The original certification motion decision by the

[1] *Voltage Pictures, LLC v Salna*, 2021 FCA 176 at paras 51 and 54 [*Salna* FCA].

Federal Court[2] concluded that Voltage's proposed reverse class proceeding should not be certified because Voltage failed to meet the conjunctive five-part test for certification.[3]

9. **Federal Court of Appeal** – The Federal Court of Appeal overturned the Federal Court's findings on all issues under Rule 334.16(1) , concluding that (1) there is a reasonable cause of action with respect to direct and authorizing infringement; and (2) there is an identifiable class of two or more persons. The Federal Court of Appeal referred the following questions back to the Court: (1) whether a class proceeding is the preferable procedure; and (2) whether there is a suitable representative respondent. It is unclear whether the Federal Court of Appeal made a conclusion on whether there are common questions of fact or law, however that question was not explicitly referred back to the Federal Court.[4]

10. **Second Certification Motion Hearing** – On re-hearing, Justice Fothergill of the Federal Court for a second time denied Voltage permission to proceed in its class lawsuit.[5] Justice Fothergill concluded that Voltage's litigation plan continued to be unworkable on the basis that it lacked a workable notice scheme and could not avail itself of the Copyright Act's notice-and-notice regime.[6] In addition, Justice Fothergill observed that "funding of class counsel is of paramount importance."[7]

11. **Decision in *Voltage v Doe #1*, 2023 FCA 194** - On September 27, 2023, the Federal Court of Appeal released a decision on the nature of authorization liability under the *Copyright Act*. In a decision involving a counsel for Voltage, Justice Rennie wrote that:

> copyright law is statutory, and that both "infringement" and "authorization" are statutory terms whose scope and content has been judicially defined (*CCH* at paras. 9 and 38; *SOCAN* at para. 82; *ESA* at paras. 71, 104-107; *Compo Co. Ltd. v. Blue Crest Music et al.*, 1979 CanLII 6 (SCC), [1980] 1 S.C.R. 357, 105 D.L.R. (3d) 249 at 372-273). In this way, *CCH*, *SOCAN*, *Rogers* and *ESA*

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[2] *Voltage Pictures, LLC v Salna*, 2019 FC 1412 at paras 156–164.
[3] *Federal Courts Rules*, SOR/98-106, Rule 334.16(1) [*Rules*].
[4] *Salna* FCA, supra note 1 at para 70.
[5] *Voltage Pictures, LLC v. Salna*, 2023 FC 893 [*Salna* Second Hearing].
[6] *Ibid* at para 85.
[7] *Ibid* at para 54.

> establish minimum evidentiary requirements of a successful claim of infringement. More specifically, this jurisprudence does two things: it prescribes certain facts that must be established to prove infringement, and it allows for the drawing of adverse inferences of infringement based on the overall state of the evidence.[8]

12. In *CCH Canadian Ltd v Law Society of Upper Canada*, Justice McLachlan, writing for the unanimous Court, stated that "Authorization is a question of fact that depends on the circumstances of each particular case".[9] Voltage continues to ignore the fundamental problem that its theory of the case is, by definition, based on the factually-distinct acts of different individuals in each of its cases.

III. POINTS IN ISSUE

13. CIPPPIC's position on the two points in issue that CIPPIC will address is that:

    a. A workable litigation plan must include a mechanism for compensating class counsel for its contribution to the success of the proceeding; and

    b. Voltage's litigation plan cannot avail itself of a notice scheme predicated on use of the notice-and-notice regime.

IV. SUBMISSIONS

A. A workable litigation plan must compensate class counsel

14. The appellants' litigation plan will inevitably entail case-by-case inquiries into the specific factual circumstances of each proposed class member as a consequence of the fact-specific nature of authorization claims. This nature was recently affirmed by the Supreme Court of Canada[10] and the Federal Court of Appeal.[11]

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[8] *Salna* FCA, *supra* note 1 at para 58 (citations omitted).

[9] *CCH Canadian Ltd v Law Society of Upper Canada*, 2004 SCC 13 at para 38 [*CCH*].

