COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Proctorio, Incorporated v. Linkletter,* 2022 BCCA 150

Date: 20220427
Docket: CA47592

Between:

Proctorio, Incorporated

Plaintiff
(Appellant)

And

Ian Linkletter

Defendant
(Respondent)

Before: The Honourable Mr. Justice Harris
The Honourable Mr. Justice Goepel
The Honourable Mr. Justice Grauer

On appeal from: An order of the Supreme Court of British Columbia, dated June 14, 2021 (*Proctorio, Incorporated v. Linkletter*, 2021 BCSC 1154, Vancouver Docket S208730).

Counsel for the Appellant (via videoconference):	T. Pinos J.L. Lewis
Counsel for the Respondent (via videoconference):	C.J. Boies Parker, Q.C. C. North
Place and Date of Hearing:	Vancouver, British Columbia January 28, 2022
Place and Date of Judgment with Written Reasons to Follow:	January 28, 2022
Place and Date of Written Reasons:	Vancouver, British Columbia April 27, 2022

Written Reasons by:
The Honourable Mr. Justice Goepel

Concurred in by:
The Honourable Mr. Justice Harris
The Honourable Mr. Justice Grauer

Summary:

Proctorio appeals the dismissal of its application seeking to mark certain documents as exhibits, for additional time to cross-examine Mr. Linkletter, and to rely on additional affidavits. Proctorio submits it properly appealed what it describes as evidentiary orders prior to the underlying Protection of Public Participation Act hearing (the "PPPA Application"). The issue on appeal is whether the chambers judge's decision is properly characterized as an order appealable as of right or evidentiary rulings that cannot be appealed until completion of the underlying proceeding.

Held: Appeal quashed. The chambers judge's decision to dismiss the application does not give rise to an "order" under the Court of Appeal Act. Proctorio must wait to appeal the dismissal of its application until completion of the underlying proceeding, being Mr. Linkletter's PPPA Application.

Reasons for Judgment of the Honourable Mr. Justice Goepel:

INTRODUCTION

[1] This appeal arises from rulings of a chambers judge on an application made in the midst of an ongoing application under s. 4 of the *Protection of Public Participation Act*, S.B.C. 2019, c. 3 [*PPPA*]. The threshold issue is whether this Court has jurisdiction to hear the appeal before the completion of the underlying application. After hearing submissions, the Court held that it did not have jurisdiction to hear the appeal, and quashed the appeal with reasons to follow. These are those reasons.

BACKGROUND

[2] The facts underlying this appeal are not contentious. Proctorio, Incorporated ("Proctorio") is a software developer that develops and licenses an online proctoring software that records and analyzes students writing exams (the "Software"). Ian Linkletter is an employee of the Faculty of Education at the University of British Columbia. Mr. Linkletter is a critic of the technology and has publicly criticized the Software on various social media platforms raising issues relating to learning technology, student safety and privacy.

[3] In August 2020, Mr. Linkletter posted eight tweets which are the subject of Proctorio's claim. Seven of the tweets included links to videos created by Proctorio, which Proctorio claims are copyrighted and confidential. The eighth tweet included a screenshot of "Proctorio Academy Courses", a website created and maintained by Proctorio for assisting users of its software.

[4] On September 1, 2020, Proctorio filed a notice of civil claim, seeking a declaration that Mr. Linkletter infringed its copyright, circumvented technological protection measures, and breached confidence. Proctorio sought an interim and permanent injunction preventing Mr. Linkletter from disseminating its confidential information. On September 2, 2020, Proctorio obtained an interim injunction against Mr. Linkletter.

[5] On October 16, 2020, Mr. Linkletter filed his response to civil claim. He admitted to sending the tweets, but denied copyright infringement or that he breached confidence, because Proctorio's information was already available to the public and that there were either no, or ineffective, technological protection measures.

