COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Linkletter v. Proctorio, Incorporated,* 2022 BCCA 313

Date: 20220914
Docket: CA48214

Between:

Ian Linkletter

Appellant
(Defendant)

And

Proctorio, Incorporated

Respondent
(Plaintiff)

SEALED IN PART

Before: The Honourable Madam Justice Newbury
(In Chambers)

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

Counsel for the Appellant:	J. Riddle
Counsel for the Respondent:	T.M. Cohen, K.C. J.M. Kindrachuk
Counsel for the Proposed Intervenor, British Columbia Civil Liberties Association:	B.M.W. Noga S.H.S. Chin (via videoconference)
Counsel for the Proposed Intervenor, Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic (via videoconference):	D. Fewer
Place and Date of Hearing:	Vancouver, British Columbia September 1, 2022
Place and Date of Judgment:	Vancouver, British Columbia September 14, 2022

Summary:

Intervenor status denied to two applicants in context of an appeal from an order of a Supreme Court judge dismissing defendant's application to dismiss action pursuant to s. 4 of the Protection of Public Participation Act. At this stage of the proceedings, CA not persuaded applicants would be of signification assistance to the Court.

Reasons for Judgment of the Honourable Madam Justice Newbury:

[1] There are before me two applications for intervenor status in this appeal, which at present is set to be heard for one day in December 2022. One applicant is the British Columbia Civil Liberties Association ("BCCLA"); the other is the Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic ("CIPPIC"). The applications are opposed by the plainitff/respondent "Proctorio".

[2] The order being appealed by Mr. Linkletter was made by a justice of the Supreme Court of British Columbia in chambers and is indexed as 2022 BCSC 400. Since it is rather lengthy, I refer the reader to those reasons directly for a detailed understanding of the facts of the case and the chambers judge's reasoning. For purposes of the applications before me, it will be sufficient here to note that in September 2020, Proctorio commenced an action against Mr. Linkletter seeking damages for the tort of breach of confidence, infringement of copyright and the circumvention of a "technological protection measure" contrary to s. 41.1 of the *Copyright Act*, R.S.C. 1985, c. C-42. Counsel for Proctorio obtained an injunction *ex parte* on September 2, which prohibited Mr. Linkletter from downloading or sharing certain information from Proctorio's online sites ("Help Center" and "Academy") or encouraging others to do so.

[3] Mr. Linkletter then applied in chambers for the dismissal of the entire action pursuant to s. 4 of the *Protection of Public Participation Act*, S.B.C. 2019, c. 3 ("PPPA"), which the judge described as "British Columbia's anti-SLAPP legislation" (i.e., against "strategic litigation against public participation"). Alternatively, Mr. Linkletter sought to have the injunction set aside on the basis that Proctorio had not made full and frank disclosure when obtaining it; or in the further alternative, to have its scope narrowed on the basis that it was overbroad.

[4] Section 4 of the PPPA states:

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

[5] Thus if Mr. Linkletter was able to show on a balance of probabilities that the action arose from ‘expressions’ made by him and that they related to a matter of public interest, the Court was required to dismiss the action against him unless Proctorio was able to demonstrate that all three conditions in s. 4(2)(a) and (b) were met. The first two conditions require only “grounds to believe” (which has been interpreted to require a “real prospect of success”); the second requires the “weighing” of likely harm and the public interest in “continuing the proceeding” as against the public interest in protecting the expression in question. (See generally *1704604 Ontario Ltd. v. Pointes Protection Association* 2020 SCC 22.) As Proctorio points out, the appeal will not finally determine the merits of Mr. Linkletter’s underlying action.

[6] The judge ruled at para. 53 of his reasons that Mr. Linkletter had met the threshold test described in s. 4(1). As to whether the claim had substantial merit, he found at para. 84 that Proctorio had met its burden to show there were grounds to believe that its claim for breach of confidence had substantial merit. He also found grounds to believe Mr. Linkletter had no valid defence to the copyright infringement claim based on his having merely shared a link rather than the copyrighted material

itself. (At para. 95.) On the other hand, with respect to copyright infringement in respect of a screenshot Mr. Linkletter had reproduced, the judge was not satisfied Mr. Linkletter had no hope of a successful defence based on the argument that he had not infringed a "substantial part" of the copyrighted work. (See para. 101.)

[7] Two other defences then remained, both arising out of the *Copyright Act*. First, the so called "fair dealing" defence under s. 29 states that "Fair dealing for the purpose of research, private study, education, parody or satire does not infringe copyright." Second, the *Copyright Act* states that subject to the four conditions specified in s. 29.21, it is not an infringement of copyright to use an existing work which has been made available to the public, in the "creation" of a new work in which copyright exists. (The section is reproduced at para. 115 of the chambers judge's reasons.)

