COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Linkletter v. Proctorio, Incorporated,* 2023 BCCA 160

Date: 20230419
Docket: CA48214

Between:

Ian Linkletter

Appellant
(Defendant)

And

Proctorio, Incorporated

Respondent
(Plaintiff)

Sealed (In Part)

Before: The Honourable Mr. Justice Groberman
The Honourable Madam Justice Fenlon
The Honourable Mr. Justice Skolrood

On appeal from: An order of the Supreme Court of British Columbia, dated March 11, 2022 (*Proctorio, Incorporated v. Linkletter*, 2022 BCSC 400, Vancouver Docket S208730).

Counsel for the Appellant:	C.J. Boies Parker, K.C. J. Riddle
Counsel for the Respondent:	T.M. Cohen, K.C. M.F.P. Rozee
Place and Date of Hearing:	Vancouver, British Columbia December 2, 2022
Place and Date of Judgment:	Vancouver, British Columbia April 19, 2023

Written Reasons by:
The Honourable Madam Justice Fenlon

Concurred in by:
The Honourable Mr. Justice Groberman
The Honourable Justice Skolrood

Summary:

The respondent Proctorio, Incorporated brought an action against the appellant Ian Linkletter in breach of confidence and copyright after he shared links to Proctorio's unlisted instructional videos hosted on YouTube. Mr. Linkletter appeals the denial of his application to dismiss that action under the Protection of Public Participation Act.

Held: Appeal dismissed. The judge did not err in finding grounds to believe that the breach of confidence claim had substantial merit and that Mr. Linkletter had no valid defence. His finding that the links were themselves confidential, and that the information was otherwise only available online in a diffuse and scattered form, is supported by the record. He also did not err in finding sufficient grounds to establish that Mr. Linkletter was obliged to keep those links confidential, based on the context in which he accessed them, and that sharing the links caused Proctorio detriment. Neither did the judge err in his consideration of the breach of copyright claim. Whether sharing a controlled link to an unlisted video amounts to a publication rather than a mere reference is a novel question which should not be ruled out at this early stage of the proceeding. Nor is it evident that Mr. Linkletter's obligation to keep the links confidential should be overridden by YouTube's terms of service. Finally, the judge appropriately weighed the public interest. He was alive to the limited harm to Proctorio of Mr. Linkletter's actions but found it outweighed the limited public interest in protecting breaches of confidence and copyright that were not necessary for Mr. Linkletter to express his views.

Reasons for Judgment of the Honourable Madam Justice Fenlon:

[1] The appellant Ian Linkletter appeals the denial of his application under the *Protection of Public Participation Act*, S.B.C. 2019, c. 3 ("*PPPA*") to dismiss the respondent Proctorio, Incorporated's action against him in breach of confidence and copyright. He asserts that the suit against him is strategic litigation intended to silence his public criticism of Proctorio's products and that the judge erred in fact, in law, and in the exercise of his discretion in coming to his decision.

Background

[2] Proctorio has developed a software product designed to monitor or "proctor" students writing examinations on their computers at home. Since the COVID-19 pandemic, which forced many courses online and prevented in-person examinations, Proctorio's software has been used increasingly by educational institutions across North America.

[3] Mr. Linkletter was employed by the University of British Columbia as a learning technology specialist in the Faculty of Education. In June 2020, he took issue with the way Proctorio and its CEO dealt with a student's complaint after the student called Proctorio's helpline during an examination. In an online discussion, Mr. Linkletter was critical of the company and its CEO; he continued to express his opinions on Twitter, alleging that Proctorio's software was causing students emotional distress and harm.

[4] In order to learn more about Proctorio's software, Mr. Linkletter created a "sandbox" or test course and designated himself as an instructor. On August 23, 2020, he logged on to Proctorio's online platform where instructors can learn about how the software functions through instructional videos. The videos are embedded in the "Help Centre" and can also be accessed by clicking those links, which takes the user to YouTube. The videos on YouTube are unlisted, so cannot be accessed other than by those who have been provided with the correct link.

[5] Over the next two days, Mr. Linkletter used Twitter to publish the links to seven of the instructional videos. When Proctorio discovered this, it immediately disabled the links. Mr. Linkletter responded by tweeting that the links were no longer working and criticized Proctorio for disabling them. In one of his tweets posted August 29, 2020, he shared a screenshot of the Academy webpage showing the original links to be unavailable.

