

Federal Court



Cour fédérale

**Date: 20170202**

**Docket: T-662-16**

**Citation: 2017 FC 130**

**Ottawa, Ontario, February 2, 2017**

**PRESENT: The Honourable Mr. Justice Boswell**

**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**

**Applicants**

**and**

**ROBERT SALNA, PROPOSED  
REPRESENTATIVE RESPONDENT ON  
BEHALF OF A CLASS OF RESPONDENTS**

**Respondents**

**ORDER AND REASONS**

[1] The Applicants have initiated a proposed class proceeding claiming, amongst other things, declaratory and injunctive relief against the Proposed Representative Respondent, Robert

Salna, on behalf of a class of Respondents. It is alleged that Mr. Salna (and others like him) has engaged in illegal file sharing over the Internet, and thereby infringed the Applicants' copyrights in several films.

[2] The Applicants propose to have this matter certified as a so-called "reverse" class action in accordance with Part 5.1 of the *Federal Court Rules*, SOR/98-106. Towards that end, a motion for certification of this proceeding as a class proceeding has been scheduled for next June. As of the date of this Order though, the Applicants have not served and filed their motion for certification. In the meantime, Mr. Salna has brought a motion seeking an Order requiring the Applicants to pay security for costs in respect of their intended motion for certification, without prejudice to him moving for further security in the event certification is granted.

[3] For the reasons that follow, I have determined that the Applicants must give security for Mr. Salna's costs in the amount of \$75,000.00. I have further determined that Mr. Salna is entitled to his costs in respect of this motion in a lump sum amount of \$750.00 (inclusive of any taxes or disbursements).

I. Issues

[4] This motion raises two main issues:

1. Should the Applicants pay security for costs in respect of their intended motion for certification?
2. If so, what is an appropriate amount of security for costs?

## II. Analysis

### A. *Should the Applicants pay security for costs in respect of their intended motion for certification?*

[5] In the context of a class proceeding, the general rule is that no costs may be awarded against any party to a motion for certification of a proceeding as a class proceeding. In this regard, Rule 334.39 provides that:

#### **No costs**

**334.39 (1)** Subject to subsection (2), no costs may be awarded against any party to a motion for certification of a proceeding as a class proceeding, to a class proceeding or to an appeal arising from a class proceeding, unless

**(a)** the conduct of the party unnecessarily lengthened the duration of the proceeding;

**(b)** any step in the proceeding by the party was improper, vexatious or unnecessary or was taken through negligence, mistake or excessive caution; or

**(c)** exceptional circumstances make it unjust to deprive the successful party of costs.

#### **Sans dépens**

**334.39 (1)** Sous réserve du paragraphe (2), les dépens ne sont adjugés contre une partie à une requête en vue de faire autoriser l'instance comme recours collectif, à un recours collectif ou à un appel découlant d'un recours collectif, que dans les cas suivants :

**a)** sa conduite a eu pour effet de prolonger inutilement la durée de l'instance;

**b)** une mesure prise par elle au cours de l'instance était inappropriée, vexatoire ou inutile ou a été effectuée de manière négligente, par erreur ou avec trop de circonspection;

**c)** des circonstances exceptionnelles font en sorte qu'il serait injuste d'en priver la partie qui a eu gain de cause.

**Individual claims**

(2) The Court has full discretion to award costs with respect to the determination of the individual claims of a class member.

**Réclamations individuelles**

(2) La Cour a le pouvoir discrétionnaire d'adjuger les dépens qui sont liés aux décisions portant sur les réclamations individuelles de membres du groupe.

[6] This Rule, however, is not engaged at this stage of this proceeding because no notice of motion for certification has been served and filed under Rule 334.15. In *Pearson v Canada*, 2008 FC 1367 at para 52, [2008] FCJ No 1797, where a motion to strike a statement of claim had been brought before the action had been certified, the Court determined that: “The class action rules and concepts such as one-way costs, even if applicable at a later stage, are not yet engaged.” To similar effect is the decision in *Campbell v. Canada (Attorney General)*, 2012 FCA 45, [2013] 4 FCR 234 [*Campbell*], where Justice Pelletier observed as follows:

[34] Presumably, an order for costs made against a party to a proposed class proceeding prior to that person becoming a party to a certification motion would not be affected by Rule 334.39(1) but that is not a question which arises on these facts. It is therefore not one which we have to answer.

