

**SIMPLIFIED ACTION
FEDERAL COURT
PROPOSED CLASS PROCEEDING**

BETWEEN:

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

APPLICANTS

- 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 AND PUBLIC INTEREST
CLINIC**

INTERVENER

MEMORANDUM OF FACT AND LAW OF THE INTERVENER

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PART I – OVERVIEW

1. This is a motion for certification of a proposed reverse class proceeding by five applicants against a proposed class of unidentified respondents. CIPPIC’s position is that the proposed reverse class proceeding should not be certified.
2. The Law Commission of Ontario (“LCO”) has acknowledged the rising number of class action proceedings in Ontario and across Canada in its recent report and has cautioned Courts about meritless or frivolous class actions. The LCO defined meritless or frivolous class actions to include cases that have weak legal arguments, weak evidentiary records, little potential benefit to or interest from individual class members, little potential impact on behaviour modification, or are cases that are otherwise not suitable for class actions. The proposed reverse class proceeding exemplifies the LCO’s definition of a meritless or frivolous class action.

Law Commission of Ontario, *Class Actions: Objectives, Experiences, and Reforms*, Final Report (Toronto: July 2019) at 40-41 [LCO Final Report].

PART II – STATEMENT OF FACTS

3. CIPPIC is a body established by the University of Ottawa to research and advocate on important public policy issues involving the intersection of law and technology from a public interest perspective. CIPPIC's mandate includes intervening before courts, tribunals, and other decision-making bodies on such issues in order to bring forward important points or perspectives that might otherwise not be represented. CIPPIC has a particular interest in the legal issues raised in this proceeding insofar as their determination will impact the rights and obligations of internet users, internet subscribers, and Internet Service Providers (“ISPs”).

Voltage’s Claim

4. The Applicants (“Voltage”) makes claims against numerous unknown individuals for copyright infringement. This is in line with their previous three suits in Canada and 96 suits in the United States alleging copyright infringement.

Affidavit of Johann Kwan sworn September 6, 2019, Interveners’ Motion Record, Tab 1 at paras 8 and 13 (“Kwan Affidavit”).

5. Voltage claims that a large number of persons have infringed or authorized the infringement of Voltage's copyright in the Works via BitTorrent protocol or authorized such sharing. Voltage claims to have identified only one person, Robert Salna, whose Internet Protocol ("IP") address was allegedly associated with the infringing activity. Voltage admits that, even with the IP address, it does not know who uploaded the Works. It does not know whether Robert Salna, James Rose, or Lorida Cerrelli—or some unknown third party—made the Works available for upload.

Affidavit of Benjamin Perino at paras (s)-(u), Applicants' Motion Record, Tab 2 at 13; Transcripts of the Cross-Examination of Benjamin Perino held September 6, 2019, qq. 14-28 ("Perino Transcript").

IP Addresses

6. An IP address is a numerical identifier assigned to a device so as to allow it to communicate with other devices via Internet Protocol. ISPs assign IP addresses to devices on their networks. These IP addresses are subject to change. This change can be initiated by the ISP or individuals.

Affidavit of Timothy Lethbridge sworn September 9, 2019, Interveners' Motion Record, Tab 2 ("Lethbridge Affidavit") at para 5.

7. While a public-facing IP address is unique, it is not necessarily tied to any one device or individual. For example, all computers using a coffee shop's free internet may share an IP address. Likewise, all members of a household, like roommates, or guests thereof using household internet, will share an IP address. Benjamin Perino, Voltage's only witness, admitted during cross-examination that an IP address cannot be associated with a particular individual as opposed to equipment such as an internet router. He further admitted that much more evidence would be required to identify an individual who carried out particular internet activity associated with an IP address.

Lethbridge Affidavit at paras 6-8; Perino Transcript qq. 59-61.

8. If a subscriber maintains an open, non-password protected WiFi network then any stranger within range could connect. That stranger's behaviour would be attributed to the subscriber's account. Similarly, a guest entrusted with a network password might share it

with others, allowing third parties to connect to the network without the subscriber's knowledge.

Lethbridge Affidavit at para 8.

9. Individuals can obscure their IP address to some extent by using anonymizing services and Virtual Private Networks ("VPNs"). Their new IP address may be shared with other users. Alternatively, a malicious individual could surreptitiously infiltrate an individual's computer or network, thereby associating his or her traffic with that of the innocent internet subscriber, under the same IP address.

Lethbridge Affidavit at para 8.

10. The result is that it may in some circumstances be possible to trace traffic or behaviour associated with an IP address to a particular physical address. However, it is not possible on that basis to impute that behaviour to a particular individual, including the account holder. An examination of the actual computers using that IP address at the relevant time may be required. Associating an IP address with particular internet activity does not identify the individual responsible for that activity. A further fact-finding inquiry is required to understand who might be responsible for that activity.

Lethbridge Affidavit at para 9; Perino Transcript q. 61.

PART III – POINTS IN ISSUE

11. The point in issue in this motion is whether the Application filed by Voltage should be certified as a reverse class proceeding under Rule 334.16 of the *Federal Courts Rules*.

PART VI – STATEMENT OF SUBMISSIONS

12. CIPPIC submits that the proposed reverse class proceeding should not be certified under Rule 334.16 because: A) Voltage's claim does not disclose a reasonable cause of action; B) there is no identifiable class of two or more persons with an objective class definition; C) there are no common issues that advance the litigation; and D) a reverse class proceeding is not the preferable procedure.

A. Voltage’s claim does not disclose a reasonable cause of action.

13. Voltage’s Notice of Application purports to make three claims: (1) offering a Work (as defined therein) for download contrary to Section 27(1) of the *Copyright Act*, (2) secondary infringement of copyright in the Works contrary to Section 27(2) of the *Copyright Act*, and (3) authorizing others to infringe copyright in the Works contrary to Section 27(2.3) of the *Copyright Act*. Voltage has not pleaded the necessary facts to disclose a cause of action for any of these three claims. Because Voltage’s pleadings do not disclose a reasonable cause of action, certification should be denied.

Pro-Sys Consultants Ltd. v. Microsoft Corporation, 2013 SCC 57 at para 63 [*Pro-Sys*]. See also *Hollick v. Toronto (City)*, [2001] 3 SCR 158 at para 25 [*Hollick*]; *Alberta v. Elder Advocates of Alberta Society*, [2011] 2 SCR 261 at para 20 [*Alberta*].

