IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Cronk v. LinkedIn Corporation,* 2021 BCSC 738

Date: 20210422
Docket: S205247
Registry: Vancouver

2021 BCSC 738 (CanLII)

Between:

Robert Andrew Cronk

Plaintiff

And

LinkedIn Corporation

Defendant

Brought under the *Class Proceedings Act*, R.S.B.C. 1996, c. 50

Before: The Honourable Madam Justice Francis

Reasons for Judgment

Counsel for the Plaintiff:	K. McLaren
Counsel for the Defendant:	M. Gelowitz E. MacKinnon
Place and Date of Trial/Hearing:	Vancouver, B.C. March 12, 2021
Place and Date of Judgment:	Vancouver, B.C. April 22, 2021

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Introduction

[1] The plaintiff has commenced an action against the defendant LinkedIn Corporation pursuant to the *Class Proceedings Act,* R.S.B.C. 1996, c. 50 [*CPA*], for alleged violations of privacy legislation. A certification hearing has not yet taken place. In this sequencing application, the defendant seeks an order allowing the defendant's summary trial application under Rule 9-7 of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009 [*Rules*], to proceed in advance of, or alternatively at the same time as, the plaintiff's application for certification. The parties have reserved three days commencing October 6, 2021, for either or both of these applications to take place.

[2] The plaintiff's claim relates to personalized advertisements called "dynamic ads" that LinkedIn displays to users ("Dynamic Ads"). Dynamic Ads are described in the notice of civil claim as follows:

> Dynamic Ads are personalized ads that change for each member. Dynamic Ads use members' profile photo, name, and job function to create customized ads for each member. Each member sees their personalized information; member profile information is not displayed to other members.

[3] According to the notice of civil claim, Dynamic Ads are a default setting for LinkedIn users and they are activated without the express consent of the user.

[4] The plaintiff alleges that Dynamic Ads breach the provincial *Privacy Acts* of British Columbia, Saskatchewan, Manitoba and Newfoundland and Labrador. Broadly speaking, each of these statutes creates a tort, actionable without proof of damage, where a person uses the name or portrait of another person without consent for advertising purposes. The plaintiff claims damages on his own behalf and on behalf of class members for the defendant's breach of this statutory tort.

[5] The defendant wishes to bring an application for a summary trial that, according to the defendant, has the potential to dispose of the entire proceeding. While the defendant has not yet prepared the summary trial application, it will seek to have the following "core issues" determined at a summary trial:

a) Is it a breach of an individual's privacy when an individual is shown their own name or photograph?

b) Do LinkedIn's Advertising Preferences, User Agreement, and Privacy Policy amount to express consent for the use of a member's own name and photograph in a Dynamic Ad shown only to them?

c) Does this Court have jurisdiction to adjudicate claims for alleged breaches of the *Privacy Acts* of Manitoba and Newfoundland and Labrador, because those statutes give exclusive jurisdiction to courts of those provinces?

d) If this Court does not dismiss the claim, do the provincial limitations statutes operate to bar the claims of the plaintiff and the proposed class members who saw personalized Dynamic Ads prior to the expiry of the applicable limitation period?

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[6] The plaintiff argues that it would be manifestly unfair to allow a summary trial application to proceed before certification. This is primarily because of the absence of documentary or oral discovery that will have taken place in advance of the proposed summary trial and the prejudice to the plaintiff that would accrue if this proceeding were determined on its merits in advance of any discovery whatsoever.

