SUPERIOR COURT

(Class actions)

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No.: 500-06-001129-218

DATE: January 25, 2024

BY THE HONOURABLE DOMINIQUE POULIN, J.S.C.

HA VI DOAN
Petitioner
v.
CLEARVIEW AI INC.
Respondent
and
ATTORNEY GENERAL DU QUÉBEC
Third party

JUDGMENT
(AUTHORIZATION FOR MODIFICATIONS AND FOR ADDUCING EVIDENCE)

OVERVIEW

[1] The Petitioner is seeking authorization to institute a class action in compensatory and punitive damages against the Respondent.

[2] The Respondent conducts activities of facial recognition services worldwide, which involve searching and collecting billions of images of people from across the Internet.

[3] The Petitioner invokes that those activities constitute mass surveillance of individuals in violation of their privacy rights.

[4] The proposed class is defined as including:

> *All natural persons, who are residents of Québec and whose facial photographs have been collected by Clearview AI Inc. since August 18, 2017 (the "Class" or the "Class Members").*

[5] The present judgment discusses the following issues:

- The Petitioner's application for being authorized to modify her originating application;
- The Respondent's application for being authorized to adduce necessary evidence;
- The determination of the proper timing to hear the Respondent's motion to dismiss for lack of jurisdiction.

CONTEXT

[6] This matter was originally introduced de *benne esse* and subsequently suspended during pending related applications before the Federal Court. It is not relevant to discuss the outcome of those litigations for the purpose of the preliminary demands.

[7] The facts which appear from the allegations of the application for authorization to institute a class action can be summarized as follows.

[8] The Respondent's activities include "scraping" images of individuals on the Internet.

[9] Scraping involves the use of multiple data collection programs " web crawlers" to scan the Internet and collect images of individuals. The range of websites scanned by the web crawlers includes social media platforms (such as Facebook, Twitter/X, LinkedIn, Instagram, Pinterest), news media, and personal, commercial and professional websites.

[10] The images are then processed and translated into a facial vector, creating a face print of each individual, based on biometric information extracted from the images.

[11] The facial vectors are stored and indexed in the Respondent's database.

[12] When a search is introduced at the request of a customer, by submitting a query photo, the Respondent is able to provide all images of the same individual which are available on the Internet. The search results provide the information on the link from the site where the images originate.

[13] The Respondent's services are provided to third party customers, including law enforcement agencies. It provided and promoted its services in Canada for a certain

period of time, until investigations were launched by the Privacy Commissioner of Canada and its counterparts in Québec and in other provinces.

[14] The Respondent suspended its services to users in Canada in March 2020, except for the RCMP, which remained a client until July 2020.

[15] In February 2021, the Privacy Commissioners issued the following recommendations:[1]

> "(i) cease offering the facial recognition services that have been the subject of this investigation to clients in Canada;
>
> (ii) cease the collection, use and disclosure of images and biometric facial arrays collected from individuals in Canada; and
>
> (iii) delete images and biometric facial arrays collected from individuals in Canada in its possession".

[16] The Respondent disagreed with the recommendations. It responded that it is not possible to conform to conditions 2 and 3:

> "It is simply not possible, merely from photographs, to identify whether the individuals in the photographs are in Canada at the time of the photograph was taken, or whether they are Canadian citizens, residents, etc."

[17] Despite that the Respondent's services are no longer provided in Canada, it continues to scrape and collect the images of Canadian individuals, which are made available to customers outside of Canada.

[18] The following order was issued by the Commission d'accès à l'information du Québec on December 14, 2021[2]:

> [TRANSLATION]
>
> [117] ORDERS Clearview to:
>
> - STOP compiling files on others in the course of operating a business in Québec;
>
> - STOP collecting images, without the consent of the persons concerned, during the operation of a business in Québec;
>
> - STOP using these images to create biometric identifiers (vectors), without the consent of the persons concerned, when operating a business in Quebec;

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1 Exhibit P-8, *Investigation report* at para 111.
2 Exhibit P-25 at para 117.

- DESTROY, within 90 days of receipt of this decision, images collected without the consent of the persons concerned in the course of carrying on a business in Québec;

- DESTROY, within 90 days of receipt of this decision, biometric identifiers (vectors) created without the consent of the persons concerned, based on the images thus collected, in the course of operating a business in Québec.

[19] This decision is stayed pending its appeal.