14. The test to satisfy the reasonable cause of action requirement is whether it is “plain and obvious” that Voltage’s pleadings, assuming the facts pleaded to be true, disclose no reasonable cause of action. Voltage must establish that there is a reasonable prospect of success should the claim be permitted to proceed towards trial. While the facts alleged are assumed to be true, they must still be pleaded in support of each cause of action. Bald assertions of conclusions are not allegations of material fact and cannot support a cause of action.

Canada v. John Doe, 2016 FCA 191 at para 23 [*Doe*].

1. Voltage has not identified any respondents for its direct infringement claims.

15. Voltage’s first two claims, offering for download and secondary infringement, are made against alleged “Direct Infringers” whom Voltage defines as individuals who committed the infringing acts. These alleged “Direct Infringers” are purportedly members of the respondent class as defined by Voltage in its Notice of Motion. However, Voltage has not provided any description as to who these parties are or how they may be identified. The Notice of Application acknowledges that “each of the proposed Class Members has been identified by an IP address that is located in Canada.” It further acknowledges that the

alleged “Direct Infringers” may not be the same individuals as the persons whose IP address Voltage has identified through its forensic software. But it does not state who the alleged “Direct Infringers” are, and does not identify or describe a single person as a “Direct Infringer.” In fact, Voltage pleads that the internet subscribers—whose IP addresses Voltage claims to have traced—“should have, and ought to have, the knowledge of who was using [their] internet account at the specifically identified date and time.” Voltage has failed to plead the facts necessary to identify even a single respondent for its “offering for download” and “secondary infringement” claims. Without an identifiable respondent, it is plain and obvious that Voltage’s claims cannot succeed.

Voltage Notice of Application, Interveners’ Motion Record, Tab 3 at paras 23, 29-30. See also Lethbridge Affidavit at paras 6–9; Perino Transcript at qq. 23–28, 58.

2. Voltage has not pleaded the necessary facts for its “advertising the work for download” and “secondary infringement” claims.

16. Voltage claims that each member of the proposed class “advertised by way of the BitTorrent protocol that a Work was available for download by each proposed Class Member.” This is not a recognised cause of action under the *Copyright Act*. Copyright law is statutory: the rights and remedies of copyright owners are provided exclusively in the *Copyright Act* and cannot be derived from any other source. Further, the claim lacks material particulars. Voltage has not pleaded any facts describing the acts of the putative class members on which it bases its claim. It does not state how the putative class members advertised the availability of the Works for download. The “plain and obvious” test cannot be fulfilled by making bald, conclusory statements. Without any material facts pleaded or a legal foundation under the *Copyright Act*, it is plain and obvious that Voltage’s claim of advertising the Works for download must fail.

Doe at para 25; *Compo Co. v. Blue Crest Music Inc.*, [1980] 1 SCR 357 at 373 [*Compo*].

17. Voltage has not pleaded the facts necessary to make out a case of secondary infringement. Secondary infringement is dealt with in sub-section 27(2) of the *Copyright*

Act. The Supreme Court of Canada held that three elements must be proven to establish secondary infringement: (1) a primary infringement; (2) the secondary infringer should have known that he or she was dealing with a product of infringement; and (3) the secondary infringer sold, distributed or exposed for sale the infringing goods. The Court also observed that the most straightforward form of secondary infringement arises when one sells a copy of an infringing work.

CCH Canadian Ltd. v. Law Society of Upper Canada, 2004 SCC 13 at para 81 [*CCH*]; *Kraft Canada Inc. c. Euro Excellence Inc.*, 2007 CarswellNat 2087, 2007 CarswellNat 2088, 2007 SCC 37, 59 C.P.R. (4th) 353, [2007] 3 S.C.R. 20 at para 19 [*Kraft*]; *Copyright Act*, R.S.C. 1985, c. C-42, s.27(2).

18. Voltage has not pleaded any of these facts. Voltage's Notice of Application and Notice of Motion do not plead any primary infringement of their Works occurring before the alleged infringements were committed by the alleged members of the proposed class. Voltage does not plead that the alleged infringers knew they were dealing with a product of infringement. Finally, it does not claim that the alleged class members committed any of the acts specified in sub-section 27(2), namely, that they sold or rented the Works or distributed the Works to an extent prejudicially affecting Voltage, or did anything with the Works by way of trade or possessed or imported the Works for such practice. It is plain and obvious that without pleading the material facts necessary to make out secondary infringement, Voltage's claim cannot succeed.

3. Voltage has not pleaded the facts necessary to disclose a claim of authorization.

19. Voltage claims that the alleged "Authorizing Infringers" authorized "others" to commit the infringing acts, thereby contravening Section 27(2.3) of the *Copyright Act*.

Voltage Notice of Application, Interveners' Motion Record, Tab 3 at para 44; Amended Notice of Motion, Applicants' Motion Record, Tab 1 at 2.

