

Federal Court



Cour fédérale

**Date: 20230531**

**Docket: T-1062-21**

**Citation: 2023 FC 764**

**Toronto, Ontario, May 31, 2023**

**PRESENT: The Honourable Madam Justice Furlanetto**

**BETWEEN:**

**MILLENNIUM FUNDING, INC., OUTPOST  
PRODUCTIONS, INC., BODYGUARD  
PRODUCTIONS, INC., HUNTER KILLER  
PRODUCTIONS, INC. AND RAMBO V  
PRODUCTIONS, INC.**

**Plaintiffs/Defendants by Counterclaim**

**and**

**BELL CANADA AND BELL ALIANT**

**Defendants/Plaintiffs by Counterclaim**

**and**

**AIRD & BERLIS LLP**

**Defendant by Counterclaim**

**ORDER AND REASONS**

[1] The Plaintiffs are a group of film studios [Millennium Producers] that assert copyright in five films. They allege in separate actions before this Court that Bell internet service customers

have infringed copyright in their films by illegally distributing the films via the BitTorrent peer-to-peer network. In the present action, which is the first one of its kind, the Millennium Producers take action against Bell Canada and Bell Aliant [collectively, Bell] as an internet service provider [ISP] for alleged failure to deliver notices to potential defendants under the Notice and Notice Regime provided under the *Copyright Act*, RSC 1985 c C-42 [Act].

[2] This motion is an appeal by Bell under Rule 51(1) of the *Federal Courts Rules*, SOR/98-106 [*Federal Courts Rules*] of an order of Case Management Judge Kevin Aalto [CMJ], dated June 23, 2022 [Order], in which the CMJ struck portions [Impugned Paragraphs] of Bell's Amended Statement of Defence and Counterclaim [ASODCC] without leave to amend. The Impugned Paragraphs include allegations that the Millennium Producers, together with their counsel Aird & Berlis LLP [AB], and other AB clients have abused the Notice and Notice Regime and misused their copyright, abused process, engaged in champerty and maintenance and unlawful means conspiracy through their use of a Copyright Enforcement Program [CEP] to enforce the Notice and Notice Regime. The Order struck the entirety of the counterclaim which sought declaratory relief against AB and the Plaintiffs in respect of these allegations and asserted breaches of sections 41.25 and 41.26 of the Act.

[3] For the reasons that follow, it is my view that while the CMJ did err in taking too limited an approach to the misuse of copyright defence, the motion should nonetheless be dismissed as Bell has not otherwise established that the CMJ erred, including in respect of his findings that insufficient material facts were pleaded to support the allegations made.

I. Background

[4] As referenced in the Order, the Notice and Notice Regime was recently summarized in *Voltage Holdings LLC v Doe #1*, 2022 FC 827 with reference to *Rogers Communications Inc v Voltage Pictures LLC*, 2018 SCC 38 [Rogers]:

[40] The notice and notice regime was discussed in *Rogers Communications Inc v Voltage Pictures LLC*, 2018 SCC 38 [Rogers] at paragraphs 22-23 as serving two complementary objectives: deterring online copyright infringement; and balancing the rights of interested parties. With respect to the first objective, it was noted that “by requiring notice of a claimed infringement to be forwarded to the person who was associated with the IP address that is alleged to have infringed copyright, the regime is aimed at deterring that person, or others who are using the IP address, from continuing to infringe copyright”. As described by the Supreme Court at paragraph 24:

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

[41] With respect to balancing the rights of interested parties, the Supreme Court in *Rogers* noted at paragraphs 26 and 27:

[26] For example, Parliament sought to strike a balance between the interests of copyright owners and of Internet subscribers, respectively, by preferring a notice and notice regime over a “notice and take down” regime (see *House of Commons Debates*, at p. 2109, per Hon. James Moore). ... the notice and notice regime allows for notices of claimed infringement to be forwarded (thereby advancing the rights of copyright holders), while accounting for the interests of Internet subscribers by maintaining the presumption of innocence and allowing them to monitor their own behaviour (and, more specifically, to avoid continued copyright infringement).

[27] Parliament also sought to balance the interests of copyright owners against those of Internet intermediaries such as ISPs. ... the amendments to the Act were also intended to “clarify Internet service providers’ liability” to copyright owners (*Copyright Modernization Act*, summary; see also Legislative Committee on Bill C-32, *Evidence*, at p. 1, per Craig McTaggart). To that end, Parliament insulated ISPs from liability for the copyright infringement of their Internet subscribers (Act, s. 31.1). Now, to attract liability under the Act, an ISP must fail to satisfy its statutory obligations under the notice and notice regime, or provide a service “primarily for the purpose of enabling acts of copyright infringement” (ss. 27(2.3), 31.1 and 41.26(3)).

[42] In my view, these comments, which refer back to the objectives of Parliament in implementing the notice and notice regime, highlight that litigation by rights holders against internet subscribers was contemplated if deterrence was not achieved by the notice and notice system. However, it does not suggest an absolute liability framework. As stated, there is a presumption of innocence for internet subscribers. Infringement by internet subscribers (either directly or through authorization), in my view, must still be proven for the claim to succeed.

[5] Section 41.25 of the Act sets out when and to whom a notice may be sent under the Notice and Notice Regime (subsection 41.25 (1)), the form and content of such notice (subsections 41.25(2)) and what would be considered as prohibited content (subsection 41.25(3)).

[6] Where a notice complies with subsections 41.25(2) and (3), an ISP is required to forward the notice electronically in accordance with paragraph 41.26(1)(a):

**41.26 (1)** A person described in paragraph 41.25(1)(a) or (b) who receives a notice of claimed infringement that complies with subsections 41.25(2) and (3) shall, on being paid any fee that the person has lawfully charged for doing so,

(a) as soon as feasible forward the notice electronically to the person to whom the electronic location identified by the location data specified in the notice belongs and inform the claimant of its forwarding or, if applicable, of the reason why it was not possible to forward it

[. . .]

**41.26 (1)** La personne visée aux alinéas 41.25(1)a) ou b) qui reçoit un avis conforme aux paragraphes 41.25(2) et (3) a l'obligation d'accomplir les actes ci-après, moyennant paiement des droits qu'elle peut exiger :

a) transmettre dès que possible par voie électronique une copie de l'avis à la personne à qui appartient l'emplacement électronique identifié par les données de localisation qui sont précisées dans l'avis et informer dès que possible le demandeur de cette transmission ou, le cas échéant, des raisons pour lesquelles elle n'a pas pu l'effectuer;

[. . .]

[7] As set out in subsection 41.26(3) of the Act, the only available remedy against an ISP who fails to perform its obligations under the Notice and Notice Regime is statutory damages:

<b>Damages related to notices</b>	<b>Dommages-intérêts</b>
<b>(3)</b> A claimant's only remedy against a person who fails to perform his or her obligations under subsection (1) is statutory damages in an amount that the court considers just, but not less than \$5,000 and not more than \$10,000.	<b>(3)</b> Le seul recours dont dispose le demandeur contre la personne qui n'exécute pas les obligations que lui impose le paragraphe (1) est le recouvrement des dommages-intérêts préétablis dont le montant est, selon ce que le tribunal estime équitable en l'occurrence, d'au moins 5 000 \$ et d'au plus 10 000 \$.

[8] In this case, the Millennium Producers allege that they sent over 81,000 notices to Bell between February 9, 2019 and June 15, 2021 and that Bell failed to comply with the requirements under paragraph 41.26(1)(a) of the Act with respect to almost 40,000 notices.

[9] The Millennium Producers seek \$10,000 for each asserted failure to deliver a notice, for a total of approximately \$400 million in damages.

[10] In its ASODCC, Bell asserts that it has complied with the Notice and Notice Regime and to the extent it did not deliver notices from the Plaintiffs, it was because it had legitimate reasons for not doing so, including: the notices were not sent to or received by Bell; the notices contained inaccurate information; the notices were duplicates; the notices did not comply with section 41.25; Bell did not have a viable customer email to forward the notices to; or Bell was otherwise unable to forward the notices despite diligent efforts. These allegations were not the subject of the motion to strike.

