SUPERIOR COURT

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No: 500-06-000961-181

DATE: August 19, 2021

PRESIDING: THE HONOURABLE THOMAS M. DAVIS, J.S.C.

STUART THIEL
and
BRIANNA THICKE
Applicants
v.
FACEBOOK, INC.
Defendants

JUDGMENT

OVERVIEW

[1] Stuart Thiel and Brianna Thicke (the "**Applicants**") seek to represent the following class in an Application to Authorize a Class Action filed on December 1, 2018 and that was the object of an amendment authorized by the Court on January 29, 2021:

> All persons in Quebec whose Facebook account data commencing in 2010 and ongoing was made accessible to third parties by the defendant without Class members' consent, or who gained access to Class members account data through exemptions from the defendant's privacy rules.
>
> or such other class definition as may be approved by the Court.

[2] At the authorization hearing, the definition of the class was modified further to read:

> All persons in Quebec who had a Facebook account during the period from July 27, 2012 to present;

[3] Without fully describing the Facebook platform, the principal uses of which are generally known, the principal grievance of the Applicants is that Facebook allowed third parties to access the personal data of its users, without first obtaining informed consent. This constituted a violation of users' rights to privacy and to the non-disclosure of confidential information under the *Charter of Human Rights and Freedoms*[1] (the "**Charter**");

[4] The Applicants add that Facebook acted with the full knowledge that its conduct would violate users' rights, thereby breaching its contractual obligations toward class members, violating provisions of the *Consumer Protection Act*[2] (the "**CPA**") and failing to meet its obligations under the *Civil Code of Quebec* and the *Act Respecting the Protection of Personal Information in the Private Sector*[3] (the "**PPIPS**").

[5] In their amended application, perhaps cognizant of the challenges of establishing a claim of compensatory damages, the Applicants have limited their claim to punitive damages against Facebook pursuant to article 49 of the Charter and section 272 of the CPA in an amount to be determined by the Court based on the evidence to be presented at trial.

[6] The Court must now determine whether the Applicants have demonstrated an arguable case, which would allow the proposed action to be authorized.

1. THE PARTIES POSITIONS

1.1 The Applicants

[7] The Applicants allege not only that class members did not consent to the impugned third party data sharing practices, but that they could not have consented. As Facebook never informed its users of the impugned practices, its users had no knowledge of their existence, and the impugned practices were in no way authorized by law.

[8] They further argue that the interference with user's privacy rights was intentional. Facebook made an explicit business choice to grant third parties access to its users' private, personal, and confidential information without their knowledge.

[9] Facebook's user agreements constitute consumer contracts of adhesion and Facebook is bound by the requirements of consumer protection law in Quebec.

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1 CQLR, c. C-12.
2 CQLR, c. P-40.1.
3 CQLR, c. P-39.1.

[10] In addition, Facebook's third party data sharing practices ran directly counter to the contractual description of the company's services, including Facebook's various contractual undertakings to the effect that:

> - Users own the information that they share on Facebook, and have the right to determine and control what information about them is collected and shared, with whom it is shared, and for what purpose(s) it is shared;
>
> - Facebook values users' privacy;
>
> - Facebook will not sell, disclose or otherwise allow third parties access to that information without users' knowledge and consent or authorization of law;[4]

1.2 Facebook

[11] The essence of Facebook's position is that the factual allegations that the Applicants make are vague and imprecise, and therefore insufficient to support the proposed legal syllogism.

[12] The Applicants fail to demonstrate, *inter alia*:

- that the alleged facts occurred to Facebook users in Québec;
- that the type of information shared was indeed "personal and private"; and
- that the type of illicit access allegedly given by Facebook effectively exempted third parties from Facebook's privacy rules.

[13] Facebook affirms that the Applicant's assumption that Facebook's alleged conduct necessarily means that there was a lack of informed consent on the part of users is unfounded.

[14] For Facebook, the class definition is circular and overly broad and moreover, the proposed common issues are necessarily dependent on individual inquiries to determine, among other things, whether any particular class members' data was shared with a third party.

