Federal Court  Cour fédérale

Date: 20230718

Docket: T-724-20

Citation: 2023 FC 968

Ottawa, Ontario, July 18, 2023

PRESENT: Madam Justice St-Louis

PROPOSED CLASS PROCEEDING

BETWEEN:

HA VI DOAN

Applicant/Plaintiff

and

HIS MAJESTY THE KING

Respondent/Defendant

ORDER AND REASONS

I. Overview

[1] On August 27, 2021, Ms. Doan filed a Motion to certify an action as a class proceeding and for her appointment as Class Representative [Motion for certification] under part 5.1 of the *Federal Courts Rules*, SOR/98-106 [Rules]. Ms. Doan's Motion for certification relates to the action she initiated against Canada, as a class proceeding, in connection with the Royal Canadian

Mounted Police [RCMP]'s involvement with Clearview AI Inc. [Clearview], a United-States based corporation that provides facial recognition and identification services using a facial recognition technology.

[2] Ms. Doan asserts that the conditions for certification set forth in Rule 334.16(1) of the Rules are met as: (1) her pleadings disclose a reasonable cause of action; (2) the Class and Subclasses are identifiable and are composed of two or more persons; (3) the claims of the Class Members raise common questions of law or fact; (4) a class proceeding is the preferable procedure for the just and efficient resolution of the common questions; and (5) she is an appropriate Class Representative.

[3] In response to the Motion for certification, His Majesty the King [Canada] submits that none of the conditions required for certification are met. Canada first stresses out that Ms. Doan does not plead any material fact that Canada looked for, saw, or copied some information related to her, and that it is therefore illusory to speak of violations of her rights or of causation.

[4] Canada thus responds that (1) it is plain and obvious Ms. Doan's pleadings do not disclose a reasonable cause of action; (2) some statements Ms. Doan swore in her affidavit must be given no weight and the third-party reports adduced in exhibits are not admissible for the truth of their contents; (3) the Class is overbroad, not rationally connected to the claims and is not identifiable; (4) the proposed common questions are overbroad and no evidence supports them; (5) a class proceeding is not appropriate as individual issues would predominate and alternative

measures to a class proceeding could resolve Ms. Doan's claims; and (6) Ms. Doan cannot represent a Class where she has no reasonable personal cause of action against Canada.

[5] In her underlying action, Ms. Doan claims that Clearview collects, copies, stores, uses, discloses, and sells personal biometric information, including facial photographs of residents and citizens of Canada [the Collected Photographs], without their knowledge or consent. She also claims that Clearview developed an algorithm allowing it to extract the biometric information contained in these Collected Photographs of human faces, effectively creating a unique "face print" for virtually every individual whose photograph(s) appears on the internet.

[6] Ms. Doan then essentially claims that by becoming a client of Clearview, the RCMP itself, as an agent of the federal Crown, willfully obtained access to and used Clearview's illicit database without assessing whether the tool was legal, thus, generally engaging its liability on the grounds of negligence and invasion of privacy and more particularly by:

1) violating section 8 of the *Canadian Charter of Rights and Freedoms*, the *Constitution Act*, 1982, Schedule B to the *Canada Act* 1982 (UK) 1982, ch. 11 [the *Charter*];

2) engaging vicarious liability of the Crown under the *Crown Liability and Proceedings Act*, RSC 1985, c C- 50 [*Crown Liability Act*] under (a) common law torts of negligence (b) intrusion upon seclusion, and where the actions of the RCMP took place in Québec, for civil liability under (c) article 1457 of the *Civil Code of Québec*, SQ 1991, c 64 [*Civil Code*]; and (d) section 49 of the *Charter of Rights and Freedoms*, RSQ, c C-12 [*Québec Charter*]; and

3) committing copyright infringement and moral rights violations under the *Copyright Act*, RSC, 1985, c C-42.

[7] Ms. Doan proposes one Class that includes two Subclasses, hence the Privacy Breach Class and the Copyright Infringement Class, described as follows in her Re-Re-Amended Statement of Claim:

> All natural persons, who are either residents or citizens of Canada, whose faces appear in the photographs collected by Clearview Inc. through July 6, 2020 (the "Collected Photographs") (the "Privacy Breach Class" or the "Privacy Breach Class Members");
>
> All natural or legal persons holding copyright and moral rights with respect to the Collected Photographs (the "Copyright Infringement Class" or the "Copyright Infringement Class Members" and, collectively with the Privacy Breach Class, the "Class" or "Class Members").

[8] In her underlying action, Ms. Doan, on her own behalf and on behalf of Class Members, seeks an award in damages, including punitive damages, declaratory reliefs against the RCMP, as well as an order enjoining the RCMP to remit to the Privacy Breach Class Members all the documents and information obtained with respect to them and destroy all copies.

[9] For the reasons that follow, I will dismiss Ms. Doan's Motion for certification. In brief, I find that the conditions set forth in Rule 334.16(1) are not met in that (1) it is plain and obvious that the pleadings, assuming the facts pleaded to be true, disclose no reasonable cause of action; (2) the open-ended leave to amend sought by Ms. Doan is not appropriate in the circumstances and will thus not be granted; and (3) Ms. Doan has not established some basis in fact to meet all the other conditions of Rule 334.16 (1).

[10] As all the conditions of Rule 334.16(1) must be met in order for a class proceeding to be certified, and since I found none of the conditions are met, the Motion for certification cannot be granted.

II. Context

[11] Ms. Doan is a resident of Montréal, Québec and a photographer. It is not disputed that she 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 photos she has taken of them online for commercial purposes.

[12] In October 2019, the RCMP purchased some licenses to use Clearview. RCMP members used Clearview via its licenses and a number of free trial accounts.

[13] On February 21, 2020, the Office of the Privacy Commissioner of Canada [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. On February 2, 2021, the Offices issued their report in regards to Clearview's activities, 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 of these provinces and the

Personal Information Protection and Electronic Documents Act, SC 2000, c 5 and they issued recommendations.

[14] On February 28, 2020, the Privacy Commissioner initiated another investigation, this time into the RCMP's use of facial recognition technology in Canada. 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" [Special Report]. The Privacy Commissioner concluded that the RCMP's collection of personal information from Clearview was in contravention of section 4 of the *Privacy Act*, RSC, 1985, c P-21. The basis for this finding was that Clearview's collection of personal information of Canadians was in contravention of the law. The Special Report concluded that there were serious and systemic failings by the RCMP to ensure compliance with the *Privacy Act* before it collected information from Clearview and, more broadly, before novel collection of personal information in general.

[15] In regards to *Charter* breach allegations by the RCMP, the Privacy Commissioner stated in its Special Report that: "While we are not making any conclusions as to the RCMP's compliance with the *Charter* in using Clearview technology, in our view, it should have been clear to the RCMP that both the collection from a privately-collected database, and the collection of information via facial recognition technology, warranted assessment from the RCMP for compliance with the *Charter* and common law principles" (Special Report, Plaintiff Motion Record at 108).

[16] The Privacy Commissioner recommended that, within 12 months, the RCMP institute systemic measures and pertinent training to understand, track, identify, assess, and control the novel collection of personal information to ensure collection is limited as required by the *Privacy Act*.

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

[18] On July 8, 2020, Ms. Doan instituted her action against Canada, as a class proceeding, and on August 27, 2021, Ms. Doan filed her Motion for certification and for her appointment as Class Representative. She provided proposed common questions of law and/or fact (Appendix A), a litigation plan for the proceeding (Appendix B), and an agreement respecting fees and disbursements between the Plaintiff and Class Counsel (Appendix C).

[19] With her Motion Record, Ms. Doan submitted her own affidavit, sworn on August 27, 2021, introducing 12 exhibits. In her affidavit, Ms. Doan affirms that, as the Plaintiff in this proposed class proceeding, she has personal knowledge of the matters on which she deposes. Notably, Ms. Doan attached to her affidavit two documents marked respectively as Exhibits 10 and 11. Exhibit 10 shows the results of an inquiry with Clearview in the form of seven distinct identified photographs of Ms. Doan, her minor child, and one or more unrelated Asian women. Most of these photographs appear to be from her public "Vivian Doan Photography" Instagram account, while others are from her public Twitter account, her commercial website, and two unrelated sources. Exhibit 11 contains results of the inquiry with Clearview in the form of photographs taken by Ms. Doan of another individual.

[20] On January 20, 2022, Canada cross-examined Ms. Doan. The transcript revealed that upon cross-examination, Ms. Doan indicated that many paragraphs of her affidavit were based on unspecified media sources and she would have to consult her counsel in order to explain how she knew them to be true, and appeared unfamiliar with some exhibits. She confirmed having never herself used Clearview's services.

[21] In response, Canada submitted affidavits sworn by: (1) Ms. Isabelle Nicolas, paralegal for Justice Canada, sworn on October 25, 2021, introducing three exhibits relating to other proceedings; (2) Mr. Justin Ducette, acting manager of Policy and Governance for the RCMP Technical Operations Strategic Branch, sworn on October 25, 2021, and testifying essentially as to the extend of the RCMP's use of Clearview; and (3) Arnold Guerin, Cybercrime program Officer for the United Nations Office on Drugs and Crime, sworn on October 25, 2021. Mr. Guerin previously held a position in the RCMP's National Child Exploitation Crime Centre and testified on the use of Clearview in that regard.

[22] Notably, Mr. Guerin affirmed, having executed searches with Clearview's database, that the user would upload a picture, the tool would perform the search and the results appeared as headshots and provided links to where the match was on the internet. Mr. Guerin affirmed that these headshots and links were the only output that the user received. The user would click on the link, the user's web browser would launch and open the URL to the public internet page where the image was found (Guerin affidavit at paras 10, 11, 13).

[23] Canada's affiants were not cross-examined.

[24] On the morning of the Motion for certification's hearing, Ms. Doan filed a Re-Re-Amended Statement of Claim and revised common questions. Canada took no position in regards to the Re-Re-Amended Statement of Claim and it was accepted for filing.

[25] In her Re-Re-Amended Statement of Claim, Ms. Doan asks the Court to certify the aforementioned Class that includes two Subclasses, hence the Privacy Breach Class and the Copyright Infringement Class.

[26] 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 action as a class proceeding and appointing her as the representative plaintiff under the *Federal Courts Rules*, SOR/98-106;

b) a declaration that the RCMP engaged its liability and violated the rights of the Class Members by becoming a client of Clearview and willfully obtaining access to its database, and by running searches in Clearview's database;

c) […];

d) a declaration that the RCMP cannot engage with Clearview and use its services […];

e) an order enjoining the RCMP to remit to the […] Privacy Breach Class Members of all the documents and information obtained from Clearview with respect to them (the "Illegally Obtained Documentation and Information") and destroy all copies of […] the Illegally Obtained Documentation and Information;

f) general pecuniary and non-pecuniary, special, punitive and/or statutory damages for negligence, willfully obtaining access to an illicit database, […] copyright infringement and moral rights violations;

g) general pecuniary, non-pecuniary, punitive and/or aggravated damages for privacy breaches, including invasion of privacy (commission of the tort of intrusion upon seclusion), and including under s. 49 of the *Charter of Human Rights and Freedoms*, CQLR c C-12 (the "*Quebec Charter*");

h) damages pursuant to section 24(1) of the *Canadian Charter of Rights and Freedoms*, the Constitution Act, 1982, Schedule B to the *Canada Act* 1982 (UK), 1982, c 11;

i) an order for aggregate assessment of damages owed to the Privacy Breach Class Members and to the Copyright Infringement Class Members;

j) pre-judgment and post-judgment interest pursuant to sections 36 and 37 of the Federal Courts Act, RSC 1985, c. F-7;

k) the costs of notice and of administering the plan of distribution of the recovery in this action, plus applicable taxes;

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

III. Order sought on this Motion for certification

[27] 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 Rules;

2. An order defining the class (the "Class" or "Class Members") […]

3. An order appointing Plaintiff as the representative plaintiff of the Class (the "Representative Plaintiff");

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

> a) claims in negligence, moral rights violations, privacy rights violations (including intrusion upon seclusion), and secondary infringement against the RCMP for retaining the services of Clearview, and for wilfully obtaining access to Clearview's database containing personal biometric information and copyrighted materials, including the Collected Photographs, which were/are collected, copied, stored, used, disclosed and sold in violation of the rights of the Class Members;
>
> b) claims in negligence, moral rights violations, privacy rights violations (including intrusion upon seclusion), and secondary infringement against the RCMP for retaining the services of Clearview and for wilfully obtaining access to its database prior to assessing whether the tools offered by Clearview were appropriate and legitimate, and whether Clearview disclosed its activities and the creation and the existence of its database, containing personal biometric information and copyrighted materials, to competent authorities;

c) claims in violations of the constitutional right not to be subject to unreasonable search and seizure;

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 the RCMP engaged its liability and violated the rights of the Class Members by retaining the services of Clearview, by wilfully obtaining access to Clearview's database, and by running searches in Clearview's database;

b) a declaration that the RCMP cannot engage with Clearview and use its services;

c) an order enjoining the RCMP to remit to the Privacy Breach Class Members all the documents and information it obtained from Clearview with respect to them (the "Illegally Obtained Documentation and Information");

d) an order enjoining the RCMP to destroy all copies of the Illegally Obtained Documentation and Information;

e) general pecuniary and non-pecuniary, special, punitive and/or statutory damages, including under s. 49 of the *Charter of Human Rights and Freedoms*, CQLR c C-12 [*Quebec Charter*], against the RCMP for:

i. negligence;

ii. having willfully obtained access to an inappropriate and illegitimate database;

iii. privacy breaches, including commission of the tort of intrusion upon seclusion;

iv. copyright infringement; and

v. moral rights violations;

f) damages pursuant to s. 24(1) of the *Charter*;

g) an order for aggregate assessment of damages owed to the Class Members;

h) an order for aggregate assessment of damages owed to the Privacy Breach Class Members;

i) an order for aggregate assessment of damages owed to the Copyright Infringement Class Members;

j) pre-judgment and post-judgment interest pursuant to ss. 36 and 37 of the *Federal Courts Act*, RSC 1985, ch. F-7;

k) the costs of notice and of administering the plan of distribution of the recovery in this action, plus applicable taxes; and

l) such further and other relief as counsel may advise and this honourable Court may permit;

8. An order approving 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 Defendant 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 Plaintiff within thirty (30) days of the issuance of the Court's Order (the "Opt-Out Period");

11. An order enjoining Defendant to provide Plaintiff's solicitors with a list of all Class Members the Defendant 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. General principles for certification

[28] Part 5.1 of the Rules sets out the framework for establishing and managing class proceedings before this Court.

