No. S208730
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

PROCTORIO, INCORPORATED

PLAINTIFF

AND:

IAN LINKLETTER

DEFENDANT

WRITTEN SUBMISSIONS OF THE DEFENDANT, IAN LINKLETTER

Application to Dismiss Under the *Protection of Public Participation Act*, S.B.C. 2019, c. 3

Counsel for the Defendant

Catherine J. Boies Parker, Q.C.
and Caroline North
Arvay Finlay LLP
1512 – 808 Nelson Street
Box 12149, Nelson Square
Vancouver BC V6Z 2H2
Tel: 604.696.9828
Fax: 1.888.575.3281

Counsel for the Plaintiff

Timothy Pinos
and Jessica Lewis
Cassels Brock & Blackwell LLP
2200 – 885 West Georgia Street
Vancouver BC V6E 3C8
Tel: 416.869.5784 and 778.372.7340
Fax: 604.691.6120

Counsel for the Attorney General of British Columbia, appearing pursuant to the Constitutional Question Act

Jonathan Penner
Legal Services Branch
Ministry of Attorney General
P. O. Box 9280 Stn Prov Govt
Victoria, BC V8W 9J7
Phone: 250.952.0122
Fax: 250.356.9154

Time: 10:00 am
Date: 30 November 2021
Place of Hearing: Vancouver BC
Time Estimate: 4 days
Matter to be heard via MS Teams

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WRITTEN SUBMISSIONS OF THE DEFENDANT, IAN LINKLETTER

PART I. INTRODUCTION

1. This is an application under section 4 of the *Protection of Public Participation Act*, S.B.C. 2019, c. 3 ("*PPPA*"). The *PPPA* is a judicial "screening mechanism" designed to prevent wealthy, powerful parties from using strategic lawsuits to silence or otherwise deter public criticism, so that public debate can remain vigorous.

2. On this kind of application, the defendant/applicant must demonstrate only that the litigation arises from expression made by the applicant on a matter of public interest. The burden then shifts to the plaintiff/respondent to demonstrate reasonable grounds to believe that it has a meritorious claim and that the defendant/applicant has no defence. The plaintiff must then demonstrate that it has suffered serious enough harm that the public interest in continuing the proceeding outweighs the public interest in protecting Mr. Linkletter's expression.

3. The plaintiff, Proctorio Incorporated ("Proctorio"), makes academic surveillance software: programs that record and analyze students while they write examinations. The use of this kind of academic surveillance software is controversial. Concerns raised by students and educators include the impact of continuous video recording on students with test anxiety,[1] barriers to students with disabilities,[2] and discrimination in face detection algorithms against students of colour.[3]

4. The defendant, Ian Linkletter, is a vocal critic of this technology, and has participated in the public debate about this software at the University of British Columbia and more broadly. In this litigation, Proctorio is suing Mr. Linkletter for eight tweets, in which he commented on Proctorio and included links to YouTube videos published by Proctorio to explain its software to its over 41,000 users. Proctorio claims that Mr. Linkletter's tweets containing these video links, and a screenshot of part of one web page, constitute a breach of confidence, infringement of copyright, and circumvention of a technological protection measure.

5. All of these claims lack merit. It is not a breach of confidence to share information that is not confidential — and the information in Proctorio's YouTube videos was widely available on

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[1] Affidavit #1 of Ian Linkletter, filed 16 Oct 2020 ("Linkletter #1"), paras. 21-22 and Exhibits E and F.
[2] Linkletter #1, paras. 23-26 and Exhibits G and H.
[3] Linkletter #1, paras. 27-30 and Exhibits I and J.

the internet, including through Proctorio's business partners. It is not infringement of copyright to hyperlink to information published on the internet, especially on YouTube where Proctorio licensed others to share its videos. It is not circumvention of a technological protection measure where Proctorio has not utilized any technology to protect its content, leaving nothing for the defendant to circumvent. Moreover, Proctorio has suffered no harm as a result of the tweets at issue. This litigation does not vindicate any legitimate interest of the plaintiff. Rather, it constitutes an undue interference with the defendants' participation in the public debate about academic surveillance software.

6. This is precisely the kind of case that the *PPPA* is meant to address.

PART II. FACTS

A. Proctorio's Academic Surveillance Software

7. Proctorio develops and markets academic surveillance software to educational institutions. The basic function of academic surveillance software is to remotely monitor, record, and analyze students who write tests and examinations.[4]

8. [redacted]

9. [redacted]

[4] Affidavit #1 of John Devoy, made 31 Aug 2020 ("Devoy #1"), para. 3.
[5] Linkletter #1, Exhibit BI, p. 348.
[6] Devoy #1, para. 3.
[7] Affidavit #1 of John Trueman, filed 2021 Apr 15 ("Trueman #1"), Exhibit FF, p. 385.
[8] Trueman #1, Exhibit FF, p. 371.
[9] Linkletter #1, Exhibit BH, p. 333.

[redacted]

B. The Public Interest in Proctorio

10. Extensive public discussion about Proctorio takes place on social media, including Twitter and Reddit;[15] in the mainstream news media, including the *Washington Post*,[16] *The New York Times*,[17] *The Guardian*,[18] and CNN;[19] in online news media, including Digital Trends[20] and VICE Media;[21] in the educational press, including *Inside Higher Ed*;[22] and in campus newspapers.[23] Dozens of student petitions have circulated calling for educational institutions to cease using Proctorio.[24] It has also been the subject of inquiry by a number of United States Senators.[25]

11. The market for academic surveillance software has grown significantly with online learning during the COVID-19 pandemic.[26] Proctorio experienced a 900% year-over-year growth in examinations completed between April 2019 and April 2020.[27] It claims to have over 1,200 educational institutions as clients[28] and over 20,000,000 assessments administered using its software in 2020.[29] Between September 2020, the month Proctorio commenced this action, and

[10] Linkletter #1, Exhibit BS, p. 421.
[11] Linkletter #1, Exhibit BS, p. 422.
[12] Linkletter #1, Exhibit BS, p. 423.
[13] Linkletter #1, Exhibit BR, p. 399.
[14] Linkletter #1, Exhibit AW, p. 313; Devoy #2, para. 11(c).
[15] Devoy #1, para. 26.
[16] Linkletter #1, para. 32(c) and Exhibit M.
[17] Linkletter #1, paras. 32(f) and (j) and Exhibits Q and U.
[18] Linkletter #1, para. 46 and Exhibit AE.
[19] Linkletter #1, para. 32(h) and Exhibit S.
[20] Linkletter #1, para. 36 and Exhibit X.
[21] Linkletter #1, para. 32(i) and Exhibit T.
[22] Linkletter #1, para. 32(b) and (d) and Exhibits L and N.
[23] Linkletter #1, paras. 32(e) and 45 and Exhibits P and AD.
[24] Linkletter #1, Exhibit W.
[25] Cross-examination of John Devoy, 16 March 2021 ("Cross-examination of Devoy"), pages 45-47.
[26] Devoy #1, para. 7.
[27] Cross-examination of Devoy, page 17, lines 1-4.
[28] Affidavit #2 of John Devoy, filed 2020 Nov 17 ("Devoy #2"), para. 6.
[29] Devoy #2, para. 7.

March 2021, the month Proctorio's affiant was cross-examined for this application, the number of active weekly users increased from 2 million to 3 million.[30]

12. The defendant, Ian Linkletter, is a Learning Technology Specialist in the Faculty of Education at the University of British Columbia ("UBC"), where he supports faculty members in delivering online courses.[31] He is actively engaged in public discussions about learning technology, student safety and privacy[32] through social media, especially Reddit and Twitter.[33] Reddit is an online discussion board which includes a "r/UBC" community frequented by UBC students.[34] Twitter is a microblogging and social networking service where users post and interact with messages known as "tweets."[35] Mr. Linkletter is active on Twitter and, in August 2020, had 958 followers.[36]

13. UBC has used Proctorio since 2017,[37] although utilization increased significantly during the COVID-19 pandemic.[38] Student discussions on Reddit indicate that Proctorio increases their stress and makes them feel under suspicion.[39] In March 2020, UBC granted an "accommodation" to excuse a student of colour from using Proctorio, because the software could not detect the student's face.[40] Ordinarily, exam "accommodations" are only offered in cases of disability.[41]

14. On June 26, 2020, Proctorio CEO Mike Olsen confronted a UBC student on Reddit who had complained that Proctorio's support agent had not provided timely or effective technical assistance during a timed exam.[42] Writing under the alias "artfulhacker,"[43] Mr. Olsen replied to the student's Reddit post, saying "If you're gonna lie bro… don't do it when the company clearly

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[30] Cross-examination of Devoy, page 20, lines 3-7.
[31] Linkletter #1, para. 10.
[32] Linkletter #1, para. 12.
[33] Linkletter #1, para. 16.
[34] Linkletter #1, para. 16.
[35] Devoy #1, para. 27.
[36] Devoy #1, para. 31.
[37] Devoy #1, para. 20.
[38] Linkletter #1, paras. 14-15.
[39] Linkletter #1, para. 16 and Exhibit C.
[40] Cross-examination of Ian Linkletter, 18 March 2021 ("Cross-examination of Linkletter"), page 104, line 25; page 105, lines 1-7.
[41] Cross-examination of Linkletter, page 105, lines 19-23.
[42] Devoy #1, para. 55.
[43] Linkletter #1, para. 41; Cross-examination of Devoy, page 80, lines 2-4.

has an entire transcript of your conversation." Mr. Olsen attached to his message a transcript of the student's private[44] and confidential online support session.[45]

15. Mr. Linkletter responded to Mr. Olsen on Reddit, criticizing his attack on the student.[46] He also tweeted a screenshot of Mr. Olsen's Reddit post, criticizing his conduct.[47] The next day, Mr. Olsen removed the transcript from Reddit and apologized to the student.[48]

16. The June 2020 incident at UBC sparked a sustained process of public discussion and debate at UBC about Proctorio and other academic surveillance software. UBC's student union, the Alma Mater Society, called for UBC to end its relationship with Proctorio.[49] UBC's Provost convened a working group that developed a set of "principles for appropriate use of remote invigilation tools" which highlighted concerns about privacy, students with disabilities, and racial bias.[50] Among other things, the UBC Principles advise instructors to "explain to students as clearly as possible what the tool does and what that means for them during and after an exam."[51]

17. The June 2020 incident received international media attention in an article published in *The Guardian* on July 1, 2020.[52]

18. It was at this point that Proctorio determined that Mr. Linkletter had taken "an aggressive critical stance against Proctorio."[53] Proctorio CEO Mike Olsen started "following" Mr. Linkletter on Twitter on June 27, 2020, and Mr. Linkletter assumes that every time he tweets, Mr. Olsen is notified.[54] Proctorio did not, however, make any attempt to contact him.[55]

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[44] Cross-examination of Linkletter, page 24, lines 6-8.
[45] Linkletter #1, para. 41 and Exhibit AA.
[46] Cross-examination of Linkletter, page 21, line 12.
[47] Linkletter #1, para. 43 and Exhibit AA.
[48] Linkletter #1, para. 44 and Exhibit AB.
[49] Linkletter #1, para. 48 and Exhibit AF.
[50] Linkletter #1, para. 50 and Exhibit AG.
[51] Linkletter #1, Exhibit AG, p. 260.
[52] Linkletter #1, para. 46 and Exhibit AE.
[53] Devoy #1, para. 30.
[54] Linkletter #1, Exhibit AC, p. 240.
[55] Cross-examination of Linkletter, page 44, lines 9-16.

C. Mr. Linkletter's Expressions at Issue in this Action

19. Proctorio's action against Mr. Linkletter concerns eight tweets which he made shortly before fall classes resumed in 2020, during a time in which the use of Proctorio software was a matter of vigorous debate at UBC and elsewhere. Seven of those tweets included links to Proctorio's YouTube videos, while one contained a screenshot showing that Proctorio had disabled some links on its own website (the "Academy Screenshot").

i. Mr. Linkletter's tweets

20. On the evening of Sunday, August 23, 2020, Mr. Linkletter accessed Proctorio's online Help Center to learn more about how the software worked.[56]

21. Mr. Linkletter clicked on some of the videos, which opened on YouTube.com.[57] YouTube is an online video sharing platform[58] which allows individuals and businesses to "share videos and other content," thus enabling "people to connect, inform, and inspire others across the globe."[59]

22. Mr. Linkletter published a tweet[60] on Twitter containing a link to Proctorio's "Abnormalities Overview" video as displayed on YouTube.com, along with Mr. Linkletter's commentary in the form of a quote from the video's narration and an emoji.[61]

23. Later that same Sunday evening, Proctorio's Director of Digital Marketing, John Devoy, became aware of Mr. Linkletter's tweet.[62] He disabled the link to the YouTube video so that it could no longer be viewed on YouTube by Mr. Linkletter's Twitter audience.[63] No one from Proctorio contacted Mr. Linkletter, either on August 23 or throughout the following day.[64]

24. On the evening of Monday, August 24, 2020, Mr. Linkletter published six further tweets containing links to Proctorio's YouTube videos.[65] Each of these tweets contained Mr. Linkletter's

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[56] Cross-examination of Linkletter, page 30.
[57] Cross-examination of Linkletter, page 32, lines 10-25.
[58] Devoy #1, para. 11.
[59] Linkletter #1, Exhibit AM, p. 294.
[60] Linkletter #1, para. 77 and Exhibit AY.
[61] Cross-examination of Linkletter, page 39, lines 9-11.
[62] Cross-examination of Devoy, page 114, lines 2-18.
[63] Devoy #1, para. 40; Cross-examination of Devoy, page 114, lines 19-25
[64] Cross-examination of Devoy, page 115, lines 24-25; page 116, lines 1-4.
[65] Linkletter #1, paras. 78-83.

original commentary about Proctorio's academic surveillance software, based on his observations from the videos.[66] For example, his tweet in relation to the "Abnormal Eye Movement" video observed that "this is the one that will show you, beyond a doubt, the emotional harm you are doing to students by using this technology."[67] About the "Abnormal Head Movement" video, he commented that "this is the one that will identify students with medical conditions that affect their head movement. They will get a higher Suspicion Level for it."[68] His comment on the "Behavior Settings" video referred obliquely to Proctorio's marketing material emphasizing how instructors could manipulate the software's settings: "This video about Behaviour Settings shows you how to create your own custom settings for what behaviour makes someone suspicious. The important thing is that the choice is yours, not theirs, got it?"[69]

25. Proctorio disabled links to all of the videos within about two hours.[70] Again, contrary to its general practice,[71] no one from Proctorio contacted Mr. Linkletter. Instead, Proctorio started preparing for litigation.[72]

26. Over several days between August 25 and 29, 2020, Mr. Linkletter perused "Proctorio Academy," an online course in the use of Proctorio's academic surveillance software.[73] He noticed that several videos in the course were not functional because Proctorio had disabled the links to them. Mr. Linkletter was aware of Proctorio's past practice of removing information when it becomes a subject of scrutiny[74] and in order to illustrate this,[75] Mr. Linkletter took a screenshot of part of one page of the Proctorio Academy course (the "Academy Screenshot").[76] He then attached

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[66] Linkletter #1, Exhibits AZ through BE.
[67] Linkletter #1, Exhibit BB.
[68] Linkletter #1, Exhibit BC.
[69] Linkletter #1, Exhibit BE.
[70] Linkletter #1, para. 84 and Exhibit BF.
[71] Devoy #2, para. 41; Cross-examination of Devoy, page 117, lines 19-25; page 118, lines 1-7.
[72] Cross-examination of Devoy, page 120, lines 11-24.
[73] Cross-examination of Linkletter, page 85, lines 1-2 and 17-24.
[74] Linkletter #1, Exhibit D, p. 15, and Exhibit AC, p. 240.
[75] Cross-examination of Linkletter, page 42, lines 24-25.
[76] Linkletter #1, para. 91 and Exhibit BG.

the screenshot to a tweet (the "Academy Screenshot Tweet") which he published on Saturday, August 29, 2020, along with his original commentary:

> All of us have to demand transparency.
>
> How EXACTLY does this non-magical software work? Why is Proctorio hiding this information? Their OWN COURSE on how Proctorio works was censored this week after I shared some of the videos.[77]

ii. The YouTube videos

27. The videos whose links were included in Mr. Linkletter's tweets are not hosted by Proctorio, but rather on YouTube, "an online video sharing platform."[78] The YouTube videos are presented to users of the Help Center and Proctorio Academy as "embedded" videos,[79] which can be viewed directly on those web sites or, by clicking on them, opened on the YouTube site.[80] It is not disputed that Mr. Linkletter first became aware of the YouTube videos from the Proctorio Help Center.[81]

28. The videos at issue were "unlisted" videos on a public YouTube channel. While unlisted videos do not appear in a YouTube search, anyone who accesses an unlisted video can share it by giving the URL to someone else,[82] by clicking the "share" button in the YouTube interface,[83] or even by "embedding" it in another web page.[84] YouTube's online help cautions that "unlisted videos and playlists can be seen and shared by anyone with the link" and that "anyone with the link can also reshare it."[85]

29. Users of YouTube, including Proctorio, are subject to YouTube's terms of service. One of those terms is that a user who uploads videos grants a license to all other YouTube users to access and use its videos, "including to reproduce, distribute, prepare derivative works, display, and perform" them.[86]

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[77] Linkletter #1, para. 90.
[78] Devoy #1, para. 11.
[79] Linkletter #1, para. 69.
[80] Linkletter #1, para. 71 and Exhibits AS-AV.
[81] Cross-examination of Ian Linkletter, 18 March 2021, page 33, lines 8-20.
[82] Linkletter #1, para. 66.
[83] Linkletter #1, para. 68.
[84] Linkletter #1, para. 69.
[85] Linkletter #1, para. 67 and Exhibit AO.
[86] Linkletter #1, para. 61 and Exhibit AM.