The Chambers Hearing

[6] Proctorio commenced this action on September 1, 2020, alleging that Mr. Linkletter was liable for the tort of breach of confidence, infringement of copyright contrary to ss. 3 and 27 of the *Copyright Act*, R.S.C. 1985, c. C-42, and circumventing a technological protection measure contrary to s. 41.1 of the *Copyright Act*.

[7] On September 2, 2020, Proctorio obtained an interim injunction, without notice to Mr. Linkletter, prohibiting him from downloading or sharing information from Proctorio's online platform or encouraging others to do so.

[8] Mr. Linkletter then applied to have Proctorio's action dismissed under s. 4 of the *PPPA*, which provides:

> 4 (1) In a proceeding, a person against whom the proceeding has been brought may apply for a dismissal order under subsection (2) on the basis that
>
> (a) the proceeding arises from an expression made by the applicant, and
>
> (b) the expression relates to a matter of public interest.
>
> (2) If the applicant satisfies the court that the proceeding arises from an expression referred to in subsection (1), the court must make a dismissal order unless the respondent satisfies the court that
>
> (a) there are grounds to believe that
>
> (i) the proceeding has substantial merit, and
>
> (ii) the applicant has no valid defence in the proceeding, and
>
> (b) the harm likely to have been or to be suffered by the respondent as a result of the applicant's expression is serious enough that the public interest in continuing the proceeding outweighs the public interest in protecting that expression.

In the alternative, he sought to have the injunction set aside for non-disclosure, or in the further alternative, to narrow it.

[9] Proctorio opposed the application, arguing that the constitutional principles of federal paramountcy and interjurisdictional immunity precluded provincial legislation like the *PPPA* from applying to prevent otherwise viable claims under a federal statute such as the *Copyright Act* from proceeding. The Attorney General of British Columbia appeared at the hearing to dispute that assertion. Proctorio argued that, if the *PPPA* did apply to the claims, the application should nonetheless be dismissed because Proctorio's action was not directed at curtailing an expression on a matter of public interest, and because in any event Proctorio had a meritorious claim.

[10] The judge conducted an assessment under s. 4 of the *PPPA* and concluded that Proctorio's claims should not be dismissed except for the claims that Mr. Linkletter had circumvented a technological protection measure under s. 41.1 of the *Copyright Act* and that the Academy screenshot infringed the *Copyright Act*. The

judge did not find it necessary to address the constitutional question. He refused to set aside the injunction because he did not find that Proctorio had failed to make full and frank disclosure on the without notice application. The judge agreed that the terms of the injunction were too broad, however, and narrowed them to reflect the remaining claims.

On appeal

[11] Proctorio does not raise the constitutional question on appeal. Mr. Linkletter did not appeal the orders made relating to the injunction, relying instead on the general appeal seeking dismissal of Proctorio's action, which would, if successful, negate the basis for the injunction.

[12] The appeal raises four issues:

1. Whether the judge erred in finding that the action arose from an expression, as defined in the *PPPA*, made by Mr. Linkletter when what was in issue was his sharing of allegedly confidential proprietary information in the form of hyperlinks;

2. Whether the judge erred in concluding there were grounds to believe the breach of confidence claim had substantial merit given that the information was widely available and its disclosure caused no harm to Proctorio;

3. Whether the judge erred in concluding that there were grounds to believe the breach of copyright claim had substantial merit; and

4. Whether the judge erred by failing to identify, assess, and weigh the interests mandated by the legislation.

Standard of review

[13] In reviewing the judgment, it must be remembered that, as the judge recognized, his task was not to make determinations on the merits of the proceeding. The question before him was whether to screen out Proctorio's action at an early stage of the case, before a determination on the merits. The standard of

proof under s. 4(2)(a) is “grounds to believe,” not a balance of probabilities. This requires a basis in the record and the law, taking into account the stage of the litigation, for finding that the underlying proceeding has substantial merit and that there is no valid defence. Any basis in the record is sufficient so long as it is legally tenable and reasonably capable of belief: *Bent v. Platnick*, 2020 SCC 23 at paras. 87–88.

