Federal Court Cour fédérale

Date: 20230317

Docket: T-1410-21

Citation: 2023 FC 236

Ottawa, Ontario, March 17, 2023

PRESENT: Madam Justice St-Louis

BETWEEN:

HA VI DOAN

Applicant

and

CLEARVIEW AL INC.

Respondent

and

ATTORNEY GENERAL OF CANADA

Intervener

ORDER AND REASONS

I. Introduction

[1] Ms. Ha Vi Doan brings a motion for certification of the proceeding as a class proceeding [Motion for certification] pursuant to Rules 334.15 and following of the *Federal Courts Rules*, SOR/98-106 [the Rules]. Ms. Doan's originating document is a Notice of Application filed to the Court under subsection 14(1) of the *Personal Information Protection and Electronic Documents Act*, SC 2000, c 5 [PIPEDA], section 26 of the *Federal Courts Act*, RSC 1985, c F-7, and Rules 301 and 334.12 of the Rules.

[2] Ms. Doan applied to the Court after having been notified by the Office of the Privacy Commissioner of Canada [the Privacy Commissioner] under subsection 12.2(3) of PIPEDA that the investigation of the complaint she filed in file no. PIPEDA-041902 had been discontinued [the Complaint]. The Privacy Commissioner then indicated having decided to exercise his discretion to discontinue the investigation pursuant to paragraph 12.2(1)(e) of PIPEDA, as the matter had already been the subject of a report by the Privacy Commissioner.

[3] In her Re-Amended Notice of Application, Ms. Doan preliminary indicates that she will rely upon PIPEDA, the *Federal Courts Act*, and the Rules, and subsequently adds that she will also rely on the following provincial statutes: the *Charter of Human Rights and Freedoms*, CQLR c C-12 (Québec); the *Personal Information Protection Act*, SBC 2003, c 63 and its Regulations (British Columbia); the *Personal Information Protection Act*, SA 2003, c P-6.5 and its Regulations (Alberta); the *Act respecting the protection of personal information in the private sector*, CQLR c P-39.1 (Québec); the *Act to establish a legal framework for Information*

technology, CQLR c C-1.1 (Québec); and the *Civil Code of Québec*, CQLR c CCQ-1991 (Québec). Ms. Doan describes the Class as:

> All natural persons, who are either residents or citizens of Canada, whose faces appear in the photographs collected by Clearview Inc. (the "Collected Photographs") (the "Class" or the "Class Members"); and
>
> All natural persons, residing in Québec, whose faces appear in the Collected Photographs (the "Quebec Class" or the "Quebec Class Members").

[4] In support of her Motion for certification, Ms. Doan submits that it is not plain and obvious that Part 1 of PIPEDA is invalid and she also submits that the conditions set out in Rule 334.16(1) are met as (1) it is not plain and obvious that the pleadings do not disclose reasonable causes of action in regards to privacy violations, tort of intrusion upon seclusion, and violations of privacy rights under Québec law (Rule 334.16(1)(a)); (2) in any event, should the Court require additional particulars, it should grant Ms. Doan leave to amend; and (3) she has shown there is some basis in fact supporting each of the conditions set out in of Rule 334.16 (1)(b) to (e), and the conditions are thus met.

[5] Clearview Al Inc. [Clearview] opposes the Motion for certification. It responds that (1) Part 1 of PIPEDA is *ultra vires* of Parliament and invalid, and served the proper Notice of Constitutional Question under section 57 of the *Federal Courts Act*; (2) even if Part 1 of PIPEDA were valid, the necessary conditions for certification are not met as (a) there exists one reasonable cause of action, as Ms. Doan herself satisfies the requirement set out in section 14 of PIPEDA, but the pleadings disclose no other reasonable cause of action; (b) the Court should not grant Ms. Doan the open-ended leave to amend she seeks; (c) Ms. Doan has not shown any basis in fact that there is an identifiable class of two or more persons, per the condition set out at Rule

334.16(1)(b); and (d) Ms. Doan has not shown any basis in fact that the class proceeding is the preferable procedure for the just and efficient resolution of the common questions of law or fact per Rule 334.16(1)(d).

[6] The Attorney General of Canada [the AGC] responded to Clearview's Notice of Constitutional Question and he participated in the Motion for certification proceedings. He submits that (1) the starting point is the presumption of validity of PIPEDA; (2) any constitutional conclusion is *ultra petita*; (3) the certification stage of a class proceeding is not an appropriate forum for this division of powers analysis; and (4) courts should not decide constitutional questions that are not necessary to resolve the case. At the hearing, Clearview agreed with the AGC that the constitutional issue should be debated at the merit stage, if the Motion for certification is granted.

[7] For the reasons outlined below, I will dismiss Ms. Doan's Motion for certification because at least two of the conjunctive conditions set out at Rule 334.16(1) are not met. Hence, after careful consideration, I find that (1) the pleadings disclose one reasonable cause of action under PIPEDA as the Class representative, Ms. Doan, meets the requirement set out in section 14 of PIPEDA; (2) the pleadings disclose no other reasonable cause of action - as all the other causes of action raised are clearly bereft of any chances of success (*Canada (National Revenue) v JP Morgan Asset Management (Canada) Inc*, 2013 FCA 250 [*JP Morgan*]); (3) Ms. Doan has not shown she is entitled to the open-ended leave to amend she seeks, or that it is available to her; (4) Ms. Doan has not shown some basis in fact that there is an identifiable class of two or more persons, per the condition set out in Rule 334.16(1)(b), while the modification she proposes

is time barred by PIPEDA; and (5) Ms. Doan has not shown some basis in fact that a class proceeding is the preferable procedure for the just and efficient resolution of the common questions of law or fact, per Rule 334.16(1)(d).

[8] Given my conclusion on the Motion for certification, the constitutional question becomes moot and there is no need to address it (*State Farm Mutual Automobile Insurance Company v Privacy Commissioner of Canada*, 2010 FC 736 at para 119 [*State Farm*]).

II. Context

[9] Clearview is a United-States based company that provides a facial recognition software to government entities - overwhelmingly law enforcement and national security agencies.

[10] Ms. Doan is a citizen of Canada and resides in Montréal, Québec. She is a photograph and posts a large number of photographs that she has taken of herself, of her family, and of her clients on various public internet and social media sites for commercial purposes. Her clients also post online photos she has taken of them.

[11] In January and February 2020, public reports indicated that Clearview was collecting digital images from a variety of different public websites, including Facebook, YouTube, Instagram, etc. On February 21, 2020, the Privacy Commissioner and three provincial counterparts, i.e., the Commission d'accès à l'information du Québec, the Information and Privacy Commissioner for British Columbia, and the Information and Privacy Commissioner of Alberta [the Offices], initiated a joint investigation into Clearview's activities in Canada.

[12] On February 2, 2021, the Offices issued their report entitled, “PIPEDA Findings #2021-001” [Investigation Report]. In brief, the Investigation Report found that Clearview collected, used and disclosed personal information without the requisite consent and for an inappropriate purpose. Accordingly, the Offices found that Clearview contravened the privacy legislations mentioned above and they issued recommendations.

[13] The privacy commissioners of British Columbia and Alberta issued orders to comply following Clearview’s non-compliance with their recommendations, which Clearview has challenged. No decision has yet been rendered on either challenge and the reports cannot therefore be considered as final reports.

[14] On February 28, 2020, the Privacy Commissioner initiated an investigation into the RCMP’s use of Facial recognition technology in Canada, and on June 2021, the Privacy Commissioner submitted a Special Report to Parliament entitled, “Police Use of Facial recognition technology in Canada and the Way Forward”.

[15] In July 2020, Clearview ceased all activities in Canada.

[16] On July 7, 2020, Ms. Doan instituted an action against Clearview in which she proposed to bring a class action on behalf of two different subclasses:

1. All natural persons, who are either residents or citizens of Canada, whose faces appear in the Collected Photographs [the Privacy Breach Class];

2. All natural or legal persons holding copyright and moral rights with respect to the Collected Photographs [the Copyright Infringement Class].

