



No. S208730
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

PROCTORIO, INCORPORATED

PLAINTIFF

AND:

IAN LINKLETTER

DEFENDANT

APPLICATION RESPONSE

Application Response of: Ian Linkletter (the “application respondent”)

THIS IS A RESPONSE TO the notice of application of the Plaintiff filed 23 Apr 2021.

Part 1: ORDERS CONSENTED TO

The application respondent consents to the granting of the order set out in paragraph 4 of Part 1 of the notice of application, but for a hearing of four days.

Part 2: ORDERS OPPOSED

The application respondent opposes the granting of the orders set out in paragraphs 1, 2, 3 and 5 of Part 1 of the notice of application.

Part 3: ORDERS ON WHICH NO POSITION IS TAKEN

The application respondent takes no position on the granting of NONE of the orders set out in Part 1 of the notice of application.

Part 4: FACTUAL BASIS

1. In this application, the plaintiff seeks additional cross-examination of the defendant, and to adduce two new affidavits, all of which is contrary to the BC *Supreme Court Civil Rules* and the *Protection of Public Participation Act*, S.B.C. 2019, c. 3 (“*PPPA*”), under which the defendant is seeking to dismiss the plaintiff’s claim. The practical effect of this application has to been to further delay the defendant’s application under the *PPPA*, and thus the defendant is consenting to the setting of early new hearing dates. The defendant

says this application is otherwise without merit, and is precisely the kind of application that the *PPPA* was designed to prevent. He accordingly seeks full indemnity costs under the *PPPA*.

The Underlying Action

2. The plaintiff manufactures academic surveillance software, which remotely monitors and records students who write tests and examinations. The software then analyzes those recordings for “abnormalities” and reports a “suspicion level” to the instructor.

Devoy #1, para. 3; Linkletter #1, para. 19.

3. The use of academic surveillance software has been the subject of vigorous debate on social media, in the mainstream news media, in the educational press, and in campus newspapers. Concerns raised include the impact of continuous video recording on students with test anxiety, barriers to students with disabilities, and discrimination in face detection algorithms against students of colour.

Linkletter #1, paras. 16-38.

4. The defendant is actively engaged in this debate, including on social media such as Twitter.

Linkletter #1, para. 16.

5. After the defendant criticized Proctorio Chief Executive Officer Mike Olsen’s behaviour towards students, the plaintiff placed the defendant under surveillance. The plaintiff and its agents monitor and record the defendant’s every statement on social media. Eight of those statements are the subject of this action.

Linkletter #1, paras. 39-53 and Exhibit AC;
Devoy #1, Exhibit D; Devoy #2, Exhibit G; Devoy #3, Exhibit E.

6. Specifically, this action concerns eight “tweets” published on Twitter by the defendant on August 23, 24, and 29, 2020. Seven of these tweets contained links to videos hosted on YouTube.com (the “**YouTube Videos**”), which the plaintiff claims are confidential. The eighth tweet contained a screenshot of part of one page of the plaintiff’s “Proctorio Academy” website (the “**Academy Screenshot**”), which it claims is confidential.

Notice of Civil Claim, paras. 19 and 21.

7. In respect of these eight tweets, the plaintiff pleads breach of confidence, copyright infringement, and circumvention of technological protection measures contrary to the *Copyright Act*.

Notice of Civil Claim, paras. 28-30.

8. The defendant’s position is that the underlying action has no merit. The plaintiff is alleging breach of confidence for information that was already available to the public, infringement

of copyright for works it licensed the defendant to share, and circumvention of non-existent or ineffective technological protection measures. The defendant has also pleaded numerous defenses, including public interest communication and fair dealing.

Response to Civil Claim, paras. 4, 19-31.

9. On October 16, 2020, the defendant filed an application (the “**PPPA application**”) to dismiss the action against him under the *PPPA* or, in the alternative, to dissolve the injunction against him.

The Plaintiff’s Improper Attempt to Expand the Action to Include the Defendant’s Private Communications

10. As pleaded, the plaintiff’s action against the defendant concerns only his public communications:

19. Between August 23, 2020 and August 30, 2020, via Twitter the defendant shared publicly links to at least seven of the plaintiff’s confidential and proprietary videos which are accessible only to administrators and instructors via the Help Center, the particulars of which include: [seven lettered items containing dates and names of videos]

Notice of Civil Claim, para. 19. See also para. 21.