2. THE APPLICABLE PRINCIPLES

2.1 Introduction

[15] The majority opinion of the Supreme Court of Canada in *L'Oratoire Saint Joseph du Mont Royal* v. *J.J.* states:

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4 Applicants' Plan of Argument in Support of Their Application for Authorization, para. 76.

> [56] Article 575(2) *C.C.P.* provides that the facts alleged in the application must "appear to justify" the conclusions being sought. This condition, which was not included in the original bill on class actions, was added in response to pressure from certain companies [translation] "that feared it would give rise to a significant volume of frivolous actions": V. Aimar, "L'autorisation de l'action collective: raisons d'être, application et changements à venir", in C. Piché, ed., *The Class Action Effect* (2018), 149, at p. 156 (emphasis added); P.-C. Lafond, "Le recours collectif: entre la commodité procédurale et la justice sociale" (1998-99), 29 *R.D.U.S*. 4, at p. 24. It is now well established that at the authorization stage, the role of the judge is to screen out only those applications which are "frivolous", "clearly unfounded" or "untenable": *Sibiga*, at paras. 34 ("the judge's function at the authorization stage is only one of filtering out *untenable claims*" (emphasis added)), 52 ("A motion judge should only weed out class actions that are frivolous or have no prospect of success" (emphasis added)) and 78 ("it was enough to show that the appellant's claim was not a frivolous one and that, at trial, she would have an arguable case to make on behalf of the class" (emphasis added)); see also Charles, at para. 70; Lafond (2006), at pp. 112 ([translation] "[t]he purpose of [art. 575(2) *C.C.P*.] is . . . first, 'to immediately eliminate actions that are *prima facie* frivolous' and, second, to 'dispose in the same way of actions that, although not frivolous, are clearly unfounded'") and 116 ("the authorization stage exists solely to screen out applications that are frivolous or clearly unfounded in fact or in law, as the legislature originally intended"); see also *Fortier*, at para. 70; O*ubliés du viaduc de la Montée Monette* v. *Consultants SM inc*., 2015 QCCS 3308, at para. 42. As this Court explained in *Infineon*, "the court's role is merely to filter out frivolous motions", which it does "to ensure that parties are not being subjected unnecessarily to litigation in which they must defend against untenable claims": para. 61 (emphasis added); see also paras. 125 ("a judge hearing a motion for authorization is responsible for weeding out frivolous cases") and 150 ("the purpose of the authorization stage is merely to screen out frivolous claims").[5]
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> [Emphasis in original]

[16] Therefore, the question for the Court is whether or not the proposed syllogism of the Applicants is frivolous, clearly unfounded or untenable.

[17] One might add that the evaluation of any potential defences must ordinarily be left to the judge on the merits.[6]

2.2 Article 575(1)

[18] The purpose of article 575(1) C.C.P. is to ensure that the members of the proposed class are united by one or more identical, similar or related issues of law of fact.[7] The

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5 2019 SCC 35.

6 *Sibiga* c. *Fido Solutions inc*., 2016 QCCA 1299, para. 83; *L'Oratoire Saint-Joseph du Mont-Royal* v. *J.J*., *supra* note 2, para. 41; *Goldman, Sachs & Co.* c. *Catucci*, 2017 QCCA 1890, para. 45-46.

7 *L'Oratoire Saint-Joseph du Mont-Royal* v. *J.J.*, *supra* note 2, para. 44; *Infineon Technologies AG* v. *Option consommateurs*, 2013 SCC 59, paras. 72-73.

members of the proposed class must share a common interest in at least one question. The answer to the common question should be capable of resolving a significant portion of the dispute. Finally, the common interest is to be interpreted generously and flexibly.[8]

[19] It is also important to note that only common questions are required (even just one). The answers need not be identical for all class members.[9] Nor do the experiences and circumstances of all class members need to be perfectly identical:

