Federal Court of Appeal File No.: A-341-23

Federal Court File No.: T-713-20

FEDERAL COURT OF APPEAL

PROPOSED CLASS PROCEEDING

BETWEEN:

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COUR D'APPEL FÉDÉRALE
FEDERAL COURT OF APPEAL
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P   DEC 1 1 2023   L
O           E
S           D
É   AHMED LAGRANI
MONTRÉAL, QC        |
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Appellant

and

Clearview AI Inc.

Respondent

NOTICE OF APPEAL

TO THE RESPONDENT:

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the appellant. The relief claimed by the appellant appears below.

THIS APPEAL will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court directs otherwise, the place of hearing will be as requested by the appellant. The appellant requests that this appeal be heard at Montréal.

IF YOU WISH TO OPPOSE THIS APPEAL, to receive notice of any step in the appeal or to be served with any documents in the appeal, you or a solicitor acting for you must prepare a notice of appearance in Form 341A prescribed by the *Federal Courts Rules* and serve it on the appellant's solicitor or, if the appellant is self-represented, on the appellant, WITHIN 10 DAYS after being served with this notice of appeal.

IF YOU INTEND TO SEEK A DIFFERENT DISPOSITION of the order appealed from, you must serve and file a notice of cross-appeal in Form 341B

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prescribed by the *Federal Courts Rules* instead of serving and filing a notice of appearance.

Copies of the *Federal Courts Rules*, information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone: 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPEAL, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

Date: DEC 11 2023

Issued by: _____

AHMED LAGRANI
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TO: **THE CHIEF ADMINISTRATOR**
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THE APPELLANT APPEALS to the Federal Court of Appeal from the order of Madam Justice Martine St-Louis of the Federal Court dated November 30, 2023 (the "**Order**"), by which she denied the Appellant's *Motion to Certify the Proceeding as a Class Proceeding* as amended (the "**Certification Motion**").

THE APPELLANT ASKS that this Court:

 a) Allow the appeal and set aside the Order;

 b) Render the judgment that Justice St-Louis ought to have rendered, namely:

  i) Grant the Certification Motion;

  ii) Certify this proceeding as a class proceeding on the terms proposed by the Appellant; and

 c) Grant such further and other relief as counsel may advise and/or this Court considers fair and appropriate.

THE GROUNDS OF APPEAL are as follows:

A. Overview

2. In the underlying proceeding, Appellant alleges that the Respondent collected, stored and used for commercial purposes billions of photographs containing human faces for its facial recognition tool, the whole in violation of Canadian copyright and moral rights protections.

3. The Certification Motion sought permission for the underlying action to be certified to proceed as a class proceeding on behalf of Canadian rightsholders against Clearview AI Inc. (the "**Respondent**") for copyright and moral rights violations.

4. Respondent admitted in its pleadings that Appellant's Certification Motion disclosed a cause of action for copyright infringements.

5. The Respondent is a private corporation that provides facial recognition and identification services to various private and public entities around the world ("**Clearview Clients**").

6. Clearview Clients are able to upload a photograph containing a human face (the "**Query Photo**") and initiate a search within the Respondent's database in connection with that Query Photo. A Clearview Client then receives a search report containing 1) a reproduction of all facial photographs within the Respondent's database deemed by the Respondent's facial recognition technology to match the Query Photo and 2) the related information accompanying these photographs, such as information from social media sites or other websites that are connected to the individual(s) appearing in the reproduced facial photographs.

7. To provide these services, the Respondent collects, stores in its database, reproduces, and processes facial photographs and related information sourced from the Internet. The Respondent retains in its database all collected facial photographs and related information, even after the photographs in question have been taken down from the Internet, and these photographs and related information may continue to subsequently appear in search results of the Respondent's database.

8. By her proposed class proceeding, the Appellant seeks to hold the Respondent accountable for the mass copyright and moral rights infringements resulting from the Respondent's unauthorized collection, possession, reproduction, use, distribution, rental, sale, and offering for rent and sale of facial photographs via the Respondent's database and facial recognition tool.

9.   The Appellant's Certification Motion was brought forward on behalf of:

a)   All natural persons, as defined below, who are the authors of the photographs collected by Clearview (the "**Collected Photographs**") and who have not assigned or licensed their copyrights in the Collected Photographs to any persons, and all natural or legal persons, as defined below, to whom the authors of the Collected Photographs assigned or licensed their copyrights in the Collected Photographs (the "**Copyright Infringement Class**" or the "**Copyright Infringement Class Members**"); and

b)   All natural persons, as defined below, who are the authors of the Collected Photographs whether or not they have assigned or licensed their copyrights in the Collected Photographs (the "**Moral Rights Class**" or the "**Moral Rights Class Members**") (together with the Copyright Infringement Class, the "**Class**" or "**Class Members**");

"Natural persons" mean natural persons who are either residents or citizens of Canada.

"Legal persons" mean legal persons constituted under the laws of Canada or one of its provinces or territories or having a place of business in Canada.

