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• CLASS DISMISSED: COPYRIGHT REVERSE CLASS ACTION FAILS TO GET PASSING GRADE •

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Class actions are a familiar feature of the Canadian litigation landscape, typically commenced by plaintiffs seeking collective redress against a common defendant or limited and defined set of common defendants. But what happens when the tables turn—when particular plaintiffs seek to certify a claim against a class of defendants? Enter the world of reverse (or defendant) class actions, a procedural mechanism that remains rare in Canada and is fraught with practical challenges. This article explores the concept of reverse class actions, their statutory basis, the jurisprudence that has shaped their use, and the recent Federal Court of Appeal decision in *Voltage Pictures v. Salna*—a case that underscores why this procedural tool is likely to remain more an academic curiosity than a mainstream litigation strategy.

WHAT IS A REVERSE CLASS ACTION?

A reverse class action is a civil proceeding brought against one or more defendants (the representative defendants) who defend on behalf of a larger group of similarly situated parties. The rationale mirrors that of plaintiff class actions, and at least in theory, the defendant class mechanism promises the same systemic benefits that justify plaintiff classes:

- **Judicial economy**: Resolving common issues in one proceeding avoids inconsistent judgements;
- **Cost efficiency**: Spreading litigation costs across a large group of defendants;
- **Access of justice**: Making it feasible for plaintiffs to pursue claims that would otherwise be uneconomical; and
- **Deterrence**: Encouraging compliance with legal obligations.

Despite these theoretical advantages, reverse class actions also present many of the same complexities seen in plaintiff class actions: adequacy of representation, compliant and effective notice requirements, cost allocation, opt-out rights, and settlement complexities. Those challenges are amplified where proposed defendants are anonymous, unrepresented, or unwilling participants.

STATUTORY FRAMEWORK FOR DEFENDANT CLASSES

The concept of a defendant class procedure in Canada can be traced back to the Ontario Law Reform Commission's 1982 report, which while identifying the possibility of such a class, devoted only three of its 880 pages on the topic.[1] This brevity foreshadowed the limited uptake of reverse class actions in practice. Consistent with that restraint, only a handful of Canadian regimes expressly contemplate defendant classes. While legislation in Ontario,[2] Nova Scotia,[3] and the *Federal Courts Rules*[4] each expressly permit defendant classes, class proceeding legislation in most other Canadian jurisdictions remain silent, reflecting a deliberately cautious approach to expanding collective litigation beyond the traditional plaintiff class model.

CANADIAN CASE LAW: SPARSE BUT INSTRUCTIVE

Reported cases involving reverse class actions are few and far between. Beyond copyright infringement as discussed below with respect to the *Voltage* cases,[5] notable Canadian examples of a defendant class procedure include cases involving aboriginal land title, conspiracy and fraud, and stand-alone declarations:

- ***Chippewas of Sarnia Band v. Canada (Attorney General)***:[6] The first Ontario case to certify a defendant class, involving land title claims affecting over 2,200 individuals identified based on title searches relating to the land at issue. The Court clarified several aspects of the relevant Ontario legislation including that there was no requirement that all potential defendants be named prior to certification, nor was the statute limited to willing or consensual representative defendants.

- ***Berry v. Pulley***:[7] A bilateral class action (both plaintiff and defendant classes) involving Air Canada and Air Ontario pilots in a seniority dispute. Both plaintiff and defendant classes—both known and identifiable—were certified.

- ***Sutherland v. Hudson's Bay Co.***:[8] In litigation relating to a pension plan, the plaintiff class (beneficiaries of the relevant fund), originally issued their statement of claim against only three corporate defendant employers. Despite opposition from the plaintiff class, the Court ordered that all members, retirees and other beneficiaries of the relevant plan who were not members of the plaintiff class be added as defendants, being "interested persons" to the litigation.

- ***Bernlohr v. Former Employees of Aveos Fleet Performance Inc.***:[9] Claims relating to bankruptcy against former employees making up the respondent class. The Court emphasized that the class approach was the best way to resolve factual and legal issues, including to provide many unrepresented respondents with pro bono representation.

Despite Canada's limited experience, defendant class actions are more common in the United States (Rule 23 of the US Federal Rules of Civil Procedure, 28 USCA). US courts have used defendant classes in antitrust, securities, and environmental litigation.[10] These examples, however, typically involve identifiable institutional or organized defendants, or involve regimes that more readily accommodate notice, binding effect, and cost-sharing.

