COURT OF APPEAL

ON APPEAL FROM the Order of Mr. Justice Milman of the Supreme Court of British Columbia pronounced the 11th day of March, 2022

BETWEEN:

IAN LINKLETTER

APPELLANT
(Defendant)

AND:

PROCTORIO, INCORPORATED

RESPONDENT
(Plaintiff)

APPELLANT'S FACTUM

Ian Linkletter

IAN LINKLETTER

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TABLE OF CONTENTS

PAGE

CHRONOLOGY

Date	Event
March 2020	Mr. Linkletter first becomes concerned about the use of Proctorio on university campuses.
June 26, 2020	Mr. Linkletter tweets about Proctorio for the first time.
July 3, 2020	UBC's student union and a number of undergraduate student societies write a letter to UBC recommending that UBC end its relationship with Proctorio and other "invasive, algorithmic remote test proctoring software."[1]
Summer 2020	The working group convened by UBC's Provost on remote invigilation tools releases a report recommending against the use of these tools given "significant and reasonable concerns about some forms of remote invigilation, especially the use of Proctorio" based on "equity concerns, privacy concerns, ethical concerns and more."[2]
August 23-24, 2020	Mr. Linkletter tweets links to seven unlisted but publicly shareable YouTube videos created by Proctorio (the "**YouTube Tweets**"). Each link is disabled in a matter of minutes to hours.
August 29, 2020	Mr. Linkletter tweets a screenshot of a Proctorio course now displaying blank screens due to the disabled links (the "**Academy Screenshot**").
September 1, 2020	Proctorio commences this action against Mr. Linkletter.
September 2, 2020	Proctorio obtains an *ex parte*, without notice injunction against Mr. Linkletter.

[1] Affidavit #1 of Ian Linkletter ("**Linkletter #1**") affirmed 15 Oct 2020, ¶48, Ex. AF, p. 253
[2] Linkletter #1, ¶¶49-50, Ex. AG, p. 256

Date	Event
September 2, 2020	Proctorio communicates with Mr. Linkletter for the first time when it serves him with the injunction and the claim.
September 2-11, 2020 (precise date not in the record)	Mr. Linkletter removes the Academy Screenshot tweet after Proctorio requests it.
October 16, 2020	Mr. Linkletter files a notice of application seeking an order under s. 4 of the *Protection of Public Participation Act*, SBC 2019, c. 3 [***PPPA***], along with his response to Proctorio's claim.
March 16 and 18, 2021	The parties cross-examine each other's affiants.
April 14, 2021	Proctorio brings an application to adduce further evidence and obtain further cross-examination for the *PPPA* hearing scheduled on April 29-30, 2021. Mr. Linkletter's *PPPA* application is rescheduled to July 26-29, 2021.
April 29, 2021	Proctorio's evidentiary application is heard in lieu of the *PPPA* application proceeding.
June 14, 2021	MacNaughton J. makes an order refusing further cross-examination and admitting six paragraphs of the respondent's new affidavit.
July 7, 2021	Proctorio appeals MacNaughton J.'s order.
July 21, 2021	Proctorio asks for a further adjournment of the *PPPA* hearing scheduled for July 26-29, 2021. Master Muir grants the adjournment for the purpose of counsel's medical leave, but Proctorio's request that the hearing wait until the outcome of the evidentiary appeal is refused.
January 28, 2022	Proctorio's evidentiary appeal is heard and quashed from the bench for want of jurisdiction.

Date	Event
February 7-10, 2022	Mr. Linkletter's *PPPA* application goes before Milman J. in chambers.
March 11, 2022	Milman J. issues reasons dismissing the *PPPA* application except with respect to the circumvention of technological protection claim and copyright claim in respect of one expression.
April 27, 2022	The Court of Appeal issues reasons in Proctorio's evidentiary appeal (2022 BCCA 150).

OPENING STATEMENT

The *Protection of Public Participation Act*, SBC 2019, c. 3 [***PPPA***] addresses litigation that arises from expressions made in the public interest. It requires courts to summarily dismiss such claims unless the respondent demonstrates both that the claim has merit ***and*** that the harm to the respondent resulting from the expression is serious enough to outweigh the public interest in protecting that expression.

This case involves a large technology company suing a vocal critic whose actions caused it no loss, harm or damage. The appellant engaged in valuable expression aimed at promoting understanding of the effects of the respondent's software product on vulnerable students. The chambers judge agreed that the appellant acted out a sense of public duty and without malice and that the harm alleged by the respondent was speculative and unlikely to materialize. Nevertheless, he dismissed parts of the *PPPA* application, failing to properly consider fundamental components of the weighing exercise mandated by the legislation.

In permitting part of the claim to continue, the chambers judge erred in law and committed palpable and overriding errors of fact and of law. While the legal error regarding the weighing exercise at the final stage of the *PPPA* test is most significant and is sufficient on its own to overturn the decision, the chambers judge made additional errors regarding the law of breach of confidence and copyright. The respondent's claim in breach of confidence is utterly meritless: correcting for the chamber judge's factual and legal errors, the information disclosed by the appellant was not confidential, was not disclosed in confidence, and caused the respondent no detriment. With respect to copyright, the chambers judge erred in finding substantial merit to the claim when nothing in the *Copyright Act*, R.S.C. 1985 c. C-42 [***CA***] gives authors the exclusive right to share links to content already available online.

If the chambers judge had not committed these errors, the entire claim would have been dismissed. Mr. Linkletter asks this court to now do as the *PPPA* requires: dismiss the claim, and finally unburden Mr. Linkletter and the justice system of this unmeritorious and harmful litigation.

PART 1 - STATEMENT OF FACTS

A. Facts

i. Overview

1. Proctorio, Incorporated ("**Proctorio**") is a privately held company that makes algorithmic proctoring software: programs that surveil and analyze students' physical movements and other behaviour while they write examinations.[3]

2. The appellant Ian Linkletter worked, at the relevant time, as a Learning Technology Specialist at the University of British Columbia ("**UBC**"). His job included assisting faculty members in the delivery of online courses.[4]

3. There is significant public concern that the respondent's software, which labels students "suspicious" based on their body movements and behaviours, causes harm by subjecting students to high levels of anxiety and discriminating against students of colour and students with disabilities.[5] In 2020, as the use of remote proctoring skyrocketed, Mr. Linkletter became a vocal critic of the use of Proctorio's algorithmic software.[6]

4. Mr. Linkletter found links to several of Proctorio's technology support videos demonstrating how the software works on the instructor-accessible portion of Proctorio's Help Center. When he watched those videos, he saw that they were hosted on YouTube, a video-sharing platform. Mr. Linkletter included links to those videos in seven tweets for the purpose of demonstrating that concerns about Proctorio's product were well-founded. The links were disabled almost immediately after being shared. Without ever contacting the appellant, the respondent filed a notice of civil claim and obtained, *ex parte*, a broadly worded injunction prohibiting him from discussing the software's functionality. Descriptions of that functionality, and indeed all of the information in the videos at issue, are widely available on the internet.[7]

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[3] *Proctorio, Incorporated v. Linkletter*, 2022 BCSC 400 [**RFJ**], ¶¶17-19, Appeal Record ("**AR**") 58
[4] RFJ ¶4, AR 55; Linkletter #1, ¶¶5-11, Ex. A-B
[5] RFJ, ¶24, AR 59-60; Linkletter #1, ¶¶21-30, Ex. C-Z, AF, 104-329, 348-51
[6] RFJ, ¶¶5, 19, AR 55, 58
[7] RFJ, ¶¶62, 66, 110-11, 113, 137, AR 70, 71-72, 86, 92-93

ii. Proctorio's Algorithmic Proctoring Software

5. Proctorio develops and markets software that records video, audio, and computer activity of students while they write examinations, analyzes students' behaviour, and flags certain individuals as suspicious. Students and educators have raised concerns about the effect of being continuously monitored on students with test anxiety.[8] There is also concern that the software creates barriers for students with certain disabilities, including ADHD and cognitive disabilities, and that the software erroneously flags the movements of darker-skinned students at a higher rate.[9]

