S.C.C. FILE NO. 40787

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA)

BETWEEN:

IAN LINKLETTER

APPLICANT
(APPELLANT)

- and -

PROCTORIO, INCORPORATED

RESPONDENT
(RESPONDENT)

APPLICANT'S REPLY MEMORANDUM OF ARGUMENT
(Ian Linkletter, Applicant)
(pursuant to Rule 28 of the *Rules of the Supreme Court of Canada*)

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1. A leave application is not the place to argue the merits of an appeal: there is no basis on which this Court can, at this time, sort out the detailed factual and legal assertions the respondent makes about the substantive arguments that might be made if leave is granted. The question on this leave application is whether the proposed appeal involves issues of public and national importance. The respondent asks the Court to conclude the case cannot raise important issues on the basis of an assertion that ultimately the applicant will not be successful on an appeal. While the applicant is plainly of the view that the proposed appeal has substantial merit, that issue is not before this Court.

2. The respondent does not contest that the four issues raised in the applicant's leave application are of public and national importance.[1] Rather, it suggests that this case does not have precedential value because it is limited to its own facts and because there is no final determination of the claims being made. There is no merit to these arguments. Each of the issues identified by the applicant are questions of law arising from an influential, novel judgment on which this Court's guidance is needed. That is the case regardless of the ultimate disposition of the proposed appeal.

3. While this is not the place to engage in argument about the facts, one point will be addressed relating to the applicant's motivation in sharing the materials. Despite the suggestion to the contrary that runs though the respondent's submissions, the chambers judge found that the applicant was motivated not by malice but by a sense of public duty.[2] There was nothing nefarious about creating a sandbox course, which was part of the applicant's job, or doing so to learn information about a software the applicant had concerns about so that he could critique it in a more informed way. The videos were not marked confidential and the respondent had uploaded them to a public channel.[3] Because of Proctorio's history of removing content from the internet that was subject to criticism, sharing the information was a matter of some urgency.

A. The BCCA Did Not Limit *Copyright Act* Liability For Sharing Links To Specific Factual Circumstances (And Even If It Did, Those Circumstances Are Deeply Unclear)

4. Turning to the question of leave, the first issue of importance identified by the applicant is that the holding that there is substantial merit to a claim in copyright for sharing a link to a video hosted on a public webpage is a significant expansion of the exclusive rights of authors under the federal copyright scheme. Proctorio argues that this finding is of no consequence because it was

[1] Respondent's Memorandum of Argument, ¶43
[2] BCSC RFJ, ¶¶107, 126; Respondent's Memorandum of Argument, ¶1, 22
[3] BCSC RFJ, ¶64

made in the context of links "unlisted" by YouTube's search engine: it variously says sharing of these links is copyright-protected because they were not found by "searching the internet", they were not "generally available to the public", or because of confidentiality obligations.[4]

5. The applicant strongly disagrees that the BCCA's reasons limit copyright liability to any of these situations – the Court did not and the respondent does not point to any basis in the *Copyright Act* that would make this so. However, if even one of the respondent's interpretations of the reasons below is correct and copyright liability for link-sharing arises only in specific factual circumstances, this is a significant development in the law, and clarifying its scope is a matter of significant importance. If it is a copyright-protected act to share links not "generally available to the public", or links found in a Google search but not links found on a specific webpage, why this is and what constitutes 'general availability' must be explained. Proctorio also suggests the judgment below does not endorse general liability for link-sharing because it is limited to when a person "deliberately disclosed content that [they] knew to be impressed with a duty of confidence, which [they] attempted to circumvent by the use of technology".[5] This suggests that copyright liability for link-sharing *only arises* where a plaintiff can establish the link-sharing was *also* a breach of confidence; and that, while the applicant did not circumvent any technological protection measure,[6] an allegation that he nonetheless "attempted" to do so is somehow relevant under the *Copyright Act*. If the judgments below create such conditional liability, the scope of this liability is deeply unclear and must be clarified.

6. Ultimately, every case turns on its own facts. But where, as here, a court recognizes as tenable a new cause of action under a statute, it is appropriate for this Court to consider the implications of that new cause of action as it may apply in a variety of situations. It is also appropriate to consider whether that new cause of action is consistent with this Court's ruling in *SOCAN* on the meaning of the *Copyright Act*, even though the facts of that case are different.

B. The BCCA's Development of the Law of Breach of Confidence Is Significant Beyond The Facts Of This Case

7. While copyright protects the form of expression, breach of confidence protects its content. In a breach of confidence claim, the plaintiff must prove that any information shared is in substance

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[4] Respondent's Memorandum of Argument, ¶¶47(a), 48, 53-54
[5] Respondent's Memorandum of Argument, ¶54
[6] BCSC RFJ, ¶¶118-21

confidential – that is, not otherwise available to the public.[7] It is not in dispute that the information in the videos was available in various forms across various webpages, as found by the chambers judge, and that it may have been acquired through reading Google search results.[8] The respondent suggests starting at para. 56 that information found across several websites is not "readily accessible" and that there will therefore be no chilling effect if there is liability for sharing it. This ignores the fact that until this decision, otherwise publicly available information was only considered confidential when it was gathered in one place if its arrangement required special skill that gave the defendant a "springboard" to an unfair advantage.[9]

8. The respondent suggests that it is sufficient that the information otherwise available was in the form of a video.[10] If this is correct, and the BCCA's judgment means that a piece of information's form is enough to create a quality of confidence, this development in the law should be addressed by this Court.

9. It is undisputed that links to the some of the actual videos were available on publicly facing websites.[11] Proctorio suggests that there is no problem with the fact that someone who got to the videos through some other page than the Help Centre could have shared those links without giving rise to breach of confidence (or apparently, copyright violation).[12] This means that when someone is browsing through websites and finds themselves on a public YouTube page or a similar video-sharing site, their ability to utilize that site's video-sharing service depends upon the steps they took before they got there. It is simply untenable to suggest this result, if widely understood, would not chill the sharing of information found on the internet.

