

Court File No. **A-189-23**

**FEDERAL COURT OF APPEAL**

**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 FATHERS & DAUGHTERS NEVADA, LLC**

101

FEDERAL COURT OF APPEAL COUR D'APPEL FÉDÉRALE	
FILED	JUL 25 2023
RECORDED	KIMI CHEONG
TORONTO, ON	

Appellants

- and -

**ROBERT SALNA, JAMES ROSE, and LOREDANA CERILLI,  
PROPOSED REPRESENTATIVE RESPONDENTS ON  
BEHALF OF A CLASS OF RESPONDENTS**

Respondents

**NOTICE OF APPEAL**

**TO THE RESPONDENTS:**

**A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU** by the appellants. The relief claimed by the appellants appears below.

**THIS APPEAL** will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court directs otherwise, the place of hearing will be as requested by the appellant. The appellant requests that this appeal be heard at 180 Queen Street West, Suite 200, Toronto, ON, M5V 3L6.

**IF YOU WISH TO OPPOSE THIS APPEAL**, to receive notice of any step in the appeal or to be served with any documents in the appeal, you or a solicitor acting for you must prepare a notice of appearance in Form 341A prescribed by the *Federal Courts Rules* and serve it on the appellants' solicitor or, if the appellants are self-represented, on the appellants, **WITHIN 10 DAYS** after being served with this notice of appeal.

**IF YOU INTEND TO SEEK A DIFFERENT DISPOSITION** of the order appealed from, you must serve and file a notice of cross-appeal in Form 341B prescribed by the *Federal Courts Rules* instead of serving and filing a notice of appearance.

1225

Copies of the *Federal Courts Rules*, information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

**IF YOU FAIL TO OPPOSE THIS APPEAL, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.**

July 25, 2023

Issued by:  
Address of  
local office: 180 Queen Street West,  
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**AND TO: THE REGISTRAR**  
Federal Court of Appeal

**THE APPELLANTS (“Voltage”) APPEAL** to the Federal Court of Appeal from the order of The Honourable Mr. Justice Fothergill (the “**Hearing Judge**”) dated June 26, 2023 in Court File No. T-662-16 (the “**Order**” and its accompanying reasons being the “**Reasons**”) by which the Court refused to certify the underlying application as a class proceeding.

**THE APPELLANTS ASK THAT** this Court grant an order:

1. the Order be reversed;
2. the motion for certification in this matter be granted by way of order compliant with Rule 334.17;
3. that no costs be awarded to any party throughout; and
4. the \$75,000 that Voltage posted as security for costs be released to Voltage with interest in full.

**THE GROUNDS OF APPEAL** are as follows:

**BACKGROUND**

1. The underlying Application is a proposed class proceeding against the individual Mr. Robert Salna as the proposed representative respondent of a proposed class of Respondents who have unlawfully, and without the Voltage Parties’ authorization or consent, infringed copyright in various copyrighted films (the “**Works**”), including by illegally uploading and distributing (making available) the Works for free over the internet.
2. Internet subscribers (“**Account Holders**”), such as Mr. Salna, are the persons legally responsible for payment of the internet bill, and those who can cancel the internet if necessary, or, more usefully, the persons who can control access to their internet accounts by changing the WiFi password to their internet device (e.g. a router) or controlling wired access to the internet. These Account Holders also receive copyright

infringement warning notices through the Notice and Notice Regime set out in s. 41.25 and s. 41.26 of the *Copyright Act*.

3. The class definition is based on the pleaded cause of action of “authorizing copyright infringement”, *i.e.*, that Account Holders are liable for the acts performed by the users of the Account Holders’ internet, these users being either the Account Holders themselves, or those provided access to the internet by the Account Holders.
4. Authorization would be found on the same facts for all Account Holders, including Mr. Salna, namely that each Account Holder would have received notice of copyright infringement and would have provided notice that they had taken steps to cease or prevent such infringement (by way of a notice system set up for the class proceeding that would notify the Applicants and class counsel).
5. Similarly, authorization of copyright infringement by the Account Holders could also be found through wilful blindness of the Account Holders, or through their agreements with their internet providers, which would not require notice.
6. Mr. Salna had been provided notice of infringement, and refused to take action to make the infringement cease, claiming that it was not his responsibility to do so.