[11] However, Bell also pleaded in defence that the Plaintiffs together with their counsel, AB, misused and abused the Notice and Notice Regime through their use of the CEP instituted by AB. Bell alleged that the CEP was a “tool of harassment and intimidation” that sent out large numbers of unreliable and automatically generated notices, in an effort to intimidate alleged infringers and extract unwarranted and disproportionate settlements and to obtain exorbitant statutory damages from ISPs.

[12] Bell alleged that these abuses of the Notice and Notice Regime through the CEP also constituted: copyright misuse by AB and its clients, including the Plaintiffs; an abuse of process that was against public policy, the public interest and the purposes of the Act; champerty or maintenance; and an unlawful means conspiracy.

[13] It alleged that the Millennium Producers assigned their beneficial interest in their copyright to AB under the CEP, and consequently lacked standing for the proceeding, and that AB and/or its other clients were improperly supporting the litigation and were involved in controlling the Plaintiffs’ litigation conduct in a relationship of champerty and/or maintenance.

[14] Bell also argued that if statutory damages could be awarded on a “per notice” basis, such provisions were contrary to sections 7 and 12 of the *Canadian Charter of Rights and Freedoms* [Charter] and should not be enforced.

[15] Bell counterclaimed against the Plaintiffs and AB, seeking declaratory relief in conjunction with these allegations, including *inter alia* a declaration that the Millennium

Producers and AB breached sections 41.25 and 41.26 of the Act. They also sought injunctive relief.

[16] The Millennium Producers brought a motion to strike the counterclaim, all allegations against AB, and the allegations of misuse of copyright, abuse of process, champerty and maintenance, and the alternative allegation that conduct was contrary to sections 7 and 12 of the Charter (the Impugned Paragraphs).

[17] In the Decision, the CMJ struck the Impugned Paragraphs, without leave to amend. A copy of the Impugned Paragraphs are set out in Schedule “A” to this Order.

## II. Issues and Standard of Review

[18] The following issues are raised by this appeal:

1. Did the CMJ err in striking the allegations relating to misuse of copyright?
2. Did the CMJ err in striking the allegations against AB?
3. Did the CMJ err in striking the allegations relating to champerty and maintenance?
4. Did the CMJ err in striking the abuse of process and unlawful means conspiracy allegations?
5. Did the CMJ err in striking the Charter allegation?
6. Should Bell have been granted leave to amend its pleading?

[19] The parties assert and I agree that the applicable standard of review for appeals of discretionary orders of the CMJ (an Associate Judge, formerly called a Prothonotary) is set out in *Hospira Healthcare Corporation v Kennedy Institute of Rheumatology*, 2016 FCA 215 at



paragraphs 66 and 79. Such orders are to be reviewed on the civil appellate standard set out in *Housen v Nikolaisen*, 2002 SCC 33, such that the correctness standard applies to questions of law and questions of mixed fact and law, if there is an extricable legal principle at issue; and palpable and overriding error applies to findings of fact and all other questions of mixed fact and law. A palpable and overriding error is “one which is obvious and apparent, the effect of which is to vitiate the integrity of the reasons”: *Maximova v Canada (Attorney General)*, 2017 FCA 230 at para 5.

### III. Analysis

#### A. *Law on motions to strike*

[20] It is well-established that the Court should only strike pleadings where it is “plain and obvious” that the allegations have no reasonable prospect of success: *Hunt v Carey Canada Inc.*, [1990] 2 SCR 959 at p. 980; *R v Imperial Tobacco Canada Ltd*, 2011 SCC 42 [*Imperial Tobacco*] at para 17. In considering a pleading, the facts set out must be accepted as true, unless they are clearly incapable of proof or amount to mere speculation: *Imperial Tobacco* at para 22.

[21] The Court must be very careful when it strikes allegations from a statement of defence. It has cautioned against doing so where the result would deprive a defendant of the opportunity to mount an arguable substantive defence: *Bayer Healthcare v Sandoz Canada*, 2007 FC 1068 at para 7.

[22] When dealing with novel claims, the question before the Court is whether the moving party should be precluded from advancing their argument in front of the trial judge. While the

Court must be generous and err on the side of permitting novel but arguable claims to proceed, as this the only way to allow the common law to continue to evolve and meet the legal challenges of a modern society (*Salna v Voltage Pictures LLC*, 2021 FCA 176 at para 83; *Imperial Tobacco* at para 21), a claim will not survive a motion to strike simply because it is novel (*Atlantic Lottery Corp Inc v Babstock*, 2020 SCC 19 [*Atlantic Lottery*] at para 19). If a court would not recognize a novel claim when the facts as pleaded are taken to be true, the claim is plainly doomed to fail and should be struck: *Atlantic Lottery* at para 19.

[23] In his Order, the CMJ recognized these legal principles, relying on the recent decision of this Court in *Fitzpatrick v Codiac Regional RCMP Force, District 12*, 2019 FC 1040 at paragraphs 14-17. While the CMJ did not specifically raise particular concern when striking a statement of defence, it is clear that he understood the Court could only do so in the clearest of cases.

[24] The CMJ also emphasized the mandatory requirement that allegations in a pleading be supported by sufficient material facts such that the Court and opposing parties are not left to speculate as to how the facts might be variously arranged to support the allegations made:

*Mancuso v Canada (National Health and Welfare)*, 2015 FCA 227.

[25] I am satisfied that the CMJ identified the correct legal principles and there is no argument to the contrary.

B. *Did the CMJ err in striking allegations relating to misuse of copyright?*

[26] The primary focus of Bell's appeal is on its allegation of misuse of copyright. In the ASODCC, Bell alleged that the Millennium Producers, AB and AB's other clients abuse the Notice and Notice Regime through their use of the CEP. Bell alleged that this abuse of the Notice and Notice Regime constituted a misuse of copyright, amongst other torts. As stated at impugned paragraph 30 of the ASODCC (in non-struck format):

30. The Copyright Enforcement program is a misuse and abuse of the Notice and Notice Regime. It also constitutes (1) copyright misuse by Aird & Berlis and the Aird & Berlis Clients, (2) It is illegal, an abuse of process (also *abus de droit*) by Aird & Berlis and the Aird & Berlis Clients and is against public policy and the public interest and the purpose of the Act, (3) it and constitutes champerty or maintenance, and (4) it constitutes an unlawful means conspiracy.

[27] In his Order, the CMJ struck the allegations regarding misuse of copyright on the basis that it was not supported by material facts, that it was an improper cause of action, and that it was a defence that could not be raised by Bell. As stated by the CMJ:

With respect to the allegations regarding misuse of copyright Bell argues that the doctrine of misuse of copyright prevents a "copyright holder from acting contrary to the policy behind copyright law" [para 31 of Bell's written representations]. I disagree. In my view, there are three answers to this allegation. First, there are no material facts to support the allegation of misuse. Second, the policy objective of copyright law is to allow a party to protect its right in the copyrighted works. Misuse of copyright is not a cause of action. It may be a defence in some circumstances where a copyright holder seeks to enlarge its monopoly improperly over that which it has no copyright or to limit competition [see the various U.S. cases cited by Bell in their written representations, for example: *A & M records, Inc. v Napster, Inc.*, 239 F.3d 1004 (2001)]. Third, Bell is not alleged to have infringed copyright. The *Copyright Act* grants remedies under the Notice and Notice Regime. Millennium is availing itself of those remedies. As noted, Bell is an ISP and is simply the conduit

between the copyright holder and the alleged infringers who are Bell customers. If misuse of copyright is applicable in any way that is an issue for the alleged infringers to raise. Bell does not act for them.

