

SUPERIOR COURT

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No: 500-06-000993-192

DATE: November 12, 2020

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

LYSE BEAULIEU
Petitioner
v.
FACEBOOK, INC.
and
FACEBOOK CANADA LTD.
Defendants

JUDGMENT
(application to adduce evidence)

OVERVIEW

[1] Petitioner, Lyse Beaulieu, is seeking the Court's authorization to institute a class action against Defendants (**Facebook**) on behalf of the following group:

All Facebook users located in Canada 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.

[2] Mrs. Beaulieu alleges that Facebook facilitates and permits discriminatory housing and employment advertisements by advertisers in breach of the Québec Charter of Human Rights and Freedoms or other applicable provincial human rights legislation or applicable law¹.

[3] She is seeking a permanent injunction against Facebook, as well as non-pecuniary and punitive damages.

[4] Facebook seeks leave to adduce evidence which it considers necessary to enable the Court to undertake an informed analysis of the authorization criteria set out at article 575 of the *Code of Civil Procedure*. More specifically, Facebook asks permission to:

1. Examine Mrs. Beaulieu on specific topics;
2. File the Sworn Statement of Andrew Howard, Director, Privacy and Data Policy at Facebook and two exhibits in support.

[5] Facebook pleads that the Court does not have sufficient information to render judgment in light of the authorization criteria and that the Application contains allegations which can be contradicted or shown to be totally inaccurate by allowing the evidence to be adduced. Facebook also asserts that the Application contains many general, incomplete or vague allegations.

[6] Mrs. Beaulieu replies that the request to examine her is not justified and that the sworn statement of Mr. Howard contains allegations that are relevant to Facebook's defense on the merits and do not meet the standard for evidence that may be filed at this stage.

[7] In response to some of Facebook's contentions, Mrs. Beaulieu seeks the Court's permission to amend the Application for authorization². Facebook does not contest Mrs. Beaulieu's amendments.

1. THE APPLICABLE LEGAL PRINCIPLES

[8] In a recent decision³, Justice Gary D.D. Morrison summarized the applicable principles that must guide a judge seized of an application to adduce relevant evidence and to examine the applicant before authorization:

¹ Application for authorization to institute a class action and to obtain the status of representative plaintiff, dated April 11, 2019 (the **Application for authorization**).

² Application for permission to amend pleading dated October 23, 2020 and Amended Application for authorization to institute a class action and to obtain the status of representative plaintiff, dated October 23, 2020 (the **Amended Application for authorization**).

³ *Leventakis v. Amazon.com inc.*, 2020 QCCS 289.

[4] Pursuant to Article 574 C.C.P., only relevant evidence ("*preuve appropriée*") can be allowed during the authorization phase. In this regard, it is not sufficient that such proof be relevant for the merits of the case per se, but it must, even more importantly, be relevant specifically for the authorization analysis to be conducted in accordance with Article 575 C.C.P.¹.

[5] Clearly, and as is often stated, the Court is not to conclude during the authorization phase as to the merits of the claim. It is exactly in this regard that allegations of fact by applicants are taken as being true and, further, that the burden of the applicant at authorization is one of logical demonstration and not of proof.

[6] Given that only allegations of fact are to be taken as true, not inferences, conclusions, unverified hypothesis, legal arguments or opinions², it is only logical to conclude that the Court should be extremely reticent to authorize parties to adduce as so-called proof elements which are tantamount to such inferences, conclusions, hypothesis, arguments or opinions.

[7] It is also in keeping with the objective of authorization being a filtering system that relevant proof be limited to what is essential and indispensable³, as well as proportional, to the authorization analysis.

[8] The Court understands from the case law that proof which is not simply contradictory in nature as regards the case on the merits, but which might possibly demonstrate on summary analysis that allegations of fact relating to essential and indispensable matters are improbable, manifestly inexact or simply false in the context of the authorization analysis, may be allowed by the judge exercising, with prudence and moderation, his or her discretion.

[9] In other words, and to use expression of the Court of Appeal in *Allstate du Canada, compagnie d'assurances v. Agostino*, the judge in deciding on relevant proof should use moderation and prudence, applying a "*couloir étroit*"⁴, a narrow corridor, that runs between the rigidity of enforcing the filtering process and a generous permissiveness that can mistakenly lead the judge to conduct an analysis of the merits of the claim.

