

CANADA
PROVINCE OF QUÉBEC
DISTRICT OF MONTRÉAL

SUPERIOR COURT
(Class Action)

No: 500-06-000993-192

LYSE BEAULIEU

Plaintiff

v.

FACEBOOK, INC.

and

FACEBOOK CANADA LTD.

Defendants

**APPLICATION BY DEFENDANTS FOR LEAVE TO EXAMINE MRS. BEAULIEU AND
TO SUBMIT RELEVANT EVIDENCE**

(Article 574 of the Québec Code of Civil Procedure, CQLR c C-25.01)

I. INTRODUCTION

1. Defendants Facebook, Inc. ("**Facebook**") and Facebook Canada Ltd. ("**Facebook Canada**" and, collectively with Facebook, the "**Defendants**"), seek leave to adduce relevant evidence necessary to enable this Court to undertake an informed analysis of the authorization criteria set out at article 575 of the Québec *Code of Civil Procedure*, CQLR c C-25.01 ("**CCP**").
2. On or about April 11, 2019, Mrs. Lyse Beaulieu ("**Mrs. Beaulieu**") filed her Application for Authorization to Institute a Class Action against Facebook (the "**Application**").
3. As appears from paragraph 5 of the Application, Mrs. Beaulieu seeks to represent a class comprised of the following persons:

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.

4. Mrs. Beaulieu alleges that the Defendants facilitate and permit discriminatory housing and employment advertisements by advertisers in breach of the *Québec Charter of Human Rights and Freedoms*, CQLR c C-12 or “*other applicable provincial human rights legislation or applicable law*”.
5. Mrs. Beaulieu is seeking a permanent injunction against the Defendants, as well as unquantified pecuniary damages, non-pecuniary damages and punitive damages.

A. Application for Leave to Examine Mrs. Beaulieu

6. The Defendants seek leave from this Court to examine Mrs. Beaulieu on the following topics in order to establish that the criteria under article 575 CCP have not been met:
 - (a) The circumstances surrounding Mrs. Beaulieu’s alleged use of Facebook described at paragraphs 40-43 of the Application, 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, knowing the Application 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, knowing the Application is silent in relation to same;
 - (d) Mrs. Beaulieu’s personal knowledge and understanding of the allegations of wrongdoing by the Defendants; and
 - (e) The circumstances pursuant to which Mrs. Beaulieu accepted to act as a designated person.

B. Application for Leave to Submit Relevant Evidence

7. The Defendants also seek leave from this Court to submit relevant evidence, which consists of a 5-page sworn statement of Andrew Howard, and the exhibits referred to therein, a draft of which is communicated herewith as **Exhibit F-1** (the “**Sworn Statement**”).

8. The content of the Sworn Statement is limited 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
 - (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
 - (ii) 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.
9. The Sworn Statement also includes two exhibits in relation to the above, namely:
 - (a) **Exhibit AH-1:** A complete version of Facebook's advertising policies as of the time of Mrs. Beaulieu's application. Facebook is providing this document to the court because 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. That provision remains in effect today.
 - (b) **Exhibit AH-2:** The press release announcing the rolling of the U.S. changes into Canada.

II. GROUNDS IN SUPPORT OF THE PRESENT MOTION

10. It appears from the Application that the Court does not have sufficient information to render judgment in light of the criteria set forth by Article 575 CCP, and therefore the Defendants should be authorized to adduce additional evidence referred to above and, most notably, showing that, even accepting Mrs. Beaulieu's allegations as true, which they are not, it is not possible to determine whether Mrs. Beaulieu or any other Facebook user was harmed, and therefore it is not possible to identify any class.
11. The Defendants submit that the Application contains allegations which can easily be contradicted or shown to be totally inaccurate by allowing the Defendants to submit evidence for this purpose, the most significant of which are the allegations to the effect that:

- (a) Paragraphs 3, 7, 9, 12, 14, 15: Facebook's targeting tools permit companies to exclude individuals from receiving housing and employment ads on the basis of protected statuses;
 - (b) Paragraph 11: All Facebook users will be excluded from seeing an advertisement on the basis of an advertiser's choice to exclude them;
 - (c) Paragraphs 17, 29: Facebook does not prevent advertisers from including discriminatory text or other content in their advertisements;
 - (d) Paragraph 43: Because of her age, Mrs. Beaulieu was excluded from the opportunity to receive job advertisements; and
 - (e) Paragraph 55: Facebook has failed to take any measures to cease the alleged discriminatory practices in Canada.
12. In addition, the Application contains many general, incomplete or vague allegations which are prejudicial to the Defendants, which include the central subjects of whether Mrs. Beaulieu has "searched" for a job on Facebook, since no "search" functionality is available for users' News Feeds, or whether Mrs. Beaulieu has suffered any type of damage.
13. These allegations are at the heart of the legal syllogism that Mrs. Beaulieu is trying to have authorized.

