

SUPERIOR COURT
(Class Actions)

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No: 500-06-000993-192

DATE: July 27th, 2021

BY THE HONOURABLE SUZANNE COURCHESNE, J.S.C.

LYSE BEAULIEU
Plaintiff

v.

FACEBOOK, INC.

and

FACEBOOK CANADA LTD
Defendants

JUDGMENT ON AUTHORIZATION TO INSTITUTE A CLASS ACTION

1. OVERVIEW

[1] Companies in Canada use the social media platform Facebook to post, among other things, paid advertisements for employment and housing opportunities.

[2] The Plaintiff Lyse Beaulieu alleges that despite Facebook's purported commitment to non-discrimination on its platforms, its targeting tools permit employers and companies to illegally exclude Facebook users from receiving their advertisement for employment and housing opportunities, on the basis of the users' age, gender or other prohibited grounds.

[3] Ms. Beaulieu requests permission to institute a class action against Facebook, Inc. and its Canadian subsidiary, Facebook Canada Ltd. (collectively, Facebook) on her own behalf and on behalf of the following class, for damages resulting from Facebook's alleged participation in discriminatory targeting of paid advertisements posted on its platform¹:

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.

(The proposed Class or Class Members)

[4] Ms. Beaulieu intends to bring an action against Facebook in non-pecuniary damages, punitive damages and injunction for employment discrimination and unjustified breaches of the *Charter of Human Rights and Freedoms*² (the **Quebec Charter**).

2. CONTEXT

[5] Ms. Beaulieu's claims are based on the following allegations on Facebook's advertising practices and on the exhibits filed in support of her allegations.³

[6] In addition, Facebook was allowed by the Court to produce as appropriate evidence the sworn statement of Andrew Howard, Director Privacy and Data Policy, which provides clarification on these practices.⁴ The Court also introduces hereinafter the information put forward by this statement.

2.1. Advertisement on Facebook

[7] Facebook provides a general use online platform that advertisers use to place millions of ads for all types of products and services – not only or even significantly housing or employment ads. Advertisers use self-serve tools to create ads and select the audience, timing, objective, and bid strategy for their ads.⁵

¹ Re-amended Application for Authorization to Institute a Class Action and to obtain the Status of Representative Plaintiff, dated January 20, 2021 (the **Application**); by her original Application, the Petitioner requested to represent a national Canadian Class.

² CQLR, c. C-12.

³ Application, para. 6 to 43.1; exhibits R-1 to R-15.

⁴ Exhibit F-1, Sworn Statement of Andrew Howard signed on January 13, 2021, and exhibits in support thereof, AH-1 and AH-2.

⁵ Exhibit F-1, para. 4.

[8] 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). When advertisers place ads on its platform, Facebook does not know what other advertising media and strategies are being used to advertise the same products and services.⁶

2.2. Ad Targeting

[9] Facebook permits prospective advertisers to target their advertisements to specific profiles of individuals through the creation of what it calls “Custom Audiences” and “Lookalike Audiences”.

[10] By creating a “Custom Audience,” advertisers may select the personal characteristics they wish to target in a user audience when placing an ad with Facebook. These characteristics might relate to a user’s interests or the pages the user “likes” on Facebook, but they can also include various demographic criteria, such as the location, age, and gender of the prospective audience, as well as language.⁷

[11] An advertiser can further use detailed targeting to include or exclude certain types of users and ultimately narrow the Custom Audience that sees a given advertisement.⁸ For instance, an advertiser can narrow an audience to only include people who are frequent travellers and are interested in cooking and are college grads.⁹ Thus, all Facebook users who are not members of that Audience will never see the advertisement in question.

[12] Through Facebook Ads’ Manager, a prospective advertiser can create a new Custom Audience based on the following parameters, among many others: location, age, gender, national or ethnic origin, civil status.¹⁰

[13] Parties can also have Facebook create “Lookalike Audiences” based on either the business’s Custom Audience(s), or the profiles of users that like the party’s Facebook page.¹¹ The prospective advertiser chooses the source audience; Facebook identifies the common qualities of the source audience and individuals who are similar to the source audience in order to create the Lookalike Audience that will be targeted by the business’s advertisements. Facebook’s algorithm is thus directly responsible for identifying and targeting Lookalike Audiences.

[14] Although targeted advertising is generally not considered discriminatory, the Quebec Charter prohibits discrimination on the basis of race, sex, civil status, age, ethnic or national origin, or social condition in offers of employment or of services that are generally available to the public, such as housing.

⁶ Exhibit F-1, para. 3.

⁷ Exhibit R-1.

⁸ Exhibit F-1, para. 6.

⁹ Exhibit R-2.

¹⁰ Exhibit R-3.

¹¹ Exhibit R-4.

