

S.C.C. FILE NO. _____

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)

APPLICATION FOR LEAVE TO APPEAL
(Ian Linkletter, Applicant)

(Pursuant to Section 40(1) of the *Supreme Court Act* and Rule 25 of the *Rules of the Supreme Court of Canada*)

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NOTICE OF APPLICATION FOR LEAVE TO APPEAL
(Pursuant to Section 40(1) of the *Supreme Court Act* and Rule 25 of the *Rules of the Supreme Court of Canada*)

TAKE NOTICE that Ian Linkletter hereby applies for leave to the Supreme Court of Canada, pursuant to s. 40(1) of the *Supreme Court Act* and Rule 25 of the *Rules of the Supreme Court of Canada*, from the judgment of the Court of Appeal for British Columbia, Docket CA48214, [2023 BCCA 160](#), made on April 19, 2023, and for any further or other order that the Court may deem appropriate;

AND FURTHER TAKE NOTICE that this application for leave is made on the following grounds:

1. The Court of Appeal for British Columbia's decision raises two categories of issues of public and national importance. First, the decision greatly expands liability for sharing information online, a matter of concern for all internet users. Specifically, the case raises the following two issues of public and national importance relating to liability for online activity:
 - a. whether the exclusive rights granted under the federal *Copyright Act* to authors can be interpreted to prohibit the sharing of hyperlinks to information found online, and

- b. whether sharing information widely available through a simple Google search can constitute a breach of confidence.
2. In addition, the case raises a number of questions regarding the appropriate approach to an application to dismiss a suit as a form of Strategic Litigation Against Public Participation (“SLAPP”), including the following issues of public and national importance:
- a. the nature of the exercise the court undertakes in determining the legal tenability of a claim that interferes with freedom of expression on a matter of public interest, specifically whether a court can and should dismiss an unprecedented claim that is framed as presenting a “novel” question of law; and
- b. the nature of the public interest in letting private litigation continue despite its impact on freedom of expression – specifically, whether a plaintiff must demonstrate some likelihood of loss that will give rise to a remedy in law, or whether it is sufficient to show some other “detriment” that is not capable of giving rise to redress.
3. Any other grounds this Honourable Court may deem appropriate.

Dated at the City of Vancouver, Province of British Columbia, this 19th day of June, 2023.

SIGNED BY



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NOTICE TO THE RESPONDENT OR INTERVENER: A respondent or intervener may serve and file a memorandum in response to this application for leave to appeal within 30 days after the day on which a file is opened by the Court following the filing of this application for leave to appeal or, if a file has already been opened, within 30 days after the service of this application for leave to appeal. If no response is filed within that time, the Registrar will submit this application for leave to appeal to the Court for consideration pursuant to section 43 of the *Supreme Court Act*.

Schedule of Reasons and Orders Below

A. Reasons for Judgment of Milman J. (Supreme Court of British Columbia), [2022 BCSC 400](#), dated March 11, 2022

B. Order of Milman J. (Supreme Court of British Columbia), dated March 11, 2022 (entered August 30, 2022)

C. Reasons for Judgment of Groberman, Fenton and Skolrood, JJ.A. (Court of Appeal for British Columbia), [2023 BCCA 160](#), dated April 19, 2023

D. Formal Order of the Court of Appeal for British Columbia, dated April 19, 2023 (to be filed when available)

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RESPONDENT
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APPLICANT'S MEMORANDUM OF ARGUMENT
(Ian Linkletter)

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APPLICANT'S MEMORANDUM OF ARGUMENT

PART I - CONCISE OVERVIEW OF POSITION WITH RESPECT TO ISSUES OF PUBLIC IMPORTANCE AND STATEMENT OF FACTS

A. Overview

1. This case raises an issue of vital importance to internet users Canada-wide: can they be sued for sharing hyperlinks to non-defamatory information already available on open online platforms? That is the claim that the courts below decided was legally tenable, such that it should go to trial notwithstanding the *Protection of Public Participation Act*.¹ This is a dangerous precedent for anyone who relies on the internet to research topics of public interest and to share information – the vast majority of Canadians. Specifically, this case raises four issues of public and national importance around internet use and public interest expression.

2. First, the Court of Appeal's ("BCCA") decision contemplates liability under the federal *Copyright Act*² for sharing hyperlinks to material already uploaded to the internet. Sharing hyperlinks is a ubiquitous activity that has never before been considered as part of the exclusive rights of authors protected under the *Act*. The decision expands those statutory rights in a manner that significantly alters the balance between user rights and authors' rights that is set out in the *Act*, interferes with the sharing of information online, causes great uncertainty and is contrary to the principle of technological neutrality.

3. Second, by concluding that information that is widely available online can nonetheless be characterized as "confidential", the decision changes the law of breach of confidence in a manner that renders everyday acts of sharing information through social media legally vulnerable. The effect of these two holdings is to materially increase liability associated with online discussions, chilling dialogue that supports the values of truth-seeking and participation in discussions on matters of public interest. The conclusion that there is "substantial merit" to such claims is significant despite the fact the decision is not a final determination on the merits because of the unique context of intellectual property litigation ("IP litigation") by large corporations against individual internet users. The courts below have effectively guaranteed that copyright and breach

¹ *Protection of Public Participation Act*, S.B.C. 2019, c. 3 [PPPA]

² *Copyright Act*, R.S.C. 1985, c. C-42 (the "*Act*")

of confidence actions can be weaponized to silence and even extract settlements from internet users.