20. Section 27(2.3) and the related Section 27(2.4) of the *Copyright Act* state as follows:

<p>Infringement generally</p> <p>27 (1) ...</p> <p>Infringement — provision of services</p> <p>(2.3) It is an infringement of copyright for a person, by means of the Internet or another digital network, to provide a service primarily for the purpose of enabling acts of copyright infringement if an actual infringement of copyright occurs by means of the Internet or another digital network as a result of the use of that service.</p> <p>Factors</p> <p>(2.4) In determining whether a person has infringed copyright under subsection (2.3), the court may consider</p> <p>(a) whether the person expressly or implicitly marketed or promoted the service as one that could be used to enable acts of copyright infringement;</p> <p>(b) whether the person had knowledge that the service was used to enable a significant number of acts of copyright infringement;</p> <p>(c) whether the service has significant uses other than to enable acts of copyright infringement;</p> <p>(d) the person’s ability, as part of providing the service, to limit acts of copyright infringement, and any action taken by the person to do so;</p>	<p>Règle générale</p> <p>27 (1) ...</p> <p>Violation relative aux fournisseurs de services</p> <p>(2.3) Constitue une violation du droit 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.</p> <p>Facteurs</p> <p>(2.4) Lorsqu’il s’agit de décider si une personne a commis une violation du droit d’auteur prévue au paragraphe (2.3), le tribunal peut prendre en compte les facteurs suivants :</p> <p>a) le fait que la personne a fait valoir, même implicitement, dans le cadre de la commercialisation du service ou de la publicité relative à celui-ci, qu’il pouvait faciliter l’accomplissement d’actes qui constituent une violation du droit d’auteur;</p> <p>b) le fait que la personne savait que le service était utilisé pour faciliter l’accomplissement d’un nombre important de ces actes;</p> <p>c) le fait que le service a des utilisations importantes, autres que celle de faciliter</p>
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<p>(e) any benefits the person received as a result of enabling the acts of copyright infringement; and</p> <p>(f) the economic viability of the provision of the service if it were not used to enable acts of copyright infringement.</p>	<p>l’accomplissement de ces actes;</p> <p>d) la capacité de la personne, dans le cadre de la fourniture du service, de limiter la possibilité d’accomplir ces actes et les mesures qu’elle a prises à cette fin;</p> <p>e) les avantages que la personne a tirés en facilitant l’accomplissement de ces actes;</p> <p>f) la viabilité économique de la fourniture du service si celui-ci n’était pas utilisé pour faciliter l’accomplissement de ces actes.</p>
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21. Any cause of action arising from Section 27(2.3) must be based on facts that show that “a **service**” was provided “**primarily** for the purpose of enabling acts of copyright infringement” and infringement occurred “**as a result** of the use of that service” (Emphasis added). Parliament has carefully detailed the factors that Courts may consider to determine whether the elements of Section 27(2.3) have been established. To establish a claim under Section 27(2.3), therefore, the existence of at least some of these factors must be pleaded. Voltage’s pleadings do not canvass any such facts.
22. Crucially, Voltage has failed to plead any facts to establish that the alleged “Authorizing Infringers” had knowledge of the infringing acts before Voltage initiated legal action. Knowledge of the infringement is a necessary, but not sufficient, element of any authorization claim under the *Copyright Act*. In *SOCAN*, on which Voltage relies, the Supreme Court of Canada observed in *obiter* that “notice of infringing content, and a failure to respond by ‘taking it down’ may **in some circumstances** lead to a finding of ‘authorization’” (Emphasis added). The Court further emphasized that in a claim of authorization, “all would depend on the facts.” Parliament helpfully provided a list of such facts and circumstances which must be pleaded and proved to establish a claim of authorization. Voltage has not pleaded any such facts.

Society of Composers, Authors & Music Publishers of Canada v. Canadian Association of Internet Providers, 2004 SCC 45 at paras 127–28 [SOCAN]; *Copyright Act*, R.S.C. 1985, c. C-42, s.27(2.4).

23. Voltage has made a bald, conclusory statement that the “activities of [Robert Salna] and each proposed Class Member are carried out intentionally, with full knowledge that what they are doing infringes copyright.” Voltage does not plead that it notified Robert Salna or any alleged member of the proposed class that it had identified their IP address as being associated with copyright infringement of the Works. Voltage does not plead any underlying facts supporting its conclusion. As the Federal Court of Appeal aptly observed regarding the “reasonable cause of action” requirement, “while the facts alleged are assumed to be true, they must still be pleaded in support of each cause of action. Bald assertions of conclusions are not allegations of material fact and cannot support a cause of action.” Voltage has not met this burden.

Doe at para 23.

24. Voltage, in its Memorandum of Fact and Law, relies on *SOCAN* to suggest that, in some circumstances, an internet service provider’s failure to take down infringing content once notified could lead to a finding of copyright infringement. In *SOCAN*, the Supreme Court of Canada dealt with the potential liability of Internet Service Providers (like Rogers, Bell, etc.) for copyright infringing content being communicated online. It did not address internet subscribers who share their internet account among multiple users. Further, the solution mooted by the Court in *SOCAN*—a “notice-and-take-down” system—was rejected by Parliament. Parliament instead introduced the Notice-and-Notice regime that immunized ISPs from liability as long as they forwarded the notice of copyright infringement to internet subscribers. By relying on the *SOCAN* approach, Voltage seeks to undo Parliament’s considered policy choice. Any claim of authorization must be based on the statutory elements and factors set out in sub-sections 27(2.3) and 27(2.4). Without these elements being pleaded, Voltage’s claim of authorizing infringement must fail.

SOCAN at paras 110-128; Voltage Memorandum of Fact and Law, Applicants' Motion Record, Tab 4 at para 38; *Copyright Act*, R.S.C. 1985, c. C-42, ss.41.25, 41.26.

25. In similar lawsuits in the United States, Voltage's authorization claim has been rejected at the "cause of action" stage. In 2018, the United States Court of Appeals for the Ninth Circuit affirmed a district court's dismissal of a similar claim of "contributory" copyright infringement made by Cobbler Nevada, LLC – one of the Applicants in this motion – against an internet subscriber who permitted inmates of his adult foster home to access the internet through his IP address. The Court of Appeals for the Ninth Circuit held that an internet subscriber is not liable for copyright infringement committed by internet users through an internet subscriber's IP address, without having actively encouraged or induced the infringement. Mere failure to take affirmative steps to prevent infringement is not actionable under US copyright law. This principle is consistent with the Canadian *Copyright Act* and should be adopted in Canada.

Cobbler Nevada LLC v. Gonzales, 901 F (3d) 1142 (9th Cir 2018) [*Cobbler*].

B. There is no identifiable class of two or more persons with an objective class definition.

26. CIPPIC adopts and relies on the submissions made by the proposed Representative Respondents in their Memorandum of Fact and Law.

C. There are no common issues that advance the litigation.

27. CIPPIC adopts and relies on the submissions made by the proposed Representative Respondents in their Memorandum of Fact and Law.

D. The proposed reverse class proceeding is not the preferable procedure.

28. Voltage's proposed reverse class proceeding is not the preferable procedure because it does not satisfy the two-part test laid down by the Supreme Court of Canada: (1) the

proposed reverse class proceeding would be unfair, inefficient, unmanageable, and abusive; and (2) the proposed reverse class proceeding would not be preferable to other reasonably available methods of resolving the claim. For these reasons, certification should be denied.

Hollick at paras 27–31; *Wenham v Canada*, 2018 FCA 199 at para 17 [*Wenham*].

29. The recent LCO Final Report on improving the efficacy of class actions recommended that courts interpret the elements of the preferable procedure branch of the certification test more rigorously.

LCO Final Report at 52.

1. **The proposed proceeding would be unfair, inefficient, unmanageable, and abusive.**
 - a. *The proposed reverse class proceeding is unfair because it targets non-infringers and not the alleged actual infringers.*

30. The proposed proceeding would not involve the alleged copyright infringers. Voltage’s “offering for download” and “secondary infringement” claims are directed against individual internet users, whom Voltage refers to as “Direct Infringers.” The alleged “Direct Infringers” are the primary respondents to Voltage’s claim, and its outcome would profoundly impact their rights. But Voltage does not propose any viable mechanism to identify “Direct Infringers,” notify them, and ensure their representation in this proceeding. Voltage’s proposed proceeding does not involve their participation at all.

