

C A N A D A

**PROVINCE OF QUÉBEC
DISTRICT OF MONTRÉAL**

**N° C.A. 500-09-
(S.C. 500-06-000993-192)**

C O U R T O F A P P E A L

LYSE BEAULIEU, an individual residing
and domiciled at 2085 Avenue de Melrose,
in the city of Montréal, province of Québec,
H4A 2R6

APPELLANT/ Plaintiff

v.

FACEBOOK, INC., a legal person having
its principal place of business at 1601
Willow Road, in the city of Menlo Park,
state of California, 94025, USA

-and-

FACEBOOK CANADA LTD, a legal
person having a place of business at 611-
1201 University Ave, in the city of Toronto,
province of Ontario, M5G 1M1

RESPONDENTS / Defendants

**NOTICE OF APPEAL
(Art. 352 C.C.P.)**
Appellant, Lyse Beaulieu
Dated September 2, 2021

I. Overview

1. The Appellant, Lyse Beaulieu, appeals the judgment rendered by the honourable Suzanne Courchesne, j.c.s. (the “**Judge**”) dated July 27, 2021 (the “**Judgment**”), with notice of judgment dated August 5, 2021. The Judgment refused to authorize a class action against Facebook, Inc. and its Canadian subsidiary, Facebook Canada Ltd. (collectively “**Facebook**”), based on allegations that Facebook has knowingly permitted and actively facilitated discriminatory advertising for employment and housing on its platform.

2. Facebook provides advertisers with the tools to target ads to users based on their personal characteristics. By targeting ads to users with certain characteristics (e.g. men under a certain age), Facebook users who do not have those personal characteristics (i.e. all women, and men over the selected age) will never receive the ad. Ms. Beaulieu alleges that by knowingly permitting advertisers to exclude Facebook users from receiving employment or housing advertisements based on their age, sex, or race, Facebook is liable for discrimination against these users pursuant to ss. 10, 4, 11, and 16 of the *Charter of human rights and freedoms*, CQLR c. C-12 (the “**Quebec Charter**”).

3. Ms. Beaulieu further alleges that even where an advertiser does not avail itself of Facebook’s discriminatory targeting/exclusion options, Facebook’s own algorithms discriminate against certain users because Facebook delivers employment and housing ads to users based on the user’s age, race, or sex.

4. Accordingly, Ms. Beaulieu proposed that the following class be authorized:

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. Even though the Judge found that Ms. Beaulieu's claim satisfied arts. 575(2), (3) and (4) CCP, she found that it did not satisfy art. 575(1) CCP. The Judge held that a discrimination class action of this nature raised too many individual issues, and that it was "impossible" to identify a class.

6. The Judge drew these conclusions despite holding that Ms. Beaulieu had personally made out a case of *prima facie* discrimination, and that a reasonable person would conclude that "the exclusion of groups from receiving employment or housing ads, on the basis of their protected characteristics which do not relate to their capacities or merits, would impact the group members' dignity and that it constitutes *prima facie* discrimination" (para. 81).

7. Respectfully, the Judge erred in law in her analysis of art. 575(1) CCP.

8. First, despite clear common issues that advance the case in a not insignificant manner, the Judge erroneously concluded that a claim for discrimination was too "context specific" and that legal standards would differ from ad to ad (para. 45). Her focus on individual issues is contrary to well-settled jurisprudence, and the primary individual issue she identifies – the intent of each individual advertiser – is irrelevant at this stage.

9. Second, despite correctly holding that Ms. Beaulieu had made out a *prima facie* claim, the Judge erroneously concluded that the claim could not be made on a class basis. Surprisingly, the Judge considered that the covert nature of the discrimination at issue made the class impossible to define, and that the group would be "too broad, circular and unmanageable at the post-authorization stage" (para. 56).

10. With respect, any concerns about class management should either have been addressed through modifications to the class definition or deferred to the judge seized of the merits to manage any such issues post-authorization.

11. More fundamentally, the Judge's approach to assessing the presence of common questions and a definable class is inconsistent with the role of class actions as a procedural vehicle intended to facilitate access to justice. Particularly in public interest cases based on allegations of systemic discrimination stemming from a hidden practice,

a class action is in all likelihood the *only* way for such practices to be brought to light and denounced, and victims recognized and compensated. Covert activity cannot be shielded from class liability, and a large class size militates in favour of, not against, authorizing a class action.

