No. S-220204
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

CLEARVIEW AI INC.

Petitioner

AND:

INFORMATION AND PRIVACY COMMISSIONER FOR BRITISH COLUMBIA

Respondent

PETITION TO THE COURT

ON NOTICE TO:

Information and Privacy Commissioner for British Columbia
4th Floor, 947 Fort Street
Victoria, BC V8V 3K3

Attorney General of British Columbia
7th Floor, 1001 Douglas Street
Victoria, British Columbia V6X 2CS

This proceeding is brought for the relief set out in Part 1 below by

☒ the person(s) named as petitioner(s) in the style of proceedings above.

If you intend to respond to this petition, you or your lawyer must

(a) file a Response to Petition in Form 67 in the above-named registry of this Court within the time for Response to Petition described below, and

(b) serve on the Petitioner

(i) 2 copies of the filed Response to Petition, and

(ii) 2 copies of each filed Affidavit on which you intend to rely at the hearing.

Orders, including Orders granting the relief claimed, may be made against you, without any further notice to you, if you fail to file the Response to Petition within the time for response.

Time for Response to Petition

A Response to Petition must be filed and served on the Petitioner,

(a) if you were served with the petition anywhere in Canada, within 21 days after that service,

(b) if you were served with the petition anywhere in the United States of America, within 35 days after that service,

(c) if you were served with the petition anywhere else, within 49 days after that service, or

(d) if the time for response has been set by Order of the Court, within that time.

(1)	The address of the registry is:	800 Smithe Street Vancouver, BC V6Z 2E3
(2)	The ADDRESS FOR SERVICE of the petitioner is: Fax number address for service (if any) of the petitioner: Email address for service of the petitioner:	**McEwan Cooper Dennis** 900 – 980 Howe Street Vancouver, BC V6Z 0C8 778.300.9393 kmcewan@mcewanpartners.com ssodhi@mcewanpartners.com
(3)	The name and office of the petitioner's lawyer is	**McEwan Cooper Dennis** 900 – 980 Howe Street Vancouver, BC V6Z 0C8 **Attn: J. Kenneth McEwan, Q.C. / Saheli Sodhi**

CLAIM OF THE PETITIONER

Part 1: ORDER(S) SOUGHT

1. A declaration that Order P21-08 of the Information and Privacy Commissioner for British Columbia dated December 14, 2021 and indexed as 2021 BCIPC 73 (the "**Decision**") is unreasonable.

2. A declaration that sections 11, 14, and 17 of the *Personal Information Protection Act*, S.B.C. c. 63 unjustifiably infringe section 2(b) of the *Canadian Charter of Rights and Freedoms, Part I of the Constitution Act 1982, being Schedule B to the Canada Act 1882 (UK), 1982, c. 11.*

3. An order quashing and setting aside the Decision.

4. Costs.

5. Such further and other relief as this Honourable Court may deem just.

Part 2: FACTUAL BASIS

Background

1. Clearview AI Inc. is a United States-based company that provides its users with a facial recognition search engine which compares user-provided images of faces to a database of images indexed from public web pages. Clearview created software that enables a user to request a search of its database for facial matches. It provides that software to law enforcement and national security agencies with the aim of supporting these agencies in their mission to identify victims and perpetrators of crimes.

2. While Clearview makes its services available to government and law enforcement agencies, its service is not available for use by any agencies in Canada.

3. From time to time, Clearview has also granted access to its software to prospective investors, government officials, or other strategic partners to enable them to test the efficiency of the technology. However, Clearview no longer creates accounts for this purpose, and all current users are composed of Clearview employees with a need to carry out their employment tasks, law enforcement or national security personnel, or technology integrators that are authorized to only sell Clearview products to law enforcement agencies.

4. Clearview has never broadly serviced law enforcement agencies in Canada. Its only paying Canadian client was the Royal Canadian Mounted Police. In the past, Clearview also provided trial accounts to Canadian users but ceased to do so as of July 2020.

