

File No. _____

SUPREME COURT OF CANADA

(ON APPEAL FROM A JUDGMENT OF THE COURT OF APPEAL OF QUÉBEC)

BETWEEN:

FACEBOOK, INC.
FACEBOOK CANADA LTD

APPLICANTS
(Respondents)

v.

LYSE BEAULIEU

RESPONDENT
(Appellant)

APPLICATION FOR LEAVE TO APPEAL
(Article 40(1) of the *Supreme Court Act* and
Rule 25 of the *Rules of the Supreme Court of Canada*)

M^e Éric Préfontaine
M^e Julien Hynes-Gagné
M^e Emily Lynch
Osler, Hoskin & Harcourt LLP
Suite 2100
1000 De La Gauchetière Street West
Montréal, Québec
H3B 4W5

Tel.: 514 904-8100

Fax: 514 904-8101

eprefontaine@osler.com

jhynesgagne@osler.com

elynch@osler.com

Counsel for Applicants

M^e Audrey Boctor

M^e Jean-Michel Boudreau

M^e Olga Redko

IMK LLP

Suite 1400

Alexis Nihon Place, Tower 2

3500 De Maisonneuve Blvd. West

Montréal, Québec

H3Z 3C1

Tel.: 514 935-4460

Fax: 514 935-2999

aboctor@imk.ca

jmboudreau@imk.ca

oredko@imk.ca

Counsel for Respondent

TABLE OF CONTENTS

Application for Leave to Appeal **Page**

Notice of Application for Leave to Appeal	fév. 20 2023	1
---	--------------	---

JUDGMENTS AND REASONS FOR JUDGMENT

Judgment of the Superior Court of Québec, 2021 QCCS 3206 (Courchesne, J.S.C.), (https://canlii.ca/t/jh7d7)	July 27, 2021	5
Judgment of the Court of Appeal of Québec, 2022 QCCA 1736 (Bich, Healy and Sansfaçon, JJ.A.), (https://canlii.ca/t/jtpzj)	Dec. 22, 2022	28

APPLICANTS' MEMORANDUM OF ARGUMENT

PART I – OVERVIEW OF POSITION WITH RESPECT TO ISSUES OF PUBLIC IMPORTANCE AND STATEMENT OF FACTS	65
A. Overview	65
B. Background	66
(a) Authorization Judgment	67
(b) Judgment of the Court of Appeal of Québec	68
PART II – QUESTIONS IN ISSUE	69
PART III – STATEMENT OF ARGUMENT	70
A. Clarifying the Assessment of the Class Definition at the Authorization Stage	70
(a) Function of the class definition requirement	71
(b) The suitability of the current class definition parameters	73

TABLE OF CONTENTS

Application for Leave to Appeal	Page
(c) The extent to which a class definition must allow individuals to self-identify	76
B. Drawing a Line Where the Factual and Legal Analyses Required for the Resolution of the Common Questions Are Unquantifiable	78
PART IV – SUBMISSIONS CONCERNING COSTS	84
PART V – ORDERS SOUGHT	84
PART VI – TABLE OF AUTHORITIES	85
 <u>DOCUMENTS IN SUPPORT</u>	
<u>Proceedings</u>	
Sworn Statement of Andrew Howard Jan. 13, 2021	87
AH-1.1 Facebook advertising policies	91
AH-1.2 Facebook policy on discriminatory practices	101
AH-2 “Helping Prevent Discrimination in Ads that Offer Housing, Employment or Credit Opportunities” December 3, 2019	102
Re-amended Application for Authorization to Institute a Class Action and to Obtain the Status of Representative Plaintiff Jan. 20, 2021	108
Court of Appeal Appellant’s Argument Dec. 7, 2021	128
Court of Appeal Respondents’ Argument Feb. 16, 2022	162
Minutes of hearing Sept. 21, 2022	193

Notice of Application for Leave to Appeal, February 20, 2023

File No. _____

SUPREME COURT OF CANADA

(ON APPEAL FROM A JUDGMENT OF THE COURT OF APPEAL OF QUÉBEC)

BETWEEN:

FACEBOOK, INC.
FACEBOOK CANADA LTD

APPLICANTS
(Respondents)

v.

LYSE BEAULIEU

RESPONDENT
(Appellant)

NOTICE OF APPLICATION FOR LEAVE TO APPEAL **(Pursuant to s. 40 of the *Supreme Court Act*, R.S.C. 1985, c. S-26 and** **Rule 25 of the *Rules of the Supreme Court of Canada*, SOR/2002-156)**

TAKE NOTICE that Facebook, Inc. and Facebook Canada Ltd. apply for leave to appeal to the Supreme Court of Canada, under section 40 of the *Supreme Court Act*, R.S.C. 1985, c. S-26 and rule 25 of the *Rules of the Supreme Court of Canada*, SOR/2002-156, from the judgment of the Court of Appeal of Québec, File No. 500-09-029679-214 (2022 QCCA 1736), December 22, 2022, and for an order:

1. granting leave to appeal;
2. if leave to appeal is granted, awarding costs to the Applicants; and
3. any further or other order that the Court may deem appropriate;

Notice of Application for Leave to Appeal, February 20, 2023

AND FURTHER TAKE NOTICE that this application for leave is made on the following grounds:

In the context of a class action authorization in Québec:

- (a) **What is the function of the class definition requirement at the authorization stage?** (Is the failure to meet the class definition requirement a ground for denying the authorization of a class action? Does the existence of a clear class definition constitute a stand-alone requirement, or should it be assessed within the article 575 *Code of Civil Procedure*¹ [the “CCP”] analytical framework?)
- (b) **What are the parameters of the class definition requirement?** (To what extent does class membership need to be ascertainable at the authorization stage? Can a class action be authorized where class membership is only determinable based on the outcome of the class action on the merits? To what extent, if any, should the parameters and conditions of the class definition requirement be applied more flexibly in certain contexts where, for instance, it is not possible to craft a definition devoid of subjective and/or self-referential criteria?)
- (c) **What is the role of the authorization judge, if any, in redefining a class that does not meet the parameters applicable to the class definition?** (Does the authorization judge have any discretion to redefine a class definition that does not meet the applicable parameters? If so, what are the limits of that discretion?)
- (d) **Is there a point at which the commonality requirement can be considered not met where the proposed common questions would lead to incalculable factual and legal analyses across every class member?** (How should proportionality be applied within the article 575(1) CCP criterion when the proposed common questions raise significant concerns as to the manageability of the class action?)