4. Third, the case raises questions about the proper application of the “legally tenable” standard in anti-SLAPP legislation to pure questions of law – one of the remaining questions left unanswered by this Court. By holding that novel questions of law should not be determined on an anti-SLAPP application, the decision diverges from the approach in Ontario, and undermines the effectiveness of anti-SLAPP legislation in achieving its public purpose.

5. Finally, the case raises the issue of the nature of the public interest in allowing claims to proceed even when they involve interference with freedom of expression. In this case, the “detriment” identified by the courts below is not a loss giving rise to any legal remedy. The public interest in private litigation lies in ensuring that plaintiffs can utilize the courts to obtain meaningful redress. Because anti-SLAPP legislation is aimed at ensuring lawsuits will only go ahead if they serve a public interest, there must be a link between alleged harm and the respondent’s ability to obtain a remedy. This case is an opportunity for this Court to finish the work begun in *Pointes*, *Platnick* and *Neufeld*,³ and resolve the outstanding questions of what kind of cases should be struck as unduly stifling valuable public expression.

B. Facts Relevant to the Application

i. The Plaintiff’s Algorithmic Software

6. This case arises at the intersection of the growing use and marketing of artificial intelligence technology, the power imbalance inherent in litigation by large corporations against private individuals and the dominant place of the internet in our society as a place to share information and engage in public debate.

7. The respondent, Proctorio, Incorporated, is a large American company that develops and markets a form of artificial intelligence that analyzes students while they write examinations. Its software records students and uses a proprietary algorithm to assess certain aspects of their

³ 1704604 *Ontario Ltd. v. Pointes Protection Association*, 2020 SCC 22 [*Pointes*]; *Bent v. Platnick*, 2020 SCC 23 [*Platnick*]; *Hansman v. Neufeld*, 2023 SCC 14 [*Neufeld*]

appearance, sounds and computer use, and flag some as “suspicious”.⁴ The need for transparency in the use of artificial intelligence technology and the link between such transparency and ethical, non-discriminatory use of artificial intelligence has long been a well-established topic of concern as use of these technologies grows. Proctorio’s product became the focus of much of this concern as its use rapidly expanded during the COVID-19 pandemic.⁵

8. The company’s software was criticized as discriminating against students with darker skin tones and students with disabilities by incorrectly flagging their movements as suspicious. It was also criticized by privacy advocates as invasive, and harmful to students’ mental health in the already-difficult circumstances of the pandemic. Many critics also took aim at the company for being insufficiently transparent about how its product works.⁶

ii. Mr. Linkletter’s Tweets

9. Ian Linkletter was, at the relevant time, a learning technology specialist at the University of British Columbia (“UBC”). This litigation in its entirety relates to eight tweets he made in August of 2020, where he posted seven links to YouTube videos made and shared online by Proctorio.

10. As part of Mr. Linkletter’s employment at UBC, he worked with learning technology, assisting UBC faculty and staff in using it correctly. In this role, he felt it was particularly important that he speak out publicly against the use of a learning technology that he sincerely believes is harmful to equitable and respectful treatment of students and other pedagogical values he holds dear.⁷

11. In order to assist faculty and staff in working with UBC’s technology, Mr. Linkletter had access to a sandbox course (a course without students used to practice or test software) on UBC’s system where he was designated as an instructor. Through that course, on August 23, 2020 he accessed Proctorio’s Help Center for the purpose of learning more about how the software worked. There, he found a number of very brief embedded YouTube videos explaining to instructors the basics of how to use the software. When he clicked on each video, it opened to show the video on

⁴ *Proctorio, Incorporated v. Linkletter*, 2022 BCSC 400 [RFJ], ¶¶17, 18; *Linkletter v. Proctorio, Incorporated*, 2023 BCCA 160 [BCCA RFJ]

⁵ RFJ, ¶24

⁶ RFJ, ¶24

⁷ RFJ, ¶¶4, 126

a public YouTube page. A small notation below each video showed it was unlisted, meaning it would not be found in a YouTube search but could otherwise be viewed by anyone with the link. Nothing in the videos or on the YouTube page stated the videos were confidential or should not be shared.⁸

12. From those public YouTube pages, Mr. Linkletter copied and pasted seven links to these technological help videos and tweeted them out. He commented on each, linking them to his concerns about the software.⁹

13. Within a few minutes or hours after they were posted, Proctorio disabled all seven YouTube links so that they no longer led to the videos. It did not communicate with Mr. Linkletter about his tweets, or otherwise. Mr. Linkletter tweeted about the deletions, highlighting how little time it took for the links to be changed and opining that this was part of a pattern on Proctorio's part of refusing to be transparent, and trying to hide information it thought might be a basis for criticism.¹⁰

14. On August 29, 2020 Mr. Linkletter made one more tweet: a screenshot of another help webpage of Proctorio's showing that instructors could no longer access the YouTube videos, as all the links were broken (the "Academy Screenshot").¹¹

15. On September 1, 2020, Proctorio started this action against Mr. Linkletter alleging he is liable for breach of confidence, infringement of copyright and circumvention of technological protection measures for his eight tweets.¹² It also obtained a broad *ex parte* injunction prohibiting him from sharing any of Proctorio's "Confidential Information" (a term not defined in the injunctive order).¹³ Prior to seeking the injunction Proctorio never contacted Mr. Linkletter to express any concerns about his tweets. Proctorio communicated with Mr. Linkletter for the first time on September 2, 2020, when its counsel emailed him to serve him with the claim and injunctive order.¹⁴

⁸ RFJ, ¶¶23, 26, 64

⁹ RFJ, ¶¶30-37

¹⁰ RFJ, ¶7

¹¹ RFJ, ¶¶7, 38

¹² RFJ, ¶¶8, 40

¹³ RFJ, ¶¶9, 141-42, 145

¹⁴ RFJ, ¶40

iii. The *PPPA* Application

16. Mr. Linkletter filed an application under the *PPPA* asking that the lawsuit targeting his critical tweets be dismissed. Mr. Linkletter argued that there was no merit, let alone “substantial merit”, to an action against him for breach of copyright or circumvention of a technological protection measure given the words and scheme of the *Act*.