[14] Grounds to believe a proceeding has “substantial merit” means a basis in the record and the law for finding “a real prospect of success—in other words, a prospect of success that, while not amounting to a demonstrated likelihood of success, tends to weigh more in favour of the plaintiff”: *Bent* at paras 88, 90; *1704604 Ontario Ltd. v. Pointes Protection Association*, 2020 SCC 22 at para. 49 [*Pointes*]. Similarly, grounds to believe the applicant has no valid defence means a basis in the record and the law for finding “that the defences do not tend to weigh more in favour” of the applicant: *Bent* at para. 103. As this Court has cautioned, “[i]ntroducing too high a standard of proof into what is a preliminary assessment might suggest that the outcome is being adjudicated rather than the likelihood of an outcome”: *Neufeld v. Hansman*, 2021 BCCA 222 at para. 24 (emphasis omitted), leave to appeal to SCC granted, 39796 (13 January 2022).

[15] A judge’s determination under s. 4 of the *PPPA* is entitled to deference on appeal, absent reviewable error: *Bent* at para. 77. The appellant frames some errors as legal errors reviewable on a correctness standard, such as whether information which is available publicly to some extent can retain the necessary air of confidentiality. Primarily, though, the errors alleged are either factual, such as the extent of disclosure of the videos, and whether Mr. Linkletter accepted the terms of service, or they are errors alleged in relation to an exercise of discretion; both attract a deferential standard of review.

[16] I turn now to the first issue on appeal.

Analysis

1. Does the action arise from an expression made by the appellant?

[17] In the court below, Proctorio opposed the appellant's application under s. 4 of the *PPPA* in part on the basis that the action did not arise from "an expression made" by Mr. Linkletter as specified by s. 4(1) of the *Act*. On appeal it seeks to uphold the order on the same basis.

[18] Proctorio asserts that the sharing of the links themselves, as opposed to the critical content of the message that accompanied them, is not an expression made by Mr. Linkletter. It stresses that the underlying action does not seek to limit expression on matters of public interest, but rather, to remedy and prevent breaches of confidence and copyright. In short, Proctorio says it is not the communication of Mr. Linkletter's views of Proctorio's software that gives rise to the litigation, but rather his disclosure of Proctorio's confidential and proprietary information.

[19] The judge concluded that Mr. Linkletter's intention in posting the seven tweets was to convince his Twitter audience that his professed misgivings about Proctorio and its software were justified: at paras. 50, 52. Further, he was of the view that Mr. Linkletter's use of the links to share the content of the videos was "an effort to illustrate his point about the harm that Proctorio's software was capable of causing to some students" and so could be characterized as an expression: at paras. 51, 53.

[20] In my view the judge did not err in concluding that the sharing of the links amounted to an expression on a matter of public interest. First, it is common ground that the debate around the use of surveillance software to invigilate exams is a matter of public interest. Second, the *PPPA* defines "expression" very broadly as "any communication, whether it is made verbally or non-verbally, publicly or privately, and whether it is directed or not directed at a person or entity". Mr. Linkletter's tweets fall within this expansive definition. Third, Proctorio's submission that the action does not constitute a proceeding falling under s. 4(1)(a) because it does not seek to limit expression misinterprets that section. As stated in *Pointes*, "proceedings arising from an expression are not limited to those *directly*

concerned with expression”—it is sufficient “that the expression is somehow causally related to the proceeding”: at para. 24 (emphasis in original). As Proctorio’s action arises from the tweets, the expression and the proceeding are causally related.

2. Were there grounds to believe Proctorio’s breach of confidence claim had substantial merit?

[21] Proctorio’s breach of confidence claim required it to establish three elements:

a) The information had a necessary quality of confidence about it;

b) The circumstances under which the information was imparted gave rise to an obligation of confidence; and

c) The defendant made unauthorized use of the information to the detriment of the plaintiff.

The threshold for establishing confidentiality is a low one: *Cadbury Schweppes Inc. v. FBI Foods Ltd.*, [1999] 1 S.C.R. 142, 1999 CanLII 705 at paras. 75–76.

