Federal Court of Appeal | Cour d'appel fédérale

Date: 20250716

Docket: A-341-23

Citation: 2025 FCA 133

CORAM: **BOIVIN J.A.**
LOCKE J.A.
WALKER J.A.

BETWEEN:

HA VI DOAN

Appellant

and

CLEARVIEW AI INC.

Respondent

Heard at Montréal, Quebec, on January 29, 2025.

Judgment delivered at Ottawa, Ontario, on July 16, 2025.

REASONS FOR JUDGMENT BY: WALKER J.A.

CONCURRED IN BY: BOIVIN J.A.
LOCKE J.A.

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REASONS FOR JUDGMENT

WALKER J.A.

[1] The appellant, Ms. Doan, appeals from an order of the Federal Court in *Ha Vi Doan v. Clearview Inc.*, 2023 FC 1612 (FC Order) dismissing her motion to certify the underlying action as a class proceeding pursuant to Rule 334.16(1) of the *Federal Courts Rules*, S.O.R./98-106 (the Rules). The certification judge concluded that Ms. Doan had not established some basis in fact that there is an identifiable class of two or more persons in the proposed proceeding and, accordingly, had not satisfied Rule 334.16(1)(b) (FC Order at para. 64).

[2] Ms. Doan now appeals the FC Order. Her arguments contesting the certification judge's Rule 334.16(1)(b) conclusion raise questions of when and how a class must be identifiable and highlight the importance and intricacies of an individual's right to opt out of a class action.

I. Background

[3] Ms. Doan is a Canadian citizen, resident in the province of Quebec. She has a keen interest in photography and regularly takes self-portraits and portraits of other individuals. Ms. Doan asserts copyright and moral rights in her photographs, many of which she has posted on the internet.

[4] The respondent, Clearview AI Inc. (Clearview), is a United States-based company that operated in Canada between 2019 and July 2020. Clearview has built, and continues to build, a vast database of images using data collection programs called "web crawlers" that search public websites worldwide for photographs, their associated URLs and web page titles. Clearview then downloads, stores and indexes images that contain a face (or faces), and provides facial recognition and identification services to its clients—predominantly law enforcement and national security agencies. More simply, Clearview's technology permits clients to search its database by submitting images of a face or faces in their possession to locate similar images (or faces) culled from the public internet and indexed in the database.

[5] In the underlying action, Ms. Doan alleges that Clearview has engaged in widespread copyright infringement contrary to multiple provisions of the *Copyright Act*, R.S.C. 1985, c. C-42, and violations of moral rights, by collecting, copying and storing images of human faces

taken in Canada without the consent of the individuals who took the images or who hold copyright and/or moral rights in those images.

[6] Ms. Doan defines the Class Members of the putative class as:

a) all natural persons (natural persons who are either residents or citizens of Canada) who are the authors of the photographs collected by Clearview (Collected Photographs) and who have not assigned or licensed their copyrights in the Collected Photographs to any persons, and all natural or legal persons (legal persons constituted under the laws of Canada or one of its provinces or territories or having a place of business in Canada) to whom the authors of the Collected Photographs assigned or licensed their copyrights in the Collected Photographs; and

b) all natural persons (as defined in (a) above) who are the authors of the Collected Photographs whether or not they have assigned or licensed their copyrights in the Collected Photographs.

[7] In addition to an order certifying the class proceeding and appointing Ms. Doan as representative plaintiff, the relief sought includes declaratory and injunctive relief, removal of the Collected Photographs from the Clearview database, and damages for copyright infringement and moral rights violations.

