

SUPERIOR COURT

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No: 500-06-000961-181

DATE: February 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] The Applicants resume their grievances as follows:

56. The applicants allege that Facebook violated Quebec users' rights to privacy and to the non-disclosure of confidential information under *the Charter of Human Rights and Freedoms*, CQLR c C-12 ("*Charter*");

57. They furthermore alleged that Facebook acted unlawfully and with the full knowledge that its conduct would violate users' rights. In particular, it breached its contractual obligations toward class members, violated provisions of the *Consumer Protection Act*, CQLR c P-40.1 (the "*CPA*"), failed to meet its obligations under the *Civil Code of Quebec*, and defied the *Act respecting the protection of personal information in the private sector*, CQLR c P-39.1 (the "*PPIPS*"), all of which inform the scope and content of its obligations under the *Charter*; The Applicants contest Facebook's application to adduce relevant evidence.

1. THE APPLICABLE PRINCIPLES

[3] The parties agree that the scope for the production of relevant evidence by the Defendant in the context of a class action is limited. They do not, however, in the context of the present proceedings, share the same view on the extent of the limitation.

[4] The Court will begin by briefly setting out some of the principles that have been considered by more recent judgments on the question.

[5] The starting point for the analysis is of course article 574 C.C.P., which allows for the production of relevant evidence. At this stage, relevance should only be considered through the prism of article 575 C.C.P., given that the Court's role at the authorization stage is only to filter out class actions which are frivolous and do not present a defensible case.¹ Hence, only evidence that is essential and indispensable to the Court's analysis of the criteria of article 575 C.C.P. should be admitted.²

[6] The Court must also bear in mind that the factual allegations in the authorization application are to be taken as true. Therefore, it is important that the Court does not permit the production of evidence, the goal of which is to simply contradict those facts, without at the same time objectively demonstrating that they are clearly false or, to use the French expression, "*invraisemblable*".³

[7] One might add that the Court should not permit the production of proof which is really of the nature of a written defence to the authorization application.⁴ This is of particular import in a situation such as this one where the essence of the proof that

¹ *Ward c. Procureur général du Canada*, 2021 QCCS 109, para. 17.

² *Lambert (Gestion Peggy) c. Écolait Ltée*, 2016 QCCA 659, paras. 37-38; *Leventakis c. Amazon.com inc.*, 2020 QCCS 289, para. 4.

³ *Ward c. Procureur général du Canada*, *supra* note 1.

⁴ *Ibid.*

Facebook seeks to adduce is a solemn declaration of one of its representatives, with only limited additional documentary evidence.

[8] Finally, there are some decisions of this Court which have allowed relevant evidence to be adduced to when it completes the allegations of the authorization application or allows the court to better understand the operations of a defendant. This said, the Court must be careful not to give too much weight to this evidence at the authorization stage, as the probity of evidence is a question for the merits.⁵

2. THE PARTIES' POSITIONS

[9] Facebook justifies its application to adduce relevant evidence essentially on the basis of the following two paragraphs:

7. This proposed class action is premised on Applicants' allegations of "secretive agreements with 150 or more third parties" and alleges that Facebook "provided them with intrusive access to Facebook users' personal data without those users' knowledge or consent".

8. In order to correct this statement and other allegations, and to complete allegations that are incomplete or too vague, Facebook seeks leave to adduce the sworn statement of Konstantinos Papamiltiadis ...

[10] For the Applicants, the solemn declaration that Facebook seeks to produce is a little more than a written defence.

3. ANALYSIS

[11] In beginning its discussion of whether the production of all or some of the solemn declaration should be permitted, it is useful to set out the following allegation of the authorization application:

78. Over the past decade and as part of the company's campaign of rapid global expansion, Facebook entered into secretive agreements with 150 or more third parties ("data partners") and provided them with intrusive access to Facebook users' personal data without those users' knowledge or consent, as reported by the New York Times in a series of articles from 2018 reproduced as Exhibit P-5, Exhibit P-6, and Exhibit P-7;⁶

[12] The authorization application adds that these partnerships allowed the third-party partners to have access to troves of information and personal data regarding Facebook users. Some specific examples of the access that third-party partners had to users' data are provided.

⁵ *Ibid.*, paras. 20 and 21.

⁶ Amended Application for Authorization to Institute a Class Action and to Obtain the Status of Representative.

[13] The Applicants also alleged that Facebook did not inform its users of its practices with third parties and did not obtain their consent to allow such use.

[14] The terms of service that Facebook users must agree to are described as a contract of adhesion.