10.   In support of the Certification Motion, the Appellant filed proposed common questions of law and/or fact, a proposed litigation plan, the agreement respecting fees and disbursements between her and class counsel, evidence, memoranda of fact and law, and authorities.

11.   Adjudicating the Certification Motion, Justice St-Louis:

a)   Concluded that the Appellant had failed to establish some basis in fact that there is an identifiable class of two or more

persons pursuant to Rule 334.16(1)(b), and thus that the Certification Motion could not be granted;

b) Did not engage with, adjudicate, or otherwise address the remaining criteria governing the certification of the proceeding as a class proceeding pursuant to Rule 334.16; and

c) Denied the Certification Motion.

B.   The Grounds of Appeal

12.   Justice St-Louis erred in law and in principle in failing to adjudicate any of the certification criteria under Rule 334.16 in accordance with the applicable factors and caselaw.

13.   Justice St-Louis erred in principle and in law by misdirecting her certification inquiry under Rule 334.16. In particular, she erred in:

a) Failing to conduct her inquiry based on the correct standard and by imposing on the Appellant an undue burden to meet a higher standard, such as by:

   i) Bringing external and improper considerations to bear on her adjudication of the identifiable class criterion;

   ii) Failing to recognize the Federal Court's powers and duties to manage various practical aspects of a class proceeding;

b) Finding that the proposed process of obtaining information from the Respondent to identify putative class members would transform the opt-out class action scheme into an opt-in scheme; and

c) Framing the Respondent's position as a contestation of all certification criteria, whereas in fact the Respondent admitted in its submissions that the Appellant had adequately pleaded

a cause of action in direct copyright infringement for the illegal reproduction of her work and those of the Copyright Infringement Class.

14. Justice St-Louis erred in law, mixed fact and law, and in principle by finding that there is not some basis in fact that there is an identifiable class of two or more persons. In particular, she erred by:

a)   Failing to consider relevant evidence establishing some basis in fact that two or more persons are identifiable as Class Members and that the putative Class and the putative Class Members can be objectively established with the assistance of information held by putative Class Members, information held by the Respondent concerning individual Collected Photographs in its database, and statistical information;

b)   Relying on the opinion evidence given by a lay witness with no relevant technical training or expertise to make multiple findings of fact;

c)   Relying on the Appellant's lack of an exact and comprehensive understanding of the intricacies of technical aspects of image files, search engines, and the Respondent's internal and confidential technical and technological processes as evidence of an insufficient basis in fact establishing an identifiable class;

d)   Holding that the identifiable class criterion requires that the Respondent be able to identify the Class Members and that the Collected Photographs contain both geolocation and copyright data;

e)   Refusing to consider the role of statistical data and analyses in fulfilling the identifiable class criterion; and

f) Refusing to draw logical and direct factual inferences based on the pleadings and the evidence adduced.

15. Justice St-Louis erred in law by failing to provide adequate reasons for the Order and thus failing to provide the parties and the public with proper justification for the Order.

16. Justice St-Louis erred in failing to adjudicate the remaining aspects of Rule 334.16(1)(b) despite the extensive pleadings, evidence and authorities submitted on this criterion, as these pleadings, evidence and authorities establish the existence of an identifiable class of two or more persons.

17. Justice St-Louis erred in failing to adjudicate the other criteria governing certification of a proposed class action under Rule 334.16 despite the extensive pleadings, evidence and authorities submitted on these criteria, as these pleadings, evidence and authorities establish that:

a) The causes of action set out in the Appellant's pleadings constitute reasonable causes of action;

b) The claims of the Class Members raise common questions of fact or law;

c) The proposed class proceeding is the preferable procedure for the just and efficient resolution of the common questions of law or fact; and

d) The Appellant fulfills the requirements to act as a representative plaintiff on behalf of the Class and the sub-classes.

18. Such further and other grounds as counsel may advise and this Honourable Court may permit.

19. Pursuant to s. 52(b)(i) of the *Federal Courts Act*, the Federal Court of Appeal has the power to give the judgment that Justice St-Louis should
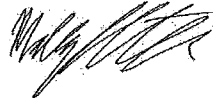
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have given, namely the certification of this proceeding as a class proceeding on the terms proposed by the Appellant.

20. The Appellant thus asks this Honourable Court to certify this proceeding as a class proceeding on the terms proposed by the Appellant.

21. The following legislative provisions will be relied on at the hearing of the appeal:

a) *Copyright Act*, RSC 1985, c. C-42;

b) *Interpretation Act*, RSC 1985, c.I-21;

c) *Federal Courts Act*, RSC 1985, c. F-7;

d) *Federal Courts Rules*, SOR 98/106; and

e) Such further and other legislative provisions as counsel may advise and/or this Honourable Court may permit.

Respectfully submitted on: December 11, 2023

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FEDERAL COURT OF APPEAL

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Appellant

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Respondent

NOTICE OF APPEAL

ORIGINAL

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