[29] During the certification stage, the Court must determine whether the five conditions of Rule 334.16(1) are satisfied, such that the action should be certified as a class proceeding (*Lin v Airbnb Inc*, 2019 FC 1563 at para 21 [*Airbnb*]; *Rae v Canada (National Revenue)*, 2015 FC 707 at para 50 [*Rae*]; *Paradis Honey Ltd v Canada (Attorney General)*, 2015 FCA 89 at para 5 [*Paradis Honey FCA*]). Hence, per Rule 334.16(1) the following conditions must be met:

> a) the pleadings disclose a reasonable cause of action;
>
> b) there is an identifiable class of two or more persons;
>
> c) the claims of the class members raise common questions of law or fact, whether or not those common questions predominate over questions affecting only individual members;
>
> d) a class proceeding is the preferable procedure for the just and efficient resolution of the common questions of law or fact; and
>
> e) there is an appropriate representative plaintiff.

[30] The test is a conjunctive one and the Court shall certify a proceeding as a class proceeding if all five conditions of the test are satisfied (*Sivak v Canada*, 2012 FC 271 at para 5). A plaintiff who fails to meet any of the five listed conditions will see their motion dismissed (*Samson Cree Nation v Samson Cree Nation (Chief and Council)*, 2008 FC 1308 at para 35 [*Buffalo FC*], aff'd in *Buffalo v Samson Cree Nation*, 2010 FCA 165 at para 3 [*Buffalo FCA*]).

[31] As the parties indicated, and as my colleague Justice Gascon outlined in *Jensen v Samsung Electronics Co Ltd*, 2021 FC 1185 [*Jensen FC*] (aff'd in *Jensen v Samsung Electronics Co Ltd*, 2023 FCA 89), the certification conditions established in Rule 334.16(1) are akin to those applied by the courts in Ontario and British Columbia (*Canada (Attorney General) v Jost*, 2020 FCA 212 at para 23 [*Jost*]; *Canada v John Doe*, 2016 FCA 191 at para 22 [*John Doe*];

Buffalo FCA at para 8; *Airbnb* at para 23). I accept that it is thus not uncommon to see this Court and the Federal Court of Appeal refer to case law arising from these provinces in matters relating to class actions.

[32] The procedural vehicle of class actions 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 (*Hollick v Toronto (City)*, 2001 SCC 68 at para 15 [*Hollick*], *Western Canadian Shopping Centres Inc v Dutton*, 2001 SCC 46 at paras 27-29 [*Dutton*]; *Vivendi Canada Inc v Dell'Aniello*, 2014 SCC 1 at para 1 [*Vivendi*]).

[33] I am mindful that it is "essential […] that courts [do] not take an overly restrictive approach to the legislation, but rather interpret [class action legislation] in a way that gives full effect to the benefits foreseen by the drafters" and to the greater overarching purposes of this specific procedural mechanism (*Hollick* at para 15. See also *Dutton* at paras 27-29; *Condon v Canada*, 2015 FCA 159 at para 10 [*Condon*]).

[34] The main purpose of a certification motion is to determine whether a class action is the appropriate procedural means for the action to proceed. As the Supreme Court of Canada noted in *Hollick*, the certification stage focuses on the form of the action, not on the substance and

merits of the actual claim (*Hollick* at para 16. See also *Vivendi* at para 37; *Infineon Technologies AG v Option consommateurs*, 2013 SCC 59 at para 65 [*Infineon*]). It is well established that the onus on a party seeking certification is not an onerous one, and the threshold for certification has generally been described as low.

[35] However, I also keep in mind the principles Justice Gascon highlighted at paragraph 60 of his decision in *Jensen FC*:

> 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).

[36] With these principles in mind, I will now examine if the conditions set out by the Rules are met.

V. Rule 334.16(1)(a): reasonable cause of action

A. *Introduction*

[37] Ms. Doan raises the following seven categories of causes of action in her Memorandum of Fact and Law: (1) breach of section 8 of the *Charter*; (2) negligent violations of privacy rights under Québec law, namely the *Civil Code* and the *Québec Charter*; (3) tort of intrusion upon seclusion; (4) negligence at common law; (5) copyright infringement under the *Copyright Act*; (6) moral rights violations under the *Copyright Act*; and (7) vicarious liability of the Crown. Alternatively, should the Court require additional particulars to establish the reasonable cause of action, Ms. Doan submits that it should grant her leave to amend, per *Paradis Honey FCA* at paragraph 80.

[38] For what I hope provides greater clarity, I have organised the causes of action and arguments raised by Ms. Doan under the following headings: (1) breach of section 8 of the *Charter*; (2) Crown liability causes of actions; (3) causes of action under the *Copyright Act*; and (4) leave to amend.

[39] I will first outline the test I must apply when assessing whether the pleadings disclose a reasonable cause of action per Rule 334.16(1)(a) and I will subsequently assess the causes of action raised by Ms. Doan against this test.

B. *Legal test: Reasonable cause of action*

[40] For the purposes of this first condition, set forth in Rule 334.16(1)(a), that the pleadings disclose a reasonable cause of action, the test is the same as the one applicable on a motion to strike a pleading in the context of an action (Rule 221 of the Rules). The test is whether it is "plain and obvious" that the pleadings, assuming the facts pleaded to be true, disclose no reasonable cause of action. This is an onerous test and the novelty of the claim will not, of itself, necessarily result in a claim being found to disclose no reasonable cause of action (*Canada v Greenwood*, 2021 FCA 186 at para 144 [*Greenwood*]).

[41] Alternatively, to put it differently, the plaintiff must establish that there is a reasonable prospect of success should the claim be permitted to proceed towards trial (*Hollick* at para 25; *Pro-Sys Consultants Ltd v Microsoft Corporation*, 2013 SCC 57 at para 63 [*Pro-Sys*]; *Hunt v Carey Canada Inc*, [1990] 2 SCR 959 at 980; *R v Imperial Tobacco Canada Ltd*, 2011 SCC 42 at paras 17, 70 [*Imperial Tobacco*]; *John Doe* at para 23). To do so, the plaintiff may rely only upon the statement of claim. Facts and arguments raised in the motion record, including documents submitted as evidence, are irrelevant to this condition (*Greenwood* at paras 90-93).

[42] Courts have consistently affirmed that to disclose a reasonable cause of action, a claim must show the following three elements (*Bérubé v Canada*, 2009 FC 43 at para 24, aff'd in *Bérubé v Canada*, 2010 FCA 276; *Oleynik v Canada (Attorney General)*, 2014 FC 896 at para 5; *Zbarsky v Canada*, 2022 FC 195 at para 13):

a) it must allege facts that are capable of giving rise to a cause of action (the requirement of Rule 174 of the Rules);

b) it must disclose the nature of the action which is to be founded on those facts; and

c) it must indicate the relief sought, which must be of a type that the action could produce and that the Court has jurisdiction to grant.

[43] At this stage, the threshold is quite low, as the right of action must be protected (*Manuge v Canada (FC)*, 2008 FC 624 at para 38; *Canada (Royal Mounted Police) v Canada (Attorney General)*, 2015 FC 1372 at para 17).

[44] However, a low threshold does not mean no threshold.

[45] The Federal Court of Appeal recently articulated the test as follows in *Canada (Attorney General) v Nasogaluak*, 2023 FCA 61:

> [18] The first certification condition, that the pleadings disclose a reasonable cause of action, is assessed on the same standard that applies on a motion to strike out a pleading. Thus, the question is whether it is plain and obvious, assuming the facts pleaded to be true (unless they are manifestly incapable of being proven), that the pleaded claims have no reasonable prospect of success: *Atlantic Lottery Corp. Inc. v. Babstock*, 2020 SCC 19 at para. 14; *Canada v. Greenwood*, 2021 FCA 186 at para. 91, leave to appeal to S.C.C. refused, 39885 (March 17, 2022). A claim that has no reasonable prospect of success will not satisfy the first condition.
>
> [19] No evidence is admissible on this issue. However, the pleading must be read generously, and as it might reasonably be amended to accommodate inadequacies attributable to drafting. Moreover, recognizing that the law is not static, the motion judge must err on the side of permitting a novel but arguable claim to proceed to trial: *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42 at paras. 19-25. This Court has described as "onerous" the burden resting on a defendant seeking to defeat a certification motion on the basis that no reasonable cause of action is pleaded: *Greenwood* at para. 144.

[46] The statement of claim must plead, in a concise, clear manner, material facts satisfying all the constituent elements of each alleged cause of action with sufficient particularity. The pleading must tell the defendant who, when, where, how and what gave rise to its liability.

[47] Notably, Rule 174 of the Rules requires that "[e]very pleading shall contain a concise statement of the material facts on which the party relies, but shall not include evidence by which those facts are to be proved". The Federal Court of Appeal held that, if it were not for Rule 174, "parties would be able to make the broadest, most sweeping allegations without evidence and embark upon a fishing expedition" (*Merchant Law Group v Canada Revenue Agency*, 2010 FCA 184 at para 34 [*Merchant*]. See also *Painblanc v Kastner* (1994), 58 CPR (3d) 502 at para 4).

[48] There is no relaxed rule of pleading for class actions (*Merchant* at para 40). Hence, as the Federal Court of Appeal outlined in *Mancuso v Canada (National Health and Welfare)*, 2015 FCA 227 at paragraphs 16 to 20 [*Mancuso*], it is fundamental to the trial process that a plaintiff plead material facts in sufficient detail to support the claim and relief sought; sufficient material facts is the foundation of a proper pleading. Notably, the Federal Court of Appeal added that what constitutes a material fact is determined in light of the cause of action and the damages sought to be recovered. In order for allegations to be considered as material facts – and thus assumed to be true – "they must be supported by sufficient particularization, and must not be bare assertions or conclusory legal statements based on assumptions or speculation" (*Jensen FC* at para 79).

[49] The Federal Court of Appeal also stated that, while the contours of what constitutes material facts are assessed by the motion judge in light of the causes of action pleaded and the damages sought, the requirement for adequate material facts to be pleaded is mandatory.

[50] Only material facts are assumed to be true. The following are not material facts (and are not assumed to be true): bare assertions; speculation; assumptions; allegations that are scandalous, frivolous or vexatious; allegations that are argumentative or inserted only for colour; legal submissions or conclusions of law. The Court does not accept as true or give weight to allegations that "are inconsistent with common sense, the documents incorporated by reference, or incontrovertible evidence proffered by both sides for the purpose of the motions" (*Jensen FC* at para 82, citing *Das v George Weston Limited*, 2017 ONSC 4129 at para 27, aff'd in *Das v George Weston Limited*, 2018 ONCA 1053 at para 74).

[51] Courts have confirmed, and this is particularly relevant to these proceedings, that although the statement of claim must be read as generously as possible to accommodate any deficiencies due to drafting defects, it is incumbent upon the plaintiff to clearly plead the facts underlying its claim (*Pelletier v Canada*, 2016 FC 1356 at para 7; *Operation Dismantle v The Queen*, [1985] 1 SCR 441 at 451). A plaintiff is not entitled to rely on the possibility that new facts may turn up as the case progresses; the facts pleaded are instead the firm basis upon which the possibility of success of the claim must be evaluated by the Court (*Jensen FC* at para 71; *Imperial Tobacco* at para 22).

[52] It is also important to note that the conditions for certification, including the sufficiency of the alleged facts, must be interpreted flexibly. However, the Court cannot go so far as to presume the existence of an element that is essential to the establishment of a cause of action (*Jensen FC* at para 76).

[53] It is with these principles in mind that I must examine the causes of action Ms. Doan raised and the material facts she pleaded in her Re-Re-Amended Statement of Claim. In essence, and as described below, I find that Ms. Doan has failed to plead material facts for the constituent elements of each cause of action or legal ground raised, and that her pleadings therefore do not disclose a reasonable cause of action.

C. *Ms. Doan's pleadings*

[54] In light of the principles highlighted above, it is useful to commence with a review of Ms. Doan's pleadings, found in her Re-Re-Amended Statement of Claim. I note that, as is often the case in class proceedings, Canada chose to refrain from filing a defence prior to the disposition of the Motion for certification.

[55] Ms. Doan's Re-Re-Amended Statement of Claim contains 62 paragraphs. It is divided in the following ten sections (1) an overview (paras 1-6), describing namely the allegation of fault committed by the RCMP (para 5); (2) the Plaintiff's and Class Members' claim (para 7); (3) Clearview's operations (paras 8-19); (4) the RCMP's involvement with Clearview and use of its services, including details about the Privacy Commissioner's reports (paras 20-38.3); (5) a description of the Plaintiff (paras 39-45); (6) the description of the Class (paras 46-50); (7) the

causes of action against the Crown, which are separated in two categories: (a) negligence, partaking in illegal activities and wilfully obtaining access to an illicit database; and (b) invasion of privacy (paras 51-58.1); (8) the remedies sought (paras 59-60); (9) the statutes Ms. Doan relies on (para 61); and (10) the location of trial (para 62).

[56] Ms. Doan's Re-Re-Amended Statement of Claim contains a number of paragraphs referring to the two investigation reports from the Privacy Commissioner and various press releases. While counsel for Ms. Doan initially asserted, these had to be considered as material facts and they were incorporated in the Statement of Claim by reference, they later confirmed unequivocally they were not to be considered as such. I agree and will therefore not consider the reports, or the information they contain, as material facts. The Court cannot incorporate reports by reference, and legal conclusions in the reports are not material facts (*Jensen FC* at para 82; *Bigeagle v Canada*, 2021 FC 504 at paras 46-47 [*Bigeagle FC*] aff'd in *Bigeagle v Canada*, 2023 FCA 128 at paras 44, 46 [*Bigeagle FCA*]). The Court cannot either "fill in the gaps" of the Statement of Claim with the evidence, as suggested by Ms. Doan at the hearing, as no evidence is examined at this stage.

[57] I note, as Canada did, that very few facts are alleged in Ms. Doan's Re-Re-Amended Statement of Claim and a number do not even concern the RCMP, but concern Clearview's operations or activities. What can generally relate to the RCMP are:

- 5. The Royal Canadian Mounted Police (the "RCMP"), as agent of the federal Crown, became a client of Clearview. By so doing, the RCMP wilfully obtained access to and used an illicit database.
- 20. […] the RCMP eagerly partook in these illegal activities by becoming a client of Clearview, by wilfully obtaining access to its database and by using its services.

- 35. As Canada's national law enforcement agency, the RCMP operates all over Canada with national, federal, provincial, and municipal policing mandates. By becoming a paying client of Clearview, by wilfully obtaining access to Clearview's database and by using its services, the RCMP was partaking in illegal activities.

- 38.3. It is clear that the RCMP repeatedly misled the OPCC, and thus by extension the Canadian public, over the course of the RCMP-Clearview Investigation.

