

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Proctorio, Incorporated v. Linkletter*,
2021 BCSC 1154

Date: 20210614
Docket: S208730
Registry: Vancouver

Between:

Proctorio, Incorporated

Plaintiff

And

Ian Linkletter

Defendant

Before: The Honourable Madam Justice MacNaughton

Reasons for Judgment

Counsel for the Plaintiff:

T. Pinos
L. Hellrung

Counsel for the Defendant:

M. Underhill
J. Trueman

Place and Date of Trial/Hearing:

Vancouver, B.C.
April 29, 2021

Place and Date of Judgment:

Vancouver, B.C.
June 14, 2021

Table of Contents

THE APPLICATION	3
The Nature of an Application under the <i>PPPA</i>	3
CONCLUSION.....	5
THE FACTUAL BASIS FOR THE APPLICATION	5
SHOULD ADDITIONAL CROSS-EXAMINATION BE PERMITTED?	8
Law on Scope of Cross-examination on an Affidavit	8
Analysis of Additional Cross-Examination	10
Is the Additional Cross-Examination Relevant to “Substantial Merit” or “No Valid Defences”?	10
Is the Additional Cross-Examination Relevant to Balancing Harm Suffered against the Public Interest?.....	15
SHOULD THE @HYPERVISIBLE DOCUMENT BE MARKED AS AN EXHIBIT? .	15
SHOULD THE TWO ADDITIONAL AFFIDAVITS BE ADMITTED?.....	17
The Applicable Law	17
The Devoy #3 Affidavit	18
The First Issue: Did Mr. Linkletter Agree to Proctorio’s Terms of Service	18
The Second Issue: Proctorio’s Efforts to Protect Its Copyrighted and Confidential Information	19
The Third Issue: Whether Proctorio’s Action Silenced Mr. Linkletter	20
Analysis of Admissibility of Devoy #3.....	20
The Beatty #2 Affidavit	22
CONCLUSION.....	22
COSTS	22

The Application

[1] The plaintiff, Proctorio, Incorporated (“Proctorio”), seeks three procedural orders:

(a) An order that an exhibit marked for identification on the defendant’s March 18, 2021, cross-examination be marked as an exhibit proper to that cross-examination.

(b) If the order sought in (a) is granted, an order that it be granted leave to cross-examine the defendant for a further hour on matters arising from its first cross-examination of the defendant, to be conducted via Zoom, at a time and date agreed to between counsel.

(c) An order pursuant to R. 8-1(14) of the *Supreme Court Civil Rules* that it be permitted to rely on Affidavit #3 of John Devoy, filed on April 19, 2021, and Affidavit #2 of Carly Beatty, filed on April 20, 2021, at the hearing of the defendant’s application filed October 16, 2020.

The Nature of an Application under the *PPPA*

[2] On March 25, 2019, the *Protection of Public Participation Act*, S.B.C. 2019, c. 3 [*PPPA*], came into force in British Columbia. Its purpose is to protect public participation in matters of public interest and to prevent or limit actions commenced for the purpose of silencing individuals or organizations that speak out about, or advocate a position on, issues of public interest. “Strategic Lawsuits against Public Participation” or “SLAPP” suits are those initiated by plaintiffs to limit the expression of others and deter them, or other parties, from participating in public affairs.

[3] The *PPPA* creates a process that is designed to screen out SLAPP suits or actions. For the most part, the *PPPA* has been applied in defamation actions. Its application in the context of this case is somewhat novel.

[4] On the filing of an application under s. 4 of the *PPPA*, the litigation is paused until a decision is made.

[5] Section 4 of the *PPPA* is modeled on similar Ontario legislation that came into force in November 2015. The Ontario *Protection of Public Participation Act, 2015*, S.O. 2015, c. 23, amended the *Courts of Justice Act*, R.S.O. 1990, c. C.43 by adding ss. 137.1–137.5. In British Columbia, the *PPPA* was enacted as stand-alone legislation.

[6] Section 4 of the *PPPA* sets out the applicable test when, as here, a defendant applies to have an action dismissed. It provides:

Application to the court

(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 likely 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.

[7] In this case, Proctorio says that it does not take issue with anything Mr. Linkletter said. It objects to the disclosure of what it alleges are copyrighted and confidential links and videos. As a result, it says an “expression” in s. 4 is not engaged.