6. The ongoing debate about this kind of software has been the subject of many media reports, and its use was the source of significant controversy at UBC in 2020.[10]

7. Proctorio has contracted to offer its software across at least 1,200 institutions.[11] Proctorio's online technical support comes from two sources: first, the Help Center which contains guides and links to instructional videos, and second, the Academy, which contains modules teaching use of the software.[12] Credentials to access the Help Center and the Academy as an instructor are distributed by each academic institution and not controlled by Proctorio.[13] Videos on the Help Center are hosted on YouTube as unlisted videos, meaning they can be viewed by anyone with the link but cannot be found in a search on YouTube.[14]

8. As of November 2020, 41,214 of the staff at Proctorio's customer institutions had access to the Academy.[15]

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[8] RFJ, ¶24, AR 59-60; Linkletter #1, ¶¶21-26, Ex. E-H
[9] RFJ, ¶24, AR 59-60; Linkletter #1, ¶¶26-30, Ex. H-J, N, T, W
[10] RFJ, ¶¶3, 24, AR 55, 59-60
[11] RFJ, ¶19, AR 58
[12] RFJ, ¶¶19, 21-23, AR 58-59
[13] Affidavit #1 of John Devoy, sworn 31 Aug 2020 ("**Devoy #1**"), ¶13; notice of civil claim filed 01 Sep 2020 ("**NOCC**"), ¶¶10 and 14, AR 14
[14] RFJ, ¶22, AR 59
[15] RFJ, ¶¶23, 19, AR 58-59

iii. Mr. Linkletter's Tweets

9. The underlying action concerns eight tweets Mr. Linkletter made shortly before fall classes resumed in 2020, when the use of Proctorio software was a matter of controversy at UBC and elsewhere. Mr. Linkletter was concerned about the use of Proctorio and had decided to learn more about its software. On August 23, 2020, he accessed Proctorio's online Help Center.[16] He added Proctorio to a sandbox course, *i.e.*, a course without students used to practice or test software.[17] He did so because he wanted to contribute to the public discussion on how Proctorio worked.[18]

10. Mr. Linkletter found instructional videos on the Help Center and clicked on one of them. The video opened on YouTube.[19] YouTube is an online video sharing platform which allows individuals and businesses to "share videos and other content."[20] A small copyright notice was displayed on the bottom of the Help Center web page, but no equivalent notice appeared when the videos were opened on YouTube.[21] Nothing in the videos suggested they were commercially sensitive or should otherwise be kept private.[22]

11. Mr. Linkletter posted a tweet on August 23, 2020 at 9:21 pm quoting from a video that noted Proctorio's software looks for "Abnormalities" in student behaviour and including the YouTube link.[23] At 11:32 pm that evening, he noticed the link had been disabled, such that a person clicking on it would no longer be taken to the video.[24] Proctorio did not contact him in relation to the link being posted or disabled.[25]

12. The next evening, Mr. Linkletter again tweeted about Proctorio, sharing links to six unlisted videos from the Help Center and describing them. The links that he tweeted and

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[16] RFJ, ¶¶6, 26, AR 56, 60-61
[17] RFJ ¶26, AR 60-61
[18] Linkletter #1, ¶¶54, 87
[19] RFJ, ¶6, AR 56; Cross-Examination on Affidavit of Ian Linkletter conducted on 18 Mar 2021 ("**Linkletter Cross**"), p. 32, ll. 10-25
[20] Devoy #1, ¶11; Linkletter #1, Ex. AM at 294
[21] Devoy #1, ¶15, Ex. A
[22] RFJ, ¶64, AR 71
[23] Linkletter #1, Ex. AY
[24] Linkletter #1, ¶77
[25] RFJ, ¶40, AR 64

the time he noticed they were disabled is as follows:

a. “Abnormalities” (posted August 23 at 9:21 pm and disabled by 11:32 pm);

b. ”Behaviour Flags” (posted August 24, 2020 at 8:06 pm and disabled by 8:18 pm);

c. “Display Room Scan” (posted August 24, 2020 at 8:23 pm and disabled by 10:13 pm);

d. “Abnormal Eye Movement” (posted August 24, 2020 at 8:44 pm and disabled by 10:13 pm);

e. “Abnormal Head Movement” (posted August 24, 2020 at 8:45 pm and disabled by 10:13 pm);

f. “Record Room” (posted August 24, 2020 at 8:47 pm and disabled by 10:13 pm); and

g. “Behaviour Setting” (posted August 24, 2020 at 8:51 pm and disabled by 10:13 pm)[26] (collectively the “**You Tube Tweets**”).

13. The links tweeted by Mr. Linkletter to the Abnormalities video, the Behaviour Flags video, and the Behaviour Setting video were all available at the time on a publicly facing UBC website.[27] The Record Room video link was also publicly available on the website of another institution.[28] The information contained in the videos themselves was found in numerous places on the internet, including in the documents from over 25 educational institutions[29] and in videos posted by Proctorio’s partner McGraw Hill that are nearly identical to the videos at issue here.[30]

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[26] RFJ, ¶7, AR 56; Linkletter #1, ¶¶78-83, Ex. AZ-BF. The videos and transcripts of the videos are found in Affidavit #1 of Andrea Wong, affirmed 01 Mar 2021, Ex. B-I
[27] RFJ, ¶62; AR 70, Linkletter #1, ¶¶73-75, Ex. AW, AX
[28] Affidavit #1 of John Trueman, sworn 01 Mar 2021 (“**Trueman #1**”), ¶10, Ex. D
[29] Linkletter #1, ¶93, Ex. BH-BS; Trueman #1, ¶¶13-32, Ex. D-FF
[30] Trueman #1, ¶5, Ex. A-C; Linkletter #1, ¶93(g); Cross-Examination on Affidavit of John Devoy, conducted on 16 Mar 2021 (“**Devoy Cross**”), p. 70, ll. 18-23; PowerPoint created by Plaintiff counsel - comparing videos to information available online (handed up at 11 Mar 2022 hearing) (“**McGraw Hill Comparison**”)

14. The chambers judge found that the purpose of the Tweets was "to convince Mr. Linkletter's Twitter audience that his professed misgivings about Proctorio and its software were justified."[31] He found that Mr. Linkletter had issued the Tweets out of a genuine sense of public duty.[32]

15. On August 29, 2020, Mr. Linkletter noticed that several videos in the Academy course were not functional because of the disabled links. He took a screenshot of part of one page of the course and tweeted it, stating "... [t]heir OWN COURSE on how Proctorio works was censored this week after I shared some of the videos."[33]

16. The chambers judge found that the purpose of this tweet was slightly different than the previous ones. He found the Academy Screenshot tweet criticized Proctorio for having "censored" its course materials after the links were shared, thereby avoiding public scrutiny, and was shared to show the links were indeed no longer available.[34]

iv. The History of the Proceedings

17. Proctorio's evidence was that its general practice when it comes across confidential and copyrighted information being shared publicly is to disable the link "and/or approach the client or third party to ask them to remove, edit or restrict access to the copyrighted and confidential information."[35] In this case, no effort was made to contact Mr. Linkletter or UBC, the entity that actually had a contractual relationship with Proctorio.[36] Instead, on September 1, 2020, Proctorio started this action against Mr. Linkletter, alleging breach of confidence, infringement of copyright, and circumvention of technological protection measures.[37] The claim describes Proctorio's loss and damage as follows:

> If the Help Center information or the Academy Course Material restricted to administrators and instructors became publicly known, students could change their behaviour or adopt strategies to circumvent the Software, giving them an unfair

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[31] RFJ, ¶50, AR 66
[32] RFJ, ¶107, AR 85
[33] RFJ, ¶37; AR 63; Linkletter #1, ¶91, Ex. BG; Devoy #1, Ex. D, pp. 22-23
[34] RFJ, ¶51, AR 66
[35] Affidavit #2 of John Devoy, sworn 16 Nov 2020 ("**Devoy #2**"), ¶41
[36] Linkletter #1, ¶57, Ex. AK
[37] RFJ, ¶8; NOCC, ¶25, AR 17