II. Judgment Under Appeal

12. Following a one-day hearing held on January 15, 2021, the Judge correctly held that the requirements of arts. 575(2), (3) and (4) CCP were met.

13. With respect to art. 575(2) CCP, the Judge held that the legal syllogism advanced by Ms. Beaulieu, as applied to the factual allegations, established a *prima facie* case for discrimination under articles 10 and 4 of the Quebec *Charter* (paras. 72-78):

[72] Applying a combination of Sections 4 and 10 of the Quebec Charter and the test set out in *Bombardier* to the alleged facts, Ms. Beaulieu contends that she and the proposed Class Members:

- (1) were excluded from receiving housing or employment ads;
- (2) based on their age, gender or other protected grounds; and
- (3) that exclusion impaired the full and equal recognition of their Charter protected right to dignity.

[...]

[76] Applying these principles to the alleged facts and assuming the allegations and the supporting evidentiary material to be true, the Court concludes that Ms. Beaulieu discloses an arguable case of discrimination under the Quebec Charter.

14. The Judge further held, with respect to the class:

[81] The Court agrees at this stage that a reasonable person would conclude that the exclusion of **groups** from receiving employment or housing ads, on the basis of their protected characteristics which do not relate to their capacities or merits, **would impact the group members' dignity** and that it constitutes *prima facie* discrimination. (Emphasis added)

15. The Judge concluded that the allegations and exhibits supported the contentions about employment and housing advertisement targeting, but not advertisement text, and with respect to discrimination based on sex, age, and race only (paras. 83-84). The Appellant does not contest this part of the Judgment.

16. The Judge further held that Ms. Beaulieu also has a claim under sections 11 and 16 of the Quebec *Charter*, which prohibit discrimination in the context of notices and hiring, respectively (paras. 85-88).

17. Finally, the Judge held that Ms. Beaulieu's allegations support a claim for moral and punitive damages (paras. 89-105) as well as for injunctive relief (paras. 106-109). She then held that Facebook's grounds for contestation, while appearing to be serious, constitute defences that should be dealt with at the trial on the merits and not at the authorization stage (paras. 110-116).

18. Despite these findings, the Judge held that art. 575(1) was not met because (i) individual issues "undermined" the systemic component of the case (paras. 44-48) and (ii) the class was "too broad, circular and unmanageable at the post-authorization stage", including "possibly several million members" (para. 56) and was "impossible to define" (para. 57).

III. Grounds of Appeal

19. The Judge erred in concluding that art. 575(1) was not met in the present case. In particular:

- a. The Judge erred in her identification of individual issues, and in her overall assessment that such issues were an impediment to authorization;
- b. The Judge erred in holding that the class was impossible to define, or that its size or manageability were an impediment to authorization.

A. The Claims of the Members of the Class Raise Identical, Similar or Related Issues of Law or Fact

20. With respect, the Judge's conclusions concerning the issues of law or fact are wrong in law.

21. First, the Judge considered that "although Facebook's advertising practices are primarily targeted by the Application, the advertisements are conceived, created and placed by third-party advertisers who, **for several different reasons, legitimate or not**, may select their audience and exclude Facebook users from viewing their ads" (para. 44; emphasis added).

22. The Judge's focus on the advertisers' intent is based on a flawed legal premise that the motives of each individual advertiser would need to be established to make out a *prima facie* claim for discrimination. In fact, the jurisprudence is unequivocal that intent is not relevant: "[n]ot requiring proof of intention applies logically to the recognition of various forms of discrimination, since some discriminatory conduct involves multiple factors or is unconscious".¹

23. As the Supreme Court explained in *Bombardier*, and as the Judge correctly summarized in her analysis of art. 575(2) CCP, the plaintiff's burden is to establish: (i) a distinction, exclusion, or preference; (ii) based on a prohibited ground, meaning that there is "a *connection* between a prohibited ground of discrimination and the distinction, exclusion or preference"; and that (iii) the distinction, exclusion or preference has the effect of impairing or nullifying the exercise of another protected human right or freedom.²

24. Establishing these elements does not require "an evaluation of multiple factors and applicable legal standards that would differ from ad to ad" (para. 45), and indeed the Judge does not identify any such factors or legal standards other than the advertiser's intent, which is irrelevant.