[28] Bell asserts that the CMJ made the following four errors: (1) the CMJ erred by prejudging and mischaracterizing the defence of misuse of copyright; (2) the CMJ erred in finding that Bell had not pled sufficient material facts to support the allegation; (3) the CMJ erred in finding it was plain and obvious that misuse of copyright could only be raised by alleged infringers; and (4) the CMJ erred in failing to recognize that policy considerations are relevant to a consideration of the rights and obligations under section 41.26 of the Act.

[29] While it is my view that the CMJ did err in taking a limited approach to the misuse of copyright defence, he did not err in finding that there was a lack of material facts to support the allegation.

(1) The Defence of Misuse of Copyright

[30] The defence of misuse of copyright while mentioned within Canadian jurisprudence has yet to be adjudicated under Canadian law. In *Havana House Cigar & Tobacco Merchants Ltd v Worldwide Tobacco Distribution Inc*, [2008] FCJ No 1828 [*Havana House*], the Court declined to strike portions of a responding affidavit that sought to raise misuse of copyright, leaving open its possible application as a defence to copyright infringement.

[31] In *Euro-Excellence Inc v Kraft Canada Inc.*, 2007 SCC 37 [*Euro Excellence*] at paragraph 98, the Supreme Court of Canada recognized misuse of copyright as a “developing

doctrine” in the United States [US] that acts as a sort of equitable defence when a copyright holder attempts to extend his copyright beyond the scope of his exclusive rights in a manner that violates antitrust law or the public policy embodied in copyright law. However, it deferred commenting on the possible application of the doctrine in Canada to another day.

[32] Bell argues that the CMJ took too limited an approach to the doctrine of misuse of copyright when he stated that the policy objective of copyright law is limited to allowing a party to protect its right in copyrighted works, that it could not be a cause of action on its own, and that it was limited to a defence to a copyright holder seeking to enlarge its monopoly improperly.

[33] Bell focusses on the language used to describe the doctrine of misuse of copyright that was given by the fourth Circuit Court in *Lasercomb America, Inc v Reynolds*, 911 F2d 970 (4<sup>th</sup> Cir. 1990) [*Lasercomb*] at 978, who stated that “[t]he question is not whether the copyright is being used in a manner violative of antitrust law ...but whether the copyright is being used in a manner violative of the public policy embodied in the grant of a copyright.”

[34] As outlined in William F Patry, *Patry on Copyright* (Thomson West) (looseleaf) 2021 [*Patry on Copyright*], at §10A:1, with reference to comments made by Judge Wardlaw of the ninth Circuit Court: “[t]he copyright misuse doctrine “forbids the use of the copyright to secure an exclusive right or limited monopoly not granted by the Copyright Office.” *Lasercomb*, 911 F.2d at 977 (alterations omitted). The defence is often applied when a defendant can provide either: (1) a violation of the antitrust laws; (2) that the copyright owner otherwise illegally extended its monopoly; or (3) that the copyright owner violated the public policies underlying

the copyright laws. *Soc’y of Holy Transfiguration Monastery, Inc. v Gregory*, 689 F.3d 29, 65 (1st Cir. 2012).”

[35] Misuse does not require that the defendant be prejudiced by the conduct in question, it is enough that a public policy embodied in the grant of copyright is violated: *Havana House* at para 12, citing *Patry on Copyright; Lasercomb* at 979.

[36] However, the defence of copyright misuse acts as a complete bar to maintaining an infringement action: *Havana House* at para 12, citing *Patry on Copyright*. When copyright misuse applies, enforcement of copyright is not permitted for the period of the misuse. As the remedy for copyright misuse is equitable, US courts have commented that it makes little sense to allow an independent claim for copyright misuse when there has been no allegation of copyright infringement: *Altera Corp v Clear Logic Inc*, 424 F3d 1079 (9<sup>th</sup> Cir. 2005).

[37] In the action, the Millennium Producers do not assert copyright infringement as against Bell. Rather, the action is limited solely to the relief provided under subsection 41.26(3) of the Act and Bell’s purported failure to perform its obligations under the Notice and Notice Regime.

[38] Indeed, Bell does not dispute that copyright exists or that it can be enforced. However, it argues that the Plaintiffs and AB have failed in their obligations under the Act. Rather than using the Notice and Notice Regime as a legitimate vehicle to enforce copyright, Bell asserts that they use the CEP to send notices to members of the public who do not infringe or who are wrongfully accused of infringement to obtain disproportionate settlements from innocent parties, to

intimidate alleged infringers to settle for larger amounts, to inundate ISPs with unreliable and automatically generated notices, and then to claim damages. Bell asserts that it is this conduct that is contrary to the public policy objectives of the Act that disentitles the Plaintiffs from claiming any damages from Bell under section 41.26 of the Act. Bell alleges these activities are a misuse of copyright as per the third application described in *Patry on Copyright*.

[39] The Respondents argue that this position is inconsistent with steps already taken by Bell in response to the CEP where Bell has acted pursuant to Norwich orders and forwarded notices on behalf of the Millennium Producers. They assert that in correspondence Bell has indicated its intention to forward additional notices identified by the Millennium Producers. They assert that the position now taken is accordingly inconsistent with these prior actions.

[40] While this could be a contextual factor that might be relevant to the determination of any such proposed defence, I agree with Bell there is no authority to support the proposition that Bell should be estopped from raising a position that is contrary to prior correspondence (*i.e.*, *Federal Court Rules*, Rule 221(e) speaks to departure from a previous pleading only). However, even with a prior inconsistent pleading, there must be something more giving rise to an injustice. The facts here are not the same as those discussed in *Glover v Leakey*, 2018 BCCA 56 at paragraph 32 or *Mystar Holdings Ltd v 247037 Alberta*, 2009 ABQB 480.

[41] The Respondents assert that because the proceedings are case managed they cannot be abusive or contrary to copyright policy. However, I do not find this argument persuasive. The fact that Norwich orders are obtained through case management does not mean that the case

management judge has oversight on the full scope of the interactions between the Plaintiffs and the alleged infringers.

[42] The CMJ asserts that the action is a simple matter of recovery of statutory damages under section 41.26 of the Act, and that the allegation of misuse of copyright is a matter of policy that is misplaced in the present action. However, Bell argues it should have the freedom to defend itself on its own terms. As long as it does not raise an allegation that is frivolous or vexatious, its novel defence of misuse of copyright should be entitled to stand and should be dealt with by the trial judge.

[43] Policy issues are central to the balancing of creators' rights and users' rights under the Act: *Thèberge v Galerie D'Art du Petit Champlain Inc*, [2002] 2 SCR 336 at para 31; *CCH Canadian Ltd v Law Society of Upper Canada*, [2004] 1 SCR 339 at para 24; *Keatley Surveying v Teranet*, [2019] 3 SCR 418 [*Keatley*]. As stated in *Keatley* at paragraph 46, "all provisions of the *Copyright Act*... must be interpreted with this balance in mind so that the *Copyright Act* continues to further the public interest." With respect to sections 41.25 and 41.26 this involves balancing the interests of all stakeholders in the copyright regime, including Internet intermediaries such as ISPs: *Rogers* at para 25. The allegations made by Bell in support of its misuse of copyright defence raise policy concerns with the application of sections 41.25 and 41.26 and its impact on ISPs.

[44] In my view it was an error to suggest that because the arguments raised involve matters of policy that they cannot be asserted in support of a misuse of copyright defence.



[45] Further, in my view, it was an error to conclude in effect that the doctrine of misuse of copyright could never extend to a section 41.26 action. In this respect, the reasoning of Justice Rennie (as he then was) in *Merck & Co v Apotex Inc*, 2012 FC 454 applies. The allegation of copyright misuse is based on a recognized doctrine in the US that has found application where a copyright owner violates the public policies underlying copyright law. The full merits and intricacies of the doctrine are beyond the scope of a motion to strike such as this. Although the underlying action is not one for infringement, Bell nonetheless is affected by the enforcement of copyright under the CEP and is subject to damages as a result of that enforcement pursuant to section 41.26 of the Act. Whether the doctrine can extend to an action under section 41.26 of the Act is not, in my view plain and obvious.