> [73] There is no requirement that each member of a group be in an identical or even a similar position in relation to the defendant or to the injury suffered. Such a requirement would be incompatible with the concern for judicial economy which the class action serves by avoiding duplicated or parallel proceedings (see *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46, [2001] 2 S.C.R. 534, at para. 27). The Court of Appeal summarized this as follows in *Guilbert v. Vacances sans Frontière Ltée*, 1991 CanLII 2869 (QC CA), [1991] R.D.J. 513:
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> > [translation] The fact that the situations of all members of the group are not perfectly identical does not mean that the group does not exist or is not uniform. To be excessively rigorous in defining the group would render the action useless . . . in situations in which claims are often modest, there are many claimants and dealing with cases on an individual basis would be difficult. [p. 517][10]

[20] The Applicants ask the Court to authorize the following questions:

1. Did Facebook enter into a contract with the class members in respect of the collection, use, retention and/or disclosure of their account information?

2. Did the contract between Facebook and the class members contain express or implied terms that Facebook would utilize appropriate safeguards to protect the class members' account information from unauthorized access and distribution?

3. Did Facebook breach the contract? If so, how?

4. Is Facebook liable to the class for breaches of the CPA?

5. Did Facebook breach articles 3, 35, 36, and/or 37 of the C.C.Q.?

6. Did Facebook breach its statutory obligations under the PPIPS?

7. Did Facebook breach article 5 of the Charter?

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8 *L'Oratoire Saint-Joseph du Mont-Royal* v. *J.J.*, *supra* note 2, para. 44; *Vivendi Canada Inc*. v. *Dell'Aniello*, 2014 SCC 1, paras. 37, 52-56; *Infineon Technologies AG* v. *Option consommateurs*, *supra* note 4, paras. 72-73; *Baratto* c. *Merck Canada inc*., 2018 QCCA 1240, para. 70.

9 *Vivendi Canada Inc*. v. *Dell'Aniello*, *supra* note 5, para. 51.

10 *Infineon Technologies AG* v. *Option consommateurs*, *supra* note 4, para. 73.

8. Did Facebook breach article 9 of the Charter?

9. Are class members entitled to punitive damages per article 49 of the Charter?

10. Is Facebook liable for punitive damages under the CPA?

11. What is the amount of the aggregate punitive damages to be awarded to the class?[11]

[21] Despite the fact that, at first bluff, these questions seem common, Facebook initially argued that the requirements of article 575(1) were not met, as the definition of the class was circular and depended on a finding that a user's information had been shared without the user's consent. There was no realistic way to ascertain this.

[22] The redefinition of the class allowed by the Court clarifies this somewhat, but some of the concerns remain. How does a user show that his or her information was indeed shared with third parties? Is the Court able to discern which individual claimants have been impacted by Facebook's alleged conduct and if not, how is it possible to know how to distribute any award to the class members?

[23] Facebook also refers the Court to *Emond* v. *Google LLC*,[12] and *Lima* c. *Google*,[13] to support its position that the size of the class makes it unwieldly and unworkable. However, these Google judgments were rendered in the context of the Court being asked to approve of a *cy-près* settlement; not really the same issue that needs to be considered at the authorization stage. In addition, this is one of the reasons that led the Applicants to limit their damage claim to punitive damages.

[24] While there is no doubt an element of truth in Facebook's affirmation that it is objectively impossible to determine which of its user's data was inappropriately shared, the facts alleged at this juncture demonstrate a potentially significant breach of privacy rights. All users, whether or not they can personally demonstrate that their information was inappropriately shared, live with the fear that it was, given the objective facts that have been alleged. In the Court's estimation, this suffices to give rise to an arguable case that user's private life has not been respected and that punitive damages may be in order.

[25] Yet, Facebook, referring to the Court of Appeal judgment in *Vidéotron* c. *Union des consommateurs*, argues that the lack of clarity as to the number of affected users prevents an award of punitive damages:

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11 Amended Application for Authorization to Institute a Class Action and to Obtain the Status of Representative.

12 2021 ONSC 302, para. 20.