5. In February 2020, the Information and Privacy Commissioner for British Columbia (the "**Commission**"), the Office of the Privacy Commissioner of Canada, the Commission d'accès à l'information du Québec, and the Information and Privacy Commissioner of Alberta (together, the "**Privacy Commissioners**") announced their intention to jointly inquire into Clearview's practices.

6. In March 2020, Clearview announced that it had suspended access to all users in Canada except for the RCMP. In early July 2020, Clearview ceased doing business with the RCMP.

7. On October 29, 2020, the Privacy Commissioners advised Clearview that, in light of their preliminary findings, they could issue recommendations or orders that would affect Clearview.

8. On November 20, 2020, Clearview responded to the October 29 notice and made submissions to the Privacy Commissioners. In particular, Clearview submitted that its current activities are not subject to federal or provincial privacy legislation.

9. On February 2, 2021, the Office of the Privacy Commissioner of Canada issued a joint Investigation Report in which the Privacy Commissioners recommended that Clearview:

   (a) cease offering facial recognition services to Canadian clients;

   (b) cease collecting, using, and disclosing images and biometric facial arrays collected from individuals in Canada; and

   (c) delete images and biometric facial arrays collected from individuals in Canada.

Affidavit #1 of Cam Hoan Ton-That, made January 13, 2022, Ex. A

10. On April 26, 2021, the Privacy Commissioners advised Clearview that they would seek binding orders in their respective jurisdictions if Clearview failed to follow the recommendations in the joint Investigation Report.

11. On May 25, 2021, Clearview repeated its jurisdictional objection and further advised the Privacy Commissioners that the recommendations in the joint Investigation Report were impossible to execute.

12. On December 14, 2021, the Commission issued the Decision.

Affidavit #1 of Cam Hoan Ton-That, Ex. B

Decision of the Commission

13. In its Decision, the Commission adopts the findings from the joint Investigation Report as the basis for its orders.

Affidavit #1 of Cam Hoan Ton-That, Ex. B at p. 31, para. 3

14. The Commission held that the *Personal Information Protection Act*, S.B.C. 2003, c. 63 [*PIPA*] applies to Clearview's activities because:

(a) Clearview's practices involve the collection of personal information of individuals within British Columbia; and

(b) Clearview collects, uses, and discloses personal information of British Columbia residents for commercial purposes, namely offering its services to law enforcement agencies in the province.

Affidavit #1 of Cam Hoan Ton-That, Ex. B at pp. 47–48, paras. 33, 34

15. The Commission concluded that the personal information collected, used, and disclosed by Clearview were not "publicly available" information under *PIPA* and the *Personal Information Protection Act Regulations*, B.C. Reg. 473/2003 [*PIPA Regulations]*, such that Clearview was required to seek consent.

Affidavit #1 of Cam Hoan Ton-That, Ex. B at pp. 49–50, paras. 44, 45.

16. The Commission further found that Clearview breached sections 11, 14, and 17 of *PIPA* because it collected and used personal information without obtaining the consent of the individuals in question and for an improper purpose.

Affidavit #1 of Cam Hoan Ton-That, Ex. B at p. 31, paras. 6, 7;
Affidavit #1 of Cam Hoan Ton-That, Ex. B at p. 56, paras. 77, 78

17. As a result of its conclusions, the Commission issued the following orders:

(a) "Clearview is prohibited from offering its facial recognition services that have been the subject of the investigation, and which utilize the collection, use and disclosure of images and biometric facial arrays collected from individuals in British Columbia without their consent, to clients in British Columbia";

(b) "Clearview shall make best efforts to cease the collection, use and disclosure of (i) images and (ii) biometric facial arrays collected from individuals in British Columbia without their consent"; and

(c) "Clearview shall make best efforts to delete the (i) images and (ii) biometric facial arrays in its possession, which were collected from individuals in British Columbia without their consent."

Affidavit #1 of Cam Hoan Ton-That, Ex. B at pp. 34–35, para. 22

18. The Commission further ordered that Clearview provide the Office of the Privacy Commissioner of Canada Registrar with written evidence of its compliance with the orders by January 25, 2022.