[6] Concurrently, Mr. Linkletter applied to have Proctorio's claim dismissed pursuant to the *PPPA* (the "*PPPA* Application"). The *PPPA* was a legislative response to what have been referred to as strategic lawsuits against public participation ("SLAPPs"). SLAPPs are lawsuits initiated against individuals or organizations that speak out or take a position on issues of public interest—with the intention being to silence or otherwise deter that party from participating in public affairs. A *PPPA* proceeding attempts to screen and prohibit lawsuits aimed at silencing debate on issues of public importance. Mr. Linkletter submits that his actions were an expression on a matter of public interest, and the underlying action is an attempt to silence his criticism of Proctorio.

[7] Evidence in a *PPPA* proceeding is given by way of affidavit with the right of cross-examination. Mr. Linkletter swore two affidavits to support his *PPPA* application. Proctorio then exercised its right to cross-examine him.

[8] On March 18, 2021, Proctorio cross-examined Mr. Linkletter on his affidavits. During the examination Mr. Linkletter admitted to sharing a link to one of Proctorio's videos with Chris Gilliard, an American professor. Mr. Gilliard then publicly shared the link through his Twitter handle, @hypervisible. Counsel for Proctorio wished to mark as an exhibit a document showing the thread of tweets from @hypervisible publicly sharing the video link (the "Document"), and to cross-examine Mr. Linkletter on the sharing of the video link with Mr. Gilliard. Counsel for Mr. Linkletter objected to the questions and objected to the Document being marked as an exhibit, taking the position the Document should only be marked for identification.

[9] Following the cross-examination, the parties filed additional affidavits. The admissibility of two affidavits were at issue in the chambers application: (1) an affidavit of John Devoy, Proctorio's director of communications and marketing, addressing certain matters arising from the cross-examinations ("Devoy Affidavit #3"), and (2) an affidavit of Carly Beatty, a legal assistant with Proctorio's law firm, attaching email correspondence between counsel, certain UBC web pages, and UBC's copyright policies ("Beatty Affidavit #2").

[10] On April 29, 2021, Proctorio brought an application (the "Chambers Application"):

> (a) to have the Document marked as an exhibit to the examination;
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> (b) for leave to examine Linkletter for a further hour; and
>
> (c) for leave to rely on the Devoy Affidavit #3 and Beatty Affidavit #2.

[11] The Chambers Application was heard by Justice MacNaughton. In reasons released on June 14, 2021, she dismissed Proctorio's application for an order that the Document be formally marked as an exhibit, as well as its application for an order that it be granted leave to examine Mr. Linkletter for an additional hour. With respect to the affidavits, she allowed Proctorio to rely on portions of the Devoy Affidavit #3 and dismissed Proctorio's application to rely on the Beatty Affidavit #2. Her reasons are indexed at 2021 BCSC 1154.

ON APPEAL

[12] Proctorio filed a Notice of Appeal on July 7, 2021. It submits Justice MacNaughton erred in:

> (a) Determining that, in order to be marked as an exhibit, the Document must be "essential" for establishing a fact and that not marking the exhibit will not be "seriously prejudicial" to Proctorio;
>
> (b) Applying the wrong legal test to whether additional cross-examination regarding the Document was proper in the circumstances; and
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> (c) Declining to exercise the Court's discretion to allow Proctorio to rely on the additional relevant affidavit material which responded to new evidence filed by Linkletter in reply and updated evidence previously given in an affidavit properly filed in this proceeding and not objected to.

[13] Mr. Linkletter submits that this Court does not have jurisdiction to hear the appeal. Alternatively, he submits the chambers judge did not make any of the errors alleged. Mr. Linkletter did not bring an application in advance of the hearing of the appeal to quash the appeal for lack of jurisdiction.

[14] The threshold issue on the appeal is whether the decisions refusing to mark the Document as an exhibit, refusing to allow additional cross-examination, and refusing to allow Proctorio to rely on additional affidavits are orders that are appealable as of right or are rulings that cannot be appealed in advance of the completion of the underlying proceeding.