¹ CQLR c. C-25.01.

Notice of Application for Leave to Appeal, February 20, 2023

Dated at Montréal, province of Québec, this 20th day of February, 2023



M^e Éric Préfontaine
M^e Julien Hynes-Gagné
M^e Emily Lynch
Osler, Hoskin & Harcourt LLP
Suite 2100
1000 De La Gauchetière Street West
Montréal, Québec
H3B 4W5

Tel.: 514 904-8100
Fax: 514 904-8101
eprefontaine@osler.com
jhynesgagne@osler.com
elynych@osler.com

Counsel for Applicants

ORIGINAL : THE REGISTRAR

COPY:

M^e Audrey Boctor
M^e Jean-Michel Boudreau
M^e Olga Redko
IMK LLP
Suite 1400
Alexis Nihon Place, Tower 2
3500 De Maisonneuve Blvd. West
Montréal, Québec
H3Z 3C1

Tel.: 514 935-4460
Fax: 514 935-2999
aboctor@imk.ca
jmboudreau@imk.ca
oredko@imk.ca

Counsel for Respondent

Notice of Application for Leave to Appeal, February 20, 2023

NOTICE TO THE RESPONDENT: A respondent may serve and file a memorandum in response to this application for leave to appeal within 30 days after the day on which a file is opened by the Court following the filing of this application for leave to appeal or, if a file has already been opened, within 30 days after the service of this application for leave to appeal. If no response is filed within that time, the Registrar will submit this application for leave to appeal to the Court for consideration under section 43 of the *Supreme Court Act*.

**APPLICANTS'
MEMORANDUM OF ARGUMENT**

APPLICANTS' FACTUM

PART I – OVERVIEW OF THE POSITION AND FACTS

A. Overview

1. This appeal raises novel issues in the context of class action authorizations, as it pertains to: (i) the function and parameters of the class definition requirement; and (ii) whether there is a limit to the flexibility inherent to the commonality requirement articulated at article 575(1) of the *Code of Civil Procedure* (“CCP”).¹

2. The underlying matter concerns a proposed class action that alleges a novel and speculative form of discrimination on the Internet. The Respondent (as defined below) has sought authorization to institute a class action against the Applicants for *inter alia*, moral and punitive damages resulting from allegedly discriminatory targeting and delivery of employment and housing advertisements posted by third-party advertisers on Facebook.

3. The Respondent's claim is shrouded in speculation and is based on a multitude of unknown factors: unknown allegedly discriminatory advertisement(s), from unknown third-party advertiser(s), who may have excluded unknown Facebook users in Québec from seeing an advertisement, based on unknown protected grounds at unknown times.

4. That is, the Respondent does not know whether she, or anyone else in the proposed class, *is* or *was* a target of the alleged discrimination. As such, the proposed action would have as its objective to allow her and millions of other Facebook users to find out, *only after possibly millions of individual trials*, if she or anyone else is or was a victim of the alleged discrimination – assuming this is ascertainable.

5. This speculation is reflected in the Respondent's common questions and in her proposed class definition, which is defined based on subjective and self-referential elements, as well as criteria that depend entirely on the outcome of a trial. In essence, the Respondent has defined the class as all Facebook users who were “interested” in housing and employment ads at any given point in time in an over five-year period, and who were excluded from seeing such ads based on an unidentified discriminatory ground.

¹ CQLR c. C-25.01.

6. The Superior Court of Québec correctly refused to authorize the class action, partly because of these unsolvable class definition problems, finding that the class was “impossible to define”, to the point that it was an impediment to the exercise of a class action.² The Court also held that the commonality requirement was not met, finding that the resolution of the proposed common questions would require a context-specific determination that would differ from ad to ad, such that no question would advance the class members' claims in a not insignificant manner.³

7. The Court of Appeal of Québec authorized the class action in spite of these issues, refraining from applying established class definition requirements and instead authorizing the class action *en raison de la nature particulière de la cause d'action*, i.e. on the basis that the subject-matter was of public order and interest.⁴

8. The novel circumstances of this case highlight the important shortcomings of the case law with respect to the courts' role in assessing the class definition at the authorization stage, which is not currently the subject of a clear or consistent jurisprudential treatment. This case also challenges the extent to which the commonality requirement can be considered met where the common questions would lead to incalculable factual and legal analyses, person-by-person, for their resolution.

9. This appeal therefore provides an opportunity for this Court to issue much-needed guidance to authorization judges across Canada having to assess class definitions and commonality requirements in the context of proposed class actions raising complex public interest issues.

10. These questions are all the more important in the face of this proposed class action, which notwithstanding the fact that it is inherently unmanageable, does not allow class members to make an informed decision as to whether they should opt out of the proposed action or whether they will be bound by an eventual final judgment.

B. Background

11. The present proceedings involve a class action against Meta Platforms, Inc. (formerly Facebook, Inc.) (and collectively with Facebook Canada Ltd., the “**Applicants**”). Meta Platforms, Inc. operates a variety of online services and applications, including Facebook. Facebook is a general use online service that third-party advertisers use to place millions of ads for all types of products and services, including employment and housing-related ads.

² *Beaulieu c. Facebook inc.*, 2021 QCCS 3206 at para. 57. [*Beaulieu CS*]

³ *Ibid.* at paras. 45 and 48.

⁴ *Beaulieu c. Facebook inc.*, 2022 QCCA 1736 at para. 82. [*Beaulieu CA*]

12. Ms. Lyse Beaulieu's (the "**Respondent**") initial cause of action against the Applicants alleged the following: (1) the Applicants allow third-party advertisers to target housing and employment ads based on protected characteristics ("**Ad Targeting**"); (2) the Applicants allow third-party advertisers to create housing and employment ads that contain discriminatory text ("**Ad Text**"); and (3) the Applicants deliver ads to users based on protected characteristics ("**Ad Delivery**"). The Respondent's personal claim was based on the allegation that she would have been precluded from receiving employment advertisements on Facebook that excluded her based on her age and gender.