Affidavit #1 of Cam Hoan Ton-That, Ex. B at p. 35, para. 23

Part 3: LEGAL BASIS

1. This petition is brought pursuant to section 2 of the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241 and Rules 2-1(2)(b) and 16-1 of the *Supreme Court Civil Rules*. The petitioner further relies on *PIPA* and the *PIPA Regulations*.

2. The Decision must be quashed or set aside for the following reasons:

   (a) the Commission's finding that *PIPA* applies to Clearview is unreasonable;

   (b) the Commission's finding that the personal information collected by Clearview was not "public information" is unreasonable;

   (c) the Commission's finding that Clearview did not have a reasonable purpose for collecting, using, and disclosing the personal information it collects is unreasonable;

   (d) further, or alternatively, sections 11, 14, and 17 of *PIPA*, on which the Commission based its ruling, violate section 2(b) of the *Canadian Charter of Rights and Freedoms* in a manner that is not justified in a free and democratic society, to the extent that these sections restrict the collection, use, and disclosure of publicly available personal information; and

   (e) the Commission's orders are impossible for Clearview to comply with and both unreasonable and unenforceable at law.

3. This petition was filed within 30 days after the receipt of the Decision. Under section 53(2) of *PIPA*, the Decision is stayed until a court orders otherwise.

Standard of Review

4. Except for the issue of the constitutionality of sections 11, 14, and 17 of *PIPA*, the Decision is reviewable on the reasonableness standard. The constitutionality of sections 11, 14, and 17 of *PIPA* falls within the rule of law category identified by the Supreme Court of Canada, such that the correctness standard applies.

Canada (Minister of Citizenship and Immigration) v. Vavilov, 2019 SCC 65 [*Vavilov*] at paras. 16, 17

PIPA *Does Not Apply to Clearview*

5. Provincial legislatures have no authority to enact laws having extraterritorial effect. The applicability of *PIPA* thus requires a "real and substantial connection" between Clearview's activities and British Columbia.

Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn of Internet Providers, 2004 SCC 45 at paras. 55, 57, 60

6. Clearview is physically located in the United States and has no offices or employees in British Columbia. No personal information is collected, used, or disclosed within British Columbia. Although Clearview previously offered trial accounts to entities in British Columbia, it ceased to do so as of July 2020. It also ceased doing business with the RCMP as of July 2020. Thus, at the time of the Commission's decision, Clearview had no commercial relationship with any person or entity in British Columbia and no Canadian users or employees at all.

7. In the circumstances, it is unreasonable for the Commission to have issued orders against Clearview based on the bare fact that Clearview may, in the course of its business, collect some publicly available information about British Columbia residents. This is not sufficient to establish a "real and substantial" connection, and the Commission had no jurisdiction to issue the orders.

Information Collected by Clearview was Publicly Available

8. Assuming PIPA applies, which is expressly denied, there is no requirement for consent where the personal information at issue is publicly available.

PIPA, ss. 12(1)(e), 15(1)(e), 18(1)(e)

9. The sources of information that are considered publicly available under *PIPA* include "personal information that appears in a printed electronic publication that is available to the public, including a magazine, book or newspaper in printed or electronic form."

PIPA Regulations, s. 6(d)

10. Clearview's search engine parses information that is publicly available on the Internet, much like Google, Yahoo, Bing, and any other commercial search engine. Its search engine behaves in a manner that is highly similar to the "reverse image search" tool offered by Google, and similar tools offered by other search engines, which also allow users to search for images publicly available on the internet.

11. The Commission took the position that social media websites are not prescribed sources of "publicly available" information. The Commission did not provide any reasons or justification in support of its conclusion, despite the inclusive language of section 6(d) of the *PIPA Regulation.*

12. As noted by the Supreme Court of Canada in *Vavilov*, where reasons for a decision are required, it is not enough for a tribunal to simply reach a determination on the issue. Rather, the decision must also be justified by the reasons themselves. The absence of adequate justification for this finding, and the fact that Clearview's search engine relies entirely on publicly available information, renders the Commission's finding unreasonable.