> testing advantage over other students. Moreover, the plaintiff's competitors could adopt similar technologies to those used by the plaintiff, which would harm the plaintiff's business and dilute the plaintiff's competitive advantage.[38]

18. On September 2, 2020, more a week after the YouTube Tweets were posted and disabled and before the notice of civil claim was served on Mr. Linkletter, Proctorio obtained an *ex parte* injunction against Mr. Linkletter prohibiting him from sharing what it alleged was confidential information.[39] Mr. Linkletter was contacted for the first time by Proctorio on September 2, 2020, when its counsel emailed him to serve him with the claim and injunctive order.[40] He was asked to remove the Academy Screenshot and complied.[41]

19. On October 16, 2020, Mr. Linkletter filed his application under s. 4 of the *PPPA*. His affidavit contained material attesting to the ongoing public debate on the potential harms of algorithmic proctoring software. It further contained the results of internet searches showing that the allegedly confidential information from the videos was widely available online as shared by educational partners of Proctorio.[42]

20. Proctorio filed a response to the *PPPA* application that repeated its allegations of harm from the notice of civil claim.[43] It further filed three affidavits in the *PPPA* proceeding from Proctorio employee John Devoy. In none of these affidavits does Mr. Devoy depose Proctorio has suffered any harm, whether financial or otherwise, as a result of the Tweets.

21. Cross-examinations on the affidavits took place on March 16 and 18, 2021. At that time, Mr. Devoy explained Proctorio's position that any information that explained the software's functionality from the instructor's perspective was confidential, including a range of publications on the internet posted by Proctorio's partners. The interlocutory injunction obtained by Proctorio, and the permanent injunction sought in the notice of civil

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[38] NOCC, ¶22, AR 16
[39] RFJ, ¶9, AR 56
[40] Linkletter #1, Ex. BT
[41] Linkletter #1, Ex. BU-BV
[42] Linkletter #1, ¶¶73-75, Ex. AW, AX, BH-BS
[43] application response of Proctorio, filed 17 Nov 2020 ("**Application Response**"), Factual Basis, ¶25(d), AR 45

claim, prohibit Mr. Linkletter from sharing "Confidential Information".[44]

22. The *PPPA* application was delayed a number of times, including as Proctorio unsuccessfully sought to adduce more evidence and then unsuccessfully appealed.[45]

B. The Chamber's Judge's Decision

23. The chambers judge was satisfied that all of the tweets at issue constituted expressions on a matter of public interest. On the merits threshold in s. 4(2)(a), the chambers judge held there were grounds to believe Mr. Linkletter had a valid defence to the copyright claim involving the Academy Screenshot, given that it did not form a "substantial part" of a copyrighted work.[46] He further concluded there were no grounds to believe Proctorio's claim for circumvention of a technological protection measure had a substantial prospect of success.[47] For the rest of the claims, he concluded there were grounds to believe they had merit and there were no valid defences.

24. At the final stage under s. 4(2)(b) of the *PPPA*, the chambers judge concluded Mr. Linkletter's expression arose "primarily out of a genuine sense of public duty" and that his tweets, while at points "intemperate", demonstrated no malice. The chambers judge found that the harms claimed by Proctorio were unlikely to materialize. However, he found Mr. Linkletter's tweets had "compromised the integrity of the Help Center and Academy screens" and determined the action lacked "hallmarks of a classic SLAPP suit."[48] He further determined the action was not "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)."[49] He then went on to narrow the injunction so that it prohibited only the sharing of information or hyperlinks to

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[44] Devoy Cross, p. 67, l. 25 to p. 73, l. 5; Order of Giaschi J. made 2 Sep 2020, AR 20-21; NOCC, ¶24, AR 16-17
[45] *Proctorio, Incorporated v. Linkletter*, 2021 BCSC 1154; *Proctorio, Incorporated v. Linkletter*, 2022 BCCA 150; see also Affidavit #1 of Nicoleta Badea, sworn 21 Apr 2021, Ex. A-B; Oral Reasons for Judgment of Master Muir, pronounced 21 Jul 2021, ¶18
[46] RFJ, ¶¶97-101, AR 81-83
[47] RFJ, ¶¶118-21, AR 87-88
[48] RFJ, ¶¶124-27, AR 89-90
[49] RFJ, ¶130, AR 90-91

information on the Help Center or Proctorio Academy.[50]

PART 2 - ERRORS IN JUDGMENT

25. The chambers judge:

a. erred in law and committed palpable and overriding errors of fact in concluding there were grounds to believe the breach of confidence claim had substantial merit where the information was not confidential, there was no obligation of confidentiality, and no detriment was suffered;

b. erred in law in concluding there were grounds to believe the *CA* claim had substantial merit without considering the *CA*'s purpose, text, or scheme; and

c. in addressing s. 4(2)(b) of the *PPPA*, erred in law by failing to identify, assess, and weigh the interests mandated by the legislation.

PART 3 - ARGUMENT

A. Background: Standard of Review and the Scheme of the *PPPA*

26. On a *PPPA* application, legal errors are reviewable on a standard of correctness, including errors in the chambers judge's characterization of the provisions of the *PPPA* or errors in their construction of the law governing the underlying claim and defences.[51] Findings of fact and mixed fact and law and exercises of discretion are entitled to deference, and reviewable on a standard of palpable and overriding error.[52]

27. The *PPPA* provides for the summary dismissal of lawsuits that restrict expression on matters of public interest except where the harm that results from the defendants' expression is serious enough that the public interest requires the claim to continue. The

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[50] RFJ, ¶¶142-48, AR 94-95
[51] *Bent v. Platnick*, 2020 SCC 23, ¶77 [***Platnick***]
[52] *Platnick*, ¶77; *Hobbs v. Warner*, 2021 BCCA 290, ¶74, leave to appeal ref'd 2022 CanLII 32897 [***Hobbs***]; see also *Neufeld v. Hansman*, 2021 BCCA 222, ¶23, leave to appeal granted 2022 CanLII 693

PPPA applies to any action against expression on matters of public interest.[53]

28. In the leading case on anti-SLAPP enactments, the Supreme Court of Canada explained that "[f]reedom of expression is a fundamental right and value; the ability to express oneself and engage in the interchange of ideas fosters a pluralistic and healthy democracy by generating fruitful public discourse and corresponding public participation in civil society."[54] The Court held that laws like the *PPPA* provide a broad scope of protection to address the full range of legitimate participation in public matters, by screening out lawsuits that unduly limit expression on matters of public interest through the identification and pre-trial dismissal of such actions.[55]

29. The *PPPA* was expressly designed to avoid unwieldy attempts to discern a plaintiff's motive.[56] The Anti-SLAPP Advisory Panel that advised Ontario on its proposed legislation expressly criticized BC's former law for requiring defendants to prove that the party suing them had a bad motive: as the Attorney General of BC described it, "[i]t's a very difficult thing to do, to prove that." The Attorney General went on to comment:

> … instead of looking to whether the person suing, this person who is expressing themselves…. Instead of trying to figure out whether they're doing it for a bad purpose, why don't we just look and see what the effect of it is? Is it a matter of public importance? Is it stopping this person from talking about it? Is it interfering with the public hearing something that's an important communication about this matter of public interest?[57]

30. In *Pointes*, the Court squarely rejected the idea that the Ontario equivalent to the *PPPA* applies only to litigation that meets the hallmarks of a classic SLAPP.[58] The "indicia" or "hallmarks" of a classic SLAPP are only relevant to the weighing exercise to

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[53] *1704604 Ontario Ltd. v. Pointes Protection Association*, 2020 SCC 22, ¶24 [***Pointes***]; see e.g. *Subway Franchise Systems of Canada, Inc. v. Canadian Broadcasting Corporation*, 2021 ONCA 25, ¶41 (where a negligence claim arose from an expression); RFJ, ¶52, AR 67
[54] *Pointes*, ¶1
[55] *Pointes*, ¶9, 16
[56] *Pointes*, ¶¶78-79
[57] British Columbia, Official Report of Debates of the Legislative Assembly, *Hansard*, 41st Parl., 4th Sess., No. 199 (14 February 2019) at 7027 (Hon. D. Eby)
[58] *Pointes*, ¶¶78-79

the extent they are tethered to s. 4(2)(b).[59]

31. An application under s. 4 of the *PPPA* involves a multi-step process for determining whether the proposed action should proceed. If the defendant demonstrates that the proceeding arises from expressions made by the defendant that relate to a matter of public interest under s. 4(1) – as the appellant did here – the plaintiff must demonstrate three elements under s. 4(2), or have their suit dismissed:

> 4(2)(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.