II. The FC Order

[8] The certification judge refused to certify the proposed class action, concluding that Ms. Doan had failed to establish some basis in fact that the underlying action discloses an identifiable class of two or more persons contrary to Rule 334.16(1)(b). The certification judge found that Class Members cannot self-identify based on the class definition and Clearview itself cannot identify Class Members based on metadata in its database. She then considered alternative "query" methods for identifying Class Members suggested by Ms. Doan. Ms. Doan's proposals involved the submission by Class Members of a query or queries to Clearview for a report confirming their class membership. The certification judge found two fatal flaws in the proposed query methods (FC Order at paras. 59-60). First, Clearview does not respond to queries from Canada because it no longer carries on business here, nor does it respond to queries that require a search for third parties (e.g., where a photograph contains the image of a third party). Second, even if Clearview could or would respond to a request for a report by a potential Class Member, this process would "transform the opt-out class action scheme into an opt-in scheme, which is unacceptable" (FC Order at paras. 61-63).

III. Standard of review

[9] The usual appellate standard of review applies to decisions of a motion or certification judge: *Imperial Manufacturing Group Inc. v. Decor Grates Incorporated*, 2015 FCA 100 at paras. 14-29; *Canada v. Greenwood*, 2021 FCA 186 at para. 89 (*Greenwood*), leave to appeal to SCC refused, 39885 (March 17, 2022). Questions of fact and questions of mixed fact and law, from which a legal error cannot be extricated, are reviewable against the standard of palpable and

overriding error, and questions of law are reviewed for correctness: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235.

[10] Absent an extricable question of law, the issue of an identifiable class is a question of mixed fact and law involving an appreciation of the evidence on the certification motion. The Federal Court's evidentiary findings and the application of those findings to the requirement of an identifiable class are reviewable on the standard of the palpable and overriding error.

IV. General principles

[11] Rule 334.16(1) sets out five conditions that must be met for a proposed class proceeding in the Federal Court to be certified:

(1) the pleadings disclose a reasonable cause of action;

(2) there is an identifiable class of two or more persons;

(3) 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;

(4) a class proceeding is the preferable procedure for the just and efficient resolution of the common questions of law or fact; and

(5) there is an adequate representative plaintiff or applicant.

[12] The test for certification is conjunctive, meaning all five requirements must be satisfied before the Court will certify an action as a class proceeding: *Brink v. Canada*, 2024 FCA 43 at para. 138, leave to appeal to SCC refused, 41266 (October 10, 2024), citing *Buffalo v. Samson First Nation*, 2008 FC 1308 at para. 35, aff'd 2010 FCA 165 at para. 3. As a result, having found that Ms. Doan had not satisfied the requirement for an identifiable class (Rule 334.16(1)(b)), the certification judge did not consider the remaining conditions of Rule 334.16(1).

[13] This appeal focusses on the certification judge's application of Rule 334.16(1)(b) and I would first underline the importance to any class action of a clear definition of the class: *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46 at para. 38 (*Dutton*). The Supreme Court has characterized this requirement as critical "because it identifies the individuals entitled to notice, entitled to relief (if relief is awarded), and bound by the judgment": *Dutton* at para. 38.

[14] In addition, it has long been recognized in Canadian jurisprudence that the identifiable class must be clear at the outset of the class proceeding: *Dutton* at para. 38; *Lin v. Airbnb, Inc.*, 2019 FC 1563 at para. 92 (*Lin*). Otherwise, the provision of effective notice to class members, which typically occurs shortly after certification, is compromised. More importantly in the context of this appeal, early identification of the parameters of the class and effective notice to class members safeguard each class member's litigation autonomy via their right to opt out of the proceeding: *Sanis Health Inc. v. British Columbia*, 2024 SCC 40 at para. 68.

[15] I emphasize that the requirement of a clear, identifiable class does not mean that the representative plaintiff must establish the identity and number of Class Members at the outset of the proceeding: Rule 334.18(d); (*Sun-Rype Products Ltd. v. Archer Daniels Midland Company,*

2013 SCC 58 at para. 57 (*Sun-Rype*)) (FC Order at paras. 52-53). Rather, the evidence must demonstrate some basis in fact that two or more persons are able to determine if they are Class Members. Proof of identity occurs later in the proceeding.