[10] *Society of Composers, Authors and Music Publishers of Canada v Entertainment Software Association*, 2022 SCC 30.

[11] *Salna* FCA, *supra* note 1, and *Voltage Holdings, LLC v Doe#1*, 2023 FCA 194 [*Voltage v Doe #1*]

15. The litigation plan proposed by the Appellants will inevitably entail the construction of a form of small claims tribunal pursuant to and consistent with Part 5.1 of the *Federal Court Rules*. This will have consequences for the workability of the Appellants' litigation plan as assessed under Rule 334.16(1)(e)(ii). Justice Fothergill made no reviewable error in considering the absence of a workable method for funding class counsel and so concluded that the plan could not advance the proceeding on behalf of the class members. This finding was factual, not merely speculative.

16. Voltage's litigation plan envisions adding new members on an ongoing basis after a determination on the merits against the Representative Respondent. Voltage's litigation plan leaves the possibility of continually adding respondents to the class open, as it only plans to name respondents after a hearing on the merits.

17. The absence of a scheme to compensate respondent counsel is fatal to the litigation plan given the complexity of the litigation. The plan will challenge respondent counsel with fairness, manageability and efficiency problems, for three reasons; (1) it must be open to the respondents to challenge the evidence against them; (2) a quasi-administrative tribunal would be necessary to support this; and (3) the costs of supporting this tribunal would be borne by the respondents.

1. Respondents must be able to challenge the evidence against them

18. The issues Voltage identifies for determination in the proposed proceedings require separate, individual determinations of fact for each class member. A factual inquiry is necessary to infer authorization.[12] There will be a need to conduct multiple repetitive proceedings to assess liability with its factual context. Any efficiency promised by Voltage for this Court in deciding the issues through a class proceeding will be lost due to the complexity of the fact driven issues which need to be individually tried. Class actions typically have a presumption of same-fact litigation; the presumption is undermined where evolving technology is used to identify infringers. The facts at issue will change as technology evolves and the Applicant employs updated or new software to identify potential respondents. As a matter of procedural fairness, respondents must be able to challenge the evidence in each particular case.

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[12] *Voltage v Doe #1*, *ibid*, at para 27.

19. A class proceeding does not create efficiencies for the Court as Voltage promises. Rather, Voltage's proposed litigation plan is unworkable as, despite acknowledging that individual mass proceedings will need to take place, Voltage does not explain how to resolve individualized determinations, nor how class counsel could engage effectively or efficiently with such a range of individual defendants. Nor does Voltage indicate how any mechanism for compensating class counsel – a point we return to below – could address the variable demands individuated hearings would necessitate.

2. The litigation plan requires a quasi-administrative tribunal

20. Given the volume of individual issues necessarily created, a reverse class proceeding would become unmanageable for counsel and necessitate the Court creating a system akin to a quasi-administrative tribunal. Other jurisdictions have crafted similar tribunals. But it is the legislators that do so. For example, New Zealand and the United States have tribunals that oversee individual claims of uploading and downloading copyrighted works. Comprehensive legislative schemes have accompanied the creation of tribunals in both jurisdictions.[13] Without an act of Parliament, the Federal Court will have to devise substantive, procedural, and administrative rules comparable to those drafted by legislatures in New Zealand and the United States.

21. At a minimum, this Court will need to determine how the Case Management Judge in Voltage's litigation plan will approach substantiative and procedural issue. Rules set out in New Zealand's Copyright Act and the *CASE Act* in the United States are informative on the various rules and procedures that this Court will need to create to support the envisioned case management system.

22. Substantive considerations include: (i) the procedure for determining questions of law that may arise;[14] (ii) the appeal process to higher courts;[15] (iii) how to address issues of

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[13] *Copyright Act 1994* (NZ), 1994/143, Part 10 [*Copyright Act* (NZ)]; *Copyright Alternative in Small-Claims Enforcement Act of 2020*, 17 USC §§ 1501-1511 (2020) [*CASE Act*].

[14] *Copyright Act* (NZ), *ibid* s 223; *CASE Act*, *ibid* at §§ 1506(m)(2).