➤ *Seigneur c. Netflix International*, [2018 QCCS 1275](#), paras 24-26, [Tab 1]:

[24] Cela étant dit, les tribunaux retiennent que pour éviter que des recours manifestement voués à l'échec ne soient indûment autorisés et n'entraînent inutilement des coûts importants, **il y a lieu de permettre un interrogatoire ou une preuve appropriée qui se destine à contredire des éléments que la partie défenderesse estime invraisemblables, faux ou inexacts, et donc à établir le défaut d'apparence de droit, sous le premier alinéa de 575 C.p.c.**

[25] D'ailleurs, dans l'arrêt *Infineon Technologies AG c. Option consommateurs*, la Cour suprême, se prononçant sur les exigences de l'article 575 C.p.c., réitère qu'à « l'étape de l'autorisation, les faits allégués dans la requête du requérant sont tenus pour avérés. Le fardeau imposé au requérant cette étape consiste à établir une cause défendable, quoique **les allégations de fait ne puissent être « vague[s], générale[s] [ou] imprécise[s]. »** »

[26] **Ainsi, compte tenu de la nature de ce fardeau, les juges gestionnaires sont appelés à examiner la qualité des allégations en demande.**

[References and original emphasis omitted, our emphasis]

- *Benizri c. Canada Post Corporation*, [2016 QCCS 454](#), paras 5, 6 and 19, [Tab 2]:

[5] En règle générale, **la preuve par déclaration sous serment ou interrogatoire hors cour est appropriée ou utile si elle est essentielle à la vérification des critères de l'article 575 C.p.c.** De plus, il faut que les éléments de preuve, que les parties désirent introduire à l'étape de l'autorisation, soient concis et respectent la conduite raisonnable et la règle de la proportionnalité aux articles 18 et 19 C.p.c.

[6] Les faits allégués dans la Demande sont tenus pour avérés. **Cependant, le tribunal pourra permettre une preuve afin de compléter ou corriger des allégations imprécises, incomplètes, fausses ou inexactes lorsque cette preuve permet au tribunal d'avoir une meilleure compréhension des faits dans son évaluation des critères de l'article 575 C.p.c.**

[...]

[19] **De façon générale, la vérification des critères sous l'article 575 C.p.c. ne se fait pas dans un vide factuel.** La preuve visant à compléter, corriger ou contredire les allégations de la demande est appropriée et utile lorsqu'elle permet au tribunal d'avoir une meilleure compréhension du contexte factuel de la demande.

[References omitted, our emphasis]

14. Equity and the principles of fundamental justice require, even at the authorization stage, that the Court consider allegations and evidence proffered by both Mrs. Beaulieu and the Defendants in determining if Mrs. Beaulieu has met the requirements of Article 575 CCP.

- *Allstate du Canada, compagnie d'assurances c. Agostino*, [2012 QCCA 678](#), paras 35, 36 and 64, [Tab 3].

15. The evidence which the Defendants seek to adduce will also assist the Court in gaining a general understanding of the way advertisements are placed and delivered to users on the Facebook platform, which undermines Mrs. Beaulieu's claims, which either contradict these facts or ignore the dynamic and interdependent nature of the technology involved in this process.

- *Regroupement des cols bleus retraités et pré-retraités de Montréal c. Ville de Montréal*, [2018 QCCS 808](#), para 17, [Tab 4]:

[17] De la sorte, le/la juge de l'autorisation **disposera d'un « coffre à outils » adéquat pour s'acquitter de sa tâche**, quitte à décider de laisser certains des outils remisés dans le coffre.

[Our emphasis]

- *Société AGIL OBNL c. Bell Canada*, [2019 QCCS 4432](#), paras 20-22, [Tab 5]:

[20] Il est prématuré à cette étape du dossier de se prononcer quant au poids à donner à la preuve que Bell entend déposer. Il est possible que le tribunal autorise le recours et réfère au juge du fond la question du poids de ces allégations quant à l'appréciation de l'article 1379 C.c.Q.

