

Federal Court



Cour fédérale

**Date: 20160617**

**Docket: T-662-16**

**Citation: 2016 FC 681**

**Ottawa, Ontario, June 17, 2016**

**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**

**JOHN DOE #1, PROPOSED  
REPRESENTATIVE RESPONDENT ON  
BEHALF OF A CLASS OF RESPONDENTS**

**Respondent**

**and**

**ROGERS COMMUNICATIONS INC.**

**Non-Party Respondent  
(Applicants' Disclosure Motion Only)**

and

**SAMUELSON-GLUSHKO CANADIAN INTERNET POLICY AND PUBLIC  
INTEREST CLINIC**

**Proposed Intervener**

**ORDER AND REASONS**

dealt with in writing without appearance of parties on the basis of written representations pursuant to Rule 369 of the *Federal Courts Rules*, SOR/98-106

[1] The Applicants have initiated a proposed class proceeding claiming, amongst other things, declaratory and injunctive relief against the Respondent whose identity is presently unknown to them. It is alleged that the Respondent (and others like him or her) has engaged in illegal file sharing over the internet, and thereby infringed the Applicants' copyrights in several films. The Applicants want to have this matter certified as a so-called "reverse" class action, and towards that end have instituted a motion for an order compelling Rogers Communications Inc. [Rogers] to disclose the contact and personal information of the account holder associated with a specified internet protocol address at various times as set forth in the motion. That motion [the Disclosure Motion] is presently pending before the Court and is returnable on June 28, 2016, before me as the case management judge for this proceeding.

[2] The Proposed Intervener, the Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic [CIPPIC], desires to intervene not only in the Applicants' Disclosure Motion but also, based on its written submissions, more generally in the Applicants' application for a proposed class proceeding. It has brought a motion pursuant to Rules 109 and 369 of the *Federal*

*Courts Rules*, requesting that CIPPIC be granted leave to intervene in this proceeding as a public interest intervener. It appears that CIPPIC is also requesting an adjournment of the Disclosure Motion, but that request is not addressed in its proposed draft order or in its written representations for purposes of its intervention motion.

[3] CIPPIC is a public interest technology law clinic with a mandate to ensure balanced decision-making on legal and policy issues emerging from law and technology, with the objective of ensuring that Canada's laws serve the public interest. CIPPIC claims it has a genuine interest in the public interest dimensions of this proceeding, which engage the balance between intellectual property rights enforcement, interests of individual internet users and individual privacy rights. All of these interests lie at the heart of CIPPIC's mandate. CIPPIC cites numerous instances and cases where it has been afforded intervener status, including one in this Court (see *Voltage Pictures LLC v John Doe*, 2014 FC 161, and *Voltage Pictures LLC v John Doe*, 2015 FC 1364).

[4] CIPPIC asserts that the Disclosure Motion raises important issues of public interest. CIPPIC says it brings an important public interest perspective to the proceeding, different from the parties to the proceeding. If granted leave, CIPPIC says it will address such issues as to whether:

- (a) additional safeguards should be added to the third party discovery order sought, including to secure any affected individuals' high expectations of privacy in anonymous online activity;

- (b) it is appropriate to identify an anonymous individual for the purpose of identifying a class action representative defendant where it is unlikely that the individual will agree to playing such a role or to mount a vigorous defence on behalf of the class;
- (c) in light of the likelihood that most individuals will exercise their right to "opt out" of this proposed class action proceeding, it is appropriate to compel identification of individuals at this stage and without additional safeguards; and
- (d) the coming into force of new amendments to the *Copyright Act*, RSC, 1985, c C-42, alters the historical rule that the costs of discovery rest with those seeking to enforce their intellectual property rights, not innocent third parties compelled to assist in discovery to identify their customers and, if so, to what extent.