[8] Further, Proctorio says that there is an issue of whether, if an expression is engaged, it relates to a matter of public interest. If both of those elements are met, the court looks at whether Proctorio's proceeding has substantial merit and whether Mr. Linkletter has no valid defence. Finally, it engages in a balancing of harm under s. 4(2)(b) in deciding whether to allow the proceeding to continue or to dismiss it.

[9] Proctorio submits that my decision on the various issues is to be made in the context of s. 4 of the *PPPA*.

Conclusion

[10] For the reasons set out below, I decline to make the order sought in para. 1(a). As a result, the order in para. 1(b) is moot. I make a limited order with respect to para. 1(c)

The Factual Basis for the Application

[11] Proctorio is an Arizona corporation that develops and licences exam proctoring software, used by educational institutions and others. The software replaces human proctors and remotely monitors and records students while writing tests and examinations. Using algorithms, the software analyzes the recordings for suspicious behaviour, and reports suspicious behaviour to the instructor (the “Software”).

[12] The use of such software has been the subject of debate and controversy within academic institutions and elsewhere. Detractors question the impact of continuous video recording on students with test anxiety and raise issues about barriers to students with disabilities and discrimination in the face detection algorithms against students of colour.

[13] The defendant, Ian Linkletter, is a learning technology specialist at the Faculty of Education at University of British Columbia (“UBC”). He is not in favour of the use of Proctorio’s Software and participated in the debate. He is an active user of Twitter and has 958 followers.

[14] Between August 23 and August 30, 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 videos are hosted on Proctorio’s “Help Center”, and they explain how Proctorio’s software detects abnormalities in student behaviours during

assessments. One tweet included a screenshot of “Proctorio Academy Courses”, a website created and maintained by Proctorio for assisting users of its Software.

[15] 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 including Proctorio Academy and Help Center materials, damages, and costs.

[16] On September 2, 2020, Proctorio obtained an interim injunction against Mr. Linkletter restraining him from sharing or disseminating Proctorio Academy and Help Center materials.

[17] On October 16, 2020, Mr. Linkletter filed a response to civil claim. In brief, in it he said that Proctorio’s information was already available to the public and that there were either no, or ineffective, technological protection measures. Mr. Linkletter admitted to sending the tweets and said that they concerned a matter of public interest. He denied copyright infringement or that he breached confidence.

[18] Coincident with filing his response, Mr. Linkletter applied to have Proctorio’s claim dismissed under the *PPPA*. Mr. Linkletter claims the action has no merit. In the alternative, he seeks to have the injunction against him dissolved.

[19] Proctorio responded to Mr. Linkletter’s application and says that neither its action, nor the injunction, restrained Mr. Linkletter’s freedom of expression with respect to the debate about online proctoring. Proctorio argued that the *PPPA*, provincial legislation, could not be used to void rights under the federal *Copyright Act*, R.S.C., 1985, c. C-42, and filed a notice of constitutional question.

[20] The following affidavits have been filed with respect to the interim injunction, the *PPPA* application, and the ancillary constitutional question:

1. an affidavit of John Devoy, Proctorio's director of communications and marketing, filed September 1, 2020, in support of the interim injunction (Devoy #1);
2. an affidavit of Mr. Linkletter, filed October 16, 2020, in support of his *PPPA* application (Linkletter #1);
3. an affidavit of Mr. Devoy, filed November 17, 2020, in response to Linkletter #1 (Devoy #2); and
4. an affidavit of John Trueman, one of Mr. Linkletter's counsel, sworn on March 1, 2020, and filed on April 15, 2021, in response to the *PPPA* application and Devoy #2 (the "Trueman Affidavit").

[21] Mr. Linkletter cross-examined Mr. Devoy on his affidavits on March 15, 2021, via Zoom.

[22] On March 18, 2021, Proctorio cross-examined Mr. Linkletter, via Zoom. Counsel for Mr. Linkletter objected to certain questions that were put to Mr. Linkletter. Those questions are the subject of part of this application. Counsel for Proctorio also sought to have a document marked as an exhibit on the cross-examination, and counsel for Mr. Linkletter objected. Counsel for Proctorio asked Mr. Linkletter questions about that document. In this application, Proctorio seeks to have that document marked as an exhibit.