Vavilov at para. 86

Clearview's Operations Serve a Reasonable Purpose

13. The Commission's conclusion that Clearview's operations were improper and unreasonable rested on the sensitivity of biometric facial arrays and the potential sensitivity of contextual information provided by source links to the information, and its determination (based on its unreasonable conclusion that the information was not publicly available) that Clearview's operations were not authorized by British Columbia law.

Affidavit #1 of Cam Hoan Ton-That, Ex. B at pp. 55–56, paras. 74–77

14. In reaching this conclusion, the Commission failed to consider whether its restrictive interpretation of the reasonable purpose requirement in sections 11, 14, and 17 of *PIPA* is consistent with the guarantee of freedom of expression under section 2(b) of the *Canadian Charter of Rights and Freedoms*.

15. Clearview provides its search engine for the purpose of assisting law enforcement agencies in investigations. Clearview rejects the claim that this is not a reasonable purpose. Clearview's technology enables its clients to investigate serious crimes, enhancing public safety, and provide justice to victims.

16. Further, and as noted above, Clearview's search engine is practically indistinguishable from other commercial search engines that allow users to search for publicly available images on the Internet.

17. The ability of all search engines to operate in this way is crucial to the free flow of information over the Internet for *all* users.

18. The interpretation of a reasonable purpose in sections 11, 14, and 17 of *PIPA* must be consistent with the *Charter*'s guarantee of freedom of expression. The Commission did not consider *Charter* rights or values in its interpretation of *PIPA*. Had it done so, the only interpretation of these provisions would have been one that recognizes that the collection, use, or disclosure of publicly available personal information in the operation of a search engine is a reasonable purpose.

Sections 11, 14, and 17 of PIPA *Violate Clearview's Freedom of Expression*

19. Sections 11, 14, and 17 of *PIPA* provide as follows:

> **11** Subject to this Act, an organization may collect personal information only for purposes that a reasonable person would consider appropriate in the circumstances and that
>
> (a) fulfill the purposes that the organization discloses under section 10(1), or
>
> (b) are otherwise permitted under this Act.
>
> **14** Subject to this Act, an organization may use personal information only for purposes that a reasonable person would consider appropriate in the circumstances and that
>
> (a) fulfill the purposes that the organization discloses under section 10 (1),
>
> (b) for information collected before this Act comes into force, fulfill the purposes for which it was collected, or
>
> (c) are otherwise permitted under this Act.
>
> **17** Subject to this Act, an organization may disclose personal information only for purposes that a reasonable person would consider are appropriate in the circumstances and that
>
> (a) fulfill the purposes that the organization discloses under section 10 (1),
>
> (b) for information collected before this Act comes into force, fulfill the purposes for which it was collected, or
>
> (c) are otherwise permitted under this Act.

20. As set out above, the Commission asserted that the personal information collected, used, and disclosed by Clearview was not "publicly available" information and thus that Clearview was required to obtain consent. The Commission further concluded that comparisons with other search engines that likewise permit users to search for publicly available images was irrelevant.

> Affidavit #1 of Cam Hoan Ton-That, Ex. B at p. 44, paras. 23, 24;
> Affidavit #1 of Cam Hoan Ton-That, Ex. B at p. 50, paras. 45, 47, 48;
> Affidavit #1 of Cam Hoan Ton-That, Ex. B at p. 53, para. 64

21. If the Commission's interpretation and application of *PIPA* is correct (which is denied), the restriction on the collection, use, and disclosure of publicly available personal information imposed by the requirement of consent in ss. 13 and 14 impedes the free flow of information and infringes Clearview's s. 2(b) *Charter* right to freedom of expression.

22. Such a restriction on freedom of expression can only stand if it is demonstrated to be justified in a free and democratic society under s. 1 of the *Charter*. When applied to entities like Clearview — which runs a search engine for publicly available information — no such justification exists, because the requirement that an organization must obtain consent to collect, use, and distribute information that is already publicly available is simply not minimally impairing. Nor do the beneficial effects of this requirement outweigh its deleterious impact on freedom of expression: failing to exempt the collection, use, and dissemination of otherwise publicly available information will undermine the most basic function of *all* search engines and thus sterilize the free flow of information over the Internet.