13. The Respondent requested permission to bring a class action against the Applicants for moral damages, punitive damages and injunctive relief flowing from such alleged conduct on behalf of the following class, which was notably significantly broader than her personal claim:

All Facebook users located in Quebec who were interested in receiving or pursuing employment or who were seeking housing and who, as a result of their race, sex, civil status, age, ethnic or national origin, or social condition, were excluded by Facebook's advertising services from receiving advertisements for employment or housing opportunities, or who were explicitly excluded from eligibility for these opportunities through advertisements posted on Facebook, between April 11, 2016, and the date of judgment in the present proceedings.⁵

(a) Authorization Judgment

14. On July 27, 2021, the Honourable Suzanne Côté of the Superior Court of Québec (the "**Authorization Judge**") dismissed the Respondent's claim (the "**Authorization Judgment**").

15. Authorization as a whole was denied for two main reasons: (i) the Respondent failed to advance a single common question susceptible of advancing the class members' claims in a manner that was not insignificant; and (ii) the class definition was encumbered by fatal issues, such that no class member could be identified.⁶

⁵ Note that the Superior Court of Québec narrowed the class definition to better reflect the Respondent's allegations and evidence, which was upheld by the Court of Appeal of Québec (as is described further herein).

⁶ *Beaulieu CS*, *supra* note 2 at paras. 39-58.

16. In addition, the Authorization Judge (i) held that the Ad Text claim was hypothetical, speculative and did not support an arguable case; and (ii) narrowed the scope of the class action to the protected grounds of sex, age, and race; thereby eliminating social condition, civil status, and ethnic or national origin from the definition.⁷

(b) Judgment of the Court of Appeal of Québec

17. On December 22, 2022, the Court of Appeal of Québec (the “**Court of Appeal**”) granted the Respondent’s appeal, thereby overturning the Authorization Judgment and authorizing the class action in part. The Court of Appeal affirmed the Authorization Judge’s findings with respect to narrowing the claim to Ad Delivery and Ad Targeting on the basis of race, sex, or age only.⁸

18. Writing for the panel, the Honourable Marie-France Bich held that the Authorization Judge erred in law on two grounds by: (i) departing from the Supreme Court of Canada’s (the “**SCC**”) rulings on commonality, and (ii) imposing unduly high requirements regarding the class definition, which “ignored the context of the case”.⁹

19. With respect to commonality, the Court of Appeal held that although the case raised certain individual questions, it was of the view that there were a number of common questions that would advance the case in a manner that was not insignificant. Unusually, however, most of the purported common questions were *created* by the Court of Appeal, having *never been proposed by the Respondent at any stage of the litigation*.¹⁰

20. As for the class definition, although the Court of Appeal confirmed that the definition suffered from a certain “*maladresse rédactionnelle*”, it held that it was sufficient in its substance in that it aligned with the claim as framed by the Respondent and did not dilute the common questions.¹¹ The Court of Appeal acknowledged the fact that ascertaining class membership would have to be determined post-authorization with the assistance of “possibly numerous” unidentified verification mechanisms, but did not consider this problematic.¹²

⁷ *Ibid.* at paras. 83-84. The protected ground of race was included, even though the Respondent’s personal claim did not include allegations that she had been discriminated on the basis of race.

⁸ *Beaulieu CA*, *supra* note 4 at para. 89.

⁹ *Ibid.* at para. 46.

¹⁰ *Ibid.* at paras. 54-60.

¹¹ *Ibid.* at para. 88.

¹² *Ibid.* at para. 79.

PART II – QUESTIONS IN ISSUE

21. The starkly contrasting decisions of the lower courts in this matter raise several issues of public importance for class action authorizations in Québec, which are also relevant for Canadian class action jurisprudence at large.

22. The first set of issues pertains to the role and parameters of the class definition requirement:

- (a) **What is the function of the class definition requirement at the authorization stage?** (Is the failure to meet the class definition requirement a ground for denying the authorization of a class action? Does the existence of a clear class definition constitute a stand-alone requirement or should it be assessed within the article 575 CCP analytical framework?)
- (b) **What are the parameters of the class definition requirement?** (To what extent does class membership need to be ascertainable at the authorization stage? Can a class action be authorized where class membership is only determinable based on the outcome of the class action on the merits? To what extent, if any, should the parameters and conditions of the class definition requirement be applied more flexibly in certain contexts where, for instance, it is not possible to craft a definition devoid of subjective and/or self-referential criteria?)
- (c) **What is the role of the authorization judge, if any, in redefining a class that does not meet the parameters applicable to the class definition?** (Does the authorization judge have any discretion to redefine a class definition that does not meet the applicable parameters? If so, what are the limits of that discretion?)

23. In addition, this case raises an important issue with respect to the commonality requirement set out in article 575(1) CCP:

- (a) **Is there a point at which the commonality requirement can be considered not met where the proposed common questions would lead to incalculable factual and legal analyses across every class member?** (How should proportionality be applied within the article 575(1) CCP criterion when the proposed common questions raise significant concerns as to the manageability of the class action?)

PART III – STATEMENT OF ARGUMENT

A. Clarifying the Assessment of the Class Definition at the Authorization Stage

24. The present matter highlights the lack of clarity surrounding the class definition requirement at the authorization stage of a class action. There is a notable lack of jurisprudential guidance from this Court with respect to the rules that govern a suitable class definition at authorization, especially as it relates to the Québec context in the post-*Infineon* and *Vivendi* age.¹³

25. These questions are significant: a clear class definition is considered “crucial”, as it identifies the individuals entitled to notice, entitled to relief, and bound by the judgment.¹⁴ It is an integral component of the authorization stage and clarity surrounding its status merits the attention of this Court.

(a) Function of the class definition requirement

26. This matter raises a novel question concerning the nature of the class definition “requirement” at the authorization stage. Notably, there is an uncertainty as to whether the adequacy of the class definition should be assessed *within* the article 575 CCP analysis (specifically, as part of the article 575(1) or 575(3) CCP assessment), or if it should be considered as a stand-alone aspect within the authorization debate.