[15] Facebook's Advertising Policies state that advertisements "must not discriminate or encourage discrimination against people based on personal attributes such as race, ethnicity, color, national origin, religion, age, sex, sexual orientation, gender identity, family status, disability, medical or genetic condition". All advertisers using Facebook's ad platform must agree to Facebook's advertising policies, including with respect to discriminatory practices.¹²

[16] Facebook states that it reviews advertisements to ensure that they are in conformity with its Policies prior to posting the ads, and it reserves the right not to approve an ad that is non-compliant. This review is automated and limited and does not currently include, in Canada, (1) a determination on whether the ad is for housing or employment, or (2) a determination as to whether the ad contains discriminatory text.¹³

[17] Users are also able to report ads, or text in ads, that they believe violate Facebook's policies. If Facebook determines that a reported ad violates its policies, the ad is removed.¹⁴

[18] Ms. Beaulieu alleges that in practice, Facebook fails to disapprove and prevent publication of advertisements that discriminate against prospective tenants or employees on multiple prohibited grounds. As a result, it has knowingly permitted and continues to knowingly permit advertisers to illegally target some users in their employment or housing advertisements while excluding others based on characteristics these advertisers select to create Custom Audiences, or that Facebook itself uses to create Lookalike Audiences.

[19] Ms. Beaulieu provides examples of ads for job opportunities which excluded people, based on their age, from receiving these ads.¹⁵ On April 8, 2019, CBC News reported that nearly 100 Canadian employers, including government agencies, used Facebook targeting services to post advertisements that restrict the age range and gender of users who receive these ads.¹⁶

2.3. Ad Text

[20] It is also possible to state in the text of an advertisement posted on Facebook that a company or prospective employer is seeking individuals with specific personal characteristics.¹⁷

[21] The news site The Logic created ads to test whether it could exclude audiences based on gender and age in housing and job posts. In addition, the Logic posted an ad

¹² Exhibits R-5 and AH-1; Exhibit F-1, para. 5.

¹³ Exhibit F-1, para. 9.

¹⁴ Exhibit AH-1.

¹⁵ Exhibits R-6, R-7, R-8 and R-9.

¹⁶ Exhibit R-10.

¹⁷ Application, para. 29-31.

with the headline "Apartment For rent: Indigenous People Need Not Apply". These test advertisements were approved for posting by Facebook.¹⁸

2.4. Ad Delivery

[22] Ad delivery refers to the process by which the advertising platform shows ads to users.

[23] According to a study dated April 4, 2019, entitled "*Discrimination through optimization: How Facebook's ad delivery can lead to skewed outcomes*" (**the Ad Delivery Study**)¹⁹, Facebook's automated advertisement delivery system discriminates against certain people based on prohibited grounds, even in cases where the advertisement and the parameters created by the advertiser are not themselves discriminatory.

[24] Once an advertisement is created, Facebook's system will deliver the advertisement predominantly to users for whom the content is deemed "relevant". Even when the creator of the advertisement does not specify a target audience, the advertisement is not delivered indiscriminately to all Facebook users. Rather, Facebook will target specific users who are deemed by its algorithm to be more likely to be interested in the product or service being advertised. For example, the Ad Delivery Study found that Facebook showed an advertisement for employment in the lumber industry principally to males, whereas an advertisement for a position as a janitor was shown predominantly to black users.²⁰

[25] Ms. Beaulieu contends that in delivering employment and housing advertisements preferentially to users with certain profiles, Facebook discriminates against certain people on the basis of prohibited grounds.

2.5. Changes implemented by Facebook

[26] In March 2019, following lawsuits brought by various advocacy groups in the United States and by the US Department of Housing and Urban Development, Facebook announced that by September 30, 2019, it would make modifications to its Ads Manager tool. These changes would initially apply only in the United States but in January 2020, Facebook announced plans to make similar changes in Canada.²¹

[27] More precisely, the changes to Facebook's ad platform are detailed as follows:²²

Specifically, among other changes, Facebook implemented a special ad creation flow for housing, credit and employment ("HEC") ads that does not allow

¹⁸ Exhibits R-11, R-12 and R-13.

¹⁹ Exhibit R-15.

²⁰ *Id.*

²¹ Exhibits R-11 and R-14.

²² Exhibit F-1, para. 13-16; Exhibit AH-2.

advertisers to target ads based on age, gender, zip code, or any other options identifying or describing protected characteristics (“HEC Flow”).

Facebook also created a section in the Ad Library on Facebook so as to allow all Facebook users to search for and view US housing ads, regardless of whether those ads were delivered to user News Feeds. Facebook will also implement employment and credit searching by December 31, 2020 (“HEC Search”).

Facebook decided, and announced on December 3, 2019, that:

- (a) the HEC Flow would roll out to Canada by December 31, 2020;
- (b) the Search Capability for housing, employment and credit ads would be available in Canada by December 31, 2020.

2.6. Ms. Beaulieu’s individual claim

[28] Ms. Beaulieu’s personal claim is based on the following allegations²³:

- She is currently 67 years old and is an active Facebook user;
- She has had a Facebook account since 2013, and logs in every day to read what is going on with her “friends” or contacts;
- She has worked as a legal and administrative assistant in Montreal and has been a legal assistant since 2008;
- Since becoming a legal assistant and a Facebook user, Ms. Beaulieu has periodically searched for jobs online; she has used job search sites like Jobboom, Monster, Sécretaire, and others, particularly from 2017 to 2019 (when she was 63 to 65 years old);
- During that time, despite her online job search activity, Ms. Beaulieu did not receive any job advertisements on Facebook;
- As an older female worker, Ms. Beaulieu was precluded from receiving employment advertisements on Facebook that excluded her based on her age and gender;
- This situation shocked her and makes her feel angry and hurt; she feels insulted and humiliated by the fact that she has been intentionally prevented from seeing job opportunities that target younger people or men;
- She feels that her dignity has been attacked and this has had a lasting impact on her self-esteem and self-confidence.