[20] Petitioner summarizes that her application to institute a class action is based on the following legal syllogism[3]:

a) Clearview collects (or "scrapes") on a massive scale class members' photographs and other personal information **without their consent** (para. 1.1, 3.4.3);

b) Clearview collects this information to **extract class members' biometric information** and create a "face-print" for each individual whose image is stored in its database (para. 3.4.1, 3.4.2, 3.6);

c) Clearview does this **for commercial purposes**: it sells access to its database to entities who are able to identify individuals by uploading a query photo, having Clearview create a face print for each individual in the photo, and seeing if that face print matches with the face prints in Clearview's database (para. 3.9, 3.9.1, 3.9.2);

d) The Petitioner's photographs, as well as those of her minor child, were scraped and collected by Clearview (para. 1.4);

e) Clearview's collecting, storing and use of class members' images and information, and its extraction of class members' biometric information constitute **violations of their right to privacy** and multiple provisions of Quebec law aimed at protecting same[4] (para. 1.3, 5.1, 5.2.1, 5.2.2, 5.2.3).

[21] She invokes that the Respondent contravened the following provisions of the Law:

- Sections 5, 6, 6.1, 7, 8, and Schedule 1 of the *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5 ("***PIPEDA***").

- Sections 3, 35-40, and 1457 of the *Civil Code of Québec*;

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[3] *Petitionner's Plan of Argument in Response to Clearview AI Inc.'s Application for Leave to Adduce Evidence* at para 24.

[4] *Civil Code of Québec*, the *Act respecting the protection of personal information in the private sector*, CQLR c P-39.1 ("***PPIPS***"), the *Act to Establish a Legal Framework for Information Technology*, CQLR c C-1.1 ("***QC LFIT***"), *Charter of Human Rights and Freedoms*, CQLR c C- 12 ("**Quebec Charter**"), and *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5 ("***PIPEDA***").

- Sections 3.1, 3.5, 3.7, 3.8, 4-8, 10-14, 17, 27-29, and 32-36 of the Act respecting the protection of personal information in the private sector ("**PPIPS**");

- Sections 44 and 45 of the *Act to Establish a Legal Framework for Information Technology*, ("***QC LFIT***");

- Quasi-constitutional rights protected by sections 1, 4, 5, 8, 9, 9.1, 24, and 24.1 of the Québec Charter

[22] In addition to the violations to the class members' privacy, the Petitioner claims for the deliberate and significant invasions of their private affairs, as well as distress, fear, anxiety, discomfort, concern, loss of propriety, and annoyance.

ANALYSIS

1. MODIFICATION OF THE APPLICATION FOR AUTHORIZATION

[23] The Respondent does not oppose to the Petitioner's Application for Permission to Amend.

[24] The proposed modifications aim to reformulate, update and precise allegations.

[25] The Court grants the requested authorization.

2. APPLICATION TO ADDUCE EVIDENCE

2.1 Legal principles

[26] Article 574 of the *Code of Civil Procedure* enunciates that the Court may permit the presentation of appropriate evidence at the stage of the application for authorization.

[27] The case law teaches that the evidence allowed will be limited to what is necessary, or even indispensable, for the analysis of the authorization criteria.

[28] Thus, evidence that demonstrates on its face that the essential allegations in the application for authorization are implausible, false or inaccurate or that the application for authorization is doomed to fail may be permitted.[5]

[29] The Court may also consider that evidence is necessary to clarify the factual elements essential to the application for leave and to ensure a better understanding of

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[5] *Baratto* v. *Merck Canada inc.*, 2018 QCCA 1240 at para 51; *Leventakis* v. *Amazone.com inc.*, 2020 QCCS 289 at paras 4 to 12; *Consumer Option* v. *Amex Bank of Canada*, 2006 QCCS 6290 at para 20.

the factual context of the application in order to verify the existence of an arguable case or to assist its analysis of the other criteria for authorization.[6]

[30] In assessing the appropriateness of the evidence, the judge must take into account the analysis to be undertaken at the authorization stage, without deciding on the grounds of contestation.

