Federal Court of Appeal  Cour d'appel fédérale

**Date: 20171115**

**Docket: A-39-17**

**Citation: 2017 FCA 221**

**CORAM:** **WEBB J.A.**
**NEAR J.A.**
**GLEASON J.A.**

**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**

**Appellants**

**and**

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

**Respondent**

Heard at Toronto, Ontario, on October 19, 2017.

Judgment delivered at Ottawa, Ontario, on November 15, 2017.

REASONS FOR JUDGMENT BY: GLEASON J.A.

CONCURRED IN BY: WEBB J.A.
NEAR J.A.

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**REASONS FOR JUDGMENT**

**GLEASON J.A.**

[1] The appellants appeal and the respondent cross-appeals from the order of the Federal Court (*per* Boswell, J.) in *Voltage Pictures, LLC et al. v. Robert Salna, Proposed Representative Respondent on Behalf of a Class of Respondents*, 2017 FC 130. In the order in question, the Federal Court granted the respondent's motion for security for costs in respect of a pending certification motion, fixed such security in the amount of $75,000.00 and granted the respondent costs on the motion in the all-inclusive amount of $750.00.

[2] In terms of the appeal, the appellants' primary position is that the Federal Court erred in making an order for security for costs in light of the presumptive no-costs regime for class proceedings enshrined in the *Federal Courts Rules*, SOR/98-106 (the Rules). In the alternative, they submit that the amount awarded is excessive and that it was premature for the Federal Court to have made an order for security for costs.

[3] In terms of the cross-appeal, the respondent submits that the Federal Court erred in fixing costs without hearing from him on the issue of quantum. The respondent made a settlement offer that meets the requirements of Rule 420 of the Rules and says that he ought to have been afforded the opportunity to make submissions on costs, which would have resulted in a much-increased award as his actual costs incurred in respect of the motion exceed $22,000.00. In response, the appellants say that the respondent had the opportunity to make cost submissions before the Federal Court, but did not do so and that such failure does not provide a basis for

setting the Federal Court's costs award aside. The appellants further say that the Federal Court ought not to have made any costs award at all, as costs should not be granted in a class proceeding and none of the exceptions allowing for an award of costs pertains. In the alternative, the appellants say that the Federal Court did not err in making a costs award on a lump-sum basis in a modest amount, but, if the costs order stands, would nonetheless be prepared to have the amount of that award doubled in keeping with the spirit of Rule 420.

[4] For the reasons that follow, I would dismiss the appeal but grant the cross-appeal and remit the issue of costs to the motion judge for redetermination in accordance with these reasons. As success is divided, I would award neither party its costs in respect of this appeal and cross-appeal.

[5] The Federal Court held that the provisions contained in Rule 334.39(1) (which establish a *prima facie* no costs regime for class proceedings) were not engaged because no notice of motion for certification had been filed at the point at which the Federal Court heard the motion for security for costs. The Federal Court likened the situation to that in *Pearson v. Canada*, 2008 FC 1367, [2008] F.C.J. No. 1797 and *Campbell v. Canada (Attorney General)*, 2012 FCA 45, 427 N.R. 371, which establish that costs in respect of a motion to strike a statement of claim in a proposed class proceeding may be awarded if the motion to strike is brought before the motion for certification is filed.

[6] With respect, I disagree with the Federal Court's reasoning on this point as the situation in this case is markedly different from that in a motion to strike a statement of claim in a

proposed class proceeding. Where such a motion is brought, it is independent from the motion for certification and, if successful, rests on a determination that the plaintiff has not brought a justiciable claim. Awarding costs in such circumstances does not negatively impact a plaintiff's access to justice as the plaintiff has no viable claim.

[7] Here, on the other hand, the situation is entirely the opposite. The purpose of a motion for security for costs is to obtain at least a partial guarantee for the payment of costs that might eventually be awarded in a proceeding. In the instant case, that guarantee was sought in respect of the costs anticipated in regard to the motion for certification. Rule 334.39 provides that, unless one of the exceptions in the rule applies, no costs may be awarded in respect of a motion for certification. It would drive a wedge through the presumptive no costs regime enshrined in the Rules if a defendant could circumvent the bar against an award of costs by merely bringing a motion for security for costs as soon as the defendant is served with a statement of claim in a proposed class proceeding. Moreover, the timing of the motion for security and of the motion for certification in the present case was the result of dates set by the motion judge. It is accordingly artificial to suggest that such timing provides the basis for making the order under appeal. Thus, the reasons offered by the Federal Court for finding that it possessed jurisdiction to award security for costs in the instant case cannot withstand scrutiny.

[8] Notwithstanding this, I believe that the Federal Court's order should nonetheless be upheld as there is an alternate basis for finding that the Court possessed the jurisdiction to make it. In the exceptional circumstances of this case, which involve a proposed reverse class proceeding brought by foreign corporations with no significant assets in Canada against a

proposed class potentially comprised of thousands of individuals resident in Canada, it is entirely possible that, if he is successful, the respondent might be awarded costs under Rule 334.39(1)(*c*). This paragraph allows for costs in respect of a certification motion, a class proceeding or an appeal arising from a class proceeding if "exceptional circumstances make it unjust to deprive the successful party of costs". Such circumstances could well be found to exist in the present case, but that issue will not be addressed unless and until the Federal Court dismisses the certification motion.

[9] The circumstances in Rules 416(1)(*a*) and (*b*) apply, and, therefore, but for this being a proposed class proceeding, the Federal Court would be empowered to make an order for security for costs. I do not believe that the fact that this is a proposed class proceeding forecloses the Federal Court from making such an order in the present case. More specifically, I do not believe that a determination under Rule 334.39(1)(*c*) is a condition precedent to the exercise by the Federal Court of its discretion under Rule 416 to order security for costs in a case such as this, and there is nothing in the Rules or the case law of this Court that would require such a conclusion.

