



PRACTICE

CLASS PROCEEDINGS

Certification — Motion by applicants seeking certification of underlying amended application as class proceeding under *Federal Courts Rules*, SOR/98-106, rr. 334.14(2),(3), 334.16, on terms, conditions under r. 334.17, with proposed class being class of respondents (as opposed to plaintiff or applicant class) — Applicants film production companies alleging that their copyrights in several films infringed online — Alleging that respondents illegally uploading, downloading their films using peer-to-peer networks, advertising that films available for download, failing to take reasonable steps to ensure that first, second unlawful acts not taking place in respect of Internet accounts controlled by Internet account subscribers, i.e. persons contractually obligated to an Internet service provider (ISP) to pay for Internet services — Applicants initially seeking to describe class of respondents as being all natural persons residing in Canada defined as either direct infringers or authorizing infringers, or both. — Clarifying herein that proposed class comprising Direct Infringers or Authorizing Infringers who are also Internet account subscribers — Respondents denying committing unlawful acts, claiming to have no personal knowledge of anyone using respondent Robert Salna's Internet connection to download applicants' films — Respondent Salna providing Internet access as part of tenancies at his rental property — Saying never controlled or monitored tenants' Internet usage — Applicants contending that application meeting conditions mandated under r. 334.16(1), that application disclosing reasonable cause of action, class of two or more respondent persons identified, claims of class members raising common issues of fact or law — Respondents of view that proposed reverse class proceeding not suitable for certification — Claiming, *inter alia*, application lacking commonality, raising individual issues requiring complex fact-finding process for each class member — Whether applicants meeting criteria for certification — Applicants' pleadings not disclosing reasonable cause of action with respect to primary infringement — Failing to identify a direct, secondary infringers in their amended notice of application — Without identifiable respondent, action cannot appropriately go forward as class proceeding — Applicants unjustifiably relying upon overly broad reading of *Society of Composers, Authors and Music Publishers in Canada v. Canadian Assn. of Internet Providers*, 2004 SCC 45, [2004] 2 S.C.R. 427 in claiming that authorizing infringer having legal obligation to monitor Internet activity of those using their Internet connection after receipt of notice of alleged infringement under "notice-and-notice" regime under *Copyright Act*, R.S.C. 1985, c. C-42 — Not pleading necessary facts for "advertising the work for download" claim — Applicants not providing material facts necessary to meet "some basis in fact" threshold to show identifiable class of two or more persons — Applicants' allegations of being in possession of thousands of IP addresses allegedly infringing copyrights in films insufficient to constitute some basis in fact as to actual existence of class of two or more persons — At best, applicants providing evidence of only one infringing IP address — Determining class membership not ascertainable without in-depth examination of merits of individual liability issues — Nexus between IP address, person responsible for copyright infringement highly technical, difficult to assess without consideration of merits of those issues — Applicants not advancing any common issues beyond two questions — Applicants' litigation plan unmanageable — Cass proceeding not preferable procedure because application predominantly raising individual issues within proposed class — Plan also relying mostly on public resources as means to its end, which is private in nature — Depending, in large part, on notice-and-notice regime — This unsustainable, unfairly overburdening ISPs — Notice-and-notice regime not intending to establish comprehensive framework by which instances of online infringement could be eliminated altogether — By relying on notice-and-notice regime, applicants diverting Parliament's purpose, intention for its own purposes

— Joinder under Rules, rr. 102, 105 preferable procedure to proposed class proceeding — Proposed representative respondents lacking necessary incentive to defend application with diligence, vigor — Applicants' proposed reverse class proceeding not certified — Applicants failed to fulfill all requirements in r. 334.16 — Motion dismissed.

VOLTAGE PICTURES, LLC CANADA V. SALNA (T-662-16, 2019 FC 1412, Boswell J., reasons for judgment dated November 12, 2019, 55 pp.)