32. If the respondent does not succeed on either ss. 4(2)(a) or 4(2)(b), where it holds the burden, its action must be dismissed.

33. In the court below, Proctorio challenged the constitutional applicability of the *PPPA* to copyright claims. The federal Attorney General did not participate while the Attorney General of British Columbia defended the applicability of the legislation. If Proctorio renews its challenge in this Court, Mr. Linkletter reserves his right to make a full response.

B. Error 1: The Chambers Judge Erred in Concluding There Were Grounds to Believe Proctorio's Breach of Confidence Claim Had Substantial Merit

34. Breach of confidence requires the claiming party to establish: (1) the information has a necessary quality of confidence about it; (2) the circumstances under which the information was imparted give rise to an obligation of confidence; and (3) the defendant made unauthorized use of the information to the detriment of the respondent.[60] The chambers judge erred in his analysis of each of these points; however, his conclusion on the merits must be overturned if he erred on his conclusion on any one of these factors.

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[59] *Pointes*, ¶¶78-79; see also *Platnick*, ¶171

[60] *Coco v. A.N. Clark (Engineers) Ltd.*, [1969] R.P.C. 41 (Ch.) at 47, quoted in *Lac Minerals Ltd. v. International Corona Resources*, [1989] 2 S.C.R. 574 [***Lac Minerals***] at 635; *Sateri (Shanghai) Management Limited v. Vinall*, 2017 BCSC 491 [***Sateri***], ¶¶462-71

i. The Chambers Judge Erred in Finding Publicly Available Information Has the Requisite Quality of Confidence

35. At the first step, the evidence is overwhelming "that virtually all of the information conveyed in the videos and Academy Screenshot was publicly available already."[61]

36. The chambers judge found that the internet searches documented in the affidavits "reveal that many of Proctorio's partners have publicly posted information of the kind that Proctorio claims to be confidential, including some of the actual videos that are the subject of this action."[62] He noted Proctorio had not been stringent in controlling the sharing of the material found on its Help Center by its partners and others online.[63] He held that Proctorio's choice to make the videos available on a public platform diluted its assertion that the information contained in the videos had the requisite degree of confidence about it.[64] Indeed, the information in the Academy Screenshot was publicly available in the lower court record itself, where Proctorio filed it to obtain its interlocutory injunction.[65]

37. The chambers judge nevertheless concluded Proctorio had met the first part of the test, in reliance on his erroneous understanding of the record before him and an erroneous understanding of the law.

38. First, he incorrectly held that "it is not disputed that the unlisted links that Mr. Linkletter shared were themselves confidential and not in the public domain."[66] This is a clear error. The uncontradicted evidence was that the links to at least three of the videos were available on a publicly facing UBC website, and that some of the video links were also available on other educational institutions' websites.[67]

39. The chambers judge seemed to recognize that the real issue was not the links but the content of the videos when he stated that the "the importance of preserving

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[61] RFJ, ¶62, AR 70
[62] RFJ, ¶62, AR 70
[63] RFJ, ¶63, AR 70-71
[64] RFJ, ¶64, AR 71; see also Linkletter #1, Ex. AN
[65] Devoy #1, Ex. D, pp. 22-23; see also Linkletter #1, Ex. BG
[66] RFJ, ¶65, AR 71
[67] Linkletter #1, ¶¶73-75, Ex. AW, AX, 405-16; Trueman #1, ¶¶5-6, 10-32, Ex. A-FF

confidentiality in the unlisted links is tied to the sensitivity of the information in the videos." He found that the information was confidential because although found on the internet it was "diffuse and scattered" there while it was "assembled" in the videos.[68]

40. This finding contains both a palpable and overriding error of fact and an error of law. First it is clearly wrong to say that the information found in the videos is only available in a "diffuse and scattered form." All of the same information is found in one publicly accessible document, the McGraw Hill Interactive Proctorio Self-Guided Demo (the "**Demo**").[69] Proctorio originally asserted that the information in the Demo was *not* confidential, but later changed that position (presumably, because the Demo and the videos are nearly identical).[70] There is no dispute that the Demo was publicly available. The chambers judge's conclusion that the information had the necessary quality of confidence is plainly undermined by this palpable error of fact.

41. Second, even if someone did have to look at multiple public websites to obtain the information in the videos, it is legally incorrect to say the need to search for information gives it a quality of confidence. As Professors Burns and Blom explain:

> … the information must in fact not be generally available. Information that is readily accessible to anyone who looks for it cannot be the subject of a breach of confidence action even if the plaintiff and the defendant both assume, at the time the information changes hands, that it is confidential.[71]

42. The record shows the information was "accessible to anyone who looks for it." All that was necessary to find the Demo or the videos was "simple Google searches."[72]

43. The only situation where publicly available information can be the subject of a breach of confidence claim is where it is assembled in such a way that accessing it would

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[68] RFJ, ¶66, AR 71-72
[69] Trueman #1, ¶5, Ex. A; McGraw Hill Comparison
[70] Devoy #2, ¶44; Devoy Cross, p. 68, l. 24 to p. 69, l. 9
[71] Peter T. Burns and Joost Blom, *Economic Torts in Canada*, 2nd ed. (Toronto: LexisNexis, 2016) at 235-36
[72] Affidavit #2 of Ian Linkletter affirmed 1 Mar 2021 ("**Linkletter #2**"), ¶9; see also Trueman #1, ¶3, Ex. A-FF

"springboard" the defendant towards some advantage.[73] The springboard principle explains that the mere fact that the information has been gathered in one place or "assemble[d]"[74] does not give it a quality of confidence where all its constituent parts are in the public domain. Instead, the information only remains confidential if it is "difficult to assemble" or it has been "assembled in an innovative manner or analysed in an innovative manner" such that access readily provides the defendant with more advantage than would be available from the publicly accessible information.[75] That is not the case here, where a Google search is not difficult to conduct and yields the same descriptions of the software's functionality (Proctorio's stated concern) as the videos. There is no suggestion the videos were used by Mr. Linkletter as a "springboard" to achieve some advantage.

44. Finally, the chambers judge erred in fact in concluding that Proctorio's decision to host the videos on YouTube did not undermine their confidentiality because Mr. Linkletter "did not access the videos through YouTube's service."[76] He clearly accessed the videos on the YouTube platform: that is the only place where they were hosted.[77]

45. A claim for breach of confidence based on easily available information cannot have any real prospect of success at trial. The claim cannot survive s. 4(2)(a)(i).

ii. The Chambers Judge Erred in Finding that the Information was Imparted in Conditions Giving Rise to a Duty of Confidence

46. The chambers judge's conclusions on the first two elements of the breach of confidence test were also permeated by another key error: the factual finding that Mr. Linkletter was required to accept Proctorio's Terms of Service before accessing the videos. The chambers judge relied on the misapprehension that Mr. Linkletter had

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[73] *Lac Minerals*, at 610-11; *Abode Properties Ltd. v. Schickedanz Bros. Limited*, 1999 ABQB 902, ¶47; *Stenada Marketing Ltd. v. Nazareno*, 1990 CanLII 917 (BCSC), pp. 11-12; *Foreman v. Chambers et al.*, 2006 BCSC 1244, ¶80, aff'd 2007 BCCA 409 [***Foreman***]; *No Limits Sportswear Inc. v. 0912139 B.C. Ltd.*, 2015 BCSC 1698 [***No Limits***], ¶¶19-20

[74] RFJ, ¶66, AR 71-72

[75] *Foreman*, ¶65

[76] RFJ ¶73, AR 73

[77] Linkletter #1, ¶¶66-70, Ex. AQ-AV; C. Error 2 at ¶73

entered into a contract with Proctorio addressing confidentiality to reach the conclusions that the information was in fact confidential and that Mr. Linkletter understood it to be so.[78] This finding simply had no basis in the record, and fatally undermines the chambers judge's conclusion that Mr. Linkletter owed an obligation of confidence.