[31] The Supreme Court clearly defined the scope of the verification of the existence of a defendable cause of action in *L'Oratoire Saint-Joseph du Mont-Royal* v. *J.J.*[7] It teaches that the authorization judge must avoid ruling on the merits of the class action in light of the alleged facts:

> [55] Je n'en dirai pas davantage en l'espèce sur ces notions complexes d'« organisations » ou de « corporations » religieuses, d'« église » ou de « congrégation ». Certes, le tribunal *peut* trancher une pure question de droit au stade de l'autorisation si le sort de l'action collective projetée en dépend; dans une certaine mesure, il *doit* aussi nécessairement interpréter la loi afin de déterminer si l'action collective projetée est « frivole » ou « manifestement non fondée » en droit : *Carrier*, par. 37; *Trudel c. Banque Toronto-Dominion*, 2007 QCCA 413, par. 3 (CanLII); *Fortier c. Meubles Léon ltée*, 2014 QCCA 195, par. 89-91 (CanLII); *Toure c. Brault & Martineau inc.*, 2014 QCCA 1577, par.38 (CanLII); *Lambert c. Whirlpool Canada, l.p.*, 2015 QCCA 433, par. 12 (CanLII); *Groupe d'action d'investisseurs dans Biosyntech c. Tsang*, 2016 QCCA 1923, par. 33 (CanLII); Finn (2016), p. 170. Toutefois, outre ces situations, il n'y a en principe pas lieu pour le tribunal, au stade de l'autorisation, de « se prononcer sur le bien-fondé en droit des conclusions en regard des faits allégués » : *Comité régional des usagers des transports en commun de Québec c. Commission des transports de la Communauté urbaine de Québec*, 1981 CanLII 19 (CSC), [1981] 1 R.C.S. 424, p. 429; *Nadon c. Anjou (Ville)*, 1994 CanLII 5900 (QC CA), [1994] R.J.Q. 1823 (C.A.), p. 1827-1828; *Infineon*, par. 60. [...]
>
> (Emphasis added)

[32] Nor can the authorizing judge be expected to substitute himself to the trial judge and to assess the probative value of the evidence before him.[8]

[33] It follows that the appropriate evidence permitted at the authorization stage must not be susceptible of being challenged as to its scope or probative value. Moreover, the evidence should not open a debate as to its sufficiency.[9]

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6 *Lachaine* v. *Air Transat AT inc., 2021 QCCS 256* at paras 57 and 58; *Lord* v. *Netflix International,* 2018 QCCS 1275 at paras 27 and 28.

7 *Saint Joseph's Oratory of Mount Royal* v. *J.J., 2019* SCC 35, [2019] 2 SCR 831 at para 55.

8 *Automobile Protection Association (APA)* v. *Bank of Montreal,* 2021 QCCA 676 at para 55; *Godin v. Canadiens Arena Inc.*, 2020 QCCA 1291 at para 54.; *Pilon v. Amex Bank of Canada,* 2021 QCCA 414 at para 12.

9 *Desjardins Financial Services Firm Inc.* c. *Asselin,* 2020 SCC 30 at para 72.

[34] The following quote from the Court of Appeal decision in *Durand* v. *Subway Franchise Systems of Canada* summarizes those principles:[10]

> [51] Cette preuve doit en effet être essentielle, indispensable et limitée à ce qui permet de démontrer *sans conteste* que les faits allégués sont invraisemblables ou faux. Elle ne doit pas avoir pour effet de forcer la tenue d'un débat contradictoire sur une question de fond ou, dit autrement, entraîner la tenue d'un procès avant le procès.
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> [52] Si la preuve déposée est susceptible d'être éventuellement contredite par le requérant, le juge de l'autorisation doit faire preuve de prudence et ne pas tenir pour acquis qu'elle est vraie. Il doit se rappeler qu'il ne doit tenir pour avérés que les faits allégués par le requérant et non pas ceux allégués par l'intimé, même lorsque la preuve produite par ce dernier démontre *prima facie* l'existence de ces faits.
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> [53] À ce stade, le fardeau du requérant en étant un de logique (également qualifié de fardeau de démonstration) et non de preuve, il n'a d'ailleurs pas à offrir une preuve prépondérante de ce qu'il avance, mais bien, tout au plus, une « certaine preuve » et n'a pas l'obligation de contester la preuve que l'intimé dépose, ni d'y répondre. D'ailleurs, il n'est souvent pas en mesure de le faire puisqu'il n'a pas toujours toute la preuve en main, une bonne partie de celle-ci pouvant être en possession de l'intimé.
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> [54] Bref, la preuve déposée par un intimé au soutien de sa contestation ne change pas le rôle du juge de l'autorisation qui peut, certes, trancher une pure question de droit et interpréter la loi pour déterminer si l'action collective projetée est frivole, mais qui ne peut, pour ce faire, apprécier la preuve comme s'il y avait eu un débat contradictoire ou encore présumer vraie celle déposée par l'intimé alors qu'elle est contestée ou simplement contestable.
>
> (References omitted; emphasis added)

[35] Essentially, *[t]he purpose is to avoid a trial at the certification stage, which is intended only to dismiss applications that are frivolous or manifestly unfounded in law*[11] (translation by the Court).