[17] Per the Privacy Breach Class, Ms. Doan alleged that Clearview collected, copied, stored, used, and in some cases, disclosed publicly available photographs found on the internet without her or the proposed Privacy Breach Class members' knowledge or consent (T-713-20 file). Ms. Doan alleged that these actions by Clearview breached a number of federal and provincial statutes, including PIPEDA and the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

[18] Clearview brought a motion for an order pursuant to Rule 221(1)(a) of the Rules to strike portions of the pleadings contained in the proposed class proceeding instituted by Ms. Doan. Clearview's motion to strike concerned solely the breach of privacy portion of the proposed class proceeding. In its motion to strike, Clearview alleged that (1) Ms. Doan did not have standing to bring the action in regards to the Privacy Breach Class before the Federal Court, pursuant to sections 14 and 15 of the PIPEDA, as only a complainant or the Privacy Commissioner can seek remedies for an alleged breach, and no other federal law grants the Court the necessary jurisdiction to do so, and Ms. Doan was not a complainant; (2) at the time the pleadings were filed, the Privacy Commissioner had not issued the Investigation Report; and (3) the Court had no jurisdiction to hear claims based on alleged breaches of provincial statutes.

[19] On May 6, 2021, I granted Clearview's motion to strike in the T-713-20 file [the Order]. I then considered, *inter alia*, that Ms. Doan had not filed a complaint under section 11 of PIPEDA,

and that the Federal Court of Appeal had already stated that (1) the express statutory language of PIPEDA indicated that the recourse of section 14 is open to a "complainant"; (2) that a complainant is an individual who has filed a complaint with the Privacy Commissioner; and (3) per subsection 14(1) of PIPEDA, only a complainant with respect to whose complaint a report was prepared by the Privacy Commissioner can apply to the Court (*Englander v Telus Communications Inc*, 2004 FCA 387 at para 50 [*Englander*]).

[20] In my Order, I had also noted that the Federal Court had confirmed the recourse is open to individuals who have filed complaints in accordance with subsection 11(1) of PIPEDA, failing which the Court has no jurisdiction (*Turner v Telus Communications Inc*, 2005 FC 1601 at paras 34 and following [*Turner*]; *Wilson v Telus Communications Inc*, 2019 FC 276 at para 17 [*Wilson*]). I concluded it was plain and obvious that Ms. Doan had no standing to bring an application under section 14 of PIPEDA and I consequently struck the related portions of the pleadings, i.e., the entire cause of action based on the allegation of privacy breaches i.e., the Privacy Breach Class.

[21] Ms. Doan did not appeal this Order striking out her pleadings of the Privacy Breach Class in the T-713-20 file.

[22] On or around June 28, 2021, Ms. Doan filed her Complaint with the Privacy Commissioner against Clearview under section 11 of PIPEDA. In her Complaint, Ms. Doan asserted, *inter alia*, that in the course of providing its facial recognition service, Clearview collected, used, retained and disclosed her personal information in the form of biometric data and

photographs without her consent and without an appropriate or legitimate purpose and thus violated her right to privacy under PIPEDA and other privacy legislations.

[23] In her Complaint, Ms. Doan asserted the Privacy Commissioner's February 2021 Investigation Report and she indicated that:

> If the OPCC initiates a complaint against Clearview in this matter (s. 11(2) of the PIPEDA), Ms. Doan will have standing before the Federal Court pursuant to ss. 14-15 of the PIPEDA, even if the OPCC discontinues its investigation on the grounds that "the matter has already been the subject of a report by the Commissioner" (s. 12.2(1)(e) of the PIPEDA) and so advises Ms. Doan (s. 12.2(3) of the PIPEDA).

[24] On August 26, 2021, the Privacy Commissioner wrote to Ms. Doan. He indicated having accepted Ms. Doan's Complaint on July 5, 2021 and he outlined what Ms. Doan had asserted in her Complaint. The Privacy Commissioner determined that the activities and PIPEDA issues Ms. Doan had referred to in her Complaint were previously investigated and were the subject of a published report of findings issued on February 2, 2021. For this reason, the Privacy Commissioner indicated that he decided to exercise his discretion pursuant to paragraph 12.2(1)(e) of PIPEDA to discontinue the investigation on the grounds that Ms. Doan's Complaint had already been the subject of the Investigation Report by the Privacy Commissioner.

[25] On September 15, 2021, Ms. Doan filed her Notice of Application. On November 18, 2021, Ms. Doan filed her Motion for certification and for the appointment of Ms. Doan as Class representative. She provided proposed common questions of law and/or fact (Appendix A), a litigation plan for the proceeding (Appendix B), and a summary of agreements respecting fees and disbursements between the Application and her solicitors of record (Appendix C).

[26] On December 1, 2021, Clearview sent a Notice of Constitutional Question to the AGC and to the Attorney General of each provinces and territories. In its Notice, Clearview indicated its intend to question the constitutional validity of Part I of the PIPEDA and, on a subsidiary basis, of paragraphs 7(1)(d), (2)(c.1), (3)(h.1) of PIPEDA and of subsection 1(e) of the *Regulations Specifying Publicly Available Information*, SOR/2001-7.

[27] On July 15, 2022, Ms. Doan filed an amended Motion Record, which included an Amended Notice of Motion and (1) an affidavit of Ms. Doan sworn on November 18, 2021, introducing 12 exhibits; (2) an affidavit of Ms. Doan sworn on March 10, 2022, introducing nine exhibits; (3) an affidavit of Ms. Emy Bergevin sworn on March 10, 2022, introducing 27 exhibits; and (4) a transcript of Clearview's General Counsel, Mr. Jack Mulcaire's cross-examination held on May 2, 2022, with six exhibits attached.

[28] On August 3, 2022, Ms. Doan amended her Notice of Application unopposed.

[29] On September 16, 2022, Clearview filed its Motion Record in Response. In support of its Motion Record, Clearview submitted (1) an affidavit of Mr. Mulcaire sworn on February 25, 2022. Mr. Mulcaire describes the material facts on which Clearview intends to rely on at the hearing and introduced three exhibits; (2) an affidavit of Ms. Narod Migdesyan, paralegal at IMK LLP, sworn on February 25, 2022, introducing 13 exhibits; (3) a transcript of Ms. Doan's cross-examination held on April 25, 2022, with two exhibits attached.

[30] On September 26, 2022, the AGC filed a Notice of intervention in relation to the Notice of Constitutional Question.

[31] On October 24, 2022, Ms. Doan again amended her Notice of Application unopposed. In her Re-Amended Notice of Application, she added a subclass for Québec residents. As I stated earlier, the proposed class is defined as follows:

> All natural persons, who are either residents or citizens of Canada, whose faces appear in the photographs collected by Clearview Inc. (the "Collected Photographs") (the "Class" or the "Class Members"); and
>
> All natural persons, residing in Québec, whose faces appear in the Collected Photographs (the "Quebec Class" or the "Quebec Class Members").

[32] In her Re-Amended Notice of Application, Ms. Doan, on her own behalf and on behalf of the Class Members, seeks the following remedies from the Court:

> a. an order certifying this application as a class proceeding and appointing her as the representative applicant under the Rules;
>
> b. a declaration that Clearview has illegally collected, copied, stored, used and disclosed personal information of the Class Members in violation of their privacy rights;
>
> c. a declaration that Clearview violated quasi-constitutional rights of the Class Members;
>
> i. an order enjoining Clearview to remove from its database and to destroy all copies of all personal information, including any data created by Clearview, of the Class Members;
>
> ii. cease collecting, retaining, using, selling and disclosing photographs and related data of the Class Members;

iii. prevent the photographs and related data of the Class Members from appearing in Clearview's search results;

iv. not market or provide its services in Canada;

d. general pecuniary and non-pecuniary, punitive and statutory damages for Clearview's privacy breaches and invasions of privacy (including the commission of the tort of intrusion upon seclusion);

e. damages, including punitive damages, under the *Charter of Human Rights and Freedoms*, CQLR c C-12 (the "Québec Charter");

f. an order for aggregate assessment of damages owed to the Class Members;

g. pre-judgment and post-judgment interest pursuant to sections 36 and 37 of the *FCA*;

h. the costs of notice and of administering the plan of distribution of the recovery in this application, plus applicable taxes; and

i. such further and other relief as this Honourable Court deems just.