[46] Having said that, however, Bell needs to plead sufficient material facts to support its allegation. The Millennium Producers assert that for a misuse of copyright defence an ulterior or improper purpose, such as an anticompetitive purpose, must be alleged. While I agree with Bell that this requirement is not expressly stated in the jurisprudence, by definition the concept of copyright misuse includes an inquiry into purpose (*Patry on Copyright*, p 5) and motives. Further, and more importantly, the pleading needs to set out “what” the misuse is and “how” the conduct complained of is contrary to public policy under the Act.

[47] In this case, the facts alleged do not sufficiently set out how the CEP is set up to intimidate and harass alleged infringers and in turn to claim exorbitant amounts from ISPs. The pleading only baldly alleges that the CEP sends out an “extremely large numbers of unreliable and automatically generated notices to ISPs”. The pleading does not explain how the CEP is used

to generate notices to members of the public who do not infringe or who are wrongfully accused of infringing. Nor does it clarify the basis for asserting that the notices are unreliable and unlawful and what proportion of the notices the allegation relates to. The pleading does not provide sufficient foundation for what constitutes the alleged improper behaviour.

[48] On this basis it is my view that despite its valiant argument, Bell has not established that the CMJ erred either in law or made a palpable and overriding error in finding that there were insufficient material facts to support a misuse of copyright defence.

(2) The Counterclaim for Declaratory and Injunctive Relief

[49] In addition to the misuse of copyright defence, Bell also brought a counterclaim seeking declarations in line with their defences, as well as injunctive relief.

[50] The CMJ found that except for the injunction, Bell was not seeking declarations of right but rather declarations of pleaded facts. Relying on the observations of Justice Stratas in *Entertainment Software Association v Society of Composers, Authors and Music Publishers of Canada*, 202 FCA 100 at paragraphs 104-106, the CMJ found that such declarations should be struck as lacking practical utility. As the injunction was predicated upon the declarations it was struck as well.

[51] Bell notes that US courts have allowed counterclaims for declarations of misuse of copyright on the basis that a defendant's interest in the issue may not be limited solely to its defence of the claim: *Apple Inc v Psystar Corp* 2009 WL 303046 at p. 3. It argues that the

declaration of misuse in this case could serve to establish that Bell does not have to send out further notices until the issues of misuse are dealt with and that the discretion as to whether a declaration should be issued should be left to the trial judge.

[52] Based on my findings on the insufficiency of the misuse of copyright defence, it is my view that the CMJ did not err in striking the request for a declaration that the Plaintiffs have engaged in copyright misuse and the requested injunction (paragraphs 49(b)(i) and (g)).

[53] With respect to the remaining requested declarations, they are in my view nothing more than statements of fact as held by the CMJ. Bell has not indicated what added value they would serve.

[54] Regarding the separate request for a declaration that the Plaintiffs have breached sections 41.25 and 41.26, as held by the CMJ a statutory breach does not give rise to an independent cause of action or permit parties to seek remedies outside of the legislation: *The Queen (Canada) v Saskatchewan Wheat Pool*, [1983] 1 SCR 205. Although Bell argues that it is relying on such allegations only to support its misuse of copyright defence, this is not how the defence and counterclaim are drafted; a separate declaration as to the breach of sections 41.25 and 41.26 is requested. The CMJ was not required to rewrite Bell's pleading and did not err in finding that this requested declaration was contrary to law.

C. *Did the CMJ err in striking the allegations against AB?*

[55] In the ASODCC, Bell alleged that AB, together with the Plaintiffs, and other AB clients, abused the Notice and Notice Regime and misused copyright. It asserted that:

- the CEP was “an arrangement developed and implemented” by AB to which the Plaintiffs had to agree;
- AB is the entity that manages the administration of the CEP using third-party forensic software and services to send notices of allegedly infringing acts to ISPs for forwarding to customers; brings motions for Norwich orders; handles all communications with alleged infringers about potential settlements; and sues individuals for infringement and negotiates settlements with them; and
- any proceeds of settlement or payments under court orders will be paid or directed to AB and AB will keep a substantial portion of the proceeds and divide the rest among the Plaintiffs and/or other AB clients which agreed to share in the risks, costs and proceeds of this action.

[56] Bell asserts that AB will unreasonably, unfairly and/or disproportionately share in any profits of the CEP and the resulting litigation and that AB had fostered frivolous and improper litigation. In Bell’s proposed counterclaim it requested declarations against AB in addition to the Plaintiffs and also asserted by counterclaim a declaration that the conduct of the Plaintiffs had been “knowingly induced, incited, persuaded, and procured” by AB.

[57] In the defence, Bell also alleged that the Plaintiffs and other AB clients had assigned their beneficial interest in their copyrights to AB for the purposes of enforcement and that the Plaintiffs consequently had no standing or entitlement to maintain the action or to recover statutory damages.

[58] In the Order, the CMJ struck all allegations against AB, including those in the counterclaim. The CMJ found that the allegations against AB were vague and speculative. The CMJ acknowledged Bell's argument that AB had effectively purchased an interest in the action and that it had induced and procured litigation which otherwise would not occur; however, he did not find sufficient material facts or foundation to support the serious allegations made.

[59] Bell argues that the CMJ erred when he found there were no material facts to support the counterclaim against AB and in striking the material facts involving AB that supported Bell's defences. It also argues that the CMJ erred in law in striking the counterclaim based on policy concerns that it amounted to a "slippery slope [which] potentially exposes all plaintiff law firms to being sued because they seek to enforce a client's rights, copyright or otherwise".

[60] As aptly noted by the CMJ, a claim cannot be made against the opposing party's solicitor for acting within their scope as a lawyer. As stated in *Davy Estate v Egan*, 2009 ONCA 763 at paragraph 28:

Obvious mischief arises from allowing one party to sue another party's solicitor. Such claims invade the sanctity of the solicitor-client relationship. The solicitor's loyalty to the client is undermined. Difficult issues regarding solicitor-client privilege are bound to arise in relation to the solicitor's defence.

[61] There are a few well-established exceptions to the general rule that a lawyer owes no duty to opposing third parties, one of which is where a lawyer is implicated in intentional torts, including, *inter alia*, abuse of process and civil conspiracy. Further, there is no absolute bar to an action against a lawyer by an opposing party whom the lawyer has injured while the lawyer was acting outside the scope of their duty as a solicitor: *Laiken v Carey*, 2011 ONSC 5892 at paras 55-56. However, in order for a claim to be maintained with respect to allegations relating to any of these exceptions, sufficient material facts must be alleged.

[62] The actions that Bell describes that AB undertakes in managing the CEP are consistent with steps that counsel would take in a solicitor and client relationship. Such actions without more detail do not provide sufficient support for the assertion that AB unreasonably, unfairly and/or disproportionately shared in any profits of the CEP, that AB has fostered frivolous and improper litigation, or that AB induced such activities by the Plaintiffs. Without more there is no explanation of how AB's actions in managing the CEP lead to the unreasonable and unfair conduct complained of, or how AB, through the use of the CEP, fostered frivolous and improper litigation. The fact that there are a large number of notices does not explain how they are improper.

[63] While Bell argues that its allegations come within a novel type of action, this does not allow it to plead defences, especially serious ones like the ones it has alleged, without foundation. Where it is plain and obvious that a cause of action, even a novel one, cannot succeed, as stated earlier, it may be properly struck: *Atlantic Lottery* at para 19.

[64] Further, as noted by the CMJ, “it does not sit in Bell’s mouth to make [a bald allegation] regarding transfer of rights as Bell admits in its pleading that it has “no knowledge” of the ownership of the Millennium film.” Bell seeks to distinguish these paragraphs of its pleading on the basis that one deals with beneficial interest while the other deals with formal ownership. However, in my view, this is not a meaningful distinction. One cannot transfer a beneficial interest unless it has a right to the copyright. The factual admission that Bell does not have knowledge regarding ownership of such rights underscores the speculative nature of any pleading of a purported transfer of beneficial interest.