[36] It is worth emphasizing that the judge must exercise his discretion with prudence and moderation and that this discretion is exercised in accordance with the rules of proportionality[12].

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10 *Durand* v. *Subway Franchise Systems of Canada*, 2020 QCCA 1647 at paras 51 to 54.

11 *Automobile Protection Association (APA)* v. *Bank of Montreal*, supra note 8, at para 62.

12 *Baratto* v. *Merck Canada inc.*, 2018 QCCA 1240 at para 51; *Leventakis* v. *Amazone.com inc.*, 2020 QCCS 28 at paras 4 to 12; *Option Consommateurs* v. *Amex Bank of Canada*, 2006 QCCS 6290 at para 20.

2.2 Discussion

[37] The Respondent's application to adduce evidence is divided in three categories and it is indicated to discuss the Respondent's request accordingly.

2.2.1 Evidence about the Respondent's operations

[38] The Respondent seeks to provide the Court with factual clarifications about how it runs its business, in order to allow the Court to better understand the allegations that must be considered at the authorization.

[39] More particularly, it requests to be permitted to introduce an Affidavit signed by its general counsel which describes the scope of its operations, information on the operation of its web crawlers and a description of how its facial recognition search engine works.

[40] This affidavit was introduced in one of the Federal Court files and the Petioner conducted a cross-examination of the Affiant, which was also filed in the Federal Court record. The Respondent wishes to file the transcripts in the interest of completeness and transparency.

[41] The Respondent alleges that the affidavit and transcript *complete the allegations in the Modified Application and provide much-needed background and context about Clearview's activities, which in turn will allow the Court to make an informed decision on the Petitioner's authorization application.* (The Court emphasizes)

[42] The particulars advanced by the Respondent regarding the need for the adducing of the evidence are the following:

- "The Modified Originating Application gives the impression that Clearview's web crawlers can craw *any* web site, whereas in fact they only crawl and download images from websites that are publicly accessible (i.e., websites that do not restrict access through a login/password mechanism or through a piece of code restricting search engines' access) – a cardinal element of Clearview's activities and an uncontradicted fact".

  -The Modified Originating Application claims that Clearview downloads ("scrapes") and stores a vast and unspecified array of personal information (paras. 3.4, 3.4.5-3.4.6). In fact, Clearview only stores and indexes "the image of the face, the URL of the web page from which that image was derived, and the title of that webpage" and no other content.

  -The Modified Originating Application misleadingly suggests that Clearview's service "identifies" or "misidentifies" individuals, when Clearview has always been clear that its search engine does not (and cannot) identify anyone.

  -The Modified Originating Application alarmingly claims that Clearview allows its users to obtain "historical or archived personal information" or "personal

> information an individual may have sought to protect via privacy settings" (para. 3.9.3), without explaining what this entails – namely, that (1) all Clearview stores in its database is an image and a link, and (2) in certain circumstances, Clearview simply provides links to websites that are no longer accessible or that no longer exist and therefore lead the user to an expired link that cannot be displayed.
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> -The Modified Originating Application liberally uses the invented term "face print" and equates it with the term "vector", without ever explaining what that means, despite this being relevant to the Court's understanding of how Clearview's search engine works. Mr. Mulcaire explained what vectors are in cross-examination.

[43] The Respondent does not advance that this proposed evidence would be essential to contradict the Petitioner's principal allegations and demonstrate how her application should fail. It does not convince that this proposed evidence would be necessary to enable the Court to decide on the applicable criteria at the stage of authorization.

[44] The evidence is peripheric and, to employ the Respondent's words, it completes the allegations and provides background and context.

[45] Prudence is warranted given the nature of the allegations contained in the Affidavit.