[23] Following the cross-examinations, the parties filed the following affidavits:

1. An affidavit of Carly Beatty, a legal assistant with Proctorio's law firm, filed on April 14, 2021, attaching various transcripts and correspondence.
2. An affidavit of Mr. Devoy, sworn on April 15, 2021, and filed April 19, 2021, addressing certain matters arising from his cross-examination, the cross-examination of Mr. Linkletter, and the Trueman Affidavit (Devoy #3).

3. An affidavit of Ms. Beatty, filed on April 20, 2021, attaching email correspondence between counsel, certain UBC web pages, and UBC's copyright policies (Beatty #2).
4. An affidavit of Nicoletta Badea, filed on April 21, 2021, attaching certain correspondence between counsel.
5. An affidavit of Ms. Beatty, filed on April 27, 2021, attaching the transcript of Mr. Linkletter's March 18, 2021, cross-examination.

This application only concerns the admissibility of Devoy #3 and Beatty #2.

Should Additional Cross-examination be Permitted?

Law on Scope of Cross-examination on an Affidavit

[24] Evidence on a *PPPA* application is by way of affidavit: s. 9(4). The *PPPA* allows for cross-examination of a witness on their affidavit prior to the hearing of the *PPPA* application: s. 9(5)(a). There is a seven-hour limit in s. 9(5)(b), but it is not an issue here as Proctorio has not come close to seven hours.

[25] The *PPPA* departs from the general rule that cross-examination is not available by right in applications or petition proceedings: *Galloway v. A.B.*, 2020 BCCA 106 at para. 16, aff'g 2019 BCSC 1417.

[26] A *PPPA* application cannot be turned into an occasion for abuse by a plaintiff, but it also cannot be a procedure that denies a plaintiff a proportional response to the challenges they face on the application. A fair balance must be struck between the competing interests of the parties: *Galloway* at para. 65.

[27] Cross-examination on an affidavit is limited to all matters in issue with respect to the proceeding in which the affidavit was filed: *Bland v. Canada (National Capital Comm.)*, [1989] F.C.J. No. 542, 29 F.T.R. 232 at para. 6. When dealing with matters summarily, a fine balance is required between not unduly extending and delaying the proceedings, while also ensuring the court has all the relevant and material evidence before it in order to make a decision on the application: also at para. 6.

[28] Three principles with respect to the scope of cross-examination on an affidavit were summarized in *Weight Watchers International Inc. v. Weight Watchers of Ontario Ltd. (No. 2)* (1972), 6 C.P.R. (2d) 169 (F.C.T.D.), cited at para. 6 of *Bland*:

1. Cross-examination on an affidavit must be relevant to the issue in respect of which the affidavit is filed, and the fact that it may accidentally disclose evidence of the witness's case is not of itself sufficient to make it admissible.
2. It must be a fair question.
3. There must be a *bona fide* intention of directing the question to the issue in the proceeding or the credibility of the witness.

[29] It is not open to the person cross-examining to cover all matters in issue in the underlying action: *Bland* at para. 12. It can extend to collateral questions arising from the deponent's answers. The affiant should answer all questions upon which they can fairly be expected to have knowledge, without being evasive, which relate to the principal issue in the proceeding upon which the affidavit touches: *Bland* at para. 6, citing to *Swing Paints Ltd. v. Minwax Company, Inc.*, [1984] 2 F.C. 521.

[30] In *Royal Bank of Scotland plc v. "Golden Trinity" (The)(T.D.)*, [2000] 4 F.C. 211 [*Bank of Scotland*], Justice Hargrave discussed two conflicting lines of authority, one supporting a broader approach to cross-examination on an affidavit and the other supporting a narrower approach. *Bank of Scotland* involved a motion in an action to determine priorities of ship sales proceeds, and one of the suppliers wanted to cross-examine the representative of Bank of Scotland on "the extent of any equities which might exist and which could cut the claims of the Bank of Scotland, making more of the proceeds available" for the supplier. This line of questioning would go "well beyond the four corners of the affidavit".

[31] Justice Hargrave commented that the pleadings in this type of action were of marginal relevance and not useful to defining the issues, but concluded that cross-examination on an affidavit must have factual underpinnings. Where there are

pleadings, the scope of cross-examination is determined by the pleadings. Where there are no pleadings, or the pleadings do not define the issues, the issues for cross-examination on an affidavit are defined by the deponent's affidavit and the other affidavits filed in the proceeding. Cross-examination on an affidavit is not *carte blanche* to pursue all matters "which could, after a fishing expedition, be relevant to the determination of the issue in respect to which the affidavit was filed, for there must be some factual basis on which to found the cross-examination."