...

[45] I believe that the construction of Rule 334.39(1) that gives fullest effect to the intention of the Rules Committee is to have the “no costs” rule apply as soon as the parties to the action are made parties to the certification motion. While this still leaves room for the possibility of an award of costs in relation to a step undertaken after the issuance of the statement of claim but prior to the service and filing of the certification motion, the scope for costs orders is reduced to a minimum, having regard to the wording of Rule 334.39(1) itself. If one assumes that the bringing of the motion for certification will follow the issuance of the statement of claim without delay, the risk to representative plaintiffs would appear to be minimal.

[7] It should be noted that the Federal Court of Appeal's observations in *Campbell* were made in the context of an action where the certification motion had been served and filed but was never heard because the Plaintiffs discontinued the proposed class proceeding. In the present circumstances, no certification motion has as yet been served and filed and, unlike the case in *Campbell* where the proposed class proceeding involved a class of plaintiffs, the proposed class in this proceeding involves a class of respondents.

[8] It should also be noted that there are no rules in the *Federal Courts Rules* regulating the order in which certification and other motions, such as a motion for security for costs, must be heard and determined. And as explained above, until a motion for certification is served and filed, Mr. Salna is not yet a party to any certification motion and, consequently, is not affected by Rule 334.39(1). It is therefore my view that Rule 334.39(1) does not prevent Mr. Salna from bringing the present motion. To be clear, Mr. Salna's success in the present motion would only require the Applicants to post security for costs; it is not and would not be determinative of whether at some later stage of this proceeding Mr. Salna will be affected by Rule 334.39(1). In my view, Mr. Salna would be subject to the provisions of this Rule if and when the Applicants serve and file their motion for certification and when that motion is heard and determined. Any determination as to whether Mr. Salna is entitled to costs, in light of Rule 334.39(1), should be made at that time.

[9] As to the question of whether the Applicants should pay security for costs in respect of their intended motion for certification, this involves consideration of Rule 416(1), which provides in relevant part as follows:

**Where security available****Cautionnement**

**416 (1)** Where, on the motion of a defendant, it appears to the Court that

**416 (1)** Lorsque, par suite d'une requête du défendeur, il paraît évident à la Cour que l'une des situations visées aux alinéas a) à h) existe, elle peut ordonner au demandeur de fournir le cautionnement pour les dépens qui pourraient être adjugés au défendeur :

**(a)** the plaintiff is ordinarily resident outside Canada,

**a)** le demandeur réside habituellement hors du Canada;

**(b)** the plaintiff is a corporation, an unincorporated association or a nominal plaintiff and there is reason to believe that the plaintiff would have insufficient assets in Canada available to pay the costs of the defendant if ordered to do so,

**b)** le demandeur est une personne morale ou une association sans personnalité morale ou n'est demandeur que de nom et il y a lieu de croire qu'il ne détient pas au Canada des actifs suffisants pour payer les dépens advenant qu'il lui soit ordonné de le faire;

...

...

the Court may order the plaintiff to give security for the defendant's costs.

[10] The Applicants have admitted that they are not ordinarily resident in Canada and also that they do not have significant assets in Canada. This being so, Mr. Salna is, on first impression, entitled to the requested Order. However, it should be noted that an order for security for costs is not automatic and that the Court retains a discretion to deny a motion for such an order (see: e.g., *Pembina County Water Resource District v Manitoba*, 2005 FC 1226 at para 14, 142 ACWS (3d) 394).

[11] In the context of this proceeding, Mr. Salna's motion should be granted given the Applicants' admissions as noted above and because there is no evidence as to the Applicants' ability or inability to satisfy a costs award or as to whether they would be hindered or forestalled in advancing their proposed class proceeding to the certification stage. It should also be granted in view of the novel nature of the proposed class proceeding and because, absent the requested Order, there is a possibility that Mr. Salna may resile from being the Proposed Representative Respondent.

B. *What is an appropriate amount of security for costs?*

[12] Mr. Salna proposed at the hearing of this motion that the amount of security should be fixed in amount equivalent to those costs which would be incurred on a full indemnity basis up to and including the intended motion for certification and that, despite Rule 334.39, he would be entitled to costs if he successfully defended such motion. This amount is estimated to be \$141,930.75.