Written Representations, *Respondent’s Motion Record* at para 27.

31. Rather, Voltage’s proposed proceeding exclusively targets the internet subscribers whose internet accounts were *used* to commit the alleged acts of infringement: the alleged “Authorizing Infringers.” Voltage proposes to identify and notify potential class members using the IP addresses that allegedly have been used to carry out the infringing activity online. These IP addresses do not identify the alleged “Direct Infringers.” They can only identify the alleged “Authorizing Infringers.” In other words, although Voltage’s

proposed respondent class includes both “Direct Infringers” and “Authorizing Infringers,” the proposed class proceeding would involve “Authorizing Infringers” only.

Voltage Memorandum of Fact and Law, Applicants’ Motion Record, Tab 4 at para 27; Lethbridge Affidavit at paras 6-9; Perino Transcript at 23–28, 58–61.

i. The proposed reverse class proceeding burdens internet subscribers with the onus of defending claims against the alleged copyright infringers.

32. Because Voltage’s proposed proceeding fails to engage the alleged infringers, the onus of defending Voltage’s claims against them would fall on the internet subscribers. As envisaged in Voltage’s litigation plan, if the proceeding is certified, Voltage would send a notice of certification to “known members of the Respondent Class.” “Known members” are the alleged “Authorizing Infringers.” The alleged “Authorizing Infringers” would “provide evidence of mitigation of damages” and to exercise their right to opt out. The proposed class proceeding will continue exclusively on the basis of the notice of certification and “positive responses” from the alleged “Authorizing Infringers.” Voltage does not contemplate sending the notice of certification to the “Direct Infringers” or receiving any evidence or other submissions from them. If the proposed proceeding is certified, the “Authorizing Infringers”—internet subscribers—would bear the burden of providing evidence of non-infringement or mitigation on behalf of the entire class.

Voltage Memorandum of Fact and Law, Applicants’ Motion Record, Tab 4 Appendix 1 at paras b(i)-(v), c-f.

ii. The proposed proceeding burdens internet subscribers with the task of identifying and pursuing class members.

33. The internet subscribers’ only alternative to defending a class of unidentified internet users is to determine the identity of the individuals who carried out the alleged infringement and disclose their identity to Voltage. The internet subscribers have no reasonable means of doing so. It would be impossible to conclude, based on the IP address alone, that a particular individual was responsible for internet activity associated with that IP address without examining the computer or device used by that individual.

Therefore, this proceeding puts the internet subscribers in an impossible position: they must either answer for unknown internet users' online activity or identify and examine every device, known and unknown, that accessed the internet through their internet router at the relevant time. Not only would the proposed proceeding be unfair, it risks violating the privacy of internet users who have no relation to this proceeding.

Lethbridge Affidavit at para 9.

iii. The class members' right to opt out is illusory.

34. Lacking a viable mechanism to issue a notice of certification to all class members, the proposed proceeding denies the proposed respondent class a meaningful right to opt-out. Even if some members exercised the right to opt out, Voltage's litigation plan contemplates automatically making them party to a case-managed proceeding within the class action. Voltage's litigation plan does not distinguish between an opt-out and an individual issues hearing. Effectively, it does not permit class members to opt out of the class proceedings. The right to opt out of the class is a "fundamental procedural right" and a vital protection afforded to unnamed class members under the *Federal Courts Rules*. Deprived of this protection, none of the alleged "Direct Infringers" would be able to "preserve legal rights that would otherwise be determined or compromised in the class proceeding." The right to opt out is particularly important in multi-jurisdictional proceedings.

Voltage Memorandum of Fact and Law, Applicants' Motion Record, Tab 4 at para (i); *Federal Courts Rules*, SOR/98-106, s 334.21; *Currie v. McDonald's Restaurants of Canada Ltd*, 74 OR (3d) 53 [2004] O.J. No. 1862 at paras 9, 13 [*Currie*]; *Cridler v. Nguyen*, 2016 ONSC 4400 at paras 48-49 [*Cridler*].

35. The absence of a viable mechanism to notify the alleged "Direct Infringers" vitiates the class members' right to opt out. Adequacy of notice is the essence of the opt out right. The Supreme Court of Canada emphasised the importance of the notice process as an "indispensable" safeguard of individual rights in class proceedings. The design of the notice process "must make it likely that the information will reach the intended recipients." Voltage's litigation plan suggests that the certification notice is not intended

to reach the alleged “Direct Infringers.” Voltage has failed to show “some basis in fact” that the proposed notice of certification is likely to reach the alleged “Direct Infringers.” Without a meaningful right to opt out, the proposed reverse class proceeding is unfair.

Canada Post Corp v. Lépine, 2009 SCC 16 at paras 42–43 [*Canada Post*];
Crider at paras 49–51; *Currie* at paras 9, 13; *Hollick* at para 25.

b. *The proposed reverse class proceeding would be inefficient because it would not advance the goals of class proceedings.*

i. The proposed reverse class proceeding would not advance access to justice.

36. The access to justice concerns in this reverse class proceeding arise from the perspective of the proposed respondent class members, not Voltage.

37. Voltage does not face any access to justice barriers in traditional litigation against copyright infringers. It is well resourced to initiate and prosecute judicial proceedings in Canada and other jurisdictions. For more than nine years, it has engaged in a campaign of court-driven copyright enforcement against individual as well as joint defendants in fourteen jurisdictions. It has initiated at least 96 separate proceedings in the United States and three actions in Canada, including before the Federal Court of Canada. It has litigated several appeals, including before the Supreme Court of Canada.

Kwan Affidavit at paras 8, 13, 15.

38. The access to justice barriers Voltage claims to face are self-imposed. Voltage claims to face economic barriers to access to justice because the infringements it complains of are non-commercial, attracting “low value” statutory damages only. It states:

“The type of film piracy in this proceeding is not (generally) thought to be of a commercial nature - it is primarily non-commercial. The statutory damages regime for non-commercial infringements allowed for a damages range of \$100 to \$5,000, plus costs.”