47. In assessing the quality of confidence of the information, the chambers judge said that access to materials on the Help Center and Academy:

> "… is restricted to a discrete group that is required to acknowledge and agree to Terms of Service requiring users to preserve their confidential nature…. Mr. Linkletter would not have been able to access [the links] had he not signed in to the Academy as a UBC course instructor and accepted Proctorio's Terms of Service...."[79]

48. It is clear that the chambers judge conflated the Help Center and the Academy. It is not in dispute that the links that were tweeted were not found on the Academy, but on the Help Center. Proctorio's own evidence was that Mr. Linkletter did not have to agree to Proctorio's Terms of Service to access the Help Center or the videos therein – only access to the Academy was restricted in this way, and the videos were not hosted on the Academy.[80] The Help Center was, on the uncontradicted evidence, where the appellant first saw the links, clicked on them, and ended up on YouTube, where he viewed the videos and found shareable links.[81] He was not in any way "required" to accept the Terms of Service before seeing the videos, and he was in fact "able to access them" without entering the Academy or entering into any contract about confidentiality.

49. Proctorio's affiant disavowed the only evidence suggesting Mr. Linkletter had agreed to the Terms of Service prior to tweeting out the links to the videos. Mr. Devoy swore an affidavit stating that he had "obtained the internal Proctorio data" showing Mr. Linkletter agreed to the Terms of Service on August 23, 2020.[82] However, on cross-examination, Mr. Devoy admitted that this was unequivocally false, stating "I did not look at any data"

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[78] RFJ ¶¶73 (re confidentiality), 76 (re obligation of confidence), AR 73-75
[79] RFJ ¶¶63, 65, AR 71 [emphasis added]
[80] Devoy #1, ¶17; see also NOCC, ¶¶10-15, AR 14
[81] Linkletter Cross, p. 35, l. 19 to p. 36, l. 2
[82] Devoy #2, ¶38

and that he did not know if the appellant had actually accepted the Terms of Service.[83] Mr. Linkletter deposed that if he did agree to the Terms of Service (which he does not recall) the earliest he may have agreed would have been August 25, 2020 – after the YouTube Tweets were posted.[84]

50. An error with no basis in the evidence is palpable. This error is also overriding: it fundamentally undermines the chambers judge's conclusion that the information in the Tweets was confidential and understood by Mr. Linkletter as such.

51. The chambers judge does not identify how the Terms of Service impose an obligation of confidence and it is not at all clear on their text that they do impose such an obligation.[85]

52. The only other finding the chambers judge relied on in concluding Mr. Linkletter owed an obligation of confidentiality was his "awareness of the need to identify himself as an instructor" to log into Canvas and access the videos.[86] Yet this provides no support for an obligation of confidence. There was nothing in the record to suggest Mr. Linkletter was not permitted to publicly share information accessed in his role as an instructor. Without more, his mere instructor status did nothing to create an obligation of confidence.

iii. Proctorio Suffered No Detriment from Mr. Linkletter's Alleged Breach

53. Finally, the chambers judge erred in law in concluding a claim for breach of confidence with no evidence of detriment had "substantial merit." Detriment is a necessary element of a claim for breach of confidence: it grounds entitlement to a remedy aimed at restoring the plaintiff to the position it would have been in but for the breach.[87]

54. In its pleadings, Proctorio alleges two specific harms: that sharing the videos would facilitate student cheating, and that it would assist Proctorio's competitors. In assessing detriment, the chambers judge considered Proctorio's allegations of prospective harm

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[83] Devoy Cross, p. 27, ll. 4-8; p. 28, ll. 1-2; see also Affidavit #3 of John Devoy sworn 15 Apr 2021, ¶¶9-14, where the respondent was unable to provide further evidence to support its position
[84] Linkletter #2, ¶5, Linkletter Cross, p. 82, l. 6 to p. 85, l. 2
[85] Devoy #1, Ex. B
[86] RFJ ¶76, AR 74-75
[87] *No Limits*, ¶¶31, 136-38; *Sateri*, ¶¶471-73, 515

and stated "there is no concrete evidence before me to show how those things might actually have occurred, particularly given that there is evidence, described above, suggesting that much of the information in issue was already in the public domain anyway." He concluded Proctorio had nonetheless 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."[88]

55. It is not clear what the chambers judge meant by "undermining a virtual barrier." There is no basis in the record to suggest that the Tweets allowed others to directly access the Help Center or the Academy without the credentials issued by an educational institution. If this is what the chambers judge was suggesting, this is a palpable and overriding error overturning his conclusion on breach of confidence.

56. If, on the other hand, the chambers judge meant that Mr. Linkletter's actions resulted in – for a brief period – information becoming accessible that Proctorio meant to keep hidden from students and the public, it is an error of law to conclude this constitutes a detriment. A breach of confidence claim cannot be grounded in a simple assertion that the effect of the appellant's actions was to lead to something not being confidential. This would be entirely circular, and deprive the third step of the test of any meaning.

57. The element of detriment is concerned with the existence of harm that could found a remedy based on the *consequences* of the breach for the respondent. If there are no actual consequences to the respondent, there is no detriment. This is true even if the respondent is frustrated in its attempt to limit the group who can view the videos to the over 40,000 people[89] whose universities have indicated are instructors or administrators.

58. Finally, the chambers judge erred when he concluded there were grounds to believe

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[88] RFJ, ¶¶79-80, AR 75-76 [emphasis added]

[89] Note that there is no figure in the record for how many people have access to the Help Center, as that is controlled by Proctorio's customers. But, as a matter of logic, it is certainly more than the 40,000 persons who have access to the Academy.

Mr. Linkletter's public interest disclosure defence was not valid, reasoning that students and academics in Mr. Linkletter's Twitter audience had no valid interest in receiving the information in question.[90] It is unclear who would have more of an interest: this was not a criminal matter that should have been reported to the police, for example.[91] The audience he shared it with was the appropriate one.

C. Error 2: The Chambers Judge Erred in Determining There Were Grounds to Believe Proctorio's Copyright Infringement Claim Had Substantial Merit

i. Sharing a Link Does Not Constitute Performance Under the *CA*

59. The chambers judge erred in law in concluding that sharing a link to a work posted on YouTube by the copyright holder could constitute infringement under the *CA*. The *CA* does not give authors the exclusive right to share links, and courts cannot create rights that do not exist in the statute, which exhaustively provides for rights and remedies.[92]

60. The *CA* strikes a balance between compensating authors and ensuring the wide dissemination of works. It does so by reserving three exclusive rights for authors in s. 3*:* "(1) to produce or reproduce a work in any material form; (2) to perform a work in public; or (3) to publish an unpublished work."[93] These protected activities are mutually exclusive.[94] Other ways of dealing with a work do not infringe copyright.