¹ *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Center)*, 2015 SCC 39, paras. 40-41. [**Bombardier**]

² *Bombardier*, paras. 35-37; 52-53.

25. Second, the Judge invoked the covert nature of the discrimination alleged by Ms. Beaulieu – i.e. that users are being excluded from receiving ads without their knowledge – as somehow being a bar to common issues (para. 44).

26. With respect, this would insulate hidden practices from class liability: in numerous cases, class members are not aware of their membership in the class until they receive a proper notice to potential class members detailing the alleged conduct.

27. Just like Ms. Beaulieu, the class members do not need to know precisely which ads they did not receive to be members of the class: they need to be Facebook users who belong to one of the protected, excluded groups.

28. Finally, the Judge alludes to the combined objective/subjective components to establishing a violation of dignity as indicating a further individual issue. However, the existence of a subjective element is not a bar to authorizing a class action, and class actions based on breaches of dignity have long been authorized in Quebec.³

29. Indeed, the Judge concluded **both** (i) that the objective element was met in this case: “a reasonable person would conclude that the exclusion of groups from receiving employment or housing ads, on the basis of their protected characteristics which do not relate to their capacities or merits, would impact the group members’ dignity and that it constitutes *prima facie* discrimination” (para. 81) **and** (ii) that Ms. Beaulieu had established a *prima facie* case that her right to dignity was impaired (paras. 77-78).

30. Even if the *extent* of the violation of dignity is held to be an individual issue, this would only impact the amount of damages each class member is owed. It would be for the court seized of the merits to decide at that point whether the evidence is sufficient to proceed by presumption, or whether individual assessments of damages are required.⁴ The jurisprudence is clear that the existence of some individual questions, which may

³ See e.g. *Quebec (Public Curator) v. Syndicat national des employés de l'hôpital St-Ferdinand*, [1996] 3 S.C.R. 211 [**St-Ferdinand**].

⁴ See e.g. *St-Ferdinand*, paras. 44-49; *Aluminerie de Bécancour inc. c. Commission des droits de la personne et des droits de la jeunesse (Beaudry et autres)*, 2021 QCCA 989, paras. 16, 110.

even give rise to individual trials down the road, do not preclude a class action from proceeding.⁵

31. Moreover, there are no subjective elements to ss. 11 and 16 of the Quebec *Charter*, and the Judge properly concluded that Ms. Beaulieu had established an arguable case based on these specific provisions (para. 88).

32. In light of the above, and contrary to the Judge's assertion, *at the very least*, Facebook's liability on a systemic basis is a common issue that advances the case in a not insignificant manner (para. 48).

B. The Proposed Class is Identifiable

33. Once again, the Judge erroneously invoked the covert nature of the alleged discrimination as a bar to authorization, this time concluding that Facebook users will not be able to determine whether they are members of the class. In her view, the class definition "makes it difficult if not impossible for a person to know at the outset whether or not they are included in the class, because of their ignorance of their personal exclusion on the basis of discrimination" (para. 53).

34. This conclusion is fundamentally flawed for two reasons: first, "exclusion on the basis of discrimination" is not the test, nor is it part of the proposed class definition, and second, there is no reason to conclude that, upon proper notice, potential class members would not be able to determine whether they are included.

35. It bears repeating: in order to make out a case of *prima facie* discrimination, the plaintiff's burden is to show (i) exclusion; (ii) based on, or "connected to" a *prohibited ground*; (iii) that has the effect of impairing the exercise of a right of freedom. Once these elements are established, the defendant has the opportunity to establish one of the recognized justifications under the Quebec *Charter*.

36. The members of the class are therefore Facebook users who are members of the excluded, protected groups, and this is how the class is defined. If Ms. Beaulieu can

⁵ E.g. *Oratoire Saint-Joseph du Mont-Royal v. J.J.*, 2019 SCC 35.

identify herself as a member of the class, then there is no reason other Facebook users, upon a notice setting forth the allegations against Facebook (which can easily be sent through Facebook), could not do the same. With respect, there is no reason to conclude, as the Judge did, that members would be unable to exercise their opt-out right (para. 53).