STATUTORY FRAMEWORK

[15] This Court derives its jurisdiction from statute. The governing provisions are set out in the *Court of Appeal Act*, R.S.B.C. 1996, c. 77 [*CA Act*]. Of import for this appeal are the following provisions:

> s. 1 "order" includes
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> (a) a judgment,
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> (b) a decree, and
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> (c) an opinion, advice, direction, determination, decision or declaration that is specifically authorized or required under an enactment to be given or made;

> s. 6. (1) An appeal lies to the court
>
> (a) from an order of the Supreme Court or an order of a judge of that court, and
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> (b) in any matter where jurisdiction is given to it under an enactment of British Columbia or Canada.
>
> s. 7. (1) In this section, "limited appeal order" means an order prescribed under the rules as a limited appeal order.
>
> (2) Despite section 6(1) of this Act, an appeal does not lie to the court from a limited appeal order without leave being granted by a justice.

[16] Also of import on this appeal is s. 9 of the *PPPA* that sets out the procedures governing applications for dismissal:

> 9 (1) Subject to this Act, an application for a dismissal order under section 4 must be made in accordance with the Supreme Court Civil Rules.
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> (2) An application for a dismissal order under section 4 may be made at any time after the proceeding has commenced.
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> (3) An application for a dismissal order under section 4 must be heard as soon as practicable.
>
> (4) Subject to subsections (5) and (6) of this section, on an application for a dismissal order under section 4, evidence must be given by affidavit.
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> (5) An applicant or respondent may, before the hearing of the application,
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> (a) call, out of court before an official reporter, the witness who swore or affirmed the affidavit for cross-examination on the witness's affidavit, and
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> (b) cross-examine the witness on the witness's affidavit, provided that
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> (i) the total period of cross-examination of all applicants in the proceeding does not exceed 7 hours in duration, and
>
> (ii) the total period of cross-examination of all respondents in the proceeding does not exceed 7 hours in duration.
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> (6) The court may extend the period permitted for cross-examination under subsection (5) if the court considers it necessary in the interests of justice.

THE COURT'S JURISDICTION

[17] We are a statutory court. The authority to appeal to this Court either as of right or with leave must be found in the *CA Act* or another enactment conferring jurisdiction: *Janis v. Janis*, 2016 BCCA 364 at para. 78. Our jurisdiction to entertain appeals from decisions of the Supreme Court is found in s. 6(1) of the *CA Act*,

dealing with appeals as of right; and s. 7, dealing with limited appeal orders, for which leave to appeal is required. The latter are prescribed under R. 2.1 of the *Court of Appeal Rules*, B.C. Reg. 297/2001.

[18] In *Skyllar v. The University of British Columbia*, 2022 BCCA 138, this Court reviewed the jurisprudence and summarized its jurisdiction to hear appeals from the Supreme Court:

> [17] Pursuant to s. 6(1) of the *CA Act*, this Court has jurisdiction to entertain an appeal from an "order of the Supreme Court", as that term is described in s. 1 of the *CA Act*. The fact that something is described as an "order" in the *Supreme Court Civil Rules* or that the decision was documented in the record of the Supreme Court as an "order", does not make it an "order" under s. 1 of the *CA Act.* Not every pronouncement of a judge of the Supreme Court constitutes an "order" for the purpose of an appeal: *Cambie Surgeries Corporation v. British Columbia (Attorney General),* 2017 BCCA 287 at paras. 30, 39 [*Cambie Surgeries*]; *First Majestic Silver Corp. v. Davila Santos*, 2015 BCCA 452 at paras. 34–35.
>
> [18] This Court hears appeals from final orders and limited appeal orders. There is, however, another undefined sub-category of judicial decisions, from which there is neither an automatic right of appeal nor an ability to seek leave to appeal. This sub-category or grey area includes a wide number of decisions made by judges in the trial court, as they manage the case load in individual cases before them. A decision in this grey area may form a ground of appeal, if later in the proceeding an appealable order is made: *The Owners, Strata Plan VR29 v. Kranz,* 2021 BCCA 32 at paras. 48–49 [*Kranz*].
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> [19] In her concurring reasons in *Cambie Surgeries*, Justice Saunders explained this grey area*:*
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> > [70] The juridical nature of the Supreme Court's tools for managing its caseload has taken on added importance with the enactment of current s. 7 of the *Court of Appeal Act* referred to by my colleague. That section changed the criterion for leave to appeal from "interlocutory order" to a "limited appeal order" enumerated in Rule 2.1. There are a great number of events that occur in the trial court under a rule that provides "the court may order", that are interlocutory, that would never have attracted leave to appeal under the former s. 7, and that are not under a rule enumerated in Rule 2.1. There are also judicial instructions given that are not expressly provided for by a rule but are recorded by the Supreme Court of British Columbia and filed in documents entitled "order". If such matters are within s. 6 of the *Court of Appeal Act*, they are appealable as of right. An example of this effect is demonstrated in *British Columbia (Director of Civil Forfeiture) v. Lloydsmith*, 2014 BCCA 72, a case concerning a document entitled "order" that addressed the timing of a cross-examination. This Court held the matter was not appealable because it concerned no more than a ruling made in the management of litigation.