#### **PROCEEDING HISTORY**

7. On September 23–24, 2019, the Honourable Mr. Justice Boswell heard a motion to certify this proceeding as a class proceeding (the “**First Certification Motion**”). On November 12, 2019, the Court issued its order and reasons, finding that Voltage had not met any of the certification criteria under Rule 334.16(1) (*Voltage Pictures, LLC v. Salna*, 2019 FC 1412). This decision was appealed by Mr. Salna on the issue of costs, and Voltage cross-appealed on the certification issues.

8. On September 8, 2021, the Federal Court of Appeal granted the cross-appeal in part (*Salna v. Voltage Pictures, LLC*, 2021 FCA 176, the “**FCA Decision**”). The Federal Court of Appeal held that Voltage had satisfied the first three certification criteria:
  - a) the pleadings disclose a reasonable cause of action;
  - b) there is an identifiable class of two or more persons; and
  - c) the claims of the class members raise common questions of law or fact, whether or not those common questions predominate over questions affecting only individual members.
9. The Federal Court of Appeal found other errors with respect to the final two certification criteria (preferable procedure and suitable representative respondent) and costs. The Federal Court of Appeal returned the certification motion to the Federal Court for consideration of the final two certification criteria. The Federal Court of Appeal also set aside the order for costs of the certification motion.
10. On September 21, 2021, Mr. Salna filed a motion for reconsideration of the FCA Decision. On November 2, 2021, the Federal Court of Appeal dismissed the motion for reconsideration. On November 5, 2021, Mr. Salna sought leave to appeal the FCA Decision to the Supreme Court of Canada. On May 26, 2021, the Supreme Court of Canada dismissed the application for leave to appeal. The FCA Decision is final.
11. After the First Certification Motion, and prior to the first appeal, the Honourable Mr. Justice Boswell retired. The Court designated that the new case management judge would preside over the re-hearing of the motion for certification. The re-hearing took place on April 20 and 21, 2023 before the Hearing Judge.
12. On June 26, 2023, the Hearing Judge released his Order and Reasons.

He held, *inter alia*, that:

- a) the fourth certification criteria (Rule 334.16(1)(d), preferable procedure) was satisfied as Voltage had provided some basis in fact that a reverse class proceeding is preferable to the procedure for individual actions or joinder;
- b) In respect of the fifth certification criteria (Rule 334.16(1)(e), he held that:
  - i) Mr. Salna was a suitable representative respondent even though he was reluctant, as he has shown himself to be capable of vigorously and fairly defending the interests of the class as a whole (Rule 334.16(1)(e)(i)), although this was subject to a reasonable assurance of funding for class counsel;
  - ii) In respect of the litigation plan (Rule 334.16(1)(e)(ii)) requirement to notify class members,
    - (1) copyright owners cannot use the notice-and-notice regime to:
      - (A) provide a hyperlink to visit a website to enable class counsel to communicate with notice recipients, which may involve disclosure of personal information,
      - (B) enable opting-out via email, which may disclose email addresses, names and any metadata imbedded in the email,
      - (C) require contacting class counsel to provide evidence that the alleged infringement has ceased, and
      - (D) provide an opportunity to opt-out or provide evidence that the infringement has ceased or steps have been taken to mitigate damages, which is offering a settlement in a

notice; but that

- iii) Voltage could present a revised, workable, litigation plan that:
  - iv) does not depend on the notice-and-notice regime to identify and communicate with Class Members, and
  - v) makes adequate provision for the funding of class counsel.

13. The Court awarded costs to Mr. Salna in the all-inclusive lump sum amount of \$50,710, which is 50% of Mr. Salna's claimed legal fees, notwithstanding the presumptive no costs regime (Rule 334.39). The Hearing Judge held "that the proceeding itself constitutes an exceptional circumstance" (para. 100).
14. The proper procedure for claiming flat fee costs was not followed, including filing any evidence of any kind at the hearing regarding costs incurred or paid.