[10] In some cases, proof may also be considered appropriate where it provides the Court with useful and contextual clarification so that it can better understand the facts of the case or the composition of the class⁵.

[11] That said, the notion of a better understanding by the Court is not an open-door to adducing evidence that is not otherwise appropriate. In exercising its discretion in this regard the Court must still do so with prudence, within the confines of the "*couloir étroit*", and this solely for the purposes of the authorization process and not for the merits of an eventual class action.

[12] As regards pre-authorization examinations of applicants, they are simply a means of obtaining factual information and to present appropriate proof. Accordingly, the rules applicable to appropriate proof generally also apply to such examinations. Hence, it is not sufficient that an examination address matters of interest for the merits of an eventual class action. The party seeking to conduct such an examination must demonstrate that the proof is necessary for the purposes of the criteria stipulated at Article 575 C.C.P.

(...)

¹ *Lambert (Gestion Peggy) v. Écolait Ltée*, 2016 QCCA 659, paras. 37-38.

² *Option Consommateurs v. Bell Mobilité*, 2008 QCCA 2201; *Harmegnies c. Toyota Canada inc.*, 2008 QCCA 380, para. 44.

³ *Asselin c. Desjardins Cabinet de services financiers inc.*, 2017 QCCA 1673, para. 38.

⁴ 2012 QCCA 678, para. 36

⁵ *Allstate du Canada, compagnie d'assurance v. Agostino*, 2012 QCCA 678, at para. 64; see also *A. v. Frères du Sacré-Cœur*, 2017 QCCS 34, at para. 29.

2. ANALYSIS

- Mrs. Beaulieu's Application for permission to amend pleading

[9] The proposed modifications to the Application for authorization provide additional details on the issue of Mrs. Beaulieu's alleged damages⁴, remove her claim for pecuniary damages⁵ and contain additional allegations pertaining to Facebook's change of policy in Canada⁶.

[10] These amendments do not delay the proceeding or the authorization schedule, are not contrary to the interests of justice, and do not result in an entirely new application having no connection with the original one⁷. They are relevant for the authorization analysis.

[11] For these reasons, the Court will authorize the amendment as requested and analyze Facebook's demands in light of the allegations of the Amended Application for authorization.

- Examination of Mrs. Beaulieu

[12] Facebook seeks leave to examine Mrs. Beaulieu on the following topics:

- (a) The circumstances surrounding Mrs. Beaulieu's alleged use of Facebook described at paragraphs 40-43 of the Application for authorization, including:
 - (i) Mrs. Beaulieu's allegation that she has "searched" for a job on Facebook;
 - (ii) Mrs. Beaulieu's recollection of advertisements she received on Facebook;
- (b) The circumstances surrounding Mrs. Beaulieu's alleged "*intense search for a job*" between 2017 and 2019, given that the Application for authorization indicates that (i) Mrs. Beaulieu "*was [concurrently] working on contracts*" and (ii) was working as of April 11, 2019 as a legal and administrative assistant in Montreal;
- (c) Mrs. Beaulieu's alleged pecuniary, moral and punitive damages, given that the Application for authorization is silent in relation to same;

⁴ Para. 43.1 of the Amended Application for authorization.

⁵ Para. 52 and 58 of the Amended Application for authorization.

⁶ Para. 35 and 35.1 of the Amended Application for authorization.

⁷ Article 206 of the Code of civil procedure.

- (d) Mrs. Beaulieu's personal knowledge and understanding of the allegations of wrongdoing by Facebook; and
- (e) The circumstances pursuant to which Mrs. Beaulieu accepted to act as a designated person.

[13] Facebook's arguments do not satisfy the Court that the conduct of this examination is necessary or relevant for the purpose of the authorization analysis.

[14] First, the factual allegations pertaining to Mrs. Beaulieu's use of Facebook and her search for a job⁸, although concise, appear sufficient for the Court's determination of the criteria set forth at article 575 CCP. Facebook fails to convince the Court that an examination of Mrs. Beaulieu on the circumstances surrounding her search for employment on the internet and on her recollection of advertisements she received through the Facebook platform is necessary for the purposes of the Court's analysis of the authorization criteria. Also, it is not appropriate to test the allegations and credibility of the applicant at this filtering stage.

[15] Second, Mrs. Beaulieu's alleged damages are now detailed in paragraph 43.1 of the Amended Application for authorization and again, questions and answers on these issues would not be relevant for the Court's review of the authorization criteria.