Compliance with the Orders is Impossible

23. The Commission ordered Clearview to "make best efforts" to: cease the collection, use, and disclosure of and delete images and biometric facial arrays collected from individuals in British Columbia without their consent.

24. Even assuming the Commission's Decision and orders were properly issued, the Commission's orders can *at most* only extend to images of, and information gathered about, British Columbia residents, since the applicable legislation only applies to the personal information of British Columbia residents.

25. That being the case, for Clearview to comply with the Commission's orders, it must be able to identify images in its database as belonging to British Columbia residents.

26. As demonstrated by the record, Clearview explained that it has no means of identifying the place of residence of any individual in any photograph in its database. Clearview only possesses publicly available images and the links where they appear, and it is impossible to infer the residency of the pictured individuals from that information.

27. Based on evidence and argument by Clearview in a proceeding in the State of Illinois, the Commission concluded that Clearview has "the means and ability to severely limit if not eliminate the collection, use, and disclosure of personal information of British Columbians."

28. In the Illinois proceeding, Clearview had indicated that it had voluntarily adjusted its collection methods to avoid creating facial vectors on photos with embedded locational metadata associating the photo with Illinois. However, most photos or images which are publicly available online do not contain locational metadata allowing Clearview or anyone else to identify where they were taken.

29. Furthermore, the fact that Clearview is occasionally able to use metadata to identify *where a photograph was taken* does not mean it can identify the *place of residence of the subject of the photograph*. Clearview cannot distinguish between a photograph taken in British Columbia of a visitor from the United States versus a photograph taken in British Columbia of a British Columbia resident. Nor can

Clearview identify who is a British Columbia resident from photos taken outside of British Columbia.

30. Given the inherent challenges in Clearview, or anyone else who views publicly available online images, in identifying the residency of the subject of the image, compliance with the order as drafted is impossible, and the Commission's conclusion that Clearview can comply is plainly unreasonable.

31. To be enforceable, the terms of an order must be clear and specific, to allow the party to know exactly what has to be done to comply with the order.

British Columbia (Director of Civil Forfeiture) v. Onn, 2009 BCCA 402 at paras 19, 20; *Este v. Esteghamat-Ardakani*, 2020 BCCA 202 at paras. 54, 55

32. The Commission's orders are ambiguous and subjective. Clearview is required to "make best efforts" in carrying out the orders. The orders do not describe what constitutes "best efforts", and how the sufficiency of efforts is to be assessed.

33. In its Decision, the Commission stated that it "expect[s]" Clearview to "at the very least, put in place the same safeguards it has with "Illinois Information" to information that originates from British Columbia and its residents." Aside from not forming part of the order, this "expectation" sheds no light on Clearview's obligations under the order: this suggests that the "same safeguards" as outlined in the Illinois proceedings would be sufficient, but what other efforts or safeguards would amount to "best efforts" is unknown.

Affidavit #1 of Hoan Ton-That, Ex. B at p. 34, para. 21

34. Any attempt by the Commission to enforce these orders, as framed, would necessarily require an assessment of Clearview's efforts on no discernable standard. The orders do not provide Clearview with a clear and specific understanding of what it must do to comply and are thus too ambiguous to be enforceable.

Part 4: MATERIAL TO BE RELIED ON

1. Affidavit #1 of Cam Hoan Ton-That, made January 13, 2022.

The Petitioner estimates that the hearing of the petition will take one (1) day.

Date: January 13, 2022

☒ Lawyer for petitioner
J. Kenneth McEwan, Q.C. / Saheli Sodhi

To be completed by the Court only:

Order made

☐ in the terms requested in paragraphs _____ of Part 1 of this petition

☐ with the following variations and additional terms:

_____

_____

_____

Date: _____ _____

Signature of ☐ Judge ☐ Master

THIS PETITION TO THE COURT was prepared by J. Kenneth McEwan, Q.C. of the firm of McEwan Cooper Dennis LLP, whose place of business and address for delivery is 900-980 Howe Street, Vancouver BC V6Z 0C8, Telephone: (604) 283-7740; Fax: (778) 300-9393.