[5] For their part, the Applicants do not strongly object to the Proposed Intervener being granted status as an intervener, at least insofar as that status is restricted to the Disclosure Motion. The Applicants state that, if CIPPIC is granted leave to intervene, its participation should not be such so as to overly complicate the Disclosure Motion, and that CIPPIC should be limited as to what issues it may address in that motion. In particular, the Applicants submit that CIPPIC should not be permitted to address the issue of who pays the costs of any disclosure ordered as a result of the Disclosure Motion because that issue will be adequately addressed by Rogers. In any event, the Applicants say CIPPIC represented at the case management conference on June 7, 2016, that it sought intervention more as a friend of the Court than as an active party and does not seek to file evidence or cross-examine any affiant.

[6] Rogers has neither objected to nor taken any position with respect to CIPPIC being granted status as an intervenor. The same cannot be said though with respect to its position on the Disclosure Motion, in which it argues that, contrary to the Applicants' position, it is entitled to its reasonable costs of any required disclosure.

[7] The main issue to address on this motion is whether intervention by CIPPIC will assist the Court in the hearing of the Disclosure Motion and serve the interests of justice. In this regard, the six factors identified by the Court in *Rothmans, Benson & Hedges Inc v Canada (Attorney General)*, [1990] 1 FC 74, 29 FTR 267, at para 12 (rev'd on other grounds [1990] 1 FC 90), should be taken into consideration. These factors are not exhaustive. All six need not be satisfied. The questions to consider are as follows:

- (a) Is the proposed intervenor directly affected by the outcome?
- (b) Is there a justiciable issue and a veritable public interest?
- (c) Is there an apparent lack of any other reasonable or efficient means to submit the question to the Court?
- (d) Is the position of the proposed intervenor adequately defended by one of the parties to the case?
- (e) Are the interests of justice better served by the intervention of the proposed intervenor?
- (f) Can the Court hear and decide the cause on its merits without the proposed intervenor?

[8] These factors have recently been reiterated and affirmed by the Court of Appeal in *Sport Maska Inc. v Bauer Hockey Corp.*, 2016 FCA 44, and also in *Prophet River First Nation v Canada (Attorney General)*, 2016 FCA 120.

[9] Having considered the above factors, I have determined that CIPPIC should be granted status as an intervener in the Disclosure Motion if only because, in its written representations responding to the Disclosure Motion, Rogers has taken no position on whether the Applicants have satisfied the applicable test for obtaining a disclosure order. Absent such intervention, the Applicants' Disclosure Motion would in effect be unopposed (although Rogers does oppose the Applicants' request that Rogers not receive any fees or disbursements in respect of any disclosure resulting from the Disclosure Motion).

[10] The Proposed Intervener has raised and, if granted leave to intervene, promises to address the question of what safeguards should accompany any disclosure order resulting from the Disclosure Motion. The Court will be better served in coming to a proper and informed decision on the Disclosure Motion having heard from differing and opposing sides to the Applicants' request for disclosure of the contact and personal information of the Rogers' account holder associated with a specified internet protocol address.

[11] The Court would not be better served, however, if CIPPIC's intervention in the Disclosure Motion was unlimited and akin to that of a party. I agree with the Applicants that it is premature and speculative for CIPPIC to raise and argue about issues that are properly the subject matter of an anticipated motion and hearing for certification of the proposed class action.

[12] Accordingly, CIPPIC's intervention upon the Disclosure Motion should be limited and shall be on the following terms:

- (a) CIPPIC may serve and file written representations on or before 12 o'clock noon June 22, 2016, and those representations shall not be duplicative of the written representations of the Applicants or Rogers already filed in the Disclosure Motion;
- (b) CIPPIC's written representations shall comply with Rules 65 to 68 and 70 of the *Federal Courts Rules* and be no more than ten pages in length;
- (c) CIPPIC may only address in its written representations the following issues:
  - (i) the type and quantity of identification data to be provided by Rogers;
  - (ii) limits that may be imposed on the use of such information data;
  - (iii) the form of notice that may be required to be provided to the Respondent when served with the Notice of Application;
- (d) CIPPIC shall not be permitted to add to the evidentiary record before the Court for purposes of the Disclosure Motion or to cross-examine any affiant whose affidavit forms part of that record;