[15] *Copyright Act* (NZ), *ibid* s 224; *CASE Act*, *ibid* §§ 1503(g).

conflicting precedent;[16] and (iv) the types of costs that can be awarded.[17]

23. Procedural considerations include: (i) limits on discovery;[18] (ii) types of evidence that can be considered in a proceeding;[19] (iii) service of notice and claims;[20] (iv) liability for contempt of tribunal;[21] (v) rules on non-attendance or refusal to co-operate;[22] and (vi) when to strike out, determine or adjourn proceedings.[23]

24. The volume of cases will provoke administrative issues. Legislatures typically determine these issues by regulation: the jurisdiction of the case management judge,[24] filing requirements and procedures,[25] the publication of decisions,[26] the costs and service of motions and application forms,[27] funding requirements,[28] and support staff.[29]

25. Voltage's litigation plan does not address the substantive, administrative and procedural burden that prosecution of the reverse class proceeding will place on the Court and – fatally – Class Counsel. The extra-legislative small claims file-sharing tribunal, called into being and overseen as a creature of an Order of a Federal Court judge, will place particular burdens on Class Counsel who will be called into action not only to defend individuals with an infinite variety of particularized circumstances, but to participate in the creation, on the fly, of the extra-legislative tribunal.

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[16] *CASE Act, ibid* §§ 1506(a)(2).
[17] *Copyright Act* (NZ), *ibid*, s 222.
[18] *CASE Act, supra* note 13, §§ 1506(m).
[19] *Copyright Act* (NZ), *supra* note 13, s 215; *CASE Act, ibid* at §§ 1506(o).
[20] *Copyright Act* (NZ), *ibid*, s 217; *CASE Act, ibid*, §§ 1506(g).
[21] *Copyright Act* (NZ), *ibid*, s 221.
[22] *Ibid*, s 220.
[23] *Ibid*, s 214A; *CASE Act, supra* note 13, §§ 1506(p).
[24] *Copyright Act* (NZ), *ibid*, s 211.
[25] *Copyright (Infringing File-sharing) Regulations 2011* (NZ), SR 2011/252, s 9 [*Copyright Regulations* (NZ)].
[26] *Copyright Act* (NZ), *supra* note 13, s 214; *CASE Act, supra* note 13, §§ 1506(t)(3).
[27] *Copyright Regulations* (NZ), *supra* note 25, s 8; *CASE Act, ibid*, §§ 1506(g).
[28] *CASE Act, ibid*, §§ 1511.
[29] *Ibid* at §§ 1502(b)(8).

3. Costs of the tribunal's operation are to be borne by the class

26. Voltage's envisioned system will require funding. In the United States and New Zealand, the taxpayer funds equivalent systems. The Federal Court is not funded to craft and operate the equivalent of a copyright small claims file-sharing tribunal.

27. Voltage's litigation plan expects class members to pay for the construction and operation of the tribunal. As a result, the class will end up paying not only to enforce the plaintiff's rights, but also to create the judicial mechanism of their censure. Class members could reasonably expect taxpayers to bear costs covering administration of the tribunal since such costs amount to funding an aspect of the judicial system.

28. Justice Fothergill astutely noted the financial challenge to Class Counsel inherent in Voltage's litigation plan:

> [89] In *Condon v Canada*, 2018 FC 522, Justice (now Associate Chief Justice) Jocelyne Gagné said the following about the need to ensure a sufficient financial incentive for class counsel (at para 91):
>
> > This Court, and courts across Canada, have recognized that the viability of class actions depends on entrepreneurial lawyers who are willing to take on these cases, and that class counsel's compensation consequently must reflect this reality. Compensation must be sufficiently rewarding to "provide a real economic incentive to lawyers to take on a class proceeding and to do it well". [Citations omitted]
>
> [90] This principle applies equally to respondent or defendant class counsel in reverse class actions.[30]

29. CIPPIC has over the course of this hearing been mooted as a potential participant in the functioning of Voltage's proposed remedial scheme far beyond the limited intervention

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[30] *Salna* Second Hearing, supra note 5 at para 89.

role it has played to date. Accordingly, CIPPIC has taken particular interest in the functioning of the remedial mechanisms Voltage has proposed. It is impossible to state with any clarity the potential for CIPPIC to recover costs or staff its services sufficiently to address the needs of the class.