17. He also argued that the cause of action in breach of confidence could not be sustained given the respondent’s inability to establish the information in the videos had the requisite quality of confidence: the information was widely available across the internet, and there was nothing unique about the videos that could give a viewer some advantage they could not gain from Googling the same information. He filed voluminous evidence showing that the information contained in the videos themselves could be found through a simple Google search, including in easily accessible Proctorio instruction manuals that over 25 educational institutions and Proctorio’s partners had shared on their websites.¹⁵

18. In response, Proctorio argued its *Copyright Act* claims were simply novel. It asserted Mr. Linkletter had made the videos “available” by sharing the links, such that s. 2.4(1.1) of the *Act* captured his actions. It relied on European case law that concluded works could be made available for the purpose of copyright infringement in that jurisdiction if they were shared with a “new public”.¹⁶

19. Proctorio’s claim alleged harm based on students circumventing the technology and competitors gaining an advantage as a result of seeing the videos whose links were tweeted. There was no evidence filed to support this assertion, and no explanation of how students or competitors could learn anything from the videos that was not already widely available online.¹⁷

20. The hearing of the application was delayed by an interlocutory application and appeal by Proctorio, as well as an adjournment sought by Proctorio.¹⁸

¹⁵ RFJ, ¶¶66, 79, 110

¹⁶ RFJ, ¶94

¹⁷ RFJ, ¶¶78, 124

¹⁸ *Proctorio, Incorporated v. Linkletter*, 2021 BCSC 1154, aff’d 2022 BCCA 150; *Proctorio, Incorporated v. Linkletter*, Oral Reasons for Judgment of Master Muir delivered August 7, 2021 in Supreme Court of British Columbia, Docket S208730 (in Chambers)

iv. The Decisions Below

21. The *PPPA* application was heard in February 2022. On March 11, 2022, Milman J. issued reasons dismissing Proctorio's claim for circumvention of a technological protection measure and its claim that the Academy Screenshot was a breach of copyright. The chambers judge allowed the rest of the claim to proceed.

22. On breach of confidence, Milman J. acknowledged that much of the information claimed to be confidential "was already available to the public elsewhere on the internet." However, he concluded it nonetheless possessed the requisite quality of confidence because elsewhere on the internet, "it was in a form that was diffuse and scattered," thereby requiring a Google search to access.¹⁹ He also found that although there was no evidence to demonstrate Proctorio had suffered any of harms it alleged, Proctorio had nonetheless suffered "some detriment" because of the breach of its "virtual barrier".²⁰

23. On Proctorio's claim that Mr. Linkletter had made the videos available to the public within the meaning of s. 2.4(1.1) of the *Act*, the chambers judge concluded that sharing a link to an unlisted video could constitute the act of making a work available because it constituted sharing the work with a "new public", relying on European jurisprudence on this point.²¹

24. Finally, in the public interest balancing analysis, the judge again considered the detriment to Proctorio, which consisted of frustrating its attempt to segregate certain information. He held the public interest in the lawsuit going forward outweighed the public interest in protecting Mr. Linkletter's expression.

25. Justice Fenlon writing for the BCCA upheld the chambers judge's decision. In the BCCA's view, the unprecedented nature of a *Copyright Act* claim for sharing an unlisted link merited it proceeding to a trial. The Court stated that "whether sharing a controlled link to an unlisted video amounts to a publication of the video rather than a mere direction or reference appears to be a novel question which should not be ruled out at this early stage of the proceeding."²² While the

¹⁹ RFJ, ¶66

²⁰ RFJ, ¶80

²¹ RFJ, ¶¶94-95

²² BCCA RFJ, ¶44

BCCA had the benefit of this Court's reasons in *SOCAN*,²³ which concluded s. 2.4(1.1) did not add any additional cause of action in copyright infringement to the statute for link-sharing but rather was a species of performance right, it appeared to distinguish that case by concluding that sharing a link to a video on the internet could be a form of "publication", rather than performance.²⁴

26. On the weighing exercise under the *PPPA*, the BCCA accepted the judge's conclusion that Proctorio had suffered a form of non-monetary harm from the "integrity of its Help Center and Academy screens" being somehow "compromised".²⁵ It further relied on the fact that, in issuing an *ex parte* injunction against Mr. Linkletter, a judge had concluded there was a potential for irreparable harm to Proctorio as of September 2020, and concluded this was a form of harm that supported the lawsuit continuing under the *PPPA* weighing exercise.²⁶

PART II – CONCISE QUESTIONS IN ISSUE

27. The question on this application is whether any of the following issues are of public and national importance:

- a. whether the *Copyright Act* prohibits sharing a hyperlink to videos posted on a publicly accessible platform;
- b. whether sharing information widely available through a simple Google search can constitute a breach of confidence;
- c. whether a court should decide novel questions of law on an anti-SLAPP application; or
- d. the nature of the public interest in allowing litigation to proceed under the anti-SLAPP analysis – specifically, whether "some detriment," without any loss or likely loss that would give rise to a remedy in law, can constitute "harm" sufficient to meet the prerequisite for the public interest weighing exercise.