²³ Application, para. 40 to 43.1.

3. **ANALYSIS**

3.1 **Criteria for Authorization**

[29] According to Article 575 of the Code of Civil Procedure (**C.C.P.**), the Court authorizes the class action and appoints the class member it designates as representative plaintiff if it is of the opinion that :

- 1° the claims of the members of the class raise identical, similar or related issues of law or fact;
- 2° the facts alleged appear to justify the conclusions sought;
- 3° the composition of the class makes it difficult or impracticable to apply the rules for mandates to take part in judicial proceedings on behalf of others or for consolidation of proceedings;
- 4° the class member appointed as representative is in a position to properly represent the class members.

[30] At authorization, the Court's limited role is to "screen" or filter out "frivolous, clearly unfounded or untenable" claims and the burden of the petitioner is not very onerous.²⁴ The criteria set out at Article 575 C.C.P. must be given a flexible, liberal, and generous approach.

[31] At this stage, the Court is ruling on a purely procedural question. The Court must not deal with the merits of the case, as they are to be considered only after the application for authorization has been granted.²⁵

[32] Although the threshold for authorizing a class action is low, the Court's filtering or screening role at this stage must be exercised and is necessary to prevent defendants from having to defend themselves on the merits against untenable claims.²⁶

[33] The rule of proportionality does not constitute a stand-alone factor and must be assessed with respect to each of the individual criteria set out at Article 575 C.C.P.²⁷

[34] If the cumulative criteria for authorization are met, the Court must authorize the class action; there is no residual discretion. The Court should err on the side of caution

²⁴ *Infineon Technologies AG v. Option consommateurs*, 2013 SCC 59, paras. 59 and 65 (**Infineon**); *Vivendi Canada Inc. v. Dell'Aniello*, 2014 SCC 1, para. 37 (**Vivendi**); *L'Oratoire Saint-Joseph du Mont-Royal v. J.J.*, 2019 SCC 35, paras. 7, 10,11 and 56 (**L'Oratoire**); *Desjardins Cabinet de services financiers inc. c. Asselin*, 2020 CSC 30 (**Asselin**).

²⁵ *L'Oratoire*, *supra*, note 24, para. 7.

²⁶ *Infineon*, *supra*, note 24, para. 59 and 61.

²⁷ *Vivendi*, *supra*, note 24, para. 66.

and authorize the class action where there is doubt as to whether the conditions are met.²⁸

[35] Facebook submits that Ms. Beaulieu's application fails to meet the requirements set out at paragraphs (1) and (2) of Article 575 C.C.P.

[36] For the reasons that follow, the Court concludes that the first criterion is not satisfied.

3.1.1. The members of the class claims raise identical, similar or related issues of law or fact (575 (1) C.C.P.)

[37] At the authorization stage, the threshold requirement for common questions is low. Thus, even a single identical, similar or related question of law would be sufficient to meet the common questions requirement provided that it is significant enough to affect the outcome of the class action.²⁹

[38] The fact that the situations of all members of the class are not perfectly identical does not mean that the class does not exist or is not uniform.³⁰

A) The issues of law or fact

[39] The proposed issues of fact or law are defined in the Application as follows:

- i. Did Facebook breach class members' rights under the Quebec Charter or other 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 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 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,

²⁸ *Sibiga v. Fido Solutions inc.* 2016 QCCA 1299, para. 51.

²⁹ *Infineon*, *supra*, note 24, para. 72 ; *Vivendi*, *supra*, note 24, para. 58; *Asselin*, *supra* note 24, para. 25.

³⁰ *Infineon*, *supra*, note 24, para. 73.

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?

[40] Ms. Beaulieu contends that the answers to these questions will substantially advance the resolution of the class members' claims because they focus on Facebook's actions and omissions on a systemic level.

[41] Facebook responds that, on the contrary, the first three questions are incompatible with the raising of an identical, similar or related issue on the merits. Specifically, the application of the discrimination test, which is the main premise of the legal syllogism, requires a subjective element in this specific context which would inevitably differ across class members.

[42] Without these three issues, Facebook contends that the remaining questions (iv-vi) proposed by Ms. Beaulieu are rendered moot since they flow from a presumed finding of discrimination. Indeed, these other questions cannot be decided in the abstract since they arise only after the questions relating to discrimination have been answered.

[43] Essentially, the first proposed questions aim at determining if Facebook's advertisement practices breached class members' rights under the Quebec Charter. For this determination, the Court would have to conclude that:

- The members were excluded from viewing advertisements for employment or housing opportunities;
- On the basis of their protected characteristics;
- In consequence, the members' rights under the Quebec Charter were breached.

[44] The present case raises several individual issues since i) 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;³¹ ii) as acknowledged by Ms. Beaulieu, it is hardly possible for

³¹ Exhibit F-1, para. 3-8.

Facebook users to know what advertisements or opportunities they did not see, if they were in fact excluded and if this exclusion was due to discrimination³².

[45] Contrary to other class action discrimination cases³³, the systemic component of the present matter appears considerably undermined by subjective issues. Whether an advertisement, its targeting or delivery, is discriminatory is a context-specific determination that depends on the evaluation of multiple factors and applicable legal standards that would differ from ad to ad.