B. The appellants' use of the notice-and-notice regime is unworkable

30. The appellants' adoption of a policy-oriented interpretation of the notice-and-notice regime pushes aside Parliament's legislative intent. Justice Fothergill's interpretation of the regime in the Court below is consistent with CIPPIC's approach: the regime can have no part to play in the notification function at the heart of a class proceeding. In the absence of any alternative, the Appellants fail to offer a workable method of notifying class members as to how the proceeding progresses.

31. CIPPIC raises two concerning aspects of Voltage's proposed litigation plan:[31] (1) Voltage's reliance on the notice-and-notice regime as a litigation support mechanism violates its rationale and unbalances the *Copyright Act*; and (2) Voltage's litigation plan imposes burdens on ISPs that raise privacy concerns for individual subscribers.

1. Notice-and-notice is not a litigation support regime

32. Voltage's litigation plan relies heavily on ISP's notice-and-notice regime to facilitate service and expedite prosecution of its class proceeding.[32] Statutory interpretation of sections 41.25 and 41.26 of the *Copyright Act* addressing the notice-and-notice regime[33] demonstrates that Parliament intended the regime to serve as a warning system intended to deter copyright infringement. Parliament did not intend for its use in the context of litigation or as an instrumental part of class proceedings.

33. The function of the notice-and-notice regime is apparent from the text, context, and purpose of the Act.[34] The Supreme Court previously interpreted the notice-and-notice regime in *Rogers v Voltage* as having only two purposes: "(1) to deter online copyright

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[31] *Rules*, *supra* note 3, Rule 334.16 (1)(e)(iii).
[32] Voltage Litigation Plan, AB Tab 32, p 2024.
[33] *Copyright Act*, RSC 1985, c C-42, ss 41.25, 41.26.
[34] *Rizzo & Rizzo Shoes Ltd (Re)*, [1998] 1 SCR 27 at para 21.

infringement; and (2) to balance the rights of interested parties."[35] Voltage's proposed use of the regime as a litigation support tool represents a departure from both of these purposes. Voltage's litigation plan moves the notice-and-notice regime beyond its deterrence purpose into an enforcement role and thereby deliberately undermines the regime's balanced purpose. Voltage seeks to unbalance the notice-and-notice regime to favour copyright owners at the expense of Internet subscribers in a manner exactly contrary to how Parliament balanced the competing rights of these interests.

34. The limited scope of the application of notice-and-notice provisions of the *Copyright Act* is supported by statutory interpretation of text, context, and purpose.

a) The text of the *Act* distinguishes litigation and notice-and-notice.

35. The words of sections 41.25 and 41.26 of the *Copyright Act*, in their ordinary meaning, do not contemplate the use of the notice-and-notice regime in the context of litigation. Rather, the words of sections 41.25 and 41.26 contemplate litigation as occurring outside of the scope of the notice-and-notice regime.

36. Section 41.26 "contemplates that a copyright owner may sue a person who receives a notice under the regime," demonstrating that the intention behind the notice-and-notice regime is not to "embody a comprehensive framework by which instances of online copyright infringement could be eliminated altogether."[36] Data retention as required by the notice-and-notice regime is to create a record that "could be used if court proceedings were to follow at some time in the future," not to create a record as a part of court proceedings that were initiated prior to the issuance of a notice.[37]

b) Context precludes the use of notice-and-notice in litigation

37. In enacting the notice-and-notice regime, Parliament insulated ISPs from liability for authorization, thereby signalling Parliament's intent to limit ISPs' involvement in

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[35] *Rogers Communications Inc v Voltage Pictures, LLC*, 2018 SCC 38 at para 22 [*Rogers v Voltage*].

[36] *Ibid* at para 24.