[65] Bell has not established that the CMJ erred with respect to the allegations involving AB.

D. *Did the CMJ err in striking the allegations relating to champerty and maintenance?*

[66] At paragraph 36 of the ASODCC, Bell asserted in the alternative that:

36. ... if the Plaintiffs have standing or capacity to bring or maintain this action, Aird & Berlis and other Aird & Berlis Clients are improperly supporting this litigation and are involved in controlling the Plaintiffs’ litigation conduct in a relationship of champerty and/or maintenance or resembling champerty and/or maintenance.

[67] The CMJ struck this allegation, noting that the only remedy arising from a finding of champerty and maintenance is the unenforceability of the champertous agreement. The CMJ found that there were no material facts in Bell’s pleading that supported a sale or assignment of a bare right of action or that sought to nullify any form of agreement. Further, there were no material facts to support a claim that AB had acted outside the scope of its capacity as legal counsel to the Millennium Producers or other film production clients. The mere fact that AB got

paid for its services or stood to receive a portion of proceeds recovered from alleged infringers was not outside the realm of common legal practice.

[68] The concept of champerty and maintenance was explained in *McIntyre Estate v Ontario (Attorney General)*, 2002 CanLII 45046 (ONCA) at paragraph 26:

[26] Although the type of conduct that might constitute champerty and maintenance has evolved over time, the essential thrust of the two concepts has remained the same for at least two centuries. Maintenance is directed against those who, for an improper motive, often described as wanton or officious intermeddling, become involved with disputes (litigation) of others in which the maintainer has no interest whatsoever and where the assistance he or she renders to one or the other parties is without justification or excuse. Champerty is an egregious form of maintenance in which there is the added element that the maintainer shares in the profits of the litigation. Importantly, without maintenance there can be no champerty...

[69] Bell argues that the CMJ erred in stating that the only potential remedy would be the unenforceability of a champertous agreement. Bell asserts that champerty and maintenance is an independent basis upon which an action may be stayed: *Operation 1 Inc v Phillips*, 2004 CanLII 48689 (Ont SC).

[70] It asserts that the allegations of champerty are relevant to its pleading that the Millennium Producers assigned a beneficial interest to AB and that the Plaintiffs engaged in an unlawful means conspiracy. Bell highlights that it pleaded that AB created the CEP to encourage “thousands of pieces of litigation” for its own profit. Bell asserts that AB’s conduct is alleged to contravene the Notice and Notice Regime, cause significant harm to the public, and was done for



the purpose of taking a disproportionate share of the proceeds. It argues there are no policy grounds to justify an exception to the rule against champerty.

[71] In my view, none of these arguments are persuasive.

[72] Bell's argument that a champertous agreement could support Bell's allegation that the Plaintiffs have no standing (and a future stay motion) if Bell proves that the Plaintiffs assigned the beneficial interest in their copyright to AB is at this stage, nothing more than speculation without sufficient material facts to support an assignment of a beneficial interest, which I have already held there are not.

[73] Further, as emphasized in *Seedling Life Science Ventures LLC v Pfizer Canada Inc*, 2017 FC 826 [*Seedling*] at paragraphs 18, 22 and 23, champerty and maintenance operates and achieves its purpose by rendering an agreement tainted by maintenance and champerty unenforceable:

[18] To the extent the doctrine of champerty and maintenance remains relevant in Canadian common law, even as means of protecting the courts and vulnerable litigants against abuses, its purpose is not and was never intended to be achieved by conferring on the courts the discretion to inquire into and approve or disapprove of a plaintiff's funding arrangements as a condition precedent to instituting or pursuing litigation. It simply operates and achieves its purpose by rendering agreements tainted by maintenance and champerty unenforceable.

[...]

[22] In the case before me, the action has been instituted and is proposed to be pursued by Seedlings itself, the original holder of the rights asserted. ... unless the plaintiff has to rely on a champertous agreement to establish its title, the mere existence of a champertous agreement or maintenance is not a defence to the

action and does not disqualify the plaintiff from pursuing an action otherwise properly vested in it.

[23] The Defendant has no legitimate interest in enquiring into the reasonability, legality or validity of Seedlings' financial arrangements, its counsel's fee structure or the manner in which Seedlings chooses to allocate the risks and potential returns of the litigation, because they do not affect or determine the validity of the rights asserted by Seedlings in this action (*McIntyre Estate*, 2001, above).

[Emphasis added]

[74] Bell has not pleaded that it seeks to nullify any form of agreement. Nor does Bell's pleading outline how any purported agreement between AB and the Plaintiffs is fundamentally different from a contingency agreement, which is not champertous: *McEwing v Canada (Attorney General)*, 2013 FC 525 at para 111.

[75] Bell has not established that the CMJ erred in finding that there were insufficient material facts to ground the allegation made, or in striking the allegation made.

E. *Did the CMJ err in striking the abuse of process and unlawful means conspiracy allegations?*

[76] The tort of abuse of process requires that the legal process be used for a collateral, extraneous, ulterior, improper or illicit purpose that is other than the purpose which it was designed to serve: *Levi Strauss & Co v Roadrunner Apparel Inc*, [1997] FCJ No 1432 (Fed CA) at paras 10-12.

[77] Further, while predominant purpose conspiracy requires that the predominant purpose of the conduct in question is to cause injury, unlawful means conspiracy does not require a

predominant purpose; rather, the unlawful conduct in question must be directed to the party with a knowledge that injury is likely, and with actual damage resulting: *Pro-Sys Consultants Ltd v Microsoft Corporation*, 2013 SCC 57 at paras 74, 80. When applied to the actions of lawyers, such alleged unlawful conduct must be more than the exercise of the lawyer's duty. As held in *Edgeworth v Shapira*, 2019 ONSC 5792 at paragraph 44, in reference to *Heydary Hamilton PC v Dil Muhammad*, 2013 ONSC 4938 at paragraphs 59 and 60 (cited by the CMJ), legal advice and advocacy on behalf of a client cannot in itself be an instance of unlawful conduct where the lawyer believes he or she has a lawful right to engage in the conduct that is later impugned.

[78] In this case, the CMJ found that there were no material facts pleaded showing how AB and the Millennium Producers were involved in anything other than a solicitor and client relationship or how their actions amounted to the tort of abuse of process or unlawful means conspiracy.

[79] Bell argues that the CMJ erred in his application of the law of abuse of process and unlawful means conspiracy by failing to recognize material facts pleaded that it purports supports each of these causes of action. Instead of presuming the facts alleged to be true, Bell alleges that the CMJ sought to determine the merits of the allegations made.

[80] Bell contends that the Plaintiffs brought the action to force ISPs into forwarding all notices received, regardless of whether the notices were duplicative, unreliable, or improper. It contends that it pleaded an improper purpose, citing the same paragraphs below relied upon for

the misuse of copyright defence as the material facts to support the allegations (paragraphs shown below in non-struck format):

26. However, the Copyright Enforcement Program described in the claim, and used by the Plaintiffs, Aird & Berlis, and other Aird & Berlis Clients (as described below) is not a proper use of the Notice and Notice Regime. The Copyright Enforcement Program is a collective tool used to send extremely large numbers of unreliable and automatically generated notices to ISPs. Rather than a legitimate effort to protect copyright, the Copyright Enforcement Program has two main purposes and consequences:

- (a) to intimidate alleged infringers who receive notices into settling claims for much larger amounts than the damages actually suffered by the copyright owners, and
- (b) to claim exorbitant amounts from ISPs alleged to not be forwarding notices that far exceed any damages actually suffered for their alleged violations of the Notice and Notice Regime.