[10] The appellants point to the decisions from British Columbia in *Samos Investments Inc. v. Pattison*, 2002 BCCA 442, 216 D.L.R. (4th) 646 [*Samos*] and *Secure Networx Corp. v. KPMG, LLP*, 2002 BCSC 1001, [2002] B.C.J. No. 1776, aff'd 2003 BCCA 227, 12 B.C.L.R. (4th) 317 [*Secure Networx*] which they say support the proposition that the Federal Court lacks jurisdiction to make an order for security for costs unless and until it finds that the exception in Rule 334.39(1)(*c*) is applicable. I disagree. *Samos* dealt only with the British Columbia

equivalent of Rules 334.39(1)(*a*) and (*b*), and in the Court of Appeal *Secure Networx* was premised on the discretion to be afforded to the trial judge. Further, neither case is binding on us.

[11] If the appellants were correct in the interpretation they urge, an order for security for costs could never be made in the case of a class proceeding involving exceptional circumstances as a determination under Rule 334.39(1)(*c*) cannot be made until a determination on the merits is made. In my view, such an interpretation is untenable as it could well deprive a representative defendant like Mr. Salna of any realistic hope of recovering the costs he might eventually be awarded.

[12] Moreover, it appears that none of the access to justice concerns that motivate the *prima facie* no-costs regime enshrined in the Rules for class proceedings militates against the order for security in the instant case. The appellants appear to be fully able to bring their action, and, indeed, had two lawyers gowned before this Court on this appeal. In addition, they declined to file any evidence detailing their financial means to retain and instruct counsel or to post the required security for costs. On the other hand, the respondent and other members of the proposed class will likely face difficulty in funding representation. Thus, there is no principled basis for finding that an order for security for costs should not be made in the present case and there is no binding authority that indicates that the Federal Court erred in making such an order. I therefore believe that it was open to the Federal Court to make the impugned order for security for costs.

[13] Nor do I see any basis to interfere with the quantum of the security set by the Federal Court, a discretionary factual determination that this Court cannot interfere with in the absence

of palpable and overriding error. The appellants can point to no such error here, particularly in light of the magnitude of the expenses incurred to merely litigate the motion for security. Further, if the appellants are right and the Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic will be intervening in the certification motion and carrying the bulk of the argument, it would be possible for the appellants to seek to have the Federal Court vary its order and decrease the amount of the security for costs they are required to provide. Indeed, in its reasons, the Federal Court commented on just such a possibility.

[14] Thus, I would dismiss this appeal.

[15] As concerns the cross-appeal, I agree with the appellants that the Federal Court could not make an order for costs on the motion unless and until it determined that one of the exceptions in Rule 334.39(1) pertained. In this regard, as noted, the motion for security for costs was made in connection with the motion for certification and, as I have already determined, Rule 334.39(1) applies to the motion. Thus, a finding under one of the exceptions listed in the rule is a condition precedent to an award of costs.

[16] The Federal Court declined to make such a finding, so its costs award must be set aside. I would remit the issue of costs (if any) payable in respect of the motion for security for costs to the Federal Court to reconsider. In its reconsideration, the Federal Court cannot award costs unless it finds one of the exceptions in Rule 334.39(1) to be applicable. Conversely, it would be open to the Court to defer making such a determination until after the certification motion, if it deems this to be the more appropriate course of action.

[17] While the foregoing is sufficient to dispose of the cross-appeal, it is useful to comment on the proper procedure for dealing with costs as there appears to have been some confusion in the Court below. I begin by noting that, where appropriate, it is open to the Court to award costs on a lump-sum basis. Indeed, the Notice to the Parties and Profession, issued by the former Chief Justice of the Federal Court on April 30, 2010, makes it clear that the Federal Court may well fix the costs on a motion in a lump-sum fashion and that the parties therefore should be prepared to debate the quantum of costs. It is thus incumbent on a party to make submissions on costs and on quantum when the issue of costs is in play in a motion before the Federal Court. Conversely, where the Court is considering making a lump-sum award, it ought to ask for submissions as to the appropriate amount if the parties have not addressed the issue.

[18] This sequence of events needs to be modified when a settlement offer has been made that might have costs consequences. Rule 422 provides that settlement offers cannot be referred to until a decision on the merits is made. Thus, where an offer has been made, the wisest course would be for counsel to request that the Court reserve the issue of costs, for determination after the decision on the merits. Following the issuance of the determination on the merits, the parties can then make whatever submission they wish on the issue of quantum. Thus, in the present case, counsel for the respondent ought to have asked the Federal Court to have reserved its determination on the issue of the quantum of costs to be awarded.

[19] In light of the foregoing, I would dismiss this appeal, grant the cross-appeal, set aside the Federal Court's costs award and remit the issue of costs to the motion judge for reconsideration in accordance with these reasons, the whole without costs.

"Mary J.L. Gleason"
J.A.

"I agree.
Wyman W. Webb J.A."

"I agree.
D. G. Near J.A."

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

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| **DOCKET:** | A-39-17 |
| **STYLE OF CAUSE:** | VOLTAGE PICTURES, LLC, ET AL. v. ROBERT SALNA, PROPOSED REPRESENTATIVE RESPONDENT ON BEHALF OF A CLASS OF RESPONDENTS |
| **PLACE OF HEARING:** | TORONTO, ONTARIO |
| **DATE OF HEARING:** | OCTOBER 19, 2017 |
| **REASONS FOR JUDGMENT BY:** | GLEASON J.A. |
| **CONCURRED IN BY:** | WEBB J.A.<br>NEAR J.A. |
| **DATED:** | NOVEMBER 15, 2017 |

**APPEARANCES:**

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