[46] In addition, the right to dignity protected by article 4 of the Quebec Charter is at the heart of this case, as discussed further. While the analysis of the compromise of the protected right to dignity must first be made according to an objective standard, the impact of the alleged infringement must then be assessed in the specific context of the litigation.³⁴

[47] In the context raised by the allegations, an examination of the specific context of each advertisement and of each Facebook user, including their own particular traits and circumstances, would be required to determine whether the user's right to dignity was impaired.

[48] Even if the Court were to identify as common issue the determination as to whether Facebook's advertising practices permit or actively facilitate discriminatory ad targeting and delivery, its resolution would not advance the class members' claims in a not insignificant manner.

B) The Class Definition

[49] In a recent judgment³⁵, the Court of Appeal reasserted the principles pertaining to class definition:

[39] The clarity of the definition of a group in a class action is important as it allows people to know if the class action concerns them or is likely to concern them and, thus, exercise their right to exclude themselves within the prescribed delay.

[40] As such, the courts have identified four main criteria pertaining to the definition of a group in a class action: (1) it must be based on objective criteria; (2) the criteria must have a rational basis; (3) the definition of the group should not be circular or imprecise;

³² Application, para. 50 and 59.

³³ *Option Consommateurs v. 2642-0398 Québec inc.*, 2021 QCCS 1988; *Ligue des Noirs du Québec v. Ville de Montréal*, 2019 QCCS 3319; *Regroupement des activistes pour l'inclusion au Québec (RAPLIQ) v. Société de transport de Montréal (STM)*, 2017 QCCS 2176.

³⁴ *Calego International inc. c. Commission des droits de la personne et des droits de la jeunesse*, 2013 QCCA 924 (**Calego**); *Ward v. Commission des droits de la personne et des droits de la jeunesse (Gabriel and al.)*, 2019 QCCA 2042, para. 183-184 (leave to appeal to the Supreme Court granted (S.C. Can., 2020-07-30) 39041) (**Ward**).

³⁵ *Levy c. Nissan Canada inc.*, 2021 QCCA 682.

and (4) the definition of the group must not be based on one or more criteria which are dependent on the outcome of the class action on the merits.

[41] A plaintiff has the burden to identify a group that matches the reality and the scope of the problem at the origin of the dispute. It is possible for a judge to redefine a class, “so that its dimensions are better aligned with the claim as framed by the applicant”. The class can also be redefined at later stages in the proceedings and not only at the authorization stage.

[42] The Court has ruled that a class should not be unnecessarily broad. I agree with the judge that the class proposed by Appellant (i.e. – all persons whose personal data was provided before the data breach of December 11, 2017) is too broad. As the judge correctly stated, there is no limit in time so that the description proposed could include persons whose data was not breached. The judge was correct to redefine the class rather than to simply refuse authorization.

(References omitted; emphasis added)

[50] Facebook pleads that no class can be identified. The Court agrees with this assertion.

[51] First, Ms. Beaulieu alleges that many if not most class members are not even aware that they are members of the class or that they have been discriminated against. She adds that it is not possible for Facebook users to know what advertisements or opportunities they did not see because they were allegedly excluded by Facebook’s targeting algorithms.³⁶

[52] 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.

[53] Furthermore, 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; therefore, they are incapable of exercising their option to opt out of the class, which is an essential right, subject to a time limit.

[54] In addition, the proposed class definition includes Facebook users who were *interested in* receiving employment or housing advertisements. Ms. Beaulieu alleges that:

Each class member was interested either in employment or housing opportunities and has sought out or paid attention to advertisements on Facebook in relation to

³⁶ Application, para. 50 and 59.

these types of opportunities, or would have paid attention to and acted on such opportunities had they been presented to the class member.³⁷

(Emphasis added)

[55] The Court agrees that it is impracticable and disproportionate to include users who had an interest, a mere curiosity in being informed of potential housing or employment opportunities. This criterion is arbitrary and purely subjective.

[56] Even if the Court were to redefine the Class to exclude this criterion, the definition of the group would remain too broad, circular, and unmanageable at the post-authorization stage. It would basically include all Facebook users in Quebec, possibly several million members³⁸, who, to be part of the class, would have to determine if they were or not excluded from receiving advertisements they did not receive, as a result of their protected characteristics. This determination is impossible at this stage.

[57] The composition of the class is highly problematic and impossible to define, to the point that it becomes an impediment to the exercise of a class action in this case.

[58] Therefore, the Court finds that it cannot conclude that the condition set out in Article 575 (1) C.C.P. is satisfied.

[59] Notwithstanding this finding, the Court will analyze the other criteria set out at Article 575 C.C.P.

3.1.2. The facts alleged appear to justify the conclusions sought (575 (2) C.C.P.)

A) The applicable principles of law

[60] The applicant's burden at the stage of authorization is to establish an "arguable case" in light of the facts and the applicable law.³⁹ The legal threshold requirement of Article 575(2) C.C.P. is a simple burden of demonstration that the proposed legal syllogism is tenable.⁴⁰

[61] The applicant is not required to establish an arguable case in accordance with the civil standard of proof on a balance of probabilities and is not, unlike an applicant elsewhere in Canada, required to show that the claim has a "sufficient basis in fact".⁴¹

[62] The facts alleged, as long as they are sufficiently precise, are assumed to be true. They must have an evidentiary foundation that is not vague, unsubstantiated or

³⁷ Application, para. 46.