[37] Bill C-11, *An Act to amend the Copyright Act, House of Commons Debates*, 47-1, vol 146, No 78 (10 February 2012) at 1015 (Mr. Scott Armstrong).

copyright infringement litigation. The *Copyright Modernization Act* coupled the original notice-and-notice provisions with section 31.1 which explicitly shields ISPs from liability for authorization.[38]

38. The *Copyright Act* omits any Norwich order mechanism in its notice-and-notice regime, further limiting the regime's involvement in litigation. Similar US legislation includes such a mechanism. The US mechanisms that operate as litigation support tools involving ISPs include §512(h) of Title 17, which authorizes a copyright owner to request a Norwich order from a court. Parliament explicitly considered and rejected the US notice-and-takedown approach for addressing online infringement.[39]

39. Contextual analysis demonstrates that the legislature chose to implement the notice-and-notice regime to impose no duty on ISPs to take active steps to stop infringements. Contrast, for example, liability of enablement service providers under sections 27(2.3) and 27(2.4)(d) of the Copyright Act, also enacted by the *Copyright Modernization Act*. There, a Court may consider "any action taken" by a service provider "to limit acts of copyright infringement."[40] If Parliament wanted ISPs to take an active role in limiting acts of copyright infringement, it would have imposed such an obligation.

c) Parliament intended notice-and-notice as normative regulation

40. Purposive analysis demonstrates that Parliament's intent in enacting the notice-and-notice regime was normative, rather than compulsive. The regime fulfils two purposes: (1) deterrence, rather than elimination, of online copyright infringement; and (2) balancing the interests of all stakeholders.

41. The purpose of the notice-and-notice regime is "to balance the interests of all stakeholders in the copyright regime."[41] This balancing purpose reflects Parliament's

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[38] *Copyright Modernization Act*, SC 2012, c 20, ss 35, 47.

[39] See "Bill C-11, An Act to amend the Copyright Act", *House of Commons Debates*, 41-1, vol 146, No 31 (18 October 2011) at 1050 (Hon James Moore) ("We disagree with the American approach with regard to copyright").

[40] *Act*, *supra* note 33, ss 27(2.3), 27(2.4)(d).

[41] *Rogers v Voltage*, *supra* note 35 at para 25 citing "Bill C-11, An Act to amend the Copyright Act", *House of Commons Debates*, 41-1, vol 146, No 31 (18 October 2011)

intent that notice-and-notice should not offer a direct remedy for infringement. Had Parliament intended the notice-and-notice regime to create direct consequences for infringers, Parliament could have provided for the service of statement of claims by notice, or legislated positive duties for recipient subscribers, or other enforcement mechanisms (or even penalties on, for example, repeat receipt of notices). Parliament chose not to do so. Rather, the notice-and-notice regime Parliament actually enacted precludes the possibility that notices include settlement offers, or requests or demands. The Act imposes no duty to act or other enforcement mechanism or penalty on subscribers in receipt of a notice.

42. Parliament could have implemented a notice-and-takedown system as a litigation support tool similar to what Voltage is proposing here, but chose not to do so. The notice-and-notice regime is preferable to notice-and-takedown because it accounts "for the interests of Internet subscribers by maintaining the presumption of innocence and allowing them to monitor their own behaviour."[42] This distinction serves the balance that Parliament sought to strike in enacting the notice-and-notice regime. Adapting the notice-and-notice regime into a litigation support tool would create an imbalance by taking away Internet subscribers' opportunity to address the alleged infringement occurring on their internet accounts.

43. Parliament enacted notice-and-notice as a regime distinct from court proceedings. This is reflected in the discussions had in numerous committee meetings regarding the efficacy of the notice-and-notice regime as an extrajudicial tool to be used as a warning system.[43] Additionally, Parliamentary debates reflect the intent to enact notice-and-notice as nothing more than an extrajudicial tool where MPs imply that court proceedings are initiated subsequently to the sending of notices through the notice-and-notice regime.[44]

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at 1035 (Hon. Christian Paradis).

[42] *Rogers v Voltage, supra* note 35 at para 26.

[43] See e.g., House of Commons, Legislative Committee on Bill C-32, *Evidence*, 40-3, No 19 (22 March 2011) where the Legislative Committee on Bill C-32 – an earlier Bill similarly attempting to legislate the notice-and-notice regime – discusses the efficacy of notice-and-notice as a warning system.