III. Order sought on this Motion for certification

[33] In her Motion for certification, Ms. Doan seeks the following orders from the Court:

1. An order seeking certification of this proposed class proceeding (the "Proposed Class Proceeding") as a class proceeding pursuant to s. 334.15 and ff. of the *Federal Courts Rules*, SOR/98-106 (the "Rules");

2. An order defining the class (the "Class" or "Class Members") as follows:

a. all natural persons, who are either residents or citizens of Canada, whose faces appear in the photographs collected by Clearview (the "Collected Photographs"); and

b. all natural persons, residing in Québec, whose faces appear in the Collected Photographs (the

"Quebec Class" or the "Quebec Class Members");

3. An order appointing the Applicant as the representative applicant of the Class (the "Representative Applicant");

4. An order stating the nature of the claims made on behalf of the Class against the Respondent as follows:

    a. Claims in privacy breaches and invasions of privacy (including commission of the tort of inclusion upon seclusion) against Clearview in connection with Clearview's collection, retention, use, sale, and subsequent disclosure of the Collected Photographs and related personal information in violation of the Class Members' rights;

    b. Claims in infringement of quasi-constitutional rights against Clearview in connection with Clearview's collection, retention, use, sale, and subsequent disclosure of the Collected Photographs and related personal information in violation of the Québec Class Members' rights;

5. An order setting out the questions contained in Appendix A to this Notice of Motion (the "Notice" or "NOM") as the common questions of law or fact for the Class;

6. An order awarding declaratory relief, injunctive relief, and damages, as more fully set out below;

7. An order stating the relief claimed by the Class as follows:

    a. a declaration that Clearview has illegally collected, retained, used, sold and disclosed personal information of the Class Members in violation of their privacy rights;

    b. a declaration that Clearview violated quasi-constitutional rights of the Québec Class Members;

    c. an order enjoining Clearview to:

        i. remove from its database and to destroy all copies of all personal information,

including any data created by Clearview, of the Class Members;

ii. cease collecting, retaining, using, selling and disclosing photographs and related data of the Class Members;

iii. prevent the photographs and related data of the Class Members from appearing in Clearview's search results;

iv. not market or provide its services in Canada;

d. general pecuniary and non-pecuniary and statutory damages for Clearview's privacy breaches and invasion of privacy (including the commission of the tort of intrusion upon seclusion);

e. damages, including punitive damages, under the *Charter of Human Rights and Freedoms*, CQLR c. C-12 (the "Quebec Charter");

f. an order for aggregate assessment of damages owed to the Class Members;

g. pre-judgment and post-judgment interest pursuant to ss. 36 and 37 of the *Federal Courts Act*, RSC 1985, c. F-7 (the "FCA");

h. the costs of notice and of administering the plan of distribution of the recovery in this application, plus applicable taxes; and

i. such further and other relief as counsel may advise and this honourable Court may permit;

8. An order approving the litigation plan (the "Litigation Plan") attached as Appendix B to this Notice as setting out a workable method for:

a. advancing the proceeding on behalf of the Class; and

b. notifying Class Members as to how the proceeding is progressing;

9. An order enjoining Clearview to pay the costs related to the notification of Class Members as set out in the Litigation Plan appended hereto as Appendix B;

10. An order following which any Class Members who wish to opt out of the Class Proceeding shall do so in writing by letter, email, or fax sent to the solicitors for Applicant within thirty (30) days of the issuance of the Court's Order (the "Opt-Out Period");

11. An order enjoining the Respondent to provide the Applicant's solicitors with a list of all Class Members the Respondent is capable of identifying and those Class Members' contact information following the expiry of the Opt-Out Period;

12. An order declaring that there shall be no costs associated with the Motion for Certification, the whole in accordance with s. 334.39 of the Rules;

13. Such further and other relief as counsel may advise and this honourable Court may permit.

IV. The issue on this Motion for certification

[34] The question at issue is whether this Court should certify the proposed class proceeding. This entails determining if Ms. Doan satisfied the following conditions per Rule 334.16(1)(a) to (e) of the Rules: (1) whether the pleadings disclose a reasonable cause of action; and (2) whether Ms. Doan has established some basis in fact for all other conditions for certification i.e., (i) there is an identifiable class of two or more persons; (ii) the claims of the Class Members raise common questions of law or fact; (iii) a class proceeding is the preferable procedure for the just and efficient resolution of those common questions; and (iv) there is an appropriate representative applicant (*Bruyea v Canada*, 2022 FC 1409 at para 89 [*Bruyea*]).

[35] The Court shall grant certification if Ms. Doan meets all five conditions of the test. Conversely, if Ms. Doan fails to meet any of the five listed conditions, the Motion for certification must fail (*Lin v Airbnb, Inc*, 2019 FC 1563 at para 21 [*Airbnb*]; *Buffalo v Samson Cree Nation*, 2008 FC 1308 at para 16 [*Buffalo*]).

V. General rules of certification

[36] The Rules pertaining to class proceedings are provided in Part 5.1 of the Rules.

[37] A class proceeding offers three important benefits over a duplication of individual litigations: (1) it allows for improved access to justice for those who might otherwise be unable to seek vindication of their rights through the traditional litigation process; (2) it enhances judicial economy, allowing a single proceeding to decide large numbers of claims involving similar issues; and (3) it encourages behaviour modification on behalf of the ones who caused harm and deters potential defendants who might otherwise assume that minor wrongs would not result in litigation (*Western Canadian Shopping Centres Inc v Dutton*, 2001 SCC 46 at paras 27-29).

[38] An overly restrictive approach must be avoided when applying class proceeding certification legislation to ensure that the advantages can be fully realized (*Buffalo* at para 29). At the certification stage, this Court's task is to determine whether a class proceeding is an appropriate procedural vehicle (*Pro-Sys Consultants Ltd v Microsoft Corporation*, 2013 SCC 57 at para 99 [*Pro-Sys*]). In other words, "the certification stage is decidedly not meant to be a test of the merits of the action" (*Hollick v Toronto (City)*, 2001 SCC 68 at para 16 [*Hollick*]).

[39] However, I also keep in mind the principles Justice Gascon highlighted at paragraph 60 of his decision in *Jensen v Samsung Electronics Co. Ltd*, 2021 FC 1185:

> That said, it is important to emphasize that, even though it is a low one, there is still a threshold to be met at the certification stage, and that certification will be denied when there is no viable cause of action or where there is an insufficient evidentiary basis for the facts on which the claims of the class members depend. While a certification motion is not a merits-based screening intended to determine the actual viability or strength of the contemplated class action, it must nonetheless operate as a "meaningful screening device" (Pro-Sys at para 103). In Pro-Sys, the SCC expressly stated that the analysis into the sufficiency of the evidence under the some-basis-in-fact standard cannot be so superficial that it would "amount to nothing more than symbolic scrutiny" of the evidence (Pro-Sys at para 103). There must be sufficient facts to satisfy the certification judge that the conditions for certification have been met "to a degree that should allow the matter to proceed on a class basis without foundering at the merits stage," by reason of the requirements not having been met (Pro-Sys at para 104). More recently, in the context of motions for authorization brought under the Quebec class action regime and the application of the "arguable case" requirement under the Quebec legislation, the SCC repeatedly reaffirmed that the authorization process "must not be reduced to 'a mere formality'" (Oratoire at para 62; Desjardins Financial Services Firm Inc v Asselin, 2020 SCC 30 [Desjardins] at para 74).

VI. Rule 334.16(1)(a): Reasonable cause of action

A. *Introduction*

[40] In her Memorandum of fact and law, Ms. Doan submits that her pleadings disclose reasonable causes of action. She presents the following three categories of causes of action: (1) privacy violations under PIPEDA, and under the *Personal Information Acts* of British Columbia and of Alberta; (2) tort of intrusion upon seclusion; and (3) violations of privacy rights under Québec law, namely the four pieces of legislations cited earlier. Alternatively, should the Court

require additional particulars, Ms. Doan submits that the Court should grant her leave to amend, citing *Paradis Honey Ltd v Canada*, 2015 FCA 89 at para 80 [*Paradis Honey*].

[41] Considering the applicable law and to avoid repetitiveness, I will examine the arguments raised by Ms. Doan under the following headings: (1) privacy violations under PIPEDA; (2) causes of action raised under various provincial laws; (3) cause of action raised under the common law tort of intrusion upon seclusion; and (4) leave to amend.