[16] The "identifiable class" condition is met if the evidence supports "some basis in fact" for an objective class definition that bears a rational connection to the litigation that is not dependent on the outcome of the litigation: *Greenwood* at para. 168. Ms. Doan submits that the certification judge imposed an evidentiary burden more onerous than "some basis in fact" of an identifiable class but I do not agree.

[17] The certification judge correctly observed that the threshold for certification is low but that it is a threshold nonetheless (FC Order at paras. 31-32; *Jensen v. Samsung Electronics Co. Ltd.*, 2021 FC 1185 at para. 60, aff'd *Jensen v. Samsung Electronics Co. Ltd.*, 2023 FCA 89, leave to appeal to SCC refused, 40807 (January 11, 2024)). The certification judge also correctly based each of her findings on the question of whether there was sufficient evidence to show some basis in fact that a Class Member would be able to identify themself as a Class Member (FC Order at paras. 51, 54, 56, 64). The fact that Ms. Doan does not agree with the evidentiary findings in the FC Order does not mean that the certification judge improperly imposed an unduly onerous burden.

[18] Ms. Doan also submits that the certification judge erred in law in implicitly requiring that Class Members be identified at certification but again I do not agree. The certification judge's reasons indicate that her concern focussed on whether the evidence established some basis in fact

of a “workable method”, to use wording from Ms. Doan’s written submissions, whereby the class would be identifiable. The certification judge was fully aware of the distinction between identifiable and identified.

V. When must a class be identifiable?

[19] The ability of a class member to opt out is fundamental to the integrity of the Federal Court’s class actions scheme because it protects the class member’s right to remove themselves from the class proceeding and preserve legal rights that would otherwise be determined in the class proceeding (FC Order at para. 62, citing *Currie v. McDonald’s Restaurants of Canada Ltd.* (2005), 74 O.R. (3d) 231 (CA), at para. 28 (*Currie*)). In the context of the Ontario class actions scheme, the Ontario Court of Appeal recently characterized the right to opt out as a substantive right, recognizing the “high premium” Canadian society places on “a person’s ability to initiate and participate in litigation as an incident to personal autonomy”: *Johnson v. Ontario*, 2021 ONCA 650 at paras. 15-16.

[20] The right to opt out can only be exercised by a class member, other than through guesswork, if they have sufficient information to know whether or not they are caught within the class definition. Therefore, I find that the certification judge did not err in requiring some basis in fact that a method or process to identify Class Members must be available and viable prior to the expiry of the opt-out period. The requirement is not one of certainty. As stated in *Beaulieu v. Facebook. Inc.*, 2022 QCCA 1736 at para. 85 (*Beaulieu*), leave to appeal to SCC refused, 40620 (August 31, 2023), the description of the class, or in this case the workable method, must be

"sufficient to protect the right of members to opt out and make sufficiently enlightened decisions in this respect". The question is what information is necessary for Class Members to opt out.

[21] I would note at this juncture that there are three methods through which a class member may be identifiable in the present case. The class description may permit the person to self-identify (as in *Beaulieu*) or the defendant may possess the required information (as in *Douez v. Facebook, Inc.*, 2014 BCSC 953). In this proceeding, neither of these two methods is available based on the evidence. This appeal centres on a third method: whether there is a workable, cooperative method by which a person, in light of the class definition, could obtain sufficient information from Clearview to ascertain that they are or are not a Class Member, and if so, be in a position to exercise their right to opt out. The query method would be described in the notice to potential Class Members: *Beaulieu* at paras. 80-85.

VI. Analysis

[22] In this section, I address two issues:

(1) whether the certification judge erred in law in concluding that Ms. Doan's proposal that a Class Member could query Clearview to determine whether they are a Class Member "would transform the opt-out class action scheme into an opt-in scheme"; and

(2) whether the evidence establishes some basis in fact that Class Members are identifiable prior to the expiry of the opt-out period.