27. The Notice and Notice Regime imposes express and implied obligations on copyright owners to ensure that the collective tools and other means used to generate notices are not used in a manner that unduly risks:

- (a) incorrectly identifying a person, account, or online location as being associated with an allegedly infringing act; or
- (b) forwarding notices to members of the public who have not infringed copyright or wrongly accusing them of an infringement or threatening them with lawsuits.

28. Despite their obligations under the Act, the Plaintiffs and Aird & Berlis, under the Copyright Enforcement Program, send tens of thousands of notices, obtain Norwich orders against thousands of alleged infringers, make excessive settlement demands, and commence legal proceedings alleging copyright infringement for the purposes set out in paragraphs 26 and in breach of the obligations as described in paragraph 27 above. In fact, under the Copyright Enforcement Program described by the Plaintiffs at paragraphs 28-33 of the Statement of Claim and established by Aird & Berlis, tens of thousand of such notices have been sent to Bell and other ISPs in respect of Aird & Berlis' clients, including the Plaintiffs, Voltage Pictures, LLC (Voltage)

and its affiliates; Cell Film Holdings LLC; Clear Skies Nevada, LLC; Cobbler Nevada, LLC; Criminal Productions, LLC; Dallas Buyers Club, LLC; Eve Nevada LLC; Fathers & Daughters Nevada, LLC; Fallen Productions, Inc.; Glacier Entertainment S.A.R.L of Luxembourg; Glacier Films 1, LLC; HB Productions, Inc.; Headhunter, LLC; I.T. Productions, LLC; LHF Productions, LLC; ME2 Productions, Inc.; Morgan Creek Productions, Inc.; POW Nevada, LLC; PTG Nevada, LLC; TVB Productions, LLC; Wind River Productions LLC; and WWE Studios, LLC (collectively, the “Aird & Berlis Clients”). The Copyright Enforcement Program is a tool of harassment and intimidation. It is used for the purpose of extracting disproportionate and unjustified settlements from innocent parties or to extract disproportionate and unjustified settlements from parties whose liability should be only minimal. The misuse of the Notice and Notice Regime by Aird & Berlis and the Aird & Berlis Clients through the Copyright Enforcement Program causes unwarranted harm and concern to Internet users who lack the ability to defend themselves or curtail such abuses. Certain Aird & Berlis Clients similarly misuse the United States court system.

[...]

44. Were the Plaintiffs’ interpretation of s. 41.26(3) correct, it would expose ISPs, hosts and search engines to exorbitant damages awards as a result of the extremely large number of notices sent by the automated software used as part of the Copyright Enforcement program. This was not the intention of the Notice and Notice statutory damages regime. Statutory damages are intended to approximate the actual damage suffered by notice senders, and such damages are grossly disproportionate against intermediaries which merely provide users with Internet connectivity.

45. Further, if the Plaintiffs’ interpretation of s. 41.26(3) was correct, all ISPs would have a very strong incentive to forward any notice they received – regardless of whether it was deficient or duplicative – to avoid the prospect of a staggering damages award. That is not how the Notice and Notice Regime was intended to operate.

[81] However, none of these paragraphs purport to assert how in advancing a statutory right under subsection 41.26(3) of the Act on behalf of the Millennium Producers, this action advances an illegal purpose. The alleged abusive conduct is with respect to the generation of notices

against third parties (the alleged infringers), not Bell. Further, nowhere in Bell's pleading does Bell claim that it has suffered any damage arising from the action. Indeed, paragraphs 44 and 45 challenge the Millennium Producers' interpretation of subsection 41.26(3) of the Act, and its calculation of the statutory damages *it* is owed.

[82] While the merits of a cause of action is not to be determined on a motion to strike, some legal analysis may be needed to determine if a claim has any reasonable prospect of success: *Mohr v National Hockey League*, 2022 FCA 145 at para 53; *McCain Foods Limited v J.R. Simplot Company*, 2021 FCA 4 at para 21.

[83] Bell has not established that the CMJ erred in finding that there were no material facts alleged to establish the torts of abuse of process and unlawful means conspiracy.

F. *Did the CMJ err in striking the Charter allegations?*

[84] At paragraph 47 of the ASODCC, Bell pleaded

47. In the further alternative, if statutory damages can be awarded on a "per notice" basis, as alleged by the Plaintiffs, such provisions are contrary to ss. 7 and 12 of the *Canadian Charter of Rights and Freedoms*, and should not be enforced. Bell relies on s. 24 of the *Canadian Charter of Rights and Freedoms*.

[85] Citing *Canada v BCS Group Business Services Inc.*, 2020 FCA 205 [*BCS Group*], the CMJ struck paragraph 47 on the basis that corporations cannot avail themselves of protections provided under the Charter. Paragraph 31 of *BCS Group* states that:

[31] Very recently the Supreme Court of Canada provided another example in *Quebec (Attorney General) v. 9147-0732 Québec inc.*, 2020 SCC 32 (*Quebec (Attorney General)*) of how

the nature of a right will have an impact on the meaning of a general expression like “everyone” (which is as general as “a party”). This decision concerned the application of section 12 of the Charter to a corporation. The Court found that even though section 12 of the Charter uses wording that would normally include a corporation as a legal person (“everyone has the right to”), other words used in their ordinary meaning in the provision, such as “cruel”, strongly suggest that it could not have been intended by the legislator to apply to inanimate objects or legal entities such as corporations. On this point, the dissenting judges agreed with the majority that the word “everyone” as found in the text of section 12 cannot, by virtue of its literal meaning, expand the protection to corporations (see paras. 82-87).

[86] Bell asserts that the CMJ’s finding was an error of law. It argues that where a corporation is involuntarily brought before the Court pursuant to a regulatory regime set up under an impugned law, it has private interest standing and may challenge that law on the basis that it is unconstitutional: *Prairies Tubulars (2015) Inc v Canada (Border Services Agency)*, 2021 FC 36 [*Prairies Tubulars*] at paras 61-70.

[87] It asserts that the CMJ incorrectly held that “what Bell appears to be pleading... is not the Charter protections of ss. 7 and 12 but only that s. 41.26(3) of the *Copyright Act* not be enforced against Bell” when Bell expressly pleads that interpreting section 41.26 of the Act in the manner alleged by the Plaintiffs is unconstitutional. Bell argues that having been involuntarily brought before the Court to defend itself in this action under section 41.26 of the Act, it should not be barred at the pleadings stage from advancing this Charter argument. Although section 41.26 was not expressly dealt with before in the jurisprudence, Bell argues that the logic applied in *Prairie Tubulars* applies equally well to this case.

[88] The Millennium Producers dispute Bell's reliance on *Prairies Tubulars*. They assert that it only stands for the proposition that corporations may have standing to invalidate a statutory provision pursuant to subsection 52(1) of the *Constitution Act, 1982*. They point out that at paragraph 76 of *Prairies Tubulars*, after having considered the issue of standing, the Court states that:

...*Quebec Inc* provides a complete answer for that conclusion: corporations do not enjoy rights under section 12. For a fine to be unconstitutional, it must be "so excessive as to outrage standards of decency" and "abhorrent or intolerable" to society — a standard that is "inextricably anchored in human dignity" and therefore not applicable to corporate entities...

[89] Bell argues that interpreting section 41.26 of the Act in the manner alleged by the Plaintiffs is unconstitutional and that it did not simply plead that section 41.26 should not be enforced against Bell. It asserts that if necessary it should be granted leave to amend to clarify that it is challenging the constitutionality of the provision.

[90] In my view, the CMJ did not err in striking paragraph 47. The full nature of any constitutional challenge that Bell might opt to allege and the authority for doing so has not been established.

G. *Should Bell have been granted leave to amend its pleading?*

[91] Bell asserts that the CMJ erred in denying leave to amend. In the Order, the CMJ stated only that he was not persuaded that the "bald and vague allegations" made in the Impugned Paragraphs could be cured by amendment.



[92] Bell contends that the CMJ failed to consider whether additional material facts or a narrowing of the claim could cure the deficiencies. Given the novelty of the allegations made and the potential high stakes of the action, it argues that Bell ought to have been given an opportunity to amend.