11. On March 18, 2021, the plaintiff cross-examined the defendant via Zoom on his two affidavits sworn in support of the *PPPA* application. Counsel had agreed in advance of the cross-examination to share any documents they planned to put to a witness.

Beatty #1, Exhibit A, p. 11, lines 6-2; Exhibit G, p. 46.

12. Despite that agreement, counsel for the plaintiff put to the defendant a document titled “hypervisible.pdf” (the “**Hypervisible Document**”), which had not been shared in advance. The Hypervisible Document appears to contain tweets written by persons other than the defendant.

Beatty #1, Exhibit A, p. 9.

13. Counsel for the plaintiff did not ask the defendant to identify the Hypervisible Document. Instead, counsel asked the defendant if he “recalled” one of the tweets displayed on the document. He also directed the defendant’s attention to a second tweet on the same document, to which the defendant replied “Yes, I see that.” He was not asked about, and did not identify, the other tweets on the Hypervisible Document, or the document itself.

Beatty #1, Exhibit A, p. 9, lines 5-20.

14. The plaintiff’s purpose in asking questions about the Hypervisible Document was, and is, to expand the scope of the action from the defendant’s public expressions on Twitter to his private communications. The plaintiff’s counsel stated at the cross-examination that: “we

will be adding to the pleadings now that we've got that admission." The "admission" in question was that the defendant had shared a link to a YouTube video in a private communication.

Beatty #1, Exhibit A, p. 12, lines 4-6.

The Plaintiff's Improper Attempt to Adduce Additional Affidavit Evidence After Cross-Examinations Have Been Completed

15. On March 16, 2021, the defendant cross-examined the plaintiff's representative, John Devoy, in respect of his two affidavits: Devoy #1, sworn September 1, 2020, and Devoy #2, sworn November 16, 2020. On March 18, 2021, the plaintiff cross-examined the defendant, Ian Linkletter, in respect of his two affidavits: Linkletter #1, affirmed October 15, 2020, and Linkletter #2, affirmed March 1, 2021.
16. Both cross-examinations took place over two weeks after the defendant served his reply affidavits on March 2, 2021.
17. On March 30, 2021, the plaintiff advised that it would "deliver a short affidavit in relation to matters which arose during Mr. Linkletter and Mr. Devoy's cross-examination." The next day, on March 31, 2021, the defendant reserved his right to object to additional evidence being submitted after the completion of cross-examinations.

Beatty #1, Exhibits F & G.

18. On April 15, 2021, the plaintiff served a third affidavit of John Devoy, contrary to Rule 8-1(14). The Devoy #3 affidavit concerns the following matters:
 - a. The plaintiff's claimed efforts to remove public information from the internet (paras. 4-7 and Exhibit A);
 - b. The plaintiff's claim that the defendant agreed to terms of service, after its affiant admitted under cross-examination that he did not know if his previous evidence was true (paras. 8-14 and Exhibits B-D);
 - c. Tweets published by the defendant between November 16, 2020 and April 13, 2021 (paras. 15-16 and Exhibit E).
19. On April 20, 2021, the plaintiff served a second affidavit of Carly Beatty, contrary to Rule 8-1(14). The Beatty #2 affidavit concerns the following matters:
 - a. The plaintiff's request for the defendant's employment contract and any other agreements or policies relating to confidentiality or information disclosure (para. 2 and Exhibit A);
 - b. Web pages from the University of British Columbia concerning university policies, downloaded by the plaintiff (paras. 3-8 and Exhibits B-G).

20. The plaintiff did not obtain consent of all parties of record, or a court order, to serve affidavits additional to those served under subrules 8-1(7), (9), and (13).

The Plaintiff's Application for Unnecessary Cross-Examination

21. On this application, the plaintiff claims to be "entitled" to an order for a further hour of cross-examination of the defendant, on two matters:
 - a. The defendant's private communications with persons who are not parties to the action; and
 - b. The internal policies of the University of British Columbia, which is not a party to the action.