[8] With respect to "fair dealing", the chambers judge noted the test summarized by Chief Justice McLachlin in *CCH Canadian Ltd. v. Law Society of Upper Canada* 2004 SCC 13. Considering the factors approved by McLachlin C.J. (set out at para. 105 of the chambers judge's reasons), he concluded that all but the first of those factors favoured Proctorio's submission that Mr. Linkletter's dealings in this case were not fair. (See paras. 106–113.) Although the judge described the possibility of actual harm resulting to Proctorio as "speculative", he acknowledged this did not mean Proctorio had no enforceable interest in maintaining the integrity of its system for segregating proprietary information intended solely for instructors and administrators, or that Proctorio would not have "lost something of value" if the system were undermined by conduct like Mr. Linkletter's. (At para. 113.) In the end, the judge concluded that the "fair dealing" defence had no real prospect of success in this case.

[9] As for a defence of "non-commercial user-generated content" under s. 29.21 of the *Copyright Act*, the judge agreed with Proctorio that the defence was not applicable. Mr. Linkletter had not created any "new work" by copying an existing work previously "published or otherwise made available to the public": he had simply

shared seven links that allowed members of the public to view copyrighted material that the copyright owner did not wish to share publicly. This defence therefore had no real prospect of success. (See para. 116.)

[10] At para. 119, the judge concluded that Mr. Linkletter had not circumvented any technological measure within the meaning of s. 41.1 of the *Copyright Act*.

[11] Beginning at para. 122, the judge turned to the question of whether the harm suffered by Proctorio was (to quote s. 4(2)(b)), "serious enough that the public interest in continuing the proceeding outweigh[ed] the public interest in protecting that expression." (See *Pointes Protection* at para. 82.) Although Proctorio had met its burden under s. 4(2)(a) of the PPPA, the judge also found that it had been able to demonstrate only "limited harm" as a result. At the same time, the evidence did support Proctorio's contention that Mr. Linkletter's conduct had compromised the integrity of its Help Center and Academy screens and that "but for" the injunction granted earlier, the harm might well have been greater.

[12] The judge went on to reject Mr. Linkletter's argument that Proctorio's action was targeted at Mr. Linkletter's *right to express himself* in a manner critical of Proctorio. In his analysis:

> On the other side of the scales, I have found that, in the impugned tweets, Mr. Linkletter was expressing himself on a matter of public interest. I have also found that he acted primarily out of a genuine sense of public duty. He has demonstrated a history of activism in the public interest. I have found no convincing evidence of malice in his tweets. That being said, some of them crossed the line from being intemperate to being actionable. His invitation to others to follow in his footsteps "on a computer you can torch" betrays an awareness that what he was doing, and encouraging others to do, would likely be viewed, at least beyond his Twitter audience, as improper.
>
> Mr. Linkletter argues that this action has all the hallmarks of a classic SLAPP suit. I am not persuaded that is so. Rather, I agree with Proctorio that the focus of this action is a narrow one. It does not, properly framed, target the right of Mr. Linkletter or anyone else to express themselves in a manner critical of Proctorio, its software, or remote invigilation generally. Rather, the only expression that Proctorio seeks to enjoin is the public sharing of confidential information from the Help Center and Academy intended exclusively for instructors and administrators. In that regard, I have already found that it was not necessary for Mr. Linkletter to breach his duty of

> confidence or infringe copyright in order to convey the opinions he wished to convey.
>
> Although I accept that, as Mr. Linkletter argues, students have a right to know what information is being collected from them and how it will be used, that does not mean that they and everyone else are entitled to see all of the instructor-side training materials in their raw form. The point is that Mr. Linkletter's right to freedom of expression does not include a right to decide for himself what, among Proctorio's confidential information, the public should be allowed to see.
>
> Mr. Linkletter notes, fairly, that dozens of other individuals and institutions have been publicizing similar information about Proctorio. The only reason he has been singled out, he says, is that he alone is a vocal and influential critic of Proctorio. I disagree that this action can be explained in that manner. The reason he has been singled out is that he did not just share information as others have. Rather, he was systematically reproducing to his Twitter audience one link after another directly from the Help Center. No one else was doing anything of that kind.
>
> 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. [At paras. 126–130; emphasis added.]

[13] In the result, he ruled that Proctorio had met its burden under s.4 of the PPPA and that the application for the dismissal of the action should be refused. He also declined to set aside the injunction (see para. 140) but did vary it in the manner described at paras. 147–8 of his reasons.