[32] Cross-examination on an affidavit should be limited to issues of fact found in the deponent's affidavit, in other affidavits filed in the proceeding, and to collateral questions arising out of answers and to documents exhibited to affidavits or otherwise produced: *Bank of Scotland* at para. 19. Cross-examination on an affidavit is not as free-ranging as examination for discovery and cannot be used to obtain all the information and all the documents which might be useful at trial: *Bank of Scotland* at para. 7.

[33] This Court adopted similar principles in *Doig v. Muir* (1997), 32 B.C.L.R. (3d) 220 (S.C.) at para. 6.

Analysis of Additional Cross-Examination

Is the Additional Cross-Examination Relevant to "Substantial Merit" or "No Valid Defences"?

[34] The question on this application is whether the additional cross-examination sought of Mr. Linkletter is relevant to the issues arising on Mr. Linkletter's application for dismissal under the *PPPA*, or his application to have the September 2, 2020, injunction overturned.

[35] During cross-examination on his affidavit, Mr. Linkletter admitted to sharing a link to one of Proctorio's videos in private communications with Chris Gilliard, an American professor. Mr. Gilliard then shared the link to one of Proctorio's Help Center videos through his Twitter handle, @hypervisible.

[36] Counsel for Proctorio wishes to cross-examine Mr. Linkletter on this instance of privately sharing the video link with Mr. Gilliard and any further instances of privately sharing the video links.

[37] Proctorio submits that Mr. Linkletter's admission is relevant to the *PPPA* application because it shows Mr. Linkletter may have shared links to Proctorio's confidential information by means other than tweets, with other individuals.

[38] Proctorio submits that disallowing additional cross-examination would restrict it to the four corners of Mr. Linkletter's affidavits.

[39] Proctorio relies on *Grinnell Company of Canada v. Retail Wholesale and Department Store Union Local 535, C.I.O., C.I.L.*(1956), 18 W.W.R. 268 (B.C.C.A.), and submits the question before the Court is what issues are relevant to the application, not what is relevant to the four corners of the affidavit.

[40] Proctorio submits the tweet from @hypervisible, and Mr. Linkletter's additional sharing of the link, is relevant to the "tweet stream" in which Mr. Linkletter participated. The tweet stream is relevant to several issues on the *PPPA* application, including the merits of Proctorio's claim. The tweet by @hypervisible shows yet another instance in which Mr. Linkletter shared a link to a proprietary and confidential video. Proctorio submits this additional instance of sharing goes to the defence of fair dealing, knowing infringement of copyright, and that Mr. Linkletter knew, or ought to have known, the video links he shared were confidential.

[41] Proctorio further submits that Mr. Linkletter's tweet, and the additional sharing of the link, are also relevant to the balancing of harm on the *PPPA* application and the extent of the harm suffered by Proctorio.

[42] Proctorio submits the notice of civil claim is not limited to eight instances of sharing copyrighted and confidential information, and it encompasses any sharing of confidential and copyrighted information by the defendant. Counsel for Proctorio submits they are entitled to conduct further cross-examination on the instance of

sharing links to the videos that led to the tweet by Chris Gilliard, and on any other instances of sharing links to the videos.

[43] I proceed on the basis that the additional cross-examination is not relevant to the constitutional question or to the issue of whether Mr. Linkletter's expression relates to a matter of public interest under s. 4(1) of the *PPPA*.

[44] Here, the issue is whether the questions that Proctorio's counsel seeks to ask are relevant to the following issues:

- Whether Proctorio can show there are grounds to believe that the proceeding has substantial merit.
- Whether Proctorio can show there are grounds to believe that Mr. Linkletter has no valid defence.
- Whether the harm suffered, or likely to be suffered, by Proctorio is serious enough that the public interest in continuing the proceeding outweighs the public interest in protecting Mr. Linkletter's expression.