27. From a legislative standpoint, the requirement of a clear class definition is technically distinct from the authorization criteria articulated at article 575 CCP. Indeed, article 576 CCP sets out the requirement that the judgment authorizing a class action “describe [...] the class whose members will be bound by the class action judgment.”¹⁵ However, the jurisprudence does not generally reflect this legislative distinction.

28. Indeed, Québec courts have considered the class definition aspect as part of the article 575(1) CCP analysis (the commonality requirement),¹⁶ as part of the article 575(3) CCP analysis

¹³ *Infineon Technologies AG v. Option consommateurs*, 2013 SCC 59 [*Infineon*]; *Vivendi Canada inc. v. Dell’Aniello*, 2014 SCC 1. [*Vivendi*]

¹⁴ *Western Canadian Shopping Centres inc. v. Dutton*, 2001 SCC 46 at para. 38 [*Western Canadian Shopping Centres*]; *Levy c. Nissan Canada inc.*, 2021 QCCA 682 at para. 39 [*Levy*]; *Durand c. Attorney General of Quebec*, 2018 QCCS 2817. [*Durand*]

¹⁵ Art. 576 CCP.

¹⁶ *Karras c. Société des loteries du Québec*, 2017 QCCS 4862 at paras. 22-25 (appeal dismissed, 2019 QCCA 813); *Regroupement des activistes pour l’inclusion au Québec (RAPLIQ) c. Société de transport de Montréal (STM)*, 2017 QCCS 2176 at paras. 23-27

(the composition of the class requirement),¹⁷ as part of *both* articles 575(1) and (3) CCP,¹⁸ as part of the article 575(4) CCP analysis,¹⁹ and as a *separate* assessment altogether.²⁰

29. The Court of Appeal's decision in this matter reflects this ambiguity without resolving it, in that it expressly states that it would separate its analysis of article 575(1) CCP from that of the class definition, despite noting a certain intersection between both elements.²¹

30. A clarification from this Court as to where the assessment of the class definition fits within the authorization debate is critical for several reasons. Notably, as each of the four criteria within the article 575 CCP analysis has been shaped by a distinct jurisprudence, the point at which the class definition requirement is assessed could lead to different outcomes.

31. Further, some courts consider an adequate class definition as a "requirement" at authorization, which is reflected in findings that problems with the class definition can lead to the rejection of the proposed class action.²² However, other courts assessing the class definition

[RAPLIQ]; *Beaulieu CS*, *supra* note 2 at paras. 37-59; *Caron c. Fraternité provinciale des ouvriers en électricité, section locale 1676*, 2016 QCCS 25 at paras. 38-83 [*Caron*]; *Picard c. Air Canada*, 2011 QCCS 5186 at paras. 92ff.

¹⁷ *M.L. c. Guillot*, 2021 QCCA 1450 at paras. 14, 17, 28 and 31; *Godin c. Aréna des Canadiens inc.*, 2020 QCCA 1291 at paras. 124-129 : (« [d]'une part – et c'est une évidence – l'art. 575 C.p.c. [...] requiert l'existence d'un « groupe », [...] »); *Atchom Makoma c. Procureure générale du Québec*, 2019 QCCS 3583 at paras. 92-100; *Lambert (Gestion Peggy) c. Écolait ltée*, 2016 QCCA 659 at paras. 53-65 (« L'existence d'un groupe est une condition à l'existence d'un recours collectif »).

¹⁸ *Boudreau c. Procureur général du Québec*, 2022 QCCA 655 at paras. 21-42. [*Boudreau*]

¹⁹ *Télévision communautaire et indépendante de Montréal (TVCI-MTL) c. Vidéotron*, 2018 QCCA 527 at paras 31-32 (application for leave to appeal to the SCC dismissed, File No. 38142).

²⁰ *Huard c. Innovation Tootelo inc.*, 2021 QCCS 416 at paras. 62-66; *Lebeau c. Syngenta*, 2022 QCCS 2831 at paras. 46-51; *Morfonios (Succession de Sarlis) c. Vigi Santé ltée*, 2021 QCCS 2489 at paras. 105-126.

²¹ *Beaulieu CA*, *supra* note 4 at para. 47 : « [b]ien que le sujet des questions communes et celui de la description du groupe s'intersectent dans une certaine mesure, j'en traiterai ci-dessous séparément. »

²² *Durand*, *supra* note 14 at para. 112; *Citoyens pour une qualité de vie/Citizens for a Quality of Life c. Aéroports de Montréal*, 2007 QCCA 1274 at paras. 106-109 (« Je reconnais, bien sûr, que les tribunaux ne doivent pas se montrer indûment sévères vis-à-vis les requérants

have expressly considered it as distinct from the authorization criteria analysis,²³ which would indicate that it may not be a “requirement” at authorization *per se*.

32. Even if the latter were the right approach, it would nonetheless need to be reconciled with a clarification of how authorization judges should apply article 576 CCP; that is, the fact that while class definitions can be modified at the post-authorization stage, the authorization judgment must nonetheless contain an adequately defined class at the *outset* of the litigation.²⁴ Such a clarification would assist in determining whether a class definition that is considered to be inadequate according to the existing parameters can preclude authorization on its own, or whether this shortcoming must be “combined” with the inability to meet one of the article 575 CCP criteria.

33. Relatedly, while authorization judges can modify elements of the class definition to avoid dismissing a class action, courts have also held that it is not the authorization judge’s role to completely rewrite and salvage a problematic definition.²⁵ Guidance in this respect could thus help dispel confusion regarding the authorization judge’s role with respect to modifying problematic proposed class definitions.

34. As is clear from the above, Québec courts are not uniform in their approach to assessing class definitions, especially as it pertains to: the role of the class definition requirement and

en autorisation, particulièrement lorsque le recours envisagé concerne une matière environnementale. Mais entre la sévérité et la licence, il y a une marge. Ce n’est pas parce que l’on traite d’environnement que le requérant est déchargé de tout fardeau au point de pouvoir proposer une définition démesurée à maints égards, pour, ensuite, laisser au juge le soin de faire tout le tri entre l’ivraie et le bon grain » [our emphasis]]. [Citoyens pour une qualité de vie/Citizens for a Quality of Life]

²³ *Sibiga c. Fido Solutions inc.*, 2016 QCCA 1299 at para. 135.

