



No. S208730
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

PROCTORIO, INCORPORATED

PLAINTIFF

AND:

IAN LINKLETTER

DEFENDANT

NOTICE OF APPLICATION

Name of applicant: The Defendant, Ian Linkletter

To: The Plaintiff, Proctorio, Incorporated

TAKE NOTICE that an application will be made by the applicant to the presiding judge or master at the courthouse at 800 Smithe Street, Vancouver, British Columbia on ~~09~~¹⁶ Nov 2020 at 9:45 a.m. for the orders set out in Part 1 below:

Part 1: ORDERS SOUGHT

1. An order dismissing this action under s. 4 of the *Protection of Public Participation Act*, S.B.C. 2019, c. 3 (the "PPPA").
2. An order under s. 7 of the PPPA that the plaintiffs pay the defendant costs of this application and this proceeding on a full indemnity basis.
3. An order under s. 8 of the PPPA that the plaintiffs pay damages to the defendant for bringing this proceeding in bad faith or for an improper purpose.
4. In the alternative, an order dissolving the injunction granted by Giaschi J. on 02 Sep 2020.
5. Such further and other relief as this Honourable Court may deem appropriate.

Part 2: FACTUAL BASIS

1. This is an application to dismiss the plaintiff's proceeding under the *Protection of Public Participation Act*. The plaintiff's proceeding targets eight "tweets" published on Twitter by the defendant on August 23, 24, and 29, 2020. The tweets contained the defendant's

expressions on matters of public interest. Included with the tweets were *links* to seven videos published by the plaintiff on YouTube, and an image depicting a portion of one web page maintained by the plaintiff.

2. It is those seven links and one image that form the basis of the plaintiff's claim. The plaintiff claims that the defendant's tweets infringed its copyright, circumvented a technological protection measure, and breached its confidence.
3. The plaintiff's proceeding has no substantial merit and is brought for the purpose of silencing the defendant.
4. Further, the plaintiff obtained an *ex parte*, without notice injunction against the defendant by failing to make full and frank disclosure by omitting or misrepresenting material facts. The application judge also erred in law by failing to consider the impact on the defendant's freedom of expression.

The plaintiff's proceeding arises from an expression made by the defendant

5. The plaintiff's proceeding against the defendant arises from eight tweets published by the defendant on Twitter, in which he criticized Proctorio, an academic surveillance software product made by the plaintiff.

Notice of Civil Claim filed 01 Sep 2020 ("Notice of Civil Claim"), at paras. 19 and 21
Affidavit #1 of John Devoy, sworn 31 Aug 2020 ("Devoy #1"), at paras. 31-33, 42

6. The defendant admits to writing the tweets but denies the legal claims made by the plaintiff in respect of them.

Affidavit #1 of Ian Linkletter, affirmed 15 Oct 2020 ("Linkletter #1"), at paras. 54-55

The Defendant's Expression Relates to a Matter of Public Interest

7. The plaintiff manufactures "Proctorio", a form of academic surveillance software that video-records students while they write tests and examinations, and then scans the recording using a proprietary algorithm to measure "behaviour", calculate "abnormalities" and then assign a "suspicion level" to each student. In this manner, Proctorio claims to ensure integrity during academic testing.

Devoy #1, at paras. 3-5
Linkletter #1, at para. 15

8. There is a vigorous debate within academic institutions and among the public at large about the ethics and efficacy of academic surveillance software such as Proctorio. Some of the concerns expressed by students and educators include the privacy implications of such software, anxiety caused to test-takers, barriers to students with disabilities, and the racist and sexist biases that may be present in its proprietary algorithms.

Linkletter #1, at paras. 16-38

9. The University of British Columbia, where the defendant is employed as a Learning Technology Specialist, has an agreement with the plaintiff for the use of Proctorio.

Devoy #1, at paras. 20, 22, 62-67
Linkletter #1, at paras. 56-58

10. The public debate over Proctorio has extended to the University of British Columbia, where in June 2020 the plaintiff released a transcript of a student's private conversation with one of the plaintiff's support agents. This has exposed the plaintiff to further criticism over its privacy practices and its treatment of students who take tests using its software.

Devoy #1, at paras. 53-61
Linkletter #1, at paras. 39-47

11. This public discussion led to the university's student union recommending that use of Proctorio be discontinued, and to the university publishing a set of "principles" to guide faculty in their use of academic surveillance software and advise them of some of the risks and drawbacks.