B. *Applicable test*

[42] The first certification condition set out in Rule 334.16(1)(a) of the Rules requires that the pleadings disclose a reasonable cause of action. This condition is assessed on the same threshold that applies to a motion to strike or dismiss (*P*ro-Sys at para 63).

[43] The motion to strike pleadings in the context of actions - with or without leave - is provided for at Rule 221 of the Rules. A pleading will be struck if it is it is plain and obvious that a claim does not exist or has no reasonable chance of success (*Airbnb* at para 70).

[44] The Rules do not contemplate a motion to strike in the context of applications. As Justice Stratas stated in *JP Morgan* at paragraph 48: "[…] the Federal Courts' jurisdiction to strike a notice of application is founded not in the Rules but in the Courts' plenary jurisdiction to restrain the misuse or abuse of courts' processes: *David Bull*, supra at page 600; *Canada (National Revenue) v RBC Life Insurance Company*, 2013 FCA 50". Justice Stratas confirmed this is a high threshold and that: "The Court will strike a notice of application for judicial review only where it

is ‘so clearly improper as to be bereft of any possibility of success’: *David Bull Laboratories (Canada) Inc v Pharmacia Inc*, [1995] 1 FC 588 at page 600 (CA). There must be a ‘show stopper’ or a ‘knockout punch’ – an obvious, fatal flaw striking at the root of this Court’s power to entertain the application: *JP Morgan* at para 47; *Rahman v Public Service Labour Relations Board*, 2013 FCA 117 at para 7; *Donaldson v Western Grain Storage By-Products*, 2012 FCA 286 at para 6; *cf. Hunt v Carey Canada Inc*, [1990] 2 SCR 959”.

[45] Although the Federal Court of Appeal seemingly hinted, in *JP Morgan,* that the threshold was higher in a motion to strike a notice of application as compared to in a motion to strike pleadings in an action per Rule 221 of the Rules, it later confirmed that the test was actually the same in both instances (*Wenham v Canada (Attorney General)*, 2018 FCA 199 at paras 33-34 [*Wenham*]). However, the words used to express the test applicable in each instance are different.

[46] As this proposed class proceeding is introduced by way of an application, and not by way of an action, I will use the words and the test outlined by the Federal Court of Appeal in *JP Morgan*, hence whether it is so clearly improper as to be bereft of any possibility of success (see also *Soprema Inc v Canada (Attorney General)*, 2021 FC 732 at para 26; *Soprema Inc c Canada (Procureur général)*, 2022 CAF 103 at para 10; *Kenney v Canada (Attorney General)*, 2016 FC 367 at para 19).

[47] In assessing the reasonable cause of action condition, no evidence may be considered and the analysis is limited to the pleadings (*Airbnb* at para 70; *R v Imperial Tobacco Canada Ltd*, 2011 SCC 42 at para 23; *Condon v Canada*, 2015 FCA 159 at para 13 *Condon*]). Otherwise,

the hearing of the motion could turn into a full hearing on the merits (*Condon* at para 13). The Court must thus assume that the material facts contained in the Re-Amended Notice of Application are true.

C. *Privacy violations allegations under PIPEDA*

(1) Cause of action under PIPEDA based on Ms. Doan's status as the Class representative

[48] Section 14 of PIPEDA provides that:

> 14(1) A complainant may, after receiving the Commissioner's report or being notified under subsection 12.2(3) that the investigation of the complaint has been discontinued, apply to the Court for a hearing in respect of any matter in respect of which the complaint was made, or that is referred to in the Commissioner's report, and that is referred to in clause 4.1.3, 4.2, 4.3.3, 4.4, 4.6, 4.7 or 4.8 of Schedule 1, in clause 4.3, 4.5 or 4.9 of that Schedule as modified or clarified by Division 1 or 1.1, in subsection 5(3) or 8(6) or (7), in section 10 or in Division 1.1.
>
> (2) A complainant shall make an application within one year after the report or notification is sent or within any longer period that the Court may, either before or after the expiry of that year, allow.
>
> (3) For greater certainty, subsections (1) and (2) apply in the same manner to complaints referred to in subsection 11(2) as to complaints referred to in subsection 11(1).

[49] The parties confirmed, and I agree, that the condition set out at Rule 334.16(1)(a) is satisfied as Ms. Doan herself has established a reasonable cause of action for the purpose of the certification. Ms. Doan established that she satisfies the requirement of subsection 14(1) of PIPEDA and that she may thus apply to the Court for a hearing. Per the language of the statute, Ms. Doan is a complainant and she has been notified under subsection 12.2(3) of PIPEDA that the investigation of the Complaint has been discontinued.

[50] Since Ms. Doan herself has established a reasonable cause of action for the purpose of the certification and as she is the proposed Class representative, a reasonable cause of action has thus been established. Under Rule 334.16(1)(a), the reasonable cause of action condition is satisfied if the representative applicant has a reasonable cause of action against the respondent (*Darmar Farms Inc v Syngenta Canada Inc*, 2019 ONCA 789 at paras 35-38; *Taylor v Canada (Attorney General)*, 2012 ONCA 479 at para 21 [*Taylor*]).

(2) Cause of action under PIPEDA in regards to the other Class Members

[51] It is clear from the evidence, and Ms. Doan does not assert otherwise, that she is the only Class Member who is a complainant under PIPEDA and who therefore meets the requirements of subsection 14(1) of PIPEDA; there is no evidence that any other member of the proposed Class is a complainant under PIPEDA. I note in passing that whether or not a class action proceeding could be brought under PIPEDA for a class of complainants is not at play in these proceedings.

[52] Ms. Doan first addresses the issue of the other members of the Class in her Reply Memorandum. She submits that it is not plain and obvious that a class proceeding under PIPEDA has no chances of success, despite the fact that Ms. Doan alone satisfies section 14 of PIPEDA, given that it is a novel claim and given the decision of *Haikola v The Personal Insurance Company*, 2019 ONSC 5982 [*Haikola*]. In *Haikola*, the defendants argued that the court did not have jurisdiction, since the statute only provided for individual actions. As the matter settled prior to the certification hearing, this question remained unresolved. Ms. Doan points out, however, that the Superior Court of Ontario commented, at paragraph 77, on the idea that an

independent right of action may ground a class proceeding even without an express reference to this procedural vehicle in the statute creating the right of action:

> […] There is uncertainty as to whether a class action can be brought in Federal Court. Section 14 of *PIPEDA* requires that a complainant alleging a privacy breach must obtain a report from the Privacy Commissioner prior to commencing an action for damages in Federal Court. *PIPEDA* does not specifically address whether a complainant who has obtained a report from the Privacy Commissioner may avail himself or herself of the class procedure in the *Federal Courts Rules* if he or she has obtained a report demonstrating a systemic privacy breach. The Defendants vehemently disputed (and continue to dispute) the Federal Court's ability to certify Haikola's claim as a class proceeding under section 14 of *PIPEDA*;

[53] Ms. Doan argues that, in the present case, those comments made from the Superior Court resonate loudly, given that the Class Members "obtained a report demonstrating a systemic privacy breach" towards Canadians (Investigation Report, Exhibit P-5, at para 89).

[54] Moreover, Ms. Doan submits that my Order of May 6, 2021 is irrelevant since the situation in this matter is different. She adds that in the T-713-20 file, I issued the dismissal Order given that: "at the time the pleadings were filed, the Privacy Commissioner had not issued a report," Ms. Doan had "not amended her Statement of Claim" otherwise and she did not plead that "she filed a complaint under section 11 of the PIPEDA at any time". She contends that the situation here is different due to the existence of the Investigation Report, of the Complaint and of the pleadings which allege mass privacy breaches under PIPEDA for all Class Members. It is thus her opinion that the possibility to institute a class proceeding based on a report from the Privacy Commissioner concluding to systemic breaches is the only interpretation which effectively promotes the goals of PIPEDA.