- 45. Irrespective of whether the RCMP actually used Clearview's services with respect to Ms. Doan or to the Doan Photographs, the fact of being a Clearview client and having wilfully obtained access to services the provision of which involves the invasion of privacy of residents and citizens of Canada and the violation of their intellectual property rights on a systematic basis, engages RCMP's liability. [my emphasis]

[58] Notably as well is the fact that Ms. Doan pleaded no material fact that the RCMP looked for or saw (let alone copied or kept) any information that relates to her. In fact, as outlined above, Ms. Doan actually alleges that it does not matter if the RCMP used Clearview's services with respect to her or to the photographs she has taken and she thus does not allege that the RCMP actually saw, or copied, even a single photograph of her or taken by her in Clearview's database. Her case is premised on the notion that this fact does not matter.

[59] Furthermore, Ms. Doan's description of the database query process appears speculative, as she herself has never used Clearview's database, and is contradicted by clear evidence submitted by both parties (*Jensen FC* at paras 82, 86). In particular, her Re-Re-Amended Statement of Claim at paragraph 16(c) states that "Clearview instantly generates and provides its client with a file containing virtually all the photographs of the individual appearing in the Query Photo available or formerly available on the Internet, along with all the information accompanying these photographs, such as, often, the individual's name, location, circle of friends, family, etc." However, the incontrovertible evidence proffered by both sides shows that

the search results into Clearview only generates head shots and links to the public internet page where the image was found.

[60] The Re-Re-Amended Statement of Claim further does not distinguish between the different causes of action; this added to the complexity of the analysis.

D. *Breach of section 8 of the Charter*

(1) Parties' position

[61] Ms. Doan initially argued, in her Memorandum of Fact and Law, that (1) the Privacy Breach Class had reasonable expectation of privacy in the Collected Photographs and the associated primary and emerging data, such as biometric face prints [Collected Personal Data] (*R v Ahmad*, 2020 SCC 11; *R v Bhogal*, 2020 ONSC 7327; *R v Cole*, 2012 SCC 53); (2) by contracting with Clearview, obtaining access to the database and searching within the database, the RCMP conducted seizures and searches; (3) the searches and seizures were conducted without a warrant and are thus presumptively unreasonable; and (4) *Charter* damages are an appropriate remedy in the present case.

[62] However, at the hearing, Ms. Doan confirmed that her claim is rather that the Privacy Breach Members were subject only to a seizure and that she did not claim they were subject to a search. Ms. Doan added that the Re-Re-Amended Statement of Claim must be understood to read that the RCMP seized the personal biometric information of all the Privacy Breach Class

Members, and thus her own information, by contracting with, obtaining access to and running searches within Clearview's database.

[63] Canada responds that (1) the pleadings contain no material facts to support Ms. Doan's allegation of a seizure; and (2) the case law does not support Ms. Doan's claim to a reasonable expectation of privacy in the circumstances alleged by her.

[64] Particularly, Canada asserts that standing to make a claim under section 8 of the *Charter* is predicated on state conduct concretely affecting the claimant's own privacy rights, and that Ms. Doan's assertions neglect this. Canada adds that Ms. Doan's pleadings disclosed no material facts that suggests the RCMP accessing Clearview resulted in the immediate seizure of the information of every single person within the database and that the mere fact the RCMP had access to information does not mean that they seized it. In essence, Canada stressed that Ms. Doan is suggesting that, by simply accessing Clearview, the RCMP seized every information, biometric or other, while her pleadings contain no material facts to support this.

[65] Canada also submits that Ms. Doan's section 8 claim suffers from a second fatal flaw as the cases she cited involve activity or information that was intended to be anonymous or that was not made available to the public at large. Canada thus submits the case law does not support Ms. Doan's claim to a reasonable expectation of privacy in the circumstances she alleged, where she has voluntarily made her photographs available to the public at large on the internet.

(2) Analysis

[66] Section 8 of the *Charter* states that "[e]veryone has the right to be secure against unreasonable search or seizure". The required elements of the section 8 *Charter* breach in regards to a seizure are: (1) the public authority effected a seizure of the information within the meaning of section 8 (*R v Dyment*, [1988] 2 SCR 417 at 431 [*Dyment*]); (2) the plaintiff has a reasonable expectation of privacy in the information allegedly seized (*Hunter et al v Southam Inc*, [1984] 2 SCR 145); and (3) the seizure was unauthorized or unreasonable. A seizure conducted without authorization is *prima facie* unreasonable and the onus of demonstrating will then lie with the defendant (*R v Collins*, [1987] 1 SCR 265).

[67] At the hearing, Ms. Doan unequivocally confirmed that her claim relates to a breach of section 8 of the *Charter* relating only to an unreasonable seizure.

[68] A "seizure" has been defined as "the taking of a thing from a person by a public official without that person's consent" (*R v Reeves*, 2018 SCC 56 at para 13 citing *Dyment* at 431) as well as the compelled production of information, for example, pursuant to a regulatory statute (*Thomson Newspapers Ltd v Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] 1 SCR 425 at 505; *R v McKinlay Transport Ltd*, [1990] 1 SCR 627 at 642).

[69] In regards to what can generally be construed as being linked to section 8 of the *Charter*, Ms. Doan, in her Re-Re-Amended Statement of Claim, alleges that the RCMP wilfully obtained

access to and used Clearview – an illicit database –, and ran searches within the database (paragraphs 5, 7, 20 35, 45, 55, 58).

[70] The Re-Re-Amended Statement of claim mentions the word "seizure" once, at paragraph 58, when stating that the "RCMP violated the rights to privacy and the right not to be subject to unreasonable search and seizure of the Class Members" without any additional description. The Re-Re-Amended Statement of Claim makes no reference to any expectation of privacy; at paragraph 55, it refers to the unlawful access to the Clearview database and to searches ran within the database. Notably, the Re-Re-Amended Statement of Claim makes no mention of section 8 of the *Charter*.

[71] In essence, Ms. Doan claims (1) "a declaration that the RCMP […] violated the rights of the Class Members by becoming a client of Clearview and wilfully obtaining access to its database, and by running searches in Clearview's database" (2) damages pursuant to subsection 24(1) of the *Charter*; and (3) "that the […] RCMP violated the rights to privacy and the right not to be subject to unreasonable search and seizure of the Class Members, as well as their intellectual property rights in the materials the RCMP obtained access to […] from Clearview".

[72] Hence, with respect to the first element required for a section 8 breach, Ms. Doan's pleadings mention nothing in relation to the RCMP action that could amount to a seizure as contemplated by section 8. In my view, the pleadings lack the most elementary precision to allow the reader to identify the state conduct being the subject of the claim.

[73] Even keeping in mind the generous interpretation that pleadings ought to receive, I agree with Canada that Ms. Doan has failed to plead any material facts in support of the alleged seizure by the RCMP while it is a central element of her section 8 breach claim.

[74] Ms. Doan submits at the hearing that her pleadings must be understood to read that the RCMP seized the personal biometric information of all the Privacy Breach Class Members, and thus her own information, by contracting with, obtaining access to and running searches within Clearview's database.

[75] I disagree; her pleadings cannot be understood to read what she suggests. Although Ms. Doan pleads that the RCMP conducted searches (on individuals other than herself and the Privacy Breach Class Members) in Clearview's database, she does not allege that the Privacy Breach Class Members' personal biometric information were in any way involved in those inquiries. Put differently, Ms. Doan does not plead that, by accessing or by conducting a search within Clearview's database, the RCMP actually seized all of the Privacy Breach Class Members' data, even biometric information, assuming they are in play, which she argued, is the basis of her section 8 claim. She does not point to allegations in her Re-Re-Amended Statement of Claim in support of her assertion that the RCMP conducted a seizure of biometric or other information.

[76] The Re-Re-Amended Statement of Claim does refer to biometric information, but in relation to Clearview's activities (i.e., its database contains biometric information); it does not plead anything as to how the RCMP seized Ms. Doan personal biometric information or those of

the Privacy Breach Class Members by contracting with, obtaining access to, and running searches within Clearview's database, particularly since she pleads it is irrelevant whether or not the RCMP searched for her. If the Court were to agree with Ms. Doan, it would ultimately endorse the idea that the mere fact that the RCMP has access to information means that it has seized it, and this position has no sound legal basis.

[77] Ms. Doan has not specifically pled in her Re-Re-Amended Statement of Claim how she or the Class Members have an expectation of privacy in the information allegedly seized, nor as to how the alleged seizure is unreasonable.

[78] The use of specific words is not necessary to crystallize a cause of action (*Bigeagle FCA* at para 38). However, in essence, the pleadings clearly fail to tell the Defendant who, when, where, how and what gave rise to its liability as required by the Federal Court of Appeal in *Mancuso*.

[79] There are no separate rules of pleadings for *Charter* cases (*Mancuso* at para 21). Given that Ms. Doan's Re-Re-Amended Statement of Claim does not plead adequate material facts, and that pleading adequate material facts is mandatory, it is therefore plain and obvious that the cause of action under section 8 of the *Charter* is doomed to fail. Ms. Doan has failed to establish that there is a reasonable prospect of success should the claim be permitted to proceed towards trial; the pleadings simply contain no discernable statement of the material facts on which Ms. Doan can rely to advance her claim.

[80] It is thus plain and obvious that the cause of action under section 8 of the *Charter* has no chance of success.

E. *Crown liability causes of action*

(1) Institutional liability for actions of the Crown itself does not exist

[81] As both Ms. Doan and Canada outline, any cause of action in civil liability against Canada begins with the *Crown Liability Act* where sections 3 and 10 state, *inter alia*, that the Crown is liable vicariously for the damages caused by the fault of a servant of the Crown (Québec) and a tort committed by a servant of the Crown (other provinces).

[82] Pursuant to sections 3 and 10 of the *Crown Liability Act*, the Crown can be held liable for the damages caused by an act or omission of a servant of the Crown if such act or omission has given rise to a cause of action for liability against that servant. In the Québec context, according to section 2 of the *Crown Liability Act*, "liability" means "extracontractual civil liability" which was found to encompass both the remedy of damages under the *Civil Code* and of punitive damages provided in the *Québec Charter* (*Hinse v Canada (Attorney General)*, 2015 SCC 35 at para 156 [*Hinse*]).

[83] The Supreme Court of Canada has unequivocally confirmed that the personal liability of a Crown servant is a precondition, while institutional fault or liability for actions of the Crown itself does not exist (*Hinse* at paras 91-92; *Merchant* at para 40). Per the clear language of the statute, the pleadings must disclose that a servant of the Crown committed a fault/tort.

[84] In her Re-Re-Amended Statement of Claim, Ms. Doan clearly claims the RCMP's liability and makes no claims in regards to its servants, agents or officers. Particularly, at paragraph 51 of her Re-Re-Amended Statement of Claim, Ms. Doan pleads that under section 3 of the *Crown Liability Act*, "the federal Crown is liable for the faults and omissions of its agents and, hence, the RCMP", and at paragraph 52, she pleads that the RCMP engaged its liability (see also e.g., paragraphs 5, 6, 7(b), 35, 45, 53, 54, 55, 56, 58, 58.1 of the Re-Re-Amended Statement of Claim).

[85] At paragraphs 35 and 36 of her Memorandum of Fact and Law, Ms. Doan submits that RCMP officers or members committed individual faults; however, Ms. Doan confirmed unequivocally both in her Reply Memorandum and at the hearing that her allegation of fault/tort is based on institutional faults committed on a systemic basis by the RCMP and is irrespective of whether any particular RCMP member committed a fault.

[86] Ms. Doan relies on *Greenwood, Nasogaluak v Canada (Attorney General)*, 2021 FC 656 [*Nasogaluak*] and *Corriveau v Canada*, 2021 FC 267 [*Corriveau*] to assert that the case law holds that institutional faults committed on a systemic basis by the RCMP may engage the vicarious liability of the Crown under the *Crown Liability Act*, and that it is consequently far from plain and obvious that her claims against the Crown as construed cannot succeed.

[87] I disagree with Ms. Doan. As mentioned above, the Supreme Court of Canada has clearly confirmed that the personal liability of a Crown servant is a precondition and that institutional fault or liability for the actions of the Crown itself does not exist (*Hinse* at paras 91-92). The

express statutory language of the *Crown Liability Act* makes it clear that Crown liability must be grounded in the personal liability of one or more Crown servants. The case law confirms that the RCMP is not itself a legal entity capable of being sued as an institution (*Davidson v Canada (Attorney General)*, 2015 ONSC 8008 at paras 25, 57-77 [*Davidson*]; *Hinse* at para 92).

[88] The decisions cited by Ms. Doan do not assert otherwise. On the contrary, they indicate that the Court has certified class actions in instances where the plaintiff sought the liability of the Crown for the wrongdoings of RCMP's agents, servants and employees or again RCMP designated doctors, rather than the liability of the RCMP as an institution (see e.g., *Greenwood* at paras 185-187; *Corriveau* at paras 25 29; *Nasogaluak* at paras 30, 41). The fact that there might have existed or that the parties may have raised an element of systemic liability in the context of these decisions did not distract the courts from the clear language of the statute. While it is true that it is not always necessary to identify the particular individuals for whose fault the Crown would be vicariously liable, this does not mean that the Crown, or in this case, the RCMP as an institution, can be directly liable (*Davidson* at para 76).

[89] Since Ms. Doan's pleadings do not claim a fault/tort committed by a servant, officer or agent of the RCMP, and since Ms. Doan has clearly confirmed that her pleadings do not contain such a claim and argued that such a claim is not necessary to engage the liability of the RCMP as an institution, it is therefore plain and obvious that the claims against the Crown in damages under the *Civil Code*, in punitive damages pursuant to the *Québec Charter*, in negligence at common law, and under the tort of intrusion upon seclusion have no chance of success. This is not an inadequacy attributed in drafting.

[90] Institutional liability for the actions of the Crown itself does not exist, per the Supreme Court of Canada's decision in *Hinse*, and all four of the causes of action that depend on the *Crown Liability Act* have no chance of success.

[91] Although it is plain and obvious that these causes of action in civil liability have no chance of success for this reason alone, I will nonetheless examine them in turn individually.

(2) Causes of action under Québec law

(a) *Parties' position*

[92] In her Memorandum of Fact and Law, Ms. Doan alleges negligent violations of privacy rights under Québec law from the RCMP. She alleges that the RCMP committed a fault and violated the Privacy Breach Class's privacy rights protected by the *Québec Charter* and thus engaged its liability under article 1457 of the *Civil Code* by contracting with Clearview, obtaining access to and accessing Clearview's database, searching within Clearview's database, and failing to take adequate measures to assess the legality of Clearview.

[93] Ms. Doan asserts that privacy rights are enshrined in the *Civil Code* and in the *Québec Charter*, which includes the right to one's image, the right to anonymity and the right to control the use of one's image. Hence, Ms. Doan adds that under the general extracontractual civil liability regime, privacy rights violations give rise to claims in pecuniary and non-pecuniary damages and to punitive damages where the violation is intentional. She stresses that government actors may be held liable towards private parties by the establishment of a fault, causation and harm.