Linkletter #1, at paras. 48-53

12. The defendant's commentary on the June 2020 incident at the University of British Columbia caused the plaintiff to place the defendant's social media posts under surveillance.

Devoy #1, at para. 29

The Defendant's Expressions

13. The defendant contributed to the public discussion about the plaintiff's academic surveillance software in two ways that are at issue in this proceeding: the "YouTube Link Tweets" and the "Academy Screenshot Tweet."

14. The defendant's tweets involve material maintained by the plaintiff in two online resources, a "Help Center" and a "Proctorio Academy." Both of these contain information on the use of Proctorio for instructors and administrators of educational institutions that use Proctorio.

Devoy #1, at paras. 9-18

The "YouTube Link Tweets"

15. The YouTube Link Tweets are a series of seven tweets published by the defendant on August 23 and 24, 2020 that contain hyperlinks to videos posted by the plaintiff on YouTube, an online video sharing platform. In each tweet, the defendant commented on aspects of the Proctorio software that concerned him.

Notice of Civil Claim, at para. 19
Devoy #1, at paras. 32-33

Linkletter #1, at paras. 76-84

16. The defendant published the YouTube Link Tweets for the purpose of contributing to the public discussion on the ethics and efficacy of academic surveillance software such as Proctorio.

Linkletter #1, at para. 54

17. The videos referred to in the YouTube Link Tweets were produced by the plaintiff and uploaded to YouTube as “unlisted” videos. They describe various aspects of the Proctorio software.

Devoy #1, at para. 11

18. The plaintiff granted every other user of YouTube a worldwide, non-exclusive, royalty-free license to access its videos through YouTube, and to use those videos, including to reproduce, distribute, prepare derivative works, display, and perform them, as enabled by a feature of YouTube.

Linkletter #1, at paras. 59-62

19. Some of these videos were available to the public through a University of British Columbia web site.

Linkletter #1, at paras. 73-75

20. Any person who views an “unlisted” video, whether directly on YouTube or embedded within a web page, is given the tools to redistribute that video.

Linkletter #1, at paras. 65-71

The “Academy Screenshot Tweet”

21. The Academy Screenshot Tweet is a single tweet published by the defendant on August 29, 2020 that contained an attached screenshot from the Proctorio Academy web site. The screenshot showed that Proctorio had disabled or removed embedded videos from its own support web site. The dominant image in the screenshot is three large boxes marked “Video unavailable: This video has been removed by the uploader.” As well, a small amount of text from a single Proctorio web page is visible.

Notice of Civil Claim at para. 21

Devoy #1, at para. 42

Linkletter #1, at para. 85-91

22. The defendant published the Academy Screenshot Tweet for the purpose of illustrating the plaintiff’s lack of transparency about how Proctorio’s algorithms work and how it labels student behaviours as “suspicious”. The screenshot attached to the Academy Screenshot

Tweet illustrated to the defendant that the plaintiff was prepared to undermine its own support resources in order to avoid scrutiny of its activities.

Linkletter #1, at para. 87

23. The information visible in the screenshot attached to the Academy Screenshot Tweet is widely available on the internet.

Linkletter #1, at paras. 92-93

The Plaintiff's Proceeding has no Substantial Merit and the Defendant has Valid Defences

24. The defendant has raised valid defences to each of the claims made by the plaintiff.
25. In response to the plaintiff's claims of copyright infringement, the defendant has raised valid defences:
- a. it is not infringement to publish a hyperlink to content available on the Internet;
 - b. the plaintiff granted a license to every other user of YouTube (including the defendant) to use and distribute its content;
 - c. the defendant's communications did not involve a substantial part of the plaintiff's work;
 - d. in the alternative, the defendant's communications constituted fair dealing permitted under the *Copyright Act*; and
 - e. in the further alternative, the defendant's communications constituted non-commercial user-generated content permitted under the *Copyright Act*.

Response to Civil Claim filed 16 Oct 2020 ("Response to Civil Claim"), at paras. 20-24

26. In response to the plaintiff's claims of circumvention of technological protection measures, the defendant has raised valid defences:
- a. publication of an "unlisted" YouTube video is not a technological protection measure;
 - b. the plaintiff did not employ any technological protection measure to prevent the taking of a screenshot from the Proctorio Academy web site;
 - c. in the alternative, the defendant did not circumvent any technological protection measure; and
 - d. in the further alternative, the defendant was not aware and had no reasonable grounds to believe that his acts constituted a contravention of the *Copyright Act*.