²⁴ *Western Canadian Shopping Centres*, *supra* note 14 at para. 38; *Levy*, *supra* note 14 at para. 39.

²⁵ *Boudreau*, *supra* note 18 at para. 41: « [...] où le juge estime que la définition du groupe comporte des lacunes qui ne sont pas mineures, mais touchent à son essence même, on ne peut lui faire reproche de ne pas s’être substitué aux appelants pour redéfinir le groupe et les questions communes »; *Durand*, *supra* note 14 at para. 112; *Citoyens pour une qualité de vie/Citizens for a Quality of Life*, *supra* note 22 at paras 86-87.

its status within the analytical framework of the authorization criteria, as well as the extent to which authorization judges may intervene to rework problematic class definitions. This uncertainty warrants this Court's attention to resolve such issues, with the purpose of providing litigants with a clear framework.

(b) The suitability of the current class definition parameters

35. Given the importance that courts have attributed to class definitions, criteria governing their adequacy were developed by this Court in the common law context,²⁶ which were subsequently endorsed by the Québec Court of Appeal.²⁷

36. According to these parameters, the class definition (i) must be based on objective criteria; (ii) the components of the definition must have a rational basis; (iii) the definition of the class should not be circular or imprecise; and (iv) the definition of the class must not be based on one or more criteria which are dependent on the outcome of the class action on the merits (the “**George Criteria**”). The purpose of these parameters is to achieve a class capable of clear definition.

37. While the Court of Appeal in this matter observed that Québec courts have applied the George Criteria more flexibly over time, it questioned whether these criteria can “survive” in the aftermath of *Infineon*²⁸ and *Vivendi*:²⁹

[69] Commençons par une parenthèse : ces critères, en forme de questions, ont été énoncés par la Cour dans *Paquin c. Compagnie de chemin de fer Canadien Pacifique*, en 2005, et appliqués dans cette affaire d’une manière plutôt souple. Ils ont cependant été resserrés dans *George c. Québec (Procureur général)*, en 2006, et plus encore dans *Lallier c. Volkswagen Canada inc.* **Ce resserrement prenait notamment appui sur une jurisprudence hors Québec et l’on doit se demander s’il peut survivre aux arrêts de la Cour suprême dans *Infineon* et *Vivendi*, entre autres.** Ils ont en tout cas survécu au passage du temps, du moins dans leur formulation, comme le montre l’arrêt *Levy c. Nissan Canada inc.* (2021), mais ils ont concomitamment gagné en flexibilité et en malléabilité, comme en témoignent cet arrêt lui-même (dont je reparlerai plus loin, *infra*, paragr. [86]) ainsi que l’arrêt *Sibiga*[63] (*supra*, paragr. [65]).³⁰ [our emphasis; footnotes omitted]

²⁶ *Western Canadian Shopping Centres*, *supra* note 14 at para. 38.

²⁷ *George v. Québec (Procureur général)*, 2006 QCCA 1204 at para. 40. [*Georges*]

²⁸ *Infineon*, *supra* note 13.

²⁹ *Vivendi*, *supra* note 13.

³⁰ *Beaulieu CA*, *supra* note 4 at para. 69.

38. This passage indicates that there is an uncertainty as to how to circumscribe this increasingly flexible approach with the fact that the George Criteria are still the operative set of parameters that a class action claimant must meet in Québec today. There is a relative paucity of guidance in Québec jurisprudence on this question, with the exception of a Québec Superior Court authorization decision in the context of discrimination, *Regroupement des activistes pour l'inclusion au Québec (RAPLIQ) c. Société de transport de Montréal (STM)*.³¹

39. In *Rapliq*, in a post-*Vivendi* and *Infineon* context, the Superior Court was faced with a class definition containing a subjective element. The Court aptly captured the delicate balance between the requirement for objective criteria in a class definition, while suggesting that some subjectivity can co-exist in the definition, so as not to preclude authorization. The Superior Court held that this is especially true in the context of complex public interest class actions, where it may be more difficult to construct a purely objective definition. The result of this balance was referred to as “the acceptable level of subjectivity” in the class definition:

[54] Toutefois, cette jurisprudence doit être appliquée avec circonspection. Ces arrêts et jugements sont antérieurs aux arrêts *Infineon* et *Vivendi*, où la Cour suprême invite les Tribunaux à moins de rigidité.

[55] **L’ouverture que la Cour suprême encourage dans ces deux derniers arrêts n’empêcherait certes pas de conclure aujourd’hui que certaines définitions de groupe ne sont pas acceptables et que le premier critère n’est pas rempli, si l’appartenance au groupe dépend entièrement de l’issue de litige.**

[56] **Par exemple, un groupe qui se définirait par « toutes les personnes qui ont un recours contre les défenderesses » ne répondrait pas davantage au premier critère d’autorisation aujourd’hui qu’il ne le remplissait avant les arrêts *Infineon* et *Vivendi*.**

[57] Entre cet exemple patent et le groupe dont la définition ne dépend que de critères purement objectifs (par exemple, « toutes les personnes qui ont acheté un clavier de marque X modèle Y à la date Z »), **il existe une marge que le Tribunal doit apprécier à la lumière de l’ensemble des circonstances. La nature de l’action collective envisagée fait partie des circonstances dont le Tribunal devrait pouvoir tenir compte pour déterminer le niveau de subjectivité acceptable dans la définition du Groupe.** [our emphasis]

³¹ *RAPLIQ*, *supra* note 16.

40. *Rapliq* is a helpful example of the uncertainties at issue, and it raises significant questions, such as:

- (i) To what extent, if any, do the teachings in *Infineon* and *Vivendi*, which call for greater flexibility in the interpretation of article 575(1) CCP, modify the interpretation of the George Criteria in Québec?
- (ii) What is the maximum level of subjectivity that is deemed permissible in a class definition?
- (iii) Should new criteria be developed to account for greater permissibility depending on the nature of the class action?
- (iv) If so, should these new parameters be applicable also to class actions filed in other Canadian provinces?

41. In the case at bar, even if greater flexibility in the application of the George Criteria may be warranted in constructing a class definition involving speculative allegations of discrimination, this flexibility should not be boundless. Indeed, the Court of Appeal in this matter effectively endorsed a class definition which would fall at the subjective extreme, according to the *Rapliq* analysis.