³⁸ Application, para. 6.

³⁹ *L'Oratoire*, *supra*, note 24, para. 58; *Infineon*, *supra*, note 24, paras. 65 and 67; *Vivendi*, *supra*, note 24, para. 37.

⁴⁰ *L'Oratoire*, *supra*, note 24, para. 58; *Infineon*, *supra*, note 24, para. 61.

⁴¹ *L'Oratoire*, *supra*, note 24, para. 58.

imprecise.⁴² Speculations, hypotheses and opinions are not assumed to be true and must be discarded.⁴³

[63] The Court must consider not only the alleged facts but any inferences or presumptions of fact or law that may arise from these facts and can serve to establish the existence of an arguable case.⁴⁴

[64] The plaintiff's individual cause of action must be analyzed to determine whether it meets the applicable criteria.⁴⁵

B) The legal syllogism

[65] The syllogism proposed by Ms. Beaulieu is the following⁴⁶:

- By allowing and facilitating the use of its own advertising services to exclude individuals from receiving advertisements for employment or housing opportunities on the basis of their race, sex, civil status, age, ethnic or national origin, or social condition, Facebook breached and continues to breach its users' rights under sections 4, 10, 11, 12, 13, 16, and 18 of the Quebec Charter;
- Also, by delivering advertisements for employment or housing predominantly to certain user profiles at the exclusion of others, based on its automated algorithms, Facebook is also violating its users' rights protected by the Quebec Charter.

[66] Facebook contends that Ms. Beaulieu's claims are based on allegations that either do not support even an inference that the alleged discriminatory practices ever occurred or that any of them caused her, or any other user in Québec not to receive any housing or employment ad on Facebook because of discrimination.

[67] According to Facebook, Ms. Beaulieu relies on speculation about the possible ways in which third-party advertisers might misuse its advertising platform and the delivery of ads. Such speculation does not support the proposed syllogism and therefore requires the dismissal of the Application.

C) Breach of the Quebec Charter

- Sections 4 and 10

⁴² *Infineon*, *supra*, note 24.

⁴³ *Option Consommateurs v. Bell Mobilité*, 2008 QCCA 2201, para. 38.

⁴⁴ *L'Oratoire*, *supra*, note 24, para. 24.

⁴⁵ *Id.*, para. 7.

⁴⁶ Application, para. 39.

[68] Ms. Beaulieu's claim is based on Section 10 of the Quebec Charter, which provides as follows:

10. Every person has a right to full and equal recognition and exercise of his human rights and freedoms, without distinction, exclusion or preference based on race, colour, sex, gender identity or expression, pregnancy, sexual orientation, civil status, age except as provided by law, religion, political convictions, language, ethnic or national origin, social condition, a handicap or the use of any means to palliate a handicap.

Discrimination exists where such a distinction, exclusion or preference has the effect of nullifying or impairing such a right.

[69] Section 10 of the Quebec Charter does not set out an autonomous equality right. Thus, its application depends upon the violation of another right or liberty set out in the Charter to which it is to be joined:

[...] The [Québec] Charter, unlike the *Canadian Charter*, does not protect the right to equality *per se*; this right is protected only in the exercise of the other rights and freedoms guaranteed by the Charter [...]

This means that the right to non-discrimination cannot serve as a basis for an application on its own and that it must necessarily be attached to another human right or freedom recognized by law. [...] ⁴⁷

[70] As the Supreme Court explained in *Bombardier*, under section 10, the claimant must establish: "(1) a 'distinction, exclusion or preference', (2) based on one of the grounds listed in the first paragraph, and (3) which 'has the effect of nullifying or impairing' the right to full and equal recognition and exercise of a human right or freedom". If these three elements are established, there is "*prima facie* discrimination".⁴⁸

[71] Section 4 of the Quebec Charter provides that "[e]very person has the right to the safeguard of his dignity, honour and reputation". This concept of personal dignity is defined as the respect to which every person is entitled simply because he or she is a human being and the respect that a person owes to himself or herself.⁴⁹ Human dignity is impaired by "unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacity or merits".⁵⁰

[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;

⁴⁷ *Quebec (CDPDJ) v. Bombardier inc.* 2015 CSC 39, para. 53 and 54 (**Bombardier**); also, *Ward*, *supra* note 34, para. 156.

⁴⁸ *Bombardier* *supra* note 47, para. 35 and 36.

⁴⁹ *Quebec (Public Curator) v. Syndicat national des employés de l'hôpital St-Ferdinand*, [1996] 3 S.C.R. 211.

⁵⁰ *Law. v. Canada*, [1999] 1 S.C.R. 497, para. 53.

(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.