> [71] Two approaches are possible. One is to give a literal reading to the *Supreme Court Civil Rules* and all documents entered by the Supreme Court of British Columbia entitled "order", so as to engage this Court's process whenever a litigant chooses to challenge such an "order". The other is to enquire into the substance of the event that occurred in the Supreme Court of British Columbia, to determine whether an "order", as intended by s. 6 of the *Court of Appeal* Act, has been made that allows an appeal.
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> [20] In *Cambie Surgeries*, this Court endorsed the second approach articulated by Justice Saunders. The Court does not take a literal approach to the question of whether a document is an "order" to determine if it gives rise to a right of appeal or to the right to seek leave to appeal. Rather, the substance of the matter is considered: *Kranz* at para. 51.

[19] The underlying policy rationale encompassing the case law is to avoid interrupting trials or hearings in mid-course. As a general rule, mid-trial rulings are appealable only after a trial concludes.

POSITION OF THE PARTIES

[20] Mr. Linkletter submits the issues raised by Proctorio are not the proper subject of an appeal. He submits this Court has no jurisdiction to consider preliminary evidentiary rulings that do not result in a properly authorized order. Further, he argues the appeals of preliminary evidentiary rulings, like those at issue here, would undermine the purpose of the *PPPA* which is designed to ensure that the litigation that is found to be subject to dismissal is not unduly burdensome to defendants.

[21] Proctorio did not submit a written reply to this issue but developed their submission in oral argument. Proctorio characterizes the decisions of the chambers judge as an "order". It submits that this is not a pre-trial evidentiary ruling but rather a ruling that occurred prior to the hearing of the *PPPA* Application. Proctorio argues it is not appealing a mid-trial evidentiary ruling but is correctly appealing an evidentiary order. It relies on *Galloway v. A.B.*, 2019 BCCA 385 (Griffin J.A., in Chambers) [*Galloway*] for the proposition that a pre-hearing ruling made on application in a *PPPA* proceeding is appealable as of right.

DISCUSSION

[22] This takes us to the nature of the "order" that was made in this case. At the outset it is important to first note the substance of the Chambers Application which has led to this appeal. This in turn requires consideration of the evidentiary framework of the *PPPA* Application.

[23] Pursuant to s. 9(4) of the *PPPA*, evidence on a *PPPA* application must be given by affidavit. Section 9(5) gives the right to cross-examination on any affidavit filed. The evidentiary record upon which the *PPPA* application will be determined are the filed affidavits, together with the transcript of any cross-examinations.

[24] The first two issues raised on the Chambers Application arose in the context of the cross-examination of Mr. Linkletter. Proctorio wanted to have the document marked as an exhibit to the examination and leave to examine Mr. Linkletter for a further hour on the sharing of the video link with Mr. Gilliard. The chambers judge dismissed both applications. In addition, she ruled that the Beatty Affidavit #2 would not be admissible at the hearing and that only certain paragraphs of the Devoy Affidavit #3 would be admitted as evidence.