13 2021 QCCS 957, para. 7.

> [108] Ces simples constats démontrent que la juge fait erreur en prononçant une condamnation en dommages punitifs pour chaque membre sans en connaître de manière suffisamment précise le total.[14]

[26] The Court does not consider these words, written following the authorization of a class action, to be applicable at this juncture. The total number of affected users and the appropriate amount of punitive damages are matters to be considered on the merits.

[27] Likewise, the refusal of Justice Belobaba to certify the class action in *Simpson* v. *Facebook* does not help Facebook, as the proposed action in *Simpson*, as described by Justice Belobaba, was very different:

> [13] The key point is this. On any fair reading of the plaintiff's pleading, it was the sharing of Canadian users' personal data with Cambridge Analytica that constituted the breach or invasion of privacy.
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> [...]
>
> [19] It became apparent as the certification hearing progressed that the plaintiff had no evidence that any Canadian user's personal data was shared with Cambridge Analytica. There is "not a shred of evidence", say the defendants, that Dr. Kogan sold or transferred any Canadian data to Cambridge Analytica.
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> […]
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> [28] In short, the defendants are right. There is no evidence in the record that any Canadian user's personal data was shared with Cambridge Analytica.[15]

[28] It cannot be said that the record before this Court is absent evidence that the privacy rights of class members were breached.

[29] The issue of privacy settings gives pause. Each potential class member may have used them differently.

[30] This reality, however, does not prevent there being a common inquiry into the breaches of users' privacy rights on the merits in light of the factual allegations of the application, which include:

> 81. Through these agreements and practices, Facebook gave its partner companies direct internal access to vast troves of its users' personal data and acted in a manner that effectively exempted them from Facebook's usual privacy policies, all despite class members' privacy settings.

[31] To say this differently: did a user's use of privacy settings actually give her or him the anticipated protection? The application purports that it did not and, in the Court's view,

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14 2017 QCCA 738.
15 2021 ONSC 968.

the evidence presented, at a demonstration stage, supports this inquiry moving forward to the merits stage.

2.3 Article 575(2)

[32] As the Court has already said, the action is principally grounded on alleged breaches of privacy rights: allowing third parties to access users' data without their consent.

[33] With respect, the evidence produced by the Applicants belies the argument advanced by Facebook that the allegations of the authorization application are vague and lack precision. Here are a few examples of objective evidence:

- Exhibit P-5, a New York Times article dated December 18, 2018:

> For years, Facebook gave some of the world's largest technology companies more intrusive access to users' personal data than it has disclosed, effectively exempting those business partners from its usual privacy rules, according to internal records and interviews.

- Exhibit P-6, a New York Times article dated June 3, 2018:

> Facebook has reached data-sharing partnerships with at least 60 device makers — including Apple, Amazon, BlackBerry, Microsoft and Samsung — over the last decade, starting before Facebook apps were widely available on smartphones, company officials said. The deals allowed Facebook to expand its reach and let device makers offer customers popular features of the social network, such as messaging, "like" buttons and address books.
>
> But the partnerships, whose scope has not previously been reported, raise concerns about the company's privacy protections and compliance with a 2011 consent decree with the Federal Trade Commission. Facebook allowed the device companies access to the data of users' friends without their explicit consent, even after declaring that it would no longer share such information with outsiders. Some device makers could retrieve personal information even from users' friends who believed they had barred any sharing, The New York Times found.

[34] These two exhibits, along with exhibit P-7, another New York Times article, provide the specific factual examples referred to in the application. This of course does not mean that they are true, but the burden at this juncture is only one of demonstration.

[35] Applicants also allege that Facebook never informed its users of these practices and that its users had no knowledge of their existence, such that they could not provide informed consent. This is also a factual allegation that can only be properly considered on the merits.

[36] They further affirm that the user agreements have at all material times been similar or identical with respect to the general principles that govern Facebook's collection, retention, use, protection, and disclosure of its customers' personal information, and have always contained express or implied terms to the effect. Exhibit P-10 shows that Facebook, in its contractual documents, goes to great lengths to underline how it values the privacy of its members. Whether it has put these values into practice can only be properly considered on the merits.