30. The seven YouTube videos at issue were created by Proctorio employees and it is not disputed that Proctorio holds copyright in them.[87] The YouTube videos are as short as 21 seconds and the longest is 1 minute 43 seconds. Each video describes an aspect of the software's functionality with accompanying visuals. They appear to be professionally produced. None of the videos contains a confidentiality notice or any indication that its contents must not be disclosed.

31. Copies of the YouTube videos provided by Proctorio's counsel are available to the court on a computer disk,[88] and transcripts prepared by Mr. Linkletter's law firm are exhibited to the first affidavit of Andrea Wong.[89] The seven YouTube videos, and the transcripts for them, are:

(a) "Abnormal Eye Movement" – 21 seconds – Wong #1 Exhibit C.

(b) "Abnormal Head Movement" – 33 seconds – Wong #1 Exhibit D.

(c) "Abnormalities Overview" – 1 minute 8 seconds – Wong #1 Exhibit E.

(d) "Behavior Flags" – 49 seconds – Wong #1 Exhibit F.

(e) "Behavior Settings" – 1 minute 43 seconds – Wong #1 Exhibit G.

(f) "Display Room Scan" – 27 seconds – Wong #1 Exhibit H.

(g) "Record Room" – 1 minute 3 seconds – Wong #1 Exhibit I.

iii. The Academy Screenshot

32. The Proctorio Academy is a web site containing online courses on the use of Proctorio's academic surveillance software.[90] The course contains about eight "modules"[91] that altogether could take a user up to an hour to complete.[92] Mr. Linkletter was invited to access the Academy by an automated email, titled "Welcome to Proctorio Academy!", on August 23, 2020, and he accessed the Academy at some point thereafter.[93]

33. The Academy Screenshot is an image created by Mr. Linkletter that shows a portion of one web page in the Proctorio Academy course. The course displays many of the same YouTube videos found on the Help Center, but when Proctorio disabled the YouTube links, the videos no

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[87] Devoy #1, para. 12.
[88] Affidavit #1 of Andrea Wong, filed 2021 May 06 ("Wong #1"), para. 3 and Exhibit B.
[89] Wong #1, paras. 4-11 and Exhibits C-I.
[90] Devoy #1, para. 16.
[91] Cross-examination of Devoy, page 30, lines 20-24.
[92] Cross-examination of Devoy, page 31, lines 1-4.
[93] Affidavit #2 of Ian Linkletter, filed 2021 Apr 15 (Linkletter #2), para. 5.

longer functioned.[94] Accordingly, the dominant feature of the Academy Screenshot tweeted by Mr. Linkletter is large black boxes that state "Video unavailable. This video has been removed by the uploader," interspersed with headings and text that describe Proctorio's functionality.[95]

34. The web page shown in the Academy Screenshot is not marked "confidential" and there is no indication that it should not be disclosed.[96]

iv. Information About the Functionality of Proctorio is Widely Available

35. The information contained in the YouTube Videos and the Academy Screenshot is freely available on the internet. Information presented in the YouTube videos is virtually identical to information published elsewhere. The following examples are illustrative:

From the YouTube videos	From Internet Sources
[redacted]	[redacted]
[redacted]	[redacted]
[redacted]	[redacted]

[94] Linkletter #1, para. 85.
[95] Linkletter #1, Exhibit BG.
[96] Linkletter #1, Exhibit BG.
[97] Wong #1, Exhibit C.
[98] Linkletter #1, Exhibit BS, p. 421.
[99] Wong #1, Exhibit D.
[100] Linkletter #1, Exhibit BS, p. 421.
[101] Wong #1, Exhibit E.
[102] Trueman #1, Exhibit X, p. 282.

36. Notably, this allegedly "confidential" information has been published by Proctorio itself, its business partners, and the educational institutions that use its product.

37. Proctorio published a "Proctorio Welcome Packet" marked "For Public Distribution," found on the web site of the University of Wisconsin Oshkosh,[103] as well as a "Frequently Asked Questions" document on its own web site.[104] Proctorio also partners with learning management system vendors, including McGraw-Hill and Top Hat, to make its academic surveillance software available to more educational institutions. McGraw-Hill interacted with Proctorio[105] to publish promotional material including an interactive demonstration of the software's functionality[106] and detailed user guides.[107] Top Hat published detailed information about Proctorio's functionality.[108]

38. The record contains documents from over 25 educational institutions[109] that describe the functionality of Proctorio, in some cases in considerably greater detail than the YouTube videos or the Academy Screenshot.

39. Several educational institutions have published links to the same YouTube videos that are at issue in this action:

(a) "Abnormalities Overview": published by the University of British Columbia.[110]

(b) "Behavior Flags": published by the University of British Columbia.[111]

(c) "Behavior Settings": published by the University of British Columbia,[112] University of Washington,[113] and Wilson College.[114]

(d) "Record Room": published by San Jose-Evergreen Community College District.[115]

40. Although Proctorio closely monitors Mr. Linkletter's tweets, it appears unaware and unconcerned about publication of information about its software by others. When confronted with

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[103] Trueman #1, para. 32 and Exhibit FF.
[104] Linkletter #2, Exhibit B.
[105] Cross-examination of Devoy, page 70, lines 18-23.
[106] Linkletter #1, Exhibit BS, page 401.
[107] Trueman #1, Exhibit A, p. 1 and Exhibit B, p. 41.
[108] Trueman #1, Exhibit C, page 83.
[109] Linkletter #1, para. 93 and Exhibits BH-BS; Trueman #1, paras. 13-32 and Exhibits G-FF.
[110] Linkletter #1, para. 74 and Exhibit AW, p. 313.
[111] Linkletter #1, para. 74 and Exhibit AW, p. 314.
[112] Linkletter #1, para. 74 and Exhibit AW, p. 313.
[113] Trueman #1, para. 11 and Exhibit E.
[114] Trueman #1, para. 12 and Exhibit F.
[115] Trueman #1, para. 10 and Exhibit D.

those publications in this litigation, Proctorio claimed to be unaware of them.[116] In March 2020, six months after Proctorio had commenced this action, publications from at least 19 educational institutions containing detailed information about Proctorio could be located with a few hours of Google searching.[117]

41. Despite its stated concern,[118] Proctorio does not monitor internet postings about ways to cheat on exams using Proctorio.[119] Its affiant, Mr. Devoy, said he did not know if anyone at Proctorio is concerned about students finding ways to cheat using its software.[120] He has never searched YouTube for videos about Proctorio.[121]

D. Proctorio's Legal Proceedings Against Mr. Linkletter

42. On Wednesday, September 2, 2020, Mr. Linkletter was called at work by a *Vancouver Sun* reporter to ask for comment on Proctorio's action and injunction. He had not yet been served with either.[122]

i. Proctorio's Usual Practice is Not to Sue

43. Proctorio's usual practice when its employees become aware of copyrighted or confidential information is to disable the content "and/or approach the client or third-party to ask them to remove, edit, or restrict access to the copyrighted and confidential information (as applicable)."[123] Proctorio's affiant Mr. Devoy says that it has done this with respect to numerous documents published by post-secondary institutions on the internet.[124] Under cross-examination, he stated that this "is the company's normal practice when academic institutions publish content that is confidential."[125]

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[116] Devoy #2, para. 43(b).
[117] Trueman #1, paras. 13-32.
[118] Devoy #1, para. 47.
[119] Cross-examination of Devoy, page 51, lines 23-25; page 52, lines 1-2.
[120] Cross-examination of Devoy, page 52, lines 9-11.
[121] Cross-examination of Devoy, page 133, lines 10-13.
[122] Linkletter #1, para. 94.
[123] Devoy #2, para. 41.
[124] Devoy #2, para. 43(c).
[125] Cross-examination of Devoy, page 9, lines 1-4.

44. Despite this practice, Proctorio made no attempt to contact Mr. Linkletter, either after his first YouTube Link Tweet on August 23, 2020 or at any time before it served him with this action.[126] It never asked him not to share Proctorio's YouTube videos.[127] Mr. Devoy said he did not know why Proctorio did not contact Mr. Linkletter.[128]

45. Proctorio was aware that Mr. Linkletter was a UBC employee,[129] and it obtained an order to serve Mr. Linkletter with documents at his UBC email address.[130] However, it made no attempt to contact Mr. Linkletter's employer, which was a customer of Proctorio at the time, before commencing this action.[131]

46. Proctorio was aware that it could submit "take down requests" with respect to confidential or copyrighted information, and had done so in the past, but did not do so with respect to Mr. Linkletter's communications.[132] Mr. Devoy said he did not know why.[133]

47. In his affidavit responding to this application, Mr. Devoy swore that Proctorio's decision to take legal action was made "only after Proctorio's initial approach of simply deactivating the shared video links did not work."[134] However, under cross-examination he admitted that Proctorio decided to take legal action after Mr. Linkletter published the YouTube Link Tweets on August 23 and 24, 2020.[135]

ii. Proctorio's *Ex Parte* Application for an Injunction

48. On September 2, 2020, Proctorio's counsel appeared before Justice Giaschi in chambers to seek an injunction against Mr. Linkletter. Proctorio did not give notice to Mr. Linkletter. Justice Giaschi said that he had "not had any opportunity to review [Proctorio's materials] whatsoever" prior to the hearing.[136]

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[126] Cross-examination of Devoy, page 116, lines 1-4; page 118, lines 19-22.
[127] Cross-examination of Devoy, page 8, lines 15-21.
[128] Cross-examination of Devoy, page 115, lines 22-23.
[129] Devoy #1, paras. 23-25 and Exhibit C.
[130] Order Made After Application, 2 September 2020, para. 4.
[131] Cross-examination of Devoy, page 116, lines 5-6.
[132] Cross-examination of Devoy, page 74, lines 6-17.
[133] Cross-examination of Devoy, page 74, lines 18-19.
[134] Devoy #2, para. 52.
[135] Cross-examination of Devoy, page 123, lines 1-11.
[136] Supreme Court of British Columbia, Proceedings in Chambers (2 September 2020), Linkletter #1, Exhibit BW, p. 490, lines 33-34.

49. The only evidence placed before Justice Giaschi on the injunction application was the first affidavit of John Devoy, then the Director of Digital Marketing at Proctorio.[137] Mr. Devoy stated on cross-examination that he was aware of Proctorio's duty of absolute candour on an *ex parte* application,[138] however his affidavit omitted key details and misrepresented certain events, as detailed in Part IV, section H, below.

50. The injunction restrains Mr. Linkletter from downloading or sharing information from the Help Center or Proctorio Academy, as well as an unspecified range of "other Application IP or Confidential Information of the plaintiff."[139] It also restrains Mr. Linkletter from "encouraging" others to download or share information from the Help Center or Proctorio Academy.[140]

iii. Proctorio Now Claims Confidentiality Over Any Description of its Product

51. Throughout these proceedings, Proctorio has employed an opaque, inconsistent, and ever-changing definition of what constitutes "confidential information."

52. In his second affidavit, Mr. Devoy stated that a marketing web site created by educational publisher McGraw-Hill to promote its partnership with Proctorio[141] "is not confidential" and that Proctorio would not take any action to remove it.[142] Mr. Linkletter relied upon Proctorio's statements about what was not confidential to govern his conduct under the injunction.[143]

53. However, under cross-examination, Mr. Devoy revealed that Proctorio now claims that "anything that shows the exam or administrator side of the software is confidential."[144] [redacted][145] Proctorio takes this position despite the fact that it published, as recently as September 2020, a detailed guide for faculty which it labelled "For Public Distribution."[146]

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[137] Devoy #1, para. 2.
[138] Cross-examination of Devoy, page 10, lines 12-19.
[139] Order Made After Application, 2 September 2020, para. 1(a)(iii).
[140] Order Made After Application, 2 September 2020, para. 1(c).
[141] Linkletter #1, Exhibit BS, p. 401.
[142] Devoy #2, para. 44.
[143] Linkletter #2, para. 23.
[144] Cross-examination of Devoy, page 68, lines 13-25; page 69, lines 1-2.
[145] Cross-examination of Devoy, page 71, lines 21-23.
[146] Trueman #1, Exhibit FF, p. 364.

iv. The Impact of the Proceedings on Mr. Linkletter

54. This action has had a significant impact on Mr. Linkletter. It has caused him stress, aggravated a medical condition, and caused difficulty in his home life. It has put considerable financial strain on him and his family.[147] He has begun regular counselling to manage the stress and anxiety caused by the lawsuit,[148] which causes him to fear for his employment,[149] as well as his professional reputation.[150]

55. The *ex parte* injunction obtained by Proctorio against Mr. Linkletter has made him anxious about criticizing or even discussing Proctorio in public and in private,[151] and the broad wording of the injunction has constrained his ability to participate in the public discussion about academic surveillance software.[152] The broad and undefined restriction on sharing "confidential information" causes him great concern and creates a chilling effect on his speech.[153] Proctorio's ever-changing definition of "confidential information" makes it difficult to point out Proctorio's inconsistent and untruthful statements,[154] and often prevents him from supporting his arguments with evidence, even when that evidence is already available to the public.[155] Mr. Linkletter has been forced to be circumspect in both the content and medium of his communications.[156]

56. Further, Proctorio has made baseless allegations about leaking source code[157] based on a tweet by Mr. Linkletter that was intended to satirize Proctorio's tendency to delete information rather than allow its activities to be subjected to public scrutiny.[158] These allegations make him fear discussing the software's security weaknesses.[159]

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[147] Linkletter #1, para. 103.
[148] Linkletter #2, para. 25.
[149] Linkletter #1, para. 104.
[150] Linkletter #1, para. 105.
[151] Linkletter #1, para. 95.
[152] Linkletter #1, para. 96.
[153] Linkletter #2, para. 24.
[154] Linkletter #2, para. 21.
[155] Linkletter #2, para. 22.
[156] Linkletter #2, para. 23.
[157] Devoy #2, para. 51.
[158] Linkletter #2, paras. 12-19.
[159] Linkletter #2, para. 20.