Response to Civil Claim, at paras. 25-28

27. In response to the plaintiff's claims of breach of confidence, the defendant has raised valid defences:
- a. the information at issue did not have the necessary quality of confidence about it because it was available to the public prior to the defendant's communications;
 - b. in the alternative, the plaintiff did not suffer any detriment as a result of the defendant's communications; and
 - c. in the further alternative that the defendant's communications were made in the public interest.

Response to Civil Claim, at paras. 29-32

The Alleged Harm Suffered by the Plaintiff as a Result of the Applicant's Expression is Not Serious Enough that the Public Interest in Continuing the Proceeding Outweighs the Public Interest in Protecting that Expression

28. The plaintiff has not pleaded any actual harms sustained as a result of the defendant's expression, and has provided only speculation as to harm that it thinks might occur if others learned about the functionality of its academic surveillance software.

Notice of Civil Claim, at paras. 12 and 22
Devoy #1, at paras. 45-48

29. The plaintiff's claims to harm resulting from the defendant's disclosures are belied by the widespread availability of information about Proctorio on the internet, and the ability of any internet user to further distribute YouTube videos. Even if the plaintiff has or will suffer harm, it cannot be attributed to the defendant.

Linkletter #1, at paras. 59-75, 92-93

30. The plaintiff mitigated any harm it might have suffered by removing or disabling links to its YouTube videos within hours, and once within minutes, of the defendant's tweets.

Devoy #1, at para. 40
Linkletter #1, at paras. 76-84

31. Meanwhile, the *ex parte*, without notice injunction the plaintiff obtained against the defendant has significantly impacted his ability to participate in the continuing and important public discourse surrounding Proctorio.

Linkletter #1, at paras. 94-101

32. Further, the plaintiff's proceeding against the defendant has caused considerable stress, marital difficulties, and financial strain on the defendant.

Linkletter #1, at paras. 102-104

The Plaintiff Materially Misstated Facts to Obtain an *Ex Parte* Without Notice Injunction

33. On September 2, 2020, the plaintiff applied for and obtained an *ex parte* injunction without notice to the defendant. In support of its application, the plaintiff's employee deposed that he was "concerned if Mr. Linkletter is given advance notice of this Application, he may take steps to further publish or give access to the Proprietary Information of Proctorio."

Devoy #1, at para. 52

34. In its application for the injunction, the plaintiff failed to make full and frank disclosure of all material facts. The plaintiff's misstatements include the following:

- a. The plaintiff misrepresented the "June 2020 incident" by failing to disclose to the Court that it had published a portion of a student's private conversation with a Proctorio support agent, and that it subsequently apologized for this conduct.

Linkletter #1, at paras. 41 and 44

- b. The plaintiff inaccurately represented to the Court that it hosted its videos on a "private channel" when, in fact, its YouTube channel is public.

Linkletter #1, at para. 64

- c. The plaintiff misrepresented to the Court the nature of an "unlisted" YouTube video, and failed to disclose to the Court that any YouTube user can share such a video.

Linkletter #1, at paras. 65-71

- d. The plaintiff failed to disclose to the Court that it had granted the defendant and other YouTube users a license to use and distribute its videos.

Linkletter #1, at paras. 60-62

- e. The plaintiff failed to disclose to the Court the Federal Court's decision in *Warman v. Fournier*, which holds that publishing a hyperlink to material available on the internet is not an infringement of copyright.

Warman v. Fournier, 2012 FC 803

- f. The plaintiff failed to disclose to the Court that several of its "unlisted" YouTube videos were already available to the public.

Linkletter #1, at paras. 72-75

- g. The plaintiff described its agreement with the University of British Columbia, including the confidentiality commitments therein, but failed to disclose to the Court that those commitments are subject to numerous exceptions, including an exception for material that is in the public domain at the time disclosed.

Linkletter #1, at paras. 56-58

- h. The plaintiff claims that the defendant breached its confidence by disclosing information about Proctorio, but failed to disclose to the Court that similar, if not identical, information about the functionality of Proctorio is widely available on the Internet.

Linkletter #1, at paras. 92-93

- i. The plaintiff represented to the Court that an injunction “will not cause any harm to the defendant, as he will continue to be able to access the Application Documentation if required for use in his employment at UBC.” However, the injunction order it obtained on an *ex parte*, without notice basis appears to prevent the defendant from even sending a link to Proctorio’s material to another employee of the university at which he works.