[22] Mr. Linkletter challenges the judge’s conclusion that there are grounds to believe that Proctorio’s breach of confidence claim has substantial merit. He contends the judge erred in his analysis of each of the three elements of the test. Although the appellant characterizes these as questions of law, in my view they are challenges to the judge’s findings of fact, or at most to his application of the test for breach of confidence to the facts as he understood them to be, both of which are reviewable on a deferential standard. I turn now to each of the errors identified by the appellant in relation to the test.

A. Necessary quality of confidentiality

[23] The appellant’s fundamental submission is that the judge made a palpable and overriding error of fact in finding the requisite element of confidentiality because virtually all of the information conveyed in the videos was already available publicly before he published the links. He points in particular to information found in the McGraw Hill Interactive “Proctorio Self-Guided Demo” website designed to market

Proctorio to purchasers of textbooks. Further, the appellant says it was an error of law for the judge to find that the information was confidential because it was only available publicly in a "diffuse and scattered" way, whereas the tweeted links assembled the information and made it readily available.

[24] Proctorio notes there was no evidence that three of the seven videos posted by Mr. Linkletter were available anywhere on the internet and that the McGraw Hill demo was not in the same form or as comprehensive.

[25] I see no basis upon which to interfere with the judge's findings on the record before him. He found that the evidence generally supported Proctorio's assertion that it had taken concrete steps to keep the materials posted in the Help Centre and Academy confidential: at para. 63. The judge did not misapprehend the extent to which the information was available on the internet, including in the McGraw Hill demo. Indeed, he acknowledged that much of it was available but said:

> [66] I appreciate that the importance of preserving confidentially in the unlisted links is tied to the sensitivity of the information in the videos. Although it appears that much of that information was already available to the public elsewhere on the internet, it was in a form that was diffuse and scattered. To assemble the same information that Mr. Linkletter shared with his Twitter audience on August 23 and 24, 2020, one would have to gather it from many sources, as Mr. Linkletter's counsel later did. The public did not have ready access to it in that assembled form.
>
> [Emphasis added.]

[26] Furthermore, the judge noted that "it is not disputed that the unlisted links that Mr. Linkletter shared were themselves confidential and not in the public domain": at para. 65. The judge recognized that an unlisted link is akin to an unlisted telephone number, a comparison made by Mr. Linkletter, in that both may embody confidential and even sensitive information. He also observed that Mr. Linkletter would not have been able to access those links had he not been signed in as a UBC course instructor. While he did state incorrectly at para. 65 that Mr. Linkletter could not have accessed the links had he not signed in to the Academy, it is clear from the reasons as a whole that the judge was aware that the links were available on the Help Centre, as discussed below. Further, he recognized that Mr. Linkletter had accepted

Proctorio's terms of service when he accessed the links—a comment best understood in the context of his later determination that there were grounds to believe that this was so.

B. Obligation of confidence

[27] The appellant says the judge erred in finding that Mr. Linkletter was required to accept Proctorio's terms of service imposing an obligation of confidence before accessing the videos. He says the judge conflated the Academy and the Help Centre and that it is not in dispute that the links that were tweeted were not found on the Academy, but on the Help Centre. Further, the appellant contends that it was on the Help Centre that the appellant first saw the links and clicked on them, ending up on YouTube where he viewed the videos and found shareable links. As a result, he was not in any way required to accept the terms of service before seeing the videos and therefore did not enter into any obligation of confidentiality.

[28] I do not see a reviewable error in the judge's findings. He was required to determine whether there were grounds to believe that Proctorio could meet its burden to show that the circumstances in which Mr. Linkletter gained access to the Help Centre and Academy were such that there was a duty on his part to maintain the confidentiality of the materials he found there. The judge understood that the links to the videos were found on the Help Centre, not the Academy: at paras. 22, 30, 83, 93, 129. He also understood that there was conflicting evidence as to whether Mr. Linkletter had accepted the terms of service before he gained access to the videos, but found that in the context, Proctorio had met its burden to show that there were grounds to believe that a claim could be established: at paras. 26, 76. He referred to an email that Mr. Linkletter received inviting him to the Academy on August 23, 2020, noting that Proctorio's Director of Communications and Marketing, John Devoy, deposed that when users seek to access the Academy for the first time upon receiving such an invitation, they are first required to acknowledge and accept Proctorio's terms of service: at para. 27. Mr. Linkletter acknowledged receiving such an email on August 23 before publishing the links on Twitter, and clicking on a link

within it to access the Academy, although he did not recall whether it required him to accept the terms of service before proceeding.