Legal Framework

The *Cannon/*Branch factors

[7] The certification hearing is typically the first step in a proposed class proceeding: *Halliday v. Shaw Communications Inc.,* 2019 BCSC 2251 at para. 9. However, the appropriate sequencing of motions is ultimately within the discretion of the case management judge. The relevant factors to be considered in a sequencing application were articulated by Justice Branch in *Kett v. Mitsubishi Materials Corporation*, 2019 BCSC 2373, who cited the commonly referred to "*Cannon* Factors", and added additional factors arising from British Columbia case law:

> [11] . . . . The leading expression of the various non-exhaustive factors to be considered in determining whether a particular motion should be allowed to overcome that presumption is set out by Strathy J., as he then was, in *Cannon v. Funds for Canada Foundation*, 2010 ONSC 146, at para. 15 as follows:
>
> > (a) whether the motion will dispose of the entire proceeding or will substantially narrow the issues to be determined;
> >
> > (b) the likelihood of delays and costs associated with the motion;
> >
> > (c) whether the outcome of the motion will promote settlement;
> >
> > (d) whether the motion could give rise to interlocutory appeals and delays that would affect certification;
> >
> > (e) the interests of economy and judicial efficiency; and
> >
> > (f) generally, whether scheduling the motion in advance of certification would promote the "fair and efficient determination" of the proceeding (s. 12).
>
> [12] To this list can be added the following more particular factors arising from the British Columbia case law:
>
> > a) the strength of the defendant's arguments: *Li v. British Columbia*, 2017 BCSC 1616 at para. 32;
> >
> > b) any delay by the plaintiff in advancing certification: *Strohmaier v. British Columbia (Attorney General)*, 2017 BCSC 2079 at para. 38;
> >
> > c) whether the defendant agrees not to pursue costs or otherwise agrees to facilitate the timely pursuit of the action, *Li* at para. 27;
> >
> > d) whether the defendant agrees to treat the motion as determinative of the s. 4(1)(a) aspect of the certification motion, *Lui v. Transportation Investment Corporation*, 2016 BCSC 827 at para.19;
> >
> > e) whether there is likely to be an overlap in the issues raised on certification and the issues the court will consider on the motion to strike, *Thomson v. Bryce*, 2016 BCSC 687 at para. 19.

[8] If the factors indicate an equal advantage to hearing one application or the other first, the “tie” goes to the plaintiff and certification will proceed first or concurrently: *Kett* at para. 16.

Will the motion dispose of the entire proceeding or substantially narrow the issues to be determined?

[9] The defendant submits that the core issues it seeks to have determined at a summary trial are likely to dispose of, or substantially narrow, the claim. The plaintiff disagrees and says that the defendant has mischaracterized the claim in its framing of core issues for determination by summary trial.

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[10] The plaintiff points out that his claim is based on the wording of the applicable privacy legislation. Section 3(2) of British Columbia's *Privacy Act*, R.S.B.C. 1996, c. 373, states that:

> It is a tort, actionable without proof of damage, for a person to use the name or portrait of another for the purpose of advertising or promoting the sale of, or other trading in, property or services, unless that other, or a person entitled to consent on his or her behalf, consents to the use for that purpose.

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[11] The plaintiff therefore says that the admitted facts of this case give rise to a *prima facie* violation of the statute. The issue in this case is not, as framed by the defendant, whether showing an individual their own name and photograph is a breach of privacy. Rather, it is whether LinkedIn's Dynamic Ads violate privacy legislation.

[12] I agree with the plaintiff that the defendant's framing of its first "core issue" is not particularly helpful and that the relevant question for the court will be whether the legislation has been breached, giving rise to a statutory tort. However, the accuracy of the defendant's framing of the core issues is not the matter I must determine in this application. It is apparent from the defendant's application that the defendant seeks in its proposed summary trial to have the court determine whether Dynamic Ads, which show users only their own name and photograph, breach the privacy statutes invoked in this action. The sequencing of a summary trial application on that issue is what I must determine.

[13] Given the clear wording of the statutes, there are a limited number of issues at play in this litigation. Without pre-determining matters that I expect will later be argued more completely before me, I find as a general matter that determining whether the relevant privacy legislation has been breached will require a consideration of:

a. whether LinkedIn used users' names and/or portraits for the purposes of advertising or promotions; and

b. whether users consented to such use.

[14] The defendant has also raised jurisdictional and limitations issues for which it seeks adjudication at a summary trial.