[44] See e.g., Bill C-11, An Act to amend the Copyright Act", *House of Commons Debates*,

44. The Supreme Court of Canada also affirmed that notice-and-notice is meant to occur prior to court proceedings, citing a Rogers representative in a House of Commons committee meeting stating 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 infringer to court."[45]

2. The proposed use of notice-and-notice raises privacy concerns

45. Internet Service Providers are subject to the *Personal Information and Electronic Documents Act* ("PIPEDA")[46] because they are federally regulated telecommunications undertakings.[47] Under PIPEDA, personal information includes factual information about identifiable individuals. Emails collected from customers by ISPs for the purpose of the notice-and-notice scheme and the litigation plan are personal information because they often include a customer's first and last name and could be linked to other information in a customer's profile.[48]

46. Voltage's litigation plan presents a privacy concern for Canadian Internet subscribers in three ways: (i) the litigation plan places Internet subscriber personal information at risk; (ii) the litigation plan risks overwhelming ISP safeguards; and (iii) the litigation plan would burden subscribers with additional costs.

a) The litigation plan risks Internet subscriber personal information

47. The litigation plan requires that ISPs collect and store personal information related to allegedly infringing activities of subscribers identified through their IP addresses.[49] This places a burden on ISPs to store and manage information that is not connected to their businesses but to the interests of the Applicant. An ISP representative has

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47-1, vol 146, No 78 (10 February 2012) at 1015 (Mr. Scott Armstrong) ("This record could be used if court proceedings were to follow at some time in the future.").

[45] *Rogers v Voltage*, *supra* note 35 at para 24 citing House of Commons, Legislative Committee on Bill C-32, *Evidence*, 40-3, No 19 (22 March 2011) at p 10.

[46] SC 2000, c 5 [*PIPEDA*].

[47] *BMG Canada Inc v John Doe*, 2005 FCA 193 at para 13. See also *PIPEDA*, *supra* note 46 at s 2(1).

[48] Statement of Phillip Deschamps in response to Written Cross-Examination (Bell Canada), AB Tab 29, at SR-1371–72 [Deschamps Statement].

[49] Deschamps Statement, *supra* note 48.

expressed concern that this could allow malicious third parties to obtain contact information about ISP subscribers in bulk by issuing false claims of copyright infringement, since ISPs lack the capacity to cross-check all notices with Court records to confirm claim validity.[50] This raises privacy concerns for individual subscribers. Canadians rightly expect the businesses they transact in will employ adequate safeguards to maintain the security the personal information they require to operate their business.[51] This also challenges subscriber expectations of ISP accountability for the personal information they collect.[52]

48. The principle of data minimization means that data controllers should limit collection of personal information to what is directly relevant and necessary to accomplish specificized purposes.[53] Data should be kept only as long as needed. The litigation plan increases the data retention obligations on ISPs.[54] ISPs are only required to retain information for a year under the existing regime. The proposed litigation plan would require ISPs to retain records indefinitely: until the "final determination of the hearing on the merits (including any appeals)".[55]

b) The litigation plan may overwhelm ISP safeguards

49. ISPs are responsible for gatekeeping their subscribers' informational privacy. The litigation plan threatens the safeguards ISPs currently employ to do so. The litigation plan envisions an automated process that utilizes ISPs' existing notice-and-notice systems to send certification notices to customers.[56] However, the increase in notices and Norwich orders that would result from the litigation plan would increase the burden placed on ISPs. The current software and data protection applications developed for the notice-and-notice system are insufficient to triage and manage the increase in data

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[50] Deschamps Statement, *supra* note 48.

[51] *PIPEDA*, *supra* note 46, Principle 7, Safeguards.

[52] *PIPEDA*, *supra* note 46, Principle 1, Accountability.

[53] *PIPEDA*, *supra* note 46, Schedule 1, Clause 4.4, Principle 4 – Limiting Collection.

[54] Voltage Litigation Plan, *supra* note 32 para b (viii).