[29] The judge also found that the circumstances in which Mr. Linkletter accessed and distributed the video links demonstrated his awareness of the intended confidentiality of the videos. The judge acknowledged Mr. Linkletter was only able to view the links due to his role as a learning technology specialist at UBC (at paras. 6, 80), and noted Mr. Linkletter had to create a "sandbox" course with no students and designate himself as an instructor in order to access the materials: at para. 76. Further, he found that Mr. Linkletter's comments when sharing the videos suggested that he was aware the videos were not generally available to the public and were intended to be kept confidential, including by encouraging others to sign on as instructors and to do so using "a computer you can torch": at para. 35.

C. Detriment to the plaintiff

[30] The appellant submits the judge erred in concluding there were reasonable grounds to believe that Proctorio could establish detriment. He says that the availability of the tweeted links for a brief period before Proctorio disabled them cannot constitute a detriment without some evidence of the consequences or harm that this caused to Proctorio. Proctorio counters that there was evidence that those accessing the links on Twitter had been invited to retweet them. At this early stage of the proceeding, it says it is not yet in a position to prove these consequences.

[31] The judge addressed Proctorio's allegations of two specific harms: first, that sharing the videos would facilitate student cheating, and second, that it would assist Proctorio's competitors. The judge acknowledged that there was no concrete evidence before him to show how those things might actually have occurred, particularly given there was evidence suggesting that much of the information in issue was already in the public domain anyway. He concluded nonetheless that Proctorio had demonstrated harm because Mr. Linkletter had "undermine[d] the virtual barrier on which Proctorio relies to segregate the information that it wishes to make available only to instructors and administrators from that available to students

and members of the public": at para. 80. He noted that the links were circulated widely, and that some of Mr. Linkletter's 958 followers on Twitter appeared to have retweeted the links: at para. 108. I will return to the scale of harm later in addressing the judge's weighing of the competing public interests; it suffices at this point to say that I see no error in the judge's conclusion that there were grounds to believe Proctorio could establish some detriment.

[32] Mr. Linkletter contends in any event that he has a public interest disclosure defence because students and academics in his Twitter audience had a valid interest in receiving the information he shared. The judge did not accept there were reasonable grounds to believe this defence could be made out, observing that it was available only insofar as the confidential information went no further than was necessary in order to vindicate the public interest. He found that, even if the material could be said to contain evidence of "misconduct of such a nature that it ought in the public interest to be disclosed to others", Mr. Linkletter did not have to share all that he did in order to disclose that "misconduct" to his Twitter audience: at para. 83, citing *Steintron International Electronics Ltd. v. Vorberg*, 10 C.P.R. (3d) 393, 1986 CanLII 1234 (BC SC). In short, the judge's decision on this element did not turn on whether the Twitter audience had an interest in the subject being addressed.

[33] I see no error in the judge's conclusion that there were grounds to believe Mr. Linkletter did not have a valid public interest defence.

3. Were there grounds to believe that the breach of copyright claim had substantial merit?

[34] Proctorio asserts that Mr. Linkletter breached its copyright in the videos by either communicating, reproducing, or publishing them. Although Mr. Linkletter does not dispute that Proctorio owns copyright in the YouTube videos, he says the judge erred in finding there were grounds to believe that an infringement of copyright claim could be made out for two reasons.

[35] First, Mr. Linkletter argues that the judge failed to appreciate that copyright is lost when a work is made available online, since it is being performed to the public at

large, relying on *Society of Composers, Authors and Music Publishers of Canada v. Entertainment Software Association*, 2022 SCC 30 at paras. 74, 91 [*SOCAN*]. He says that all he did by sharing a link was to provide a reference letting others know where that publicly available performance of the work could be found—he did not transmit the work to the user. Further, he argues that Proctorio continued to control the ability of the public to view the videos, because it could remove them.