37. The Judge's conclusion that the class definition is circular seems to suffer from the same flawed premise. The Judge states that "the purported advertising practices have allegedly caused members of the group to be excluded from receiving employment or housing ads, **but such exclusion could only be determined at trial, upon complete and exhaustive evidence**. Thus, the class membership depends on the outcome of the class action on the merits." (para. 51)

38. With respect, this is directly contrary to the Judge's assessment of Ms. Beaulieu's claim in the context of art. 575(2):

[79] As for the other potential Members of the proposed Class, the allegations of the Application and the exhibits, detail and illustrate the purported use by advertisers of Facebook targeting services to post employment advertisements that restrict the age and gender of the users who receive the ads. Although Facebook prohibits discriminatory content and selections by its ad policies, its ad targeting system allegedly permits advertisers to illegally target some users in their employment or housing advertisements while excluding others based on protected characteristics.

[80] Ms. Beaulieu further alleges that Facebook's algorithms, not only the parameters selected by advertisers, are also responsible for identifying an ad's audience. According to the Ad Delivery Study, significant skew was observed in the platform's ad delivery process along gender and racial lines for ads for employment and housing opportunities, despite a selection of neutral targeting parameters by the advertisers.

[81] The Court agrees at this stage that a reasonable person would conclude that the exclusion of groups from receiving employment or housing ads, on the basis of their protected characteristics which do not relate to their capacities or merits, would impact the group members' dignity and that it constitutes *prima facie* discrimination.

39. A trial on the merits is not required to determine whether a Facebook user was excluded: every user who falls outside the prohibited ground parameters of an ad was necessarily excluded. Of course, being a member of the class does not mean that the claim will ultimately succeed: for example, if the Court seized with the merits accepts Facebook's argument that it cannot be held liable for third party advertisements, and that its own practices comply with the Quebec *Charter*, then the action will fail. But the fact that the class may not succeed does not mean there cannot be a class.

40. In any event, some degree of circularity is inevitable in certain contexts and courts have repeatedly affirmed that circularity is not a bar to authorization. For example, a class can be defined as "individuals who were sexually assaulted"⁶ even if class members' claims ultimately depend on proving conduct fitting the definition of sexual assault and an absence of consent. This is not a bar to authorization.

41. Finally, although the Judge did not deem this to be determinative, she concluded that "interested in receiving" employment ads was too subjective. These terms were included because they capture workers who, while not actively searching for a job, would nonetheless have been interested in receiving employment ads. If this is too subjective then the solution was to strike these words from the class definition.⁷

42. However, the Judge went on to hold that the definition of the group would still remain "too broad, circular and unmanageable at the post-authorization stage", and would "basically include all Facebook users in Quebec, possibly several million members" (para. 56).

43. With respect, if Facebook had charged a hidden fee to all of its members, then a class action against Facebook based on that practice would include all of its members, which would indeed be several million members. This is not a valid bar to authorization; to the contrary, the existence of a class of this size militates in favour of authorization.

⁶ See the class definitions in, e.g., *F. c. Frères du Sacré-Coeur*, 2019 QCCS 5122; *Y. c. Servites de Marie de Québec*, 2018 QCCS 4889; *Tremblay c. Lavoie*, 2014 QCCS 3185

⁷ *Levy c. Nissan Canada inc.*, 2021 QCCA 682, para. 42.

44. In any event, the resulting class would not “basically include all Facebook users in Quebec” (para. 56), but only those who belong to one of the groups with respect to whom the allegations and evidence at this stage establish exclusion from receiving housing or employment advertisements as a result of a prohibited personal characteristic.

45. In addition, the class definition further restricts membership to those who were interested in receiving or pursuing employment or seeking housing. While this will likely still result in a large class, it is not one that would be “too broad, circular, and unmanageable at the post-authorization stage” (para. 56). Again, if the words “interested in receiving” were deemed to be too broad, the proper remedy was to strike them. The Superior Court has authorized complex class actions with thousands or even millions of class members before.⁸

IV. Conclusion

46. In sum, the proposed class action is precisely the type of claim for the which the class action vehicle is most appropriate: the Judge concluded that Ms. Beaulieu has a valid *prima facie* claim for discrimination; the claim is against a defendant with unlimited resources; and it is completely unrealistic to expect any individual class member to bring an individual action, no matter how insidious and reprehensible Facebook’s conduct might be. Allowing the Judgment to stand undermines rather than upholds the objectives of class actions.