[55] Moreover, Ms. Doan asserts that the case law relied on by this Court in the dismissal Order is neither binding nor persuasive as concerns the present case, given that:

- In *Wilson* at paras 25–26, there was no evidence of any complaint nor any investigation pursuant to PIPEDA;
- In *Turner* at paras 34–38, this Court was asked to adjudicate whether a labour union could be party to or act in the complaint proceedings initiated by four of its members, and importantly, the Court was not seized of any alleged systemic breaches;
- In *Englander* at paras 49–52, the Federal Court of Appeal's comments that "it flows from subsection 14(1) that only a complainant with respect to whose complaint a report was prepared by the Commissioner can apply to the Court," were made in a context that the Court qualified to be "exceptional" circumstances, e.g., that of a complainant who had no personal interest in the complaint. That is not the present case. Moreover, the Court did not, and did not purport to, enumerate all ways in which an individual could have standing pursuant to PIPEDA.

[56] I disagree. In 2010, subsection 14(1) of PIPEDA was amended to add the reference to the fact that the complainant may, after "[…] being notified under subsection 12.2(3) that the investigation of the complaint has been discontinued, apply to the Court to reflect the addition of paragraph 12.2 (1)(e)". Contrary to Ms. Doan's argument, I am satisfied this amendment did not affect the principles set out by the Federal Court of Appeal in *Englander* and that I am still bound by its teachings. Moreover, in *Wilson*, after the adoption of the amendment, the Federal Court has confirmed section 14 pertains to the Court's jurisdiction.

[57] At the hearing, counsel submitted that as long as Ms. Doan herself meets the condition for a reasonable cause of action under PIPEDA, she can bring in the class proceeding on behalf of all the people identified in the Investigation Report. In other words, she asserts that the steps taken by the representative applicant under sections 11 to 14 of the PIPEDA act as an umbrella

to cover the other Class Members. It is her opinion that these statutory procedural steps, necessary on an individual basis, become waved in a class proceeding certification context and that the other Class Members benefit from the procedural steps taken by the representative applicant. Ms. Doan relies on *Canadian Imperial Bank of Commerce v Green*, 2015 SCC 60 [*CIBC v Green*]. In her view, this issue should therefore be treated within the reasonable cause of action assessment.

[58] Ms. Doan thus argued that the requirement set out by PIPEDA is a procedural one and that section 14 of PIPEDA serves to regulate the exercise of the right not to create it. At the hearing, she extensively relied on *CIBC v Green* for the proposition that the process of filing a complaint under the PIPEDA is a procedural matter, comparable to the leave requirement under subsection 138.8 (1) of the *Ontario Securities Act*, RSO 1990, c S 5 [*OSA*].

[59] I disagree. As I indicated in my Order issued May 6, 2021, the Federal Court confirmed that the recourse under PIPEDA is open to individuals who have filed complaints in accordance with subsection 11(1) of PIPEDA, failing which the Court has no jurisdiction (*Turner* at paras 34 and following; *Wilson*). Again, Ms. Doan did not appeal this Order.

[60] The requirements set forth in section 14 of PIPEDA are not procedural - they create substantive rights and they must be met for the Court to have jurisdiction. Under PIPEDA, being a “complainant” is a constituent element of the statutory cause of action. PIPEDA creates the statutory right to come to the Federal Court. As Clearview submits, section 14 creates a substantive right of action for a discrete group of individuals. Those who do not meet the

requirement simply have no right of action and, as I stated in my unchallenged Order, the Court has no jurisdiction to entertain their application.

[61] At the hearing of this Motion for certification, counsel for Ms. Doan in fact confirmed unequivocally she agreed that an individual must be a complainant and satisfy the requirements of PIPEDA's subsection 14(1) in order to apply to the Court. However, despite this acknowledgment and despite having previously argued it was a procedural step, Ms. Doan argued that the class proceeding actually served to extend the substantive rights of one individual, i.e., a complainant who satisfies section 14 of PIPEDA, to all the Class Members even though they do not have this right on an individual basis.

[62] I cannot accept this argument. In *Bisaillon v Concordia University*, 2006 SCC 19, the Supreme Court of Canada confirmed unequivocally that the class proceeding does not modify or create substantive rights (paragraph 17):

> The class action is nevertheless a procedural vehicle whose use neither modifies nor creates substantive rights (*Malhab v Métromédia CMR Montréal Inc*, [2003] RJQ. 1011 (CA), at paras 57-58; *Tremaine v AH Robins Canada Inc*, [1990] RDJ 500 (CA), at p 507; Y. Lauzon, *Le recours collectif* (2001), at pp 5 and 9). It cannot serve as a basis for legal proceedings if the various claims it covers, taken individually, would not do so: D. Ferland and B. Emery, eds, *Précis de procédure civile du Québec* (4th ed 2003), vol 2, at pp 876-77.

[63] At paragraph 22 of the decision, the Supreme Court of Canada stated that "[i]n short, the class action procedure cannot have the effect of conferring jurisdiction on the Superior Court over a group of cases that would otherwise fall within the subject matter jurisdiction of another

court or tribunal. Except as provided for by law, this procedure does not alter the jurisdiction of courts and tribunals. Nor does it create new substantive rights".

[64] The fact that the litigation has been rebranded as a class proceeding cannot create substantive rights for the Class Members who are not complainants, as detailed above.

[65] Based on the teachings of the Supreme Court of Canada and of the Federal Court of Appeal, I am convinced that Ms. Doan's argument – that the Class Members who are not "complainants" can join in in the Application she filed under section 14 of PIPEDA – is bereft of any chance of success.

[66] Furthermore, the fact that the argument is novel, that the Ontario Superior Court has expressed concerns in *Haikola*, or again that the violations are systemic is of no moment in light of the above defects.

D. *Causes of action raised under various provincial laws*

[67] Ms. Doan raises causes of action under the following provincial laws of British Columbia, Alberta and Québec:

- *Personal Information Protection Act* and its Regulations (British Columbia);
- *Personal Information Protection Act* and its Regulations (Alberta);
- *Charter of Human Rights and Freedoms* (Québec);
- *Act respecting the protection of personal information in the private sector* (Québec);

- *Act to establish a legal framework for Information technology* (Québec); and
- *Civil Code of Québec* (Québec).

[68] Ms. Doan first addresses the jurisdiction of the Court to entertain her provincial law claims in her Reply Memorandum. She submits that it is well settled law that, once the jurisdiction of the Federal Court is established, a litigant in this Court can also rely on provincial laws, and that this Court can consider and apply them in an incidental manner (*ITO-Int'l Terminal Operators v Miida Electronics*, [1986] 1 SCR 752 at 781-782 [*ITO-Int'l Terminal Operators*]; *Peter G White Management Ltd v Canada (Minister of Canadian Heritage)*, 2006 FCA 190 at paras 58-59, 68 [*Peter G White*]).

[69] Hence, per her argument, since PIPEDA confers jurisdiction to the Federal Court to decide of an application filed pursuant to section 14 of PIPEDA, the Court may then rely on provincial laws and apply them in an incidental manner.

[70] Ms. Doan notably relies on *Robertson v Beauvais*, 2014 FC 208 [*Robertson*] where she asserts that this Court confirmed the applicability of provincial law in an incidental manner along with the possibility for this Court to grant punitive damages under the *Charter of Human Rights and Freedoms*. She reproduces the following paragraphs of *Robertson*:

> [82] The case law also recognises that where this Court possesses jurisdiction under the […] criteria [set out in ITO-International], but the Federal Courts Rules, SOR/98-106 [the Rules] or federal case law do not cover a subsidiary part of the claim, regard may be given to provincial law in the jurisdiction where the cause of action arose to fill the gap (see e.g., ITO at para 34; Stoney Band v Canada (Minister of Indian & Northern Affairs), 2005 FCA 220 at paras 40–41, 74–75, [2006] 1 FCR 570; St-

> Hilaire v Canada (Attorney General), 2001 FCA 63 at para 31, 204 DLR (4th) 103). […]
>
> [101] In my view, the foregoing cases support the conclusion that I possess jurisdiction to award damages in this case both because the majority of them support this conclusion and because, on a principled basis, this conclusion flows from the decision of the Supreme Court in *Roberts*. […]
>
> [102] To hold otherwise would cast an unwarranted burden on plaintiffs by requiring them to bifurcate their claims if they choose to invoke this Court's undoubted jurisdiction to grant declaratory and injunctive relief in cases such as the present. Proceeding in this fashion would also expose defendants to the costs of a second action before a provincial superior court and would result in duplicative proceedings, which are results that ought be avoided if at all possible. There are, therefore, sound policy reasons which likewise inform the determination that this Court possesses jurisdiction over damages claims like those made by Mr. Robertson in this case.
>
> [103] I therefore find that I do possess jurisdiction to award the damages claimed. The fact that in so doing I may need to have regard to civil law principles or to the *Québec Charter* does not forestall this conclusion. […]

[71] Ms. Doan thus submits that her reliance on provincial causes of action is incidental to the claim made pursuant to PIPEDA and that said reliance is necessary to ensure the matter is resolved fully without the multiplication of accessory proceedings before the provinces' superior courts (*Peter G White* at paras 79-80). She adds that, if the Federal Court declined to assert jurisdiction on parts of the present case, the Class Members would be forced to split their claims, based on the very same facts as the claim under PIPEDA, across the provinces' superior courts.