[73] The applicable test in a discrimination case under the Quebec Charter is summarized as follows by the Supreme Court in *Bombardier*:

[...] Under s. 10 of the *Charter*, a plaintiff must establish three elements, including a connection between a prohibited ground of discrimination and the distinction, exclusion or preference of which he or she complains. A plaintiff who successfully establishes these elements will be said to have proven a *prima facie* case of discrimination or to have made *prima facie* proof of discrimination. In such a case, it will then be open to the defendant to try to justify a seemingly discriminatory measure, and if the defendant succeeds in doing so, the tribunal will find no violation under s. 10. Although this process successively imposes separate burdens of proof on the plaintiff and the defendant, and the onus on the plaintiff is simply to prove a “connection” between a prohibited ground of discrimination and the differential treatment he or she receives, it does not create an exception to the standard of proof — proof on a balance of probabilities — that normally applies in the civil law. The plaintiff must therefore establish *prima facie* discrimination on the basis of that standard.⁵¹

[74] As explained by the Supreme Court, a claimant does not need to prove direct and immediate causation between the alleged distinction and the prohibited ground. The claimant only has the burden of showing that there is a connection between the prohibited ground and the distinction, or that the ground in question was a factor in said distinction.⁵²

[75] With respect to the third element of the *prima facie* discrimination test, the analysis of the compromise of the protected right to dignity must first be made according to an objective standard, the perception of the reasonable person. The impact of the alleged infringement must then be assessed in the specific context of the litigation.⁵³

[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.

[77] As for her personal situation, Ms. Beaulieu alleges that for a period of three years, despite her online job search activity, she did not receive any job advertisements on Facebook. She complains that, as an older female worker, she was precluded from receiving employment advertisements on Facebook that excluded her, based on her age and gender. She feels that her dignity has been attacked and describes the lasting impact of her exclusion on her self-esteem and confidence.

⁵¹ *Bombardier*, supra note 47, para. 3.

⁵² *Id.*, para. 51-52.

⁵³ *Calego*, supra note 34; also, *Ward*, supra note 34, para. 183-184.

[78] The factual allegations pertaining to her personal case, although succinct and terse, are sufficient and precise enough, in light of the other allegations of the Application and her exhibits, to support a *prima facie* claim of discrimination on the basis of sex and age and of an impairment of her right to dignity.

[79] As for the other potential Members of the proposed Class, the allegations of the Application⁵⁴ and the exhibits⁵⁵, 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.⁵⁶

[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.

[82] The Court disagrees with Facebook's contention that Ms. Beaulieu's claims rely on speculation and on unsubstantiated allegations. At this preliminary stage, the Court must only determine if Ms. Beaulieu has established an arguable case, rather than a reasonable chance of success, a "mere possibility" of succeeding on the merits, not even a realistic or reasonable possibility.⁵⁷ The alleged facts, supported by examples of advertisements on Facebook, media reports and study, are sufficient to meet the evidentiary threshold for establishing an arguable case on the basis of sections 4 and 10 of the Quebec Charter, with respect to Facebook's Ad Targeting and Ad Delivery practices.

[83] However, the Court considers that Ms. Beaulieu's contentions pertaining to purported housing and employment ads containing discriminatory text (the Ad Text claim)⁵⁸ are hypothetical and speculative and do not support an arguable case on this specific basis. They rely on fictional and fake ads placed by a news organization and on the mere possibility that third party advertisers use Facebook's platform to place ads containing explicit discriminatory content.

⁵⁴ Application, para. 24-28.

⁵⁵ Exhibits R-6, R-7, R-8, R-9 and R-10.

⁵⁶ Application, para. 36-38 and Exhibit R-15.

⁵⁷ *Infineon*, supra note 24, para. 80 and 100.

⁵⁸ Application, para. 29-31; exhibits R-11, R-12 and R-13.

[84] Furthermore, the allegations and exhibits support a claim of discrimination based on sex, age and race only. There is no supporting evidence to broaden the scope of the class action in order to include other protected grounds such as social condition, civil status or ethnic or national origin.

- **Sections 11 and 16**

[85] Although Ms. Beaulieu alleges in her Application that Facebook's advertising practices also infringe the Class Members' rights under Sections 11, 12, 13, 16, and 18 of the Quebec Charter, she limits her claims in her argument plan to ss. 11 and 16, which prohibit discrimination in the context of notices and hiring:

11. No one may distribute, publish or publicly exhibit a notice, symbol or sign involving discrimination, or authorize anyone to do so.

16. No one may practise discrimination in respect of the hiring, apprenticeship, duration of the probationary period, vocational training, promotion, transfer, displacement, laying-off, suspension, dismissal or conditions of employment of a person or in the establishment of categories or classes of employment.

[86] Ms. Beaulieu contends that Facebook's conduct also nullifies her equal right to the specific protections provided by these provisions.

[87] Sections 11 and 16 of the Quebec Charter prohibit discrimination in specific circumstances and do not constitute autonomous protected rights distinct from section 10.

[88] However, in light of the Court's findings on Ms. Beaulieu's allegations of Facebook's alleged participation in discriminatory targeting and delivery of paid advertisements posted on its platform for housing and employment, the Court considers that she also established an arguable case on the basis of these specific provisions.

D) Claim for moral and punitive damages, and for injunctive relief

[89] Ms. Beaulieu intends to seek moral and punitive damages and injunctive relief against Facebook, on the basis of Section 49 of the Quebec Charter which provides:

49. Any unlawful interference with any right or freedom recognized by this Charter entitles the victim to obtain the cessation of such interference and compensation for the moral or material prejudice resulting therefrom.

In case of unlawful and intentional interference, the tribunal may, in addition, condemn the person guilty of it to punitive damages.

- **Causation and moral damages**

[90] Facebook pleads that even if Ms. Beaulieu could prove that a housing or employment ad was inappropriately targeted in a discriminatory way by a third-party advertiser or delivered using preferential treatment, and that she did not receive that ad, she cannot prove that, if not for these alleged advertising practices, she or any other Facebook user would have received those ads. Therefore, Ms. Beaulieu cannot prove a causal connection between the alleged fault and the alleged injury, let alone on behalf of a class.

