Cassels

Targeted Online Advertising Forms Basis for Quebec Class Action

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Overview

"Discrimination and collective action – cross-cutting themes in cyberspace"[1] is how the Quebec Court of Appeal captioned the recent decision of *Beaulieu v. Facebook Inc.*, 2022 QCCA 1736. The Court allowed an appeal of a decision refusing to authorize a class action on behalf of Facebook users in Quebec who claimed they were discriminated against because of targeted job and housing advertising based on their age, sex, or race.

Background

In April 2019, Lyse Beaulieu commenced a class action against Facebook under Article 575 of the *Québec Code of Civil Procedure*. Beaulieu accused Facebook of violating the Quebec *Charter of Human Rights and Freedoms* by, among other things, allowing and delivering employment or housing advertisements preferentially to certain individuals based on their age, sex, or race, or withholding those advertisements on the same prohibited grounds, whether by the express wishes of the advertiser or by the operation of the algorithm that dictates what advertisements users can see. The authorization judge dismissed Beaulieu's motion, concluding that (i) the case would not include enough common issues to advance the cause of all the members of the group[2]; and (ii) the composition of the class was inadequately defined.[3] Beaulieu appealed this decision in 2022 and was successful as the Quebec Court of Appeal reversed the motions judge and granted authorization.

The Decision

Two issues were reviewed on appeal: (1) whether the appellant's action involved common issues adequate to justify its authorization; and (2) whether the class proposed by the appellant was adequately defined.

Justice Bich, on behalf of a unanimous Court, found that while the proposed class action raised individual questions, it also included several common ones. In other words, while the personal circumstances of each member of the class and each advertiser may differ, the common issues raised by the allegations – such as

whether Facebook can be held liable for the actions of its advertisers, whether the alleged discrimination was detectable, whether (assuming it existed) it was intentional or driven by an algorithm, etc. – were numerous and likely to advance the individual claims in a material way. The Court concluded that the motions judge made a reviewable error by downplaying the general dimension of the case in favour of its individual aspects without taking an interest in the common issues that existed.[4]

On the second issue, Justice Bich concluded that the appellant's description of the group was adequate. Specifically, the appellant modelled the group after her own situation, and the proposed description was "neither circular nor particularly vague."[5] While some class members may not be able to self-identify as members of the group, the Court determined, the definition was nevertheless sufficient to enable class members to exercise their opt-out rights.

Ultimately, the class action was authorized on December 22, 2022, on behalf of the following group:

All Facebook users in Québec who were looking for a job or housing or who were interested in job or housing advertisements and who, because of their race, sex or age, were excluded by Facebook's advertising services from the distribution of job or housing advertisements on Facebook, between April 11, 2016, and the date of this judgment.[6]

Key Takeaways

1. While Quebec's legal landscape differs substantially from other provinces, this class action authorization may set the stage for similar arguments to be raised elsewhere in Canada. Plaintiffs may rely on different legislation depending on the case and the jurisdiction, such as the human rights code for the relevant province or territory, or the *Canadian Human Rights Act*, R.S.C., 1985, c. H-6. This decision highlights the different ways in which actions taken by an organization could give rise to allegations of discrimination. As businesses increasingly rely on AI and algorithms to target their preferred demographics, they must be mindful of the risk that the targeted distribution of opportunities does not mean that they will be distributed equitably or lawfully – and that discrimination will often affect a class of individuals that may be identifiable after the fact.
2. The Court reiterated the Supreme Court's guidance that a common question does not imply common answers, and that common issues can exist even if the resolution of those issues may differ from one member of the group to another."[7] That is, particularly in Quebec but also elsewhere, the fact that individuals will be impacted differently by events does not mean they do not have authorizable/certifiable issues in common with the rest of a proposed class.
3. The Quebec courts continue to further liberalize their approach to authorization even as other provinces consider or impose stricter certification requirements. This case may be a high-water mark for an intentionally loose class definition. Despite the Court's protestations to the contrary, it is difficult to avoid the perception that the authorized definition embraces the kind of merits assessment and circularity fatal to class definitions in common law Canada. The people entitled to receive notice

of the action are those with a personal interest in housing or jobs that were excluded from receiving advertisements because of their race, sex, or age, whether they knew about that exclusion or not. The Canadian class actions bar will be watching with interest to see how the parties go about complying with their notice obligations in this precedent-setting case.

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[1] *Beaulieu v. Facebook Inc.*, 2022 QCCA 1736 at para 14.

[2] *Beaulieu v. Facebook Inc.*, 2022 QCCA 1736 at para 34.

[3] *Beaulieu v. Facebook Inc.*, 2022 QCCA 1736 at para 16.

[4] *Beaulieu v. Facebook Inc.*, 2022 QCCA 1736 at para 61.

[5] *Beaulieu v. Facebook Inc.*, 2022 QCCA 1736 at para 71.

[6] *Beaulieu v. Facebook Inc.*, 2022 QCCA 1736 at para 90.

[7] *Beaulieu v. Facebook Inc.*, 2022 QCCA 1736 at para 48.