61. Proctorio purports to rely on ss. 3(1)(f) and 2.4(1.1) with respect to the YouTube Tweets. The subparagraphs of s. 3(1) of the *CA* provide examples of what constitutes reproduction, performance, or publication.[95] Section 3(1)(f) specifies that it is the author's right, "in the case of any literary, dramatic, musical or artistic work, to communicate the

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[90] RFJ, ¶¶82-83, AR 76-77
[91] *Lion Laboratories Ltd. v. Evans*, [1985] 1 Q.B. 526, at 537 per Stephenson L.J.
[92] *Society of Composers, Authors and Music Publishers of Canada v. Entertainment Software Association*, 2022 SCC 30, ¶57 [***SOCAN***]; *CCH Canadian Ltd. v. Law Society of Upper Canada*, [2004] 1 S.C.R. 339 [***CCH***], ¶9; *Théberge v. Galerie d'Art du Petit Champlain inc.*, 2002 SCC 34 [***Théberge***], ¶5; *CA*, s. 89
[93] *SOCAN*, ¶54; *CA*, s. 3(1)
[94] *SOCAN*, ¶55
[95] *SOCAN*, ¶54; *Entertainment Software Association v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 34 [***ESA***], ¶42

work to the public by telecommunication." Section 3(1)(f) is an illustration of the "broader right to perform a work in public."[96] Section 3(1)(f) was added to the *CA* in 1988, as communication technologies expanded, to capture transmissions outside of radio waves such a cable television.[97]

62. In 2012, Parliament added a definition to the *CA* to clarify the scope of s. 3(1)(f). Section 2.4(1.1) states:

> 2.4(1.1) For the purposes of this Act, communication of a work or other subject-matter to the public by telecommunication includes making it available to the public by telecommunication in a way that allows a member of the public to have access to it from a place and at a time individually chosen by that member of the public. [emphasis added]

63. In a decision issued after the chambers judge's judgment was rendered, the Supreme Court of Canada made it clear that the only activity protected by ss. 3(1)(f) (as modified by s. 2.4(1.1)) is a performance right – the act of actually transmitting a protected work to a public audience. In other words, Proctorio's allegation that Mr. Linkletter had engaged in "unauthorized reproduction or publication" of the YouTube videos in question is, on its face, incorrect – no publication or reproduction right is engaged by s. 2.4(1.1).[98]

64. If an individual posts a work on the internet, the Court explained in *SOCAN*, that interferes with the author's exclusive right to perform the work because it is now, by virtue of being *made available* online, *being performed* to the public writ large.[99] What Mr. Linkletter did was wholly different: he shared a link, or reference, to the video where Proctorio had already made it available. Mr. Linkletter's tweets told other internet users where the videos could be found. The Tweets did not transmit the work to the user themselves, as shown by the fact that Proctorio could and did swiftly remove the videos. Proctorio at all times controlled the ability of the public to view the videos it had decided to put on a public YouTube channel.[100]

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[96] *SOCAN*, ¶54
[97] *ESA*, ¶¶24-27
[98] NOCC, ¶28, AR 17; see also Application Response, Legal Basis ¶16, AR 47
[99] *SOCAN*, ¶74, 91
[100] See e.g. Devoy #1, ¶11 (referring to the "links which Proctorio controls")

65. In *SOCAN*, the Court confirmed that s. 2.4(1.1) applies to the party controlling an upload in the context of a music provider uploading a work to the internet and thereby making it "available" for streaming. The Copyright Board had concluded that each of the uploading and the streaming of the work were separate protected activities under the *CA*. The Court disagreed. Correctly interpreted, it held, s. 2.4(1.1) means that "a work is performed as soon as it is made available for on-demand streaming," or uploaded to a location where it can be accessed.[101] The provision, it held, was implemented because "[a]uthors should have recourse against individuals who upload their works online in a way that makes them available for downloading or streaming."[102]

66. Section 2.4(1.1) of the *CA* thus only protects performance by way of uploading. If Mr. Linkletter had uploaded the videos to a new site, he would have breached Proctorio's exclusive right to make the videos available. But it was *Proctorio* that uploaded the videos, thereby making them available. Mr. Linkletter did not. The Court's interpretation of the text and scheme of s. 2.4(1.1) in *SOCAN* definitively excludes the appellant's actions from the scope of the *CA*.

67. The Court in *SOCAN* further supported its interpretation of s. 2.4(1.1) by reference to the principle of technological neutrality underpinning the *CA*'s purpose, logic that equally reasons against extending the scope of performance to somehow include sharing links.[103] Technological neutrality requires that the *CA* apply equally notwithstanding the technological diversity of different forms of media.[104]

68. A hyperlink is a reference:[105] like a footnote in a book, an advertisement in a newspaper, or a poster on a lamppost, it tells someone where to go to see a performance of a work. The principle of technological neutrality requires that a hyperlink be treated the same as any other form of reference. Just as distributing in print form the address of a link would not be a breach of copyright in the work found at that link, tweeting the link is

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[101] *SOCAN*, ¶91
[102] *SOCAN*, ¶¶74 [emphasis added]
[103] *SOCAN* ¶¶62-73, 94
[104] *ESA*, ¶2; *SOCAN*, ¶63
[105] See *Crookes v. Newton*, 2011 SCC 47, ¶27

also not a breach. If Mr. Linkletter would not be liable in copyright for tweeting that a copy of certain book can be found at the reserve desk of a certain library, he equally cannot be held liable in copyright for tweeting where a copy of Proctorio's "Abnormalities" video can be found on YouTube.

69. In concluding there were grounds to believe this *CA* claim has substantial merit, the chambers judge did not engage with the text of ss. 3(1)(f) or 2.4(1.1) whatsoever, or the jurisprudence interpreting the performance right under the *CA*. He distinguished two Canadian cases relied on by the appellant, but referred to no Canadian cases that supported the copyright claim. The only support the chambers judge relied on for his *CA* decision was found in European case law.[106] Justice Rowe's reasons in *SOCAN* again make it clear this reliance was legally incorrect, for a Canadian court must always base its decisions on the meaning of the domestic statute.[107] The Copyright Board in that case was overturned in part because it "relied heavily" on the wording of the *WIPO Copyright Treaty* instead of on the *CA* itself.[108]

70. To state the obvious, the Court of Justice of the European Union was not, in either case applied by the chambers judge, interpreting or applying the Canadian *CA*. Even the wording of a treaty is only helpful to interpreting the *CA* insofar as it indicates Parliament's intent in enacting domestic law; the reasoning of the European Court of Justice on implementing the *WIPO Copyright Treaty* in a different jurisdiction has no relevance.

71. When the question of copyright infringement is assessed with reference to the actual wording and scheme of the *CA*, it is apparent Proctorio's claim simply does not apply to the circumstances of Mr. Linkletter's case. There are no grounds to believe it has any merit, let alone "substantial" merit. It must be dismissed.

ii. Proctorio Authorized Performance of the Videos Via YouTube's Terms of Service

72. In the alternative, even if sharing a link constituted "performance" under ss. 3(1)(f)

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[106] RFJ, ¶¶94-95, AR 81
[107] *SOCAN*, ¶¶46, 47-48
[108] *SOCAN*, ¶15

and 2.4(1.1) of the *CA* (which it does not), Proctorio authorized the performance of its videos by agreeing to YouTube's Terms of Service and uploading the videos to YouTube.

73. The chambers judge decided Proctorio had not authorized the performance of the videos through YouTube in reliance on two errors. He found that Mr. Linkletter "did not access the videos through YouTube's service, but rather through Proctorio's Help Center, and therefore on and subject to Proctorio's, not YouTube's, Terms of Service."[109] As addressed above, the chambers judge erred in stating Mr. Linkletter had accepted Proctorio's Terms of Service to access the Help Center; and erred in finding Mr. Linkletter accessed the videos through the Help Center when he in fact followed the links found in the Help Center to YouTube and shared the videos from there.[110]

74. By uploading its videos to YouTube, Proctorio authorized its copyrighted content to be performed to anyone who came across it, or happened to type in the correct link. Both YouTube's Terms of Service and its public description of unlisted videos make this clear: the description states that one of the "feature[s] of the Service" is that "anyone with the link [to an unlisted video] can also reshare it."[111] On accepting YouTube's Terms of Service, Proctorio granted Mr. Linkletter a licence with respect to the video:

> **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 permissions for a user to make use of your Content independent of the Service.[112]

75. Thus, by uploading an unlisted video to YouTube, Proctorio agreed that it understood the YouTube Service would enable users to share links to the uploaded content, and that no technological protection would prevent this.