[93] As stated in *Simon v Canada*, 2011 FCA 6 at paragraph 8, for a pleading to be struck without leave to amend any defect in the pleading must be one that “is not curable by amendment.”

[94] The fact that allegations are bald is not, in itself, a basis for refusing leave. It is only where it is clear that the party cannot allege further material facts that he knows to be true to support the allegations that leave to amend should be refused: *Miguna v Ontario*, 2005 CanLII 46385 (ONCA) at para 22.

[95] In this case, Bell did not indicate how it would cure the deficiencies in its pleadings. Rather, its argument seems to be that because its allegations are novel there should be leeway given. This does not overcome the necessity for the party who needs to respond to the pleading to understand the foundation for the allegations made, including how the CEP is asserted to be used in an unlawful manner and on what basis it is asserted that there are large numbers of notices that are sent that are unreliable and which identify potential infringers that are not infringing.

[96] In this case, the correspondence that was before the CMJ indicated that when Bell amended its pleading, it knew of many of the Plaintiffs' concerns, yet failed to rectify the issues. As discussed in *Committee for Monetary and Economic Reform v Canada*, 2016 FC 147 at paragraph 147, this is relevant context. In such circumstances, I agree with the Millennium Producers, there is no basis to suggest that further amendment would cure the defects noted and as such, the decision to deny leave was justified.

[97] There was no error by the CMJ in not allowing leave to amend.

#### IV. Conclusion

[98] For all of these reasons, the appeal is dismissed.

#### V. Costs

[99] Each of the parties made submissions on costs. Bell argued that costs should be awarded in the cause. The Respondents argued that it should be awarded solicitor and client costs in view of the allegations made against AB.

[100] In view of the novel aspects to this action, in my view the appropriate award of costs is costs to the Millennium Producers in the cause.

**ORDER IN T-1062-21**

**THIS COURT ORDERS that:**

1. The appeal is dismissed.
2. Costs are awarded to the Plaintiffs in the cause.

"Angela Furlanetto"

---

Judge

Schedule "A"

**B. BELL HAS NO OBLIGATION TO FORWARD DUPLICATE NOTICES**

[...]

24. In the alternative, the Plaintiffs are precluded, including by reason of waiver and estoppel, from alleging that Bell had an obligation to forward duplicate notices. The Plaintiffs and their legal counsel Aird & Berlis have represented to this Court, that under the Copyright Enforcement Program copyright owners do not send duplicate notices to alleged infringers within less than a week. The Plaintiffs are thus barred from now alleging otherwise.

*The Plaintiffs Abuse the Notice and Notice Regime*

[...]

26. However, the Copyright Enforcement Program described in the claim, and used by the Plaintiffs, ~~Aird & Berlis, and other Aird & Berlis Clients (as described below)~~ is not a proper use of the Notice and Notice Regime. The Copyright Enforcement Program is a collective tool used to send extremely large numbers of unreliable and automatically generated notices to ISPs. ~~Rather than a legitimate effort to protect copyright, the Copyright Enforcement Program has two main purposes and consequences:~~

- ~~(a) to intimidate alleged infringers who receive notices into settling claims for much larger amounts than the damages actually suffered by the copyright owners, and~~
- ~~(b) to claim exorbitant amounts from ISPs alleged to not be forwarding notices that far exceed any damages actually suffered for their alleged violations of the Notice and Notice Regime.~~

27. The Notice and Notice Regime imposes express and implied obligations on copyright owners to ensure that the collective tools and other means used to generate

notices are not used in a manner that unduly risks:

- (a) incorrectly identifying a person, account, or online location as being associated with an allegedly infringing act; or
- (b) forwarding notices to members of the public who have not infringed copyright or wrongly accusing them of an infringement or threatening them with lawsuits.

28. Despite their obligations under the Act, the Plaintiffs and Aird & Berlis, under the Copyright Enforcement Program, send tens of thousands of notices, obtain Norwich orders against thousands of alleged infringers, make excessive settlement demands, and commence legal proceedings alleging copyright infringement for the purposes set out in paragraphs 26 and in breach of the obligations as described in paragraph 27 above. In fact, under the Copyright Enforcement Program described by the Plaintiffs at paragraphs 28-33 of the Statement of Claim and established by Aird & Berlis, tens of thousand of such notices have been sent to Bell and other ISPs in respect of Aird & Berlis' clients, including the Plaintiffs, Voltage Pictures, LLC (Voltage) and its affiliates; Cell Film Holdings LLC; Clear Skies Nevada, LLC; Cobbler Nevada, LLC; Criminal Productions, LLC; Dallas Buyers Club, LLC; Eve Nevada LLC; Fathers & Daughters Nevada, LLC; Fallen Productions, Inc.; Glacier Entertainment S.A.R.L of Luxembourg; Glacier Films 1, LLC; HB Productions, Inc.; Headhunter, LLC; I.T. Productions, LLC; LHF Productions, LLC; ME2 Productions, Inc.; Morgan Creek Productions, Inc.; POW Nevada, LLC; PTG Nevada, LLC; TVB Productions, LLC; Wind River Productions LLC; and WWE Studios, LLC (collectively, the "**Aird & Berlis Clients**"). The Copyright Enforcement Program is a tool of harassment and intimidation. It is used for the purpose of extracting disproportionate and unjustified settlements from innocent parties or to extract disproportionate and unjustified settlements from parties whose liability should be only minimal. The misuse of the Notice and Notice Regime by Aird & Berlis and the Aird & Berlis Clients through the Copyright Enforcement Program causes unwarranted harm and concern to Internet users who lack the ability to defend themselves or curtail such abuses. Certain Aird & Berlis Clients similarly misuse the

United States court system.

~~29. — There are two consequences to this improper use of the Notice and Notice-Regime: (A) the Copyright Enforcement Program is illegal, and (B) the Plaintiffs have no standing to bring this action.~~

~~A. — **THE COPYRIGHT ENFORCEMENT PROGRAM IS ILLEGAL**~~

~~30. — The Copyright Enforcement program is a misuse and abuse of the Notice and Notice Regime. It also constitutes (1) copyright misuse by Aird & Berlis and the Aird & Berlis Clients, (2) It is illegal, an abuse of process (also abus de droit) by Aird & Berlis and the Aird & Berlis Clients and is against public policy and the public interest and the purposes of the Act, (3) it and constitutes champerty or maintenance, and (4) it constitutes an unlawful means conspiracy.~~

~~31. The Copyright Enforcement Program is an arrangement developed and implemented by Aird & Berlis. All Aird & Berlis Clients, including the Plaintiffs, must agree to the program. All the members jointly agree that Aird & Berlis will:~~

- ~~(a) — manage the administration of the Copyright Enforcement Program, using third party forensic software and services to send notices of allegedly infringing — acts to ISPs for forwarding to their customers;~~
- ~~(b) — bring motions for Norwich orders;~~
- ~~(c) — handle all communications with alleged infringers about potential settlements; and~~
- ~~(d) — sue individuals for infringement and negotiate settlements with them.~~

~~32. — Any proceeds of settlement or payments under court orders are paid or directed to Aird & Berlis, which keeps a substantial portion of the proceeds and divides the rest among the members that have agreed to share in the risks, costs, and proceeds of the Copyright Enforcement Program, including the Plaintiffs and the Aird & Berlis Clients.~~

~~33. — For this claim for statutory damages against Bell, Aird & Berlis developed and implemented a similar arrangement with the Plaintiffs and/or other Aird & Berlis Clients. Any proceeds of settlement or payments under court orders will be paid or directed to Aird & Berlis. Aird & Berlis will keep a substantial portion of the proceeds and divide the rest among the Plaintiffs and/or other Aird & Berlis Clients which agreed to share in the risks, costs and proceeds of this action.~~

~~34. Pursuant to these arrangements, Aird & Berlis will unreasonably, unfairly and/or disproportionately share in any profits of the Copyright Enforcement Program and this litigation. Further, through this Action and the Copyright Enforcement Program generally, Aird & Berlis has fostered frivolous and improper litigation.~~

**B. — THE PLAINTIFFS HAVE NO STANDING TO BRING THIS ACTION**

~~35. — Through the Copyright Enforcement Program, the Plaintiffs and other Aird & Berlis Clients have assigned the beneficial interest in their copyrights to Aird & Berlis for the purposes of enforcement.~~

~~36. — Consequently, the Plaintiffs have no standing or entitlement to bring or maintain this action or to recover any statutory damages. As well, or alternatively, if the Plaintiffs have standing or capacity to bring or maintain this action, Aird & Berlis and other Aird & Berlis Clients are improperly supporting this litigation and are involved in controlling the Plaintiffs' litigation conduct in a relationship of champerty and/or maintenance or resembling champerty and/or maintenance.~~

[...]