PART III. ISSUES

57. The issues on this application are:

(a) Should the action be dismissed pursuant to the *PPPA*?

(b) Should the defendant be awarded costs on a full indemnity basis?

(c) Should the defendant be awarded damages?

(d) In the alternative, should the injunction be dissolved?

PART IV. ARGUMENT

A. The Proceeding should be dismissed under the *PPPA*

58. The *PPPA* is legislation designed to provide for the summary dismissal of lawsuits that unduly restrict expression on matters of public interest, known as strategic lawsuits against public participation ("SLAPPs"). Although SLAPP suits are commonly brought in defamation, the *PPPA* applies to any action against expression on matters of public interest,[160] including the claims made by Proctorio in this action.

59. In the leading case on the Ontario *PPPA*, which is virtually identical to the BC *PPPA*, the Supreme Court of Canada explained that "freedom of expression is a fundamental right and value; the ability to express oneself and engage in the interchange of ideas fosters a pluralistic and healthy democracy by generating fruitful public discourse and corresponding public participation in civil society."[161] The *PPPA* was intended to provide a "broad scope of protection" that would "ensure that the full scope of legitimate participation in public matters is made subject to the special procedure,"[162] which procedure is designed "to screen out lawsuits that unduly limit expression on matters of public interest through the identification and pre-trial dismissal of such actions."[163]

60. An application under s. 4 of the *PPPA* involves a three-part test:

(a) Threshold burden: Mr. Linkletter must demonstrate that the proceeding arises from expressions made by the defendant that relate to a matter of public interest.

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[160] *1704604 Ontario Ltd. v. Pointes Protection Association*, 2020 SCC 22 ("*Pointes Protection*") at para. 24.
[161] *Pointes Protection* at para. 1.
[162] *Pointes Protection* at para. 9.
[163] *Pointes Protection* at para. 16.

(b) Merits hurdle: Proctorio must demonstrate that there are grounds to believe that

(i) the proceeding has substantial merit; and

(ii) the defendant has no valid defence

(c) Public interest hurdle: Proctorio must demonstrate that it has suffered serious enough harm that the public interest in continuing the proceeding outweighs the public interest in protecting Mr. Linkletter's expression.

61. If Proctorio does not succeed on either of the merits and public interest hurdles, where it holds the burden, its action must be dismissed.

62. Proctorio raises a preliminary issue regarding the applicability of the *PPPA* to its claims in copyright.

B. The *PPPA* applies to claims in copyright

63. Proctorio asserts that the *PPPA* is inapplicable to its claims under the *Copyright Act,* R.S.C., 1985, c. C-42 ("*Copyright Act*"), a federal statute.[164] This assertion is incorrect, for three reasons. First, the *Copyright Act* expressly contemplates the application of provincial civil procedure laws. Second, Proctorio has chosen to bring its action in this Court, instead of the Federal Court, and it must therefore accept this Court's procedures, including the *PPPA*. Third, the proper application of constitutional doctrines makes the *PPPA* applicable to actions in copyright.

i. The *Copyright Act* Expressly Contemplates that Provincial Laws and Rules will Govern Enforcement

64. This issue may be disposed of solely on the basis of statutory interpretation. Parliament expressly provided that provincial laws and rules of civil procedure apply to copyright proceedings. There is no reason to treat the *PPPA* any differently from other legislation addressing civil proceedings in this Court.

65. The *Copyright Act* does not contain a procedural code for the enforcement of the rights it grants. To the contrary, section 34 makes clear that existing court procedures are to be used:

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[164] Application Response ("AR"), Part 5, paras. 1-5.

> **34 (1)** Where copyright has been infringed, the owner of the copyright is, subject to this Act, entitled to all remedies by way of injunction, damages, accounts, delivery up and otherwise that are or may be conferred by law for the infringement of a right.
>
> **…**
>
> **(5)** The rules of practice and procedure, in civil matters, of the court in which proceedings are commenced by way of application apply to those proceedings, but where those rules do not provide for the proceedings to be heard and determined without delay and in a summary way, the court may give such directions as it considers necessary in order to so provide.
>
> **(6)** The court in which proceedings are instituted by way of application may, where it considers it appropriate, direct that the proceeding be proceeded with as an action.

66. This provision makes clear that Parliament intended copyright actions to be subject to the same laws and rules as other civil proceedings. Parliament could have prescribed rules of procedure, or assigned exclusive jurisdiction to the Federal Court. It did not. However, it *did* prescribe a limitation period for copyright matters,[165] thus demonstrating an intention to supplant provincial limitations laws but leave other questions of civil procedure to the provinces.

ii. Proctorio Chose to Bring this Action in this Court and Must Accept this Court's Rules

67. Proctorio's argument that the *PPPA* is inapplicable to copyright is inconsistent with its position throughout this litigation that expressly pleads and relies upon provincial statutes and rules of court.[166] Plaintiffs cannot avail themselves of this Court's process and then pick and choose which provincial rules to follow and which to ignore. To the contrary, the usual rule is that "where no other procedure is prescribed, a litigant suing on a federal matter in a provincial court takes the procedure of that court as he finds it."[167]

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[165] *Copyright Act*, s. 43.1.

[166] Proctorio commenced this lawsuit by availing itself of the *Supreme Court Civil Rules*, Rules 8-5(4) and 10-4, which permit a party to apply on short notice for an *ex parte* injunction order. These rules are made under the *Court Rules Act*, R.S.B.C. 1996, c. 80, a provincial statute. Proctorio further relied upon section 39 of the *Law and Equity Act*, R.S.B.C. 1996, c. 253, a provincial statute, to obtain an injunction against Mr. Linkletter.

[167] *Kourtessis v. M.N.R.*, 1993 CanLII 137 (SCC), [1993] 2 S.C.R. 53 at p. 79 (per La Forest J., for the majority) and p. 105 (per Sopinka J., for the minority), in both cases citing *Laskin's Canadian Constitutional Law* (5th ed. 1986), vol. 1, at p. 186.

68. It was open to Proctorio to initiate proceedings in the Federal Court,[168] to apply for an interim injunction there,[169] and to do so on an *ex parte* basis.[170] It could have brought a copyright proceeding in Federal Court even though it incidentally concerned other matters, such as contract.[171] Had Proctorio done so, it would have had to overcome jurisprudence that strictly limits the availability of *ex parte* injunctions to situations where the applicant can demonstrate urgency and evidence of irreparable harm that is clear and not speculative.[172] In *Injunctions: British Columbia Law and Practice*, chapter co-authors Claire Immega and Veronica Rossos observed that "British Columbia's jurisprudence supports a lower standard [than the Federal Court] on irreparable harm aspect of test for interlocutory injunctions."[173] The authors contrasted the Federal Court of Appeal's line of authority based on *Centre Ice*[174] from this Court's approach in *Wale*[175] in which, according to the authors, "the test for establishing irreparable harm in British Columbia is lower."[176] Further, Proctorio would have been bound by provisions of the *Federal Courts Rules* that limit *ex parte* interim injunctions to no more than 14 days, following which Proctorio would have been required to bring a motion on notice to Mr. Linkletter to extend the injunction.[177]

69. Evidently Proctorio believed that provincial statutes and the rules of this Court provided it an advantage in its proceedings against Mr. Linkletter. Having chosen this forum, Proctorio is bound by all the rules of this Court, including the *PPPA*.

iii. The *PPPA* is Constitutionally Applicable

70. Proctorio chose this forum and Parliament intended that this Court's rules should apply to that choice. Neither interjurisdictional immunity nor paramountcy assist Proctorio in escaping the consequences of its choice.

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[168] *Copyright Act*, s. 41.24.
[169] *Federal Courts Act,* R.S.C., 1985, c. F-7, s. 44.
[170] *Federal Courts Rules*, SOR/98-106 ("*FCR*"), Rule 373.
[171] *Titan Linkabit Corp. v. S.E.E. See Electronic Engineering Inc.,* [1992] F.C.J. No. 807 (QL), 58 F.T.R. 1.
[172] *Fournier Pharma Inc. v. Apotex Inc.*, 1999 CanLII 7961 (FC), [1999] F.C.J. No. 504 (QL).
[173] *Injunctions: British Columbia Law and Practice* (Vancouver: Continuing Legal Education Society of British Columbia, 2020), §7.23.
[174] *Centre Ice Ltd. v. Nat Hockey League*, [1994] F.C.J. No. 68 (QL) (FCA) ("*Centre Ice*").
[175] *British Columbia (Attorney General) v. Wale*, 1986 CanLII 171 (BCCA) ("*Wale*").
[176] *Injunctions: British Columbia Law and Practice* (Vancouver: Continuing Legal Education Society of British Columbia, 2020), §7.23. See also *Vancouver Aquarium Marine Science Centre v. Charbonneau*, 2017 BCCA 395 ("*Vancouver Aquarium*") at paras. 58-60.
[177] *FCR*, Rule 374(2).

1. Pith and Substance: the PPPA is a Valid Law Concerning the Administration Of Justice

71. The first step in the division of powers analysis is determining the validity of the impugned law and the constitutional head of power under which it was enacted. Pith and substance analysis requires characterizing the purpose and effects of an impugned law and then classifying it within the appropriate head of power.[178] In recent years, the Supreme Court of Canada has repeatedly emphasized the importance of precision in the characterization exercise to avoid superficial classifications or the exaggeration of the extent to which a law extends into the other level of government's jurisdiction.[179] It is permissible to include the legislature's choice of means in the characterization exercise, particularly where this adds precision.[180]

72. The extrinsic evidence confirms the "mischief" that the *PPPA* is intended to remedy.[181] The *PPPA* was enacted to prevent wealthy, powerful parties from using strategic lawsuits to silence or otherwise deter public criticism, so that public debate can remain vigorous.[182] The *PPPA* focusses exclusively on managing litigation which arises from expressions on a matter of public interest. The *PPPA* creates a judicial "screening mechanism"[183] that applies to all litigation; it does not change the underlying substantive law.

73. The management of litigation in provincial courts is undoubtedly part of the provincial power over the administration of justice in the province, set out in s. 92(14) of the *Constitution Act, 1867*:

> 14. The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts.

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[178] *Reference re Pan-Canadian Securities Regulation*, 2018 SCC 48 (CanLII), [2018] 3 SCR 189 at para. 86.
[179] *Reference re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11 ("*Greenhouse*") at paras. 52 and 69; *Reference re Genetic Non-Discrimination Act*, 2020 SCC 17 at para. 32; *Desgagnés Transport Inc. v. Wärtsilä Canada Inc.*, 2019 SCC 58 ("*Desgagnés*") at para. 35.
[180] *Greenhouse* at para. 53.
[181] *Reference re Firearms Act (Can.)*, 2000 SCC 31 (CanLII), [2000] 1 S.C.R. 783 at para. 21.
[182] *Hobbs v. Warner*, 2021 BCCA 290 at para. 6 ("*Hobbs*"); *Neufeld v. Hansman*, 2021 BCCA 222 at para. 3 ("*Hansman*").
[183] *Pointes Protection* at para. 16.

2. Interjurisdictional Immunity: The PPPA Does Not Impair the Core of the Federal Copyright Power

74. The Supreme Court of Canada has clearly signalled that interjurisdictional immunity "is of limited application and should in general be reserved for situations already covered by precedent."[184] This is because the "dominant tide"[185] of constitutional interpretation means "that a court should favour, where possible, the ordinary operation of statutes enacted by *both* levels of government."[186] Interjurisdictional immunity has never been employed in a copyright case.

75. Even if the doctrine of interjurisdictional immunity were available, the *PPPA* does not "impair" the "core" of the federal power over copyright. The *PPPA* is merely an additional tool in the judicial toolbox to help courts manage litigation. It sits alongside the proportionality principle[187] and provisions for dismissing cases that disclose no reasonable claim, are frivolous or vexatious or an abuse of process,[188] for rendering summary judgment when there is no genuine issue for trial,[189] for resolving all or part of a claim by summary trial,[190] for dealing with vexatious litigants,[191] for requiring corporations to post security for costs,[192] and for discouraging improper conduct through an adverse costs award.[193] These tools are essential to the proper management of the courts, and it is not seriously arguable that actions brought under federal statutes should enjoy an unregulated free-for-all in provincial courts.

76. The provincial power over administration of justice goes beyond the rules of court. The Supreme Court of Canada has upheld a provincial law that grants jurisdiction in admiralty law matters to small claims courts,[194] and has applied provincial arbitration law to actions under the *Copyright Act*, even where that has the effect of preventing a plaintiff from bringing an action.[195]

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[184] *Canadian Western Bank v. Alberta*, 2007 SCC 22 (CanLII), [2007] 2 S.C.R. 3 ("*Canadian Western Bank*") at para. 77.
[185] *Ontario (Attorney General) v. OPSEU*, [1987] 2 S.C.R. 2, 1987 CanLII 71 (SCC) (cited to CanLII) at para. 27.
[186] *Canadian Western Bank,* at para. 37, emphasis in original.
[187] *Supreme Court Civil Rules* ("*SCCR*"), Rule 1-3(2).
[188] *SCCR*, Rule 9-5(1).
[189] *SCCR*, Rule 9-6(5).
[190] *SCCR*, Rule 9-7(2).
[191] *Supreme Court Act*, R.S.B.C. 1996, c. 443, s. 18; *Court of Appeal Act*, R.S.B.C. 1996, c. 77, s. 29.
[192] *Business Corporations Act*, S.B.C. 2002, c. 57, s. 236.
[193] *Supreme Court Civil Rules*, Rule 14-1(14).
[194] *Ontario (Attorney General) v. Pembina Exploration Canada Ltd.*, 1989 CanLII 112 (SCC), [1989] 1 S.C.R. 206.
[195] *Desputeaux v. Éditions Chouette (1987) inc.*, 2003 SCC 17 (CanLII), [2003] 1 S.C.R. 178 at para. 46.

As well, numerous cases have affirmed the right of provinces to grant or modify appellate jurisdiction in respect of civil matters arising under federal statutes, such as divorce.[196]

77. As these examples demonstrate, provincial statutes may permissibly "affect" a federal head of power. Interjurisdictional immunity, when it applies at all, only concerns the *impairment* of the core of a federal head of power,[197] and the *PPPA* in no way meets this test.

3. Paramountcy: No Operational Conflict or Frustration of Purpose

78. Proctorio further argues that the *PPPA* is inoperative on the basis of paramountcy because the provincial law creates an operational conflict and/or frustrates the purpose of the *Copyright Act*.

79. An operational conflict arises "when it is impossible to comply simultaneously with both laws."[198] Proctorio says that the *PPPA* "voids" its rights under a federal statute or "interfere[s] with" the exercise of federal jurisdiction over copyright.

80. The *PPPA* creates no such conflict. It merely provides a screening mechanism to ensure that litigation in the superior courts of the Province is not utilized as a means of unduly limiting expression and stifling public debate. A plaintiff pursuing a remedy under the *Copyright Act* in this Court need demonstrate only that its action has merit and that the public interest in pursuing it outweighs the public interest in protecting expression.