[91] Several reasons can explain why a Facebook user will or will not see an advertisement at any particular moment, for instance, selected timing and objectives for ads.⁵⁹

[92] While the Court concedes that other factors may exist to justify the fact that a Facebook user was excluded from the distribution of a specific housing or employment ad, as long as a discriminatory factor is established, the class members do not have to prove that they would have received the advertisement, but for the discriminatory practice. The exclusion based on discrimination could entitle class members to moral damages resulting from the impairment to their right to dignity caused by the discriminatory factor.

[93] The Court agrees that the personal injury requirement does not change in class action proceedings.⁶⁰ Thus, the plaintiff in a class action is not relieved of the burden of proving that each member of the group sustained personal injury, although proof of injury could be based on presumptions of fact and inferences.⁶¹ Potential difficulty proving or assessing moral damages in the context of a class action is not a factor that precludes the use of this procedural vehicle.

[94] Ms. Beaulieu's burden at this stage is to establish an arguable case, a good colour of right, and not to specify in minute details the evidence that she intends to adduce in support of her allegations at the trial on the merits.⁶² It would be premature at the present stage of the proceedings to decide that there is no possible basis for the award of moral damages for the class members.

[95] As for her individual case, Ms. Beaulieu's allegations support her claim for moral damages.

[96] She contends that her exclusion from viewing advertisements based on her gender or age gives her the sense that she does not have the same value, as an older woman, as other users of Facebook. These feelings make her feel powerless and less worthy of respect because she is denied opportunities even though she is experienced

⁵⁹ Exhibit F-1, para. 6-8.

⁶⁰ *Bou Malhab v. Diffusion Métromédia CMR*, [2011] 1 S.C.R. 214, para. 46 and 50.

⁶¹ *Id.*, para. 54-55.

⁶² *Asselin*, supra note 24, para. 21.

and competent and has much to offer. This has had a lasting impact on her self-esteem and self-confidence.⁶³

[97] On the basis of these alleged facts, taken as true, Ms. Beaulieu is entitled to claim that she suffered a moral prejudice caused by her purported exclusion on the basis of prohibited grounds.

[98] As for the class members, she further alleges that:⁶⁴

- Each class member has sought out or paid attention to advertisements on Facebook in relation to housing or employment opportunities, or would have paid attention to and acted on such opportunities had they been presented to the class member;
- Each class member was excluded by Facebook's advertising services from receiving advertisements for employment or housing opportunities as a result of their race, sex, age, or other protected ground;
- Each class member suffered non-pecuniary damages as a result of being so excluded.

[99] These assertions, although perfunctory, suffice at this stage to support a claim for moral damages caused by an illicit exclusion.

- ***Punitive damages***

[100] The second paragraph of section 49 of the Quebec Charter authorizes the award of punitive damages where the unlawful interference with rights or freedoms protected by the Charter is intentional.

[101] The case law requires proof:

- (i) that the author of the interference wished to cause the consequences of the wrongful interference, or
- (ii) that he or she was aware of the immediate and natural or extremely probable consequences of his or her misconduct.⁶⁵

[102] The notion of intentional interference requires more than simple negligence but is not strict as a specific intent.⁶⁶

⁶³ Application, para. 43.1.

⁶⁴ Application, para. 46-48.

⁶⁵ *Imperial Tobacco Canada ltée v. Conseil québécois sur le tabac et la santé*, 2019 QCCA 358, para. 1000.

⁶⁶ *Levy v. Nissan Canada inc.*, 2021 QCCA 682, para. 30.

[103] Ms. Beaulieu's allegations to support her claim for punitive damages⁶⁷ essentially concern Facebook's knowledge since at least 2017 that its ad targeting tools may be used to discriminate, and the timing of its change of policies in Canada several months after the filing of Ms. Beaulieu's proceedings.

[104] Again, the allegations appear sufficient to conclude that Facebook's purported conduct could potentially be the source for punitive damages. Any doubt that the Court maintains in that regard must be interpreted in favour of the plaintiff at the authorization stage.

[105] Facebook pleads that its decision to implement changes in Canada to prevent any potential misuse of its advertising platform by third-party advertisers is inconsistent with a claim for punitive damages, since its proactive approach renders the preventive purpose of punitive damages moot. This is a determination to be made at the trial on the merits.

- ***Injunctive relief***

[106] Considering the previous analysis and conclusions and Section 49 of the Quebec Charter, Ms. Beaulieu is also entitled to seek the cessation of the alleged unlawful interference with the Class members' protected rights.

[107] However, the Court agrees with Facebook's contentions that Ms. Beaulieu's injunctive relief sought corresponds to a general order, too vague to be enforceable, and that it does not specifically address the remaining issues following Facebook's changes implemented in December 2020.

[108] The judge on the merits would, in light of the evidence adduced, determine if the changes implemented by Facebook are sufficient to address Ms. Beaulieu's concern for potential abuse by advertisers on its platform and thus, if injunctive conclusions are or not justified and appropriate under the circumstances.

[109] At this stage, the request for injunctive relief, subject to modifications in order to be more precise and enforceable, is *prima facie* supported by Ms. Beaulieu's allegations.