Intervenor Applications — the Law

[14] Although the jurisdiction of a judge in chambers to permit a party to intervene in an appeal is now located at R. 61 of the new *Court of Appeal Rules*, B.C. Reg. 120/2022, it would appear that the substantive considerations applicable to such applications remain the same as under the previous R. 36 of the *Court of Appeal Rules*, B.C. Reg. 297/2001.

[15] If the applicant does not have a direct interest in the litigation, the court must, as I stated in *R. v. Watson and Spratt* 2006 BCCA 234, consider the nature of the issue(s) before the court, whether the case has a dimension that legitimately engages the interest of the would-be intervenor, the representativeness of the

applicant of a particular point of view or "perspective" that may be of assistance to the court, and whether that viewpoint will assist the court in the resolution of the issues or whether the proposed intervenor is likely to "take the litigation away from those directly affected by it". (At para. 3.) In *Araya v. Nevsun Resources Ltd.* 2017 BCCA 402, Madam Justice Dickson noted further (at para. 12) that an intervenor's role is to make "principled submissions on pertinent points of law", not to support the position of a party. While its submissions may support one party's position, that is not their purpose: see *Friedmann v. MacGarvie*, 2012 BCCA 109 at para. 28.

[16] I was also referred to the reasons of Mr. Justice Groberman in *Equustek Solutions Inc. v. Google Inc.* 2014 BCCA 448, who emphasised the discretionary nature of an order granting intervenor status. He noted that the court must be convinced the intervention will be of assistance to it and that a prospective intervenor must demonstrate more than that the court's decision will have "broad ramifications". In his words:

> ... There is a real danger that intervenors that do not propose to do more than point out the importance of the Court's decision will simply be a burden to the parties and to the Court. Esson J.A. put it this way in *Hobbs v. Robertson*, 2002 BCCA 168:
>
> > [9] In most cases, it is my impression that the efforts of intervenors make no significant contribution other than to add to the length of hearing, and the weight of paper. Underlying the submissions of the applicants seems to be an assumption that courts are incapable, without the assistance of intervenors, of understanding that decisions often have consequences far beyond those to the immediate parties. That assumption, with respect, is unjustified. Judges are conscious of the considerations often expressed on one side as the fear that to fail to recognize a right will unjustly affect others and, on the other that recognition of a right will "open the floodgates".
> >
> > [10] The courts have struggled with considerations of those kinds for a very long time. There is much to be said for the view that the law develops best on a case-by-case basis deciding only what is needed to resolve the issues between the parties. [At para. 12.]

[17] In *Equustek*, applications to intervene were made by both the Canadian Civil Liberties Association ("CCLA") and CIPPIC. There was no doubt that each of these applicants "[had] legitimacy" (see *Equustek* at para. 11) and that each had been granted intervenor status in various other cases concerning matters generally

relevant to the present appeal. The CCLA was not granted intervenor status in *Equustek*, however, except on a very limited (and one might say esoteric) argument concerning whether restrictions on freedom of expression in foreign countries interferes with "core concerns" of national self-determination. This was a facet of the issues before the court that might otherwise be ignored, and was unlikely to "take away from the core issues that are to be presented to the Court." (At para. 22.) As for the remainder of the arguments sought to be advanced by CCLA, Groberman J.A. concluded that they did not represent a distinctive position that would be of particular assistance to the Court.

[18] Similarly, Groberman J.A. refused CIPPIC's application to intervene, since it was unlikely to provide a "unique or important perspective on the issues that would be absent if it were not given intervenor status." (At para. 26.)

Mr. Linkletter's Appeal

[19] I have had the opportunity to review Mr. Linkletter's factum for the purpose of determining the scope of the issues to be raised on the appeal in this case. Para. 25 states Mr. Linkletter's grounds of appeal, or alleged errors in judgment on the part of the chambers judge, as follows:

> a) [The chambers judge] 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 [*Copyright Act*] claim had substantial merit without considering the [*Copyright Act*]'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.

[20] Proctorio contends in its factum that the appeal is "really reliant" on the chambers judge's findings of *fact*, including the findings relating to the availability of the so-called "Unlisted Videos" to the public; that Mr. Linkletter was subject to Proctorio's Terms of Service when he "shared" the links to the Unlisted Videos; that Proctorio had suffered "some detriment" as a result of Mr. Linkletter's conduct; and

the scope of Proctorio's proceeding and its impact on Mr. Linkletter's freedom of "expression". Proctorio's factum asserts that the *legal* errors in Mr. Linkletter's factum can be summarized as constituting the following issues, namely whether the action "arose" from an "expression" made by Mr. Linkletter; whether the chambers judge erred in finding that Proctorio showed grounds to believe its breach of confidence claim had substantial merit; whether he erred in law in concluding that Proctorio showed grounds to believe its copyright infringement claim had substantial merit; and last whether he erred in law in failing to identify, assess and weigh the interests "mandated by the legislation".