81. With respect to frustration of purpose, Proctorio has not identified any purpose of the *Copyright Act* that is frustrated by the *PPPA*. Surely, Parliament's purpose was *not* to enable meritless lawsuits that unduly limit expression on matters of public interest.

82. The *Copyright Act* does not set out a complete code for remedying alleged infringement. To the contrary, as discussed above, Parliament chose to leave virtually all the details of civil procedure to the provinces. In such cases, the province is entitled to regulate access to its courts, so long as this regulation does not frustrate the purpose of the federal Act or prohibit something that the federal Act requires. The *PPPA* does neither.

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[196] See, for example, *Adler v. Adler et al.*, 1965 CanLII 251 (ONCA) and the cases cited within.
[197] *Canadian Western Bank,* at para. 48.
[198] *Desgagnés*, at para. 100.

83. This conclusion is consistent with the Supreme Court of Canada's approach to federalism over the 15 years since *Canadian Western Bank* was decided: "the division of powers between the federal and provincial governments must be managed with a view to flexible federalism. Where possible, the Court has sought to maintain a role for the two orders of government in areas of overlapping jurisdiction."[199]

C. The Proceeding Arises From Expressions Made by Mr. Linkletter on a Matter of Public Interest

84. In *Pointes Protection*, the Supreme Court of Canada provided a detailed analysis of Ontario legislation that is nearly identical to the *PPPA*.[200] The Ontario Act was based on the October 2010 report of the Anti-SLAPP Advisory Panel,[201] which the Court said was a persuasive source of information about the background and purpose of the legislation.[202] Both the Advisory Panel report and the legislative history of the Ontario Act "emphasized balancing and proportionality between the public interest in allowing meritorious lawsuits to proceed and the public interest in protecting expression on matters of public interest."[203] This Court has followed *Pointes Protection* when applying the BC *PPPA*.[204]

85. At the first stage, Mr. Linkletter must satisfy the court that (a) "the proceeding arises from an expression made by the applicant,"[205] Mr. Linkletter, and (b) "the expression relates to a matter of public interest."[206] The Supreme Court of Canada unanimously held that this threshold burden should be interpreted "in a generous and expansive fashion."[207] The burden "is purposefully not an onerous one."[208]

86. There can be no dispute that the proceeding arises from Mr. Linkletter's expressions on a matter of public interest. Proctorio's complaints center on what Mr. Linkletter included in his

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[199] *Desgagnés,* at para. 4.
[200] *Courts of Justice Act*, R.S.O. 1990, c. C.43, ss. 137.1 to 137.5.
[201] *Pointes Protection* at para. 7.
[202] *Pointes Protection* at para. 14.
[203] *Pointes Protection* at para. 18.
[204] *Galloway v A.B.*, 2021 BCSC 320 at para. 21; *Cheema v Young*, 2021 BCSC 461 at paras. 8-11; see also *Hobbs v. Warner*, 2021 BCCA 290; *Neufeld v. Hansman*, 2021 BCCA 222.
[205] *PPPA*, s. 4(1)(a).
[206] *PPPA*, s. 4(1)(b).
[207] *Pointes Protection* at para. 30.
[208] *Pointes Protection* at para. 28.

tweets, tweets which were part of the ongoing conversation about the use of Proctorio at UBC and elsewhere. Each of the tweets contain original commentary, with an express or implied criticism of Proctorio. They were made in the context of a continuing, international debate about the ethics of academic surveillance software. They clearly constitute "expressions" within the meaning of the *PPPA*.

87. The *PPPA* defines "expression" as "any communication, whether it is made verbally or non-verbally, publicly or privately, and whether it is directed or not directed at a person or entity."[209] This definition is broad enough to include tweeting. Accepting that tweeting can be an expression is consistent with the *Charter* jurisprudence holding that "if the activity conveys or attempts to convey a meaning, it has expressive content and *prima facie* falls within the scope of the guarantee."[210]

88. The proceeding "arises from" an expression if "the expression is somehow causally related to the proceeding."[211] The Supreme Court of Canada made clear in *Pointes Protection* that "many different types of proceedings can arise from an expression," and "that proceedings arising from an expression are not limited to those *directly* concerned with expression, such as defamation suits."[212] Indeed, *Pointes Protection* itself was a claim in breach of contract.

89. In its Application Response, Proctorio agues that "the infringement of copyright and misuse of confidential information does not constitute a protected 'expression' relating to 'a matter of public interest' in the circumstances."[213] In support of its argument, Proctorio cites *Dolphin Delivery*, apparently for the proposition that the *Charter* right to freedom of expression does not protect "destruction of property, or assaults, or other clearly unlawful conduct."[214]

90. However, Proctorio's argument conducts the analysis in the wrong order. It presupposes that Proctorio has already established "unlawful" conduct based solely on its unproven claims,

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[209] *PPPA*, s. 1, definition of "expression."
[210] *Irwin Toy Ltd. v. Quebec (Attorney General)*, 1989 CanLII 87 (SCC), [1989] 1 S.C.R. 927 at p. 969.
[211] *Pointes Protection* at para. 24.
[212] *Pointes Protection* at para. 24.
[213] AR, Part 5, para. 8.
[214] *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573, 1986 CanLII 5 (SCC), (cited to CanLII) ("*Dolphin Delivery*") at para. 20.

which are vigorously disputed in this action.[215] By this logic, even a defamation action could not be dismissed under the *PPPA* because defamation, being actionable, is "unlawful."

91. Section 4(1)(b) requires that the applicant's expression relate to a matter of public interest. The Supreme Court of Canada unanimously held that "these words should be given a broad and liberal interpretation, consistent with the legislative purpose."[216]

92. *Grant* provides useful guidance on public interest.[217] There is no single "test,"[218] but the Canadian jurisprudence expressly rejects a narrow interpretation focussing on government and political matters, or public figures.[219] Rather, "the public has a genuine stake in knowing about many matters, ranging from science and the arts to the environment, religion and morality. The democratic interest in such wide-ranging public debate must be reflected in the jurisprudence."[220]

93. Proctorio does not dispute this public interest. Academic surveillance software generally, and Proctorio specifically, have been the subject of articles in widely-read publications such as the *Washington Post*, *The New York Times*, and *The Guardian* as well as education industry publications and the student newspaper at Mr. Linkletter's own university, *The Ubyssey*. The record contains no fewer than seventeen articles illustrating this public interest, including Proctorio's own participation in the debate.[221]

94. Although Proctorio may not be a household name, the record demonstrates that the ethics of academic surveillance software are of significant concern to students and educators. As the Supreme Court of Canada has made clear, public interest does not require that everyone find the subject riveting: "It is enough that some segment of the community would have a genuine interest in receiving information on the subject."[222] The evidence shows that the UBC community, as well as the academic community more broadly, has been actively engaged in discussion about Proctorio for over a year.

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[215] Response to Civil Claim ("RtCC"), paras. 19-31.
[216] *Pointes Protection* at para. 26.
[217] *Grant v. Torstar Corp.*, 2009 SCC 61 (CanLII), [2009] 3 S.C.R. 640 ("*Grant*") at para. 101, qtd. in *Pointes Protection* at para. 27.
[218] *Grant* at para. 103.
[219] *Grant* at para. 106, qtd. in *Pointes Protection* at para. 27.
[220] *Grant* at para. 106, qtd. in *Pointes Protection* at para. 27.
[221] Linkletter #1, Exhibit O.
[222] *Grant* at para. 102, qtd. in *Pointes Protection* at para. 27.

95. The present action clearly arises from expressions by Mr. Linkletter on a matter of public interest. The tweets at issue in this action were part of a broad debate about academic surveillance software, in which Mr. Linkletter and others were frequent participants.[223]

D. Proctorio's Claims Lack Substantial Merit and Mr. Linkletter has Valid Defences

i. What Proctorio Must Demonstrate

96. In the next stage of the *PPPA* analysis, the "merits hurdle," Proctorio must satisfy the court that there is "a basis in the record and the law — taking into account the stage of litigation at which a [*PPPA*] motion is brought — for finding that the underlying proceeding has substantial merit and that there is no valid defence."[224] If Proctorio does not satisfy *both* branches of this test, the proceeding must be dismissed.

97. "Substantial merit" means that Proctorio's claim "must have a real prospect of success — in other words, a prospect of success that, while not amounting to a demonstrated likelihood of success, tends to weigh more in favour of the plaintiff."[225] It must be "legally tenable and supported by evidence that is reasonably capable of belief."[226] A "mere technical case" or a claim with "only technical validity" is insufficient to meet this threshold.[227]

98. The Supreme Court of Canada has held that the "real prospect of success" standard is more demanding than that on a motion to strike, which requires *some* chance of success, and more demanding than a *reasonable* chance of success. "A real prospect of success means that the plaintiff's success is more than a possibility; it requires more than an arguable case." "A claim with merely *some* chance of success will not be sufficient to prevail."[228]

99. Proctorio must also show that Mr. Linkletter has "no valid defence." Mr. Linkletter must put in play the defences he intends to present, and the onus is then back on Proctorio to show that there are grounds to believe that all of those defences are not valid.[229] Proctorio must show a basis

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[223] Devoy #1, Exhibit D.
[224] *Pointes Protection* at para. 39.
[225] *Pointes Protection* at para. 49.
[226] *Pointes Protection* at para. 49.
[227] *Pointes Protection* at para. 47.
[228] *Pointes Protection* at para. 50.
[229] *Pointes Protection* at paras. 56-57.

in the record and in the law — taking into account the stage of the proceeding — to support a finding that the defences Mr. Linkletter has put in play do not tend to weigh *more* in his favour.[230]

100. This analysis is not a final adjudication of the merits of the underlying claim, but the court does go beyond the pleadings to consider the evidentiary record, which may involve a limited weighing of the evidence and a preliminary assessment of the parties' credibility.[231] Throughout this stage, Proctorio holds the burden of persuading the court.

101. The following sections examine each of the three causes of action pleaded by Proctorio — breach of confidence, infringement of copyright, and circumvention of a technological protection measure — in turn, along with Mr. Linkletter's defences to each of them.

ii. Breach of Confidence

102. Proctorio alleges that Mr. Linkletter breached its confidence by disclosing the links to Proctorio's YouTube videos and the Academy Screenshot.[232] The parties are in general agreement[233] that Proctorio must establish all three elements of breach of confidence:

> (i) The information itself must have the necessary quality of confidence about it;
>
> (ii) That information must have been imparted in circumstances importing an obligation of confidence; and
>
> (iii) There must be an unauthorized use of that information to the detriment of the party communicating it.[234]

103. None of the necessary elements are present in this case: the information at issue was not truly confidential, and in any case Mr. Linkletter was not under any obligation of confidentiality. There was therefore no confidence to breach. Further, Proctorio has not established any detriment.

1. The Information at Issue was not Confidential

104. To be actionable, a confidence must actually be confidential. As Professors Burns and Blom explain,

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[230] *Bent v. Platnick*, 2020 SCC 23 ("*Bent*") at para. 103.
[231] *Pointes Protection* at para. 52.
[232] Notice of Civil Claim ("NoCC"), paras. 19 and 21.
[233] NoCC, para. 30; RtCC, para. 28.
[234] *Coco v. A.N. Clark (Engineers) Ltd.* [1969] R.P.C. 41 (Ch. D.) ("*Coco*") at p. 47.

> the information in question must have the necessary quality of confidence about it. That is, the information must in fact not be generally available. Information that is readily accessible to anyone who looks for it cannot be the subject of a breach of confidence action even if the plaintiff and the defendant both assume, at the time the information changes hands, that it is confidential.[235]

105. In *Stenada*, this Court found that the information at issue was not confidential, notwithstanding that the plaintiff insisted that the defendant sign a confidentiality agreement.[236] After all, "[h]owever confidential the circumstances of communication, there can be no breach of confidence in revealing to others something which is already common knowledge."[237] To lose the "necessary quality of confidence," knowledge need not be "widely known" so long as it is available to the public.[238]

106. Proctorio admits that the "circle of confidence" for the Proctorio Academy web pages numbers over 41,000 individuals,[239] and that Proctorio has "no idea" how many people can access the Help Center.[240] Further, Proctorio appears to have no means of granting or revoking access to individual users, [241] but has left access control entirely in the hands of its over 1,200 customers,[242] "many of whom are large organizations."[243] Thus, students who work as teaching assistants and perhaps others might have both student and instructor access.[244] Access to Proctorio Academy is granted automatically[245] through an email sent whenever a user installs Proctorio in a course.[246]

107. Proctorio's use of YouTube is inconsistent with its claims of confidentiality. YouTube is a platform for sharing, not concealing, videos, and its documentation makes clear that "anyone with the link [to an unlisted video] can also reshare it."[247] As a condition of uploading videos to

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[235] Peter T. Burns and Joost Blom, *Economic Torts in Canada*, 2nd ed., (Toronto: LexisNexis, 2016) ("*Economic Torts in Canada*") at p. 235-236.
[236] *Stenada Marketing Ltd. v. Nazareno*, 1990 CanLII 917 (BCSC) ("*Stenada*").
[237] *Coco* at p. 47.
[238] *Abode Properties Ltd. v. Schickedanz Bros. Limited*, 1999 ABQB 902 at para. 36.
[239] Devoy #2, para. 33(b).
[240] Cross-examination of Devoy, page 29, lines 18-20; page 30, lines 2-4.
[241] Cross-examination of Devoy, page 33, lines 24-25; page 34, lines 1-4; page 134, lines 5-25.
[242] Cross-examination of Devoy, page 28, lines 21-23.
[243] Devoy #2, para. 40(f).
[244] Cross-examination of Devoy, page 29, lines 2-5.
[245] Cross-examination of Devoy, page 23, lines 14-19.
[246] Cross-examination of Devoy, page 22, lines 5-25.
[247] Linkletter #1, para. 67 and Exhibit AO.

YouTube, users like Proctorio must consent to other users redistributing their videos.[248] YouTube is simply not a medium by which one would expect to keep a communication confidential.

108. Most importantly, Proctorio's authorized marketing partners and dozens of post-secondary institutions have republished Proctorio's material, or made their own publications derived from Proctorio's material, containing the same information — often in much greater detail — than that contained in the YouTube videos and the Academy Screenshot (for examples see Appendix A). Some of these publications included links to the same YouTube videos that Mr. Linkletter tweeted links to.[249]

109. Information shared so widely does not have "the necessary quality of confidence about it." Proctorio actively facilitated, acquiesced in, or was wilfully blind to the widespread distribution of information about its academic surveillance software, including the very same information that Proctorio now claims against Mr. Linkletter for disseminating.

110. It is immaterial that Proctorio did not *wish* or *cause* this information to become public: it has, and it is no longer confidential. As Professors Burns and Blom explain,

> Information loses its confidential nature when it is made available to the public, irrespective of whether that happens against the plaintiff's wishes. … If someone other than the plaintiff makes information public, that person may be liable for breach of confidence but the information thereafter is no longer confidential.[250]

111. Without confidential information, there can be no breach of confidence. That is sufficient to demonstrate that the claim has no substantial merit.

2. The Information was not Communicated in Circumstances that gave rise to a Duty of Confidence

112. Even if the information at issue *were* confidential, Proctorio did not communicate it to Mr. Linkletter in circumstances that gave rise to a duty of confidence.