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[109] RFJ, ¶¶73, 96, AR 73, 81
[110] Linkletter #1, ¶¶66-70, Ex. AQ-AR, AT, AU
[111] Linkletter #1, ¶67, Ex. AO
[112] Linkletter #1, ¶61, Ex. AM

76. Beyond even the Terms of Service, Proctorio arguably authorized the sharing of the video by uploading it. In *Warman v. Fournier*,[113] Rennie J. concluded an author had authorized the reproduction of a photograph under s. 3(1) of the *CA* by uploading it to the internet. The chambers judge attempted to distinguish *Warman* by again relying on the misapprehensions that Mr. Linkletter was contractually bound to keep the location of the videos secret and that Proctorio did not license public use by putting them on YouTube.[114] In fact, use of the videos was authorized by Proctorio's agreement and actions.

iii. The Law of Fair Dealing Plainly Applies to Mr. Linkletter's Tweets

77. In the further alternative, if this Court concludes ss. 3(1)(f) and 2.4(1.1) apply to the sharing of hyperlinks and their use was not authorized, Mr. Linkletter's sharing of those links is a quintessential case of fair dealing and is not infringement under the *CA*.

78. The *CA* is designed to strike an appropriate balance between "promoting the public interest in the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator."[115] The fair dealing exception to infringement brings this balance to the forefront of a copyright infringement case. In ss. 29-29.2, 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. Parliament recognized that reproducing, publishing, or performing a work for these purposes should be allowed unless context suggests this dealing in the work is not, in fact, "fair".

79. Accordingly, "to understand and apply [the] fair dealing doctrine requires first understanding the copyright balance."[116] Beginning with this purpose in mind, the fair dealing analysis proceeds in two parts: a defendant must show: (1) that the dealing was for a specified purpose in the *CA*; and (2) that it was fair.[117] The fairness in (2) is assessed

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[113] *Warman v. Fournier*, 2012 FC 803, ¶¶36-39
[114] RFJ, ¶93, AR 81
[115] *Théberge*, ¶30; *CCH*, ¶23
[116] *York University v. Canadian Copyright Licensing Agency (Access Copyright)*, 2021 SCC 32, ¶91
[117] *CCH*, ¶50

by reference to a non-exclusive list of contextual factors.[118]

80. In this case, the chambers judge correctly identified the test from *CCH*.[119] However, he fell into error when he failed to assess the fairness of the dealing in light of the overarching purpose of the *CA*: the balancing of user rights and the protection of the creator's economic objectives.

81. The chambers judge accepted that Mr. Linkletter's tweets included the links for a valid statutory purpose, though he did not decide which one.[120] Moving to the fairness of the dealing, the chambers judge listed the factors from *CCH* and then "concluded that all but the first of those factors favour Proctorio's position."[121] Based on this, he determined there were grounds to believe the defence was not valid.[122]

82. At no point in his analysis did the chambers judge identify the purpose of the *CA* or of the fair dealing provisions. However, considering the *CCH* factors in light of the *CA*'s purpose of achieving balance plainly leads to a conclusion that Mr. Linkletter's tweets were fair dealing. Mr. Linkletter's tweets served "the public interest in the encouragement and dissemination of works of the arts and intellect." Specifically, they served the public interest in their dissemination for the purpose of criticism and public education – purposes not just permitted, but encouraged, by the *CA*. Criticism in the fair dealing context "extend[s] to the idea to be found in a work and its social or moral implications."[123]

83. The *CA* requires this strong interest in dissemination to be balanced against the need to "obtain a just reward for the creator" for the creation of their work. However, the Tweets did nothing to interfere with the ability of Proctorio to obtain a "just reward". This is the protection the *CA* is concerned with: the protection of the author's ability to gain benefit from the specific creative work itself. While the effect of the dealing is not the most

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[118] *CCH*, ¶53
[119] RFJ, ¶¶103, 105, AR 83-84
[120] RFJ, ¶104, AR 84
[121] RFJ, ¶106, AR 84
[122] RFJ, ¶114, AR 86
[123] *Pro Sieben Media A.G. v. Carlton Television Ltd & Anor*, [1998] EWCA Civ 2001, p. 7

important of the contextual *CCH* factors,[124] the other factors – such as the character and amount of the dealing and the availability of alternatives – similarly have weight *only insofar* as they relate to the *CA*'s purpose. In this case, there was no alternative to utilizing the full videos given their very brief length and Mr. Linkletter's objective of wanting to share what Proctorio *itself* said about its product.

84. The chambers judge's assessment of the effect of the dealing reflects his fundamental misunderstanding of the task before him. He said:

> [112] … Proctorio has a legitimate interest in keeping segregated the instructional material made available to instructors and administrators on the one hand, from other material made available to students and the general public, and particularly competitors, on the other.[125]

85. It is Proctorio's interest in keeping the videos "secret" that the chambers judge found was "legitimate". But this is not an interest the *CA* protects – secrecy is the domain of an action in breach of confidence, or the law of trade secrets. If a competing software company took one of Proctorio's videos and replicated key creative aspects for use in its own help centre, this would undoubtedly tarnish the value of the videos and would properly engage fairness concerns. Absent this type of creative misappropriation, there is no basis on which to say Mr. Linkletter's dealing in the videos was anything but fair.

86. Having misunderstood the entire purpose of the fair dealing analysis, the chambers judge's conclusion on this point cannot stand.

D. Error 3: The Chambers Judge Erred in Law in His Approach to the Public Interest Weighing Under Section 4(2)(b) of the *PPPA*

87. The weighing exercise under s. 4(2)(b) is the "crux" of the *PPPA* analysis. Again, the provision states a court must dismiss a proceeding under s. 4(2)(b) unless:

> … 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.

88. While the chambers judge quoted the correct test in form, he did not apply it. He

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[124] *CCH*, ¶59
[125] RFJ ¶112, AR 86

committed overarching error in his application of s. 4(2)(b) by failing to turn his mind to the essential question: was the *harm* suffered by the respondent serious enough to outweigh the public interest in protecting Mr. Linkletter's expression?

89. The chambers judge failed to consider two essential elements of the s. 4(2)(b) analysis. First, how serious is the harm experienced by the respondent that is attributable to the appellant's conduct? Second, what is the public interest in protecting the appellant's expression? Without turning his mind to these two factors, the chambers judge could not conduct the weighing exercise mandated by the legislation.

i. Proctorio Suffered No Harm, Let Alone Serious Harm

90. The Supreme Court of Canada has held that "[h]arm is principally important in order for the plaintiff to meet its burden under [s. 4(2)(b)]."[126]

91. On the *PPPA* application, Proctorio put forward two theories of harm: that students would circumvent the software's oversight function or that the competitors would learn how the software works. The chambers judge flatly rejected both of these theories, finding "the evidence suggests that those particular risks are unlikely to materialise."[127] Having failed to meet the "harm likely... to be suffered" standard in s. 4(2)(b), these harms could not, therefore, found any public interest in Proctorio's action continuing.

92. The chambers judge instead went on to propose a different basis to support a public interest in the action continuing, namely "that Mr. Linkletter's conduct compromised the integrity of [Proctorio's] 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."[128]

93. The conclusion that Proctorio's screens had been "compromised" was the sole element the chambers judge weighed on Proctorio's end of the s. 4(2)(b) analysis. Yet

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[126] *Pointes*, ¶68
[127] RFJ, ¶124, AR 89
[128] RFJ ¶125, AR 89

even before the weighing, there is a fundamental problem with this aspect of the analysis: what the chambers judge identified is not harm.

94. Harm is not a form of wrongdoing. Harm is wrongdoing's consequence. This is evident from the causal definition of harm in the *PPPA*: harm is something suffered *as a result of* the applicant's expression. Suffering humiliation and anxiety[129] because of allegations of professional misconduct is harm.[130] Being subject to financial loss and further litigation because of an appellant's expression is harm.[131] Students gaining information that helps them cheat, or competitors gaining secrets that help them compete, are harms, and could have weighed in Proctorio's favour if there was any evidence these harms had or were likely to come about.[132] The mere fact that information was made publicly available that Proctorio wished to keep secret is not in itself a harm if Proctorio suffered no consequences as a result.