THE *VOLTAGE* SAGA: A CASE STUDY IN COMPLEXITY

The most prominent and recent example of an attempt to certify a reverse class action in Canada arises from the film industry's battle against online piracy. In 2015, several film studios and production companies sought to certify a class of defendants in an action for copyright infringement. The defendant class was alleged to have engaged in illegal file sharing over the BitTorrent peer-to-peer file sharing protocol, thereby infringing the studios' copyrights in several films.[11] The studios asked to certify a class against approximately 874 unknown defendants whose Internet Protocol ("IP") addresses (identified by the studios' forensic software) were allegedly used to upload and/or download the films without authorization.

After nearly a decade of litigation, the Federal Court of Appeal's recent decision in *Voltage Pictures, LLC v. Salna* ("*Voltage FCA #2*")[12] marks a significant impasse in the studios' efforts, with the Court dismissing the appeal for certification—without leave to reapply—for several reasons. We address two aspects of the decision below.

1. The Litigation Plan and Canada's Notice-And-Notice Regime

As with plaintiff class proceedings, defendants can also opt out of a defendant class (*e.g.*, the Ontario legislation expressly provides that any certification order "shall … specify the manner in which class members may opt out of the class proceeding"). In *Voltage*, the only information the studios had about the defendant identities was a list of IP addresses—no specific names, addresses, and/or contact information.

In a typical case of online piracy in which only an IP address is known, a plaintiff would apply to the court to obtain a *Norwich* order, compelling an Internet service provider ("ISP") to disclose the customer information associated with the relevant IP address. In *Voltage,* the studios' litigation plan proposed bypassing the need to obtain a *Norwich* order altogether. Instead, the studios suggested gaining the necessary defendant contact information by relying on Canada's "notice-and-notice" regime under the *Copyright Act*.[13]

Adopted in 2012, Canada's *Copyright Act* includes a notice-and-notice regime (ss. 41.25 to 41.27), whereby copyright owners who believe their works have been infringed over the Internet can require ISPs to forward notices of claimed infringement to subscribers associated with an IP address. Subsection 41.25(2) of the *Copyright Act* lists the information to be included in a notice. However, subsection 41.25(3) prohibits notices from containing certain information like settlement offers, demands for payment or personal information, or references to such offers/demands.

In *Voltage*, the studios' proposed notice under the *Copyright Act* included a hyperlink allowing the alleged infringer to contact class counsel if they chose to opt out of the class proceeding, as well as the opportunity for the subscriber to provide counsel with evidence that the alleged infringement had stopped and details about the steps the subscriber had taken to mitigate damages.

The lower court found that the studios' notice was contrary to the *Copyright Act*. The FCA agreed that subsection 41.25(2), which sets out the information to be included in a notice of alleged infringement, must be interpreted narrowly and would not include the information as proposed by the studios. Moreover, the studios' proposed notice amounted in part to a request or demand for personal information and for payment, contrary to subsection 41.25(3). Notwithstanding, the FCA found it was improper for the lower court to have refused certification solely based on the studios' proposed notice, as the court ought to have certified the proceeding or adjourned the certification motion to allow the parties to negotiate the notice and, thereafter, allow the studios to present an amended plan. Only if the studios were unwilling or unable to amend the plan would it have been open for the court to have dismissed the certification motion. This portion of the *Voltage FCA #2* decision is important beyond issues of copyright, as courts should hesitate to reject certification solely based on a remediable litigation plan. But it also underscores a persistent practical problem unique to anonymous defendant classes: obtaining compliant, effective notice without first compelling identification.

2. Preferable Procedure and the Impact of *Voltage FCA #1*

Under the *Federal Courts Rules* relating to class proceedings, five criteria must be satisfied for certification, including that there is some basis in fact to conclude that the claims raise common questions of fact or law and that a class proceeding is the preferable procedure.

In *Voltage FCA #2*, the only known respondent (Mr. Salna) sought—by way of cross-appeal—to vary the order under appeal to provide that the studios' motion for certification be dismissed without leave to reapply on the basis that a class proceeding was not the preferable procedure for resolving the supposed common questions proposed by the studios.

In undertaking its analysis, the FCA noted that the lower Court did not have the benefit of the earlier FCA decision in *Voltage Holdings, LLC v. Doe #1* ("*Voltage FCA #1*"),[14] as those reasons had yet to issue. In *Voltage FCA #1*, the FCA held that to establish copyright infringement in the context of downloading/uploading a work using the BitTorrent protocol, proof is required that the alleged infringer was the specific individual who undertook the act of downloading/uploading or had some degree of control over the person who committed the wrongdoing. To establish infringement, it is not enough to show that an individual is merely the subscriber associated with an IP address of an account over which infringement is alleged to have taken place: "the mere association with an IP address is not conclusive of guilt".[15] The person to whom an IP address belonged at the time of an alleged infringement may not be the same person who shared copyrighted content online, and it is also possible for an IP address to have been incorrectly identified from the outset.