[36] The judge rejected Mr. Linkletter's argument that, based on the reasoning in *Crookes v. Newton*, 2011 SCC 47, his sharing of the link was nothing more than a reference to a publicly available work. He distinguished *Crookes* on the basis that it was a defamation case in which the defamatory comment was located in the original material to which the hyperlink referred. In that case the court concluded that by merely conveying where that material could be found, the defendant was not repeating it because he was not exerting any control over it. The judge stated that in the context of copyright law, that same reasoning did not apply because the wrongdoing did not lie in the original work itself but in the very act of sharing access to it without the owner's authorization: at para. 90. Furthermore, he observed that Justice Abella writing for the majority in *Crookes* identified a distinction that could be drawn between hyperlinks of the kind in issue in *Crookes* and those like the ones in issue in this case that "automatically display other content": at para. 43. She observed that such links may attract different treatment.

[37] Nor did the judge accept Mr. Linkletter's premise—on which his argument drawn from *SOCAN* rests—that the videos were available to the public, given that they were unlisted videos accessible only to those who had been granted access to Proctorio's Help Centre and given his finding that there were grounds to believe that Mr. Linkletter had acknowledged and agreed to abide by Proctorio's terms of service before he accessed them: at paras. 65, 93.

[38] The appellant's second argument is that the judge failed to give effect to the YouTube terms of service to which Proctorio agreed when making use of that service to host its videos. He says that under those terms, by uploading an unlisted

video to YouTube, Proctorio granted an implied license to anyone with the links to its videos to share them with others without restriction:

> **License to Other Users**
>
> You also grant each other user of the service a worldwide, non-exclusive, royalty-free license to access your content through the service, and to use that content, including to reproduce, distribute, prepare derivative works, display and perform it, only as enabled by a feature of the service (such as video playback or embeds). For clarity, this license does not grant any rights or permission for a user to make use of your content independent of the service.

[39] Mr. Linkletter also says Proctorio is mistaken in its argument that YouTube's terms of service cannot override the common law and contractual obligations he undertook to comply with as a result of Proctorio's terms of service and his use of the Proctorio's Help Centre. He submits that Proctorio's copyright claim can have nothing to do with his common law or contractual obligations since it sues pursuant to statute. He says the *Copyright Act* only creates liability for unauthorized uses of an artistic work, and that granting of the license to use one's work through YouTube is fatal to a claim under the *Copyright Act*.

[40] The judge was not persuaded that, simply by having posted the tutorial videos on YouTube, Proctorio effectively granted Mr. Linkletter and other users of YouTube a license to share the links through YouTube's terms of service: at para. 67. He noted Proctorio's argument that YouTube's terms of service also contain provisions that restricted how Mr. Linkletter could use YouTube's service including the following:

> You [in this case, Mr. Linkletter] may access and use the Service as made available to you, as long as you comply with this Agreement and applicable law. You may view or listen to Content for your personal, non-commercial use. You may also show YouTube videos through the embeddable YouTube player.
>
> …
>
> [Emphasis added by the chambers judge.]

[41] The judge concluded that the license relied on by Mr. Linkletter applied to the accessing of YouTube material through YouTube, and did not apply to the accessing

of information through Proctorio's Help Centre, finding that Mr. Linkletter was bound by the Proctorio terms of service when he accessed the videos: at para. 73.

[42] Proctorio submits the judge's reasoning is sound on this issue. It says that although the language concerning unlisted videos provides that anyone with the URL can reshare it, that cannot allow a user who has agreed to a confidentiality term prior to being given that link to ignore his obligations. In other words, the manner in which the link is obtained comes with restrictions that continue to apply and override the general language of the YouTube terms of service. The obligation of a user to comply with applicable law and to "access and use the service as made available to you" is said to underscore those obligations.

[43] Finally, Proctorio points to some evidence that Mr. Linkletter used the links to the unlisted videos and the unlisted videos themselves independently of YouTube. That line of questioning has not been developed due to the preliminary stage of the action.

[44] I am not persuaded that the judge erred in finding there were grounds to believe the breach of copyright claim had substantial merit. Whether sharing a controlled link to an unlisted video amounts to a publication of the video rather than a mere direction or reference appears to be a novel question which should not be ruled out at this early stage of the proceeding. Nor is it evident that YouTube's terms of service could not be overridden by an acceptance to maintain as confidential a link that would otherwise be shareable under the YouTube terms of service.

[45] I turn next to the appellant's argument that the judge erred in finding that Mr. Linkletter did not have a valid defence to the copyright infringement.