²³ *Society of Composers, Authors and Music Publishers of Canada v. Entertainment Software Association*, 2022 SCC 30 [*SOCAN*]

²⁴ BCCA RFJ, ¶37

²⁵ BCCA RFJ, ¶51, quoting RFJ, ¶125

²⁶ BCCA RFJ, ¶52

PART III - STATEMENT OF ARGUMENT

A. The Decision Creates New Liabilities for Sharing Nondefamatory Information Already Available Online, Thereby Disrupting the National Scheme of the *Copyright Act* and Derogating From the Public Interest in Protecting Truth-Seeking and Participation in Public Discourse

28. This is an anti-SLAPP case, but it is one that takes place in a unique legal context: that of the rules governing the sharing of information on the internet. In contrast to other cases considering expression online, the applicant here is not on trial for harming the respondent's reputation, or for making intemperate statements online. He is not even on trial for saying anything incorrect or inaccurate. Rather, Mr. Linkletter is being sued because the respondent says he caused it harm by sharing the most accurate information he could find about its software in an attempt to demonstrate his criticisms of that software were well-founded.

29. The public and national importance of this case is thus rooted in its potential impact on freedom of expression by means of researching and sharing information online. Proctorio failed to implement any technological protection measures on internet content it now alleges was commercially sensitive.²⁷ When that unprotected content, which contained nothing to suggest it was commercially sensitive or confidential, was shared online, the respondent company responded not with a cease and desist letter but with an immediate *ex parte* injunction and a knee-jerk lawsuit making unprecedented legal claims about liability for information-sharing.

30. The BCCA's conclusion that these causes of action are "legally tenable" will chill online discourse about matters of public interest, including complex discussions about the potentially discriminatory use of artificial intelligence technology as a surveillance tool. If an individual can be found liable for sharing hyperlinks to videos posted on public platforms or for sharing information that can be gathered from multiple easily accessible sites, it will make users who are proficient in navigating the internet hesitant to share their understanding through the most inexpensive and accessible form of communication – social media.

31. It is of public and national importance that this Court address this concern. If it does not, it leaves an appellate precedent giving *carte blanche* to companies who want to halt information-sharing they do not like with litigation. This endorsement chills expression of the most

²⁷ RFJ, ¶¶118-21

valuable kind: expression, like Mr. Linkletter's, based on sincerely held concerns about equity, fairness, and the protection of vulnerable communities, and backed by the most reputable sources of information available.

i. The Relationship Between the *Copyright Act* and the Ubiquitous Act of Sharing Hyperlinks is of National and Public Importance

32. There is no question that individuals can be held liable for the statements they make online. Similarly, there is no question that individuals can be held liable for unlawfully downloading, publishing or reproducing the intellectual property of others on the internet. But, under Canadian law, telling others where or how to find the performance of a work has never been a breach of any of the exclusive rights of authors under the *Act*. In this case, Proctorio chose to post its videos on a public channel on YouTube, without any digital locks to control who could access those videos.²⁸ It now alleges that when Mr. Linkletter told the public where to find those videos, its copyright was breached.

33. The chambers judge accepted Proctorio's argument that s. 2.4(1.1) of the *Act* – the “making available” provision discussed at length in this Court's reasons in *SOCAN* – created a cause of action for making a work available to a “new public”.²⁹ Section 2.4(1.1) is Canada's adoption of the *WIPO Copyright Treaty*, which has been interpreted as expanding author rights in Europe.³⁰ Based on jurisprudence from Europe, the chambers judge concluded that Mr. Linkletter could be liable for what the European Court of Justice has held is an exclusive author right to make works available to a “new public”.³¹

34. However, this Court in *SOCAN* – in reasons released subsequent to the chambers decision in this case – rejected the chambers judge's interpretation of s. 2.4(1.1). It concluded that unlike in Europe, Canada's Parliament had not intended to create additional author rights by the addition of s. 2.4(1.1) to the *Act*. Rather, this Court stated, s. 2.4(1.1) is simply an enumerated form of performance right under the *Act*. Where a work is both uploaded to the internet and streamed by

²⁸ RFJ, ¶¶118-21

²⁹ RFJ, ¶94

³⁰ RFJ, ¶94

³¹ *Svensson v. Retriever Sverige AB*, 2014 E.C.D.R. 9 (Court of Justice of the EU) (C-466/12); see also *GS Media BV v. Sanoma Media Netherlands BV*, 2016 E.C.D.R. 25 (Court of Justice of the EU) (Case C-160/15)

users, performance occurs when that work is uploaded, and not each time it is streamed.³²

35. The BCCA did not conduct an analysis of the text of the *Act* or refer to which provision it concluded created a substantially meritorious cause of action against Mr. Linkletter under the *Act*. It did not specifically state a viable cause of action exists against Mr. Linkletter for making a work available to a “new public”, as the chambers judge did, perhaps implicitly acknowledging the effect of *SOCAN*. The only copyright-protected act it specifically identified as one that passed the merits-based test under the *PPPA* was that of “publication.”

36. By holding that the sharing of a “controlled link to an unlisted video” may be a form of “publication” under the *Act*,³³ the Court has substantially expanded the publication right in a manner that significantly shifts the balance between the rights of authors and those who use information posted by authors on publicly facing websites. In doing so, the Court endorsed the chambers judge’s determination that the “wrongdoing” in copyright infringement lies in “the very act of sharing access to it without the owner’s authorization.”³⁴ This is a far-reaching change to Canadian copyright law.