But Voltage is not restricted to claiming statutory damages. It has chosen to do so. The *Copyright Act* gives the copyright owner an election to pursue damages and profits or statutory damages only. Voltage, having claimed full damages and profits in its Notice of Application, subsequently elected to limit its claim to statutory damages. Voltage elected statutory damages despite its claim that “each proposed class member” caused

“significant damages” to Voltage and made “unlawful profits”. Its reason for electing statutory damages is to allow “uniform application of damages to the proposed Class Members” and because it “would make the proceeding more cost effective and fair to all parties.” Voltage chose statutory damages to reduce its own evidentiary burden, reduce its litigation costs, and increase the likelihood of mass settlement.

Voltage Notice of Application, Interveners’ Motion Record, Tab 3 at paras 1(g), 13, 48; Amended Notice of Motion, Applicants’ Motion Record, Tab 1 at 2.

39. In addition to limiting the value of its own claim, Voltage has chosen to treat the infringements as non-commercial contrary to the *Copyright Act*. The *Copyright Act* explicitly deems the alleged infringement by “Authorizing Infringers” as non-commercial. Voltage would have been entitled to seek damages and profits from all class members or, having elected statutory damages, to treat the “Authorizing Infringers” as commercial infringers. Having chosen to limit itself to “low value” claims, Voltage cannot complain that the lack of economic incentive to sue is an access to justice barrier.

Voltage Memorandum of Fact and Law, Applicants’ Motion Record, Tab 4 at paras 5–6; *Copyright Act*, RSC 1985 c C-42, ss 38.1(1), 38.1(1.11).

40. On the other hand, reverse class proceedings do not necessarily serve the access to justice concerns of class members. Plaintiff class proceedings are generally understood to advance access to justice for plaintiffs having small disaggregated claims. This is because plaintiff class proceedings favour both procedural and substantive aspects of access to justice. Plaintiff class proceedings serve procedural access to justice because they provide claimants access to a fair process to resolve their claims. Plaintiff class proceedings serve substantive access to justice because they enable claimants to receive a just and effective remedy if their claims are established. However, as the Supreme Court of Canada has noted, in some cases, defects of process will raise doubts as to the justness of the substantive outcome. This is why reverse class proceedings may not always serve access to justice in the same manner as plaintiff class proceedings.

AIC Limited v. Fischer, 2013 SCC 69 at para 24 [*Fischer*].

41. Reverse class proceedings that involve a single well-resourced plaintiff suing thousands of individuals for “low value” claims without affording adequate procedural safeguards to individual defendants risk sacrificing “the ultimate goal of a just determination between the parties on the altar of expediency.” In such circumstances, reverse class proceedings are apt to impair, not aid, access to justice.

Abdool v Anaheim Management Ltd, 15 OR (3d) 39 at 17 (Gen Div) aff’d 21 OR (3d) 453 (Div Ct) [*Abdool*].

42. In particular, the proposed reverse class proceeding significantly impairs access to justice for the members of the proposed respondent class. The proposed proceeding does not provide adequate notice to class members, particularly the alleged “Direct Infringers.” These class members do not have an opportunity to defend Voltage’s claim. The alleged “Authorizing Infringers,” to whom Voltage contemplates giving notice, cannot fairly and adequately represent the whole of the proposed class. Without adequate notice and representation, class members are denied access to justice. The absence of adequate notice and representation undermines the very legitimacy of the proposed proceeding.

Western Canadian Shopping Centres v Dutton, 2001 SCC 46 at para 49 [*Western*].

43. Further, the distribution of litigation costs among class members—the chief advantage of class proceedings—would not obtain in the proposed proceeding. The cost of defending Voltage’s claim on behalf of the proposed class would fall entirely on the proposed Representative Respondents. If this reverse class proceeding is certified and proceeds to trial, the alleged “Direct Infringers,” who cannot be identified, will not share the burden of defending the claim. The alleged “Authorizing Infringers” would not be involved in the proceeding until an Order on the merits is issued and would have no incentive to share the costs of litigation with the Representative Respondents. Since class members will not receive damages, unlike in plaintiff class actions, class counsel would have no means of recovering the costs from class members. Any award of costs to the Representative Respondent would be subject to the outcome of the trial and the court’s

discretion. Since the proposed reverse class proceeding does not enable the distribution of litigation costs, and disproportionately burdens the class representatives, it denies, rather than promotes, access to justice.

Joshua A Druckerman, *The Uncertifiable Swarm: Why Defendant Class Actions and Mass BitTorrent Copyright Litigation Don't Mix*, (2013) 58 NY L Sch L Rev 931 at 954–955 [Druckerman].

44. This reverse class proceeding affects low-income groups disproportionately. It targets internet subscribers who provide shared internet access to multiple users such as tenants, co-op residents, residential students, and public Wi-Fi users. More threateningly, it targets these shared internet users themselves. Voltage seeks certification of a national class: a class of unnamed, unknown users of shared internet access across Canada with no notice of the proposed proceeding. Even if all potential class members had notice, securing adequate representation in a court proceeding in Toronto would be costly and burdensome for many Canadians. Members of the proposed respondent class across Canada face economic, social, and psychological barriers to access to justice. The proposed reverse class proceeding exacerbates, rather than alleviates, these barriers.

Lethbridge Affidavit at para 8. See also *Cobbler* at 1145.

- ii. The proposed proceeding would not further behaviour modification goals.
45. Reverse class proceedings do not carry the same incentive structure that produces behaviour modification in plaintiff class proceedings. Plaintiff class proceedings enable fee-shifting by enabling class plaintiffs to shift or distribute the cost of litigation to defendants or among themselves. Such proceedings also enable claim-aggregation, resulting in claims of significant economic value. Together, these features create a system for private enforcement of public harm caused by the behaviour of corporate or government entities. The powerful incentives that drive behaviour modification are absent in reverse class proceedings. The “speeding ticket” Voltage claims from each proposed class member is unlikely to stop online copyright infringement. As Professor Rubenstein opines in *Newberg on Class Actions*, “the whole scheme of defendant class proceedings has but a marginal effect on the enforcement of substantive norms.”

William B Rubenstein, *Newberg on Class Actions*, 5th ed (New York: Thomson Reuters, 2019) (e-looseleaf) at § 5:1 [Rubenstein].

iii. The proposed reverse class proceeding does not improve judicial economy.

46. One of the main drivers of judicial economy in class proceedings is the avoidance of multiple repetitive proceedings, conserving judicial resources. This is one of the few advantages of class proceedings that reverse class proceedings potentially can provide.

Chippewas of Sarnia Band v Attorney General of Canada [1996] OJ No 2475 at para 15 [*Chippewas*]. See also Notes: Defendant Class Actions, 91 Harv LR 630 (1977-78), at 630-31, 658.