Notice of Application, Part 3, para. 10.

22. At the cross-examination of the defendant on March 18, 2021, counsel for the plaintiff could not identify any part of the pleadings that could support the relevance of questioning the defendant on his private communications, and did not ask the defendant any questions about any of the policies of his employer, the University of British Columbia.

Beatty #1, Exhibit A, p. 14-15.

The Need to Expedite the Re-Scheduling of the Hearing of the *PPPA* Application

23. The plaintiff obtained an *ex parte* injunction against the defendant on September 2, 2020, and served its Notice of Civil Claim the same day. The defendant served his Notice of Application seeking dismissal of the action under the *PPPA* on October 16, 2020. The plaintiff served its Application Response on November 16, 2020. The plaintiff served its Notice of Constitutional Question on November 24, 2020.
24. It has now been over six months since the defendant's *PPPA* application was filed.
25. Supreme Court Scheduling has tentatively confirmed a four day hearing in the week of July 26-30, 2021 for the hearing of the defendant's *PPPA* application that was originally scheduled to be heard April 29-30, 2021.

Part 5: LEGAL BASIS

The Application to Mark The Hypervisible Document as an Exhibit is Frivolous

1. Nothing turns on the distinction drawn by the plaintiff between marking the Hypervisible Document as an exhibit as opposed to identification purposes only. Plaintiff's counsel did not ask the defendant to identify the Hypervisible Document, but only asked if he recalled two of the eight tweets recorded on it. The defendant readily did so. Nothing prevents the plaintiff from relying on the Hypervisible Document in conjunction with the admissions

made by the defendant on cross-examination. This aspect of the plaintiff's application is frivolous.

Cross-Examination On Affidavits is Limited to the Issues on the Application

2. The *PPPA* provides that evidence must be given by affidavit and allows a party, as of right, to "cross-examine the witness on the witness's affidavit," for up to 7 hours in duration.

PPPA, s. 9(5)(b).

3. In British Columbia, cross-examination on an affidavit is limited to matters relevant to the determination of the issue on the application in respect of which the affidavit was filed, and any matters related to the credibility of the deponent. It must be limited to matters which have a potential relevance to the question at hand in the application which the affidavit supports.

Grinnell Company of Canada v. Retail, Wholesale and Department Store Union Local 535 et al., 1956 CanLII 594 (BCCA), 18 WWR (ns) 263 at p. 270;
Doig v. Muir, 1997 CanLII 2029 (BCSC), 32 BCLR (3d) 220 at para. 6.

4. A cross-examination on an affidavit is not an examination for discovery, nor is it a means by which a plaintiff may expand the scope of the action. Counsel does not "have the right to cover all matters which might be said to be in issue in the action."

Grinnell Company of Canada v. Retail, Wholesale and Department Store Union Local 535 et al., 1956 CanLII 594 (BCCA), 18 WWR (ns) 263 at p. 270-1 citing
Thomson v. Thomson, [1948] OWN 137, [1948] O.J. No. 24 (QL) at para. 12.

5. The fact that this application is brought under the *PPPA* does not change these basic principles. The *Galloway* decision cited by the plaintiff stands for the proposition that a plaintiff can seek documents relevant to the strength of the defences pleaded. The plaintiff cannot use its right to cross-examine on affidavits as an opportunity to expand its action. This would be the kind of "occasion for abuse by a plaintiff" that Chief Justice Bauman expressly warned against.

Galloway v. A.B., 2020 BCCA 106 at paras. 63-65.

The Proposed Questioning is an Improper Attempt to Expand the Action

6. The plaintiff's claim is in respect of the defendant's *public* communications, as pleaded in paragraph 19 of its Notice of Civil Claim. By the present application, the plaintiff now seeks to cross-examine the defendant about his *private* communications, which are not at issue in this action. Further, the plaintiff's claim is clearly limited to the seven tweets identified in paragraph 19 of its Notice of Civil Claim. The claim is not pleaded in an open-ended way with the usual language.

7. The plaintiff's real objective, to which its counsel admitted during the cross-examination, is to amend its pleadings to encompass additional and different conduct that it wishes to claim against the defendant.