[15] If there is sufficient evidence before the court at a summary trial application to determine the issues framed by the defendant, the application will likely dispose of the constituent elements of the claim, namely whether LinkedIn used users' names and portraits for the purpose of advertising and promotion, and whether users consented to such use. The first issue is not controversial. LinkedIn admits that it uses the names and photographs of its users in advertisements. However, it argues that provincial privacy legislation does not apply to circumstances where a user's name and photograph are only shown to that user.

[16] With respect to the second issue, the plaintiff argues that adjudicating the matter of consent involves a consideration of conflicting evidence on material issues that will require the Court to make findings of credibility. Much of this argument centres on the plaintiff's allegation that the defendant implemented "dark patterns" to benefit itself through the sale of advertisements using users' profile photos and registered names for Dynamic Ads.

[17] According to the plaintiff's expert, Dr. Julia Rubin, dark patterns are elements of a user interface designed to trick users into doing things without explicitly focussing the user's attention on the performed action. Examples of applications with dark patterns would be ones that trick users into signing up for premium subscriptions, or applications that add unexpected charges after a long checkout process. As I understand Dr. Rubin's report, the essence of a dark pattern is that it misleads users into doing things they may not intend to do by focussing their attention elsewhere.

[18] Dark patterns are alleged in the notice of civil claim at paras. 35 and 36:

> 35. The Plaintiff has used a profile photo of himself for his LinkedIn profile. The Plaintiff and Class Members have not consented to the use of their profile photos and registered names for use in Dynamic Ads by LinkedIn. Nevertheless, LinkedIn has sold advertising using the Plaintiff and Class Members' registered names and profile photos in Dynamic Ads and has profited from the sale of that advertising.

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> 36. LinkedIn developed and implemented these deceptive setting changes – or “dark patterns” – intentionally to benefit itself through the sale of advertisements using users’ profile photos and registered names for Dynamic Ads. LinkedIn did so knowing that users had not consented to and were not aware of the setting change.

[19] I need not determine in this application whether LinkedIn’s implementation of Dynamic Ads is a dark pattern. In fact, the presence of dark patterns on LinkedIn’s user interface appears to me to be extraneous to the cause of action pursued by the plaintiff in this action. The question to be determined under the legislation is whether the plaintiff and other class members consented to the use of their photos and names in Dynamic Ads. That is a fact-based inquiry, the answer to which will be determinable with reference to the user experience, specifically the information that is provided to users about the use of Dynamic Ads and the process by which users can enable or disable Dynamic Ads through the user interface. While “dark patterns” is certainly an evocative phrase (and it may be that the LinkedIn’s user interface contains processes that scholars of the internet would refer to as “dark patterns”), the phrase has no bearing on the task of this Court at the proposed summary trial, which will be to determine as a matter of fact whether users consented to the use of their images and names in Dynamic Ads.

[20] Because dark patterns are extraneous to the issues that must be determined at summary trial, the conflicts in the evidence anticipated by the plaintiff about dark patterns are not of significant import in considering whether a summary trial will dispose of some or all of the issues in this proceeding. The evidentiary conflicts that are likely to arise with respect to dark patterns, which according to the plaintiff will be in relation to “the purpose and intent regarding how the LinkedIn platform is designed vis-à-vis Dynamic Ads”, are simply not conflicts that a court would have to resolve in order to determine whether a user consented to the use of his or her image and name in Dynamic Ads.

[21] In saying this, I must emphasize that the defendant’s Rule 9-7 application materials were not before the court in this application. Even if they were, it would not be the role of this Court on a sequencing application to determine suitability for

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summary determination under the principles laid down by the B.C. Court of Appeal in *Inspiration Management Ltd. v. McDermid St. Lawrence Ltd.* (1989), 36 B.C.L.R. (2d) 202 (C.A.). That is a matter to be determined on the evidentiary record before the court at the Rule 9-7 application. The purpose of considering potential conflicts in the evidence at this stage is only to discern the likelihood of the issues in the proceeding being disposed of or narrowed as a result of the outcome of the summary trial application.