[21] **Force est de constater cependant que ces allégations complètent le portrait du cadre de la relation contractuelle et pourraient être utiles à l'autorisation.**

[22] **Il apparaît prudent de ne pas s'en priver.**

[Our emphasis]

- *Pilon c. Banque Amex du Canada*, [2018 QCCS 4645](#), para 14, [Tab 6]:

[14] Le présent jugement se limite à **aménager les éléments de preuve dont les parties pourront faire usage lors du débat sur l'autorisation**, quitte à ce que le Tribunal les considère alors déterminants ou non.

[Our emphasis]

16. In sum, the examination of Mrs. Beaulieu on the above-mentioned subjects, and the evidence which the Defendants seek to adduce, would enable this Court to proceed with an efficient review of the criteria contained at Article 575 CCP, and would result in a more efficient hearing of the Application.
17. This Court should not prevent itself from having the benefit of evidence which could assist it in its analysis of the criteria set forth in Article 575 CCP.
18. By granting leave to examine Mrs. Beaulieu on the above-mentioned subjects, and to submit the evidence described above, this Court would be ensuring that, as required by the jurisprudence, the authorization hearing will not be a simple formality devoid of any real meaning in which the Court would be bound by allegations and evidence based solely on editorial choices made to support the sole perspective of Mrs. Beaulieu.

WHEREFORE MAY IT PLEASE THIS COURT TO:

GRANT the present Application;

ALLOW Facebook, Inc. ("**Facebook**") and Facebook Canada Ltd. ("**Facebook Canada**") and, collectively with Facebook, the "**Defendants**", to proceed with the examination out of Court of Mrs. Lyse Beaulieu ("**Mrs. Beaulieu**"), limited to the following topics:

- (a) The circumstances surrounding Mrs. Beaulieu's alleged use of Facebook described at paragraphs 40-43 of the Application, 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, knowing the Application indicates that (i) Mrs. Beaulieu "was [concurrently] working on contracts" and (ii) worked as of April 11, 2019 as a legal and administrative assistant in Montreal;
- (c) Mrs. Beaulieu's alleged pecuniary, moral and punitive damages;
- (d) Mrs. Beaulieu's personal knowledge and understanding of the allegations of wrongdoing by the Defendants; and
- (e) The circumstances pursuant to which Mrs. Beaulieu accepted to act as a designated person.

ALLOW Defendants to submit the sworn statement of Andrew Howard, and the exhibits referred to therein, the contents of which shall be limited 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
- (c) Description of changes to Facebook's ad platform that will be implemented in Canada this year, which address the vast majority of Mrs. Beaulieu's claims, 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
 - (ii) 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.

THE WHOLE without costs, save in the event of contestation.

MONTREAL, October 9, 2020.

(s) Osler, Hoskin & Harcourt LLP

OSLER, HOSKIN & HARCOURT LLP

Lawyers for Defendants Facebook, Inc. and
Facebook Canada Ltd.

c/o Me Éric Préfontaine / Me Céline Legendre /
Me Julien Hynes-Gagné

1000 De La Gauchetière Street West
Suite 2100

Montréal, Québec H3B 4W5

Tel: 514.904.5282 / 514.904.8108 /

514.904.5633

Fax: 514.904.8101

Email: eprefontaine@osler.com /

clegendre@osler.com /

jhynesgagne@osler.com

Our file: 1200814

NOTICE OF PRESENTATION

Me Audrey Boctor
Me Jean-Michel Boudreau
IMK LLP
3500 De Maisonneuve Boulevard West
Suite 1400
Montréal, Québec H3Z 3C1
Attorneys for Plaintiff

TAKE NOTICE that the attached Application by Defendants Facebook, Inc. and Facebook Canada Ltd. for Leave to Examine Mrs. Beaulieu and to Submit Relevant Evidence will be presented for hearing and allowance at a time and place to be determined by the Honourable Suzanne Courchesne of the Superior Court of Québec.

MONTREAL, October 9, 2020.

(s) Osler, Hoskin & Harcourt LLP

OSLER, HOSKIN & HARCOURT LLP

Lawyers for Defendants Facebook, Inc. and
Facebook Canada Ltd.

c/o Me Éric Préfontaine / Me Céline Legendre /

Me Julien Hynes-Gagné

1000 De La Gauchetière Street West

Suite 2100

Montréal, Québec H3B 4W5

Tel: 514.904.5282 / 514.904.8108 /

514.904.5633

Fax: 514.904.8101

Email: eprefontaine@osler.com /

clegendre@osler.com /

jhynesgagne@osler.com

Our file: 1200814