[46] Indeed, the affidavit does not serve to introduce and attest as to the authenticity of documentary evidence or pictures or other material evidence which would need to be introduced thru testimony and which would clearly contradict allegations of the Application.[13]

[47] The affidavit serves to establish the facts that the Respondent's general counsel alleges. Those facts are not substantiated and they would need to be demonstrated by factual and technical evidence, introduced by witnesses with first-hand knowledge, if the case proceeded on the merits.

[48] Mere assertions at the present stage, without corroborating exhibits or technical support, cannot suffice to contradict allegations which are deemed to be true.

[49] Furthermore, even with substantiating documents and technical support, this evidence would need to be subjected to an assessment of its probative value.

[50] Allowing this evidence would place the Court in a situation where it would need to decide over a contradictory debate before the authorization, which the authorization process means to avoid.

[51] This evidence is not allowed.

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[13] Certain documents are mentionned in the *Affidavit of Jack Mulcaire dated February 25, 2022*, but they are not the object of the application to adduce evidence.

2.2.2 Extracts of evidence given by the Petitioner in her proceedings before the Federal Court

[52] The Petitionner introduced affidavits in support of her applications before the Federal Court. She was also cross-examined by the Respondent on many occasions.

[53] The Respondent argues that this evidence is necessary *to clarify incomplete or even entirely inaccurate allegations concerning Clearview's activities and the impact of those activities on the Petitioner herself, and thus fill in the gaps in the Modified Application about the factual elements essential to the analysis of the cause of action based on alleged invasion of class members' privacy.*

[54] The rules before the Superior Court differ from the rules in force before the Federal Court.

[55] The legislator abolished the requirement of affidavit evidence in 2003 to circumscribe the authorization stage to filter out only the most frivolous and unsubstantiated claims and to avoid debating the merits of the matter.[14]

[56] The Petitionner did not need to file a sworn declaration in support of her application. The facts that she alleges are taken as proven.

[57] The Court is of the opinion that the evidence filed before the Federal Court should not be allowed, unless it demonstrates that the Petitionner is misleading the Court and advancing false allegations to support her application.

[58] The detailed evidence which the Respondent wishes to introduce is described as follows:

> i.Despite making various allegations about Clearview's operations and services in the Modified Application (paragraphs 3.4-3.4.4, 3.6-3.6.2, 3.8- 9.3, 3.10.5-3.10.8, and 4.6), the Petitioner has admitted that she has never worked for Clearview, has never used Clearview as a service, does not know what Clearview has in its database, and cannot identify to whom Clearview has provided services besides the RCMP;
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> ii. With respect to the allegations that Clearview violated the Petitioner's privacy (paragraphs 4.3.4, 4.4, and 4.4.4-4.6) by scraping photographs of her that are "not in the public domain", the Petitioner has admitted that all photographs of her that appear in Exhibit P-8 are available on publicly accessible websites;
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> iii. With respect to the allegations that Clearview violated the Petitioner's privacy by scraping her photographs of her that are "not in the public domain" (paragraphs 4.3.4, 4.4, and 4.4.4-4.6), the Petitioner has further admitted that she has implicitly consented to search engines accessing and scraping her website and social media

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[14] *Sibiga* c. *Fido Solutions inc.*, 2016 QCCA 1299.

pages as well as the photographs found there (and indeed, she has paid Google to optimize the appearance of her website in its search results); and

iv. With respect to the allegations that Clearview violated the Petitioner's privacy by disclosing photographs of her to its clients (paragraphs 4.6 f) and 4.22-4.24), the Petitioner has admitted that she does not know whether any photos of her that appear online have ever shown up in a Clearview search result of any of Clearview's clients

[59] The Petitionner's cause of action can be summarized as follows from her allegations:

- She considers her biometric information as being highly sensitive information.
- She uses Internet and platforms such as Facebook and Instagram to communicate with others and upload photos of herself and of her minor child.
- Some of her personal information appearing on the Internet was provided by her, other information was provided by others.
- She expects that others will respect her privacy and her right to control the use of her image.
- She expects that the information shared in these virtual spaces will be used solely for the purpose for which she has shared it; to her, sharing information does not make her personal information public or part of the public domain.
- She never consented that the Respondent process her photographs to create new personal information concerning her and her minor child, this without her knowledge or consent.
- She claims her personal information was scraped and used by the Respondent to create biometric information retained, used and/or disclosed to others and that this violated her expectation of privacy.
- She alleges that no Class Member can, on their own, determine whether their Personal Information was scraped and used by Clearview or viewed by Clearview's users.