[72] Clearview submits that the Federal Court lacks jurisdiction to consider Ms. Doan's claims based on provincial law. Clearview submits that to apply provincial law, this Court must be satisfied that (1) it has jurisdiction under a valid federal law; and (2) the application of some provincial law is incidentally necessary to resolve the issues arising under that federal law (citing *Peter G White* at para 58). Clearview states that this Court has jurisdiction to hear Ms. Doan's

cause of action under PIPEDA - and only Ms. Doan's - and that the application of provincial law is not necessary to decide the application under PIPEDA.

[73] Clearview adds that this Court does not have general jurisdiction to consider claims based on provincial statutes and that this is essentially what Ms. Doan is trying to do by attempting to bring an action in civil liability in Federal Court (*Windsor (City) v Canadian Transit Co*, 2016 SCC 54 at para 33 [*Windsor*]). Clearview relies on *Sibomana c Agence de recouvrement collectcents*, 2019 CF 1257 at paragraphs 27 to 29 [*Sibomana*], which already considered the same issue.

[74] Clearview also submits that, although the Federal Court has a limited jurisdiction to apply provincial law incidentally, this jurisdiction is not applicable here. In this case, it is Clearview's argument that it is not incidentally necessary for the Court to turn to provincial laws or the common law to buttress or complete its analysis under PIPEDA. On the contrary, Clearview stresses that the Federal Court decision *Sibomana* is in fact directly to the contrary.

[75] In regards to the Alberta and the British Columbia privacy violations raised by Ms. Doan, Clearview confirmed it has challenged the reports issued by the privacy commissioners of both provinces. Clearview thus stresses that these reports are therefore not "final" reports per the applicable legislation, and that no right of action has thus been yet created, citing sections 60(1) and 57 of the *Personal Information Protection Acts* of Alberta and British Columbia respectively. It thus submits that, even if the Federal Court had jurisdiction to apply provincial

laws, this cause of action would be bereft of any chances of success given the current circumstances.

[76] Also, in regards to the Alberta and the British Columbia privacy violations raised by Ms. Doan, Clearview submits that, even if the Court had jurisdiction over the provincial law claims, Ms. Doan is a resident of Québec and subject to Québec laws. Clearview adds that she manifestly does not have a claim either under British Columbia or Alberta statutes. It notably refers to *Taylor* at paragraph 21 and *Leroux v Ontario*, 2021 ONSC 2269 at paragraph 50 to assert that the condition must be assessed from the perspective of the representative applicant.

[77] I agree with Clearview that the Federal Court has no jurisdiction over claims raised under provincial laws in these proceedings.

[78] As a statutory court, the Federal Court possesses only the jurisdiction that has been conferred upon it by statute: it is a statutory court with limited and specific jurisdiction (as well as such inherent powers of a superior court of record as are required to effectively manage and decide cases before the Court, as was noted in *Canada (Human Rights Commission) v Canadian Liberty Net*, [1998] 1 SCR 626 at paras 35-38). The Federal Court does not generally have jurisdiction to consider claims based on provincial statutes: its power is confined by its constitutional boundaries to the administration of federal laws (*Windsor* at para 33; *Sibomana* at paras 27, 28; *ITO-Int'l Terminal Operators* at 781; *Canadian Forest Products Ltd v Canada (Attorney General)*, 2005 FCA 220 at paras 56-57).

[79] In *ITO-Int'l Terminal Operators*, the Supreme Court of Canada stated that "[w]here a case is in pith and substance" within the Court's statutory jurisdiction, the Federal Court may apply provincial law incidentally necessary to resolve the issues presented by the parties (*ITO-Int'l Terminal Operators* at 782).

[80] Here the Court has jurisdiction to hear Ms. Doan's application under a valid federal law, i.e., subsection 14(1) of PIPEDA. The case is not only in pith and substance within the Court's jurisdiction, it is entirely within the Court's jurisdiction. The issue over which the Federal Court has jurisdiction is the application under subsection 14(1) of PIPEDA; the application of provincial law is not at all incidentally necessary to resolve the issue (*Peter G White* at para 58). On the contrary, it is clear that the legislation establishes a complete code for the resolution of applications brought under subsection 14(1) of PIPEDA and that there is no suggestion anywhere in the statute, or in the jurisprudence, that any provincial laws are "necessary" to resolve the issues raised under PIPEDA.

[81] As Justice Roy stated at paragraph 28 of his decision in *Sibomana*, section 26 of the *Federal Courts Act* provides a particular foundation when jurisdiction is conferred to the Federal Court. Section 26 states that:

> The Federal Court has original jurisdiction in respect of any matter, not allocated specifically to the Federal Court of Appeal, in respect of which jurisdiction has been conferred by an Act of Parliament on the Federal Court of Appeal, the Federal Court, the Federal Court of Canada or the Exchequer Court of Canada.

[82] Justice Roy outlined that the Court will thus have jurisdiction when another federal law will have expressly granted it said jurisdiction and he cited authority on the subject. He added

that section 14 of PIPEDA both grants the Court jurisdiction and sets the extend of the Court's jurisdiction. As Justice Roy indicated, the Court does not have jurisdiction to consider issues that extend beyond the boundaries set by section 14 of PIPEDA (see paragraphs 27 to 31 of *Sibomana*).

[83] Ms. Doan wishes to use section 14 of PIPEDA as a gateway to access the Federal Court and litigate issues that are not within its jurisdiction. Her allegations that it would be simpler and more convenient to have all the matters litigated in the Federal Court rather than initiating separate proceedings in the provincial courts cannot succeed; the fact that it would be simpler cannot confer jurisdiction where none exists.

[84] The claims raised under provincial laws are clearly bereft of any chances of success (*JP Morgan* at para 47).

[85] I need not examine the other arguments raised by Clearview in regards to the British Columbia and Alberta privacy violations.

E. *Tort of intrusion upon seclusion*

[86] Ms. Doan raises the tort of intrusion upon seclusion which, she argues, imposes liability on a person who intentionally intrudes upon the seclusion, private affairs, or private concerns of another person, "where the invasion would be highly offensive to a reasonable person" (*Jones v Tsige*, 2012 ONCA 32 at para 70). Ms. Doan alleges that the necessary requirements are met and that, based on the facts as pled, damages, including pecuniary, non pecuniary, punitive and

aggravated damages are available to the Class Members as remedies for the tortious acts committed by Clearview.

[87] Clearview responds first that it is plain and obvious that the Federal Court lacks jurisdiction to consider Ms. Doan's liability claims based on common law, referring to the statutory jurisdiction of the Federal Court as it did in regards to the lack of jurisdiction over claims under provincial laws. Clearview adds, as it did in regards the laws of British Columbia and Alberta, that even if the Court considers it has jurisdiction, Ms. Doan is a resident of Québec and subject to Québec law and manifestly has no claim pursuant to the tort of intrusion upon seclusion which does not exist in Québec.

[88] I am not certain that this claim can be raised through the procedural vehicle that is an application under Rules 300 and following of the Rules, and that the remedies sought are available. In any event, assuming it can, it is clear this Court has no jurisdiction to entertain it; it is not necessary to consider the tort of intrusion upon seclusion in order to resolve the issue under PIPEDA and in fact, PIPEDA does not allow it per Justice Roy's conclusions in *Sibomana*. The analysis stated above in regards to the claims raised under provincial laws applies equally here *mutatis mutandis*.