47. In Voltage's proposed reverse class proceeding, however, this advantage is absent or negligible. The proposed proceeding would require multiple individual fact-finding proceedings for each class member on almost every issue. The only class members involved in the proposed proceeding would be the alleged "Authorizing Infringers." Voltage's claim against these class members requires a determination of their subjective knowledge, intent, personal living arrangements, and the extent of control they exercised over the users of their internet subscription. These facts would vary widely from one alleged "Authorizing Infringer" to another. The facts and circumstances on the basis of which a court could determine issues like knowledge, intention, and extent of control are myriad and varied among class members. Any judicial economy gained by deciding the issue of subsistence and ownership of copyright would be quickly lost upon entering into the quagmire of complexity created by the fact-driven issues of infringement. These issues cannot be decided once for all class members; they can only be decided for one class member at a time, in the particular factual context of that class member. The need to conduct multiple, repetitive proceedings to decide the issues in their full factual context destroys any prospects of judicial economy arising from the proposed proceeding.

Lethbridge Affidavit at paras 8-9; Perino Transcript q. 61.

48. Even if the Court were to derive some economy by certifying the proposed reverse class proceeding, the ability of all class members to freely opt out, especially in the event of an adverse determination, would seriously undermine any such benefit. In reverse class

proceedings, the right of respondent class members to opt out has an anomalous effect on the benefits that are ordinarily expected to flow from class proceedings. It cuts against judicial economy. Judicial economy remains preserved in a reverse class proceeding only if respondent class members have a strong incentive to stay in the class. This is one of the important factors considered by courts certifying reverse class actions.

Berry v Pulley, 2001 CanLII 28228 (ONSC) at paras 46–47 [*Berry*];
Chippewas at paras 35–36; Rubenstein at § 5:1.

49. In the proposed proceeding, the respondent class members have no incentive to stay in the class. Ordinarily, class members in both plaintiff and reverse class proceedings have a financial incentive to stay in the class because the costs of litigation are distributed among class members. In reverse class proceedings, this may occur when respondent class members are identified, notified, and provided an opportunity to collectively organize their representation and defence as a class, enabling cost distribution. This must be accompanied by a continued threat of individual litigation to incentivize class membership. Both factors are absent in the proposed class proceeding. Respondent class members would have no incentive to stay in the class. If significant numbers of class members opt out, the proposed reverse class proceeding would be a fruitless enterprise.

c. This reverse class proceeding is unmanageable because it demands a separate trial for each class member.

50. The unmanageability criterion involves a cost-benefit analysis of certifying a proposed class proceeding. When the individual issues—issues that turn on individual facts and circumstances—constitute a substantial portion of the claims, class proceedings are not appropriate. In such cases, class proceedings would create greater difficulties than resolving the claims through other means. Certification in these circumstances offers but a “mirage of judicial economy.”

Vaugeois v. Budget Rent-A-Car of B.C. Ltd., 2015 BCSC 802 at 38–40, 45–49 aff’d 2017 BCCA 111 [*Vaugeois*]; *Winnipeg Dump Truck Seniority List Members v. Winnipeg (City)*, [2003] MJ No 423 (QB) at 15 [*Winnipeg*]; *Sorotski v. CNH Global NV*, 2007 SKCA 104 at para 59 [*Sorotski*]; *Thorburn v. British Columbia (Public Safety and Solicitor*

General), 2013 BCCA 480 at para 47 [*Thorburn*]; *Mouhteros v. DeVry Canada Inc.*, 41 O.R. (3d) 63 [1998] O.J. No. 2786 at 15-16; *Bittner v. Louisiana Pacific Corp* (1997), 43 BCLR (3d) 324 (SC) at para 59; *Gary Jackson Holdings Ltd v Eden*, 2010 BCSC 273 at para 66–68.

51. The issues Voltage identifies for determination in the proposed proceedings require separate, individual determinations of fact for each class member. Barring subsistence and ownership of copyright, each of the purported common issues listed by Voltage can only be decided based on evidence of the facts and circumstances in which each alleged “Authorizing Infringer” permitted his or her internet subscription to be used by individual users and the possibility of unauthorized use. The factual context in which an internet subscriber may permit users to access the internet using the subscriber’s IP address can vary wildly from one class member to another. The extent of control exercised by the internet subscriber in each case would depend closely on the factual context. In *SOCAN*, on which Voltage bases its claim against the alleged “Authorizing Infingers”, while discussing the possibility to infer authorization in a proper case, Binnie J. emphasised that “all would depend on the facts.” Voltage’s claim against the alleged “Authorizing Infingers” too depends entirely “on the facts”, and the facts for each individual respondent are discrete. Such a claim is not appropriate for certification in a reverse class proceeding.

SOCAN at para 128; Lethbridge Affidavit at paras 8(a)–(n); Voltage Memorandum of Fact and Law, Applicants’ Motion Record, Tab 4 at para 3.

52. Further, Voltage’s proposed reverse class proceeding is unworkable because Voltage has not identified the necessary mechanisms and procedures in its litigation plan. A litigation plan that does not sufficiently detail how the individual issues would be resolved apart from the common issues is fatal to the proposed class proceeding. Voltage has not provided any indication of the mechanism by which individual issues would be decided within the class proceeding. Voltage’s litigation plan presumes that all class members who do not opt out would accept its claims of infringement or enter into a settlement. Voltage’s litigation plan is deficient in material particulars. Without a clear litigation plan, the proposed reverse class proceeding would be unmanageable.

Sorotski at para 59; *MacDonald v Dufferin-Peel Catholic Board*, 2000 OJ No 5014 (SCJ) at 19–20 [*MacDonald*].

- d. *The proposed reverse class proceeding opens the door to abusive proceedings.*
- i. Copyright trolls use reverse class proceedings to force speculative settlements.

53. There is significant U.S. case law surrounding the behaviour of copyright trolls generally and Voltage specifically. All of the copyright troll litigation in the US share the same *modus operandi*: plaintiff owns a copyright to a film; plaintiff sues numerous John Does in a single action for using BitTorrent to copy the movie; plaintiff subpoenas the ISPs to obtain the identities of these Does; if successful, plaintiff will send out demand letters to the Does; and, finally, Does will send a settlement to the plaintiff. Very rarely do these cases reach the merits.