Devoy #1, at para. 50
Linkletter #1, at para. 95

Part 3: LEGAL BASIS

Dismissal Under the *Protection of Public Participation Act*

1. The defendant relies on the provisions of the *Protection of Public Participation Act*, S.B.C. 2019, c. 3 (the “PPPA”).
2. The expressions in respect of which the respondent plaintiff has claimed against the defendant relate to a matter of public interest within the academic community; namely, the ethics and efficacy of academic surveillance software such as Proctorio.
3. The plaintiff’s proceeding has no substantial merit, and the defendant has raised valid defences in respect of all of the claims brought by the plaintiff.
4. The plaintiff has suffered no harm as a result of the defendant’s actions; or, alternatively, any harm that has been or might be suffered by the plaintiff is not sufficiently serious.
5. The public interest in continuing the proceeding does not outweigh the public interest in protecting expression related to the ethics and efficacy of academic surveillance software.

Dissolution of the Injunction

6. A party seeking an *ex parte*, without notice injunction is under a duty to make full and frank disclosure of all the material facts.
7. Non-disclosure on an application for an *ex parte*, without notice injunction can form a stand-alone basis for dissolving the injunction, and in any event the nature of the failure and the degree and extent of the applicant’s culpability are highly material factors for consideration.

MacLachlan v. Nadeau, 2017 BCCA 326, at para. 37

8. It is an error of law to fail to consider the impact of an injunction on *Charter*-protected freedom of expression in the balance of convenience test.

Vancouver Aquarium Marine Science Centre v. Charbonneau, 2017 BCCA 395,
at paras. 71-83

Part 4: MATERIAL TO BE RELIED ON

1. Affidavit #1 of Ian Linkletter, made 15 Oct 2020;
2. Affidavit #1 of John Devoy, made 31 Aug 2020; and
3. Such other material as counsel may advise and this honourable court may permit.

The applicant(s) estimate(s) that the application will take 2 hours.

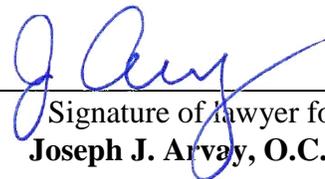
[Check the correct box.]

- This matter is within the jurisdiction of a master.
 This matter is not within the jurisdiction of a master.

TO THE PERSONS RECEIVING THIS NOTICE OF APPLICATION: If you wish to respond to this notice of application, you must, within 5 business days after service of this notice of application or, if this application is brought under Rule 9-7, within 8 business days after service of this notice of application,

- (a) file an application response in Form 33,
- (b) file the original of every affidavit, and of every other document, that
 - (i) you intend to refer to at the hearing of this application, and
 - (ii) has not already been filed in the proceeding, and
- (c) serve on the applicant 2 copies of the following, and on every other party of record one copy of the following:
 - (i) a copy of the filed application response;
 - (ii) a copy of each of the filed affidavits and other documents that you intend to refer to at the hearing of this application and that has not already been served on that person;
 - (iii) if this application is brought under Rule 9-7, any notice that you are required to give under Rule 9-7 (9).

Dated: 16 Oct 2020



Signature of lawyer for the applicant
Joseph J. Arvay, O.C., O.B.C., Q.C.

This NOTICE OF APPLICATION is filed by Solicitors for the Applicant Ian Linkletter, Arvay Finlay LLP, Barristers and Solicitors, whose place of business and address for service is 1512 – 808 Nelson Street, Box 12149, Nelson Square, Vancouver, British Columbia, V6Z 2H2. Telephone: 604.696.9828 / Fax: 1.888.575.3281. Email: jarvay@arvayfinlay.ca

To be completed by the court only:

Order made

in the terms requested in paragraphs _____ of Part 1 of this notice of application

with the following variations and additional terms:

Date: _____

Signature of Judge Master

APPENDIX

[The following information is provided for data collection purposes only and is of no legal effect.]

THIS APPLICATION INVOLVES THE FOLLOWING:

- discovery: comply with demand for documents
- discovery: production of additional documents
- other matters concerning document discovery
- extend oral discovery
- other matter concerning oral discovery
- amend pleadings
- add/change parties
- summary judgment
- summary trial
- service
- mediation
- adjournments
- proceedings at trial
- case plan orders: amend
- case plan orders: other
- experts
- none of the above