A. *The status of the proposed proceeding as an opt-out scheme*

[23] By way of introduction, the certification judge found that Ms. Doan's evidence did not show some basis in fact that any one of the three methods she proposed to identify Class Members would be effective. I consider certain of her evidentiary findings in the next section of these Reasons but one of those evidentiary findings was that Ms. Doan's proposal of a query method to enable a Class Member to confirm whether one or more of their photographs (in which they assert copyright) appears in the Clearview database is unsustainable. The certification judge also found that, even if Clearview is able to, will, or could be required to, respond to queries from Canada, the process would impermissibly transform the proposed proceeding into an opt-in scheme (FC Order at para. 61).

[24] The Federal Court's class proceeding rules clearly establish an opt-out scheme (Rules 334.17(1) f) and 334.21). An individual who does not wish to be part of a class proceeding and be bound by its results may choose to opt out of the proceeding and pursue their own recourse. The difference between an opt-out model and an opt-in model was succinctly described in *Tucci v. Peoples Trust Company*, 2020 BCCA 246 at para. 97:

> The question of whether persons coming within the class definition are automatically included in the class is one defined by legislation: typically a class proceedings regime will either adopt a model in which persons within the class definition are automatically class members, subject to opting out (the "opt out" model) or a model in which persons within the class definition do not become members of the class unless they exercise an option to do so (the "opt in" model).

[25] As currently drafted, the pleadings in the underlying action contemplate an opt-out class action scheme. If a person does nothing, they remain a Class Member assuming they later prove they are a Class Member. Similarly, an individual who is unsure whether they are or are not a Class Member and who submits a query to Clearview remains a Class Member unless they choose to opt out, again assuming they later prove they are a Class Member. In other words, persons who fall within the class definition are automatically Class Members. The fact that they may choose to confirm that status via a query to Clearview, does not, in my opinion, change the characterization of the proceeding as an opt-out scheme.

[26] The jurisprudence cited by the certification judge in the course of her analysis of this issue supports her findings regarding the importance of the right to opt out (*Currie* at para. 28) and the fact that the Federal Court will not certify an opt-in class proceeding (*Durling v. Sunrise Propane Energy Group Inc.*, 2011 ONSC 7506 (*Durling*); *Lambert v. Guidant Corporation*, 2009 CanLII 23379 (ONSC) (*Lambert*)). These cases do not suggest that a query mechanism necessarily converts a proposed class proceeding into an opt-in scheme or otherwise undermines the opt-out nature of the proceeding.

[27] In *Durling*, the class definition included "[a]ll persons who were present or owned or leased or occupied properties located" in an area of Toronto who claimed recourse after an industrial explosion in the area. Counsel for the parties agreed generally that the class action should be certified. However, one issue with certification was whether each class member should be required to register with class counsel's online registration system. A class member who failed to register within the deadline was to be barred from future involvement in the class

action. The Ontario Superior Court refused to approve the registration requirement, concluding that it would fundamentally change the structure of the action contrary to the opt-out regime contemplated by the Ontario *Class Proceedings Act*, 1992, S.O. 1992, c. 6 (CPA) (*Durling* at paras. 41-42, 54-55). Factually, the claims bar proposed in *Durling* required a person to take action to remain a class member. If they did nothing, they were excluded from the class action. The opposite is true in this case.

[28] As in *Durling*, if a class member took no action in the *Lambert* action, they were ousted from future participation in the proposed class action (*Lambert* at para. 117). At issue in the case was a proposal that class members who wanted to make claims be required to identify themselves prior to the trial of the common issues. The Ontario Superior Court rejected the proposal, as it "would, in effect, convert the opting-out procedure under the CPA into an opting-in process": *Lambert* at para. 117.

[29] The relevant analysis in the two remaining cases cited by the certification judge (*Ramdath v. George Brown College of Applied Arts and Technology*, 2010 ONSC 2019 and *Silver v. IMAX Corp.*, 2013 ONSC 1667) involved factually distinct scenarios and do not address circumstances in which a person is not required to take action to remain a class member but can confirm their class membership through positive action, as here.