42. As the Authorization Judge recognized, the only unifying criterion that remains among the proposed class of Facebook users in Québec is the fact that they *are* or *were* Facebook users in Québec.³² The mere fact that one is or was a Facebook user in Québec does not bear a sufficiently rational link to the sweeping common questions created by the Court of Appeal. Indeed, whether the Applicants breached class members' rights under the Québec Charter is not ascertainable on the mere basis that one is a Facebook user, as this analysis is contingent on a multitude of unknown factors.³³

43. If class actions should not be dismissed at the authorization stage on the basis that certain subjective factors exist within the class definition, they should all the same not be authorized where the definition of the class amounts to "every person who might have a claim against the defendant, whether they know it or not". The latter would raise significant manageability concerns, and is inconsistent with the proper administration of justice and the principle of proportionality.

³² *Beaulieu CS*, *supra* note 2 at para. 56.

³³ *Charter of Human Rights and Freedoms*, CQLR c. C-12. Such factors are non-exhaustively enumerated herein at para. 59 of this Argument.

44. Finally, there are no SCC decisions pertaining to a potential re-evaluation of the class definition parameters in contexts where subjective criteria are components of the definition, including in the common law context. As such, a clarification of the case law on the class definition requirement as it relates to Québec will also be informative for common law jurisdictions, albeit with any required modifications.

(c) The extent to which a class definition must allow individuals to self-identify

45. This appeal also raises questions as to whether a class action can be authorized where the class definition does not contain criteria allowing for individuals to know whether they are class members. Indeed, even the Respondent acknowledges that “[...] *most class members will necessarily not be aware that they are members of the class.*”³⁴ The extent to which an individual should be able to self-identify as a class member is not clear, as is evident from the different approaches taken by courts, including in this matter. This uncertainty warrants a clarification from this Court.

46. Here, the Authorization Judge rightly found that no class could be identified, that class membership was not determinable at the outset of the litigation and that it depended on the outcome of the class action on the merits, “upon complete and exhaustive evidence”.³⁵ The Court of Appeal disagreed, holding that the fact that potential class members could establish their status as such in the post-authorization stage with the assistance of “possibly very numerous” unidentified verification mechanisms was not an issue.³⁶

47. A consistent jurisprudential principle in Québec is the fact that a class definition *must* allow putative class members to know whether they are part of the class, *before* trial.³⁷ Although this case law has not been overturned, some courts have indicated that, in the context of complex public interest cases in the post-*Infineon* and *Vivendi* age, a person who believes they may be a class member may not have a definitive answer to certain questions until after the final judgment on the merits has been rendered, which may not preclude authorization.³⁸

³⁴ Re-Amended Application for Authorization to Institute a Class Action and to Obtain the Status of Representative Plaintiff at para. 50, **Application for Leave to Appeal (hereinafter “A.L.A.”) at p. 119.**

³⁵ *Beaulieu CS*, *supra* note 2 at paras. 50 and 52-53.

³⁶ *Beaulieu CA*, *supra* note 4 at para. 79.

³⁷ *Caron*, *supra* note 16 at para. 79 : (« *La description du groupe doit permettre aux membres potentiels de savoir s'ils en font partie ou non, et ce, avant la tenue du procès* »); *George*, *supra* note 27 at para. 40.

³⁸ *RAPLIQ*, *supra* note 16 at para. 58.

48. However, a balance is warranted: even if the ability to self-identify with a proposed class action may not be rigidly assessed in the fundamental rights context, ascertaining class membership at the authorization stage should not be eschewed from the analysis altogether.

49. At its core, the function of self-identification with a class definition is tied to informing members about how the judgment authorizing the class action affects them and about the rights they have under the judgment, such as their essential right of opting out of the class.³⁹ The clarity of the class definition is critical as it allows people to know if the class action concerns them or is likely to concern them, which is tied to their essential right to exclude themselves within the prescribed delay, and more broadly, to the goal of ensuring the finality and certainty of judgments.⁴⁰

50. Courts have repeatedly emphasized the importance of the class action notice and an individual's right to opt out of a class, which is tied to article 579 CCP.⁴¹ The legislator's call to include a right to opt out of the class in a class notice must thus be given meaning. The Applicants submit that the Court of Appeal's analysis, according to which class membership can be ascertained at the post-authorization stage, does not respect the edicts of article 579 CCP, as it would not allow individuals to meaningfully opt out of the proposed class.⁴²

51. Authorizing class actions with unidentifiable classes until a complete analysis is done at trial is contrary to the principle that a class definition should not depend on the outcome of the action on the merits. Indeed, in this case, this would lead to post-authorization hearings whereby the Superior Court would have to hold potentially millions of mini trials to ascertain who is or is not a class member.⁴³

52. The weight that must be given to self-identification in the assessment of a class definition is thus unclear. This matter provides this Court with an opportunity to provide greater certainty for authorization judges in Québec and Canada faced with evaluating the adequacy of class definitions lacking in self-identifiable criteria.

³⁹ *Levy*, *supra* note 14 at para. 39; *Western Canadian Shopping Centres*, *supra* note 14 at para. 38; *Canada Post Corp. v. Lépine*, 2009 SCC 16 at para. 42.

⁴⁰ *Levy*, *supra* note 14 at para. 39.

⁴¹ *Meubles Léon ltée c. Option consommateurs*, 2020 QCCA 44 at paras 78-79.

⁴² *Beaulieu CA*, *supra* note 4 at paras. 79-82.

⁴³ See *infra* at para. 59 of this Application for some of the assessments that would need to be individually considered.