37. If this line of reasoning is correct, millions of Canadians may be committing copyright infringement in their daily, routine use of the internet. Modern hyperlink use is widespread: links are the means by which people share music, videos, GIFs, informational webpages, news articles and other internet content with their family, friends, colleagues, acquaintances and strangers. Hyperlinks are shared constantly by text message, email, Twitter, Facebook, Slack, WhatsApp, Signal, book footnotes, journal article footnotes, blogs – by virtually every means imaginable. Indeed, the videos at issue here were hosted on a platform created specifically for the purpose of sharing videos. Copying and pasting a hyperlink into an email – or clicking a “share” button at the bottom of a webpage in order to forward a link onwards – does not require or even ask a user to obtain the “owner’s authorization” to share that hyperlink. The BCCA’s reasoning in this case amounts to a conclusion that a form of copyright wrongdoing is occurring every time a person emails another a link to a *Washington Post* article without first contacting the author to obtain their permission, or every time an academic links to another author’s paper in a footnote.

³² *SOCAN*, ¶¶8, 55, 56

³³ BCCA RFJ, ¶44

³⁴ BCCA RFJ, ¶36, referring to RFJ, ¶90

38. The BCCA suggests its proposed liability for hyperlink-sharing could be limited based on the “controlled” nature of a link or “unlisted” nature of the content behind it – but this distinction is not grounded anywhere in the *Act* that gives rise to liability in the first place. In any event, it is thoroughly unclear how such a limit would work in practice. If a subscriber shares a link to a *Wall Street Journal* article, are they required to research whether the recipient has a *Wall Street Journal* subscription, or whether the link has safeguards such that a person accessing it would need a subscription to read it? At what point does a link cease to be “controlled”? In Mr. Linkletter’s case, at minimum tens of thousands of internet users had already been given access to the hyperlinks before he shared them,³⁵ and they were hosted on a site designed for video sharing among public users. Nevertheless, the BCCA concluded the videos could still be classified as “controlled” links to “unpublished” works. Internet users are left to guess as to what a “controlled link to an unlisted video” could possibly mean to their potential copyright liability.³⁶

39. The BCCA’s decision also does not grapple with the implications of its reasons for technological neutrality. A hyperlink is the internet version of a footnote in a book, or a lamppost flyer advertising a concert: it tells a reader where a copyrighted work can be found, but is not the copyrighted work itself. As this Court has stated, technological neutrality requires that “absent parliamentary intent to the contrary, the *Copyright Act* should not be interpreted so as to favour or discriminate against any form of technology.”³⁷ If sharing a hyperlink can constitute copyright infringement, there must be some language in the *Act* explaining why this is the case for an online reference to a work, but not for an analog reference. The BCCA failed to point to any such language and thus left internet users with no ability to understand the scope and rationale for their potential liability.

40. Even if the sharing of a hyperlink can constitute publication under the Act, it is nonetheless of vital public and national importance that this Court fill in the gaps in the BCCA’s interpretation, and explain when and why this will be the case. The effect of leaving the BCCA’s ambiguous

³⁵ Proctorio provided evidence that over 41,000 university administrators could access the Academy – the more exclusive of the two locations where it posted the video links. The second location, the Help Center, was accessible by a larger but unspecified number of users. RFJ, ¶19

³⁶ BCCA RFJ, ¶44

³⁷ *SOCAN*, ¶6

decision on the books is to create immense uncertainty among internet users about the scope of their potential liability for link-sharing.

41. Although the BCCA characterized its conclusion on the viability of the copyright claim in this case as a “preliminary” one,³⁸ its decision will still be significantly influential on the sharing of information online. In the particular context of a claim for non-commercial use of intellectual property against an individual internet user, there is a unique lack of incentive for any individual to bear the costs of defending a suit. This is because in many cases the amount of monetary liability facing that individual is so limited – which, combined with the significant costs involved in civil litigation and the profound resource imbalance between large companies and individual internet users, provides little incentive to take on the cost of a legal defence, as opposed to agreeing to a company’s demands.

42. The *Act* provides for statutory damages for non-commercial infringement. However, under s. 38.1(1)(b) of the *Act*, an author can only claim in the range of \$100 to \$5,000 for non-commercial infringement with respect to all infringements involved in the proceedings, for all works or other subject matter. Thus, an individual threatened with a copyright claim over sharing a link faces a choice: settle for \$5,000 or less, or incur tens or hundreds of thousands of dollars in litigation costs.

43. The lack of incentives for individuals to fight non-commercial intellectual property claims, however questionably meritorious, is illustrated by the treatment of other copyright infringement cases in the courts. The use of copyright claims by companies to *en masse* disincentivize conduct by internet users even if such conduct may well be legally permissible is well-documented – the significant power imbalance between companies and individual internet users has virtually guaranteed the legal bases for such claims will not be ever tested. In many contexts, questionable copyright claims have been weaponized to allow companies to collect damages in the form of settlements from hundreds of users at a time; these “copyright trolling” actions have been a problem in the United States for some time, even as they creep north of the border.³⁹

³⁸ BCCA RFJ, ¶43

³⁹ Matthew Sag and John Haskell, “Defense Against the Dark Arts of Copyright Trolling” (2018) 103 Iowa L. Rev. 571 at 573; see also *ME2 Productions, Inc v. Doe*, 2019 FC 214, ¶48; *Voltage Pictures LLC v. John Doe*, 2014 FC 161, ¶¶106-15; *Voltage Holdings, LLC v. Doe #1*, 2022 FC 827, ¶9

44. The BCCA’s decision makes it even more likely that defendants in these kinds of claims will settle rather than go to trial. It guarantees, at the very least, that a defendant cannot hope to dismiss such a claim by means of the full indemnity costs of the *PPPA*⁴⁰ because such a claim is not legally tenable – removing even that limited possibility of an individual being able to afford a defence. It is very important to the public’s ability to understand the laws that govern their use of the internet that this Court clearly explain their rights on this rare opportunity to do so.

ii. Imposing Liability for Breach of Confidence for Sharing Information Widely Available Online Will Create Great Uncertainty and Chill Valuable Discourse

45. Another issue of importance to all individuals who share information on the internet relates to the legal question of whether information posted in various places online retains the quality of confidence necessary to found a cause of action for breach of confidence.