[60] The Court is of the view that the evidence which the Respondent is asking to adduce does not contradict the Petitioner's allegations. The evidence is relevant to arguments which the Respondet might wish to raise in defense to an eventual class action, but it does not contradict the cause of action that is invoked by the Petitioner in her application.

[61] Furthermore, allowing the affidavits and cross-examinations would go against the rules outlining the process of certification and the Court sees no need and no reason to grant this request.

2.2.3 The Petitioner's statement of claim before the Federal Court in file T-724-20

[62] The Respondent invokes that although the Petitioner has filed in support of her application the proceedings and decision of the Federal Court in one matter, she neglected to produce the proceedings and decision rendered in file T-724-20.

[63] The Respondent invokes that those proceedings and decisions have direct bearing on the plaintiff's ability to establish an appearance of rights with respect to some of the allegations and claims in the current proceeding.

[64] The Respondent asks that the Petitioner's *Re-Re-Amended Statement of Claim* be adduced in order to demonstrate that the RCMP Class Action involved the same proposed representative plaintiff, largely the same facts, and largely the same allegations. The Federal Court found that *none* of the criteria for certification were met. That decision was not appealed.

[65] Since the Respondent wishes to argue that the Federal court's decision ruled on the falsity of the Petitioner's allegations, the filing of the statement of claim appears necessary for an adequate understanding of the decision.

[66] The Court will allow the filing of the Petitioner's *Re-Re-Amended Statement of Claim in Federal Court file* T-724-20.

3. MANAGEMENT OF DEBATE ON APPLICATION TO DISMISS FOR LACK OF JURISDICTION

[67] The respondent contests this Court's jurisdiction over the proposed class action. The Respondent's arguments can be summarized as follows.

- It is a foreign Respondent that is not domiciled in Quebec, does not have a place of business in Quebec, and does not carry on activities within the province.

- All the acts that would allegedly constitute the faults it is accused of having committed towards the Petitioner would have occurred outside of Quebec. The scraping of photographs from various websites did not occur in the province. It did not provide information to its clients from within Quebec.

- As regards the application of 3148 (3) CCQ, in cases where the location of an alleged injury is necessarily coextensive with the physical location of the plaintiff, the bare fact of injury occurring in a province – without anything more – cannot

create the real and substantial connection that is constitutionally required for a court of any province to assume territorial jurisdiction over a dispute. A constitutional interpretation of article 3148(3) CCQ requires reading this provision down to exclude the possibility of recognizing jurisdiction where the only damage alleged is necessarily coextensive with the plaintiff's physical location. In this case, the moral damages allegedly suffered are necessarily and only connected to the domicile of the purported class members.

- Alternatively, if a constitutional reading-down is impossible, the part of article 3148(3) C.C.Q that provides that injury suffered in the province of Quebec is sufficient to ground jurisdiction must be declared ultra vires Quebec's jurisdiction over the administration of justice in the province (s. 92(14) of the Constitution Act, 1867). 12.

[68] The issue before the Court at the present stage is to determine at which time the motion to dismiss should be debated, given that the Court's jurisdiction is at issue.

[69] The jurisprudence of the Supreme Court and of the Court of Appeal confirms that a declinatory exception founded on arguments contesting the jurisdiction *ratione loci* of the Court can suitably be debated at the hearing on the request for certification.[15]

[70] As the Supreme Court explains in *Infineon*, the judgment rendered at the stage of certification will determine, on the basis of the allegations, whether it appears that the Court is properly seized of the matter. The judgment is only interlocutory and the issue may be revisited on the merits in light of the evidence:[16]

> [42] According to a well-established jurisprudence of the Quebec courts, challenges to Quebec's jurisdiction can properly be made and dealt with at the outset of a proceeding for authorization of a class action. The judgment rendered at this stage will determine, on the basis of the allegations, whether the matter appears to be properly before the court (see *Thompson v. Masson*, 1992 CanLII 3662 (QC CA), [1993] R.J.Q. 69 (C.A.)). However, this does not mean that a judgment dismissing a jurisdictional challenge at the authorization stage ends the debate over the territorial jurisdiction of the Quebec courts. This issue could be raised again later, because the judgment rendered at this stage is only an interlocutory decision (art. 1010 of the *C.C.P.*). The court may subsequently reconsider the issue in light of all the evidence, and decline jurisdiction, at the trial on the merits (*Thompson*, at p. 73).