[94] In her Memorandum of Fact and Law, Ms. Doan alleged that both RCMP officers and the RCMP as an organization committed faults, although she confirmed, at the hearing and in her Reply, that she was claiming solely the liability of the RCMP as an organization, this is discussed above.

[95] Hence, Ms. Doan alleged that the RCMP committed a fault and violated the Privacy Breach Class's privacy rights protected by the *Québec Charter*, and thus engaged its liability under article 1457 of the *Civil Code*, by retaining Clearview's services, by failing to put in place adequate measures to ensure compliance with the governing privacy protections, by failing to pre-emptively assess whether Clearview's tools were appropriate and legitimate, and by failing to determine whether Clearview complied with its regulatory obligations concerning its tools and services.

[96] In essence, Ms. Doan submits in her Memorandum of Fact and Law that:

1. the Collected Photographs are protected (articles 3, 35, 36, 37 of the *Civil Code*; sections 4, 5, 9, 9.1, 24, 24.1, 49 of the *Québec Charter*; sections 44 and 45 of the *Act to establish a legal framework for information technology*, CQLR c C-1.1);
2. the RCMP breached the Privacy Breach Class Members' right to control the use of their image and to anonymity (articles 5, 36(3) of the *Civil Code*) and the RCMP's actions constitute unlawful surveillance;
3. the RCMP acted intentionally and unlawfully;
4. institutional faults committed on a systemic basis by the RCMP engage the vicarious liability of the Crown under sections 3, 10, 36 of the *Crown Liability Act*; and
5. these faults caused direct and immediate harms to the Privacy Breach Class Members.

[97] Accordingly, Ms. Doan seeks compensatory damages under articles 1457, 1607, 1621 of the *Civil Code* and punitive damages under section 49 of the *Québec Charter*.

[98] In her Reply Memorandum and at the hearing, Ms. Doan identified the material facts in her pleadings that support the requisite elements of her causes of action in extracontractual civil liability.

[99] Particularly, she identifies the following:

- alleged fault: paragraphs 10 to 15, 17 to 20, 38.2 to 38.3, and 52 to 58 of her Re-Re-Amended Statement of Claim;
- alleged injury: paragraphs 5, 7, 30, 43 to 45, and 52 to 59 of the Re-Re-Amended Statement of Claim;
- causal link: paragraphs 5, 18 to 20, 26 to 31, 35, 38.1, 45, 52 to 58 of her Re-Re-Amended Statement of Claim;
- allegation of an unlawful and intentional interference with a *Québec Charter* right: paragraphs 5, 18 to 20, 35 to 36, 38.1, 45, and 52 to 58.1 of her Re-Re-Amended Statement of Claim;

[100] Canada responds that there is no reasonable cause of action in extracontractual civil liability as the Crown is not liable. I have already examined the issue of the systemic institutional fault allegation above and concluded that the Crown cannot be liable.

[101] In respect to her cause of action in damages under the *Civil Code*, Canada initially submitted that Ms. Doan alleges (and suffered) no injury, that she alleges (and has) no casual link, and that her allegations do not support a finding of fault. In other words, Canada asserts that Ms. Doan has failed to plead material facts that could demonstrate each constitutive element of her cause of action.

[102] At the hearing, Canada added to its response, given Ms. Doan's filing of Re-Re-Amended Statement of Claim the morning of the hearing. Canada examined each of the paragraphs Ms. Doan identified supporting an allegation of injury for her cause of action in damages. Canada submitted that, except for paragraph 58.1 of Ms. Doan's Re-Re-Amended Statement of Claim, her pleadings do not purport that she or any Member of the Subclass has suffered any injury and only assert general allegations. As per paragraph 58.1 of Ms. Doan's Re-Re-Amended Statement of Claim, Canada asserted that it (1) does not meet the threshold to support an allegation of injury (*Li v Equifax*, 2019 QCCS 4340 [*Li*]); and (2) fails to plead any injury suffered by Ms. Doan herself, which is fatal (*Bou Malhab v Diffusion Métromédia CMR Inc*, 2011 SCC 9 [*Bou Malhab*]).

[103] Canada adds that Ms. Doan has no reasonable cause of action for punitive damages under the *Québec Charter* because (1) she does not allege any personal violation of privacy; (2) there is no explicit allegation made suggesting an unlawful and intentional interference with a *Québec Charter* right as those terms are defined; and (3) Ms. Doan's alleged intentional interference is inconsistent with the applicable standard (*Quebec (Public Curator) v Syndicat national des employés de l'hôpital St-Ferdinand*, [1996] 3 SCR 211 at paras 118, 121 [*Hôpital St-Ferdinand*]).

(b) *Analysis*

[104] Ms. Doan raises allegations of the Crown's liability, for the Privacy Breach Class Members residents of Québec, under article 1457 of the *Civil Code* and under section 49 of the *Québec Charter*. She seeks damages under the first and punitive damages under the second.

[105] Ms. Doan does not address these two causes of action distinctively and I will thus address them under one heading as well.

[106] Article 1457 of the *Civil Code* states that:

> 1457. Every person has a duty to abide by the rules of conduct incumbent on him, according to the circumstances, usage or law, so as not to cause injury to another.
>
> Where he is endowed with reason and fails in this duty, he is liable for any injury he causes to another by such fault and is bound to make reparation for the injury, whether it be bodily, moral or material in nature.
>
> He is also bound, in certain cases, to make reparation for injury caused to another by the act, omission or fault of another person or by the act of things in his custody.

[107] Is it not in dispute as between the parties that the requisite elements for a cause of action in damages based on extracontractual civil liability under article 1457 of the *Civil Code* are the following: (1) the defendant committed a fault; (2) the plaintiff suffered an injury; and (3) there is a causal link between the fault and the injury (*Infineon* at paras 76-79).

[108] Section 49 of the *Québec Charter* states that:

> Any unlawful interference with any right or freedom recognized by this Charter entitles the victim to obtain the cessation of such interference and compensation for the moral or material prejudice resulting therefrom.
>
> In case of unlawful and intentional interference, the tribunal may, in addition, condemn the person guilty of it to punitive damages.

[109] As for the cause of action in punitive damages under the *Québec Charter*, the Supreme Court of Canada stated, in *de Montigny v Brossard (Succession)*, 2010 SCC 51 [*de Montigny*], that paragraph 49(2) of the *Québec Charter* sets out two conditions for awarding punitive damages: the act – interference – in question must be both unlawful and intentional. In regards to the first condition, i.e., that the act be unlawful, the Supreme Court of Canada cited the approach it had taken in *Hôpital St-Ferdinand* at paragraph 116:

> To find that there has been unlawful interference, it must be shown that a right protected by the *Charter* was infringed and that the infringement resulted from wrongful conduct. A person's conduct will be characterized as wrongful if, in engaging therein, he or she violated a standard of conduct considered reasonable in the circumstances under the general law or, in the case of certain protected rights, a standard set out in the *Charter* itself […].

[110] In regards to the second condition, the Supreme Court indicated that it involves determining whether the interference, or act, was intentional, which, it added, refers not to the intent to commit the fault but rather to the intent to cause the result thereof, adding that, in the context of the *Québec Charter*, the result in question is unlawful interference with a protected right.

[111] As outlined earlier, in the present case, it is plain and obvious that Ms. Doan's claims based on the *Civil Code* and the *Québec Charter* do not disclose a reasonable cause of action because her pleadings fail to allege a fault committed by a servant of the Crown per the clear language of the *Crown Liability Act* and as confirmed by the Supreme Court of Canada in *Hinse*, as this is a constitutive element of both claims.

[112] However, there are additional reasons why Ms. Doan's causes of action under Québec law are doomed to fail.

[113] In regards to extracontractual civil liability under article 1457 of the *Civil Code*, Ms. Doan's pleadings (1) fail to meet the threshold set out in the case law for demonstrating *prima facie* injury; and (2) do not contain any allegation that Ms. Doan, as the Class Representative, has sustained a personal injury necessary to her cause of action (*Bou Malhab*).

[114] In regards to injury, the case law is clear: the alleged injury "must be serious and prolonged and rise above the ordinary annoyances, anxieties and fears that people living in society routinely, if sometimes reluctantly, accept" (*Mustapha v Culligan of Canada Ltd*, 2008 SCC 27 at para 9 [*Mustapha*]. See also *Mazzonna c DaimlerChrysler Financial Services Canada Inc/Services financiers DaimlerChrysler Inc*, 2012 QCCS 958 at paras 56-63; *Li* at para 31; *Sofio c Organisme canadien de réglementation du commerce des valeurs mobilières (OCRCVM)*, 2015 QCCA 1820 at para 25; *Fortin c Mazda Canada Inc*, 2016 QCCA 31 at paras 170-171).

[115] The only allegation of injury contained in Ms. Doan's Re-Re-Amended Statement of Claim to support a claim in damages under the *Civil Code* was added the morning of the hearing and is found at paragraph 58.1. It reads as follows:

> As a foreseeable, direct and immediate result of the RCMP's illegal, wrongful, negligent, and intentional actions and omissions (as set out above), the Class Members have suffered the following harms:
>
> > a) For the Class Members: distress, anxiety, discomfort, concern, and annoyance;

> b) For the Privacy Breach Class Members: being put under continual and mass police surveillance, distress, anxiety, discomfort, concern, loss of propriety, and annoyance; […]

[116] The alleged injury suffered by the Privacy Breach Class Members are clearly not characterized or described in a way that rises to the level of injury under her cause of action in damages based on extracontractual civil liability under the *Civil Code*. The distress, anxiety, discomfort, concern, loss of propriety and annoyance pleaded by Ms. Doan are the nature of ordinary annoyances and anxieties. Bearing in mind the generous interpretation that pleadings ought to receive, they are not sufficiently detailed to go beyond mere assertions, and it is therefore plain and obvious they do not constitute injury under the applicable law.

[117] Moreover, Ms. Doan does not plead that she has suffered a *personal* injury. The paragraph cited above only asserts general injury suffered by the Privacy Breach Class Members. However, injury is compensable under the *Civil Code* only if it is personal to the plaintiff, or put differently, the fault must go behind the screen of generality of the class and the representative plaintiff must be personally affected by the faulty conduct (*Bou Malhab* at para 48). Accordingly, the class representative must plead that they sustained personal injury for their cause of action in extracontractual civil liability under the *Civil Code* to succeed, and Ms. Doan has failed to do so (*Bou Malhab* at paras 47-48).

[118] The allegations found in paragraph 58.1 of the Re-Re-Amended Statement of Claim are insufficient as they do not demonstrate the existence of any specific compensable injury suffered by the Privacy Breach Class Members or by the Class Representative.

[119] It is plain and obvious that Ms. Doan's cause of action in extracontractual civil liability under article 1457 of the *Civil Code*, based on the facts as pleaded, has no reasonable prospect of success. I need not examine the other arguments raised by Canada in regards to the causal link.

[120] Punitive damages claim under paragraph 49(2) of the *Québec Charter* can succeed on an independent stand-alone basis (*de Montigny* at paras 38-46), but the requisite elements must be pleaded. In the present case, I find that Ms. Doan's pleadings on the intentionality of the interference are clearly insufficient at this stage. Particularly, she fails to allege that the result of the wrongful conduct was desired as required by the Supreme Court of Canada in *de Montigny*.

[121] In another one of the landmark cases on the topic, the Supreme Court of Canada determined that an intentional interference can arise when (1) the author of the unlawful interference has "a state of mind that implies a desire or intent to cause the consequences of his or her wrongful conduct"; or (2) the "person acts with full knowledge of the immediate and natural or at least extremely probable consequences that his or her conduct will cause" (*Hôpital St-Ferdinand* at para 121). It further stated "an individual's recklessness, however wild and foolhardy, as to the consequences of his or her wrongful acts will not in itself satisfy this test" (*Hôpital St-Ferdinand* at para 121).

[122] Ms. Doan submits that her pleadings do in fact allege an intentional interference with *Québec Charter* rights by the RCMP and she refers in her Reply Memorandum to her Re-Amended Statement of Claim at paragraphs 5, 18 to 20, 35 to 36, 38.1, 45 and 52 to 58. She added reference to paragraph 58.1 of her Re-Re-Amended Statement of Claim at the hearing. She

asserts that her pleadings establish that the RCMP wilfully obtained access to an illicit database and ran searches within prior to assessing whether the tools offered by Clearview were legal, and in her Reply Memorandum, she submits that these allegations amount to an "intentional conduct or proof of willfully blind or grossly negligent conduct" which in her view meets the applicable standard (*Spieser c Procureur général du Canada*, 2020 QCCA 42 at paras 558, 568-592; *Brochu c Agence du revenu du Québec*, 2018 QCCS 722 at paras 181-183).

[123] According to Ms. Doan's pleadings, confirmed by her submissions, the RCMP's intentional interference with the Privacy Breach Class's privacy rights lies in its intent to commit its actions and omissions (having access and running searches in Clearview's database), hence the alleged fault, rather than in its desire to cause the consequences of said actions or omissions (i.e., anxiety, loss of property, discomfort, etc.). However, "intentionality refers not to the intent to commit the fault but rather to the intent to cause the result thereof" (*de Montigny* at para 60). In order for her claim to succeed, based on the Supreme Court's teachings, she needed to plead that the RCMP intentionally caused the consequences of its wrongful conduct or it could not ignore, without being voluntarily blind, the consequences would result from its actions or omissions.

[124] Again, the Crown cannot be liable and Ms. Doan has failed to plead the requisite material facts to support the cause of action she raises. Even a generous approach to Ms. Doan's pleadings cannot fill the numerous gaps identified above (*Bigeagle FC* at para 183). It is therefore plain and obvious that Ms. Doan's causes of action in Québec law, based on the facts as pleaded in her Re-Re-Amended Statement of Claim, have no reasonable prospect of success.

(3) Causes of action under common law

(a) *Tort of intrusion upon seclusion*

(i) Parties' position

[125] Ms. Doan raises the tort of intrusion upon seclusion on behalf of the Privacy Breach Class Members residing outside of Québec 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 [*Jones*]). She says that the RCMP invaded the private affairs or concerns of the Privacy Breach Class by contracting with Clearview, gaining access to Clearview's database, and conducting searches within Clearview's database. Ms. Doan alleges that the necessary requirements are met, and based on the facts as pleaded at paragraphs 20, 30 to 35, 38.1, 43 to 45, 50, 52, 55 to 58, and 58.1 of her Re-Re-Amended Statement of Claim, damages, including pecuniary, non-pecuniary, punitive and aggravated damages are available to the Privacy Breach Class Members who reside outside Québec as remedies for the tortious acts committed by the RCMP.