53. Relatedly, the extent to which “self-referential” criteria within the class definition is permissible is not clear in the jurisprudence. In this matter, the class definition included a measure of putative class members’ “*interest*” in receiving employment or housing opportunities. While the Authorization Judge deemed the “*interest*” criterion “arbitrary and purely subjective”,⁴⁴ the Court of Appeal did not view it as problematic, noting that self-referential criteria are not uncommon in class definitions and that this criterion could be established with greater precision, via unidentified methods, in the post-authorization stage.⁴⁵ Notably, the Court of Appeal conceded that establishing the “*interest*” element could require an individual assessment for each class member: “[...] *l’on peut admettre qu’elle repose principalement sur la crédibilité de la déclaration qui pourrait devoir en être faite par chaque membre potentiel*.”⁴⁶ Left standing, the Court of Appeal’s interpretation would effectively cause a jurisprudential reversal from the well-established and widely applied principles established by this Court with respect to the parameters for an adequate class definition.⁴⁷

54. The Court of Appeal also acknowledged that the ability to self-identify with the class definition constituted a “difficulty” as to putative class members not being able to know whether they were excluded from seeing certain advertisements.⁴⁸ However, it held that it was not a “true” difficulty, as the nature of the present case required an “adaptation” of the usual rules governing class composition.⁴⁹ As such, the extent to which such rules should be adapted in these contexts requires clarification from this Court, such that ongoing and future cases in the public interest context presenting similar class definition challenges are provided with a clear legal framework.

B. Drawing a Line Where the Factual and Legal Analyses Required for the Resolution of the Common Questions Are Unquantifiable

55. The second key issue in this appeal raises a question as to whether there is a point at which the duplication of factual and legal analyses required to resolve the common questions can ever factor into Québec’s distinct approach to the commonality requirement. While this Court has stated that

⁴⁴ *Beaulieu CS*, *supra* note 2 at para. 55.

⁴⁵ *Beaulieu CA*, *supra* note 4 at paras. 78-79.

⁴⁶ *Ibid.* at para. 78 [our emphasis].

⁴⁷ *Western Canadian Shopping Centres*, *supra* note 14 at para. 38.

⁴⁸ *Beaulieu CA*, *supra* note 4 at para. 80.

⁴⁹ *Ibid.* at paras. 81-82.

common questions do not have to “predominate” over individual ones,⁵⁰ where a colossal amount of individual and context-specific analyses is required, it is not clear at which point the former can become subsumed by the latter, such that the class action vehicle is no longer appropriate.

56. The principles governing the commonality requirement at article 575(1) CCP are well-established, having been elucidated in a number of SCC judgments.⁵¹ For clarity, the present appeal does not put any of these bedrock principles at issue.

57. While previous SCC judgments have stated that the fact that “numerous” individual questions are irrelevant to the commonality requirement articulated at article 575(1) CCP, this appeal raises the novel question as to whether and when a line can be crossed where the proposed common questions would necessitate *too many* or even *incalculable* factual and legal analyses for their resolution.

58. Although it is well-established that Québec’s approach to commonality is interpreted more flexibly than in common law jurisdictions,⁵² the present matter tests where the *limit* to that flexibility lies, which has not specifically been assessed by this Court.

59. Fundamentally, the purpose of ensuring commonality is to avoid the duplication of fact-finding or legal analysis.⁵³ Applied to the present matter, the questions of whether Ad Targeting or Ad Delivery are discriminatory would, invariably, involve *a repetition of factual and legal analyses across every Québec Facebook user*, including, but not limited to the following:

- (a) Within all advertisements that could have been delivered to each Facebook user in Québec at any given moment across a more than five-year period, the specific housing or employment advertisement(s) delivered to each person (of which there are potentially millions);
- (b) Whether, when, how often, and for how long every such user was “interested” in housing or employment during the relevant time period;

⁵⁰ *Desjardins Financial Services Firm inc. v. Asselin*, 2020 SCC 30 at para. 27. [Desjardins]

⁵¹ *Infineon*, *supra* note 13 at para. 72; *Vivendi*, *supra* note 13 at paras. 46, 56-58 and 60; *Desjardins*, *supra* note 50 at paras. 25, 27, 47 and 88; *L’Oratoire Saint-Joseph du Mont-Royal v. J.J.*, 2019 SCC 35 at para. 15.

⁵² *Vivendi*, *supra* note 13 at para. 57.

⁵³ *Ibid.* at para. 44.

- (c) Whether the given Facebook user was “interested” in an employment or housing opportunity at the exact time coinciding with their alleged exclusion from seeing a given advertisement;
- (d) A consistent assessment of “interest” across all class members: What is the required level of “interest” a person must manifest and how would that be demonstrated to prove membership in the class? For example, if an active search is required, can a person be considered “interested” if no active job or housing search was done? What level of search is required to demonstrate that one was interested in a job or housing opportunity and how would that be demonstrated to prove membership of each individual in the class?;
- (e) As to housing, each users’ interest in location (city, town, neighborhood, walkable, distance to important locations), kind (home, condo, apartment, number of bedrooms/bathrooms, types of amenities), contract (rent, purchase), and living situation (roommates, single occupancy), among others. Would each class member have to demonstrate that they had the capacity (financial or otherwise) to be interested? In the case of renters, must they demonstrate that they were at the end of a lease or could effectively terminate a lease early?;
- (f) As to employment, each users’ interest in the type of job, the amount of pay, and the work schedule (hourly, salary, in-person, fully remote, partially remote), among others. Further, can a person that is employed (such as the Respondent) be “interested in opportunities”? Is that person’s interest assessed differently depending on whether they work full-time or part-time? Does mere curiosity in what is going on in the market count or is each class member required to have been actively searching for a new opportunity?;
- (g) Whether housing or employment matching those interests were even generally available during the time period when each user had that interest;
- (h) If so, whether third-party advertisers posted advertisements for such housing or employment opportunities on Facebook, what the targeting criteria were for such ads,

why those third parties chose those criteria, and when and for how long such ads ran on Facebook;

- (i) A determination of every third-party advertiser's overall advertising campaign and strategy *across different advertising media*, to understand whether the advertiser used audience selection tools in a legitimate way by, for instance, using parallel advertising.⁵⁴ Advertisers often place ads for the same products and services using different types of traditional and online traditional media (e.g., newspapers, magazines, TV) and online media (e.g., Facebook, Google, Kijiji), which Facebook is not privy to;
- (j) The context underlying each advertisement, including the third-party advertiser's selection of the timing, objectives, audience, and bid strategy of its ads;⁵⁵
- (k) Whether the specific ads matching the specific interests of each user were made available to them, whether each user actually saw the ad or not, and if not, why (for example, where the user logged into Facebook and did something other than navigate and scroll through the page where they could see ads, such as choosing to only post content, review a friend's content, play a game, or even where they navigated to a page with ads and scrolled through them, did not scroll far enough such that they would have seen the desired ad had they done so);
- (l) Whether the user was prevented from seeing such an ad *because* of a specific protected ground under the Québec Charter⁵⁶ (as opposed to another reason based on information the user chose to share on his or her profile);⁵⁷
- (m) That as a result of any alleged exclusion, the user suffered personal injury.⁵⁸

⁵⁴ Sworn Statement of Andrew Howard at para. 3, **A.L.A. at p. 87.**

⁵⁵ *Ibid.* at para. 4, **A.L.A. at pp. 87-88.**

⁵⁶ *Charter of Human Rights and Freedoms*, CQLR c. C-12.