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[22] Based on the evidence before me in this sequencing application, it appears likely that the question of consent is capable of being resolved with recourse to minimal evidence. Specifically, whether or not a user consented to their image and name being used for advertising purposes will likely be determinable with reference to: (i) LinkedIn’s Advertising Preferences, User Agreement, and Privacy Policy; (ii) evidence about how the user interface makes a user aware of Dynamic Ads; and (iii) the means by which a user is given the opportunity to opt in or out of Dynamic Ads.

[23] Even if the evidence with respect to consent turns out to be more complex than it is characterized to be by the defendant, it is not likely to be contentious or require findings of credibility. As pointed out by the plaintiff’s expert Dr. Rubin, most applications treat all users alike and behave in a standardized way for all users. The means by which LinkedIn’s user interface implements Dynamic Ads, and the extent to which a user is made aware of the use of Dynamic Ads and given an opportunity to consent to them, will be the same for every user. All users have the same experience. It is difficult to conceive of how evidence about user experience with Dynamic Ads could give rise to contests of credibility.

[24] Therefore, I find that it is very likely that the summary trial application will substantially narrow the issues to be determined in this proceeding.

Likelihood of delay and costs

[25] The plaintiff points out that a summary trial is likely to delay the certification application. However, if the defendant is successful at the summary trial, it will likely be dispositive of the entire claim.

[26] The defendant has undertaken not to launch any appeal from a summary trial decision until after certification. This minimizes delays that could have otherwise accrued if the defendant was unsuccessful and the certification application had to be set at a later date.

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[27] In all the circumstances, it does not appear that significant delays are likely to arise if the summary trial proceeds in October 2021. This is particularly true if the court grants the defendant its alternative relief sought and allows the application for summary trial and the certification application to be heard together on the scheduled dates.

Economy and judicial efficiency

[28] A class proceeding, once certified, transforms an individual action into a proceeding with time-consuming and costly procedures. There is a sound policy reason for allowing defendants in class proceedings to bring applications in advance of certification that might dispose of or narrow the issues in appropriate cases so that judicial economy is preserved: *Consumers' Association et al. v. Coca-Cola Bottling Company et al.*, 2005 BCSC 1042 at para. 75 [*Coca-Cola*].

[29] As noted in *Dahl v. Royal Bank*, 2006 BCCA 369 at para. 37, in some class proceedings it is appropriate to decide a central legal issue before the certification application in order to save time and expense for all the parties:

> It makes no sense to expose the parties to the expense of a certification hearing and the discovery process when the litigation can be pared to its proper dimensions by the appropriate determination of central legal issues.

[30] In cases like *Li v. British Columbia*, 2017 BCSC 1616, and *Coca-Cola,* the issues sought to be determined at summary trial were discrete issues of law that could be resolved summarily, disposing of or narrowing the issues in each case. In *Pantusa v. Parkland Fuel Corp.,* 2020 BCSC 1988 at para. 38, Justice Milman described the kinds of applications that defendants have been permitted to bring pre-certification as ones that raise "a narrow, discrete, and potentially determinative

question, one that is uncluttered by the possible need for discovery on the facts going to the merits of the claim”.

[31] In this case, it appears likely that the most significant issue in contention will be the question of whether users consented to the use of their names and photographs in Dynamic Ads, which is a question of fact. It is therefore not clear that this case is completely analogous to *Li* and *Coca-Cola*, where the opportunity to pare down the litigation (and in so doing, save money and judicial resources) was obvious because the issues to be determined at summary trial were purely legal.

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[32] However, in this case, the defendant raises narrow and potentially determinative questions. While I cannot say with certainty that those questions are “uncluttered by the possible need for discovery on the facts going to the merits of the claim”, it seems likely that minimal, if any, discovery will be required in order to determine the facts surrounding consent. As such, economy and judicial efficiency are likely promoted by the defendant proceeding with its summary trial.