[126] Canada responds that (1) the Crown is liable only vicariously for the torts of its servants; (2) Ms. Doan is a resident of Québec, thus subject to Québec law, and the tort of intrusion upon seclusion does not exist in Québec law (*Darmar Farms Inc v Syngenta Canada Inc*, 2019 ONCA 789 at paras 35-38 (leave to appeal to SCC refused, 38915) [*Darmar*]); and (3) in any event, Ms. Doan has not pleaded any material allegations with respect to the elements required for the

application of the tort of intrusion upon seclusion. More specifically, Canada submits that Ms. Doan's pleadings do not allege that Canada invaded her private affairs without justification, as is required by the second element of the test for the tort, and secondly, the personal information is not sufficiently intrusive to give rise to the cause of action.

[127] In her Reply Memorandum, Ms. Doan asserts that it is sufficient that the cause of action be held by Class Members; it need not be held by every Class Member nor by the Class Representative in particular. She notably relies on *Bank of Montreal v Marcotte*, 2014 SCC 55 at paragraph 55 [*Marcotte*] and *MacKinnon v Instaloans Financial Solution Centres (Kelowna) Ltd*, 2004 BCCA 472 at paragraph 51 [*MacKinnon*].

(ii) Analysis

[128] Again, according to sections 3 and 10 of the *Crown Liability Act*, Canada is only vicariously liable for torts committed by Crown servants (*Asghar v Canada*, 2023 FCA 62 [*Asghar*]). I have already addressed this issue above.

[129] Ms. Doan relies on the Ontario Court of Appeal's decision in *Jones* to allege a tort of intrusion upon seclusion committed by the RCMP. The key features of this cause of action are (1) that the defendant must have invaded, without lawful justification, the plaintiff's private affairs or concerns; (2) that the defendant's conduct must be intentional, within which includes reckless; and (3) that a reasonable person would regard the invasion as highly offensive causing distress, humiliation or anguish (*Jones* at para 71).

[130] Canada alleges that Ms. Doan has no reasonable cause of action because she is a resident of Québec, is thus subject to Québec law, and the substantive law of Québec does not recognize this tort.

[131] While the Ontario courts decided that there must be a representative who can claim from each of the defendants, or in other words, if the representative plaintiff does not have a reasonable cause of action against the defendant, it does not matter that other potential class members may (*Darmar* at paras 35-38; *Taylor v Canada (Attorney General)*, 2012 ONCA 479 at para 21), courts from other provinces found it was sufficient that a cause of action be held by class members, and not necessarily the representative plaintiff, as long as a cause of action exists against each named defendant (*MacKinnon* at para 51; *Banque de Montreal c Marcotte*, 2012 QCCA 1396 at paras 52-57; *Marcotte* at para 55).

[132] None of the cases I am aware on this issue is binding on this Court. I further note that I only found two cases from this Court in which the motion for class certification considered including Québec residents, even though the representative plaintiff was from another province, but ultimately found that the Québec law argument lacked a reasonable cause of action due to the absence of material facts (see e.g., *Tippett v Canada*, 2019 FC 869 at paras 3, 8, 75; *Bigeagle FC* at para 218). In these circumstances, I do not find the Ontario courts' decisions relied on by Canada to be very persuasive authority for rejecting Ms. Doan's claim at this early stage. There must be "a decided case directly on point, from the same jurisdiction, demonstrating that the very issue has been squarely dealt with and rejected" (*Arsenault v Canada*, 2008 FC 299 at para 27

cited in *Airbnb* at para 59) to conclude that it is plain and obvious that no claim exists, and Canada has failed to demonstrate that such a case exists in this matter.

[133] However, notwithstanding what I have just highlighted, the present case presents a peculiar set of circumstances, as Ms. Doan's pleadings disclosed no *personal* reasonable cause of action against Canada. I have already outlined that her causes of action under Québec law are doomed to fail, and, as will be discussed in the next subsection, I reach the same conclusion in regards to her claims under the *Copyright Act*. In my view, it would be antinomic to the objectives of a class proceeding, and to the Rules, to permit a representative plaintiff to bring a class action on behalf of members who have a cause of action without the representative plaintiff themselves having a cause of action against at least one defendant (*Horseman v Canada*, 2015 FC 1149 at paras 24-26).

[134] In particular, I highlight that Rule 334.12(1) provides that "a member of a class of persons may commence an action or an application on behalf of the members of that class". Rule 334.12(2) then states that "[t]he member shall bring a motion for the certification of the proceeding as a class proceeding and for the appointment of the member as representative plaintiff or applicant". Rule 334.12(3) provides that "[t]he representative of a class shall be a person who may act as a plaintiff or an applicant under these Rules". The Federal Court of Appeal indicated (albeit in the context of the condition of Rule 334.16(1)(e)) that "[t]hese provisions certainly suggest that a proposed class proceeding has to be commenced by a member of the relevant class of persons" (*Jost* at para 104).

[135] In *Bisaillon v Concordia University*, 2006 SCC 19, the Supreme Court of Canada confirmed 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.

[136] At the hearing, Ms. Doan confirmed that as long as she has one personal cause of action against Canada, she can advance a class action on behalf of other Class Members whether or not she can personally advance them.

[137] In any event, again I find that Ms. Doan's Re-Re-Amended Statement of Claim contains no material allegations that the RCMP intentionally or recklessly invaded her private affairs, let alone that an intrusion touched on details that meet the standard for "highly offensive". She thus failed to properly plead the commission of the constitutive elements of the tort of intrusion upon seclusion by the RCMP as detailed below. She directs the Court to paragraphs 20, 30 to 35, 38.1, 43 to 45, 50, 52, and 55 to 58 of her Re-Re-Amended Statement of Claim.

[138] Ms. Doan fails to plead a conduct by the RCMP that amount to an invasion of her private affairs or concerns. She does not provide any particulars as to the alleged intrusions, or how those intrusions resulted in a significant invasion of personal privacy. Ms. Doan has confirmed that her claim is irrespective of whether any RCMP member searched for, or saw, a photo of her. She thus does not plead that the Defendant invaded, without lawful justification, her private

affairs or concerns. Ms. Doan does not allege that the purposes for which the RCMP used Clearview were improper. Neither she nor the RCMP have any knowledge or reason to believe that the RCMP has ever searched for or seen any image of her. Indeed, she frames her case as "[i]rrespective of whether the RCMP actually used Clearview's services with respect to" her or photographs taken by her. She simply contends that the RCMP's ability to access Clearview violated her privacy and copyright and creates liability to her. Ms. Doan does not allege that the RCMP actually saw, let alone copied, even a single photograph of her or taken by her in Clearview. Her case is premised on the notion that this fact does not matter which is irreconcilable with the tort of intrusion upon seclusion.

[139] Further, I do not see how the wrong alleged by the RCMP can in law amount to an intrusion or an invasion of *Ms. Doan's private affairs or concerns*; publicly available photographs on the internet is not included in the strict parameters of this tort set out in *Jones*. At paragraph 72, *Jones* included the type of matters that should be considered "private affairs or concerns":

> These elements make it clear that recognizing this cause of action will not open the floodgates. A claim for intrusion upon seclusion will arise only for deliberate and significant invasions of personal privacy. Claims from individuals who are sensitive or unusually concerned about their privacy are excluded: it is only intrusions into matters such as one's financial or health records, sexual practices and orientation, employment, diary or private correspondence that, viewed objectively on the reasonable person standard, can be described as highly offensive. [my emphasis]

[140] In addition to there being no invasion of private affairs or concerns, Ms. Doan has failed to plead that the RCMP *intentionally* intruded, physically or otherwise, upon the seclusion of another or her private affairs or concerns (*Jones* at para 70). Intention is established if the RCMP

meant to intrude upon the privacy of Ms. Doan or knew that it was a substantially certain consequence of the act which constitutes the intrusion. Ms. Doan's only allegation in regards to an intent is found at paragraph 55 of her Re-Re-Amended Statement of Claim and it reads as follows: "By intentionally, unlawfully, and recklessly obtaining access to and running searches within Clearview's database, RCMP engaged in a deliberate and significant invasion of the Privacy Breach Class Members' privacy, therefore committing the tort of intrusion upon the Privacy Breach Class Members' seclusion". Such allegation is vague, brief and conclusory, and consequently does not constitute material fact that the RCMP's conduct was intentional or reckless (*Jensen FC* at para 79).

[141] Finally, Ms. Doan has not pleaded the third element of the tort, which is that a reasonable person would regard the RCMP's conduct as highly offensive, causing distress, humiliation or anguish (*Jones* at paras 71-72). Without any invasion of privacy, one can hardly argue that the invasion is highly offensive. Even if the alleged conduct amounted to an invasion in this case, in my view, a reasonable person viewing the matter objectively would not consider the alleged intrusion – RCMP's ability to access Clearview – as "highly offensive". The pleadings do not specify how this conduct could meet the legal threshold; the only paragraph in the Re-Re-Amended Statement of Claim in regards to this requirement reads as follows: "56. RCMP's invasion of the Privacy Breach Class Members' privacy, without lawful justification, is highly offensive, considering the very personal and sensitive nature of the biometric information contained in Clearview's database". Such pleading amounts to bold assertions or conclusions rather than material facts, and lacks particularity.

[142] As the Crown cannot be liable, Ms. Doan is a resident of Québec and, moreover, as the constituent elements of this cause of action are absent from the pleadings, along with the necessary allegations to support them, it is plain and obvious that this cause of action has no chance of success.

(b) *Negligence at common law*

(i) Parties' position

[143] Ms. Doan's Re-Re-Amended Statement of Claim alleges negligence at common law on behalf of the Class Members residing outside Québec, hence for both the Privacy Breach Class Members and the Copyright Infringement Class Members residing outside of Québec. More specifically, in her Memorandum of Fact and Law, Ms. Doan asserts that (1) the RCMP owed a duty of care to implement and use search and surveillance techniques and technology in a non-negligent manner; (2) the RCMP breached that duty of care by negligently implementing and using Clearview's database; and (3) as a result, the Class Members suffered harms. Ms. Doan refers to paragraphs 20, 30 to 35, 38, 38.1, 43 to 45, 50, and 52 to 58.1 of her Re-Re-Amended Statement of Claim to submit that she pleaded the required material facts to support this cause of action.

[144] Accordingly, she seeks the liability of the RCMP as an institution for the resulting harms to the Class Members residing outside Québec and asks general pecuniary, non-pecuniary, and punitive damages.

[145] Canada submits that Ms. Doan has no reasonable cause of action in negligence because (1) a legally cognizable harm is absent from Ms. Doan's pleadings; (2) by Ms. Doan's own pleadings, no duty of care arises here; her description of proximity relates to "persons whose personal information the RCMP gathers, uses, holds, and discloses", none of which are alleged via material facts; (3) the theory of material implication introduced in her Memorandum of Fact and Law is based on no material fact and has no air of reality; and (4) Ms. Doan pleadings are silent on the standard of care and on causation.

(ii) Analysis

[146] Again, according to sections 3 and 10 of the *Crown Liability Act*, Canada is only vicariously liable for torts committed by Crown servants (*Asghar*). I have already addressed this issue above.

[147] Furthermore, the requisite elements of Ms. Doan's cause of action in negligence are: (1) the existence of a duty of care; (2) the breach of that duty; and (3) damages flowing from the breach of the duty of care (*Saadati v Moorhead*, 2017 SCC 28 at para 13). Courts determine whether a duty of care exists by applying the *Anns/Cooper* test (*Cooper v Hobart*, 2001 SCC 79).

[148] Ms. Doan's Re-Re-Amended Statement of Claim does not mention the duty of care, its existence, its nature and or how it was breached.

[149] In regards to the damages, the case law establishes that damages for "upset, disgust, anxiety, agitation or other mental states that fall short of injury" do not constitute compensable

damages in a negligence claim (*Mustapha* at para 9; *Stewart v Demme*, 2020 ONSC 83 at paras 86-90. See also *a contrario*, *Condon* at para 22).

[150] In her Re-Re-Amended Statement of Claim, Ms. Doan pleads damages at paragraph 58.1 cited above, which refers generally to the distress, anxiety, discomfort, concern, loss of propriety and annoyance. The pleadings on damages are at best "transient upset", and, based on the case law cited above, are insufficiently detailed to go beyond mere assertions. Furthermore, since Ms. Doan does not mention the duty of care or its breach, there is likewise no pleadings that concern the causality between the breach and any damages.

[151] Again, the Crown cannot be liable, Ms. Doan is a resident of Québec, and Ms. Doan has failed to plead the requisite material facts to support the cause of action she raises. Accordingly, it is plain and obvious that the cause of action in negligence in common law cannot succeed.

F. *Causes of action under the Copyright Act*

(1) Copyright infringement

(a) *Parties' position*

[152] In her Memorandum of Fact and Law, Ms. Doan argues that by creating accounts to access Clearview's database, accessing Clearview's database, conducting searches within Clearview's database, viewing the results of these searches, making available and circulating the Collected Photographs within the RCMP structure, and by possessing the Collected Photographs through the database and the downloaded search reports, the RCMP infringed copyright in the

Collected Photographs of the Copyright Infringement Class Members. As the RCMP knew or should have known that these actions infringed copyright in the works, the RCMP also committed secondary infringement. She adds that, as none of the exceptions to copyright infringement apply, damages, including pecuniary, non-pecuniary, statutory, punitive, and aggravated damages, are available as remedies.

[153] Ms. Doan alleges on behalf of the Copyright Infringement Class that the RCMP committed secondary copyright infringement (paragraphs 27(2)(a), (b), (c), (d), (2.3), (2.4) of the *Copyright Act*) with respect to the Copyright Infringement Class Members' protected work – the Collected Photographs – and none of the exceptions to copyright infringement applies in this case (sections 29-32.2 *Copyright Act*). In her Reply Memorandum, she asserts that her pleadings clearly allege the necessary elements of her cause of action and she refers the Court to paragraphs 20, 35, 43, 44 to 45, and 52 to 54 of her Re-Re-Amended Statement of Claim.

[154] At the hearing, Ms. Doan raised for the first time that Canada further committed secondary infringement under subsection 27(4) of the *Copyright Act*. It is improper to allege a new cause of action at the hearing of the Motion and, for this reason, I will not entertain it. In any event, there is no mention of this cause of action in the pleadings and it is thus plain and obvious that it is doomed to fail.

[155] Canada responds that (1) Ms. Doan's pleadings contain no material facts that any member of the RCMP produced, reproduced or published, sold, rented out or distributed, any

photos from Clearview; and (2) in any case, investigative work by police officers is research that falls under the exception for fair dealing (sections 29 and 30 *Copyright Act*).

(b) *Analysis*

[156] Secondary copyright infringement is provided at subsection 27(2) of the *Copyright Act* and reads:

> **27 (1)** It is an infringement of copyright for any person to do, without the consent of the owner of the copyright, anything that by this Act only the owner of the copyright has the right to do.
>
> **(2)** It is an infringement of copyright for any person to
>
> **(a)** sell or rent out,
>
> **(b)** distribute to such an extent as to affect prejudicially the owner of the copyright,
>
> **(c)** by way of trade distribute, expose or offer for sale or rental, or exhibit in public,
>
> **(d)** possess for the purpose of doing anything referred to in paragraphs (a) to (c), or
>
> **(e)** import into Canada for the purpose of doing anything referred to in paragraphs (a) to (c),
>
> a copy of a work, sound recording or fixation of a performer's performance or of a communication signal that the person knows or should have known infringes copyright or would infringe copyright if it had been made in Canada by the person who made it.