[45] I have concluded that the additional questions sought to be asked are not necessary or relevant to the application. Proctorio has Mr. Linkletter's admission that he shared the video links with Mr. Gilliard in private communications, and that Mr. Linkletter shared the links on his public Twitter account. Mr. Gilliard then shared the video links on his public Twitter account. It is not at all clear how demonstrating more incidents of sharing the video links in private communications will assist Proctorio in addressing the legal issues on the *PPPA* application or the application with respect to the interim injunction.

[46] Proctorio submits that the private link-sharing incident, and any other incidents of privately sharing the video links, will assist in showing its claim has substantial merit. This connection is not clear to me. If Proctorio is unable to show a reasonable prospect that its action will succeed, based on the known seven incidences of public sharing relied on in its notice of civil claim, I do not see how it will be able to establish a reasonable prospect of success, or that its claim has

substantial merit, by obtaining more details on an eighth incident of private sharing or by questioning Mr. Linkletter on additional instances of private sharing.

[47] In addition, I agree with Mr. Linkletter that it is the pleadings that define relevance. The pleadings allege that Mr. Linkletter shared the links to Proctorio's videos publicly, not privately. Proctorio alleges that it suffered harm because of the public sharing, as public sharing could allow its competitors to adopt similar technologies. The sharing could also allow students to adapt their behaviour to circumvent the Software, thereby achieving a competitive advantage and making the Software less effective. The heading "The Plaintiff's Loss and Damage" in Proctorio's notice of civil claim describes loss and damage arising from the public sharing of video links, not private sharing.

[48] Counsel for Proctorio indicated Proctorio's intention to expand the pleadings after Mr. Linkletter's admission. This does not support Proctorio's position that Mr. Linkletter's admission, and further instances of sharing the links in private communications, are captured in the pleadings in Proctorio's notice of civil claim.

[49] The fact is, due to the cross-examination, Proctorio has Mr. Linkletter's admission, on record, that he shared the video link privately. Proctorio can rely on that admission in the *PPPA* application.

[50] Similarly, I do not see how the fact that Mr. Linkletter shared the video link in private communications will assist Proctorio in showing that Mr. Linkletter has no valid defence to its action. Proctorio's claims relate to making the video links publicly available. The alleged harm relates to its copyrighted material being made available publicly, and there is no dispute that Mr. Linkletter posted the links to his public Twitter feed.

[51] The *PPPA* application will primarily involve legal, not factual, issues. The legal issues will be based on the defences raised in Mr. Linkletter's application to dismiss, that is whether:

- publishing a hyperlink to content available on the internet is copyright infringement;
- Proctorio granted a license to every user of YouTube to use and distribute its content;
- Mr. Linkletter's communications constituted fair dealing under the *Copyright Act*;
- Mr. Linkletter's communications constituted non-commercial user-generated content permitted under the *Copyright Act*;
- publication of an unlisted YouTube video is a technological protection measure;
- Proctorio employed any technological protection measures to prevent Mr. Linkletter from taking a screenshot of the Proctorio Academy website;
- Mr. Linkletter circumvented any technological protection measure;
- Mr. Linkletter was not aware and had no reasonable grounds to believe that his acts constituted a contravention of the *Copyright Act*;
- the information at issue did not have the necessary quality of confidence because it was available to the public prior to Mr. Linkletter's tweets about;
- Proctorio suffered any detriment as a result of Mr. Linkletter's communications; and
- Mr. Linkletter's communications were made in the public interest.

[52] It is not clear how additional instances of private communication where Mr. Linkletter shared the video links will be relevant to establishing that Mr. Linkletter's defences are not valid. All the facts necessary for determining whether those defences are valid are already established.

Is the Additional Cross-Examination Relevant to Balancing Harm Suffered against the Public Interest?

[53] The weighing that the court will undertake pursuant to s. 4(2)(b) of the *PPPA* is at the core of the analysis and, as the Supreme Court of Canada has said, can be informed by cases under s. 2(b) of the *Charter*. *1704604 Ontario Limited v. Pointes Protection Association*, 2020 SCC 22 at para. 77. It requires considering whether the harm suffered, or likely to be suffered, by Proctorio is serious enough that the public interest in continuing the proceeding outweighs the public interest in protecting the expression.