113. Such circumstances can include *relationships* such as employer and employee and doctor and patient,[251] as well as *transactions* including business opportunities and trade secrets.[252] In this

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[248] Linkletter #1, para. 61 and Exhibit AM.
[249] Linkletter #1, paras. 73-75; Trueman #1, paras. 9-12.
[250] *Economic Torts in Canada* at p. 239.
[251] *Economic Torts in Canada* at p. 240-248.
[252] *Economic Torts in Canada* at p. 248-254.

case it is noteworthy that there is no extrinsic evidence demonstrating a duty of confidence. There is nothing in the YouTube videos, the Help Center, or Proctorio Academy that would have alerted Mr. Linkletter to the fact that information was being provided to him in confidence. None of the videos are marked "confidential" or gives any indication that they should not be disclosed. Rather, the enthusiastic tone in which the narrator describes the product's various features suggests the videos were positive marketing materials intended to be shared, not secrets to be concealed.

114. The obligation can also be created expressly, by contract,[253] although where this is so the terms of the contract will take precedence over the breach of confidence claim.[254] While Proctorio has not pleaded its case in breach of contract, it appears to rely only on express contractual terms as the sole basis for the alleged confidence. The two contracts it pleads are its agreement with UBC,[255] and the Proctorio terms of service that it alleges Mr. Linkletter agreed to.[256]

115. It is undisputed that Mr. Linkletter is not a party to the contract between Proctorio and UBC. In fact, there is no evidence that Mr. Linkletter was aware of the terms of that contract prior to this litigation. Moreover, the principles of privity of contract dictate that Proctorio's remedy, if any, lies against UBC and not Mr. Linkletter. Further, Proctorio's agreement with UBC contains several exceptions to the obligation of confidentiality. These include exceptions for information that "is publicly available or in the public domain at the time disclosed" or that "is or becomes publicly available or enters the public domain through no fault of the recipient."[257]

116. Proctorio also claims that Mr. Linkletter agreed to "terms of service" that required him to keep information confidential. Mr. Linkletter disputes that he agreed to any terms, and in any event there is significant doubt whether the alleged terms can be enforced in this action.

117. Any alleged agreement applies only to the Proctorio Academy, the source of the Academy Screenshot. There is no evidence that users are asked to agree to any terms of service when

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[253] *Economic Torts in Canada* at p. 231 and 248.
[254] *Economic Torts in Canada* at p. 231, citing *Cadbury Schweppes Inc. v. FBI Foods Ltd.*, 1999 CanLII 705 (SCC), [1999] 1 S.C.R. 142 ("*Cadbury Schweppes*") at para. 36.
[255] NoCC, paras. 16-17.
[256] NoCC, paras. 14-15.
[257] Linkletter #1, para. 58 and Exhibit AK, p. 278. Proctorio's counsel has confirmed by letter that this section is identical in the agreement that was in effect at the time of Mr. Devoy's first affidavit on August 31, 2020. See letter of Timothy Pinos to Catherine Boies Parker, Q.C., dated 7 April 2021.

accessing the Help Center,[258] from which Mr. Linkletter first became aware of the YouTube videos referenced in his tweets.[259]

118. Mr. Linkletter's evidence is that he does not recall agreeing to any terms and conditions upon accessing Proctorio Academy.[260] Proctorio has offered four different, and conflicting, representations that he did, but has produced no proof. In his first affidavit, Proctorio's Director of Communications and Marketing, John Devoy, stated that administrators and instructors accessing the Academy "are prompted to agree to the Acceptable Use Policy which requires consent to the [sic] Proctorio's Privacy Policy and Terms of Service."[261] In his second affidavit, Mr. Devoy swore that he "was able to obtain the internal Proctorio data that shows when Mr. Linkletter agreed to the Terms of Service for the Academy."[262] Under cross-examination he admitted that he did not, in fact, review any records,[263] and that he did not know if his previous sworn evidence was true.[264] Eventually, Proctorio obtained an order[265] to file a further affidavit containing printouts of computer screens that it says are presented to new users but no proof of any agreement by Mr. Linkletter, despite its previous representation that it maintained records.[266] The documents exhibited to this fourth version of events[267] make no mention of confidentiality, although the latter appears to link to Terms of Service which are not exhibited.

119. The Court is entitled to conduct "limited weighing of the evidence" to resolve conflicts in the affidavit evidence on a *PPPA* application,[268] and this Court ought to reject Proctorio's wholly unreliable evidence on this point.

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[258] Cross-examination of Devoy, page 35, lines 24-25; page 36, lines 1-2.
[259] Cross-examination of Linkletter, page 33, lines 8-20.
[260] Linkletter #2, para. 5.
[261] Devoy #1, para. 17.
[262] Devoy #2, para. 38.
[263] Cross-examination of Devoy, page 27, lines 4-6.
[264] Cross-examination of Devoy, page 27, lines 7-15.
[265] *Proctorio, Incorporated v. Linkletter*, 2021 BCSC 1154 at paras. 87-91.
[266] Affidavit #3 of John Devoy, sworn 2021 Apr 14 ("Devoy #3"), paras. 13-14 and Exhibits C and D.
[267] Devoy #3, Exhibits C and D.
[268] *Pointes Protection* at para. 52.

3. Proctorio did not Suffer any Detriment

120. Although there is some debate in the literature about whether a plaintiff must establish detriment as an element of breach of confidence,[269] the prevailing view in British Columbia is that detriment is an essential element of the cause of action. In *Icam Technologies*, Toy J.A. for a unanimous division expressly held that a plaintiff must prove that it had suffered detriment as a result of misuse of its confidential information by the defendant.[270] The Supreme Court of Canada cited *Icam* in *Cadbury Schweppes*, while acknowledging that detriment might be broader than financial loss, and could include "emotional or psychological distress that would result from the disclosure of intimate information."[271] Recent British Columbia cases have held that failure to prove any losses would mean failure to prove entitlement to a remedy,[272] and that the absence of a demonstrated detriment was "fatal" to a breach of confidence claim.[273]

121. Proctorio has not pleaded that it has actually suffered any detriment, nor indicated how it intends to prove the existence or quantum of detriment, or that it was caused by Mr. Linkletter and not others who published the same information. The issue of harms will be discussed in greater detail in section E(i) below.

122. In her review of the law in this area, Nation J. of the Alberta Court of Queen's Bench makes the telling observation that "The discussion about detriment may be somewhat academic, because in cases in which it cannot be shown, it will usually be unlikely that an action will be pursued."[274] Indeed, an action pursued in the absence of demonstrated detriment may be an indicia of a SLAPP suit.[275]

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[269] *Economic Torts in Canada* at p. 263. See also *Murphy Oil Company Ltd. v. Predator Corporation Ltd.*, 2006 ABQB 680 ("*Murphy Oil*") at paras. 106-110.
[270] *Icam Technologies Corp. v. Ebco Industries Ltd.*, 1993 CanLII 2289 (BCCA), 85 B.C.L.R. (2d) 318 ("*Icam Technologies*").
[271] *Cadbury Schweppes* at para. 53. Ultimately, the Court held (at para. 54) that detriment did not need to be explored in that case. For similar discussion in the English jurisprudence of the nature of the detriment that is required, see *Coco* at p. 47. Since *Cadbury Schweppes*, British Columbia courts have occasionally commented on the unsettled nature of the law: see *Minera Aquiline Argentina SA v. IMA Exploration Inc.*, 2007 BCCA 319 at para. 85; *Seaway Marine Services Ltd. v. Weiwaikum General Partner Limited*, 2014 BCSC 2102 at para. 94.
[272] *No Limits Sportswear Inc. v. 0912139 B.C. Ltd.*, 2015 BCSC 1698 at para. 31.
[273] *Sateri (Shanghai) Management Limited v. Vinall*, 2017 BCSC 491 at para. 515.
[274] *Murphy Oil* at para. 9.
[275] *Pointes Protection* at para. 78, citing *Platnick v. Bent*, 2018 ONCA 687 at para. 99.

4. Mr. Linkletter's Communications were in the Public Interest

123. Although Proctorio has not made out the necessary elements of breach of confidence, Mr. Linkletter also advances, in the alternative, the defence that his communications were made in the public interest.

124. This defence has a long pedigree in English law[276] and has been expressly recognized by this Court.[277] While once constrained to confidences involving "crime or fraud," the defence now "extends to any misconduct of such a nature that it ought in the public interest to be disclosed to others."[278]

125. Mr. Linkletter has consistently argued that Proctorio's academic surveillance software is unethical, discriminatory, and causes harm to students. His tweet of Proctorio's "Abnormal Eye Movement" video made this point explicitly:

> This video from Proctorio's YouTube channel shows how the Abnormal Eye Movement function works. This is the one that will show you, beyond a doubt, the emotional harm you are doing to students by using this technology.[279]

126. This Court does not need to determine the availability or applicability of this defence on the present application. Rather, Proctorio has the burden of showing that the defence has "no real prospect of success."[280]

iii. Copyright Infringement

127. The second cause of action pleaded by Proctorio is infringement of copyright.[281]

128. Proctorio claims that Mr. Linkletter infringed its copyright when he tweeted links to seven videos available on YouTube, and when he tweeted a screenshot of part of one web page from Proctorio Academy. Mr. Linkletter does not dispute that Proctorio owns the copyright in these works. However, his actions did not infringe Proctorio's copyright, because they were authorized either by Proctorio itself or by the *Copyright Act*.

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[276] *Gartside v. Outram* (1856), 26 L.J. Ch. 113 ("*Gartside*"); *Initial Services, Ltd. v. Putterill et al.*, [1987] 3 All E.R. 145 (C.A.) ("*Initial Services*").
[277] *Steintron International Electronics Ltd. v. Vorberg*, 1986 CanLII 1234 (BCSC) ("*Steintron*").
[278] *Initial Services* at para. 148, cited in *Steintron* at para. 16.
[279] Linkletter #1, Exhibit AY, p. 324.
[280] *Pointes Protection* at para. 60.
[281] NoCC, paras. 26-28.

129. Copyright law is "usually presented as a balance between promoting the public interest in the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator (or, more accurately, to prevent someone other than the creator from appropriating whatever benefits may be generated)."[282] However, the Supreme Court of Canada has observed that "[e]xcessive control by holders of copyrights… may unduly limit the ability of the public domain to incorporate and embellish creative innovation in the long-term interests of society as a whole."[283]

130. Proctorio's copyright claim is unusual because there was never any "market" for its "works." Proctorio does not claim that Mr. Linkletter has deprived it of any revenue, nor that he has profited from redistributing its works. Rather, Proctorio calls the *Copyright Act* into service of its claim for breach of confidence. Instead of sensitively balancing the twin goals of protection and access,[284] Proctorio's infringement claim seeks to invoke copyright as a means of diminishing expression rather than "as a mechanism through which to encourage the creation and dissemination of expression."[285]

131. Mr. Linkletter's response to Proctorio's copyright claims is, in respect of:

(a) The YouTube videos: (1) it is not infringement to hyperlink to content available on the Internet; (2) Proctorio granted a license to redistribute its YouTube videos; (3) Mr. Linkletter's communications were fair dealing; and (4) Mr. Linkletter's communications were non-commercial user-generated content.

(b) The Academy Screenshot: (1) Mr. Linkletter did not communicate a substantial part of Proctorio's works; (2) Mr. Linkletter's communications were fair dealing; and (3) Mr. Linkletter's communications were non-commercial user-generated content.

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[282] *Théberge v. Galerie d'Art du Petit Champlain inc.*, 2002 SCC 34 (CanLII), [2002] 2 SCR 336 ("*Théberge*") at para. 30.
[283] *Théberge* at para. 32.
[284] *Society of Composers, Authors and Music Publishers of Canada v. Bell Canada*, 2012 SCC 36 (CanLII), [2012] 2 SCR 326 ("*Society*") at para. 10.
[285] Graham Reynolds, "The Limits of Statutory Interpretation: Towards Explicit Engagement, by the Supreme Court of Canada, with the *Charter* Right to Freedom of Expression in the Context of Copyright" (2016) 41:2 Queens L J 455 at 466, cited in *Vancouver Aquarium* at para. 44.

1. It is not an Infringement to Hyperlink to Content Available on the Internet

132. Of the eight alleged infringements claimed by Proctorio, seven concern hyperlinks to "unlisted" videos posted on YouTube by Proctorio. Proctorio acknowledges that a hyperlink is not a "publication" or "reproduction" of a work. Instead, it argues that Mr. Linkletter has "made it available to the public by telecommunication," which by sections 2.4(1.1) and 3(1)(f) of the *Copyright Act* are rights of the copyright holder.[286]

133. The leading case on the copyright implications of hyperlinks is *Warman v. Fournier,* 2012 FC 803. It holds that a hyperlink to information available on the internet is not infringement because the author implicitly authorized the communication of the work by posting it on the internet.[287] The Court rejected the argument that this was "blaming the victim," and pointed out that the work "was within the applicant's full control and if he did not wish it to be communicated by telecommunication, he could remove it from his website, as he eventually did."[288]

134. The facts of this case are very similar: Proctorio made its videos available to the public on YouTube instead of a more private platform. It implicitly authorized resharing using the functionality of the YouTube web site. As in *Warman*, Proctorio disabled the links to its YouTube videos after they had been shared,[289] which was its right to do.

135. More broadly, the Supreme Court of Canada made clear in *Crookes* that hyperlinks are like references: "Both communicate that something exists, but do not, by themselves, communicate its content."[290] The Court also emphasized that the evolution of the law in this area must not only take into account the private interests of the parties concerned, "but also the public's interest in protecting freedom of expression."[291]

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[286] AR, Part 5, para. 12.
[287] *Warman v. Fournier*, 2012 FC 803 ("*Warman*") at para. 37.
[288] *Warman* at para. 38.
[289] Devoy #1, para. 40.
[290] *Crookes v. Newton*, 2011 SCC 47, [2011] 3 S.C.R. 269 ("*Crookes*") at para. 30.
[291] *Crookes* at para. 31.

2. Proctorio granted a license to redistribute its YouTube videos

136. By using YouTube to distribute its videos, Proctorio authorized Mr. Linkletter and others to redistribute them. An act authorized by the owner of the copyright is not infringement.[292]

137. All users of YouTube, including Proctorio and Mr. Linkletter, must agree to YouTube's Terms of Service as a condition of using YouTube.[293] One of those terms reads as follows:

> **License to Other Users**
>
> You also grant each other user of the Service a worldwide, non-exclusive, royalty-free license to access your Content through the Service, and to use that Content, including to reproduce, distribute, prepare derivative works, display, and perform it, only as enabled by a feature of the Service (such as video playback or embeds). For clarity, this license does not grant any rights or permissions for a user to make use of your Content independent of the Service.[294]

138. In these terms, the "Service" means "the YouTube platform and the products, services and features we [YouTube] make available to you as part of the platform."[295] The "Content" includes videos provided by Proctorio, YouTube, or a third party.[296]

139. These terms allow use of videos "as enabled by a feature of the Service." Mr. Linkletter's uncontested evidence outlines some of those features, including opening any video (including an "unlisted" video) by entering the URL into a web browser;[297] clicking YouTube's "share" button;[298] posting the link to a video to a social media site such as Twitter or Reddit;[299] and clicking on an embedded video to open it on the YouTube web site and sharing it from there.[300]

140. Proctorio argues that Mr. Linkletter was not "enabled by a feature of the Service" when he shared YouTube links on Twitter.[301] This argument overlooks the clear evidence that sharing

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[292] *Copyright Act*, s. 27(1).
[293] Linkletter #1, para. 60.
[294] Linkletter #1, para. 61 and Exhibit AM.
[295] Linkletter #1, Exhibit AM, p. 294.
[296] Linkletter #1, Exhibit AM, p. 295.
[297] Linkletter #1, para. 66-67.
[298] Linkletter #1, para. 68.
[299] Linkletter #1, para. 68.
[300] Linkletter #1, para. 70 and Exhibits AQ, AR, AT and AU.
[301] Devoy #2, para. 35; AR, Part 5, para. 18.

videos from YouTube to Twitter is expressly authorized and indeed facilitated by YouTube, which provides a "Share" button on all videos, where "Twitter" is expressly provided as an option.[302]

141. Proctorio erroneously argues that "There is no license to access the unlisted videos directly on YouTube."[303] In fact, the YouTube Terms of Service expressly provide a license "to access your Content through the Service…".[304]

142. The license excludes "any rights or permissions for a user to make use of your Content independent of the Service." This means that a user is not permitted to download a video from YouTube to their computer and do something else with it. But Mr. Linkletter did not do anything "independent of the Service": he tweeted links to the videos *on YouTube* where Proctorio's videos could be found in their original form.