[157] In order to establish a cause of action in secondary infringement, Ms. Doan must allege the following elements: (1) primary infringement occurred; (2) the secondary infringer knew or should have known that he or she was dealing with a product of infringement; and (3) the secondary infringer sold, rented out, distributed to such an extent as to affect prejudicially the

owner of the copyright, or exposed for sale the infringing good (subsection 27(2) of the *Copyright Act*; *CCH Canadian Ltd v Law Society of Upper Canada*, 2004 SCC 13 at para 81; *Salna v Voltage Pictures*, LLC, 2021 FCA 176 at para 87; *Excellence Inc v Kraft Canada Inc*, 2007 SCC 37 at para 19).

[158] While Ms. Doan claims to have pled material facts in relation to each element of the test for secondary infringement, she clearly has not. In particular, Ms. Doan fails to plead material facts in relation to the third element of the test for secondary infringement which requires that the secondary infringer (the RCMP) sells or rents out, distributes to such an extent as to affect prejudicially the owner of the copyright; by way of trade distributes, exposes or offers for sale or rentals, or exhibits in public; possess for these purposes the Collected Photographs.

[159] Ms. Doan asserts that her pleadings clearly allege that the RCMP created accounts to access Clearview's database, conducted searches within Clearview's database, viewed the results of these searches, made available and circulated the Collected Photographs within the RCMP structure, and possessed the Collected Photographs through the database and the downloaded search reports. She adds that these allegations effectively constitute dissemination and distribution of the Collected Photographs.

[160] In support of her argument, Ms. Doan directs the Court to the following paragraphs in her Re-Re-Amended Statement of Claim:

> 20. Despite the fact that Clearview's undertaking was modelled on and required a large-scale invasion of privacy of residents and citizens of Canada and copyright infringements, the RCMP eagerly partook in these illegal activities by becoming a client of

Clearview, by wilfully obtaining access to its database and by using its services.

35. As Canada's national law enforcement agency, the RCMP operates all over Canada with national, federal, provincial, and municipal policing mandates. By becoming a paying client of Clearview, by wilfully obtaining access to Clearview's database and by using its services, the RCMP was partaking in illegal activities.

43. Based on the claims made by Clearview with respect to the scope of its database and the fact that, until recently, Canada was one of Clearview's primary markets, Ms. Doan alleges that her personal biometric information and the Doan Photographs have been collected, copied, reproduced, stored and/or used by Clearview, without her knowledge or consent.

44. By its actions, Clearview violated Ms. Doan's right to privacy and her copyright and moral rights in the Doan Photographs.

45. Irrespective of whether the RCMP actually used Clearview's services with respect to Ms. Doan or to the Doan Photographs, the fact of being a Clearview client and having wilfully obtained access to services the provision of which involves the invasion of privacy of residents and citizens of Canada and the violation of their intellectual property rights on a systematic basis, engages RCMP's liability.

52. RCMP engaged its liability towards the Class Members on the following grounds:

A- Negligence, partaking in illegal activities and wilfully obtaining access to an illicit database

53. As further explained above, RCMP engaged its liability towards Class Members by becoming a client of Clearview and by wilfully obtaining access to its illicit database, containing personal biometric information and copyrighted materials which were being used in violation of the rights holders.

54. In addition, the RCMP was negligent in getting access to Clearview's database and in using same, including running searches within the database, prior to assessing whether the tools offered by Clearview were legal and, since they contain personal biometric information, whether Clearview disclosed its activities, the creation and the existence of its database to competent authorities (which it did not).

[161] Ms. Doan asserts, in her Reply Memorandum, that these paragraphs "effectively constitutes dissemination and distribution of the Collected Photographs" and thus meet the third element of the secondary infringement test as they disclose that the RCMP "made available and circulated the Collected Photographs within the RCMP structure, and possessed the Collected Photographs through the database and the downloaded search reports".

[162] After carefully reading Ms. Doan's pleadings, I disagree. I find no mention, in the pleadings, that the RCMP made available and circulated the Collected Photographs within the RCMP structure, or possessed the Collected Photographs through the database and the downloaded search reports. Even a generous reading cannot allow me to find such allegations in the pleadings. Rather, the pleadings limit the allegations by asserting that the RCMP accessed and conducted searches in a database that contained copyrighted materials.

[163] Ms. Doan's pleadings thus fail to outline the material facts that can ground the statutory requirement for a secondary copyright infringement cause of action. The statute is clear: it is a secondary infringement of copyright for a person to "sell or rent out", "distribute", or "by way of trade distribute, expose or offer for sale or rental, or exhibit in public" a copy of a work that the person knows or should have known infringes copyright, or to "possess" a copy of a work for the purpose of doing any of these things (subsection 27(1) of the *Copyright Act*). The pleadings contain no material facts suggesting even remotely that the RCMP did either of these things, and the Court cannot override the language chosen by Parliament (*Théberge v Galerie d'Art du Petit Champlain Inc*, 2002 SCC 34 at para 5).

[164] Accordingly, Ms. Doan has failed to plead the facts necessary to support a secondary infringement cause of action. It is plain and obvious her action would fail on this cause of action.

(2) Moral rights violations

(a) *Parties' position*

[165] Ms. Doan's Re-Re-Amended Statement of Claim alleges violations of the Copyright Infringement Class Members' moral rights in the Collected Photographs and thus seeks general pecuniary and non-pecuniary, special, punitive and statutory damages against Canada on behalf of the Copyright Infringement Class.

[166] In her Memorandum of Fact and Law, Ms. Doan asserts that (1) the Copyright Infringement Class Members hold moral rights in their works within the Collected Photographs (sections 2, 14.1 of the *Copyright Act*); (2) the RCMP infringed their moral rights by creating accounts to access Clearview's database, accessing Clearview's database, conducting searches within Clearview's database, viewing the results of these searches, making available and circulating the Collected Photographs within the RCMP structure, and by possessing the Collected Photographs through the database and downloaded search reports without their consent (sections 14.1, 28.1 of the *Copyright Act*); and (3) the remedies she seeks are available (sections 34, 35-38.2 of the *Copyright Act*). Ms. Doan directs the Court's attention to paragraph 20, 35, 43, 44 to 45, and 52 to 54 of her Re-Re-Amended Statement of Claim and asserts that her pleadings clearly allege that the RCMP violated the Copyright Infringement Class Members' rights.

[167] Canada submits that Ms. Doan has no reasonable cause of action in moral rights violations because (1) the Statement of Claim alleges that Clearview violated Ms. Doan's moral rights, not Canada; (2) her argument in her Memorandum of Fact and Law of "used in association" has no air of reality; and (3) no material fact concerning objective prejudice to the author's honour or reputation is alleged.

(b) *Analysis*

[168] Per section 14 of the *Copyright Act*, under the title "Moral rights":

> the author of a work has, subject to section 28.2, the right to the integrity of the work and, in connection with an act mentioned in section 3, the right, where reasonable in the circumstances, to be associated with the work as its author by name or under a pseudonym and the right to remain anonymous.

[169] In turn, section 28.2 of the *Copyright Act* provides that moral rights to the integrity of a work are infringed where (1) the author's honour or reputation is prejudiced, (2) by the distortion or modification of the original work or by *using* the work in association with a product, service, cause or institution.

[170] Ms. Doan asserts that her pleadings clearly allege that the RCMP violated the Copyright Infringement Class's moral rights and refers to paragraphs 20, 35, 43, 44 to 45, and 52 to 54 of her Re-Re-Amended Statement of Claim. These paragraphs were reproduced in the previous subsection under the copyright infringement cause of action, and I will thus not cite them again.

[171] Even if I were to find that Ms. Doan actually pleaded that the RCMP, not Clearview, violated the Copyright Infringement Class Members' moral rights, it remains that she has not pleaded an objective prejudice to herself or the Copyright Infringement Class Members' honour or reputation (*Maltz v Witterick*, 2016 FC 524 at para 49; *Collett v Northland Art Company Canada Inc*, 2018 FC 269 at para 22), nor anything related to the distortion or modification of the original work or by *using* the work in association with a product, service, cause or institution.

[172] Without any material facts pleaded on a legal foundation for a moral rights infringement under the *Copyright Act*, it is plain and obvious that the claim for moral rights violation cause of action is doomed to fail.

G. *Leave to amend*

[173] Ms. Doan submits that she has pled the requisite constituent elements of the causes of action asserted, and thus has fulfilled this condition. In the alternative, she requests that, should the Motion for certification be denied on this first condition, she be granted leave to amend her pleadings. Ms. Doan relies on *Paradis Honey FCA* at paragraph 80, *Jost* at paragraphs 49 and 50, and *Trotman v WestJet Airlines Ltd*, 2022 BCCA 22.

[174] Canada did not dispute Ms. Doan's right to further amend her Statement of Claim, but (1) stressed that Ms. Doan did amend it and most recently the morning of the hearing of the Motion for certification; (2) outlined that it is problematic for Ms. Doan to ask for leave to amend without first providing details as to the nature of the amendments sought; and (3) submitted that in any event, the defect is incurable because there are no other facts disclosing a cause of action:

there is nothing in the evidence that could be added as a material fact that would change the outcome.

[175] I note that 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. 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.

[176] 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 paragraph 3. See also *Boakye v Canada (Citizenship and Immigration)*, 2018 FC 831 at paragraph 19).

[177] In the context of an action, Rule 200 states that notwithstanding Rules 75 and 76, a party may, without leave, amend any of its pleadings at any time before another party has pleaded thereto or on the filing of the written consent of the other parties. Canada has not yet filed his Statement of Defence, having been authorized to delay, in the context of the Motion for certification. This being said, we must place Rule 200 in perspective when in the context of a motion for certification where the defendant, and the Court surely can expect to get to the

hearing of the motion for certification with a definite record and not be taken by surprise by constantly changing pleadings.

[178] In *Paradis Honey FCA*, 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. 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. 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. 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 v Canada*, 2022 FC 1409 at paragraphs 48-53, 133).

[179] Here, Ms. Doan thrice amended her Statement of Claim and did not cure the deficiencies. Furthermore, Ms. Doan has not suggested or proposed any amendments to the Court that could cure the deficiencies that were highlighted; Ms. Doan rather asks the Court to grant her another kick at the can so to speak, should the Court not be inclined to decide in her favour, until she can get it right.

[180] Finally, I agree with Canada that the deficiencies in the pleadings are incurable given the circumstances and the arguments raised by Ms. Doan; they are not inadequacies attributed to drafting. Again, I must stress that Ms. Doan did not indicate how her pleadings could be amended to remedy the deficiencies identified under the reasonable cause of action assessment, and I do not see how they could be so amended. An open leave to amend, as sought by Ms. Doan, will therefore not be granted.

VI. Other conditions of Rule 334.16: Some basis in fact

A. *Introduction*

[181] I now turn to the four other conditions that must be met before the Court can grant the Motion for certification and certify the proceeding as a class proceeding. For these conditions, set out at Rules 334(1)(b) to (e) of the Rules, Ms. Doan bears the burden of adducing evidence to show "some basis in fact" that said conditions are met (identifiable class, common questions, preferable procedure and class representative) (*Hollick* at para 25; *Pro-Sys* at para 99; *AIC Limited v Fischer*, 2013 SCC 69 at para 40 [*Fischer*]). These conditions are concerned with the form of the action, not its merits.

[182] Some basis in fact is a lower threshold than the balance of probabilities, as certification is not the appropriate stage to resolve conflicts in the evidence (*Pro-Sys* at para 102). That said, a plaintiff must nonetheless come forward with a sufficient evidentiary basis to support certification. Again, while certification remains a low hurdle, it is nonetheless a hurdle (*Simpson v Facebook*, 2021 ONSC 968 at para 50).

B. *Preliminary Evidentiary Issues*

[183] In its Memorandum of Fact and Law, Canada takes issue with Ms. Doan's evidence, which consists of her single affidavit and its exhibits. Canada raises the following issues: (1) though she swore that she had personal knowledge of the matters within her affidavit, upon cross-examination, Ms. Doan indicated that (i) many paragraphs were based on unspecified media sources; or (ii) she would have to consult her counsel in order to explain how she knew them to be true; (2) she appeared unfamiliar with some exhibits; (3) she has never herself used Clearview's services and her description of the information generated by Clearview is contradicted by her own evidence and by Canada's evidence; (4) general rules related to affidavits apply; (5) reports by third parties are not admissible for the truth of their contents (*Bigeagle FC* at paras 46-47); and (6) documents attached to pleadings and assertions in the Memorandum of Fact and Law are not evidence.

[184] Ms. Doan replied that the affidavit and documentary evidence she filed do establish some basis in fact for each of the latter four certification conditions. She asserts that her cross-examination demonstrates she has personal knowledge of the facts alleged in her affidavit through various sources, including news media, public knowledge, and discussions with her counsel.

[185] Ms. Doan adds that the Court is seized of a Motion for certification and that the impugned documentary and affidavit evidence have been filed in order to demonstrate the existence of some basis in fact and that it is neither relevant nor necessary at this preliminary

stage to establish the objective truth of the allegations and evidence put forth in support of the Motion for certification.

[186] Ms. Doan's Motion for certification is supported by two affidavits that she has sworn, and in which she swears having personal knowledge of the matters to which she hereinafter deposes. She did not include statements as to her belief. However, and despite having sworn personal knowledge, Ms. Doan indicated in cross-examination that she has never herself used Clearview's services and that many paragraphs of her affidavit were based on unspecified media sources, or that she would have to consult her counsel in order to explain how she knew some to be true; she also appeared unfamiliar with some exhibits. Since it seems clear Ms. Doan did not hold in fact personal knowledge of all the facts she swore to, the evidence she adduced is given less weight.

[187] In regards to the Privacy Commissioner reports, I agree that it is admissible, although not for the truth of its content. The reports may assist in discharging the "some basis in fact" burden; but only to help put the facts pled into context (*Bigeagle FC* at paras 46-47 aff'd in *Bigeagle FCA* at para 44; *Johnson v Ontario*, 2016 ONSC 5314 at para 67; *Ewert v Canada (Attorney General)*, 2016 BCSC 962 at paras 39-40).

[188] It is with these principles in mind that I must examine if Ms. Doan has established "some basis in fact".