Kwan Affidavit at paras 13-14; *Voltage Pictures, LLC v. Does 1-12, Does 1-34, Does 1-371*, 2013 U.S. Dist. LEXIS 66729 [*Voltage*]; *Cobbler Nevada, LLC v. Anonymous Users of Popcorn Does 1-11*, 2016 WL 4238639 [*Popcorn*]; *Malibu Media, LLC v. John Does 1-10*, 2012 WL 5382304 [*Malibu*]; Mathew Sag & Jake Haskell, *Defence Against the Dark Arts of Copyright Trolling*, (2018) 103 Iowa L Rev 571 at 576–580.

54. In one case where Voltage sought certification for a reverse class action in the same type of BitTorrent file sharing case, Judge Ann Aiken held that, “While these are indeed the type of cases in which discovery, pre-service, is merited, the use of a reverse class action is not. This is especially true given the proliferation of the use of the courts’ subpoena powers to troll for quick and easy settlements.” Voltage’s attempt to use a reverse class proceeding in the US to force speculative settlements has been deemed meritless. Similarly, Voltage’s attempt to certify this reverse class proceeding in Canada to force speculative settlements is also meritless.

Voltage at para at 2.

- ii. This reverse class proceeding deters the provision of internet facilities to low-income groups.
55. Voltage lumps “Direct” and “Authorizing” infringers in the same class and seeks to “award” both alleged infringers with a “speeding ticket”. In other words, Voltage seeks to place all putative class members with the same degree of culpability regardless of intent,

participation, or profit. Their claim, as stated, properly lies against persons who are unidentified and not the putative members of the respondent class. It unfairly captures innocent parties.

Voltage Memorandum of Fact and Law, Applicants' Motion Record, Tab 4 at paras 8-9.

56. Access to the internet is imperative in today's digitized society. However, not all Canadians have access to a private internet connection. Many public places, institutions, and businesses offer free public Wi-Fi to enable access to the internet for those who need or wish to connect to it. Certifying this reverse class proceeding will deter the provision of free public Wi-Fi because of the threat of liability for copyright infringement by individual users. The lack of availability of free public Wi-Fi will have disproportionate effects on low-income groups and will inhibit them from accessing the internet and participating in today's digitized society.

Lethbridge Affidavit at para 8.

iii. Voltage is seeking to misuse Notice and Notice as a litigation support service.

57. Voltage's Litigation Plan assumes that ISPs will willingly participate in the litigation at every step of the class proceeding. This is problematic for two reasons. First, ISPs are unlikely to willingly participate in the litigation. Last year, in this very proceeding, Rogers Communications Inc., an ISP, was involved in litigation over the costs of complying with the Notice-and-Notice regime up to the Supreme Court of Canada. Voltage's Litigation Plan does not specify who would bear the costs of the ISPs' involvement at every step of the reverse class proceeding. Second, Parliament's Notice-and-Notice provisions were not intended for this purpose and it places an onerous burden on the ISPs and risks violating the privacy of internet subscribers.

Rogers Communications Inc. v. Voltage Pictures, LLC, 2018 SCC 38 [Rogers].

iv. Voltage is attempting to overreach the remedies provided in the *Copyright Act*.

58. The *Copyright Act* provides a suite of remedies against online copyright infringement, along with appropriate safeguards to protect the interests of internet users. In 2012,

Parliament formalised the existing the Notice-and-Notice regime into law to “provide copyright owners tools to enforce their rights while respecting the interests of users.” By doing so, Parliament adopted an approach that respected the user-rights and privacy of internet users, in contrast to the U.S.-style “notice-and-take down” system mooted by Binnie J. in *SOCAN*.

SOCAN at para 127; *Copyright Act*, RSC 1985, c C-42, s 27(2.3)–(2.4).

59. In 2018, Parliament noted the ongoing abuse of the Notice and Notice system by copyright owners and built in safeguards “to ensure 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.” In addition to the Notice-and-Notice regime, Parliament introduced a statutory damages system that could be applied at the election of a claimant to avoid the complexities of having to prove damages when difficult or costly to prove. Parliament further addressed online copyright infringement by introducing the statutory claim of “provid[ing] a service primarily for the purpose of enabling acts of copyright infringement.” Here, too, Parliament laid down two important safeguards: (1) a requirement to prove actual infringement as a result of the use of the service provided, and (2) a list of factual circumstances that would need to be shown to establish the statutory claim.

Kwan Affidavit, Exhibit S at 198-228, Exhibit R at 192-193, Exhibit Q at 187-188.

60. By seeking certification of this reverse class proceeding, Voltage attempts to overcome the safeguards Parliament built in to the statutory remedies. Voltage seeks a “super-remedy”: a mass prosecution unhinged from the substantive and procedural safeguards that protect individual internet users. While Parliament prohibited speculative settlement offers in infringement notices, Voltage seeks to induce class members to settle through the threat of litigation in which they will not be fairly represented. While Parliament carefully delineated the facts and circumstances that, in a specific case, could lead to a finding of authorization of infringement, Voltage seeks to recover damages based on a blanket claim against all the alleged “Authorizing Infringers” without having to prove any of the facts and circumstances delineated by Parliament.

61. Parliament has chosen not to adopt the type of mass enforcement remedy Voltage seeks in this reverse class proceeding. In 2011, New Zealand introduced an abridged and expeditious copyright enforcement procedure in its copyright statute. This procedure places the burden of challenging copyright infringement notices on the alleged infringer failing which the Copyright Tribunal is empowered to make a monetary award in favour of the copyright owner. In the event of a challenge, the matter is heard “on the papers”, without requiring either party to appear in person. Effectively, it is the “speeding ticket” mechanism for copyright infringement that Voltage seeks to transplant in Canada. Canadian Parliament in 2012 chose to establish the Notice-and-Notice regime instead of adopting the New Zealand system and, in 2018, strengthened the safeguards provided to individual internet users in the Notice-and-Notice regime.

Kwan Affidavit at Exhibit U; Voltage Memorandum of Fact and Law,
Applicants’ Motion Record, Tab 4 at paras 8-9.

2. There are other preferable methods of resolving the claim.

62. Rule 334(1)(d) of the *Federal Courts Rules* specifies that a class proceeding must be “the preferable procedure for the just and efficient resolution of the common questions of law or fact”. The onus rests on Voltage to show that the proposed class proceeding is the preferable procedure for the just and efficient resolution of the common issues. The preferability analysis requires a review of other available options for resolving the dispute, including potential court proceedings and non-litigation solutions. In so doing, the Court must take into account “all relevant matters,” 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 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.