[54] In this case, it is not clear how the additional questions will allow Proctorio to establish greater harm, or greater loss and damage. In other circumstances, questions about additional instances of sharing could be relevant to the harm suffered, but not in this case. Proctorio has not clarified the connection between sharing the links privately and the extent of the harm it suffered. The harm alleged by Proctorio arose from making the links available in the public realm in the first place. It is not clear how showing one, or even several, additional instances of sharing the links privately will add anything to the harm analysis.

Should the @hypervisible Document be Marked as an Exhibit?

[55] During cross-examination of Mr. Linkletter, counsel for Proctorio put a document to Mr. Linkletter via “screenshare”, and later shared the document in the Zoom chat function. The document was a screenshot of a thread of tweets showing the Twitter user @hypervisible publicly sharing a link to a Proctorio Help Center video (the “@hypervisible document”).

[56] Mr. Linkletter identified Chris Gilliard, an American professor, as the person behind the Twitter handle @hypervisible. He admitted to sending a link to one of the Proctorio videos in private communications to Mr. Gilliard.

[57] Counsel for Mr. Linkletter maintains that Mr. Linkletter did not properly identify the @hypervisible document. He was only asked if he “recalled” the tweets and was

not asked about the other tweets or the document itself. Counsel for Mr. Linkletter submits it should not be marked as an exhibit proper.

[58] Counsel for Proctorio submits that Mr. Linkletter identified and authenticated the @hypervisible document, so it should be marked as an exhibit.

[59] Counsel for Mr. Linkletter also submits that nothing turns on the distinction between marking the @hypervisible document as an exhibit as opposed to marking it for identification.

[60] I disagree. An exhibit is a thing, other than oral evidence, that is made part of the record of trial. There is no statute or rule that defines the term “exhibit”: Keith Bracken & Monique W. Dull, *British Columbia Courtroom Procedure*, 2nd ed (Toronto: LexisNexis, 2018) at 256. Rules 12-5(9) and 12-5(11) deal with the process for marking exhibits in civil proceedings but do not differentiate between exhibits marked for identification and exhibits proper.

[61] Bracken & Dull explain the importance of marking exhibits at 257:

It is the long-established practice in all trials to mark as exhibits those things that become part of the evidence. They are marked to make clear to the parties, the trial court and any appeal court the evidence upon which rulings and judgments were based.

[62] In general, for a document to be admissible on an application, it will be exhibited to an affidavit, identified during cross-examination on an affidavit or during examination for discovery, or introduced through a witness. It may also be admissible by consent or by statutory authority: *Murphy Oil Company Co. v. Predator Corp.*, 2002 ABQB 403 at para. 27.

[63] The importance of marking the @hypervisible document as an exhibit depends on whether the document will be relied on as evidence in the *PPPA* application and at trial, if this matter goes to trial.

[64] In this case, Mr. Linkletter acknowledged that he sent the materials to Mr. Gilliard. He acknowledged recalling two of the eight tweets set out in the

@hypervisible document, but did not properly identify and authenticate it. For that reason, I conclude that it should not be marked as an exhibit.

[65] Declining to mark the @hypervisible document as an exhibit will not be seriously prejudicial to the plaintiff, either in the *PPPA* application or on an appeal of that decision. The key point is that during his cross-examination, Mr. Linkletter recognized the tweets, and acknowledged that he sent the link posted in one of the tweets to Mr. Gilliard, the author of that tweet. The @hypervisible document showing the tweets is not essential for establishing the fact that Mr. Linkletter shared the link in private communications with a person who then shared it in a tweet. Mr. Linkletter made that admission.

Should the Two Additional Affidavits be Admitted?

The Applicable Law

[66] Rule 8-1(14) provides that unless all parties of record consent, or the court otherwise orders, a party must not serve any affidavits additional to those served under Rule 8-1(7), (9), and (13).

[67] In this case, the parties had served their affidavits under R. 8-1(7), (9) and (13). They are unable to agree on whether Proctorio's two additional affidavits are admissible. As a result, Proctorio is seeking the court's leave to serve two additional affidavits.

[68] Whether to admit the additional affidavits is an exercise of discretion to be exercised sparingly, only in clearly meritorious cases, and where excluding the evidence would result in a substantial injustice: *Ivarson v. Lloyd's M.J. Oppenheim Attorney in Fact in Canada for Lloyd's Underwriters et al.*, 2002 BCSC 1627 at para. 25.

[69] In order to decide this issue, it is necessary to understand the sequence of the affidavits filed in this case. I have set out the order of the filing of the affidavits earlier in this decision.