C. *Rule 334.16(1)(b): Identifiable Class of two or more persons*

(1) Parties' position

[189] Ms. Doan submits that the proposed Class and Subclasses easily meet the requirements of Rule 334.14(1)(b). She asserts that, given the number of photographs in Clearview's database, the Class and the Subclasses are each estimated to have memberships numbering in the millions. It is Ms. Doan's opinion that their precise sizes are objectively determinable and can be determined based on the exclusive knowledge and/or records of Canada and/or Clearview. She stresses that a lack of information about the precise number or identities of Class Members cannot ground a refusal to certify (*Merlo v Canada*, 2017 FC 51 at para 15), and adds, moreover, that the proposed Class and Subclasses definitions are rationally connected to the common issues. Ms. Doan opines that a determination of those issues is directly relevant to all Canadian persons whose faces appear in the Collected Photographs and/or who hold copyright or moral rights with respect to the Collected Photographs.

[190] Canada responds that (1) the Class is overbroad and has no rational connection to the claim, and (2) the Class is not identifiable.

[191] First, Canada alleges that the Class includes large identifiable groups of people that has no claim and is overbroad. It argues that neither the allegation nor the evidence suggests that the RCMP looked for or saw, let alone collected, images of the vast majority of the proposed Class. In this context, Canada alleges that the proposed Class Members are akin to purchasers who will never know whether price fixing affected their beverages (*Sun-Rype Products Ltd v Archer*

Daniels Midland Company, 2013 SCC 58 [*Sun-Rype*]) and to lottery consumers who were not victims of fraud (*Loveless v Ontario Lottery and Gaming Corporation*, 2011 ONSC 4744 at paras 48-49, 53-59 [*Loveless*]). Canada adds that the uncontested evidence (Guertin affidavit) indicates that only a single self-search by a RCMP member was copied from Clearview.

[192] Second, Canada alleges that the proposed Class is not identifiable. Essentially, Canada's position is that Class Members have no way to self-identify to determine Class membership; let alone at the relevant time (July 6, 2020). Canada takes the position that the speculative and imprecise nature of Ms. Doan's own litigation plan to identify the Class confirms the impossibility of identifying the Class.

(2) Analysis

[193] 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 [*Paradis Honey FC*]).

[194] 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 action, 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" (*Paradis Honey FC* at para 23). The burden is on the proposed representative plaintiff 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; *Paradis Honey FC* at para 24).

[195] The rationale behind these criteria is that the "Court must be in a position to identify: (i) who is entitled to notice, (ii) who is entitled to relief, and (iii) who is bound by the judgment" (*Airbnb* at para 92. See also *Dutton* at para 38).

[196] The class definition can also be amended after certification if the Court finds it appropriate (*Paradis Honey FC* at para 24).

[197] In this case, Ms. Doan asks the Court to certify the following Class and Subclasses:

> All natural persons, who are either residents or citizens of Canada, whose faces appear in the photographs collected by Clearview Inc. through July 6, 2020 (the "Collected Photographs") (the "Privacy Breach Class" or the "Privacy Breach Class Members");
>
> All natural or legal persons holding copyright and moral rights with respect to the Collected Photographs (the "Copyright Infringement Class" or the "Copyright Infringement Class Members" and, collectively with the Privacy Breach Class, the "Class" or "Class Members").

[198] Canada argues that the Class is not identifiable because Members have no means of self-identifying to determine their membership in the Class, let alone at the relevant time, as Clearview's database has more than tripled since Ms. Doan filed her claim.

[199] In *Loveless*, the Ontario Supreme Court concluded that the class was not identifiable because there was no objective means to determine which ticket purchasers had been deprived of

their prizes. The evidence suggested that during the identify period, more than ten billion lottery tickets were sold to millions of people, and only a very small proportion of them had been victimized. Moreover, most people affected by retail fraud will have no idea that they have been defrauded. Therefore, the court concluded that the plaintiff's inability to define a more limited class suggests that the procedure is inappropriate for certification as a class action (*Loveless* at paras 46-59).

[200] In *Sun-Rype*, the problem lied in the fact that indirect purchasers, even knowing the names of the products affected, were unable to know whether the particular item that they purchased did in fact contain the offensive sweetener. The appellants failed to offer evidence that there was some basis in fact that could help to overcome the identification problem created by the fact that the offensive sweetener and liquid sugar were used interchangeably (*Sun-Rype* at paras 65-66). This ultimately led the Supreme Court of Canada to reject the certification because class membership was not determinable.

[201] Similarly, in the present case, Ms. Doan does not offer any means of identifying the Class Members whose photos were in the Clearview database at the relevant time – July 6th, 2020 per her Class definition. The failure to show that there is a factual basis for Class Members to determine whether they were in the database at the time the RCMP conducted searches makes it impossible, in my view, to determine membership in the Class. Even Ms. Doan did not have confirmation that her photo was in the Clearview database until July 10, 2020; a few days after Clearview ceased all services with the RCMP. Therefore, "[w]e are left with a massive class, of

whom only a fraction would benefit from the resolution of the common issues" (*Loveless* at para 59).

[202] Given the finding that an "identifiable class" cannot be established, the class action cannot be certified.

D. *Rule 334.16(1)(c): The claims of the proposed Class Members raise common questions of law or fact*

(1) Parties positions

[203] In Appendix A attached to her Notice of Motion, Ms. Doan initially presented the proposed common questions of law and/or fact divided in the three following sections (I) eight proposed common questions for the Class; (II) eight proposed common questions for the Privacy Breach Class; and (III) four proposed common questions for the Copyright Infringement Class.

[204] The morning of the hearing, Ms. Doan filed new common questions and referred to paragraph 12 of *Buffalo FCA*:

> I accept that in certification motions, and in the post-certification period, courts can be quite active and flexible because of the complex and dynamic nature of class proceedings: for example, they must always remain open to amendments to such matters as the class definition, the common issues and the representative plaintiff's litigation plan, and they can play a key role in case management.

[205] In her revised proposed common questions of law and/or fact, she added 20 common questions, for a total of 40 proposed common questions. The common questions are divided in

the three following sections (I) 18 proposed common questions for the Class; (II) 13 proposed common questions for the Privacy Breach Class; and (III) nine proposed common questions for the Copyright Infringement Class.

[206] I accept the document for filling; in any event, it does not change my conclusion that this condition has not been met. In my opinion, the proposed common questions – whether the new or old ones – do not remedy the fundamental problem of the lack of some factual basis to support them.

[207] In her Memorandum of Fact and Law, Ms. Doan submits that the proposed common issues concern: (1) the RCMP's legal duties; (2) the RCMP's conduct; (3) Canada's vicarious liability; and (4) the nature of Clearview's database. She asserts that these issues are common to all Members, do not touch on the specific circumstances of individual Members, predominate over any residual individual issues, and that resolving these issues will advance the litigation for all Members:

> i. Common issues I.1 and I.2 the Collected Photographs address the characterization of the Collected Photographs and the Collected Personal Data as personal information. These questions do not engage the analysis of any member's individual factual context or experience and are necessary and substantial part of adjudicating all members' claims.
>
> ii. Issues I.3, I.4, I.5, I.6, I.7, I.8, I.9, I.10, and I.11 —liability and remedies as concerns the Class-address the RCMP's civil liability towards the Class, as well as the remedies available to the Class. They relate to the nature of Clearview's database, and to the RCMP's interactions with Clearview and with Clearview's database.
>
> iii. Issue I.12 adjudication of individual issues-addresses the adjudication of possible individual issues after the common issues trial.

iv. Issues II.1, II.2, II.3, II.4, II.5, II.6, II.7, and II.8 liability and remedies as concerns the Privacy Breach Class-address the alleged privacy and *Charter* breaches committed by the RCMP, the vicarious liability of the Defendant for these breaches, and the remedies available to the Privacy Breach Class as a result. Adjudicating these issues will require assessments of the RCMP's conduct vis-à-vis Clearview and vis-à-vis Clearview's database. No assessment of individual members' circumstances is required.

v. Issues III.1, III.2, III.3, and III.4 - liability and remedies as concerns the Copyright Infringement Class-address the alleged copyright and moral rights violations committed by the RCMP, as well as the remedies available to the Copyright Infringement Class as a result of these infringements.

[208] Ms. Doan asserts that the proposed common questions are appropriate and are not overbroad. Moreover, should the Court take issue with one or more of the proposed common questions, she opines that this is not a bar to certification, as the Court may, in certifying the class proceeding, modify and reformulate the common questions.

[209] At the hearing, Canada presented general comments on the common questions and did not analyze each question as it had not been alerted to the new document and received it on the morning of the hearing. Canada maintained Ms. Doan has not established some basis in fact to support her proposition in regards to the old or new common questions and that her questions were overly broad and were not common.

[210] In its Memorandum of Fact and Law, Canada used different references to categorize the common question (i.e., "G" for common general question, "P" for the Privacy Breach Class, and "C" for the Copyright Infringement Class) but, for clarity, I will here refer to the same identification system used by Ms. Doan (i.e., sections I, II and III).

[211] Relying on the document and common questions they had when preparing their Memorandum of Fact and Law in response, Canada opines in regards to the first category, that questions I.5, II.1, II.2, III.1, III.2 are overbroad. Canada adds that these questions purport to combine entire causes of action into issues of whether the Defendant was "negligent" or "engaged its liability" for various acts. It emphasizes that for every Class Member, consent, privacy, and copyright would vary depending upon, *inter alia*, the original source of each individual image while the questions make no provision for variations in applicable law.

[212] In regards to the second category, Canada submits that questions I.7, II.5, III.3; II.4, II.6 are overly broad, as no allegation of evidence has been submitted concerning injury. Canada adds that there is no basis in fact for questions related to aggregate damages assessment, that no evidence has been tendered to suggest a method for the conduct of an assessment of aggregate damages nor does the litigation plan suggest one. Canada also submits that no evidence suggests individual search and seizure on a class-wide basis-giving rise to section 24 damages or intentional invasion of privacy giving rise to punitive damages under section 49 of the *Québec Charter*.

[213] In regards to the third category, Canada alleges that certifying I.9-I.12 as common questions does not help advance the case in any way, as costs, interest, and modes of proof are procedural issues within the inherent jurisdiction of the Court.

(2) Analysis

[214] Ms. Doan bears the burden to demonstrate some basis in fact for the claims of the Class Members raising common questions of law or fact. The Court must first decide whether there is some basis in fact for the very existence of each common issue and second determine whether the claims of the Class Members raise common questions of law or fact (*Jensen FC* at paras 193-216 aff'd in *Jensen FCA* at paras 77-78). Accordingly, Ms. Doan must first show that the Class Members have some minimal evidence supporting the existence of their claims, and second, she must show that there is some evidence that the common issue is such that its resolution is necessary to the resolution of each Class Member's claim.

[215] In regards to the first requirement, the plaintiff must show some evidentiary basis to show that a common issue exists beyond a bare assertion in the pleadings. I adopt Justice Gascon's thorough analysis of this issue in *Jensen FC* at paragraphs 193-216 (aff'd in *Jensen FCA* at paras 77-94), and particularly reproduce the following paragraphs:

> [200] In *Hollick*, the SCC clearly established that more than bare pleaded allegations are required to establish some basis in fact for the common issues in a proposed class action (*Hollick* at para 25), a principle that the SCC recently reaffirmed in *Atlantic Lottery* at paragraph 160. This Court has also confirmed that, to grant certification, there has to be some basis in fact demonstrating that common issues exist beyond a bare assertion in the pleadings (*Greenwood FC* at para 60). In sum, a plaintiff is required "to adduce some evidence demonstrating that there is a 'colourable claim,' or a rational connection between the class members as defined, and the proposed common issues" (*Kuiper* at para 27). It is therefore not sufficient for a plaintiff to merely rely on bare assertions in the pleadings in proving the commonality of the issues; rather, there must be a sufficient evidentiary basis demonstrating the existence of these common issues, "a factual

> underpinning to support the existence of claims on behalf of class members" (*Greenwood* at para 169). […]
>
> [206] In other words, the *Pro-Sys* decision confirmed that the evidentiary basis for establishing the existence of a common issue is not as high as proof on a balance of probabilities and that there is no need to demonstrate that the alleged acts "actually occurred" (see also *Greenwood* at para 169; *Fulawka* at para 78; *Crosslink* 1 at para 66). But it did not negate that there nonetheless needs to be a sufficient evidentiary basis (i.e., some basis in fact) indicating that a common issue exists in fact, beyond a bare assertion in the pleadings (*Fulawka* at para 79; *Simpson* at para 43). Moreover, *Pro-Sys* certainly does not stand for the proposition that a plaintiff is under no obligation to establish that the alleged grounds of a cause of action need to be anchored in reality. Mere assertions are insufficient without some form of factual underpinning (*Infineon* at para 134).

[216] Hence, the Court has to establish whether the common issues exist in the sense that there is some minimal factual basis for the claims made and to which the common issues relate, and whether the questions are common to all the class members (*Jensen FC* at para 208). The certification requirements are not meant to authorize class actions to proceed on the basis of the commonality of a non-existent proposed common issue (*Jensen FC* at para 214). However, an exhaustive record upon which the merits of the case will be argued is not necessary; "[t]he standard requires some basis in fact, but not the proof of fact, or proof that the facts actually occurred" (*Jensen FC* at para 212).

[217] For instance, in *Hollick*, the Supreme Court of Canada dealt with a proposed environmental class action brought forward by individuals living in proximity of a landfill and complaining about the noise and physical pollution emanating from it. The Supreme Court of Canada concluded that the "appellant ha[d] shown a sufficient basis in fact to satisfy the commonality requirement" in that the complaint records they had submitted went on to show

"that many individuals besides the appellant were concerned about noise and physical emissions from the landfill" (*Hollick* at para 26). The record thus provided an evidentiary basis for the plaintiff's assertion that there was, in fact, an "issue" with noise and physical pollution emanating from the landfill (see discussion in *Jensen FC* at paras 199-200).

[218] Second, in determining the commonality question, "[t]he underlying question is whether allowing the suit to proceed as a [class action] will avoid duplication of fact-finding or legal analysis" (*Dutton* at para 39). The Supreme Court of Canada in *Dutton*, at paragraph 39, set out a test that was reiterated in *Pro-Sys* at paragraph 108:

1) The commonality question should be approached purposively.

2) An issue will be "common" only where its resolution is necessary to the resolution of each class member's claim.

3) It is not essential that the class members be identically situated *vis-à-vis* the opposing party.

4) It is not necessary that common issues predominate over non-common issues. However, the class members' claims must share a substantial common ingredient to justify a class action. The court will examine the significance of the common issues in relation to individual issues.

5) Success for one class member must mean success for all. All members of the class must benefit from the successful prosecution of the action, although not necessarily to the same extent.

[219] An identical answer is not necessary for all the members of the class, as long as the answer to the question does not give rise to conflicting interests among them (*Vivendi* at para 46).