143. Proctorio was not required to host its copyrighted videos on YouTube. It could have used its own private media server, or any number of other video-hosting web sites that offered different terms and conditions. Having chosen to make its videos available to the public on YouTube, Proctorio accepted YouTube's Terms of Service, which clearly and unequivocally granted a license to Mr. Linkletter and others to share those videos. It cannot claim infringement of copyright in respect of actions that it expressly authorized.

3. Not a Substantial Part of Proctorio's Work

144. In addition to the YouTube videos, Proctorio also claims that Mr. Linkletter infringed its copyright when he posted a screenshot containing a portion of a single web page from Proctorio Academy (the "Academy Screenshot") on Twitter.[305]

145. The *Copyright Act* incorporates a *de minimis* standard by restricting claims of infringement to "the work or any substantial part thereof."[306] The jurisprudence clearly establishes that "[t]here is no infringement unless the matter copied constitutes a substantial part of the copyright."[307]

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[302] Linkletter #1, Exhibits AP and AV.
[303] AR, Part 5, para. 18.
[304] Linkletter #1, para. 61 and Exhibit AM.
[305] NoCC, paras. 21 and 28.
[306] *Copyright Act*, s. 3(1).
[307] *Kantel v. Grant*, [1933] Ex.C.R. 84 (QL) at para. 13.

146. Whether a substantial part has been reproduced is a question of fact and involves a qualitative rather than quantitative analysis.[308] The substantiality analysis is a "holistic" one[309] undertaken from "the perspective of a lay person in the intended audience for the works at issue."[310]

147. Although a number of factors are often at play in the substantiality analysis,[311] it is clear that by any measure, the Academy Screenshot is not a substantial portion of Proctorio's work. The screenshot depicted a portion of a single web page that was part of an overall collection of eight modules that might take a user up to an hour to complete.[312] There is no evidence to suggest that the content visible in the Academy Screenshot is any more significant or valuable than any other part of the Proctorio Academy web site.

148. Further, the dominant feature of the Academy Screenshot is two black boxes labelled "Video unavailable."[313] These boxes were not part of Proctorio's work at all, but rather were displayed by YouTube after Proctorio disabled the links to its YouTube videos.[314] Indeed, this was the primary message that Mr. Linkletter was conveying with the Academy Screenshot Tweet: the absence, not the presence, of copyrighted information.[315]

4. Fair dealing

149. The above three sections set out a complete defence to Proctorio's copyright claims. However, in the alternative, Mr. Linkletter pleads that his communications constituted "fair dealing" permitted under the *Copyright Act*.[316]

150. Put simply, the concept of fair dealing recognizes that intellectual, academic, artistic, literary, and other pursuits inevitably draw upon prior works, and it is in the public interest to allow some use of copyrighted works without permission of the author. The *Copyright Act* therefore

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[308] *Warman* at para. 23.
[309] *Cinar Corporation v. Robinson*, 2013 SCC 73 (CanLII), [2013] 3 SCR 1168 ("*Cinar*") at para. 36.
[310] *Cinar* at para. 51.
[311] See *Warman* at para. 23 for a catalogue of the relevant factors to be considered.
[312] Cross-examination of Devoy, page 31, lines 1-4.
[313] Devoy #2, Exhibit G, p. 47.
[314] Devoy #1, para. 40.
[315] Linkletter #1, Exhibit BG.
[316] RtCC, para. 22.

provides a number of defined purposes — including research, education,[317] criticism, review,[318] and news reporting[319] — for which use of copyrighted works, if "fair," does not infringe copyright.

151. Fair dealing is not a defence, but a user's right.[320] As Professor Vaver explains, "whoever does a permitted act is not just taking advantage of a limitation, exception, exemption, defence, 'loophole,' or gracious indulgence extended by a copyright owner. He is exercising a right inherent in the balance the *Copyright Act* strikes between owners and users."[321] Thus, in its seminal *CCH* decision, the Supreme Court of Canada made clear that "In order to maintain the proper balance between the rights of a copyright owner and users' interests, it [fair dealing] must not be interpreted restrictively.[322]

152. Fair dealing involves a two-part test. The defendant must first prove that the dealing was for a purpose set out in the *Copyright Act*, and then must prove that it was fair.[323]

153. The purposes for which fair dealing are permitted "must be given a large and liberal interpretation in order to ensure that users' rights are not unduly constrained."[324] The research purpose, for example, is not limited to non-commercial or private contexts,[325] nor is research restricted to the creation of new works.[326] It can be piecemeal, informal, exploratory, or confirmatory.[327] Likewise, the criticism purpose "need not be limited to criticism of style. It may also extend to the idea to be found in a work and its social or moral implications."[328] The education purpose was broadened in the 2012 revisions to the *Copyright Act* and is no longer restricted only to educational institutions.[329] The news reporting purpose, once limited to a "newspaper

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[317] *Copyright Act*, s. 29.
[318] *Copyright Act*, s. 29.1.
[319] *Copyright Act*, s. 29.2.
[320] *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13 (CanLII), [2004] 1 SCR 339 at para. 48 ("*CCH*").
[321] David Vaver, *Intellectual Property Law: Copyright, Patents, Trade-marks*, 2nd ed (Toronto: Irwin Law, 2011) at p. 215.
[322] *CCH* at para. 48.
[323] *CCH* at para. 50.
[324] *CCH* at para. 51.
[325] *CCH* 339 at para. 51.
[326] *Society* at para. 27.
[327] *Society* at para. 22.
[328] *Pro Sieben Media A.G. v Carlton Television Ltd & Anor* [1998] EWCA Civ 2001 (BAILII).
[329] *Copyright Modernization Act*, S.C. 2021, c. 20, s. 21, replacing s. 29 of the *Copyright Act*.

summary," now extends to all media, including the online political news discussion forum at issue in *Warman*.[330]

154. An analysis of Mr. Linkletter's tweets makes clear that his purpose was one or more of research, criticism, education or news reporting. His research involved ascertaining how Proctorio's academic surveillance software functions, so as to determine whether it actually accomplishes what it claims to (preventing cheating) and whether it functions in an ethical manner. His criticism involved pointing out how Proctorio's academic surveillance software was harmful to students. His expressions were directed towards furthering understanding in the education community about how academic surveillance software works and some of the harms associated with its use.

155. Once a permitted purpose is established, the analysis turns to whether the dealing was fair. While the ultimate assessment "must be a matter of impression,"[331] the Supreme Court of Canada set out six factors in *CCH* to help structure the analysis of whether the dealing was fair.

156. A review of these factors shows that Mr. Linkletter's dealing with Proctorio's works was fair. The purpose was allowable under the *Copyright Act*,[332] and the character[333] and amount[334] were merely links and a screenshot of a portion of one page of a web site. In terms of the nature of[335] and effect of dealing on[336] the work, Mr. Linkletter's expressions had no impact because there was no market for the works and no one was deprived of the advantage of first publication. There were no alternatives to the dealing[337] because Mr. Linkletter's criticisms of Proctorio pertained to the very features of the software that were demonstrated in the videos.

157. At this stage, the Court need not determine whether Mr. Linkletter's dealing was fair; rather, Proctorio has the burden of showing that Mr. Linkletter's assertion of his user rights has "no real prospect of success."[338]

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[330] *Warman* at para. 31.
[331] *CCH* at para. 52, qtg. *Hubbard v. Vosper*, [1972] 1 All E.R. 1023 (C.A.) at p. 1027.
[332] *CCH* at para. 54.
[333] *CCH* at para. 55.
[334] *CCH* at para. 56; *Society* at para. 41.
[335] *CCH* at para. 58.
[336] *CCH* at para. 59.
[337] *CCH* at para. 57.
[338] *Pointes Protection* at para. 60.

5. Non-Commercial User-Generated Content

158. In the further alternative, Mr. Linkletter pleads that his tweets are non-commercial user-generated content permitted by section 29.21 of the *Copyright Act*.[339] This section provides an additional user right — beyond the exceptions for non-substantial use and fair dealing — where someone uses an existing copyrighted work to create a new work.

159. Mr. Linkletter's expressions meet all the requirements for this user right.[340] Proctorio's videos had already been "published or otherwise made available to the public" (s. 29.21(1)) because Proctorio uploaded them to YouTube.[341] Mr. Linkletter's "new work" (s. 29.21(1)) was his eight tweets containing original commentary with reference to (not copies of) the YouTube videos, and the Academy Screenshot. There is no dispute that Mr. Linkletter's communications were solely for non-commercial purposes (s. 29.21(1)(a)), and that he indicated the source and author of the existing work (s. 29.21(1)(b)). The existing works, namely Proctorio's YouTube Videos and Proctorio Academy, were not themselves infringing copyright (s. 29.21(1)(c)), and Proctorio's assertions to the contrary[342] are contradicted by its own evidence that Proctorio employees created the videos and own copyright in them.[343] Mr. Linkletter's communications did not have a substantial adverse effect on the exploitation or market for the existing work (s. 29.21(1)(d)), as there was no "market" for Proctorio's videos, which it offered gratuitously on YouTube.

iv. Circumvention of a technological protection measure

160. Proctorio's third pleaded cause of action is circumvention of a technological protection measure ("TPM") contrary to section 41.1 of the *Copyright Act*.

161. TPMs are colloquially known as "digital locks" and generally involve sophisticated cryptography to monitor and manage the way that digital property is used. They are most commonly incorporated by the copyright owner into works, such as Amazon Kindle e-books or Apple Music songs, that are sold or licensed to consumers. The measure prevents anyone other

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[339] RtCC, para. 23.
[340] *Copyright Act*, s. 29.21(1).
[341] Linkletter #1, para. 67 and Exhibit AO.
[342] AR, Part 5, para. 20(d).
[343] Devoy #1, para. 12.

than the paying customer from using the digital book or music file, thus protecting the copyright owner's revenue stream. This kind of TPM is sometimes referred to as "digital rights management."[344]

162. The *Copyright Act* prohibits the circumvention of TPMs to prevent people from defeating these measures and using works for which they have not paid. Section 41.1(2) of the *Copyright Act* provides civil remedies against a person who circumvents such a measure.

163. TPMs are defined in a technology-neutral way:

> technological protection measure means any effective technology, device or component that, in the ordinary course of its operation, (a) controls access to a work . . .[345]

164. In its Application Response, Proctorio particularizes three TPMs that it claims Mr. Linkletter "circumvented": (1) hosting of "unlisted" videos on YouTube, (2) access controls to the Help Center, and (3) access controls to Proctorio Academy.[346]

165. None of these three meets the statutory definition of a TPM, because none of them is an effective means for controlling access to the copyrighted works. The evidence demonstrates that an "unlisted" YouTube video is easily shared by anyone who has access to it, including by using "Share" buttons provided by YouTube itself. The Help Center has no access controls at all: anyone authorized by any of Proctorio's over 1,200 customers may access it, and from there, the YouTube videos. Likewise, access to the Proctorio Academy is granted by an automated email to anyone who installs Proctorio on a course. In both cases, no one at Proctorio can grant or deny access to individuals.

166. Moreover, there is no evidence that Mr. Linkletter "circumvented" anything at all. He certainly did not "descramble, decrypt, avoid, bypass, remove, deactivate or impair"[347] any of the three TPMs claimed by Proctorio. To the contrary, Mr. Linkletter used the features of YouTube

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[344] Ian Kerr, "Digital Locks and the Automation of Virtue," in Michael Geist, ed., *From "Radical Extremism" to "Balanced Copyright": Canadian Copyright and the Digital Agenda* (Toronto: Irwin Law, 2010) at p. 267-268.
[345] *Copyright Act*, s. 41.
[346] AR, Part 5, para. 24.
[347] *Copyright Act*, s. 41, definition of "circumvent."

exactly as YouTube intended them to be used, and he accessed the Help Center and Proctorio Academy using his regular UBC credentials.

E. The Public Interest in Protecting the Defendant's Expression Outweighs any Interest in Continuing the Proceeding

167. Even if Proctorio could satisfy the merits-based hurdle, it cannot discharge its burden with respect to the final step. This is the public interest hurdle, where Proctorio must satisfy the court that "the harm likely to have been or to be suffered by the respondent as a result of the applicant's expression is serious enough that the public interest in continuing the proceeding outweighs the public interest in protecting that expression."[348]

168. The Supreme Court of Canada has described this step as the "crux" of the analysis[349] at the "core" of the *PPPA*.[350] It "open-endedly engages with the overarching concern that this statute, and anti-SLAPP legislation generally, seek to address by assessing the public interest and public participation implications."[351] It "serves as a robust backstop for [application] judges to dismiss even technically meritorious claims if the public interest in protecting the expression that gives rise to the proceeding outweighs the public interest in allowing the proceeding to continue."[352]

169. This step is a "weighing" exercise: the public interest in allowing the proceeding to continue must *outweigh* the public interest in protecting expression, or else the action must be dismissed.[353] This reflects the concern throughout the legislative history of anti-SLAPP legislation in Ontario and British Columbia, that proportionality is "the paramount consideration in determining whether a lawsuit should be dismissed."[354] Ultimately, the Court must weigh "the public interest in freedom of expression and public participation against the public interest in vindicating a meritorious claim."[355]

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[348] *PPPA*, s. 4(2)(b).
[349] *Pointes Protection* at paras. 18, 61, and 82.
[350] *Pointes Protection* at para. 62.
[351] *Pointes Protection* at para. 62.
[352] *Pointes Protection* at para. 62.
[353] *Pointes Protection* at para. 66-67.
[354] *Pointes Protection* at para. 63; see also paras. 9 and 18.
[355] *Pointes Protection* at para. 63.

i. Proctorio has not Established any Harm

170. The concept of harm is "principally important"[356] to this analysis. As the Supreme Court explained in *Bent v. Platnick*, "the point is for the plaintiff to show that they have a legitimate impetus for bringing their lawsuit, by virtue of a legitimate harm that they seek to remedy, in order to alleviate the apprehension that they are using litigation as a tool to quell expression and silence the defendant."[357] Proctorio must show both the existence of harm and that the harm was suffered as a result of Mr. Linkletter's expression.[358] The harm need not be monetary nor synonymous with the damages alleged,[359] but it must be more than "bald assertions."[360]

171. The precise evidentiary burden applied in the harm analysis may vary depending on the nature of the substantive law being applied.[361] For example, in a defamation action where there is always some harm to reputation and thus general damages are presumed, the requirement for specific evidence of loss may be less relevant than in a case involving a breach of contract claim.[362] This is not a defamation action. In this case, like in the circumstances of *Pointes*, the plaintiffs failure to provide specific evidence of loss or damage is highly significant because it indicates that the plaintiffs do not have a legitimate injury to remedy.