[30] Clearview argues that a class definition that effectively requires a class member to take steps to obtain information regarding their status is unacceptable. I do not agree. The fact there will almost inevitably be Class Members who do not engage with the process does not result in

an opt-in process, nor does it thwart the objective of the class action regime in promoting access to justice. The Class Member remains part of the class and could, if they so wish, take steps to opt out. They remain unengaged at their own risk.

[31] Accordingly, I find that the certification judge erred in concluding that the method proposed by Ms. Doan whereby a Class Member could submit a query to Clearview to confirm their status would transform the proposed class proceeding into an opt-in scheme.

B. *The alleged errors of fact in the certification judge's evidentiary findings*

[32] I have emphasized the importance of a Class Member's right to opt out of the proposed class proceeding and have found that the query method of identifying Class Members does not transform this proceeding into an opt-in scheme. The remaining question is whether, on the evidence presented, the certification judge made one or more palpable and overriding errors in her evidentiary analysis and conclusions.

[33] The right to opt out is personal to each class member. A class member must be able to determine, based on the class definition and information available to them, whether they are or are not a class member and then decide whether or not to remain involved in the class proceeding. For this reason, two of Ms. Doan's alleged errors of fact in the certification judge's appreciation of the evidence are not persuasive. Her arguments that the evidence demonstrates (A) at least two Class Members based on photographs she submitted; and (B) that geolocation metadata in the Collected Photographs establishes a class floor of approximately 1 million instances of Canadian copyright violations, are both inconsistent with the requirement that a

Class Member must have or be able to obtain sufficient information to make an informed decision as to whether to opt out of the proceeding.

[34] Ms. Doan argues that the certification judge erred in fact because she simply accepted Clearview's statement that copyright information in the Collected Photographs is not retrievable by its web crawlers. Ms. Doan also argues that the certification judge misapprehended or overlooked evidence regarding two image identification methods Clearview uses, one of which was available to Canadians in 2020 and 2021. Ms. Doan states that the certification judge failed to recognize that Clearview could and did identify Canadians upon receipt of a query from an individual requesting their image(s) be removed from Clearview's database. Ms. Doan alleges that the certification judge also did not consider the process mandated by the US *Digital Millenium Copyright Act* (DMCA), which Ms. Doan states is available to Canadians, that permits copyright owners to upload their images, compare them to images in the database and request that Clearview remove their images from its database.

[35] Unsurprisingly, Clearview submits that the certification judge committed no palpable and overriding errors in her analysis of Ms. Doan's evidence. Clearview's submissions focus on the importance of a viable method by which Class Members are identifiable prior to the end of the opt-out period and states that Ms. Doan's assertions of factual error must be considered "in light of this cardinal principle".

[36] Clearview argues that the two query methods relied on by Ms. Doan do not enable Class Members, as currently defined, to be identified. The first process she identifies permits

individuals to ask Clearview to remove only images of themselves, and not photographs they have taken; it does not assist in identifying the authors or copyright holders of images in Clearview's database, but the class definition includes such persons. Clearview then argues that the DMCA takedown process could not be used to identify Class Members at the appropriate time, that is prior to the expiry of the opt-out period.

[37] Class Members must have or be able to obtain sufficient information to protect their right to opt out. Often, class members can self-identify (*Beaulieu*; *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57; contrast the situation in *Sun-Rype* where class members were not identifiable pre- or post- opt-out period) and in other cases the defendant can identify class members even if the work required is onerous (*Sun-Rype* at para. 62; *Lin* at para. 109). In the present case, the certification judge concluded that neither party alone could identify Class Members and Ms. Doan has not persuaded me that the certification judge made any reversible error in so concluding.

[38] What then of the availability of a query process that enables identification of Class Members during the opt-out period?