- (e) CIPPIC shall be served with all materials filed or to be filed by the parties with respect to the Disclosure Motion;
- (f) CIPPIC shall not be permitted to appeal any decision in the Disclosure Motion without leave of this Court;
- (g) CIPPIC may provide no more than 20 minutes of oral submissions at the hearing of the Disclosure Motion on the issues set out in paragraph 12 (c) above; and
- (h) Costs shall not be awarded for or against CIPPIC in the Disclosure Motion provided it participates responsibly in that proceeding.



**ORDER**

**THIS COURT ORDERS** that the Proposed Intervener, the Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic (CIPPIC), is granted leave to intervene in the Applicants' motion in this matter filed on May 25, 2016, upon and subject to the following conditions:

- (a) CIPPIC may serve and file written representations on or before 12 o'clock noon June 22, 2016, and those representations shall not be duplicative of the written representations of the Applicants or Rogers already filed in the Disclosure Motion;
- (b) CIPPIC's written representations shall comply with Rules 65 to 68 and 70 of the *Federal Courts Rules* and be no more than ten pages in length;
- (c) CIPPIC may only address in its written representations the following issues:
  - (i) the type and quantity of identification data to be provided by Rogers;
  - (ii) limits that may be imposed on the use of such information data;
  - (iii) the form of notice that may be required to be provided to the Respondent when served with the Notice of Application;
- (d) CIPPIC shall not be permitted to add to the evidentiary record before the Court for purposes of the Disclosure Motion or to cross-examine any affiant whose affidavit forms part of that record;

- (e) CIPPIC shall be served with all materials filed or to be filed by the parties with respect to the Disclosure Motion;
- (f) CIPPIC shall not be permitted to appeal any decision in the Disclosure Motion without leave of this Court;
- (g) CIPPIC may provide no more than 20 minutes of oral submissions at the hearing of the Disclosure Motion on the issues set out in paragraph (c) above; and
- (h) Costs shall not be awarded for or against CIPPIC in the Disclosure Motion provided it participates responsibly in that proceeding.

**THIS COURT FURTHER ORDERS that** there shall be no order as to costs of this motion.

"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 JOHN DOE #1, PROPOSED REPRESENTATIVE RESPONDENT ON BEHALF OF A CLASS OF RESPONDENTS v ROGERS COMMUNICATIONS INC. v SAMUELSON-GLUSHKO CANADIAN INTERNET POLICY AND PUBLIC INTEREST CLINIC

**MOTION IN WRITING CONSIDERED AT OTTAWA, ONTARIO PURSUANT TO RULE 369 OF THE *FEDERAL COURTS RULES***

**ORDER AND REASONS:** BOSWELL J.

**DATED:** JUNE 17, 2016

**WRITTEN REPRESENTATIONS BY:**

Kenneth R. Clark  
Paul V. McCallen  
Patrick Copeland

FOR THE APPLICANTS

Not Represented

FOR THE RESPONDENT

Andrew Bernstein  
Jams Gotowiec

FOR THE NON-PARTY RESPONDENT  
(APPLICANTS' DISCLOSURE MOTION ONLY)

David Fewer  
Tamir Israel

FOR THE PROPOSED INTERVENER

**SOLICITORS OF RECORD:**

Aird & Berlis LLP  
Barristers and Solicitors

FOR THE APPLICANTS

Toronto, ON

Not Represented

Torys LLP  
Barristers and Solicitors  
Toronto, ON  
Samuelson-Glushko Canadian Internet  
Policy and Public Interest Clinic  
University of Ottawa, Faculty of Law,  
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Ottawa, ON

FOR THE RESPONDENT

FOR THE NON-PARTY RESPONDENT  
(APPLICANTS' DISCLOSURE MOTION ONLY)

FOR THE PROPOSED INTERVENER