In *Voltage FCA #2*, the FCA found that none of the common questions proposed by the studios would advance the proceeding in any meaningful way, because for each identified IP address it would still be necessary to determine exactly what that subscriber did with respect to each work—if anything—before liability could be established.

Therefore, the class procedure "would do little to promote judicial economy or access to justice".[16]

On that basis, the FCA allowed the cross-appeal and dismissed the studios' certification motion without leave to reapply. As of the date of this article, the studios are continuing to seek leave to appeal at the Supreme Court of Canada.

PRACTICAL BARRIERS TO REVERSE CLASS ACTIONS

The *Voltage FCA #2* decision and the Canadian experience with defendant classes illustrate two main hurdles that continue to make such proceedings unattractive in Canada.

First, the *Ragoonanan* principle: in some Canadian jurisdictions, the rule in conventional class actions is that there must be a representative plaintiff who has an individual claim against each defendant. Practically speaking, there will be related challenges even if *Ragoonanan* does not strictly apply in reverse class actions. This requirement is difficult (or near impossible) to satisfy in large-scale infringement cases, particularly in cases of online piracy where an infringer's identity is unknown. In any event, even where subpoenas or *Norwich* orders are available, proving the acts of each alleged infringer—and separating subscriber from user—undercuts the commonality of issues.

Second, opt-out risk: even if certified, defendant classes may dissolve through widespread opt-outs (*e.g.*, because defendants wish to control their own defence or avoid litigation altogether), leaving plaintiffs no better off than before. Additionally, conflicts of interest among defendants and the challenge of appointing adequate representative defendant(s) further complicate governance of a defendant class.

While reverse class actions remain a theoretical possibility, they continue to be a rarity in Canada. They promise efficiency and fairness, but falter in practice due to doctrinal and logistical constraints. The *Voltage* decisions confirm that, in least in the realm of copyright enforcement, the door to defendant classes is likely to remain closed. Whether future reforms will pry that door open remains uncertain, but for now, copyright owners combatting online piracy against multiple defendants must rely on individual suits or alternative enforcement strategies.

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1 Ontario Law Reform Commission, Report on Class Actions (Toronto: Ministry of the Attorney General, 1982), Volume I, at pp. 41-43.

2 *Class Proceedings Act, 1992*, S.O. 1992, c. 6, s. 4.

3 *Class Proceedings Act*, S.N.S. 2007, c. 28, s. 5(2).

4 Federal Courts Rules, S.O.R./98-106, Rules 334.14(2), (3).

5 In this article, we refer to the *Voltage* litigation in general as "*Voltage*".

6 *Chippewas of Sarnia Band v. Canada (Attorney General)*, [1996] O.J. No. 2475, 29 O.R. (3d) 549 (Ont. Gen. Div.).

7 *Berry v. Pulley*, [2001] O.J. No. 911, 103 A.C.W.S. (3d) 1093 (Ont. S.C.J.).

8 *Sutherland v. Hudson's Bay Co.*, [2005] O.J. No. 1455, 74 O.R. (3d) 608 (Ont. S.C.J.).

9 *Bernlohr v. Former Employees of Aveos Fleet Performance Inc.*, [2019] F.C.J. No. 757, 2019 FC 837 (F.C.).

10 See Ontario Law Reform Commission, Report on Class Actions (1982), at p. 43; *Chippewas of Sarnia Band v. Canada (Attorney General)*, [1996] O.J. No. 2475, 29 O.R. (3d) 549 (Ont. Gen. Div.).

11 *Voltage Pictures, LLC v. John Doe No. 1*, [2016] F.C.J. No. 1517, 2016 FC 681 (F.C.).

12 *Voltage Pictures, LLC v. Salna*, [2025] F.C.J. No. 1229, 2025 FCA 131 (F.C.).

13 R.S.C. 1985, c. C-42.

14 *Voltage Holdings, LLC v. Doe #1*, [2023] F.C.J. No. 1386, 2023 FCA 194 (F.C.A.).

15 *Voltage Holdings, LLC v. Doe #1*, [2023] F.C.J. No. 1386, 2023 FCA 194 at para. 25 (F.C.A.).

16 *Voltage Holdings, LLC v. Doe #1*, [2023] F.C.J. No. 1386, 2023 FCA 194 at para. 135 (F.C.A.).