[55] Voltage Amended Litigation Plan, Exhibit A to the Affidavit of Phillip Deschamps sworn November 30, 2022 (Bell Canada), AB Tab 22 [Deschamps Affidavit].

[56] Voltage Litigation Plan, *supra* note 32 at paras b, h and i.

that ISPs are required to retain.[57] This will place a particular strain on smaller ISPs because ISP notice-and-notice systems are already complex and expensive to develop and modify.[58] Further changes will require retraining and relearning software because the ISPs no longer employ many of the original developers.[59] Troubleshooting and increased use will require increased human intervention.[60] Automation of notices risks further error: inaccurate notices will irreversibly put personal information at risk.[61]

c) The litigation plan would burden subscribers with additional costs

50. ISP subscribers will likely bear the costs of ISPs offering this litigation support service to Voltage. Without a clear means for remunerating ISPs for this service – if at all – ISPs will likely amortize costs through their customer base. Internal resources consumed by changes to software and data servers will be proportionally more significant to ISPs with smaller customer bases, meaning that Voltage's litigation plan could impact the competitiveness of the ISP marketplace.[62]

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 26th day of March, 2024

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[57] Affidavit of Greg McColl sworn November 30, 2022 (Cogeco), AB Tab 21 at para 11.

[58] Affidavit of Christine Prudham sworn November 30, 2022 (Xplore), AB Tab 20 at para 20 [Prudham Affidavit].

[59] Deschamps Affidavit, *supra* note 55 at para 21.

[60] Affidavit of Scott Moskall sworn November 30, 2022 (SaskTel), AB, Tab 19 at paras 27–28.

[61] Jason Millar and Ian Kerr "Delegation, Relinquishment and Responsibility: The Prospect of Robot Experts" in Ryan Calo, A Michael Froomkin, Ian Kerr, eds, *Robot Law* (Edward Elgar Press, 2014).

[62] Prudham Affidavit, *supra* note 58.

V. AUTHORITIES

Statute or Regulation
Copyright Act, RSC 1985, c C-42, ss 2.4(1.1), 3(1)(f), 27(2.3), 27(2.4)(d), 31.1(1), 41.25, 41.26.
Copyright Act 1994 (NZ), 1994/143, Part 10.
Copyright Alternative in Small-Claims Enforcement Act of 2020, 17 USC §§ 1501-1511 (2020).
Copyright Modernization Act, SC 2012, c 20, ss 35, 47.
Copyright (Infringing File-sharing) Regulations 2011 (NZ), SR 2011/252.
Federal Courts Rules, SOR/98-106, Rule 334.16(1).
Personal Information and Electronic Documents Act, SC 2000, c 5.
Cases
BMG Canada Inc v John Doe, 2005 FCA 193
CCH Canadian Ltd v Law Society of Upper Canada, 2004 SCC 13.
Entertainment Software Association v Society of Composers, Authors and Music Publishers of Canada, 2012 SCC 34.
Rizzo & Rizzo Shoes Ltd (Re), [1998] 1 SCR 27.
Rogers Communications Inc v Voltage Pictures, LLC, 2018 SCC 38.
Society of Composers, Authors and Music Publishers of Canada v Entertainment Software Association, 2022 SCC 30.
Voltage Holdings, LLC v Doe#1, 2022 FC 827.
Voltage Holdings, LLC v Doe#1, 2023 FCA 194
Voltage Pictures, LLC v Salna, 2019 FC 1412.
Voltage Pictures, LLC v Salna, 2021 FCA 176.

Secondary Materials
"Bill C-11, An Act to amend the Copyright Act", *House of Commons Debates*, 41-1, vol 146, No 31 (18 October 2011).
"Bill C-11, An Act to amend the Copyright Act", *House of Commons Debates*, 47-1, vol 146, No 78 (10 February 2012).
House of Commons, Legislative Committee on Bill C-32, *Evidence*, 40-3, No 19 (22 March 2011) at p 10.
Jason Millar and Ian Kerr "Delegation, Relinquishment and Responsibility: The Prospect of Robot Experts" in Ryan Calo, A Michael Froomkin, Ian Kerr, eds, *Robot Law* (Edward Elgar Press, 2014).