[25] In making these decisions, the chambers judge was determining the evidentiary record upon which the *PPPA* Application would be determined. In *Cambie Surgeries Corporation v. British Columbia (Attorney General),* 2017 BCCA 287, a five-member division of this Court confirmed that this Court does not have jurisdiction to hear free standing appeals from evidentiary and other rulings made during the course of a trial.

[26] The question of whether a decision dealing with the admissibility of evidence is independently appealable came before this Court in *Tylon Steepe Homes Ltd. v. Landon*, 2011 BCCA 162 [*Tylon*]. In *Tylon,* prior to the start of the trial, the case management judge held the parties would be bound by certain findings of fact and law made in a related previous trial. The plaintiff appealed. In dismissing the plaintiff's appeal, Justice Levine stated:

> [22] Rulings on the admissibility of evidence at a trial are not appealable until the conclusion of the trial as part of the final judgment. An application to quash an appeal is made on the basis that the Court does not have jurisdiction to hear an appeal. There is no right of appeal because the decision appealed from is not an "order" within the meaning of s. 6 of the *Court of Appeal Act*: *see Rahmatian* at para. 7; *New Brunswick (Milk Marketing Board)* at paras. 5–7, 18.

[27] In *Tylon*, this Court further held that the jurisdiction to hear an appeal from a ruling on an evidentiary matter did not turn on whether the ruling was made by the trial judge during the trial or on a pre-trial application brought in advance of the trial. The Court further found the appealability of an evidentiary ruling did not turn on when the trial started and which judge made the ruling (*Tylon* at para. 34).

[28] That finding resonates in this case. While Justice MacNaughton may not be the judge who ultimately hears the *PPPA* Application, her decision on the Chambers Application has shaped the evidentiary record upon which the *PPPA* Application will be determined.

[29] The decision is *Galloway* does not assist Proctorio. While *Galloway* concerned a pre-hearing ruling made in a *PPPA* proceeding, the application was of a different nature. In *Galloway*, during the course of cross-examination on affidavits, requests were made for the production of certain documents. When the defendants refused to produce the documents, an application was brought for their production. The chambers judge ordered some of the documents produced. Justice Griffin in this Court determined that the order was appealable as of right.

[30] This case is distinguishable from *Galloway* in that the documents for which production was sought would not, as a result of the order, become evidence on the ultimate application unless the documents were subsequently put to a party in the course of their cross-examination and marked as exhibits. That is a far different situation than that faced in this case. In this case, the Documents, the questions and answers in any extended cross examination, and the affidavits that Proctorio wants to introduce would all become evidence on the *PPPA* application. An analogous situation is an order requiring a party to answer questions asked at an examination

for discovery. Such an order gives rise to a limited appeal order that can be appealed with leave. Like the documents ordered produced in *Galloway*, the answers to the discovery questions do not automatically become evidence at trial.

[31] In the result, therefore, this Court does not have jurisdiction to hear an appeal of Justice MacNaughton's rulings. The quashing of the appeal does not leave Proctorio without a remedy. If it is not satisfied with the decision in the *PPPA* Application, it can appeal, and on the appeal, can challenge Justice MacNaughton's rulings. Erroneous procedural or evidentiary rulings are subsumed in the judgment and may constitute grounds of appeal when the judgment is entered. It is during that appeal that this Court can consider whether the chambers judge erred.

[32] In the result, therefore, the appeal must be quashed. Proctorio does not have the right to appeal the rulings made in the Chambers Application.

COSTS

[33] Mr. Linkletter seeks special costs. He submits that the appeal was without merit, an abuse of process, designed to increase his costs and impede the hearing of the *PPPA* Application. While we have quashed the appeal, I would not find it to be an abuse of process and it does not warrant the imposition of special costs.

[34] Mr. Linkletter is entitled to the costs of the appeal, but I would limit those costs to those that would have been incurred if he had brought an application to quash the appeal upon receipt of the notice of appeal. In particular, Mr. Linkletter will not be entitled to recover any costs under tariff items 4, 10, and 11.

"The Honourable Mr. Justice Goepel"

I AGREE:

"The Honourable Mr. Justice Harris"

I AGREE:

"The Honourable Mr. Justice Grauer"