172. Proctorio's evidence on harm is purely speculative. Mr. Devoy states that harm *might* occur if *certain information* (perhaps not that communicated by Mr. Linkletter) were to become public. His evidence is replete with speculation and qualifications: students "could" change their behaviour to avoid being flagged as suspicious[363] or the tweets "may" have allowed competitors to learn how Proctorio works.[364] In his reply affidavit, Mr. Devoy seemed to back away from his claims about Proctorio's competitors, stating only that "one of the primary challenges of any technology company is the protection of its intellectual property in order to maintain its competitive advantage."[365]

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[356] *Pointes Protection* at para. 68.
[357] *Bent* at para. 150; see also *Hobbs* at para. 78.
[358] *Pointes Protection* at para. 68; *Hobbs* at para. 19.
[359] *Pointes Protection* at para. 69.
[360] *Pointes Protection* at para. 71.
[361] *Hobbs* at para. 79.
[362] *Hobbs* at paras. 78-84; *Hansman* at paras. 51-55.
[363] Devoy #1, para. 19.
[364] Devoy #1, para. 46.
[365] Devoy #2, para. 24.

173. At no time has Proctorio proffered any evidence of *actual* harms resulting from Mr. Linkletter's actions. Mr. Devoy admitted that no one at Proctorio is concerned about students potentially finding ways to cheat using its software.[366] It is clear that Proctorio's competitors can easily learn about Proctorio's functionality through a simple Google search.[367]

174. Moreover, even if Proctorio did lead evidence of the existence of harms, it would be unable to establish causation. This is because its entire action is based upon Mr. Linkletter's disclosure of information — information *which was already public*. Even if Mr. Linkletter's tweets disseminated this information to a wider audience, Proctorio has offered no basis to attribute any student cheating or competitive pressure to Mr. Linkletter as distinct from the original publishers of that information. In *Pointes Protection*, the plaintiff's inability to establish causation weighed heavily in favour of the decision to dismiss its claim.[368]

ii. The Public Interest Favours Protecting Expression

175. The *PPPA* requires this Court to weigh any harm that Proctorio can prove it suffered against the public interest in protecting Mr. Linkletter's expression. In this part of the analysis, the quality of the expression and the motivation behind it are relevant factors.[369] The Court may also consider the defendant's history of activism or advocacy in the public interest, the potential chilling effect on *future* expression, and any disproportion between the resources being used in the lawsuit and the harm caused or the expected damages award.[370]

1. Mr. Linkletter's Motives

176. Mr. Linkletter's motives are clear: he believes that academic surveillance software is harmful to students, that instructors and students should have a clear understanding of how it works, and that damaging uses should be curtailed. While his expressions were critical of Proctorio, they were not motivated by malice or financial gain. They are not the sort of "deliberate falsehoods", "gratuitous personal attacks," "lies," or "vitriol" that might warrant less protection.[371] The quality of Mr. Linkletter's expression reflects his motives. While admittedly brief because of

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[366] Cross-examination of Devoy, page 52, lines 9-11.
[367] Trueman #1, para. 13.
[368] *Pointes Protection* at para. 115-116, 119 and 125.
[369] *Pointes Protection* at para. 74; *Hansman* at para. 61.
[370] *Pointes Protection* at para. 80.
[371] *Pointes Protection* at para. 75; *Hansman* at para. 61.

Twitter's character limit,[372] they reflect his factual observations about Proctorio and the harms he believes it causes to students.

177. One of the reasons Mr. Linkletter expresses himself is to draw attention to the discrepancies between what Proctorio tells instructors and what it tells students.[373] For example, Proctorio's Frequently Asked Questions page states that Proctorio does not track eye movements.[374] Proctorio's affiant made the same statement under cross-examination.[375] [redacted]

[redacted][377]

178. This video appears to describe a setting in the Proctorio software called "Head and Eye Movement," which is further described in various documents available on the internet.[378] As well, students who take examinations using Proctorio are prompted to give permission for Proctorio to collect "Your eye movements."[379] Under cross-examination, Mr. Devoy could not explain why Proctorio made an inaccurate video about its product.[380] It has not changed the "Abnormal Eye Movement" video.[381]

2. The Chilling Effect of this Action on Others

179. The public interest in protecting expression extends far beyond Mr. Linkletter. It goes to whether anyone can criticize Proctorio and other academic surveillance software, and whether they can discuss the software's functionality — over which Proctorio now claims total confidentiality — in so doing.

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[372] Cross-examination of Linkletter, page 76, line 24.
[373] Linkletter #2, para. 21.
[374] Linkletter #2, Exhibit B, page 6.
[375] Cross-examination of Devoy, page 56, line 8.
[376] The "Abnormal Eye Movement" video is distinct from, and contains different content than, the "Abnormal Head Movement" video. See Wong #1, Exhibit D, page 10.
[377] Wong #1, Exhibit C, page 8.
[378] Trueman #1, Exhibit A, page 32; Cross-examination of Devoy, page 56, lines 10-13.
[379] Linkletter #1, Exhibit K, page 65.
[380] Cross-examination of John Devoy, page 60, lines 8-13.
[381] Cross-examination of John Devoy, page 66, lines 23-25; page 67, lines 1-3.

180. An enriched and informed evaluation of the pros and cons of Proctorio necessarily requires an understanding of what the software actually does. As Proctorio concedes,[382] students have a right to know what information is being collected from them and how it will be used, especially when it might be used to suggest they have cheated. Likewise, students have a valid interest in avoiding inadvertently triggering the software's "suspicion rating," and it is for this reason that Proctorio advises students to talk to their roommates and even their pets,[383] to ensure that nothing intrudes upon the software's watchful gaze.

181. The educational institutions that use Proctorio also have an interest in hearing concerns about academic surveillance software and using that information to make decisions about the appropriate use of such software. For example, the record demonstrates how the June 2020 incident at UBC prompted sustained discussion and debate about Proctorio, including development of an official set of principles governing its use.[384] This is a normal and healthy aspect of academic governance that ought to be encouraged, not suppressed.

182. UBC's "principles for appropriate use of remote invigilation tools" advise instructors to "explain to students as clearly as possible what the tool does."[385] This mirrors Proctorio's public support material, which encourages instructors to explain the software before exams, in order to prevent misunderstanding and ease anxiety.[386] Educational institutions often go further, in part because of the need to explain the software's many limitations to instructors and prevent misuse. The British Columbia Institute of Technology cautioned instructors against the use of the "Record Room" feature, stating that it "is complex, invasive and misleading in the degree of security it offers."[387] The University of Missouri – St. Louis cautions instructors against "false positives" that may wrongly suggest that students have cheated.[388] The University of Washington advises instructors not to audio-record students as they write exams, to protect the privacy of students and others who share their living space.[389] Boston College warns instructors "that Proctorio, like other tools driven by algorithms, can inadvertently disadvantage students of color or others who don't

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[382] Devoy #2, para. 9.
[383] Trueman #1, Exhibit FF, p. 385.
[384] Linkletter #1, para. 50 and Exhibit AG.
[385] Linkletter #1, Exhibit AG, p. 260.
[386] Cross-examination of Devoy, page 89, lines 20-25; Trueman #1, Exhibit FF, p. 366; Devoy #2, para. 10(b).
[387] Linkletter #1, Exhibit BI, p. 348.
[388] Linkletter #1, Exhibit BK, p. 363.
[389] Trueman #1, Exhibit E, p. 111.

fit the norm around which the algorithm was built."[390] Miami University cautions that the "record room" function "may be difficult, or nearly impossible, for students with motor disabilities."[391]

183. All of these publications inevitably reveal some information about how the software works from the instructor's point of view. Some, like California State University, Fullerton, provide illustrated step-by-step instructions on how to configure Proctorio to reduce impacts on students with disabilities, such as those who need to read questions aloud, move their head and eyes due to their disability, or who require restroom breaks.[392] Yet, under the definition of "confidential information" that Proctorio has adopted in this action — [redacted][393] — educational institutions would be severely restricted in what they can communicate to their own students.

184. Proctorio will likely argue that the notion of it suing instructors and educational institutions is absurd. And, of course, it would be. However, this disparity only heightens the singling out of Mr. Linkletter — a vocal critic of Proctorio — from the dozens of other individuals and institutions who have published information about it.

185. The record reveals that the present action is the latest step in an escalating pattern of intimidation by Proctorio against its critics, which included its CEO publishing a private support chat transcript to discredit a student,[394] and its aggressive demands for a retraction from the author of "Our Bodies Encoded," which caused him to seek legal advice.[395] The present action against a high-profile critic in the education technology community undoubtedly has a chilling effect on others.

3. What is Really Going On?

186. In the final weighing exercise, Proctorio must show that the public interest in vindicating its claim *outweighs* the public interest in protecting Mr. Linkletter's expression.[396] Proportionality

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[390] Trueman #1, Exhibit H, p. 129.
[391] Trueman #1, Exhibit N, p. 199.
[392] Trueman #1, Exhibit L, p. 176.
[393] Cross-examination of Devoy, page 71, lines 21-23.
[394] Linkletter #1, para. 42.
[395] Devoy #2, paras. 57-59.
[396] *Pointes Protection* at para. 66.

is "the paramount consideration in determining whether a lawsuit should be dismissed"[397] under the *PPPA*. Ultimately, the court must "scrutinize what is really going on in the particular case before them."[398]

187. What *is* really going on in this case? Throughout this litigation, Proctorio has made shifting and inconsistent claims of confidentiality. But at their core, Proctorio's claims against Mr. Linkletter allege breach of confidence for information that was already available to the public, infringement of copyright in works it licensed YouTube users to distribute, and circumvention of non-existent or inadequate technological protection measures. It is hard to see how any of these causes of action could succeed on the facts.

188. One fact distinguishes Mr. Linkletter from the dozens of individuals and institutions that have published information about the functionality of Proctorio's software: the fact that Mr. Linkletter is a vocal and influential critic of academic surveillance software. This fact explains why Proctorio did not contact him or his employer about his tweets, or issue a takedown notice to Twitter. Instead, Proctorio began preparing for litigation with a view to obtaining an injunction.[399]

189. In this important respect, Proctorio has already achieved much of its purpose. Bringing this action allowed it to obtain an *ex parte* injunction against Mr. Linkletter. Further, it has caused him significant emotional turmoil and financial hardship to defend litigation brought by a large corporation reaping windfall profits during a pandemic-fuelled boom in online education and test-taking. All of this has had, and will continue to have, a significant chilling effect on Mr. Linkletter's speech and that of other critics of Proctorio.

190. It is precisely this kind of conduct that the *PPPA* was enacted to discourage. Proctorio's claims have no merit, and even if they did, the public interest in protecting expression about academic surveillance software significantly outweighs any public interest in allowing this litigation to continue. It is therefore appropriate for this Court to dismiss Proctorio's action, and award costs and damages in favour of Mr. Linkletter.

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[397] *Pointes Protection* at para. 63.
[398] *Pointes Protection* at para. 81.
[399] Cross-examination of Devoy, page 120, lines 18-24.

F. The Defendant Should be Awarded Costs on a Full Indemnity Basis

191. Section 7(1) of the *PPPA* creates a presumption that a successful defendant "is entitled to costs on the application and in the proceeding, assessed as costs on a full indemnity basis unless the court considers that assessment inappropriate in the circumstances."

192. This provision is identical in substance to section 137.1(7) of the Ontario Act, and guidance on its application can be taken from the Ontario Court of Appeal's decision in *Rabidoux*.[400] In essence, s. 7(1) "makes an important change to the starting point of the assessment of an appropriate costs order in cases to which the section applies," but it maintains "the overriding judicial discretion to ultimately impose the order that is appropriate in all the circumstances."[401] When determining whether to depart from the full indemnity starting point, the Court may consider any findings regarding (i) the merits of the case, (ii) the motivations of the parties, or (iii) the manner in which the parties have conducted the proceedings.[402] A full indemnity award is more likely to be appropriate in lawsuits that have strong indicia of a true SLAPP.[403]

193. In this case, there is no basis for departing from the *PPPA*'s "starting point" of full indemnity costs. Proctorio's claim never had any merit, and the manner in which it pursued its claim — including obtaining an *ex parte* injunction based on false and misleading statements and omissions — warrants a strong signal of disapproval from this Court.

G. The Plaintiff Should be Ordered to Pay Damages for Bringing This Proceeding in Bad Faith or for an Improper Purpose

194. Section 8 of the *PPPA* also gives the court discretion to "award the damages it considers appropriate against a respondent [plaintiff] if it finds that the respondent brought the proceeding in bad faith or for an improper purpose."

195. This provision is identical in substance to section 137.1(9) of the Ontario Act, which the Ontario Court of Appeal considered in *Mohammed*. Relying on the Advisory Panel Report that

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[400] *Hobbs* at para. 102.
[401] *Fortress Real Developments Inc. v. Rabidoux*, 2018 ONCA 686 ("*Rabidoux*") at para. 64.
[402] *Rabidoux* at para. 67.
[403] *Hobbs* at para. 104.

led to enactment of the Ontario Act, the Court held that the damages provision is "an effort to separate out a subset of SLAPP cases which go beyond simply reflecting an effort to limit expression and include active efforts to intimidate or to inflict harm on the defendant."[404]

196. The Court also noted that where the defendant is someone "inexperienced in litigation, who would understandably suffer the stress and anxiety associated with being the subject of a proceeding of this type," it "may be presumed that damages will arise from the use of a SLAPP lawsuit."[405] Medical evidence is not required.[406] The purpose of damages in this context is "to provide compensation for harm done directly to the defendant arising from the impact of the instituted proceeding."[407]

197. Some of the indicia of bad faith and improper purpose can be found in one of the trial decisions that led to *Barclay*. In that case, the plaintiff had "pounced" on the defendant Barclay's comments and immediately initiated proceedings. The plaintiff persisted in the claim notwithstanding that the allegedly defamatory comments had been deleted from Facebook.[408] The Court concluded that "shutting down public debate around an important issue or instilling fear in one's critics amounts to bad faith and an improper purpose."[409]

198. In *Mohammed*, the Ontario Court of Appeal upheld the motion judge's award of $7,500 in damages to the defendant Mohammed,[410] and $20,000 in damages to the defendant Barclay.[411] The $7,500 award to Mohammed was based solely on stress.[412] The $20,000 award to Barclay was based on harm to her health, financial security, and public humiliation,[413] an award the judge considered "modest."[414]

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[404] *United Soils Management Ltd. v. Mohammed*, 2019 ONCA 128 ("*Mohammed*") at para. 34.
[405] *Mohammed* at para. 36.
[406] *Mohammed* at para. 36.
[407] *Mohammed* at para. 38.
[408] *United Soils Management Ltd. v. Barclay*, 2018 ONSC 1372 ("*Barclay*") at para. 106.
[409] *Barclay* at para. 109.
[410] *Mohammed* at paras. 9 and 39.
[411] *Mohammed* at para. 17 and 39.
[412] *United Soils Management Ltd. v. Mohammed*, 2017 ONSC 4450 at paras. 80-81.
[413] *Barclay* at para. 133.
[414] *Barclay* at para. 137.

199. Like the plaintiffs in *Barclay*, Proctorio "pounced"[415] on Mr. Linkletter's tweets without contacting him or asking him to remove them. It persisted in its claim even though its YouTube videos were available to the public for only a few hours or minutes before Proctorio disabled the links to them.