46. Both the chambers judge and the BCCA failed to identify any information in the videos that was not available by simply Googling “how Proctorio works” and reading any of the dozens of webpages that show up in such a search. The respondent itself, along with two levels of court, declined to identify anything meaningfully different between the information in the videos and the information available elsewhere.

47. Nonetheless, the chambers judge concluded, and the BCCA agreed, that the information possessed the requisite quality of confidence. The law of breach of confidence is clear – there can be no liability for breach of confidence if the information is not in fact confidential because it is otherwise publicly available. This is so even if the plaintiff sought to keep the information confidential and even if the defendant did not know, at the time of sharing the information, that it was otherwise available.⁴¹

48. The only exception to this is the “springboard principle”: the concept that publicly available information can found a breach of confidence claim where it is assembled in such a way that accessing it would “springboard” the defendant towards some unfair advantage.⁴² The springboard

⁴⁰ *PPPA*, s. 7

⁴¹ Peter T. Burns and Joost Blom, *Economic Torts in Canada*, 2nd ed. (Toronto: LexisNexis, 2016) at 235-36

⁴² *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 SCR 574, at 610-11; *Abode Properties Ltd. v. Schickedanz Bros Ltd.*, 1999 ABQB 902, ¶47; *Stenada Marketing Ltd. v.*

principle explains that the mere fact that information has been gathered in one place or “assemble[d]”⁴³ does not mean it retains a quality of confidence if its material constituent parts are publicly available. Instead, the information only remains confidential if it is “difficult to assemble” or it has been “assembled in an innovative manner or analysed in an innovative manner” such that access readily provides the defendant with more advantage than would be available from the publicly accessible information.⁴⁴

49. In this case, the BCCA imposed a significantly lower standard for information available on the internet to retain its quality of confidence than for information available elsewhere. Normally, if information is otherwise available, a person is free to share it without being liable for breach of confidence, regardless of how they obtained it. The amount of effort required to conduct a simple Google search to “assemble” information would not, in other contexts, mean that the information continued to be confidential – such a search is not a “innovative” or difficult method of assembly or analysis.

50. The effect of the BCCA’s decision is that information obtained from a website that requires a password can form the basis for a breach of confidence claim notwithstanding that the information is also available from a simple Google search. This will cause extraordinary uncertainty and lead to arbitrary outcomes – one individual may be liable for sharing information because they obtained it from one website while another is free to share it because they obtained it from a number of other websites that did not require any credentials to access.

51. This breach of confidence precedent has significant implications because, like the copyright claim in this case, it is based on facts applicable to the daily activities of users across the internet. The respondent’s argument that Mr. Linkletter had an obligation to keep the links confidential is based on a broadly worded contract of adhesion he allegedly clicked agreement to at some point⁴⁵

Nazareno, 1990 CanLII 917 (BC SC), pp. 11-12; *Foreman v. Chambers et al.*, 2006 BCSC 1244, ¶80, *aff’d* 2007 BCCA 409 [*Foreman*]; *No Limits Sportswear Inc v. 0912139 B.C. Ltd.*, 2015 BCSC 1698, ¶¶19-20

⁴³ RFJ, ¶66

⁴⁴ *Foreman*, ¶65

⁴⁵ Mr. Linkletter strongly disputes and disputed in the courts below that the language in this contract – which merely requires him to refrain from “copy[ing] or duplicat[ing]” the information

– the type of agreement that internet users regularly agree to with minimal to no review, but are nonetheless bound by.

52. Many internet users would likely be alarmed to learn that sharing information from videos viewed online that do not, on their face, state they are “commercially sensitive or should be kept from public view” could give rise to a breach of confidence action. This is especially the case when the information in those videos is widely available elsewhere on the internet.⁴⁶

B. This Court’s Intervention is Required Because the BCCA’s Decision Departs From Ontario Authority and Undermines the Public Purpose Served by Anti-SLAPP Legislation

53. The BC Legislature, like the legislatures in Ontario and Quebec, has attempted to cope with the recent increased proliferation⁴⁷ of SLAPP suits in that province by means of legislation that screens out suits impacting public participation where they lack merit, or will not actually accomplish the public interest goal behind litigation – i.e., the redress of harm. The BCCA’s interpretation of the *PPPA* in this case fundamentally undermines the ability of the courts to dismiss suits in either of these instances, and diverges BC anti-SLAPP law from the accepted approach in Ontario.

i. The Public Interest in the Effective Operation of Anti-SLAPP Legislation is Significantly Undermined by the BCCA’s Holding That a “Novel” Cause of Action Should Not be Dismissed

54. The *PPPA* serves an important public interest by ensuring that litigants with access to significant legal resources cannot strategically deploy those resources to intimidate individuals who speak out on matters of public interest. The public interest in the effective operation of anti-SLAPP legislation is heightened where, as in this case, Mr. Linkletter is seeking to protect the interests of vulnerable students who may be harmed by a corporate plaintiff’s product. As of the date of this memorandum the BCCA has never applied the *PPPA* to dismiss a lawsuit. The decision in this case creates an additional safe harbour for lawsuits that attack public expression by holding

in the links and explicitly provides that Proctorio is not responsible for content hosted on other sites, such as YouTube – imposed an obligation to keep links to public YouTube videos confidential.