[89] I need not address Clearview's other arguments in this regard. Ms. Doan's cause of action in tort of intrusion upon seclusion is bereft of any chance of success.

F. *Leave to amend*

[90] Ms. Doan submits that she has pled the requisite constituent elements of the asserted causes of action, and that she thus has fulfilled this condition. Subsidiarily, she asks the Court to grant her leave to amend, should the Court require further particulars (*Paradis Honey* at para 80). At the hearing, Ms. Doan's counsel clarified that, if the Court finds that a detail is missing from the Re-Amended Notice of Application, the Court has the discretion to grant leave to amend if the Court believes that the amendment will indeed lead to proper certification. However, if there is a fundamental defect that cannot be corrected, Ms. Doan's counsel agrees that leave to amend should not be granted, referring to *Canada (Attorney General) v Jost*, 2020 FCA 212 at paras 49, 111 [*Jost*] and *Buffalo v Samson Cree Nation*, 2010 FCA 165 at para 12.

[91] Ms Doan has not pointed to, and I have not found any Rule, as part of the Class Proceedings Rules contained in Part 5.1, that permits or provides for the Court to grant an open leave to amend to Ms. Doan to alleviate or remedy a negative finding on the first criteria of Rule 334.16.

[92] Rule 75(1) sets out the general rule that the Court may, on motion, allow a party to amend a document on terms that will protect the rights of all parties. Rule 75 applies to all proceedings including applications (*Astrazeneca AB v Apotex Inc*, 2006 FC 7 at para 19 aff. *Astrazeneca AB v Apotex Inc*, 2007 FCA 327). Limitation is set at Rule 75(2) whereby no amendment shall be allowed under subsection (1) during or after a hearing unless (a) the purpose is to make the document accord with the issues at the hearing; (b) a new hearing is ordered; or

(c) the other parties are given an opportunity for any preparation necessary to meet any new or amended allegations. Rules 200 and 201 pertain to an amendment in the context of actions, not of applications.

[93] Rule 75 does not prescribe the criteria for amendment. In *Janssen Inc v Abbvie Corporation*, 2014 FCA 242 at paragraph 3 [*Abbvie*], the Federal Court of Appeal stated that the test is whether it is more consonant with the interests of justice that the withdrawal or amendment be permitted or that it be denied (*Abbvie* at para 3. See also *Boakye v Canada (Citizenship and Immigration)*, 2018 FC 831 at para 19).

[94] In *Paradis Honey*, the Federal Court of Appeal held that an amendment to the statement of claim could be proposed to show that some problems could be cured, even after the defendant had moved to strike it.

[95] In a motion to certify a class action, *Jost* at paragraph 49 established that, to deny a leave to amend, it must be plain and obvious that the action cannot succeed on the facts as alleged: the defect in the statement must be one that is not curable by amendment.

[96] In the context of a motion to strike, in *Ward v Canada (Public Safety and Emergency Preparedness)*, 2014 FC 568 at paragraph 30, this Court refused a leave to amend where the plaintiff did not specify how the claim would be amended, nor explanation given as to how if amended, those facts would support a cause of action.

[97] I also note a recent decision of this Court that granted a leave to amend to add systemic negligence or negligent misrepresentation after the plaintiff submitted a proposed further amended statement of claim and allowed the defendant to provide brief post-hearing submissions (*Bruyea* at paras 48-53, 133).

[98] First, here, Ms. Doan did not suggest or propose any amendment to the Court. Second, and, in any event, I am convinced there is here no way to cure the defects that have been identified as they relate to the jurisdiction of the Court. The Court simply has no jurisdiction to hear causes of action in regards to (1) individuals who do not meet the requirements set forth in subsection 14(1) of PIPEDA; (2) claims made under provincial laws in the context of these proceedings; and (3) a claim in common law tort between private parties and as part of an application.

VII. Rule 334.16(1)(b): Identifiable class of two or more persons

[99] Having decided that Ms. Doan has one reasonable cause of action under PIPEDA, I now turn to the other conditions that must be satisfied in order for the Court to certify a proceeding as a class proceeding.

[100] Ms. Doan submits that the proposed Class and the Québec Class easily meet the condition of Rule 334.16(1)(b) and that she has shown some basis in fact that there is an identifiable Class and Québec Class of two or more persons.

[101] Ms. Doan contends that, given the number of photographs in Clearview's database, the Class and the Québec Class are each estimated to have memberships numbering in the millions. Ms. Doan asserts that that their sizes are objectively determinable based on (1) the exclusive knowledge and/or records of Clearview in the manner Ms. Doan describes; and (2) statistically by taking into account the number of internet users and social network Canadian users who regularly use social networks to post photographs containing human faces.

[102] Ms. Doan stresses that, in any event, lack of information about the precise number of Class Members or their identities is not determinative at the certification stage and nor can the numerical size of the class (*Option Consommateurs c Google*, 2022 QCCS 2308). She adds that the condition that must be applied by the Court is whether the putative class members can be identified, not whether they can self-identify at the time of the certification, nor whether the representative applicant knows how other members can self-identify (*Douez v Facebook*, 2014 BCSC 953 at para 204 distinguishing *Sun-Rype Products Ltd v Archer Daniels Midland Company*, 2013 SCC 58 [*Sun-Rype*]). She asserts that the evidence demonstrates that (1) there is some basis in fact that Class Members can be identified; (2) that Clearview has the ability to identify the Class and should respond to access requests from Canadians (*Airbnb*); (3) that Clearview can access and use the geolocation data of the Collected Photographs; and (4) that the Class Members can be identified by objective criteria.

[103] Finally, Ms. Doan asserts that the Class period is not overly broad and that there is no principled reasons to limit the Class to the period during which Clearview offered its services to Canadian users.

[104] Clearview responds that the Class is overbroad as (1) most Class Members do not have a claim; (2) the Class period is too broad; and (3) the Class is not identifiable.

[105] First, Clearview submits that the proposed Class suffers from essentially the same defect that plagued the Ms. Doan's original privacy claim in file T-713-20: an individual only has a right of action in Federal Court for a violation of PIPEDA under subsection 14(1) if that person is a "complainant" (Order of May 6, 2021; *Englander* at para 50). Although Ms. Doan has corrected this defect for herself by following the process provided for by section 11 of PIPEDA and becoming a "complainant" who may apply to the Court under subsection 14(1), Clearview points out that there is no evidence or even a single allegation that anyone besides Ms. Doan has made a complaint under section 11 of PIPEDA. Hence, Clearview argues that the overwhelming majority of the proposed Class Members do not have a claim under PIPEDA, and in fact based on the record, the only person who might have a claim under PIPEDA is Ms. Doan herself.

[106] Second, Clearview responds that the proposed Class is also overbroad because it is not properly time-limited to the period during which Clearview has users in Canada – that is between early 2019 and July 2020. Outside of this period, Clearview argues, this Court lacks jurisdiction over its activities.

[107] Third, Clearview submits that the Class is not identifiable as there must be sufficient evidence to show some basis in fact that two or more persons will be able to determine if they are in fact a member of the Class (citing *Sun-Rype* at para 58).

[108] The parties agree that, in regards to the conditions other than the reasonable cause of action, Ms. Doan bears the burden of adducing evidence to show "some basis in fact" that the conditions have been met (*Hollick* at para 25; *Pro-Sys* at para 99; *AIC Ltd v Fischer*, 2013 SCC 69 at para 40 [*Fischer*]). These conditions are concerned with the form of the proceeding, not its merits. This threshold is lower than a balance of probabilities, as certification is not the appropriate stage to resolve conflicts in the evidence (*Pro-Sys* at para 102). That said, an applicant must nonetheless come forward with sufficient pleadings and with a sufficient evidentiary basis to support certification. While certification remains a low hurdle, it is nonetheless a hurdle (*Simpson v Facebook*, 2021 ONSC 968 at para 50).