#### **REVIEWABLE ERRORS**

15. The Hearing Judge reviewably erred by:
  - a) making a legal error requiring that the Applicant either fund or provide a method of funding of the Respondent Class Counsel be a condition of certification when no such requirement is found in Rule 334.16 and when same is contrary to the principles of the Canadian adversarial litigation system;
  - b) making a legal error in his statutory interpretation of s. 41.25 of the *Copyright Act* and the restrictions on sending copyright notices through the Notice and Notice Regime including by finding that various forms of notice and communications cannot be initiated through the notice-and-notice regime;
  - c) making a legal error by refusing to certify the proceeding as a class

proceeding based on relatively minor concerns related to the litigation plan (i.e. on how to provide notices to class members) which instead should have been addressed following certification in accordance with Rules 334.32 to 334.38;

- d) making a legal error in his statutory interpretation of Rule 334.39 and awarding costs to Mr. Sala by finding that “exceptional circumstances” exist because “the proceeding itself constitutes an exceptional circumstance”, which was also decided without sufficient reasons or analysis; and
- e) making a legal error by granting a lump-sum costs award of 50% to Mr. Salna without following the procedure required by law.

**A) CONSTRUCTION OF THE NOTICE-AND-NOTICE REGIME**

- 16. The Hearing Judge’s construction did not fully take into account the full context of the notice-and-notice regime and Parliament’s intentions. The Hearing Judge did not fully consider what Parliament required a notice to contain, prohibited a notice from containing and allowed a notice to contain as part of encouraging “marketplace solutions”. The Hearing Judge did not consider that s. 41.25(2)(a) requires notices of claimed infringement to include information to “enable communication with the claimant”. The notice-and-notice regime does not ban enabling methods of communication that may eventually include personal information.
- 17. The Hearing Judge made a palpable and overriding error by finding that class members had to disclose personal information when they did not. Further, the Hearing Judge reviewably erred when not considering the advantage to the class members of remaining anonymous through the use of the Notice and Notice system.

**B) THE HEARING JUDGE MADE A LEGAL ERROR REQUIRING THE APPELLANTS TO DETERMINE HOW THE RESPONDENTS FUNDED THEIR DEFENCE**

18. There is no requirement under Rule 334.16(1) that certification should not be granted unless there is a class counsel funding scheme, either for “regular” class proceedings or “reverse” class proceedings.
19. The Appellants do not have, and should not have, the responsibility to provide a plan for funding the Class Respondents’ lawyers. Requiring an opposing party to provide a plan for funding an adverse party’s defence offends the adversarial system. In private litigation, a plaintiff should not be in control of the funding of a defendant’s counsel.

**C) THE HEARING JUDGE ERRED BY REFUSING TO CERTIFY BASED ON SPECULATIVE CONCERNS WHICH COULD BE ADDRESSED FOLLOWING CERTIFICATION.**

20. Rule 334.16 is mandatory and requires a proceeding to be certified as a class proceeding if the circumstances are met. The Court may not refuse to certify a proceeding on the basis of speculative concerns that may undermine the viability. The *Rules* provide mechanisms to address issues with the viability of a class proceeding as the proceeding unfolds, such as subclasses, case management and litigation plan amendments.
21. The Hearing Judge should not have refused to certify the proceeding on the basis that the Respondent could encounter difficulty in funding his defence. This is a concern that should be addressed if it occurs by e.g. appointing other class members to be representative class members, or otherwise. To prevent certification based on speculative concerns is an error of law, as recognized by the Hearing Judge in the case of speculation regarding opting-out of the class action.