Federal Courts Rules, SOR/98-106, ss. 334(1)(d), 334.16(1), 334.16(2);
Fischer at para 35.

63. Preferability in this context means the extent to which the proposed class proceeding serves the goals of class proceedings: (a) judicial economy; (b) access to justice; and, (c) behavior modification. The question is not whether the class proceeding would fully achieve these goals, but rather merely whether the class proceeding is preferable.

See *Pro-Sys* at para 137; *Hollick* at para 27; *Fischer* at para 16.

64. Even assuming that Voltage can establish the claimed common questions of fact and law, CIPPIC submits that Voltage has failed to show that the proposed procedure is preferable for the just and efficient resolution of those questions.

65. CIPPIC suggests that at least two potential procedures are preferable to the proposed proceeding: (1) discrete actions against individuals defendants joined pursuant to Rules 102 and 105, and (2) the market-based approaches preferred by Parliament.

a. Joinder

66. The Federal Courts Rules 102 and 105 provide the Federal Court with the ability to join two or more plaintiffs, applicants, or appellants with the same representative together in one proceeding. This may be done where there is a common question of fact or law, or where the relief claimed arises from substantially the same facts or matter.

Federal Courts Rules, SOR/98-106, ss. 102, 105.

67. Joinder is preferable from the perspective of respondents' interest in access to justice since joinder of actions preserves known procedural safeguards; Voltage's proposed approach casts these aside in favour of unspecified managed proceedings to be crafted at some future point by this Court.

68. Voltage's litigation plan lays bare the problem with all copyright troll litigation: the financial incentives of internet subscribers caught in the snare of a Norwich Order are to

get out of the litigation as quickly and cheaply as possible, regardless of liability. Indeed, liability is irrelevant to the vast majority of subscribers receiving notice of a potential claim of infringement, since the legal, financial and time costs of demonstrating that they undertook no infringing act greatly exceed the costs of settling.

69. The proposed reverse class proceeding cannot change this from the class respondent side. It can, however, serve Voltage by improving the procedural efficiency of securing settlements from IP subscribers identified by Voltage.

70. The solution to the problem of copyright troll settlement initiatives accordingly lies not in more efficient class settlement mills, but in greater scrutiny of potential troll proceedings at the early discovery stage.

71. Voltage has a history of using alternative procedures for pursuing copyright infringement claims in Canada and elsewhere. Voltage has filed numerous joinder cases in many jurisdictions, including in Canada, joining multiple Does in action.

72. In three actions filed in the Federal Court of Canada, CIPPIC found no file-sharing case filed by Voltage that has proceeded to trial or judgment on merits despite having filed 2 distinct actions (in addition to the present proceeding).

Kwan Affidavit at paras 8-12.

73. In the United States, CIPPIC discovered 96 file sharing cases filed in the American Federal Court system since 2010 where Voltage, Cobbler, PTG, Clear Skies, Glacier, Glacier Films, or Fathers & Daughters are listed as a party to an action. The plaintiffs in these cases did not proceed against any individual defendant who filed a defence, instead seeking voluntary withdrawal, filing consent judgments, or proceeding to default judgment where no defence was filed. This search included discovering cases where courts noted the trend of file-sharing plaintiffs including Voltage to withdraw their claims when faced with a defence.

Kwan Affidavit at paras 13-17.

74. Some jurisdictions have addressed troll activity in joinder cases. In Oregon, for example, US District Court for the District of Oregon has issued Standing Order 2016-8 which

prohibits joinder of defendants in file-sharing cases solely on the basis of having allegedly used file-sharing protocols, instead requiring additional discovery steps to identify the identity of alleged infringers.

Kwan Affidavit at para 18.

75. Voltage may claim to an intent to “close the net” by pursuing all respondents who opt out of the litigation. They have proposed that the Court spin off special case-managed proceedings to address those who opt out. Each respondent who exercises a right to opt out should enjoy all of the procedural protections due any other defendant in an infringement action. The Applicant whose work has been infringed in any given case bears the burden of identifying an actual defendant – not merely an internet subscriber – and establishing a case. The evidence reviewed suggests that Voltage has not chosen to do so as it has not pursued judgments on merits.

76. Voltage’s proposed procedure also fails the preferability test on the basis of judicial economy. As noted above, in this class proceeding the individual issues of class members will overwhelm their common issues. As such, judicial economy will be undermined, and the proceeding will be fundamentally unfair to all parties. This reality is exacerbated by the right of respondents to opt out of the class proceeding. The proposed class proceeding is merely “a prelude to many individual trials”. In the result, the class proceeding cannot be said to be preferable.

Thorburn at para 25.

b. Market-based Resolution

77. Parliament’s objective in recent *Copyright Act* amendments was to encourage copyright owners to engage in market-based solutions to the challenges of digital consumption of works rather than litigate against end-users. Online infringement is best resolved through giving consumers accessible and affordable access to content in the formats and channels they demand. Parliament sought to encourage the development of online platforms for market-based distribution and consumption of works, including Voltage’s works.

78. Parliament did not craft a litigation framework for enforcement of rights against small-scale, low-harm infringements. It could have done so; indeed, New Zealand’s approach to low-value copyright infringement offered one model. Parliament chose not to follow the New Zealand model. Instead, Parliament chose to craft litigation tools for going after “enablers” of copyright infringement and an expedited notice scheme.

Affidavit of Johann Kwan, paras. 19-21.

79. Voltage, in contrast, asks this Court to do what Parliament chose not to do: craft a custom-made, low-cost litigation court – and to do so without any particulars as to procedural protections to internet subscribers caught up in the scheme. The proposed litigation plan amounts to a request to structure a small claims court within the proceeding itself – something the Federal Court lacks.

80. Voltage’s proposed class proceeding, viewed in the context of the evidence of past actions of the Applicant, Voltage, cannot meet the policy objectives of access to justice, judicial economy, and behaviour modification. With respect to behaviour modification, the Applicant has not in the past sought determination of contested actions or otherwise obtained trial judgments on the merits. Nor has Voltage chosen to litigate against platforms and services that enable infringement. Such judgments could provide the behaviour modification Voltage seeks. Voltage’s proposed procedure, in contrast, would in practice enlist this Court in crafting a settlement mill that would not modify Canadians’ behaviour.

PART V – ORDERS SOUGHT

81. CIPPIC asks that the Applicant’s application be dismissed.

82. CIPPIC makes seeks no costs and asks that no costs be awarded against it.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 17th day of September, 2019.

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PART VI – LIST OF AUTHORITIES

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