

Federal Court



Cour fédérale

Ottawa, June 26, 2023 – The Honourable Justice Simon Fothergill of the Federal Court issued a decision today in file T-662-16:

**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 v**

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

Summary: The Applicants are motion picture production companies that form a part of the Voltage film studio [Voltage]. Voltage asked the Court to certify a class proceeding against approximately 874 unknown Class Members whose Internet Protocol addresses were allegedly used to upload and download films produced by Voltage without authorization, thereby infringing Voltage’s copyright in the films.

This case concerns a defendant or respondent class action, also known as a “reverse” class action. Conventional class actions are intended to level the playing field between vulnerable individual plaintiffs and well-resourced corporate entities. By contrast, reverse class actions allow powerful corporations to pursue compensation from those much less powerful. Nevertheless, reverse class action may advance judicial economy by reducing the financial implications of mounting a defence for each class member, and alleviating the pressure on class members to settle.

Reverse class actions are rare in Canada. This is the first proposed reverse class action involving allegations of copyright infringement against individuals who share movies over the Internet.

Voltage commenced this application in 2016. The proceeding has been ongoing for over six years. Aspects have been elevated to the Federal Court of Appeal [FCA] three times and to the Supreme Court of Canada once.

On September 8, 2021, the FCA set aside this Court’s refusal to certify the proceeding as a reverse class action, and found in Voltage’s favour with respect to the first three parts of the certification test, namely: (a) reasonable cause of action, (b) identifiable class of two or more persons, and (c) common issues. The FCA directed that the certification motion be returned to this Court for reconsideration of (d) preferable procedure and (e) suitable class representative.

Following the re-hearing of the certification motion, the Court found that Voltage had discharged its onus of demonstrating “some basis in fact” for the conclusion that a class action is the preferable procedure for resolving its claims of copyright infringement against hundreds of unidentified Class Members. Subject to a reasonable assurance of funding for Class Counsel, the Court also found that Mr. Robert Salna is a suitable Representative Respondent.

In its litigation plan, Voltage proposed that the “notice-and-notice” regime under the *Copyright Act* be used to notify Class Members of the class action and subsequent steps in the proceeding.

Pursuant to s 41.25(2) of the *Copyright Act*, copyright owners may prepare “notices of claimed infringement” to be forwarded by Internet Service Providers [ISPs] to their subscribers. ISPs must retain records identifying the recipients for a period of six months. If the copyright owner commences legal proceedings and notifies the ISP, then the data retention period is extended to one year. The copyright owner may then seek a court order to identify the recipients.

The Court held that the notice-and-notice regime could not be used to notify Class Members of the class action and subsequent steps in the proceeding. Nor could it be used to give Class Members an opportunity to opt out of the proceeding in exchange for proof of ceasing to infringe or mitigating damages. Voltage’s proposed use of the notice-and-notice scheme as a litigation support tool changed the deterrence function envisaged by Parliament to one of enforcement, thereby disrupting the regime’s balance.

Given the deficiencies in the litigation plan, the Court refused to certify the proposed class proceeding at this time. However, Voltage remains at liberty to present a revised litigation plan that does not depend on the notice-and-notice regime in the *Copyright Act* to identify and communicate with Class Members, and that makes adequate provision for the funding of Class Counsel.

A copy of the decision can be obtained via the Federal Court website: <https://decisions.fct-cf.gc.ca/fc-cf/decisions/en/item/523710/index.do>.