Promotion of the fair and efficient determination of the proceeding

[33] While efficiency and judicial economy are important factors to consider in a sequencing application, so too is fairness. I must consider whether the claim of the plaintiff and the class members can be fairly adjudicated if the defendant’s summary trial application proceeds prior to the certification application.

[34] This factor merits specific attention because the plaintiff’s arguments on this application are primarily about fairness. The plaintiff argues that a summary trial has distinct features that make it different from other dispositive applications that a defendant may seek to bring in advance of a trial. These features, according to the plaintiff, weigh in favour of delaying any summary trial application until after certification.

[35] A summary trial is a trial on the merits. The onus remains on the plaintiff even where the defendant has brought the application: *Gichuru v. Pallai,* 2013 BCCA 60 at para. 35. All parties must come to a summary trial hearing prepared to prove their

claim or defence: *Gichuru* at para. 32. Often a summary trial in a class proceeding in advance of certification will be premature because, in many cases, discovery is required before the parties are in a position to have a fair trial on the merits of the claim. In most class proceedings, full discovery doesn't take place until after certification.

[36] However, where the summary trial application seeks to dispose of an issue that appears on its face to be capable of summary adjudication, the fact that it is brought in the context of a class proceeding does not preclude determination under Rule 9-7. Section 40 of the *CPA* provides that the *Rules* apply to class proceedings to the extent that those rules are not in conflict with the *CPA.* The *Rules* allow a party to bring a Rule 9-7 application in any action where a response to civil claim has been filed.

[37] A class proceeding, while subject to the *Rules*, is not the same as any other civil action. It has been described by our Court of Appeal as "an action with ambition": *MacKinnon v. Instaloans Financial Solution Centres (Kelowna) Ltd.,* 2004 BCCA 472 at para. 33. I am mindful that I must apply the *Rules* in the context of this proceeding's potential future as a class action.

[38] I accept that fairness in the context of a class proceeding requires the court to ensure that the values underpinning the *CPA*, which include access to justice, are not undermined by a ruling that could result in the dismissal of a claim, pre-certification, that would have survived if the plaintiff had access to post-certification discovery.

[39] The plaintiff argues that in this class proceeding, a summary trial before certification would be premature and unfair to the class members because the plaintiff has not yet had access to any form of discovery. The plaintiff relies on the following statement from *Player v. Janssen-Ortho Inc.,* 2014 BCSC 1122 at para. 198:

> There are comments in the law, as in *Ho v. Ho*, 2013 BCSC 559, that the court should be hesitant to grant judgment on a summary trial where a party

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> has not yet had an opportunity to conduct examinations for discovery and where there appears to be an issue that requires exploration by way of examinations or production of documents.

[40] *Player* was a decision in a summary trial, it was not a sequencing decision. The court in *Player* had to grapple with the question, one that every summary trial judge must confront, as to whether the case was appropriately determined summarily. This same question is one that I will confront, as case management judge, at the defendant's summary trial application. It is a question that can only be answered with reference to the application materials and evidentiary record before the court at the time the application is heard.

[41] The broad and uncontroversial proposition from *Player* relied on by the plaintiff is sound: the court should proceed with caution in determining that a case is suitable for summary determination where there has been no discovery. However, each case must turn on its own facts and circumstances, and suitability for summary trial can only be determined in the context of the record before the court in a summary trial application.

[42] In *Coca-Cola,* the plaintiffs argued that they required the benefit of disclosure from discovery and other pre-trial procedures before they could meet the burden of proving their case at a summary trial. In considering this argument, Justice Mackenzie noted that, as in any action, the *Rules* allow for a party to a class proceeding to make pre-trial applications with respect to document disclosure and pre-trial examination of witnesses. Those tools were available to the plaintiffs and as a result, Mackenzie J. held that the summary trial should proceed first.