⁴⁶ RFJ, ¶64

⁴⁷ *Pointes*, ¶3

that “novel” claims should not fail the merits test under the *PPPA*. If creative pleading and framing of a case can avoid the dismissal of suits pursuant to the *PPPA*, the legislation will be rendered even more ineffective in protecting individuals from well-funded litigation.

55. Anti-SLAPP legislation in BC and Ontario creates a unique evidentiary standard by which claims must be assessed for dismissal. If a plaintiff does not satisfy the court that “there are grounds to believe... the proceeding has substantial merit,” the case must be dismissed. To meet this standard, the respondent must show the claim is “legally tenable and supported by evidence that is reasonably capable of belief.”⁴⁸

56. In *Pointes*, *Platnick*, and *Neufeld*, this Court has addressed in several contexts the meaning of “evidence that is reasonably capable of belief” – a standard “more demanding than the one applicable on a motion to strike,” with the plaintiff’s evidentiary burden “taking into account the stage of litigation at which [the application] is brought.”⁴⁹ However, it has yet to address what “legally tenable” means in the context of anti-SLAPP legislation where the question on the application is a novel question of law: should the court definitively determine the viability of the claim in such an instance, or should it be left to be determined at trial?

57. Courts in Ontario and BC have proposed two different interpretations of this phrase. The BCCA concluded in this case that in determining whether the claim was legally “legally tenable”, it should not resolve novel questions of law.”⁵⁰ Ontario courts, on the other hand, have held that such questions can and should be resolved on an anti-SLAPP application.⁵¹

58. The BCCA’s view that it is not only not required to decide novel questions of law on an anti-SLAPP application, but in fact “should not” do so is inconsistent with the plain meaning of “legally tenable”, and introduces a tremendous amount of inefficiency to the anti-SLAPP framework.

59. Where a question turns on the wording of the statute or interpretation of the common law,

⁴⁸ *Pointes*, ¶¶17, 49

⁴⁹ *Pointes*, ¶¶37, 39, 50; see also *Neufeld*, ¶55

⁵⁰ BCCA RFJ, ¶44

⁵¹ see *Subway v. CBC*, 2019 ONSC 6758 [*Subway ONSC*], rev’d 2021 ONCA 25, leave to appeal ref’d 2021 CanLII 61401 [*Subway ONCA*]

and not an assessment of the facts, assessing the legal tenability of a claim requires the court to decide the question before it, even if there are novel aspects to the claim. If this is not the case, the legal assessment on an anti-SLAPP application is *less* demanding than a motion to strike standard, where novel claims must be determined when the court is capable on the pleadings of making such a determination. As this Court recognized in *Atlantic Lottery*, determining novel legal issues on the pleadings is necessary to the efficient functioning of the civil justice system:

[A] claim will not survive an application to strike simply because it is novel. It is beneficial, and indeed critical to the viability of civil justice and public access thereto that claims, *including novel claims*, which are doomed to fail be disposed of at an early stage in the proceedings. This is because such claims present “no legal justification for a protracted and expensive trial” (*Syl Apps Secure Treatment Centre v. B.D.*, 2007 SCC 38, [2007] 3 S.C.R. 83, at para. 19). If a court would not recognize a novel claim when the facts as pleaded are taken to be true, the claim is plainly doomed to fail and should be struck. In making this determination, it is not uncommon for courts to resolve complex questions of law and policy...⁵²

60. These comments apply with even more force to an application under the *PPPA*, where a “more demanding” standard applies than on a motion to strike.⁵³ Further, on an anti-SLAPP application, the need to avoid “a protracted and expensive trial” is grounded not only in judicial efficiency but the importance of protecting freedom of expression on matters of public interest.

61. As the Ontario courts have recognized, these applications can take a considerable amount of time and resources;⁵⁴ in the interests of judicial economy and in fairness to litigants, the courts must take seriously their obligation to provide a meaningful answer to the question of whether the claim has substantial legal merit. Despite the fact that the determination is in one sense “preliminary”, the legal analysis must be clear, and in case like this one, firmly grounded in the statute. No deference should be shown to the trial judge’s findings on the law. The BCCA’s legal analysis in this case, on the other hand, is perfunctory, apparently on the basis that the determination is “preliminary”.⁵⁵

62. The BCCA’s approach here creates a different standard for a “legally tenable” in BC than in

⁵² *Atlantic Lottery Corp. Inc v. Babstock*, 2020 SCC 19, ¶19 (emphasis in original)

⁵³ *Pointes*, ¶50

⁵⁴ *Tamming v. Paterson*, 2021 ONSC 8306, ¶¶7-9; *Park Lawn Corporation v. Kahu Capital Partners Ltd.*, 2023 ONCA 129, ¶35

⁵⁵ BCCA RFJ, ¶¶14, 43

Ontario. In the case of *Subway v. CBC*, the plaintiff Subway brought a negligence claim alleging a novel duty of care on the part of the defendant Trent University. The chambers judge refused to dismiss the claim in part because of its novelty, concluding that the novelty of the claim made it “one that should not be dismissed at an early stage like this.”⁵⁶ The Court of Appeal disagreed. It conducted an in-depth legal analysis of the existence of duty of care in the circumstances, concluding that no such duty was owed and that the claim should thus be dismissed under the *PPPA*.⁵⁷