C. The Anti-SLAPP Questions Raised By This Case Have Never Been Addressed By This Court

10. Contrary to the respondent's assertion at para. 5, the two questions of law that the applicant raises with respect to the anti-SLAPP framework have not been "fully canvassed and addressed"[13] by this Court. To the contrary, this Court has never addressed whether a court can dismiss a "novel"

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[7] *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574 [*Lac Minerals*]
[8] BCSC RFJ, ¶66
[9] Applicant's Memorandum of Argument, ¶48; see also *Lac Minerals*, at 610-11
[10] Respondent's Memorandum of Argument, ¶60
[11] BCSC RFJ, ¶62
[12] Respondent's Memorandum of Argument, ¶62
[13] Respondent's Memorandum of Argument, ¶5

claim under anti-SLAPP legislation, or whether a plaintiff must demonstrate some likelihood of harm that gives rise to a remedy in law to succeed on the anti-SLAPP weighing analysis.

11. With respect to the first question, the courts below concluded there was substantial merit to the respondent's *Copyright Act* claim without referring to a single word of that statute. In refusing to overturn the chambers judge on this point, Justice Fenlon noted the question of law underlying copyright claim was "novel", and in a single paragraph found that it should only be determined at a trial.[14] This was the entire analysis undertaken by the appeal court in determining that the suit could pass the merits hurdle of an anti-SLAPP application. This characterization of the claim's viability in law as "a novel question which should not be ruled out at this early stage of the proceeding" cannot be seen as "simply commenting"[15] on the case, but goes to the heart of how the Court understood its task. The facts that the respondent spends three-quarters of its factum reciting only become relevant if there is a basis in law to make them so. Yet the courts below did not assess that law.

12. A statutory cause of action by definition must be founded in the words of the statute: while the respondent asserts the "substantial merit" analysis "does not turn on the wording of the Act *alone*",[16] the problem here is that the lower courts' analysis does not have regard to the wording of the Act *at all*. This squarely raises the question of what, precisely, a lower court must do to determine a claim is "legally tenable"[17] – a question as yet unaddressed by this Court.

13. The respondent attempts to argue the merits of the question raised by the applicant of whether "harm" in the *PPPA* must mean harm giving rise to a remedy: harm, it says, must be "flexibly" assessed, such that no connection is needed between an alleged harm and a remedy.[18] While claiming this principle has already been fully determined in this Court's previous jurisprudence, the respondent points to no support for that position, instead developing its own argument to that effect. Indeed, while it argues, based on *Pointes* and *Bent*, that this Court has endorsed a broad approach to defining harm under anti-SLAPP legislation, it conspicuously does not refer to this Court's comments in *Neufeld* that emphasize the limits to defining harm.[19]

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[14] BCCA RFJ, ¶44
[15] Respondent's Memorandum of Argument, ¶66
[16] Respondent's Memorandum of Argument, ¶68 [emphasis added]
[17] *1704604 Ontario Ltd. v. Pointes Protection Association*, 2020 SCC 22, ¶¶17, 49
[18] Respondent's Memorandum of Argument, ¶72
[19] *Hansman v. Neufeld*, 2023 SCC 14, ¶¶74-78

14. At para. 73, the respondent suggests the applicant has "ignored" that proof of loss may not be necessary to a breach of confidence claim, and damages may be at large in a copyright claim. This mischaracterizes the specific role of harm in the public interest analysis under the *PPPA*, which is separate from the merits-based test.

15. The remainder of the respondent's arguments are irrelevant to the question raised here, and attempt to distract from the issues raised by this application. The respondent repeatedly emphasizes that Mr. Linkletter criticized Proctorio in the months after the lawsuit was filed[20] – failing to mention that the focus of many of those tweets was to fundraise to afford a legal defence.[21] The respondent argues that harm does not need to be quantified to be relevant to the *PPPA* – an obvious point that is not contested. The respondent argues that it claims non-compensatory damages for breach of confidence, injunctive relief, and/or statutory damages that could have justified the claim proceeding to trial – ignoring the fact that none of these forms of harm were what the chambers judge relied on, and the BCCA endorsed, as harms giving rise to a public interest in the action continuing.[22]

D. A Determination That These Claims Have "Substantial Merit" Is A Final Determination That They Can Be Used to Suppress Information-Sharing Online

16. There is no merit to the suggestion that this case has no precedential value because it is not a final determination of the respondent's legal claims. The harm that anti-SLAPP legislation aims to address arises from the ability of powerful parties, like Proctorio, to utilize lawsuits as a means of imposing legal costs on those engage in expression about them, and to chill the speech of others by maintaining the threat of litigation. The harm does not arise from the final disposition of the case but from allowing it to be brought and maintained up to trial.

17. The respondent attempts to ignore this practical reality by arguing that, technically speaking, there has been "no merits determination or determination of any legal issue" in the litigation so far.[23] This is untrue and ignores the practical importance of this precedent. Deciding that these claims have "substantial merit" is a determination of a significant legal issue. The practical consequences are to give the power to wealthy parties to weaponize legal proceedings against parties who have done nothing legally wrong, but lack the funds to prove it.

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[20] Respondent's Memorandum of Argument, ¶¶1, 10, 37(c)
[21] See e.g. Respondent's Response Book, Tab K, p. 18
[22] Respondent's Memorandum of Argument, ¶73; BCSC RFJ, ¶125; BCCA RFJ, ¶51
[23] Respondent's Memorandum of Argument, ¶47(b)

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated: 31 August 2023

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