**D) THE HEARING JUDGE ERRED BY REFUSING TO CERTIFY CONDITIONAL ON A REVISED LITIGATION PLAN**

22. Of the five criteria required for certification, the Reasons only leave two concerns (funding of class counsel and method of identifying and

communicating with class members) to address to enable certification. Both of these concerns could be addressed through amendments to the litigation plan. The Hearing Judge should have granted the motion conditional on the parties submitting a satisfactory amended litigation plan, rather than requiring the moving parties to bring a fresh certification motion on all issues.

**E) THE HEARING JUDGE ERRED IN FINDING “EXCEPTIONAL CIRCUMSTANCES” BASED ON THE PROCEEDING ITSELF**

23. Under Rule 334.39, class proceedings are presumptively a no-costs regime. In order to award costs despite the no-costs regime, the Court must identify and explain why one of the three circumstances in Rule 334.39 is met.
24. The Hearing Judge awarded costs on the grounds that “the proceeding itself constitutes an exceptional circumstance”. The Hearing Judge provides no further analysis or explanation as to why seeking to certify a respondent class proceeding amounts to exceptional circumstances that justifies departing from the no-costs regime. The Hearing Judge made a legal error by failing to properly construe Rule 334.39 in its full context and identify a legally tenable ground for awarding costs outside of the no-costs regime. Further, the Hearing Judge erred in failing to provide sufficient reasons for finding exceptional circumstances. The Federal Court of Appeal decision in this matter on security for costs relied on by the Hearing Judge did not find that every reverse class proceeding is an exceptional circumstance and interpreting the decision in that way is an error of law.
25. Further, the Hearing Judge’s logic that a judge may “grant costs to a representative respondent in a reverse class action pursuant to Rule 334.39(1)(c)” explicitly creates a one-way costs regime. Under this reasoning, any person seeking to certify a defendant or respondent class proceeding may be subject to a costs award, but any proposed

representative defendant or respondent would not. One-way costs regimes do not exist in private-party civil litigation in Canada. Either both parties may be subject to costs or neither party is subject to costs. This otherwise dis-incentivizes rightful reverse class proceedings contrary to the intention of Parliament when it enacted the Federal Court class action regime – it expressly set out a “no-costs” regime to encourage class proceedings including reverse class proceedings.

**F) THE HEARING JUDGE ERRED IN AWARDING LUMP SUM COSTS OUTSIDE OF THE PROPER PROCEDURE**

26. In the Federal Courts, costs are generally awarded in accordance with the Tariff amounts under the *Rules*. In order to depart from the Tariff (e.g. a lump sum costs award), Federal Courts case law requires certain procedural steps and supporting documentation. These are procedural protections for parties who may be subject to a lump sum costs award.
27. The Hearing Judge awarded costs on a lump sum basis despite Mr. Salna not taking the required procedural steps and supporting documentation. Voltage is entitled to the procedural protections the law provides, such as the ability to review and challenge what costs or work is being claimed and cross-examine on evidence. The Hearing Judge made a legal error in ordering costs on a lump sum basis outside of the proper procedure. On this ground, the lump sum costs award must be vacated, or alternatively the quantum reduced to the Tariff amount.

**STATUTORY BASIS**

28. *Federal Courts Act*, R.S.C. 1985, c. F-7, including section 27;
29. *Federal Courts Rules*, SOR/98-106, including Rules 3, 334.14, 334.16, 334.17, 334.18, 334.19, 334.21, 334.23, 334.32, 334.39, 335, 336 and 337;
30. *Copyright Act*, R.S.C. 1985, c. C-42, including sections 41.25 and 41.26;

31. Such further and other grounds as counsel may advise and this Honourable Court may permit.
32. Voltage proposes that the appeal be heard at Toronto.



Date: July 25, 2023

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Court File No.  
**FEDERAL COURT OF APPEAL**

**PROPOSED CLASS PROCEEDING  
B E T W E E N :**

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

Appellants

- and -

**ROBERT SALNA, JAMES ROSE,  
and LOREDANA CERILLI,  
PROPOSED REPRESENTATIVE  
RESPONDENTS ON BEHALF OF  
A CLASS OF RESPONDENTS**

Respondents

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**NOTICE OF APPEAL**

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