[37] A potential difficulty is whether the Applicants have a personal action against Facebook.

[38] The essence of their position is that they made a great deal of personal information available to Facebook and given the practices of Facebook, it would have been shared with third parties.

[39] The Court acknowledges that they cannot precisely say which of their private information was inappropriately shared. This was the main argument put forward by Facebook to argue that the Applicants had failed to establish a personal right of action. Indeed, their allegations are general in nature, but given the factual allegations around Facebook's use of the personal information of its members, believes that there is sufficient foundation for the matter to move to the merits. To accept Facebook's position would effectively mean that an action such as this one could never go forward, given the obstacles to a user knowing which of his or her information was shared.

[40] Those elements of the law that the Applicants call into question must also be considered. Article 1458 C.C.Q. requires persons to honour their contractual obligations.

[41] More important, given that the claim is limited to punitive damages, are perhaps the impugned sections of the CPA, sections 41 and 42:

> 41. The goods or services provided must conform to the statements or advertisements regarding them made by the merchant or the manufacturer. The statements or advertisements are binding on that merchant or that manufacturer.
>
> 42. A written or verbal statement by the representative of a merchant or of a manufacturer respecting goods or services is binding on that merchant or manufacturer.

[42] A breach of these sections can give rise to a claim in punitive damages under article 272 of the CPA.

[43] And last but not least, the alleged breach of their privacy rights under section 5 of Charter and articles 3, 35, 36, 37 and 38 of the Civil Code. Article 37 is particularly relevant:

> **37.** Every person who establishes a file on another person shall have a serious and legitimate reason for doing so. He may gather only information which is relevant to the stated objective of the file, and may not, without the consent of the person concerned or authorization by law, communicate such information to third persons or use it for purposes that are inconsistent with the purposes for which the file was established. In addition, he may not, when establishing or using the file, otherwise invade the privacy or injure the reputation of the person concerned.

[44] The Court agrees with the Applicants that if the breach is demonstrated at a trial on the merits, punitive damages may be claimed under section 49 of the Charter.

2.4 Article 575(3)

[45] Justice Nollet considers the appropriate analysis of the 575(3) criteria in *Brière* c. *Rogers Communications*:

> [71] Dans son livre *Le recours collectif*, Yves Lauzon énumère les divers facteurs retenus par les tribunaux dans l'analyse de la causalité entre « *composition du groupe* » et le fait qu'il est difficile ou peu pratique d'appliquer les articles 59 et 67 *C.p.c.*
>
> [72] Les éléments suivants s'appliquent : le nombre probable des membres; la situation géographique des membres; les coûts impliqués; et les contraintes pratiques et juridiques inhérentes à l'utilisation du mandat et de la jonction des parties en comparaison avec le recours collectif.
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> [73] Dans *Morin* c. *Bell Canada*, la Juge Savard rappelle que les requérants n'ont pas à démontrer que l'application des articles 59 et 67 *C.p.c.* est impossible; ils doivent plutôt démontrer que l'application de ces articles est difficile ou peu pratique.[16]
>
> [References omitted]

[46] In the present matter, there are thousands of potential class members and they are no doubt located in a rather wide geographical area. The number and the geographical dispersion of the class members will make the application of the rules for mandates to take part in judicial proceedings impractical.

[47] Finally, the likely cost of this suit and the required expert evidence will make it difficult for most or many class members to assert their claims on an individual basis.

[48] In the circumstances, the Court considers that the conditions of article 575(3) are satisfied.

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[16] 2012 QCCS 2733.