[71] The determination of the issue of jurisdiction made at the time of certification is based on the facts as they are alleged[17].

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15 *Infineon Technologies AG . Option consommateurs*, 2013 CSC 59, [2013] 3 RCS 600, (***"Infineon"***) at paras 42 and 43; *Watch Tower Bible and Tract Society of Pennsylvania* c. *A*, 2020 QCCA 1701, (***"Watch Tower Bible"***).

16 *Infineon*, *supra* note 15 at para 42.

17 *Id.* at para 43; *Watch Tower Bible supra* note 15 at para 14.

[72] However, the alternative constitutional argument raised regarding the validity of 3148 (3) CCQ cannot be determined on such basis, outside of complete factual and legislative contexts.

[73] The Superior Court decided on many occasions to defer to the merit of the case constitutional issues debating the validity of statutory provisions founding the right of action.[18]

[74] But no decision was rendered in a case like the present one, where the constitutional issue which is raised has an impact on the jurisdiction of the Court.

[75] The Court believes that deferral is warranted, as for any other constitutional issues necessitating an analysis in light of factual background.

[76] As the Supreme Court stated in *Kitkatla Band* v. *British Columbia*,[19] *constitutional questions should not be discussed in a factual vacuum. Even in a division of powers case, rights must be asserted and their factual underpinnings demonstrated.*

[77] Only exceptional cases will allow deciding a constitutional question as a simple question of law outside of extrinsic evidence.[20]

[78] Furthermore, the Court should avoid deciding of a constitutional issue if it is not necessary.[21]

[79] The constitutional issue raised by the Respondent is raised alternatively to other arguments which might not be definitely decided until a decision is rendered on the merit. The constitutional issue needs to be adressed only if necessary and if so, in light of the facts of the matter and the legislative factual background.

[80] The stage of certification is not appropriate to hold such debate.

[81] The Court will hence consider, for the purpose of deciding on the certification issues, that article 3148 (3) C.C.Q. benefits from a presumption of validity.[22]

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18 *Maison des femmes sourdes de Montréal* c. *Communauté des soeurs de Charité de la Providence*, 2023 QCCS 4647 (CanLII) at para 21-23; *Coalition contre le bruit* c. *Shawinigan (Ville de)*, 2012 QCCS 4142 at paras 111 to 116; *Union des consommateurs* c. *Air Canada*, 2011 QCCS 5083 at paras 36 and 43.

19 *Kitkatla Band* v. *British Columbia (Minister of Small Business, Tourism and Culture)*, 2002 SCC 31 (CanLII), [2002] 2 SCR 146, (**"*Kitkatla Band v. British Columbia*"**) at para 46.

20 *Danson* v. *Ontario (Attorney General)*, 1990 CanLII 93 (SCC), [1990] 2 RCS 1086 at 1101.

21 *Phillips* v. *Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*, 1995 CanLII 86 (SCC), [1995] 2 RCS 97 at paras 6-7; *Coalition contre le bruit* c. *Shawinigan (Ville de)*, 2012 QCCS 4142 at para 113; *Restaurants Mcdonald du Canada Ltée* c. *Sainte-Foy (Ville)*, 2003 CanLII 47979 (QC CA) at paras 52 and 53.

22 *Union des consommateurs* c. *Air Canada*, *supra* note 18 at paras 25 and 26.

[82] In conclusion, the motion to dismiss will be heard during the hearing on certification, except for the constitutional issue, which will be deferred to the merit of the case.

FOR THESE REASONS, THE COURT:

[83] **ALLOWS** the Petitioner to amend the *Application for Authorization to Institute a Class Action and to Obtain the Status of Representative*, as set forth in the *Modified Application for Authorization to Institute a Class Action and to Obtain the Status of Representative* dated September 14, 2023, Exhibit R-1;

[84] **AUTHORIZES** the Respondent, Clearview AI Inc., to file the Petionner's *Re-Re-Amended Statement of Claim in Federal Court file* T-724-20.

[85] **DECLARES** that the motion to dismiss will be presented at the certification hearing, except for the alternate argument contesting the validity of 3148 (3) CCQ, which is deferred to the merit.

[86] **THE WHOLE** each party paying its costs.

DOMINIQUE POULIN, J.S.C.

Me Lev Alexeev
Me William Colish
Me Molly Krishtalka
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Hearing date: December 19, 2023