[15] The applicants summarize their grievances in the following paragraph:

98. At no time did these agreements contain terms that were sufficiently clear as to authorize the kind of collection, use, or disclosure of users' personal information to third parties alleged herein. Furthermore, to the extent that terms in these agreements could purport to justify the impugned activities, the terms are so vague, overbroad, conflicting, and general that a consumer could not have provided his or her manifest, free, and enlightened consent to them;⁷

[16] Now considering the solemn declaration of Mr. Papamiltiadis that Facebook proposes to adduce, it focuses on several issues.

[17] The solemn declaration begins with some general affirmations regarding partnerships and why Facebook entered into them. While these elements might well be relevant to provide context in another situation, for the purposes of deciding the present authorization application, the Court does not need to know what Facebook's motivation was for entering into partnerships. The relevant issue is the access to user's personal data that these partnerships afforded to the third parties and the use that they could make of it. The introductory paragraphs of the solemn declaration do not address this question and certainly do not demonstrate the falsity of the allegations in the authorization application.

[18] These introductory paragraphs also posit that Facebook users had to provide consent prior to accessing the platform of a partner through their Facebook account.

[19] The factual affirmations that Mr. Papamiltiadis makes around consent will not assist the Court at the authorization stage and do not provide a clear demonstration that the allegations in the authorization application are false. Whether or not an individual has given his or her informed consent to the use of personal data by a third party is a question of mixed fact and law that can only be determined following a contradictory debate. The validity of a person's consent can only be determined following an analysis of the complete information that was provided to that person to obtain his or her consent and Mr. Papamiltiadis does not provide any insight into that.

[20] The Court's comments also apply to paragraphs 25, 26, 30 and 31 of the solemn declaration.

⁷ *Ibid.*

[21] The principles that the Court has already discussed, around one objective of a defendant's evidence being to show the falsity of the authorization application's allegations, also apply to the elements of the solemn declaration relating to the background of messaging and device integration partnerships. The information provided will not assist the Court and certainly is not essential to the Court in its evaluation of whether the criteria of article 575 C.C.P. are satisfied in the present matter.

[22] The solemn declaration then goes on to suggest that the partners were not permitted to use any data for their own purposes beyond the integrations and that Facebook is not aware of any abuse by any partner.⁸

[23] With respect, this is essentially self-serving evidence which does not serve to demonstrate the falsity of any allegation of the authorization application or the unlikelihood of an allegation of the authorization application. Rather, it strikes of an attempt by Facebook to contradict or call into doubt certain allegations of the authorization application, much like a defendant would do in a written defence to any originating application. It may well be that Facebook will ultimately be able to prove these allegations, but they will be better considered on the merits in the event the class action is authorized.

[24] The solemn declaration also calls into question the secretive nature of the third party agreements between Facebook and its partners and produces the announcements of two third parties about their relationships with Facebook.

[25] With respect, these allegations of the declaration miss the mark. The issue around secretive partnerships is not whether the partnerships were announced to the public, but what information the partners may have had access to as a result of the partnerships with Facebook and whether the full implications of the partnerships were shared with the users.

[26] The Court adds that these allegations also appear to be more in the nature of the defence than to demonstrate the falsity of the allegations in the authorization application. Whether something is secretive or not is not a determination that the Court can make on the basis of simple allegations in a procedure. Evidence will be required and no allegation of the proposed solemn declaration demonstrates the falsity of the Applicants' position at this juncture.

4. CONCLUSION

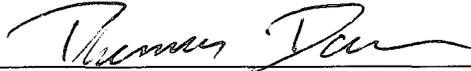
[27] Finally, a word on the use of solemn declarations of a defendant company's representatives as appropriate evidence in class actions. While the Court does not want to generalize, often these declarations are replete with subjective assessments of the declarant, as opposed to objective documentary evidence that might better assist the

⁸ Sworn Statement of Konstantinos Papamiliadis, paras. 18 and 19.

Court to determine the falsity or patent unlikelihood of the allegations of an authorization application. With respect, save for the two documents produced in relation to the Royal Bank and Spotify, Mr. Papamiltiadis' solemn declaration is largely subjective in nature. If the class action is authorized, he will no doubt have his opportunity to testify in order to contradict the evidence put forward by the Applicants. The judge on the merits will then have the information necessary to weigh the probative value of the evidence presented by each party. That, however, is not the judge's role when hearing an authorization application.

FOR THESE REASONS, THE COURT:

- [28] **DISMISSES** Defendant's Application to Adduce Appropriate Evidence;
[29] **WITH JUDICIAL COSTS.**



THOMAS M. DAVIS, J.S.C.

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Hearing date: February 16, 2021