[43] I am mindful of the fact that a significant financial burden is placed on a representative plaintiff who is required to engage in pre-certification applications and to seek pre-certification discovery. It has been noted by this Court that the brief, 90-day period for bringing a certification application is an indication of legislative intent that certification should precede other preliminary motions: *British Columbia v. Apotex*, 2020 BCSC 412 at para. 20. Minimizing the financial burden on a proposed

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representative plaintiff pre-certification serves the access to justice principles that animate the *CPA.*

[44] However, class proceedings are intended not only to promote and improve access to justice but also to make more efficient use of scarce judicial resources: *Seidel v. TELUS Communications Inc.,* 2011 SCC 15 at para. 52. This proceeding remains subject to the *Rules* and the procedural tools granted to both parties to seek to resolve matters expeditiously and efficiently where the circumstances warrant.

[45] Many of the plaintiff's concerns about fairness have the potential to be addressed by the summary trial application process itself. If the defendant were to bring its summary trial application on a less-than-complete evidentiary record, it would do so at its own peril, as it would risk the court declining to determine the issues summarily at that time. The plaintiff would have an opportunity to argue at that point that the matter was not suitable for summary determination. Any concerns about inadequate disclosure or discovery would then properly be placed in the context of the summary trial application record and not argued in the abstract as they were before me at this sequencing hearing.

Strength of the defendant's arguments

[46] As noted by Justice Bowden in *Li* at para. 32, any assessment of the strengths of the defendant's summary trial arguments at this stage is by necessity very preliminary.

[47] While it is premature to conclusively determine the defendant's substantive arguments about the plaintiff's claim, or the defendant's position that the matters it raises are suitable for summary trial, both may be considered on a preliminary basis in determining sequencing.

[48] In this application, the defendant argues that on its face, privacy legislation does not protect a person from the use of their name and images in advertising that no one other than that person sees. I am not persuaded that, as the defendant argues, the plaintiff's claim "borders on the absurd". The legislation describes a

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statutory tort that, subject to the determination of the question of consent, the defendant appears to have breached. While I must not come to any conclusion on the matter, I cannot find on the basis of the record before me that this action is as obviously misconceived as the defendant suggests.

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Delay by the plaintiff

[49] The defendant concedes, and I agree, that there has been no delay caused by the plaintiff in advancing this case to certification.

Whether the defendant agrees not to pursue costs or otherwise agrees to facilitate the timely pursuit of the action

[50] The defendant has confirmed that, if the summary trial proceeds first and is successful, it won't seek costs of the summary trial against the plaintiff.

Whether the defendant agrees to treat the motion as determinative of the s. 4(1)(a) aspect of the certification motion

[51] The defendant has conceded that, if it is unsuccessful on the issues raised at the summary trial, when the matter proceeds to certification, it will treat the court's decision as determinative of the issue of whether the pleadings disclose a cause of action under s. 4(1)(a) of the *CPA.*

Whether there is likely to be an overlap in the issues raised on certification and issues to consider on the motion

[52] There is considerable overlap among the certification issues, the merits of the claim, and the expected subject matter of the summary trial application. Any concerns arising from this overlap are somewhat attenuated by: (i) the defendant's concession with respect to the motion being determinative of the cause of action requirement for certification; and (ii) the fact that I am the case management judge hearing both applications.

<u>Conclusion Re: Sequencing</u>

[53] I have determined that it is appropriate in this case to order that the defendant's summary trial application and the certification application should be

heard concurrently. The issues raised in this claim are straightforward and a summary trial has the potential to conclusively determine them at an early stage. However, I do not have the summary trial application materials before me and there remains some possibility that the issues raised at the summary trial application, particularly issues surrounding the factual question of consent, could be more complex than they appear at this stage. At that point, it may become apparent to the court that the matter is not suitable for summary determination. In order to ensure that such an application does not delay the process of certification, the application for certification may be heard at the same time.

[54] Should the parties be unable to agree on a schedule for exchange of materials in advance of the hearing, they may schedule a judicial management conference before me to speak to scheduling.

"Madam Justice Francis"

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