E) Facebook's grounds for contestation

[110] As submitted by Facebook, the alleged discriminatory ads may represent isolated incidents, or the restrictions they impose could be legitimate and lawful either on the basis of occupational requirements⁶⁸ or because the ads were part of a larger, non-targeted advertising effort through parallel advertising.⁶⁹

⁶⁷ Application, para. 22, 35 and 35.1.

⁶⁸ *Bombardier*, supra note 47, para. 38; Quebec Charter, s. 20.

⁶⁹ Exhibit F-1, para. 3.

[111] Facebook also contends that it fulfilled its duty to accommodate the members of the proposed Class by implementing reasonable measures up to the point of undue hardship and that it would be unmanageable and unrealistic for Facebook to review every advertisement posted on its platform.⁷⁰

[112] While these arguments appear serious and could be successful on the merits, the Court must limit itself in performing its screening task to analyzing the proposed legal syllogism and not the various defenses that Facebook could raise against the legal action. These arguments and means of defence rest on summary evidence at this stage. They would be analyzed and considered at the second phase of the applicable discrimination test, at the stage of the merits, on the basis of a full evidentiary record.

[113] Furthermore, Facebook submits that it cannot be held liable as an intermediary, a service provider, in conformity with the provisions of the *Act to establish a legal framework for information technology*⁷¹ and in light of the recent Canada-United States-Mexico Agreement which provides more rigorous protection for websites hosting user-generated content.

[114] Facebook contends that it is not an editor or publisher of advertisements since it has no control or final authority over the content of an ad posted on its self-service platform. As a result, it cannot be held liable for the discriminatory activities of its users unless it fails to act once it becomes aware of a specific illicit activity on its platform.⁷² Also, Facebook submits that it is under no obligation to actively monitor the information published on its platform for potential illicit activity.⁷³

[115] However, although Facebook's recently implemented initiative to prevent discriminatory targeting of users by its advertisers for housing and employment opportunities⁷⁴ constitutes a positive development and improvement, it raises doubts as to its purported incapacity to intervene and prevent publication of illegal ads on its platform.

[116] The time to weigh defences as against the allegations of the motion for authorization that are assumed to be true is, as a general rule, at trial.⁷⁵ Furthermore, the determination of Facebook's intermediary liability is not a pure question of law and raises complex determinations of fact and law which should be examined at a later stage.

* * *

⁷⁰ Exhibit F-1.

⁷¹ CQLR, c. C-1.1.

⁷² *Id.*, section 22; exhibit F-1.

⁷³ The *Act to establish a legal framework for information technology*, supra note 72, section 27.

⁷⁴ Exhibit F-1, para. 13-16; Exhibit AH-2.

⁷⁵ *Sibiga v. Fido Solutions inc.*, supra note 28, para. 83.

[117] For all these reasons, the Court is of the view that the evidentiary and the legal threshold requirements under article 575 (2) C.C.P. have been met. Although imperfect, Ms. Beaulieu's claims are neither frivolous nor unsubstantiated and the merits of Facebook's arguments and grounds of defence raised against them must be evaluated and decided on the merits of the case.

3.1.3 The composition of the class makes it difficult or impracticable to apply the rules for mandates to take part in judicial proceedings on behalf of others, or for consolidation of proceedings (575(3) C.C.P.)

[118] This criterion must be given the same broad and liberal interpretation as the other conditions set forth at Article 575 C.C.P.

[119] There are between 3,000,000 and 4,000,000 Facebook users in Quebec. The proposed class potentially includes several thousand if not millions of members dispersed across the province of Quebec. It would be impossible to contact these potential members and obtain a mandate from them to institute proceedings on their behalf.

[120] Also, the magnitude of the damages that could be awarded for personal discrimination claims makes it impracticable for class members to file individual actions.

[121] This criterion is not contested by Facebook and is satisfied.

3.1.4. The class member appointed as representative plaintiff is in a position to properly represent the class members (575(4) C.C.P.)

[122] Three conditions must be met in deciding whether an applicant should be granted the status of representative plaintiff. The applicant must show:

- (a) An interest in the suit,
- (b) Competence, and
- (c) An absence of conflict with the class members.⁷⁶

[123] These factors are to be interpreted liberally, which means that "[n]o proposed representative should be excluded unless his or her interest or competence is such that the case could not possibly proceed fairly".⁷⁷

[124] Ms. Beaulieu's ability to represent the Class is not contested by Facebook.

⁷⁶ *L'Oratoire*, *supra*, note 24, para. 32; *Infineon*, *supra*, note 24, para. 149; *Union des consommateurs v. Air Canada*, 2014 QCCA 523, para. 82.

⁷⁷ *Infineon*, *supra*, note 24, para. 149.

[125] For the reasons alleged in the Application⁷⁸, taken as true, the Court considers that M. Beaulieu fulfills the applicable requirements to be appointed Class representative.

[126] Considering the Court's conclusions on the first condition for authorization, Ms. Beaulieu's Application cannot succeed and must be dismissed.

WHEREFORE, THE COURT:

[127] **DISMISSES** Plaintiff's Re-amended Application for Authorization to Institute a Class Action and to obtain the Status of Representative Plaintiff;

[128] **WITH** judicial costs.

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⁷⁸ Application, para. 61-67.