[70] The affidavits challenged by Mr. Linkletter followed affidavits filed by him, or others, in support of his *PPPA* application. The affidavits in question are Devoy #3 and Beatty #2. I will consider each affidavit and the possible issues for which they might be relevant.

The Devoy #3 Affidavit

The First Issue: Did Mr. Linkletter Agree to Proctorio's Terms of Service

[71] At paras. 16 and 42 of Devoy #1, filed in support of the without notice interim injunction, Mr. Devoy states that, before Mr. Linkletter could access the Proctorio Academy, and the videos posted there, he must have agreed to Proctorio's terms of service. Devoy #1 included a copy of Proctorio's terms of service.

[72] Attached to Linkletter #1 is a March 4, 2018, agreement entered into between Proctorio and UBC, which purports to be the entire agreement between them.

[73] At paras. 36–38 of Devoy #2, Mr. Devoy states that he obtained internal Proctorio data showing that Mr. Linkletter agreed to the terms of service for Proctorio Academy. He claimed that Proctorio's records showed that a user named "Ian" accessed the Academy on August 23, 2020. At his cross-examination, Mr. Devoy admitted that he had not reviewed any records.

[74] Devoy #3 purports to set out further evidence that Mr. Linkletter agreed to Proctorio's terms of service.

[75] At para. 9 of Devoy #3, Mr. Devoy refers to Mr. Linkletter's admission on cross-examination that he set up a demonstration or "sandbox" course through the UBC's online learning program, Canvas. By doing so, Mr. Linkletter was able to access Proctorio Academy. Attached to Devoy #3 is a copy of the August 23, 2020, email Mr. Linkletter received from Proctorio when he created the "sandbox" course.

[76] Devoy #3 explains that, when a user accesses the Proctorio Academy for the first time following such an email invitation, they are required to accept Proctorio's

terms of service. Attached to the affidavit is a copy of the window that the user has to click to accept the terms of service.

The Second Issue: Proctorio's Efforts to Protect Its Copyrighted and Confidential Information

[77] Devoy #3 also concerns Proctorio's efforts to remove its purportedly confidential and copyrighted information from the internet.

[78] Beginning at para. 92 of Linkletter #1, Mr. Linkletter purports to demonstrate that information about how Proctorio's Software functions is widely available on publicly-accessible websites. He attaches copies of websites as they appeared on certain dates that contain information about how Proctorio monitors and assesses student behaviour during exams, including links to Proctorio's videos. The purpose of these documents is to show that the links to the videos shared by Mr. Linkletter do not contain any confidential or copyrighted material.

[79] Devoy #2 describes Proctorio's general policy of taking steps to disable any links to copyrighted and confidential information when it becomes aware that those links are being shared publicly. Proctorio also approaches third parties or clients and ask them to remove, edit, or restrict access to the copyrighted and confidential information.

[80] Trueman #1 responds to information in Devoy #2. Trueman #1 includes over 30 documents obtained through a number of Google searches. These documents purportedly show that information that Proctorio claims is copyrighted and confidential is hosted on various publicly accessible websites.

[81] Devoy #3 responds to Trueman #1 and Linkletter #1. Mr. Devoy sets out how he reviewed the links in Trueman #1 and Linkletter #1, then directed members of his team to contact the institutions hosting the links and ask them to take down the links. Devoy #3 attaches a chart showing which links were removed and which are still hosted on the websites.

The Third Issue: Whether Proctorio's Action Silenced Mr. Linkletter

[82] Devoy #3 attaches tweets published by Mr. Linkletter between November 16, 2020, and April 13, 2021. Presumably, the tweets are included to show that Proctorio has not “silenced” Mr. Linkletter’s criticism of its proctoring software.

Analysis of Admissibility of Devoy #3

[83] Proctorio submits that the significant legal issues in this action, and the fact that as a result of Mr. Linkletter’s *PPPA* application, Proctorio faces having its action dismissed entirely, with full indemnity and costs to Mr. Linkletter, favours the admission of these affidavits. Proctorio characterizes Mr. Linkletter as taking the position that neither affidavit is relevant. Proctorio submits that if the affidavits are not relevant, then there is no prejudice to Mr. Linkletter in admitting the affidavits to the application record.