[13] Although the Applicants opposed Mr. Salna's motion, they suggested that in the event security was ordered an appropriate amount would be a total of \$32,191.55, having regard to Column III of Table B of the *Federal Courts Rules*. They also submitted that the amount proposed by Mr. Salna was excessive and improper, especially if the Canadian Internet Policy and Public Interest Clinic seeks and is granted status as an intervener on the intended motion for certification.

[14] The determination of the quantum of security for costs is a discretionary decision, having regard to the reasonable amount of costs that might be awarded. As stated by this Court in

*Bodum USA, Inc v Trudeau Corporation (1889) Inc*, 2012 FC 240, [2012] FCJ No 268:

[19] ... It is well established that the amount of security for costs must correspond to the probable costs to which the defendant would be entitled, should it be successful in defending the action brought against it. While security for costs is an indemnity and ought not be illusory, it must also not be oppressive so as to prevent a plaintiff from bringing a lawsuit. The amount of security is at the discretion of the Court, bearing in mind the draft bill of costs while also taking into account any reductions that might be made on a taxation. ...

[15] In my view, a reasonable amount for security for costs at this stage of the proceeding is \$75,000.00, based on the assumption that the intended motion for certification will be served and filed and the motion heard later this year. This amount may be paid into Court in cash or by way of a banker's draft issued by a Canadian bank listed in Schedule I of the *Bank Act*, S C 1991, c 46; it may also be paid by way of an irrevocable letter of credit issued by such a bank in form and substance satisfactory to Mr. Salna.

[16] In fixing this amount, I have considered that there is at least a possibility, but not necessarily any probability, that costs might be awarded under Rule 334.19 whether this proceeding becomes certified as a class proceeding or not. I have also considered that this amount is in no way determinative or suggestive of what costs, if any at all, might be appropriate if and when the present proceeding is or is not certified. Lastly, I note that either the Applicants or Mr. Salna are at liberty to bring a motion to vary the amount of security for costs at some later stage of this proceeding should there be sufficient reason for so doing.



III. Conclusion

[17] Mr. Salna's motion is allowed for the reasons and on the terms as stated above. Mr. Salna is awarded his costs in respect of this motion in a lump sum amount of \$750.00 (inclusive of any taxes or disbursements) in any event of the cause.

**ORDER**

**THIS COURT ORDERS, for the reasons stated above, that:**

1. The Applicants shall forthwith pay into Court as security for costs, up to and including their intended motion for certification, the sum of \$75,000.00, such sum to be payable (i) in cash, or (ii) by way of a banker's draft issued by a Canadian bank listed in Schedule I of the *Bank Act*, S C 1991, c 46, or (iii) by way of an irrevocable letter of credit issued by such a bank in form and substance satisfactory to Mr. Salna.
2. The Applicants shall forthwith pay to the Proposed Representative Respondent costs in respect of this motion in the fixed amount of \$750.00 (inclusive of any taxes or disbursements) in any event of the cause.
3. The Applicants are prohibited from taking any further steps in this proceeding, including the bringing of any motions for certification or otherwise, until the amounts in paragraphs 1 and 2 are paid. This prohibition shall not apply to the bringing of an appeal from this Order.
4. Any further amendments or additions to this Order shall be within the discretion of the Case Management Judge for this proceeding.

"Keith M. Boswell"

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Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

**DOCKET:** T-662-16

**STYLE OF CAUSE:** 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, PROPOSED REPRESENTATIVE RESPONDENT ON BEHALF OF A CLASS OF RESPONDENTS

**MOTION HELD VIA VIDEOCONFERENCE ON JANUARY 31, 2017 FROM TORONTO, ONTARIO AND OTTAWA, ONTARIO**

**ORDER AND REASONS:** BOSWELL J.

**DATED:** FEBRUARY 2, 2017

**WRITTEN REPRESENTATIONS BY:**

Kenneth R. Clark  
Patrick Copeland

FOR THE APPLICANTS

Sean Zeitz  
Ian Klaiman

FOR THE PROPOSED  
REPRESENTATIVE RESPONDENT

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