[16] Finally, the last two topics pertain to Mrs. Beaulieu's ability and capacity to act as a class representative. It is well established that the threshold under this criteria is minimal and only requires the consideration of her interest in the suit, her competence and the absence of conflict with the other class members⁹. Facebook does not explain how issues (d) and (e) are determinant factors to investigate for the analysis of the adequate representation criteria.

- **Sworn statement of Andrew Howard and exhibits in support**

[17] Facebook also seeks leave to submit relevant evidence, which consists of a 5-page sworn statement of Andrew Howard¹⁰, and the two exhibits referred to therein.

[18] The content of the sworn statement pertains to the following topics:

- (a) Description of Facebook's ad platform, including the process by which an advertiser may place an advertisement on the Facebook platform;
- (b) Description of Facebook's ad delivery process, which delivers advertisements to users' News Feeds on Facebook; and

⁸ Para. 40-43 of the Amended Application for authorization.

⁹ *Infineon Technologies AG v. Option consommateurs*, 2013 CSC 59; *L'Oratoire Saint-Joseph du Mont-Royal c. J.J.*, 2019 CSC 35.

¹⁰ Exhibit F-1.

(c) Description of changes to Facebook's ad platform that will be implemented in Canada this year, most notably:

- (i) The implementation of a special ad creation flow for housing and employment advertisements, which does not include the targeting options challenged by Mrs. Beaulieu, and technical enforcement measures requiring housing and employment advertisers to use that special flow; and
- (j) The creation of a functionality that allows Facebook users to search for and view housing and employment advertisements, regardless of whether they were delivered to those users' News Feeds.

[19] The Sworn Statement also includes two exhibits, namely:

- (a) Exhibit AH-1: A complete version of Facebook's advertising policies as of the time of Mrs. Beaulieu's application; according to Facebook, the version attached to Mrs. Beaulieu's application as Exhibit R-5 was truncated to exclude the provision prohibiting advertisers using Facebook's ad platform from engaging in discrimination and that provision would remain in effect today;
- (b) Exhibit AH-2: The press release announcing the rolling of the U.S. changes into Canada.

[20] In light of the allegations of the Amended Application for authorization, the Court considers that the proposed evidence is mostly admissible and useful for the Court's analysis at this stage.

[21] More specifically, exhibits AH-1 and AH-2 respectively complete exhibit R-5 and paragraph 35 of the Amended Application for authorization.

[22] Mr. Howard's sworn declaration provide relevant and useful circumscribed factual clarification on the way advertisements are placed and delivered to Facebook users (para. 3-10) and on changes that will be implemented by Facebook to its add platform, in Canada (para. 13-16).

[23] As for paragraphs 11 and 12 of the sworn declaration, they proffer information on ad ranking and auctions in order to demonstrate that it is not possible to retroactively determine why a particular user, such as Mrs. Beaulieu, received or did not receive a specific ad at a given moment, and information on Facebook News Feeds to demonstrate that they are not searchable. Facebook contends that these information are relevant for the Court's determination on the existence of a class.

[24] The Court agrees with Mrs. Beaulieu's contentions that these paragraphs do not meet the standard for appropriate evidence at the authorization stage. This evidence exceeds the scope of contextual clarification to better evaluate the composition of the

class. Its complexity and intricacies require a complete and adversarial debate at trial, should Mrs. Beaulieu's demand reach that stage.

[25] Accordingly, the Court concludes that Facebook should be entitled to submit as evidence the sworn statement of Andrew Howard except as regards paragraphs 11 and 12 thereof.

WHEREFORE, THE COURT:

[26] **AUTHORIZES** the amendment of the Application for authorization to institute a class action and to obtain the status of representative plaintiff;

[27] **DISMISSES** Defendants' application to examine Mrs. Lyse Beaulieu;

[28] **GRANTS** in part Defendants' application to submit relevant evidence;

[29] **ALLOWS** Defendants to produce as appropriate evidence the sworn statement of Andrew Howard, exhibit F-1, excluding paragraphs 11 and 12;

[30] **ALLOWS** Defendants to produce as appropriate evidence exhibits AH-1 and AH-2;

[31] **WITH COSTS** to follow.

SUZANNE COURCHESNE, S.C.J.

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(judgment rendered on the basis of written representations - article 230 of the Directives of the S.C., district of Montreal)