200. Mr. Linkletter's uncontested evidence is that this action has caused him stress, aggravated a pre-existing medical condition, caused difficulty in his home life, and caused he and his wife to postpone their plans to start a family.[416] It has caused him to fear for his employment and his professional reputation.[417] He has had to reassure his 68 year-old mother that he will not go to jail as a result of Proctorio's lawsuit.[418] Further, he has commenced regular counselling to help manage the stress and anxiety caused by this action.[419] Additionally, and unlike the defendants in *Barclay*, Mr. Linkletter has had to live under an *ex parte* injunction obtained by Proctorio, which has affected his personal life[420] and his employment.[421]

201. The harms suffered by Mr. Linkletter are specific and substantial, and the damages award should reflect this reality, as well as the power imbalance between an individual of modest means and a technology corporation enjoying phenomenal growth during the pandemic-fuelled boom in online learning and test-taking. While the harms experienced by Mr. Linkletter are difficult to quantify in monetary terms, when compared against the defendants in *Barclay*, an award of $30,000 in general damages would be appropriate.

H. The Injunction Should Be Dissolved

202. In the alternative to his application for dismissal of the action under the *PPPA*, Mr. Linkletter seeks an order dissolving the *ex parte* injunction made against him, because (1) Proctorio did not disclose material facts in its *ex parte* application; (2) the injunction is overbroad; and (3) the application judge failed to consider the impact of the injunction on Mr. Linkletter's freedom of expression.

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[415] *Barclay* at para. 106
[416] Linkletter #1, para. 103.
[417] Linkletter #1, paras. 104-105.
[418] Linkletter #2, para. 25.
[419] Linkletter #2, para. 25.
[420] Linkletter #1, paras. 95-100; Linkletter #2, paras. 19-24.
[421] Linkletter #1, paras. 95 and 105.

i. Proctorio Did Not Disclose Material Facts and Law in its Ex Parte Application

203. This court has observed that "there is no situation more fraught with potential injustice and abuse of the court's powers than an application for an *ex parte* injunction."[422] It is because of this risk that courts often deal severely with parties who do not fulfil their obligation to make full and fair disclosure of all the material facts and law.

204. In this case, Proctorio made numerous omissions and misstatements in its application for an *ex parte* injunction. Some of these facts were highly relevant material, such as the fact that Proctorio had granted a license to other YouTube users to redistribute its videos,[423] that YouTube readily facilitates the sharing of videos with others,[424] and that the allegedly confidential material — including several of the YouTube videos[425] — was widely available on the internet through simple Google searches.[426]

205. Mr. Devoy's affidavit also materially misrepresented the June 2020 incident at UBC by omitting the fact that it was triggered by Proctorio CEO Mike Olsen's publication of a student's private and confidential online support transcript to Reddit,[427] and that Mr. Olsen subsequently apologized for this conduct.[428] He falsely claimed that the YouTube videos were on a "private channel on YouTube,"[429] when in fact Proctorio's YouTube channel was public.[430] Mr. Devoy quoted the confidentiality clauses in Proctorio's agreement with UBC,[431] but omitted that those clauses are subject to numerous exceptions, including an exception for material that is in the public domain at the time disclosed.[432]

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[422] *Watson v. Slavik*, 1996 CanLII 3545 (BCSC) at para. 10.
[423] Linkletter #1, paras. 60-62.
[424] Linkletter #1, paras. 63-71.
[425] Linkletter #1, paras. 72-75.
[426] Linkletter #1, paras. 92-93.
[427] Linkletter #1, para. 41.
[428] Linkletter #1, para. 44.
[429] Devoy #1, para. 11 and para. 32.
[430] Linkletter #1, para. 64. Mr. Devoy did not correct this misstatement in his second affidavit, but only under cross-examination over five months later: see Cross-examination of John Devoy, 16 March 2021, page 3, lines 18-23.
[431] Devoy #1, para. 67.
[432] Linkletter #1, paras. 56-58. Proctorio's counsel has confirmed by letter that this section is identical in the agreement that was in effect at the time of Mr. Devoy's first affidavit on August 31, 2020. See letter of Timothy Pinos to Catherine Boies Parker, Q.C., dated 7 April 2021.

206. Furthermore, Proctorio failed to draw the application judge's attention to highly relevant, adverse though non-binding authority holding that hyperlinking to material available on the internet is not infringement,[433] and failed to explain that its copyright infringement claim must be balanced against user rights such as fair dealing.[434]

207. This misconduct, on its own, warrants dissolution of the injunction. As Justice Sharpe, then of the Ontario Superior Court of Justice, observed, having an improperly obtained *ex parte* injunction set aside "is the price the Plaintiff must pay for failure to live up to the duty imposed by the law. Were it otherwise, the duty would be empty and the law would be powerless to protect the absent party."[435]

ii. The Injunction is Overbroad and Uncertain

208. The injunction is dangerously overbroad and uncertain. It enjoins Mr. Linkletter from sharing "any other… Confidential Information of the plaintiff; or hyperlinks to any of the above." This wording rests on Proctorio's overbroad and ever-changing definition of what is "confidential," which it now claims includes "anything that shows the exam or administrator side of the software," including its own publications.

209. The effect of the injunction, therefore, is to leave Mr. Linkletter entirely at the mercy of Proctorio, forcing him to censor himself in respect of not only the Help Center and Proctorio Academy, but of virtually any aspect of Proctorio that it might claim is "confidential."[436]

210. Further, the interim injunction Proctorio obtained is broader than the relief it sought in its Notice of Civil Claim, which did not include a prohibition on sharing "confidential information."[437] As the Federal Court has observed, "it will hardly be just and equitable for a court to issue an interlocutory injunction if the moving party is in fact claiming more, as interlocutory relief, than what it is asking the court in its underlying action or application."[438]

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[433] *Warman.*
[434] *Wiseau Studio et al. v. Richard Harper*, 2017 ONSC 6535 at para. 49.
[435] *United States of America v. Friedland*, [1996] O.J. No. 4399 (Ont. Gen. Div.) at para. 28.
[436] Linkletter #1, para. 96; Linkletter #2, para. 24.
[437] NoCC, para. 24(b)(i).
[438] *Ahousaht First Nation v. Canada (Fisheries, Oceans and Coast Guard),* 2019 FC 1116 at para. 59.

iii. The Application Judge Failed to Consider The Injunction's Impact on Mr. Linkletter's Charter-Protected Freedom of Expression

211. Further, the application judge erred in law by failing to consider the impact of the injunction on Mr. Linkletter's freedom of expression.

212. In *Vancouver Aquarium*, which was also a copyright case, the British Columbia Court of Appeal held that an application judge must consider the impact of an injunction on the respondent's *Charter*-protected freedom of expression, as part of the balance of convenience test.[439] Likewise, in the context of an interlocutory injunction, the Court of Appeal in *Hall* held that it was "essential that the potential for 'harm' to our constitutionally entrenched right to freedom of expression must be taken into account as part of the familiar balance of convenience test."[440]

213. In *Hall*, the Court of Appeal also noted that the respondent's right to later apply to vary or set aside the order is not an adequate substitute for being heard at the time the application for an interlocutory injunction is made,[441] and held that the proper course of action was an interim injunction for a short, specified period to allow the respondent to make submissions at a contested hearing.[442] Proctorio did not advise the application judge of this binding authority and instead sought an injunction on terms contrary to it.

214. Regrettably, the application judge's attention was not drawn to the freedom of expression issue on the *ex parte* application, perhaps because of the force of Proctorio's misstatements of the confidential nature of the information being published by Mr. Linkletter. If the application judge had been given the full picture at a contested hearing, it is unlikely that he would have granted an injunction on these terms.

PART V. ORDER SOUGHT

215. Mr. Linkletter seeks an order dismissing the action, awarding him costs on a full indemnity basis, and awarding him damages in the amount of $30,000.

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[439] *Vancouver Aquarium* at paras. 72, 79 and 82.
[440] *Provincial Rental Housing Corporation v. Hall*, 2005 BCCA 36 ("*Hall*") at para. 58.
[441] *Hall* at para. 60.
[442] *Hall* at para. 62.

216. In the alternative, Mr. Linkletter seeks an order dissolving the injunction granted on 2 September 2020 by Justice Giaschi, costs on a full indemnity basis, and damages in an amount determined by the Court.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated: October 18, 2021

Signature of lawyer for the Defendant
Catherine J. Boies Parker, Q.C.
and Caroline North

List of Authorities

Tab	Description
Cases	
1	*1395804 Ontario Ltd. (Blacklock's Reporter) v. Canada (Attorney General)*, 2016 FC 1255
2	*1704604 Ontario Ltd. v. Pointes Protection Association*, 2020 SCC 22 ("*Pointes Protection*")
3	*Adler v. Adler et al.*, 1965 CanLII 251 (ONCA)
4	*Ahousaht First Nation v. Canada (Fisheries, Oceans and Coast Guard),* 2019 FC 1116
5	*Abode Properties Ltd. v. Schickedanz Bros. Limited*, 1999 ABQB 902
6	*British Columbia (Attorney General) v. Wale*, 1986 CanLII 171 (BCCA)
7	*Cadbury Schweppes Inc. v. FBI Foods Ltd.*, 1999 CanLII 705 (SCC), [1999] 1 S.C.R. 142
8	*Canadian Western Bank v. Alberta*, 2007 SCC 22 (CanLII), [2007] 2 S.C.R. 3
9	*CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13 (CanLII), [2004] 1 SCR 339
10	*Centre Ice Ltd. v. Nat Hockey League*, [1994] F.C.J. No. 68 (QL) (FCA
11	*Cheema v Young*, 2021 BCSC 461
12	*Cinar Corporation v. Robinson*, 2013 SCC 73 (CanLII), [2013] 3 SCR 1168
13	*Coco v. A.N. Clark (Engineers) Ltd.* [1969] R.P.C. 41 (Ch. D.)
14	*Crookes v. Newton*, 2011 SCC 47, [2011] 3 S.C.R. 269 ("*Crookes*")
15	*Desgagnés Transport Inc. v. Wärtsilä Canada Inc.*, 2019 SCC 58
16	*Desputeaux v. Éditions Chouette (1987) inc.*, 2003 SCC 17 (CanLII), [2003] 1 S.C.R. 178
17	*Fortress Real Developments Inc. v. Rabidoux*, 2018 ONCA 686
18	*Fournier Pharma Inc. v. Apotex Inc.*, 1999 CanLII 7961 (FC), [1999] F.C.J. No. 504 (QL).

19 *Galloway v A.B.*, 2021 BCSC 320

20 *Gartside v. Outram* (1856), 26 L.J. Ch. 113 ("*Gartside*");

21 *Grant v. Torstar Corp.*, 2009 SCC 61 (CanLII), [2009] 3 S.C.R. 640

22 *Hobbs v. Warner*, 2021 BCCA 290

23 *Icam Technologies Corp. v. Ebco Industries Ltd.*, 1993 CanLII 2289 (BCCA), 85 B.C.L.R. (2d) 318

24 *Initial Services, Ltd. v. Putterill et al.*, [1987] 3 All E.R. 145 (C.A.) ("*Initial Services*")

25 *Irwin Toy Ltd. v. Quebec (Attorney General)*, 1989 CanLII 87 (SCC), [1989] 1 S.C.R. 927

26 *Kantel v. Grant*, [1933] Ex.C.R. 84 (QL)

27 *Kourtessis v. M.N.R.*, 1993 CanLII 137 (SCC), [1993] 2 S.C.

28 *Mineral Aquiline Argentina SA v. IMA Exploration Inc.*, 2007 BCCA 319

29 *Murphy Oil Company Ltd. v. Predator Corporation Ltd.*, 2006 ABQB 680

30 *Neufeld v. Hansman*, 2021 BCCA 222

31 *No Limits Sportswear Inc. v. 0912139 B.C. Ltd.*, 2015 BCSC 1698

32 *Ontario (Attorney General) v. Pembina Exploration Canada Ltd.*, 1989 CanLII 112 (SCC), [1989] 1 S.C.R. 206

33 *Platnick v. Bent*, 2018 ONCA 687

34 *Pro Sieben Media A.G. v Carlton Television Ltd & Anor* [1998] EWCA Civ 2001 (BAILII).

35 *Proctorio, Incorporated v. Linkletter*, 2021 BCSC 1154

36 *Reference re Firearms Act (Can.)*, 2000 SCC 31 (CanLII), [2000] 1 S.C.R. 783

37 *Reference re Genetic Non-Discrimination Act*, 2020 SCC 17

38 *Reference re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11

39 *Reference re Pan-Canadian Securities Regulation*, 2018 SCC 48 (CanLII), [2018] 3 SCR 189

40 *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573, 1986 CanLII 5

41 *Sateri (Shanghai) Management Limited v. Vinall*, 2017 BCSC 491

42 *Seaway Marine Services Ltd. v. Weiwaikum General Partner Limited*, 2014 BCSC 2102

43 *Society of Composers, Authors and Music Publishers of Canada v. Bell Canada*, 2012 SCC 36 (CanLII), [2012] 2 SCR 326

44 *Steintron International Electronics Ltd. v. Vorberg*, 1986 CanLII 1234 (BCSC)

45 *Stenada Marketing Ltd. v. Nazareno*, 1990 CanLII 917 (BCSC)

46 *Théberge v. Galerie d'Art du Petit Champlain inc.*, 2002 SCC 34 (CanLII), [2002] 2 SCR 336

47 *Titan Linkabit Corp. v. S.E.E. See Electronic Engineering Inc.*, [1992] F.C.J. No. 807 (QL), 58 F.T.R. 1

48 *United Soils Management Ltd. v. Barclay*, 2018 ONSC 1372

49 *United Soils Management Ltd. v. Mohammed*, 2017 ONSC 4450

50 *United Soils Management Ltd. v. Mohammed*, 2019 ONCA 128

51 *United States of America v. Friedland*, [1996] O.J. No. 4399 (Ont. Gen. Div.)

52 *Vancouver Aquarium Marine Science Centre v. Charbonneau*, 2017 BCCA 395

53 *Warman v. Fournier*, 2012 FC 803

54 *Watson v. Slavik*, 1996 CanLII 3545 (BCSC)

55 *Wiseau Studio et al. v. Richard Harper*, 2017 ONSC 6535

Other

56 David Vaver, *Intellectual Property Law: Copyright, Patents, Trade-marks*, 2nd ed (Toronto: Irwin Law, 2011)

57 Graham Reynolds, "The Limits of Statutory Interpretation: Towards Explicit Engagement, by the Supreme Court of Canada, with the *Charter* Right to Freedom of Expression in the Context of Copyright" (2016) 41:2 Queens L J 455

58 *Injunctions: British Columbia Law and Practice* (Vancouver: Continuing Legal Education Society of British Columbia, 2020)

59 Peter T. Burns and Joost Blom, *Economic Torts in Canada*, 2nd ed., (Toronto: LexisNexis, 2016)

Statutes

60 *Business Corporations Act*, S.B.C. 2002, c. 57, s. 236

61 *Copyright Act,* R.S.C., 1985, c. C-42, ss. 27(1), 29, 29(1), 29(2), 29.21(1), 41, 41.24, 43.1,

62 *Copyright Modernization Act*, S.C. 2012, c. 20, s. 21

63 *Court of Appeal Act*, R.S.B.C. 1996, c. 77, s. 29

64 *Court Rules Act*, R.S.B.C. 1996, c. 80

65 *Courts of Justice Act*, R.S.O. 1990, c. 43, ss. 137.1 to 137.5.

66 *Federal Courts Act,* R.S.C., 1985, c. F-7, s. 44

67 *Federal Courts Rules*, SOR/98-106, ss. 373, 374(2)

68 *Law and Equity Act*, R.S.B.C. 1996, c. 253, s. 39

69 *Protection of Public Participation Act,* S.B.C. 2019, c. 3

70 *Supreme Court Act*, R.S.B.C. 1996, c. 443, s. 29

71 *Supreme Court Civil Rules*, B.C. Reg. 168/2009, Rules 1-3(2), 8-5(4), 9-5(1), 9-6(5), 9-7(2), 10-4, 14-1(14).