⁵⁷ For example, a job advertisement for a chef's position could be targeted to all Facebook users in Montréal who "liked" cooking-related content on their Facebook profiles. As such, the reason for being excluded from the ad would be based on not having "liked" cooking-related content, and not because of a protected ground.

⁵⁸ *Bou Malhab v. Diffusion Métromédia CMR inc.*, 2011 SCC 9 at para. 45.

60. In short, such questions, which are necessary to determine whether an advertisement's targeting or delivery was *prima facie* discriminatory in relation to any given Facebook user, would inevitably require individual and context-specific assessments. These queries are manifestly distinct from previous cases that have been before the SCC, such as in *Asselin*, where the SCC held that the alleged omissions did *not* depend on each client's individual characteristics.⁵⁹

61. This case illustrates that the extent to which the article 575(1) CCP assessment is shaped by excessive and disproportionate analyses necessary to answer the common questions is unclear. This uncertainty is reflected in the fundamentally different approaches between the Superior Court and the Court of Appeal in this case. Where the Authorization Judge found that there was not a single common question that could advance the class members' claims in a not insignificant manner due to the multitude of context-specific determinations,⁶⁰ these considerations did not influence the Court of Appeal's identification of several purported common questions, most of which had not even been proposed by the Respondent.⁶¹

62. Notwithstanding the fact that *creating* purported common questions constitutes an overstep of the Court of Appeal's limited and deferential role in such contexts,⁶² the sweeping nature of these questions raises concerns with the parameters of the commonality criterion: where the proposed class action would verge on that of a commission of inquiry rather than an action at law, it is certainly no longer connected to the purpose of the commonality requirement.⁶³

63. The present appeal also raises questions as to how the proportionality criterion must be assessed within the context of article 575(1) CCP. It is well-known that the proportionality of

⁵⁹ *Desjardins*, *supra* note 50 at para. 128.

⁶⁰ *Beaulieu CS*, *supra* note 2 at para. 45.

⁶¹ *Beaulieu CA*, *supra* note 4 at paras. 54-60.

⁶² *Hazan c. Micron Technology Inc.*, 2023 QCCA 132 at para. 6; *Desjardins*, *supra* note 50 at para. 15: (“[...] *one plainly understands that “read between the lines” is not an invitation to search in a vacuum — on the blank page — for allegations that are missing from the motion*”).

⁶³ *Durand*, *supra* note 14 at para. 120 (“*But what a putative member seeking an authorization cannot do is to transform a potential action at law into a commission of inquiry or an academic or scientific forum. That is not the essence of an action at law, and it is no more acceptable by reason of the fact that it involves a class action*”).

the class action is not a separate fifth criterion.⁶⁴ However, the SCC has stated that although the authorization judge cannot rely on the principle of proportionality to refuse to authorize an action that otherwise meets the article 575 CCP criteria, the “principle of proportionality must be considered in the assessment with respect to each of [the article 575 CCP] criteria.”⁶⁵

64. In the present matter, the Court of Appeal did not consider proportionality within its assessment of article 575(1) CCP, which is alarming given that there is a legitimate concern as to whether the questions identified by the Court of Appeal could be the subject of a manageable class action.

65. Further guidance from the SCC on how to apply proportionality is thus required: given that it “must” be considered within the article 575(1) CCP criteria, at what point does proportionality influence the outcome of the analysis and how should it be assessed concretely?

66. The consequence of imposing no limit on the quantity of individualized and context-specific factual and legal questions necessary to resolve a proposed class action is, in all likelihood, an unfeasible and unmanageable class action. Indeed, it is telling that even the Court of Appeal’s draw up of purported common questions included a question as to *how to proceed* in the proposed class action (relating to whether each third-party advertisers’ campaign strategies would need to be assessed in the class action).⁶⁶

67. This case highlights the existence of a distinction between *numerous* individual questions, which is not considered to be a hurdle to commonality in Québec, and an *unascertainable* amount. The latter can no longer reasonably be said to be tethered to the underlying purpose of commonality, which is intended to avoid the duplication of legal and factual analysis.

68. In short, clarity on the application of proportionality within the article 575(1) CCP analysis is required for cases such as the present matter, which may increasingly arise in contexts involving

⁶⁴ *Vivendi*, *supra* note 13 at para. 66; *Durand*, *supra* note 14 at para. 118.

⁶⁵ *Vivendi*, *supra* note 13 at para. 66 [our emphasis].

⁶⁶ *Beaulieu CA*, *supra* note 4 at para. 58 (« *Pour déterminer le caractère véritablement discriminatoire de la publicité des tiers-annonceurs, faut-il examiner la stratégie publicitaire globale de chacun de ceux-ci (qui pourraient ne s’être adressés qu’à une clientèle restreinte sur Facebook, mais en viseraient une autre dans des médias différents)?* » [our emphasis]).

the intersection of technology and public interest matters, and which raise significant concerns as to the manageability and judicial economy of class actions.

PART IV – SUBMISSIONS CONCERNING COSTS

69. In accordance with the Court's practice, the Applicants submit that they should be granted the costs of this application if leave is granted.

PART V – ORDERS SOUGHT

70. The Applicants seek an order granting leave to appeal.

Montréal, February 20, 2023



**M^e Éric Préfontaine
M^e Julien Hynes-Gagné
M^e Emily Lynch
Osler, Hoskin & Harcourt LLP
Counsel for Applicants**