Beatty #1, Exhibit A, p. 12, lines 4-6.

8. This is improper. The *PPPA* expressly prevents plaintiffs from amending their pleadings without leave of the court. This is to prevent plaintiffs from avoiding a dismissal order or from continuing the proceeding if it is dismissed.

PPPA, s. 6.

The Proposed Questioning has no Relevance to any Issue on the *PPPA* Application

9. The cross-examination at issue arises from the defendant's application to dismiss the action under the *PPPA* and the affidavits he filed in support of that application.
10. The only questions at issue on the *PPPA* application are:
 - a. Does the *PPPA* apply to claims in copyright?
 - b. Does the proceeding arise from expressions made by the defendant that relate to a matter of public interest?
 - c. Can the plaintiff demonstrate that there are grounds to believe that the proceeding has substantial merit, and the defendant has no valid defence?
 - d. Are the harms suffered by the plaintiff serious enough that the public interest in continuing the proceeding outweighs the public interest in protecting the defendant's expression?
 - e. Should the defendant be awarded costs on a full indemnity basis?
 - f. Should the defendant be awarded damages?
 - g. In the alternative, should the injunction be dissolved?

Notice of Application of the defendant under the *PPPA*;
Notice of Constitutional Question of the plaintiff

11. Nothing in Proctorio's application materials indicates which of these issues further questioning would relate to.
12. Even if further questioning of the defendant yielded additional instances of sharing of the YouTube Videos and Academy Screenshot at issue in this action, this would not make any difference on the *PPPA* application. Additional instances do not remedy the plaintiff's incomplete causes of action, nor do they defeat the defendant's valid defences. For example, additional instances would not overcome the fact that Proctorio's YouTube

videos do not contain information which is confidential, or that the Proctorio Academy Screenshot is not a substantial part of the work.

13. Likewise, the plaintiff has provided no basis for questioning the defendant about the University of British Columbia's policies on copyright. UBC is not a party to the action, and its own subjective interpretation of its obligations are not relevant to whether the defendant's private conduct constituted infringement of copyright.

The additional affidavits are improper and unnecessary

14. Rule 8-1(14) provides:

Unless all parties of record consent or the court otherwise orders, a party must not serve any affidavits additional to those served under subrules (7), (9) and (13).

15. The broad purpose of Rule 8-1 and its predecessor, former Rule 51A, was to preclude the "...the delivery of important material at the last minute which frequently created significant difficulties and often necessitated the adjournment of applications." This is exactly what happened here: the plaintiff's late-arriving affidavits have contributed to the delay in the hearing of the *PPPA* application on its merits.

P.K.K. v. A.M.K., 2003 BCSC 1056 at para. 28.

16. The test for admission of additional evidence is set out in *Ivarson*. The Court's discretion "ought to be used sparingly, and then only in clearly meritorious cases, where to exclude the evidence would result in a substantial injustice."

Ivarson v. Lloyd's M.J. Oppenheim Attorney In Fact In Canada,
2002 BCSC 1627 at para. 25;
First National Financial GP Corporation v 0734763 B.C. Ltd.,
2020 BCSC 1349 at paras. 59, 62.

17. Relevance of the proposed affidavits is a necessary but not sufficient condition to their admission: "Relevance is the minimal requirement for admission of any evidence, but more is required to be able to admit evidence late in proceedings."

Tietz v Cryptobloc Technologies Corp., 2021 BCSC 190 at para. 29.

18. The plaintiff has not established that any injustice would result from an inability to serve further affidavits, or that any of the evidence contained within them would change the Court's conclusion on the *PPPA* application. The plaintiff's claim that the legal issues on the application are "significant" or "novel" or that the plaintiff's action faces dismissal does not meet the test for admission of additional affidavits.

The Devoy #3 affidavit

19. Paras. 4-7 and Exhibit A are an attempt to shore up Mr. Devoy's previous evidence, in Devoy #2, paras. 40-43, in which Mr. Devoy had made claims about the plaintiff's

allegedly “confidential” information and the plaintiff’s efforts to remove that information from the internet.