95. The chambers judge's consideration of Proctorio's "harm" was limited to a one-paragraph description. He did not go on to consider the *seriousness* of that harm. If he had, he would have had to decide that the harm was not in fact serious at all, given that Proctorio could not identify any consequences flowing from Mr. Linkletter's activities.

96. The Supreme Court of Canada has held that general nominal damages "will ordinarily not be sufficient" to establish serious harm.[133] A "bald assertion" of harm does not show seriousness.[134] In defamation suits, damages are presumed and harm can be inferred from the seriousness of the defamatory statements; however, a failure to substantiate allegations of harm is "highly significant" where the cause of action does not contain such a presumption.[135] Even in defamation, it is not sufficient to show that there is some impact on a person's reputation: there must be evidence that the nature of the

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[129] *Platnick*, ¶¶149
[130] *Platnick*, ¶147-49
[131] *Pointes*, ¶¶114-19
[132] RFJ, ¶¶79, 124, AR 75, 89
[133] *Platnick*, ¶144
[134] *Platnick*, ¶145
[135] *Hobbs*, ¶83

allegedly defamatory statement was such that *serious* harm should be presumed.[136]

97. In this case, Proctorio has claimed general and special damages.[137] However, it has pled no material facts and filed no evidence suggesting it suffered any loss, let alone as a result of Mr. Linkletter sharing allegedly confidential information or allegedly breaching copyright. The only evidence of Proctorio's financial performance since the Tweets in fact suggests that the company has continued to grow significantly since August 2020.[138] Put simply, there no evidence of Proctorio suffering any harm at all, and certainly nothing going to seriousness.

98. Even should its claims pass s. 4(2)(a), the only compensation that may be available to Proctorio – given its inability to prove harm – would be statutory damages for copyright infringement, falling in the range of $100–5,000 for all infringements.[139] This highlights that the "disproportion between the resources being used in the lawsuit and the harm caused or the expected damages award" is extreme, and the idea that there is public interest in pushing such an amount to trial is, respectfully, absurd.[140]

ii. Mr. Linkletter's Expressions Were Closely Tied to the Values Underlying Freedom of Expression

99. On the other side of the scale, the chambers judge failed to consider a required element of the public interest in protecting the expression in question. As Justice Côté stated in *Pointes*, not all expression is of equal value: 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."[141] To assess the public interest in protecting the expression, it is necessary to consider the content of the appellant's expression.

100. The values Justice Côté referred to include "the search for truth, participation in

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[136] *Platnick*, ¶¶144-48; *Montour v. Beacon Publishing Inc.*, 2019 ONCA 246, ¶35, leave to appeal ref'd 2019 CanLII 94477; *Levant v. Stirling*, 2022 ONSC 3608, ¶45
[137] NOCC, ¶¶24(d), 23, AR 16-17
[138] Devoy Cross, p. 17, ll. 1-4; p. 19, l. 9 to p. 20, l. 7
[139] *CA*, s. 38.1(1)(b)
[140] *Pointes*, ¶80
[141] *Pointes*, ¶77

political decision making, and diversity in forms of self-fulfilment and human flourishing."[142] Mr. Linkletter's expression was very closely tied to these. His tweets were aimed at addressing a number of concerns: the discriminatory effects of algorithmic proctoring software on minority students, namely students with disabilities and racialized students; the effects of the software of the mental health of students simultaneously living through a life-altering global pandemic; and the ethics and transparency of the company developing and promoting the software.

101. Further, the judge's analysis failed to look beyond Mr. Linkletter's own circumstances to examine "the public interest in protecting [his] expression" under s. 4(2)(b). As Côté J. recognized in *Pointes*, a lawsuit targeting public interest expression does not just impact the defendant; its impacts also include the "broader or collateral effects on other expressions on matters of public interest" and "the potential chilling effect on future expression either by a party or by others."[143] Despite compelling evidence in the record about the effects of the lawsuit beyond Mr. Linkletter – such as the hundreds of concerned educational practitioners expressing that the lawsuit is "chilling" and "scary" for people in their roles[144] – the chambers judge failed to turn his mind to the breadth of public interest concerns engaged.

102. The chambers judge's only analysis with respect on the quality of Mr. Linkletter's expression was his finding that it was made out a sense of public duty and without malice. The motive behind the expression is one of the important factors, and the chambers judge was correct to consider it. However, he did not go on to consider the second important factor: the value of the content of the expression. This was a fundamental error.

103. The chambers judge's s. 4(2)(b) analysis was thus fatally flawed for two reasons. By not having regard to the existence, let alone the seriousness, of any harm suffered by Proctorio, he missed the *key* element of the public interest in letting the lawsuit continue. By not having regard to the quality of the content of Mr. Linkletter's expression and its link

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[142] *Pointes*, ¶77
[143] *Pointes*, ¶80
[144] Linkletter #1, Ex. V, pp. 149, 151, 154

to *Charter* values, he missed a *key* element in assessing the public interest in protecting that expression. It is an error of law to fail to consider a required element of a legal test.[145]

104. Allowing a claim utterly devoid of harm to continue, despite its impact on public expression on a matter of public importance, is unprecedented under anti-SLAPP legislation. Properly assessed, there is no public interest in a claim continuing when it has no harm to vindicate, and significant harm to the public interest in allowing such a lawsuit to go forward. Section 4(2)(b) requires that this claim be dismissed.

iii. The Chambers Judge's Analysis Was Tainted by Irrelevant Considerations

105. Instead of weighing the competing concerns under s. 4(2)(b) based on those factors the Supreme Court of Canada has directed are relevant, the chambers judge's reasons zeroed in on two immaterial considerations. As he stated:

> [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.[146]

106. The chambers judge's emphasis on Proctorio's "objective" in bringing the claim improperly attempts to discern the motives behind the claimant's action, thereby committing the precise error the *PPPA* was drafted to avoid.

107. Moreover, in assessing the impact on Mr. Linkletter's expression, the chambers judge assumed that the entire lawsuit was narrowed in the same manner as he narrowed the interlocutory injunction. That again was an error. Proctorio is still pursuing, and Mr. Linkletter must still defend against, a claim for a much broader injunction akin to the one it was initially granted, which had a significant chilling effect on Mr. Linkletter's

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[145] *Housen v. Nikolaisen*, 2002 SCC 33, ¶27, quoting *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748, ¶39
[146] RFJ ¶¶130-31, AR 90-91 [emphasis added]

speech.[147] In addition, by denying Mr. Linkletter his full indemnity costs despite making a partial dismissal order and narrowing the injunction, the chambers judge failed to give effect to the *PPPA*'s purpose of ensuring that valuable speech is not silenced by the cost of defending litigation brought by powerful companies who suffer no harm.

108. When an appellate court identifies an error or errors that undermine the lower court order, it may reassess the evidence where it is in the interests of justice and practically feasible.[148] On the evidence, this case lacks any perceptible merit or any serious harm that could warrant its continuation. The *PPPA* was designed for this case, and this Court should give it effect. This includes awarding the appellant costs in the court below on a full indemnity basis. Only this will ensure the *PPPA* achieves its legislative purpose.

PART 4 - NATURE OF ORDER SOUGHT

109. Mr. Linkletter seeks an order that:

a. the appeal is allowed;

b. the appellant's application under the *PPPA*, s. 4 is allowed;

c. costs in the court below assessed on a full indemnity basis, pursuant to s. 7 of the *PPPA*;

d. costs of the appeal; and

e. such further and other relief as this honourable court may allow.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated at the City of Vancouver, Province of British Columbia, this 27th day of July, 2022.

Catherine Boies Parker, Q.C.
and Julia W. Riddle
Solicitors for the Appellant

[147] Linkletter #2, ¶¶19-25
[148] *Hollis v. Dow Corning Corp.*, [1995] 4 S.C.R. 634, ¶33; *Jiang v. Shi*, 2017 BCCA 276, ¶72

APPENDICES: LIST OF AUTHORITIES

APPENDICES: ENACTMENTS