FOR THESE REASONS, MAY IT PLEASE THE COURT:

ALLOW the appeal in Superior Court file 500-06-000993-192;

GRANT the Petitioner’s Application;

AUTHORIZE the class action on behalf of the following class:

All Facebook users located in Quebec who were interested in receiving or pursuing employment or who were seeking housing and who, as a

⁸ See *Association québécoise de lutte contre la pollution atmosphérique c. Volkswagen Group Canada Inc.*, 2018 QCCS 174, certifying a class action whose class included every resident of Quebec (leave to appeal refused: 2018 QCCA 1034; appeal to the Supreme Court of Canada dismissed: 2019 SCC 53).

result of their race, sex, [...] or age [...] 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.

IDENTIFY the principal questions of law and fact to be dealt with collectively as follows:

- i. Did Facebook breach class members' rights under the Quebec *Charter* or other applicable provincial human rights legislation or applicable law by allowing and facilitating the use of its advertising services to exclude individuals from viewing advertisements for employment or housing opportunities on the basis of their race, sex, civil status, age, ethnic or national origin, or social condition?
- ii. Did Facebook breach class members' rights under the Quebec *Charter* or other applicable provincial human rights legislation or applicable law by allowing and facilitating the use of its advertising services to advertise employment or housing opportunities in a manner that explicitly excludes individuals from consideration for these opportunities on the basis of their race, sex, civil status, age, ethnic or national origin, or social condition?
- iii. Did Facebook breach class members' rights under the Quebec *Charter* or other applicable provincial human rights legislation or applicable law by delivering employment or housing advertisements preferentially to certain individuals on the basis of their race, sex, civil status, age, ethnic or national origin, or social condition?
- iv. Is Facebook liable to the class members for non-pecuniary damages, and if so, in what amount?
- v. Is Facebook liable to the class members for punitive damages, and if so, in what amount?
- vi. Should an injunction be issued to prohibit Facebook from allowing and/or facilitating the discriminatory targeting of advertisements based on race, sex, civil status, age, ethnic or national origin, or social condition with respect to employment and housing opportunities?

IDENTIFY the conclusions sought by the class action as follows:

- I. **CONDEMN** Facebook, Inc. and Facebook Canada Ltd. to pay to each member of the class an amount to be determined for non-pecuniary damages, and **ORDER** collective recovery of these sums;
- II. **CONDEMN** Facebook, Inc. and Facebook Canada Ltd. to pay to each member of the class an amount to be determined for punitive damages, and **ORDER**

collective recovery of these sums;

- III. **CONDEMN** Facebook, Inc. and Facebook Canada Ltd. to pay legal interest and additional indemnity on the above amounts from the date of service of the Application for Authorization to Institute a Class Action;
- IV. **CONDEMN** Facebook, Inc. and Facebook Canada Ltd. to bear the costs of the present action including the costs associated with all notices;
- V. **ISSUE** an injunction prohibiting Facebook, Inc. and Facebook Canada Ltd. from allowing and/or facilitating the discriminatory targeting or delivery of advertisements based on race, sex, civil status, age, ethnic or national origin, or social condition with respect to employment and housing opportunities;
- VI. **RENDER** any other order that the Court shall determine and that is in the best interests of the class members.

ORDER the Respondents to provide to class counsel, in electronic form, a list containing the names and last known coordinates of all members of the proposed class;

DECLARE that any member of the class who has not requested his/her exclusion from the class be bound by any judgment to be rendered on the class action, in accordance with law;

FIX the deadline for exclusion from the class at sixty (60) days from the date of the notice to the members, after which time those members who did not request exclusion from the class shall be bound by all judgments to be rendered with respect to the class action;

ORDER the publication of a notice to the members of the class drafted according to the terms of form VI of the Rules of Practice of the Superior Court of Quebec in the manner and locations to be determined by the Court;

REFER the present file to the Chief Justice for determination of the district in which the class action should be brought and designation of the Judge before whom it will be heard;

THE WHOLE with costs, including the costs of publication of all notices.

Notice of the present Notice of Appeal is given to: Respondents, Facebook, Inc. and Facebook Canada Ltd.; to M^e Céline Legendre, M^e Eric Préfontaine and M^e Julien Hynes-Gagné of Osler, Hoskin & Harcourt LLP, attorneys for the Respondents Facebook, Inc. and Facebook Canada Ltd. in first instance, and the Clerk of the Superior Court, district of Montreal.

MONTREAL, September 2, 2021

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