20. The veracity of these claims was undermined by the defendant’s reply affidavits, Linkletter #2, paras. 9-11 and Trueman #1, paras. 2-32. These reply affidavits were served on March 2, 2021, two weeks before Mr. Devoy was cross-examined.
21. Mr. Devoy’s new affidavit evidence is, at most, an admission against interest that none of the information at issue in this action was confidential at the time that the defendant communicated it. Mr. Devoy’s efforts to repair his November 2020 affidavit evidence in April 2021 are unnecessary and improper.
22. Paras. 8-14 and Exhibits B-D are an attempt to repair Mr. Devoy’s previous evidence, in Devoy #2, para. 38, where he claimed to have reviewed records that proved the defendant accepted terms of use to access the Proctorio Academy web site.
23. These claims proved to be false. On cross-examination, Mr. Devoy admitted that he had not, in fact, reviewed any records and did not know if his previous evidence was true. This is Mr. Devoy’s third attempt to claim that the defendant agreed to any terms of service with Proctorio.
24. Paras. 15-16 and Exhibit E are an attempt to augment Mr. Devoy’s previous evidence, in Devoy #2, para. 48, in which Mr. Devoy exhibited tweets published by the defendant between September and November, 2020.
25. Mr. Devoy’s new affidavit evidence, which exhibits tweets published by the defendant between November 2020 and April 2021, is an attempt at sur-reply not permitted by the Rules and unnecessary for disposition of the *PPPA* application.

The Beatty #2 affidavit

26. Paras. 2-8 and Exhibits B-G exhibit various University of British Columbia policies that the plaintiff downloaded from UBC web sites. The plaintiff has not explained how any of these policies are relevant to its action against the defendant, including how UBC’s subjective interpretation of its obligations under copyright legislation has any bearing on whether the defendant’s private conduct constituted infringement under the *Copyright Act*. Nor has the plaintiff explained why it did not include these policies in its initial affidavits if it believed them to be relevant.
27. The defendant says the plaintiff should not be able to rely on either affidavit. In the alternative, if the plaintiff is granted leave to do so, the defendant seeks an order for further cross-examination of Mr. Devoy and the right to provide reply affidavit evidence as required.
28. The defendant seeks costs of this application in any event of the cause, to be assessed as costs on a full indemnity basis pursuant to s. 7 of the *PPPA*.

Part 6: MATERIAL TO BE RELIED ON

1. Notice of Civil Claim, filed September 1, 2020;
2. Order of Justice Giaschi (re injunction), made September 2, 2020;
3. Response to Civil Claim, filed October 16, 2020;
4. Defendant's Notice of Application under the *PPPA*, filed October 16, 2020;
5. Plaintiff's Application Response, filed November 17, 2020;
6. Notice of Constitutional Question of the Plaintiff, filed November 24, 2020;
7. Affidavit #1 of John Devoy, sworn August 31, 2020;
8. Affidavit #2 of John Devoy, sworn November 16, 2020;
9. Affidavit #3 of John Devoy, sworn April 15, 2021, filed contrary to Rule 8-1(14) and served on April 16, 2021;
10. Affidavit #1 of Ian Linkletter, affirmed October 15, 2020;
11. Affidavit #1 of Carly Beatty, affirmed April 14, 2021;
12. Affidavit #2 of Carly Beatty, sworn April 20, 2021, filed contrary to Rule 8-1(14) and served on April 20, 2021; and
13. Affidavit #1 of Nicoleta Badea, sworn April 21, 2021.

The application respondent estimates that the application will take 3 hours.

[Check whichever one of the following is correct and complete any required information.]

- The application respondent has filed in this proceeding a document that contains the application respondent's address for service.

Dated: 26 Apr 2021


Signature of lawyer for the application respondent

Mark G. Underhill and

John Trueman

Tel: 604-283-2912

Email: munderhill@arvayfinlay.ca

This Application Response is prepared by Solicitors for the Application Respondent Ian Linkletter, Arvay Finlay LLP, Barristers and Solicitors, whose place of business and address for service is 1512 – 808 Nelson Street, Box 12149, Nelson Square, Vancouver, British Columbia, V6Z 2H2. Telephone: 604.696.9828 / Fax: 1.888.575.3281.