Analysis

[21] I am not willing at this point to characterize the issues raised by the appeal as ones purely of law or fact: they seem more of a mixture, with the element of judicial discretion added in. The chambers judge was interpreting and applying the PPPA, and the case-law governing it, to the evidence. For the most part, he did not have to make true findings of fact, but only had to decide whether there were reasonable grounds under s. 4(2)(a) and to determine (again not finally) whether the harm "likely to have been suffered" by Proctorio was serious enough that the public interest in continuing the litigation outweighed the interest in protecting his "expression".

[22] Not surprisingly, Mr. Linkletter emphasizes the fundamental nature of freedom of expression as a constitutional right, as does the BCCLA in its argument in favour of intervening in the appeal. The Association says it is "gravely concerned" that if endorsed by this court, the chambers judge's approach to the s. 4(2)(b) analysis would "undermine" this "robust backstop for protecting expression in the public interest" and thus erode the *Charter* rights of British Columbians to free expression and weaken public participation essential to democracy.

[23] The BCCLA also emphasizes that it intervened in *Pointes,* which the chambers judge was of course aware of: see para. 44 of his reasons. The BCCLA notes that the Court in *Pointes* emphasized that the two considerations referred to in s. 4(2)(b) are to be "weighed" against each other rather than "balanced" against

each other. (See paras. 65–6 of *Pointes*.) As well, it emphasizes various factors that may come under the rubric of "public interest", in particular the "potential chilling effect on future expression either by a party or by others". It says it brings a unique perspective to the required analysis and that it could make its arguments without addressing the merits of the appeal or otherwise duplicating Mr. Linkletter's submissions.

[24] With respect, I am unable to discern a specific point on which the BCCLA can add to the arguments that will be made by the parties at the hearing of the appeal. The question is not whether freedom of expression is to be encouraged and protected, but whether the Draconian remedy of dismissing the action without trial was justified under s. 4 of the Act. The judge found that Proctorio met the fairly onerous conditions in the statute, and that its claims did not target Mr. Linkletter's right to express himself in a manner critical of Proctorio. Rather, the judge said, Proctorio was seeking to enjoin only the public sharing of *confidential information* intended exclusively for instructors and administrators in the course of their duties.

[25] I am not persuaded that the BCCLA "perspective" will add materially to this court's appreciation of the issues on appeal or on any particular aspect of those issues, including the 'weighing' process under s. 4(2)(b). I would therefore dismiss the BCCLA's application.

[26] With respect to the CIPPIC, its "core mandate" is to "advocate in the public interest in debates arising at the intersection of law and technology". It hopes to "advise" and "guide" the Court on the interpretation and application of the *Copyright Act* and international copyright legislation and jurisprudence, and confidential information law. It says it would focus its submissions on the interpretation of the *Copyright Act*, and its "text, context and purpose". Its written argument offers to provide the Court with an understanding of the "limited nature of [copyright] owners' rights and the implications of the Supreme Court of Canada's admonition that judges are to interpret user rights" liberally.

[27] CIPPIC would also make submissions on the defences of fair dealing and user-generated content, again to the effect that the "large, liberal and remedial" approach to user rights adopted by the Supreme Court of Canada should inform our interpretation of these defences.

[28] At the end of the day, I am not persuaded that *at this stage of the litigation*, CIPPIC's submissions offer anything more than Mr. Linkletter's submissions are likely to include. The applicant seems to assume that the courts will not be well served by counsel for the parties in advocating the particular rights, be they *Charter* rights or statutory rights, that are part of the normal diet of Canadian courts. As well, the scope of CIPPIC's planned submissions would in my view threaten to "take the litigation away" from the parties themselves.

[29] I emphasize that this litigation is at an early stage and that what the chambers judge was doing was considering whether there was a real prospect of success in the proceeding and the defences, and carrying out a weighing of the harm done to Proctorio and the competing aspects of the public interest set forth in s. 4(2)(b) of the Act. If the underlying action proceeds to trial, the intervenors' submissions may well become more relevant. At this stage, however, I believe this court is in a position to interpret the Act having in mind, *inter alia*, the freedoms and values that the applicants espouse, and to interpret the *Copyright Act* in an appropriate manner.

[30] I would dismiss the applications.

"The Honourable Madam Justice Newbury"