[109] Having an identifiable class of two or more persons is the first remaining condition and it is set out at Rule 334.16(1)(b) of the Rules. Class proceedings require an identifiable class in order to identify persons who are entitled to notice for certification, entitled to potential relief and bound by the judgment (*Paradis Honey Ltd v Canada*, 2017 FC 199 at para 22 [*FC Paradis Honey*]; *Airbnb* at para 92). To determine if there is an identifiable class of persons, the class must be defined by reference to objective criteria, without reference to the merits of the proceeding, and the claims of the class members must raise common issues or, in other words, "there must be a rational connection between the common issues and the proposed class definition" (*FC Paradis Honey* at para 23). The burden is on the proposed applicant representative to show that the class is defined sufficiently narrowly, such that it meets these criteria. This burden is, however, not an onerous one: the Court must be convinced that the class is not unnecessarily broad, but not that everyone in the class shares the same interest in the resolution of the common issues (*Hollick* at para 21; *FC Paradis Honey* at para 24).

[110] It is worth repeating that Ms. Doan asks the Court to certify the following Class:

> All natural persons, who are either residents or citizens of Canada, whose faces appear in the photographs collected by Clearview Inc. (the "Collected Photographs") (the "Class" or the "Class Members"); and
>
> All natural persons, residing in Québec, whose faces appear in the Collected Photographs (the "Quebec Class" or the "Quebec Class Members").

[111] Based on the evidence in the record, Ms. Doan is the only person who satisfies subsection 14(1) of PIPEDA and who can thus apply to the Court for a hearing. There is thus no basis in fact showing there exists a class of two or more persons over which the Federal Court has jurisdiction. I have discussed this earlier and the same principles apply. The fact that Ms. Doan herself can apply to the Court does not and cannot grant the Court jurisdiction over the other Class Members, of which none is a complainant.

[112] Ms. Doan has suggested the Court modified the Class to limit it to "complainants" under PIPEDA, suggesting that they would complain and all rely on the February 2021 Investigation Report, and that would thus all receive the same notification from the Privacy Commissioner. However, as Clearview pointed out at the hearing, the procedure is time-barred per subsection 14(2) of PIPEDA. No attempt has been made to persuade the Court that the one-year time limit should be extended and I hasten to add that an extension request is not guaranteed to succeed in an application that is more than one year overdue.

[113] I agree with Clearview that Ms. Doan has not shown some basis in fact that there exists a class of two or more persons over which the Federal Court has jurisdiction. As Ms. Doan has not

shown some basis of fact that a class of two or more persons have been identified, this condition has not been met and the application cannot be certified as a class proceeding. There is no need to examine the other arguments raised under this heading.

[114] I nonetheless point out that Clearview has unequivocally confirmed that it cannot identify the individuals who appear in images that its crawlers collect or if that person is a Canadian citizen or resident itself. This situation is therefore different than the one in *Airbnb* and in *Douez v Facebook Inc*, 2018 BCCA 186, where the company had confirmed it was possible, albeit difficult, to find the sought after information (Mulcaire Affidavit at para 23).

VIII. Rule 334.16(1)(d): Preferable procedure

[115] In order to meet the preferable procedure condition, the representative applicant must show: (1) that a class proceeding would be a fair, efficient and manageable method of advancing the claim and determining the common issues which arise from the claims of multiple applicants; and (2) that it would be preferable to any other reasonably available means of resolving the class members' claims (*Fische*r at para 48; *Hollick* at para 28; *Wenham* at para 77). Determining whether a class proceeding is preferable must be "conducted through the lens of the three principal goals of class action, namely judicial economy, behaviour modification and access to justice" (*Fischer* at para 22; *Wenham* at paras 81, 85-98; *Airbnb* at para 143).

[116] Ms. Doan submits that a class proceeding is the preferable procedure for the just and efficient resolution of the common questions of law or fact, per Rule 334.16(1)(d) of the Rules.

She raises that it (1) is a fair, efficient and manageable method of advancing the claims; (2) is preferable to other reasonably available means; and (3) serves the goals of class proceedings.

[117] I disagree. As Clearview outlined and as stated earlier, PIPEDA grants a right only to individuals who have filed a complaint to the Privacy Commissioner and who meet the requirement of section 14 of PIPEDA.

[118] Again, as Clearview argues, a class proceeding on behalf of millions of Canadians citizens or residents who have never filed a complaint under PIPEDA and do not meet the requirements of section 14 cannot be a "preferable procedure" for resolving these individuals' claims because they have no such claims. Accordingly, a class proceeding in this instance would not fulfill the class proceeding objectives of judicial economy, access to justice, and a fair and efficient procedures to all parties, including the Court (*Fischer* at para 16).

[119] Additionally, without some basis in fact as to how membership is to be determined, "it is impossible to determine whether a class proceeding would be preferable over other reasonably available options" (*Salna v Voltage Pictures, LLC*, 2021 FCA 176 at para 118 [*Salna*]). This has consequences for the preferability analysis, as the Federal Court of Appeal held in *Salna*: "The preferability analysis will differ depending on the size of the class. To be clear, a court does not need to know the exact number of class members, nor the ultimate boundaries of the class with precision. But there must be some evidence on which a court can conclude that a class proceeding is the preferred approach" (*Salna* at para 119).

[120] Ms. Doan has not shown some basis in fact that a class proceeding is the preferable procedure for the just and efficient resolution of the common questions of law or fact.

IX. Constitutional question

[121] On November 30, 2021, Clearview served a Notice of Constitutional Question, noticing its intent to question the constitutional validity of Part I of PIPEDA and, on a subsidiary basis, of paragraphs 7(1)(d), (2)(c.1), (3)(h.1) of PIPEDA and of subsection 1(e) of the *Regulations Specifying Publicly Available Information*.

[122] Clearview essentially submits that Part I of PIPEDA is *ultra vires* the general branch of Parliament's jurisdiction over the regulation of trade and commerce (subsection 91(2) of the *Constitution Act, 1867*) because it fails to meet certain key indicia of the five factors that were set out in *General Motors of Canada Ltd v City National Leasing*, [1989] 1 SCR 641.

[123] Subsidiary, Clearview submits that the combined effect of clause 4.3 of Schedule 1 of PIPEDA, paragraphs 7(1)(d), (2)(c.1), (3)(h.1) of PIPEDA and section 1 of the *Regulations Specifying Publicly Available Information* is to infringe the right to freedom of expression guaranteed by subsection 2(b) of the *Canadian Charter of Rights and Freedoms* in a way that cannot be justified in a free and democratic society.

[124] Ms. Doan notably asserts that the Court is currently seized of only one motion: her Motion to certify the present proceeding as a class proceeding. As a result, Ms. Doan submits that the Court's consideration of the constitutional questions raised by Clearview is limited to

adjudicating whether it is plain and obvious that she has no reasonable cause of action under PIPEDA; which includes Clearview's argument. Hence, it is her opinion that to succeed with this argument, Clearview must demonstrate that it is plain and obvious that Part I of PIPEDA is unconstitutional, which Clearview has failed to do so.

[125] The AGC submits, amongst other things, that a declaration of constitutional invalidity should not be granted in the context of the Motion for certification, in this case, for the simple reason that no party has sought this conclusion (Rules 182(d); 359(b); Form 359; *Energizer Brands, LLC v The Gillette Company*, 2020 FCA 49 at paras 38-39; *Pascal v Canada (Attorney General)*, 2005 FCA 31 at para 2).

[126] Conversely, as pointed out by the AGC, if this Court declines to certify the class proceeding on the basis of any of the other arguments Clearview has advanced, the constitutional question becomes moot (*State Farm* at para 119). At the hearing, Clearview agreed with the AGC on this point.

[127] In this case, the Court does not need to answer the constitutional question given that the Motion for certification of the proceeding as a class proceeding will be dismissed on other basis.

X. Conclusion

[128] Considering the above, I will dismiss Ms. Doan's Motion for Certification.

ORDER in T-1410-21

THIS COURT'S ORDER is that:

1. The Motion for certification is dismissed.

2. No costs are awarded.

"Martine St-Louis"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1410-21
STYLE OF CAUSE:	HA VI DOAN AND CLEARVIEW AL INC., AND ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	MONTRÉAL, QUÉBEC
DATE OF HEARING:	DECEMBER 14, 2022
ORDER AND REASONS:	ST-LOUIS J.
DATED:	MARCH 17, 2023

APPEARANCES:

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Me Doug Mitchell Me Olga Redko Me Mathilde Couture	FOR THE RESPONDENT
Me Michelle Kellam Me Erin Morgan	FOR THE INTERVENER

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