63. The BCCA’s approach also comes with significant consequences for anti-SLAPP applications in BC. If anti-SLAPP motions cannot be brought with respect to novel causes of action, defendants in such actions will be deprived of an important benefit that the *PPPA* on its face seems to provide, requiring those defendants to instead (or in addition) bring separate motions to strike. Moreover, if a claim can survive an anti-SLAPP motion simply because it is “novel”, and thus “should not be ruled out at this early stage of the proceeding,”⁵⁸ a plaintiff that wishes to avoid a dismissal is simply required to marshal their superior legal resources to ensure the claim pleads something unprecedented. This cannot have been the legislature’s intention. This Court’s intervention is required to ensure that the public interest protected by the statute is not compromised in a fundamental way.

ii. The BCCA’s Decision on Harm Further Weakens the *PPPA*, and Compromises the Public Interests Protected by That Legislation

64. This case raises a second issue of public importance related to the effective and uniform application of anti-SLAPP legislation: the meaning of “harm” under the statutory weighing analysis. Under s. 4(2)(b) of the *PPPA*, a court must identify “harm likely to have been or to be suffered by the respondent as a result of the applicant’s expression” as a prerequisite to the public interest weighing exercise. If this harm exists and is serious enough that the public interest in continuing the proceeding outweighs the public interest in protecting the applicant’s expression, the lawsuit continues on.

65. In this case, it was undisputed that there was no evidence Proctorio had or would likely suffer

⁵⁶ *Subway ONSC*, ¶127

⁵⁷ *Subway ONCA*

⁵⁸ BCCA RFJ, ¶44

loss as a result of Mr. Linkletter's tweets. The only loss pled by Proctorio involved assertions that after viewing the information in the videos students might be able to circumvent the technology or that competitors might gain an advantage. But Proctorio led no evidence at all to substantiate that these were real possibilities. The chambers judge concluded that the harms the respondent alleged were not, on the evidence, likely to occur, but instead were a mere "theoretical risk".⁵⁹ Given the evidence that the information on the videos was otherwise available, even if it had suffered harm the respondent could not have met the fundamental requirement of showing that harm was caused by the defendant's actions in any event.⁶⁰

66. The chambers judge and the BCCA, however, proposed a novel interpretation of "harm" that will have significant consequences for anti-SLAPP litigation. The BCCA relied on the chambers judge's holding that there was a "detriment" to Proctorio because it was unable to keep certain information segregated, and that this "compromised the integrity of [the plaintiff's] Help Center and Academy screens."⁶¹ This amounts to no more than a recognition that Proctorio wanted to keep the information out of the public eye and could not do so – it does not identify any *harm* that resulted from this frustration of Proctorio's objective.

67. The "harm" of "compromised... screens" is not a form of loss that gives rise to a remedy in law. Proctorio in this case claims for (a) general and special damages and (b) a permanent injunction. To receive those remedies, it has to show that (a) it suffered losses that entitle it to damages and (b) it requires an injunction against Mr. Linkletter to prevent him from sharing "Confidential Information" again (something very difficult to show here, where the respondent sued Mr. Linkletter and obtained an *ex parte* injunction against him without even sending him an email to explain its position that the technological support videos were confidential).

68. The BCCA also relied on the "potential for irreparable harm" that the judge on the interlocutory *ex parte* injunction application concluded existed. But a chambers judge's non-binding interlocutory decision that there was, on the limited (and in some respects incorrect)⁶² evidence before him, a "potential" for harm is not harm giving rise to any remedy for the

⁵⁹ RFJ, ¶124

⁶⁰ RFJ, ¶¶66, 79; *Pointes*, ¶¶68, 72

⁶¹ RFJ, ¶125, quoted in BCCA RFJ, ¶51

⁶² RFJ, ¶137

respondent here.

69. The identification of harm as a prerequisite to the public interest weighing exercise is grounded in the purpose of anti-SLAPP legislation – making sure that lawsuits that interfere with public expression only proceed where there is a public interest in the litigation going forward. The public interest in private litigation is triggered by the ability of a lawsuit to provide redress for specific harms. Where the only detriment to the plaintiff is a frustration of its intention unconnected to a loss that gives rise to a legal remedy, there is no public interest in the litigation going forward.

70. Given the valuable nature of Mr. Linkletter’s expression and the complete lack of evidence regarding meaningful harm, there is no doubt that the chambers judge erred in concluding that the “harm” was “serious” enough to outweigh the public interest in protecting Mr. Linkletter’s expression. This is particularly clear after this Court’s holding in *Neufeld*, issued after the decision in this case was released. This is the exact type of case the *PPPA* was meant to stop.

71. But on a broader level, by concluding forms of “harm” unconnected to an eventual remedy in the litigation can give rise to a suit continuing past an anti-SLAPP application, the BCCA here has put forward a hamstrung version of the *PPPA*. Like its interpretation of the “legally tenable” standard, the Court’s conclusion allows for claims to continue where there is little to be practically achieved through the litigation: claims like this one, where a wealthy company can continue to burn through court time in order to pursue a grudge against a technology specialist who criticized it, without any hope of getting anything from him as a result. This Court’s intervention is required to clarify that the weighing analysis in the public interest analysis under anti-SLAPP legislation requires a demonstration not just of a theoretical detriment but harm giving rise to a remedy in law.

PARTS IV AND V - SUBMISSIONS CONCERNING COSTS AND ORDER SOUGHT

72. The applicant asks that leave to appeal be granted with costs in the cause.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated: June 19, 2023



Catherine Boies Parker, K.C.
and Julia W. Riddle
Counsel for the Applicant

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