[46] Mr. Linkletter submits that the judge erred in finding there were grounds to believe that he did not have a valid defence of fair dealing. He says the *Copyright Act* is designed to strike an appropriate balance between "promoting the public interest in the encouragement and dissemination of works of arts and intellect and obtaining a just reward for the creator": *Théberge v. Galerie d'Art du Petit Champlain*

inc., 2002 SCC 34 at para. 30. Under the fair dealing exception to infringement, Parliament expressly excepted acts of research, private study, education, parody or satire, criticism, and news reporting from the scope of copyright infringement as long as they are done fairly: *Copyright Act*, ss. 29–29.2. Mr. Linkletter asserts that, although the judge correctly identified the factors to be considered in determining whether a fair dealing defence has been made out, relying on *CCH Canadian Ltd. v. Law Society of Upper Canada* 2004 SCC 13 at paras. 103, 105, he failed to assess the fairness of Mr. Linkletter's use of the material in light of the overarching purpose of the *Copyright Act* of balancing protection of the creator's economic objectives and the rights of users with regard to the public interest.

[47] I see no merit in this ground of appeal. In effect, the appellant challenges the judge's findings of fact, and in particular his finding that the criticism would have been equally effective if it did not actually reproduce the copyrighted work it was criticizing. The judge concluded that all but one of the six factors to be considered favoured a finding that the sharing of the unlisted videos was not fair and was not necessary to serve the public interest that is the focus of the *Copyright Act*. These findings are accorded deference.

4. Did the judge err in his approach to weighing the public interest?

[48] The weighing exercise under s. 4(2)(b) of the *PPPA* is the crux of the analysis. The judge was required to dismiss the proceeding unless “[t]he harm likely to have been or to be suffered by [Proctorio] as a result of [Mr. Linkletter's] expression is serious enough that the public interest in continuing the proceeding outweighs the public interest in protecting that expression”.

[49] The appellant acknowledges that the judge stated the correct test applicable to a consideration of s. 4(2)(b), but says that he failed to apply it, identifying three errors in his analysis:

a) he ought not to have found harm, let alone serious harm;

b) he failed to consider the nature of the expression targeted by Proctorio's proceeding and its value; and

c) he took into account irrelevant considerations in the weighing exercise.

I will address each contention in turn.

A. Proctorio did not suffer harm

[50] The appellant submits that the judge relied simply on the breach of confidence as evidence of harm without properly considering whether harm had resulted from a breach, and if so how serious that harm was**.** The appellant says Proctorio claims general and special damages but has pleaded no material facts and filed no evidence suggesting it suffered any loss as a result of Mr. Linkletter's actions. To the contrary, the only evidence of Proctorio's financial performance since the tweets suggest that the company continued to grow significantly after August 2020. As a result, says the appellant, there is no evidence of Proctorio suffering any harm at all, let alone anything that could be described as serious harm.

[51] The judge acknowledged that the harm Proctorio was able to demonstrate was limited, finding there was only a theoretical risk that Mr. Linkletter's disclosure would result in students learning how to circumvent the software's oversight function, thereby making it less effective, and a similarly theoretical risk that competitors would learn how the software works, thereby reducing the value of Proctorio's intellectual property: at para. 124. But he went on to say:

> [125] On the other hand, I have also found that the evidence supports Proctorio's allegation that Mr. Linkletter's conduct compromised the integrity of its Help Center and Academy screens, which were put in place in order to segregate the information made available to instructors and administrators from that intended for students and members of the public. But for the injunction granted early on in this proceeding, moreover, the harm in that category may well have been greater.

[52] The judge thus placed some emphasis on the injunctive relief sought in the proceeding as a relevant factor in assessing proportionality under s. 4(2)(b). The

granting of the injunction was based on potential for irreparable harm—a finding necessary to support the injunction, which was not appealed.

[53] At this stage of the proceeding, no definitive determination of harm or causation is required. Proctorio's burden was simply to “provide evidence for the motion judge to draw an inference of likelihood in respect of the existence of the harm and the relevant causal link”: *Pointes* at para 71. In my view the judge did not err on this point.