[84] Mr. Linkletter submits that Proctorio has not shown how substantial injustice would result if the additional affidavits are not admitted. Proctorio’s claims that the legal issues in this case are significant and novel do not meet the test for admission of additional affidavits. Demonstrating that the issues are novel and significant does not establish how excluding the affidavits will result in substantial injustice. Proctorio submits Devoy #3 is an attempt to shore up Mr. Devoy’s previous evidence which was severely damaged by his admission that he had not reviewed records as set out in Devoy #2.

[85] I accept that refusing to admit Devoy #3 could be prejudicial to Proctorio but conclude that it would not rise to the level of a substantial injustice as it relates to the second issue—Proctorio’s steps to protect its copyrighted and confidential information.

[86] In my view, it is unlikely to matter whether Proctorio made efforts to remove or restrict access to copyrighted and confidential material after it was brought to their attention in Linkletter #1 and Trueman #1 that, apparently, the information was otherwise publicly available when Mr. Linkletter published the tweets linking to

Proctorio videos. The affidavit demonstrates that Proctorio diligently protected its confidential and copyrighted information after the fact. At the time it took the actions set out in Devoy #3, Proctorio was already engaged in these legal proceedings and had an interest in demonstrating its diligence.

[87] I reach a different conclusion about the parts of Devoy #3 relating to the first issue—whether Mr. Linkletter agreed to Proctorio’s terms of service.

[88] In my view, whether Mr. Linkletter agreed to the terms of service is likely to be a significant issue at the hearing of the *PPPA* application. Devoy #3 puts information about this issue squarely before the court hearing Mr. Linkletter’s *PPPA* application and deciding whether the interim injunction should be maintained. It may also be relevant to the constitutional question.

[89] If Mr. Linkletter agreed to Proctorio’s terms of service, and if Proctorio cannot prove that fact that, without Devoy #3, a substantial injustice could arise due to the centrality of Proctorio’s terms of service. Further, I note that Proctorio only learned, during cross-examination, of Mr. Linkletter that he accessed the Proctorio videos by creating a “sandbox” course. That information was not in Linkletter #1. As a result, the documents showing the process for accessing the Proctorio videos, after the creation of the “sandbox” course, were not in Mr. Devoy’s earlier affidavits.

[90] A substantial injustice could result to Proctorio if it is unable to show that Mr. Linkletter agreed to its terms of service. Those limited paragraphs of Devoy #3 are therefore admissible. In particular, I would admit paras. 9–14 of Devoy #3.

[91] Finally, with respect to the third issue dealt with in Devoy #3, whether Mr. Linkletter has been silenced, I am of the view that excluding them would not result in a substantial injustice. If those parts of the affidavit were permitted to be admitted then, presumably, a new affidavit would be filed each time Proctorio learned that Mr. Linkletter expressed a public opinion about the Software. That is exactly what the *Rules* was intended to prevent. The fact that Mr. Linkletter continues to express opinions does not have any bearing on this application.

The Beatty #2 Affidavit

[92] Beatty #2 followed a request made at Mr. Linkletter's cross-examination for production of his employment contract and any other agreements or policies relating to confidentiality or information disclosure.

[93] In response, Mr. Linkletter provided a copy of his employment contract.

[94] Proctorio filed Beatty #2 attaching additional documents, publicly available from UBC's website, relating to UBC's policies on copyright and fair dealing and the acceptable use of its electronic information and systems.

[95] I have concluded that Beatty #2 is not admissible. Proctorio has not set out how the UBC documents are relevant to the issues on the *PPPA* application or the application to dissolve the injunction. I cannot see how UBC documents, that may or may not apply to Mr. Linkletter in his employment relationship, will assist Proctorio in the arguments it will make on Mr. Linkletter's application.

[96] In addition, there is no explanation in Proctorio's materials as to why these policies, if relevant, could not have been put before the court in an earlier affidavit. Doing so would have avoided the potential need for further affidavits from Mr. Linkletter or further cross-examination.

Conclusion

[97] Proctorio's application is dismissed with the exception of admitting a small portion of Devoy #3.

Costs

[98] The parties did not speak to the issue of costs. If, in light of the outcome of the applications, they are unable to agree on costs, they may seek to appear before me to speak to them. Of course, the parties may also seek to address costs on the argument of the *PPPA* application.

"MacNaughton J."