[220] In the present case, Ms. Doan is asking the Court to certify this class proceeding on the basis of a total of 40 common questions separated in three sections: (1) 18 common questions for

the Class which concerns the characterization of the Collected Photographs, Clearview and the RCMP's conducts, the RCMP's obligation towards the Class Members (i.e., whether the RCMP have a duty of care to the Class Members residing outside of Québec), the vicarious liability of the Crown and includes questions on the assessment of damages; (2) 13 common questions for the Privacy Breach Class relating to the causes of action for this Subclass; and (3) nine common questions for the Copyright Infringement Class relating to the causes of action for this Subclass.

[221] Applying the first part of the two-step approach, I find that Ms. Doan has failed to show "some basis in fact" to support her core allegations underlying each of her proposed common issues regarding Canada's vicarious liability towards her and the Class Members, and rely particularly on Ms. Doan's and Guerin's affidavits; keeping in mind the evidentiary issues highlighted above. As stated in *Jensen FC* at paragraph 214, "non-existent or fictitious issue has no more basis or justification because it happens to be common to a group of plaintiffs. A cause of action with no factual underpinning does not become somehow more founded because it is common to a group of plaintiffs, nor does it gain any more value or traction just because it is shared by hundreds, thousands or millions".

[222] I highlight in particular, as per the questions of entitlement to damages, that no evidence has been submitted (1) in regards to the injury suffered by Ms. Doan or by any Class Members; (2) to suggest a method for the conduct of an assessment of aggregate damages and the litigation plan does not suggest one either (*Greenwood* at para 188); and (3) that suggests individual seizure on a class-wide basis giving rise to section 24 damages or intentional invasion of privacy

giving rise to punitive damages under section 49 of the *Québec Charter* (see *a contrario Pro-Sys* at para 140; *Krishnan v Jamieson Laboratories Inc*, 2021 BCSC 1396 at paras 207-210).

[223] As for the second part of the two-step approach, it is not clear that the resolution of the common question in relation to the fault submitted by Ms. Doan is necessary to the resolution of each Class Member's claims, that the proposed questions make provision for variations in applicable law (civil law vs common law), and that each of them will benefit from the successful prosecution of the action.

[224] For the reasons detailed above, Ms. Doan does not satisfy the common issues requirement for certification, and I will thus not certify these questions.

E. *Rule 334.16(1)(d): The preferable procedure for the just and efficient resolution of the common questions of law or fact*

(1) Parties' positions

[225] Ms. Doan argues that there is "some basis in fact" that a class is the preferable procedure. First, she submits that there is a fair, efficient, and manageable method because the common issues predominate over any questions affecting individual Class Members. She notes that these issues concern Clearview's database, the RCMP's conduct in regards to Clearview's database, and the Defendant's vicarious liability, and can all be adjudicated on a common basis. While limited individual assessments will be required following the common issues trial, it is her opinion that this cannot ground a refusal to certify.

[226] Second, Ms. Doan contends that all other reasonably available means of resolving the claims are less practical or less efficient. She pleads that given the estimated size of the proposed Class and Subclasses and the likely quantum of alleged damages owing to each Member, individual actions against the Defendant would be inefficient and economically unfeasible. She points out that there is no evidence that any Members would seek to individually or that have been the subject of another proceeding and Canada bears the burden of leading evidence of meaningful alternatives, which they have not done.

[227] Third, it is Ms. Doan's opinion that, absent a class proceeding, multiple significant access-to-justice impediments exist for individual litigants in this matter (notably economic barriers, strategic barriers, and informational barriers). Indeed, despite the millions of people who are negatively impacted by the RCMP's alleged conduct, she states that she is the only one who has commenced litigation to challenge this conduct.

[228] Canada submits that no proper common issues are proposed. It argues that Ms. Doan has also failed to identify real access to justice issues because of the absence of any interest from other putative Members compared to the size of the proposed Class. Furthermore, Canada alleges that if the Plaintiff's claims had merit, other procedures have or could resolve them (Rule 334.16(2)(c, d, e). Canada submits that the RCMP is committed to every measure recommended by the Privacy Commissioner. It adds that claims related to investigations or searches conducted by the RCMP can also be brought through two different statutory processes, notably the Privacy Commissioner. Canada points out that an individual case would be more efficient to seek declaratory or general injunctive conclusions with *erga omnes* effects.

(2) Analysis

[229] According to Rule 334.16(2) of the Rules, when determining whether a class proceeding is the preferable procedure for the just and efficient resolution of the common questions of law or fact, the following matters shall be considered:

a) the questions of law or fact common to the class members predominate over any questions affecting only individual members;

b) a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate proceedings;

c) the class proceeding would involve claims that are or have been the subject of any other proceeding;

d) other means of resolving the claims are less practical or less efficient; and

e) the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means.

[230] The burden of proof lies with the party seeking certification (*Paradis Honey FC* at para 97). The standard is again "some basis of fact", meaning "sufficient facts to satisfy the applications 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" (*Pro-Sys* at para 104).

[231] In *Fischer*, the Supreme Court of Canada set out principles in this regard, which are summarized in *Paradis Honey FC* at paragraph 96:

> (1) The starting point is the relevant statutory provision. The preferability requirement is broad enough to take into account all available means of resolving the class members' claims including avenues of redress other than court actions.

> (2) The court must look at the common issues in the context of the action as a whole, and when comparing possible alternatives with the proposed class proceeding, it is important to adopt a practical cost-benefit approach, and to consider the impact of a class proceeding on class members, the defendants, and the court.
>
> (3) The preferability analysis considers the extent to which the proposed class action serves the goals of class proceedings. The three principal goals of class actions are (1) judicial economy, (2) behaviour modification, and (3) access to justice. This is a comparative exercise, and the ultimate question is whether other available means of resolving the claim are preferable, not if a class action would fully achieve those goals.

[232] For example, in *Paradis Honey FC*, Justice Manson was doubtful that every class member would be able to effectively bring an individual action, should the action not move forward as a class proceeding (at para 117), including due to the financial burden of the case.

[233] I will analyze, in turn, each of the matters highlighted in Rule 334.16(2).

> (a) *Whether questions of fact or law common to the members of the class predominate over any questions affecting only individual members*

[234] The common issues must advance the claim of each Class Member and I have already concluded that they do not.

> (b) *Whether a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate proceedings*

[235] There is no evidence that any putative Class Members wish to pursue these claims on an individual basis.

(c) *Whether the class proceeding would involve claims that are or have been the subject of any other proceeding*

[236] There is no evidence that the class proceeding involves claims that are or have been the subject of any other proceeding.

(d) *Other means of resolving the claims are less practical or less efficient*

[237] Claims related to investigations or searches conducted by the RCMP can be brought through Civilian Review and Complaints Commission for the RCMP. Individuals can also make a complaint to the Privacy Commissioner, who is required to receive and investigate complaints.

[238] Conducting the preferable procedure analysis with regard to the goals of class proceedings, it seems to me that the Civilian Review and Complaints Commission offers the Class Members access to justice in a forum that is designed to deal with complaints such as those at issue in this action and that has specific experience in dealing with public complaints in relation to the RCMP.

[239] Ms. Doan submits that the Civilian Review and Complaints Commission would be ill-equipped to deal with the complaints given the systemic nature of the alleged wrongs. However, the Commission has the authority to conduct systemic investigations.

[240] Additionally, "[j]udicial economy is promoted by deferring to the expertise of a specialized tribunal that can consider the policy implications of its decision – a task that the court

is ill-equipped to undertake" (*Penney v Bell Canada*, 2010 ONSC 2801 at para 190 [*Penney*]). As the court stated in *Penney* at paragraph 190, "Behaviour modification is best accomplished, in my view, by deference to the tribunal charged with that very responsibility and one that can develop remedies tailored to the needs and the interests of the several parties in complex regulatory environment under its jurisdiction".

[241] Ms. Doan opines that the Privacy Commissioner is less efficient given the inability to issue binding orders on Canada. *Fischer* states that access to justice requires a "fair process" to resolve claims; not the specific procedural rights asserted by the plaintiff. In *Lauzon v Canada (Attorney General*), 2014 ONSC 2811 at paragraph 67, the court concluded that "a plaintiff cannot invoke the class action procedure merely by including a particular remedy in his claim. To hold otherwise would undermine the court's discretion in determining whether a class action is preferable in a given case". In *Penney* at paragraph 193, the judge noted that while "the relief available is not precisely the same, I am not convinced that any substantial injustice would be done to the proposed class by deferring to the CRTC".

(e) *the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means*

[242] Ms. Doan alleges that "despite the millions of people who are negatively impacted by the RCMP's alleged conduct, only the Plaintiff has commenced litigation to challenge this conduct". As stated above, for the overwhelming majority of Class Members who did not suffer damages, or who cannot prove their right to privacy was violated, the class proceeding does nothing to provide access to justice (*Loveless*).

[243] Based on the above, I am satisfied the class action has not been shown to be the preferable procedure to address the specific procedural and substantive access to justice concerns in this case (*Fischer* at para 38).

F. *Rule 334.16(1)(e): Appropriateness of the Class Representative*

(1) Parties' position

[244] Ms. Doan submits that she satisfies Rule 334.16(1)(e) condition as she is a Member of the Class and the Subclasses, she is generally well informed about the nature of the proposed class proceeding as a result of her review of information concerning Clearview and the Defendant and as a result of her consultations with Class Counsel, and she has proper and well-founded motivations for acting as Class Representative. She adds that (1) she has retained competent legal counsel and is capable of bearing costs that may be incurred; (2) the litigation plan provides workable and detailed methods for advancing the proceeding on behalf of the Class Members, and for informing the Class Members of this progress; (3) there is no evidence of any conflict of interest between Ms. Doan and other Class Members; and (4) Ms. Doan's agreement with Class Counsel concerning fees and disbursements is both clear and reasonable, and a summary of this agreement is on file.

[245] Ms. Doan adds that representative plaintiffs "need not have a claim typical of the class, or be the 'best' possible representative" (*Miller v Merck Frosst Canada Ltd*, 2015 BCCA 353 at para 75. See also *Sibiga c Fido Solutions Inc*, 2016 QCCA 1299 at para 108) and also adds that simply put, the standard is adequacy, not perfection.

[246] Canada alleges that Ms. Doan cannot represent the Class as: (1) she has no reasonable personal cause of action against Canada; (2) she has offered no evidence that she has gauged interest of any putative Class Member; (3) the litigation plan is not adequate for the issues or the complexity of this case; for example, proposing a "normal" discovery process is not a workable plan in this case. Most documents the Plaintiff would appear to want are in the possession of Clearview, a third party with no residence in Canada and against whom authorities have issued binding orders to destroy information concerning Canadians; and (4) Ms. Doan also provides no mechanism by which aggregate damages could be determined, nor does it seriously address that the issues raised are highly individual.

(2) Analysis

[247] Rule 334.16(1)(e) provides that there needs to be an appropriate representative plaintiff who:

> i. would fairly and adequately represent the interests of the class,
>
> ii. has prepared a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members as to how the proceeding is progressing,
>
> iii. does not have, on the common questions of law or fact, an interest that is in conflict with the interests of other class members, and
>
> iv. provides a summary of any agreements respecting fees and disbursements between the representative plaintiff or applicant and the solicitor of record.

[248] When assessing the adequacy of the proposed representative, "the court may look to the motivation of the representative, the competence of the representative's counsel, and the capacity of the representative to bear any costs that may be incurred by the representative in particular (as

opposed to by counsel or by the class members generally)" (*Dutton* at para 41. See also *Honey Paradis* at para 120). The proposed representative needs not be the best possible representative, but the Court should be satisfied that it will prosecute the interest of the class in a vigorous and capable way (*Dutton* at para 41). The representative need not be a typical member, nor the best-placed member. However, the representative plaintiff needs to be a member of the class (*Jost* at paras 103-104).

[249] At the certification stage, "the Court will not scrutinize the plan in order to determine whether it is adequate and could carry the case through to trial without being amended" (*Rae* at para 79). The jurisprudence established a list of non-exhaustive matters to be addressed in a litigation plan:

> (i) the steps that are going to be taken to identify necessary witnesses and to locate them and gather their evidence;
>
> (ii) the collection of relevant documents from members of the class as well as others;
>
> (iii) the exchange and management of documents produced by all parties;
>
> (iv) ongoing reporting to the class;
>
> (v) mechanisms for responding to inquiries from class members;
>
> (vi) whether the discovery of individual class members is likely and, if so, the intended process for conducting those discoveries;
>
> (vii) the need for experts and, if needed, how those experts are going to be identified and retained;
>
> (viii) if individual issues remain after the termination of the common issues, what plan is proposed for resolving those individual issues; and

> (ix) a plan for how damages or any other forms of relief are to be assessed or determined after the common issues have been decided.
>
> (*Buffalo FC* at para 151)

[250] At the certification stage, a litigation plan "is not to be scrutinized in great detail' because it will 'likely be amended during the course of the proceeding'" (*Airbnb* at para 147). The plan must nevertheless show that the plaintiff and their counsel have "thought the process through, having considered the complexities of the case and procedures" (*Airbnb* at para 147. See also *Rae* at paras 79, 80).

[251] Although not perfect, the plan demonstrates that Ms. Doan and her Class Counsel have "thought the process through" (*Airbnb* at para 147), I do not see any conflict of interest, and Ms. Doan provided an agreement concerning fees and disbursements.

[252] However, I agree with Canada that Ms. Doan has not demonstrated that she has a workable method of advancing the proceeding on behalf of the Class or for informing the millions of people she proposes to represent. The ability to represent a class encompasses many facets, including that they must be a member of the class and have a tenable claim; they must have a sufficient understanding of the facts and the case, and must be credible and take their obligations seriously. Here Ms. Doan has offered no facts about her motivation in bringing this case, no evidence that she has gauged the interest of any putative Class Member, or that she has engaged in the available administrative processes. Her uncertainty as to facts alleged in her affidavit, revealed in cross-examination, calls into question her autonomy from her counsel, her

credibility, and her ability to represent the millions of people on whose behalf she proposes to bring this case.

[253] In light of the above, I cannot conclude that Ms. Doan has shown some basis in fact that she is an adequate Class Representative as per Rule 334.16(1)(e).

VII. Conclusion

[254] In conclusion, I find that Ms. Doan has failed to meet any of the legal requirements set forth in Rule 334.16(1) for the certification of this class proceeding. Therefore, I will dismiss Ms. Doan's Motion for certification without leave to amend.

ORDER in T-724-20

THIS COURT ORDERS that:

1. The Motion for certification is dismissed;

2. No costs are awarded.

"Martine St-Louis"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-724-20
STYLE OF CAUSE:	HA VI DOAN v HIS MAJESTY THE KING
PLACE OF HEARING:	MONTRÉAL (QUÉBEC)
DATE OF HEARING:	SEPTEMBER 14, 2022
ORDER AND REASONS:	ST-LOUIS J.
DATED:	JULY 18, 2023

APPEARANCES:

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