B. Failure to consider the nature of the expression

[54] Mr. Linkletter submits that the judge failed to consider the quality of the expression at this stage of the proceeding and the direction that the closer the particular expression is to the core values that underlie the freedom of expression protected by the *Charter*, “the greater the public interest in protecting it”: *Pointes* at para. 77. The appellant says that his expression was closely tied to "the search for truth, participation in political decision making, and diversity in forms of self-fulfillment and human flourishing”: *Pointes* at para. 77. He says his tweets were aimed at addressing a number of concerns, including the discriminatory effects of algorithmic proctoring software on students with disabilities and racialized students, as well as the effects of the software on the mental health of students who were simultaneously living through a life-altering global pandemic. Mr. Linkletter contends further that the judge’s analysis failed to look beyond the appellant's own circumstances to examine the public interest in protecting his expression; he says a lawsuit targeting public interest expression has a “potential chilling effect on future expression either by a party or by others”: *Pointes* at para. 80 (emphasis omitted).

[55] In short, the appellant says the judge failed to have regard to the quality of the content of Mr. Linkletter's expression and its link to *Charter* values, thus missing a key element in assessing the public interest in protecting that expression.

[56] The difficulty with this submission is that the judge squarely assessed the quality of the expression in issue and the public interest in protecting it. He noted that what was in issue was only Mr. Linkletter’s sharing of Proctorio’s confidential

information, not his expressions criticizing the software and its impact on students, expressions the proceeding did not inhibit: at paras. 127–28. In other words, the judge concluded that the sharing of the unlisted videos was not necessary for Mr. Linkletter's purpose and accordingly the public interest in that particular expression was limited.

C. Taking into account irrelevant considerations

[57] Mr. Linkletter submits the judge "zeroed in on two immaterial considerations": first, Proctorio's motive for suing Mr. Linkletter; and second, the assumption that by narrowing the scope of the injunction, the judge had narrowed the entire lawsuit. He points to the following passages in the judgment:

> [130] I therefore reject the submission that this action was brought with the tacit objective of constraining legitimate expression or that it has had or will have that effect (assuming, that is, that the injunction is narrowly tailored, an issue that I address below). Mr. Linkletter has been and will continue to be free to express his views, as long as he does not misuse the access he was given to instructor-level materials.
>
> [131] For those reasons, I have concluded that Proctorio has met its burden under s. 4(2)(b) and that the application under s. 4 of the *PPPA* should therefore be refused.
>
> [Emphasis added.]

[58] As to the first consideration, the judge's reference to Proctorio's "tacit objective" above is solely in response to Mr. Linkletter's submission that the action had all the hallmarks of a classic SLAPP suit and that Proctorio's purpose in bringing its claim was to silence Mr. Linkletter and others: at para. 127.

[59] Turning to the second impugned consideration, the judge did not, as the appellant suggests, assume that if he narrowed the injunction, the entire lawsuit would be narrowed. Rather, he whittled down the scope of the injunction so that it fit the four corners of the claim that had been pleaded.

[60] Deference is owed to the judge's weighing of the competing interests at play in this case. The judge was alive to the limits on the harm to Proctorio caused by Mr. Linkletter's sharing of the confidential links, but he was also alive to the limited

public interest in protecting breaches of confidence and copyright that were not necessary to fully and forcefully express Mr. Linkletter's views on the subject of Proctorio’s invigilation software—views Mr. Linkletter was able to continue to express after the claim was commenced and the injunction obtained.

[61] In effect, the judge found there was relatively little weight on either side of the scales in this case, but concluded that the public interest in continuing the proceeding outweighed the public interest in protecting an expression which there were reasonable grounds to believe involved the sharing of confidential and copyrighted information. As the court stated in *Pointes*, the *PPPA* is intended to function as a mechanism to screen out lawsuits that unduly limit expression on matters of public interest through the identification and pretrial dismissal of such actions, but “it must also ensure that a plaintiff with a legitimate claim is not unduly deprived of the opportunity to pursue it”: at para. 46.

Disposition

This was a particularly challenging application for the judge to assess given the nature of both the claim and the expression in issue. Ultimately, I can see no reviewable error in the judge's findings of fact, analysis, or weighing of the competing public interests. I would accordingly dismiss the appeal.

"The Honourable Madam Justice Fenlon"

I AGREE:

"The Honourable Mr. Justice Groberman"

I AGREE:

"The Honourable Justice Skolrood"