**B. THIS COURT SHOULD ONLY AWARD STATUTORY DAMAGES COMMENSURATE WITH DAMAGES SUFFERED**

46. In the further alternative, if statutory damages can be awarded on a “per notice” basis as alleged by the Plaintiffs, this Court has the jurisdiction to reduce such damages to an amount this Court deems to be in the interests of justice. In this regard, the Court

can take into account, among other things:

- (a) the conduct of the Plaintiffs and Bell before and during the proceedings;
- (b) whether the award, if any, is proportionate to the alleged violations;
- (c) whether the award is correlated to actual damages and/or loss of profits of the Plaintiffs and would in all circumstances yield a just result;
- ~~(d) the impact of the alleged violations on the Plaintiffs' business model;~~
- (e) the failure of the Plaintiffs to mitigate their damages;
- (f) the contribution of other online infringements, including by customers of other ISPs worldwide, if any, to the Plaintiffs' alleged losses;
- ~~(g) the Plaintiffs' abuse of the Notice and Notice Regime; and~~
- (h) Bell's good faith and significant efforts to comply with the Notice and Notice Regime, especially in light of the torrent of notices sent by the Plaintiffs through the Copyright Enforcement Program.

~~47. In the further alternative, if statutory damages can be awarded on a "per notice" basis, as alleged by the Plaintiffs, such provisions are contrary to ss. 7 and 12 of the Canadian Charter of Rights and Freedoms, and should not be enforced. Bell relies on s. 24 of the Canadian Charter of Rights and Freedoms.~~

[...]

**AMENDED COUNTERCLAIM**

~~49. The Defendant/Plaintiff by Counterclaim, Bell, seeks:~~

- ~~(a) A declaration that the Plaintiffs/Defendants by Counterclaim and Aird & Berlis have breached sections 41.25 and 41.26 of the Copyright Act;~~
- ~~(b) A declaration that the Plaintiffs/Defendants by Counterclaim and Aird &~~



Berlis have:

- (i) — engaged in copyright misuse,
- (ii) — abused the court's process,
- (iii) — engaged in champerty & maintenance and
- (iv) — conducted an unlawful means conspiracy

(b)(c) — A declaration that the Plaintiffs/Defendants by Counterclaim and Aird & Berlis have acted in concert with one another pursuant to an agreement and a common design to send improper, non-compliant, illegal, duplicative, or disproportionate notices, and the other conduct set out in the Statement of Defence and in breach of the Notice and Notice Regime, purportedly pursuant to sections 41.25 and 41.26 of the Copyright Act, for the purposes of:

- (i) — intimidating alleged infringers who receive notices into settling claims where they are not liable for infringement or into settling for much larger amounts than the damages actually suffered by copyright owners, and
- (ii) — claiming exorbitant amounts from ISPs, including Bell, alleged to not be forwarding notices that far exceed any damages actually suffered for their alleged violations of the Notice and Notice Regime.

(d) — A declaration that Bell had no obligation to forward the Asserted Notices (as defined in the Claim) received from the Plaintiffs/Defendants by Counterclaim as a result of the Plaintiffs/Defendants by Counterclaim's breach of sections 41.25 and 41.26 of the *Copyright Act* and the other conduct set out in the Statement of Defence;

(e) — A declaration that Bell has no obligation under the Notice and Notice

~~Regime to forward any notices sent by the Plaintiffs/Defendants by Counterclaim as a result of the Plaintiffs/Defendants by Counterclaim's breach of sections 41.25 and 41.26 of the *Copyright Act* and the other conduct set out in the Statement of Defence;~~

~~(f) — A declaration that the conduct of the Plaintiffs/Defendants by Counterclaim has been knowingly induced, incited, persuaded, and procured by Aird & Berlis;~~

~~(g) — An interim, interlocutory and permanent injunction restraining the Plaintiffs/Defendants by Counterclaim and Aird & Berlis, their officers, directors, employees, agents, servants, successors, licensees, affiliates, subsidiaries, related companies and all those over whom they exercise control from directly or indirectly sending further notices of alleged infringing acts to Bell under the Notice and Notice Regime under the Copyright Enforcement Program until they cure the breaches of sections 41.25 and 41.26 of the *Copyright Act* and the other conduct set out in the Statement of Defence;~~

~~(h) — Its costs of this action payable forthwith; and~~

~~(i) — Such further and other relief as this Honourable Court may deem just.~~

50. — ~~The Defendant/Plaintiff by Counterclaim repeats and relies on each and every allegation set out in the Statement of Defence.~~

51. — ~~By reason of their actions, as described in the Statement of Defence, the Plaintiffs and Aird & Berlis have violated and/or abused sections 41.25 and 41.26 of the *Act* and have acted illegally and contrary to public policies concerning the enforcement of copyrights online. The Plaintiffs have also misused their copyrights. The Copyright Enforcement Program and the arrangements between the Plaintiffs and other Aird & Berlis Clients and Aird & Berlis also constitutes champerty or maintenance, or conduct that resembles it, an abuse of process and an unlawful means conspiracy.~~

52. — ~~The conduct of the Plaintiffs/Defendants by Counterclaim set out in the Statement~~

~~of Defence has been knowingly induced, incited, persuaded, and procured by Aird & Berlis. Further, the Plaintiffs/Defendants by Counterclaim and Aird & Berlis have acted in concert with one another pursuant to a common design and concerted action to engage in such conduct including to violate and/or abuse sections 41.25 and 41.26 of the Act.~~

**FEDERAL COURT**

**SOLICITORS OF RECORD**

**DOCKET:** T-1062-21

**STYLE OF CAUSE:** MILLENNIUM FUNDING, INC., OUTPOST PRODUCTIONS, INC., BODYGUARD PRODUCTIONS, INC., HUNTER KILLER PRODUCTIONS, INC. AND RAMBO V PRODUCTIONS, INC. v BELL CANADA AND BELL ALIANT AND AIRD & BERLIS LLP

**PLACE OF HEARING:** TORONTO, ONTARIO

**DATE OF HEARING:** JANUARY 31, 2023

**ORDER AND REASONS:** FURLANETTO J.

**DATED:** MAY 31, 2023

**APPEARANCES:**

Steven G. Mason  
Barry Sookman  
Kendra Levasseur

FOR THE DEFENDANT/  
PLAINTIFFS BY COUNTERCLAIM

Dale E. Schlosser

FOR THE PLAINTIFFS AND DEFENDANTS BY  
COUNTERCLAIM

**SOLICITORS OF RECORD:**

McCarthy Tetreault LLP  
Barristers and Solicitors  
Toronto, Ontario

FOR THE DEFENDANTS/  
PLAINTIFFS BY COUNTERCLAIM

Springs Intellectual Property  
Law  
Barristers and Solicitors  
Toronto, Ontario

FOR THE PLAINTIFFS AND DEFENDANTS BY  
COUNTERCLAIM

Aird & Berlis LLP  
Barristers and Solicitors  
Toronto, Ontario

FOR THE PLAINTIFFS/DEFENDANTS BY  
COUNTERCLAIM