[39] In its written submissions, Clearview argues that neither query method could identify Class Members during that period but could be used to prove identity later in the proceedings, at the discovery or recovery stages. It is not clear from Clearview's submissions or from the FC Order why such method(s) could only be used later in the process to prove identity. Indeed, when questioned directly on the timing issue during the hearing before this Court, counsel to

Clearview conceded that, if a Class Member could submit a query to Clearview later in the proceeding to prove their status as a Class Member, they could, in theory, query Clearview to obtain sufficient information during the opt-out period. I acknowledge that this concession was made during the hearing and is not reflected in Clearview's written submissions. I also acknowledge that the concession was made leaving aside Clearview's jurisdictional arguments and arguments regarding reasonable causes of action (Rule 334.16(1)(a)). However, the concession is important as it suggests the possibility of a workable solution to class identification during the opt-out period.

[40] In fairness to the certification judge, she was focussed on the question of whether the proceeding would be transformed into an opt-in scheme if the class were only identifiable via a query from a Class Member and response by Clearview (rather than the more usual question of self-identification or the provision of information by the defendant). It is less than clear that the timing of a query and its viability during the opt-out period were fully argued, nor does it appear that Clearview acknowledged before the Federal Court that a query could be made during the opt-out period. In any event, the issue is not addressed in the FC Order.

[41] The fact that the query method may be available to identify Class Members during the opt-out period must be fully canvassed. The resolution of this issue may require submissions from the parties and consideration of the remaining substantive arguments raised in this appeal or not addressed by the certification judge. These arguments include: the breadth of the class definition that includes authors and holders of copyright and moral rights in the Collected Photographs and whether queries submitted to Clearview can provide information regarding

Class Members as currently defined; Ms. Doan's reliance on the presumption of copyright in section 34.1 of the *Copyright Act* (raised for the first time on appeal) which may impact the certification judge's factual findings in the FC Order; the jurisdictional limitations raised by Clearview; the scope of adequate notice of the proposed class proceeding; and the necessary duration of the opt-out period.

VII. Conclusion and disposition

[42] In summary, I find that the certification judge erred in concluding that the proposed query method to identify Class Members transforms the underlying action into an opt-in scheme. I also find that the certification judge omitted to fully examine whether or not the evidence demonstrates some basis in fact of a workable method to identify Class Members (as currently defined) before the end of the opt-out period. This omission, together with the certification judge's error regarding the opt-in issue, necessitate this Court's intervention.

[43] I would, therefore, allow Ms. Doan's appeal without costs, set aside the FC Order and return her motion for certification to the Federal Court.

[44] Ms. Doan requests that the Court certify the underlying action in reliance on subparagraph 52(b)(i) of the *Federal Courts Act*, R.S.C., 1985, c. F-7. The relevant factors in determining whether to decide the motion or send it back to the Federal Court include whether the outstanding issues are factually voluminous and complex, whether they involve oral or documentary evidence and involve the assessment of credibility, whether the result is uncertain or factually suffused, whether the parties have had the opportunity to make specific submissions

on the issues that remain to be decided, and whether the additional delay caused by sending the matter back would be contrary to the interests of justice (*Ghermezian v. Canada (National Revenue)*, 2023 FCA 183 at para. 62, leave to appeal to SCC refused, 40987 (May 16, 2024), citing, among other authorities *Sandhu Singh Hamdard Trust v. Navsun Holdings Ltd.*, 2019 FCA 295 at paras. 59-60 and *Canadian Council for Refugees v. Canada (Citizenship and Immigration)*, 2023 SCC 17 at paras. 175-178, 182).

[45] It is apparent that there are complex evidentiary and legal questions left to resolve in Ms. Doan's motion for certification, including issues identified in these reasons regarding Rule 334.16(1)(b). Further, the remaining conditions for certification in Rule 334.16(1), and the parties' submissions in relation to those conditions, have not been considered. In my view, the appropriate forum for resolution of those issues is the Federal Court and I decline Ms. Doan's request that the Court render the judgment that ought to have been made. I would also leave to the Federal Court the scheduling of what may be a lengthy hearing but encourage the hearing be scheduled as soon as feasible to minimize delay.

"Elizabeth Walker"
J.A.

"I agree.
Richard Boivin J.A."

"I agree.
George R. Locke J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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