2.5 Article 575(4)

[49] In *Infineon Technologies AG* v. *Option consommateurs*, the Supreme Court of Canada decided the following with respect to the ability of a plaintiff to represent the class:

> [149] Article 1003(*d*) of the *C.C.P.* provides that "the member to whom the court intends to ascribe the status of representative [must be] in a position to represent the members adequately". In *Le recours collectif comme voie d'accès à la justice pour les consommateurs* (1996), P.-C. Lafond posits that adequate representation requires the consideration of three factors: [TRANSLATION] ". . . interest in the suit . . ., competence . . . and absence of conflict with the group members . . ." (p. 419). In determining whether these criteria have been met for the purposes of art. 1003(*d*), the court should interpret them liberally. No proposed representative should be excluded unless his or her interest or competence is such that the case could not possibly proceed fairly.[17]

[50] The Applicants meet this standard.

3. THE COMMON QUESTIONS

[51] Facebook argued that the questions should be circumscribed, but the Court considers that the proposed questions are appropriate and will allow the matter to move forward in a proportional manner.

FOR THESE REASONS, THE COURT:

[52] **GRANTS** the Applicants Amended Application for Authorization to Institute a Class Action and to Obtain the Status of Representative;

[53] **ASCRIBES** the Applicants the status of representatives of the persons included in the group herein described as:

> All persons in Quebec who had a Facebook account during the period from July 27, 2012 to present;

[54] **IDENTIFIES** the principle questions of fact and law to be treated collectively as the following:

1. Did the Defendant enter into a contract with the class members in respect of the collection, use, retention and/or disclosure of their account information?

2. Did the contract between the Defendant and the class members contain express or implied terms that Facebook would utilize appropriate safeguards to protect the class members' account information from unauthorized access and distribution?

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[17] *Supra* note 4.

3. Did the Defendant breach the contract? If so how?

4. Is the Defendant liable to the class for breaches of the *Consumer Protection Act*?

5. Did the Defendant breach articles 3, 35, 36, and/or 37 of the *Civil Code of Quebec*?

6. Did the Defendant breach its statutory obligations under the *Act Respecting the Protection of Personal Information in the Private Sector*?

7. Did the Defendant breach article 5 of the *Charter of Human Rights and Freedoms*?

8. Did the Defendant breach article 9 of the *Charter of Human Rights and Freedoms*?

9. Are class members entitled to punitive damages per article 49 of the *Charter of Human Rights and Freedoms*?

10. Is the Defendant liable for punitive damages under the *Consumer Protection Act*?

11. What is the amount of the aggregate punitive damages to be awarded to the class?

[55] **IDENTIFIES** the conclusions sought by the class action to be instituted as being the following:

- **GRANT** the Applicants' action against the defendant;
- **DECLARE** that the Defendant:
  - Breached its contractual obligations toward class members;
  - Violated its statutory obligations under the *Civil Code of Quebec* and the *Act Respecting the Protection of Personal Information in the Private Sector*;
  - Breached its statutory obligations under the *Consumer Protection Act*;
  - Intentionally and unlawfully violated class members' rights to privacy and to the non-disclosure of their confidential information under the *Charter of Human Rights and Freedoms*;

- **CONDEMN** the Defendant to pay the class members punitive damages pursuant to article 49 of the *Charter of Human Rights and Freedoms* and article 272 of the *Consumer Protection Act* in an amount to be determined by the Court based on the evidence at trial;

- **ORDER** collective recovery in accordance with articles 595 to 598 of the *Civil Code of Procedure*;

- **THE WHOLE** with interest from the date of judgment and with full costs and expenses, including expert fees, notice fees and fees relating to administering the plan of distribution of the recovery in this action;

[56] **DECLARES** that all Class members that have not requested their exclusion from the Class in the prescribed delay to be bound by any judgment to be rendered on the class action to be instituted;

[57] **FIXES** the delay of exclusion at 60 days from the date of the publication of the notice to the Class members, following its approval and the approval of the dissemination plan by the Court;

[58] **THE WHOLE** with costs, including the costs of all publications of notices.

Thomas Davis
Signature numérique de Thomas Davis
Date : 2021.08.19 18:21:17 -04'00'

THOMAS M. DAVIS, J.S.C.

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Hearing date: May 12, 2021