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Minding the Gap: Why and How Nova Scotia Should Enact a New *Cyber-safety Act*

Case Comment on *Crouch v. Snell*

By Jennifer Taylor*

INTRODUCTION

Nova Scotia's *Cyber-safety Act*[1] was meant to fill a gap in the law.[2] Where criminal charges and civil claims like defamation were unavailable or undesirable, the *Act*, it was hoped, would contain a substantive definition of cyberbullying, set out when it was actionable, and provide procedures for victims to obtain remedies. But the statute that was ultimately passed was too blunt a tool to address the problem, from both a substantive and a procedural perspective.

That helps explain why Justice McDougall of the Supreme Court of Nova Scotia struck down the entire statute as unconstitutional, in the recent case of *Crouch v. Snell*.[3] Now that the *Cyber-safety Act* is no more, the gap is back. Since the statute was enacted, in 2013, there have been amendments to the *Criminal Code*[4] and developments in tort law[5] that arguably temper the need for a revised statute.

So is there still a gap that needs filling? This case comment suggests that there is, in light of the continued prevalence of harmful online speech — but only if it is filled properly. In filling the gap the second time around, the Legislature should take some cues from Justice McDougall's decision which, though not perfect,

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1 *Cyber-safety Act*, S.N.S. 2013, c. 2 [alternatively, "the Act"].

2 Nova Scotia, House of Assembly, *Hansard*, 61st Assembly, 5th Sess, 13-32 (10 May 2013) at 2514 (Hon Marilyn More).

3 *Crouch v. Snell*, 2015 NSSC 340, 2015 CarswellNS 995 (N.S. S.C.).

4 See e.g. the new offence of publication of an intimate image without consent in section 162.1 of the *Criminal Code*, R.S.C. 1985, c. C-46.

5 See e.g. *Jane Doe 464533 v. D. (N.)*, 2016 ONSC 541, 2016 CarswellOnt 911 (Ont. S.C.J.), which established in Ontario the tort of "public disclosure of private facts": see para. 46.

lays the groundwork for what reasonable limits on the substantive definition of "cyberbullying," and reasonable tweaks to the process, should look like.

I. REVIEW OF THE *CYBER-SAFETY ACT*

The soul of the *Cyber-safety Act* was the definition of cyber-bullying:

> Interpretation
>
> 3 (1) In this Act,
>
> > (b) "cyberbullying" means any electronic communication through the use of technology including, without limiting the generality of the foregoing, computers, other electronic devices, social networks, text messaging, instant messaging, websites and electronic mail, typically repeated or with continuing effect, that is intended or ought reasonably [to] be expected to cause fear, intimidation, humiliation, distress or other damage or harm to another person's health, emotional well-being, self-esteem or reputation, and includes assisting or encouraging such communication in any way[.]

The two main pillars of the *Cyber-safety Act* rested on this definitional foundation:[6]

- ***Part I — Protection Orders***: Part I set out the procedure to apply to a justice of the peace for an *ex parte* protection order against an alleged cyberbully. The "subject" of cyberbullying could apply for this order himself or herself; if the subject was a "minor" then their parent, a police officer, or another designated person would have to apply on their behalf. The protection order could include, *inter alia*, a provision restricting the respondent from communicating with the subject. An order would have to be served on the respondent, and reviewed by the Supreme Court, which would have powers to revise or revoke it.
- ***Part II — Liability for Cyberbullying***: Part II established the tort of cyberbullying, and outlined the available remedies if liability was proven (including remedies against the parent of a defendant who was a minor).

Cyberbullying was on the government's mind well before this *Act* came into being. In 2011, the government had appointed a Task Force to investigate the issue:

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[6] This comment does not consider Part IV or Part V of the *Act*, which amended the *Education Act* and the *Safer Communities and Neighbourhoods Act* respectively (and led to the creation of Nova Scotia's CyberSCAN unit). These provisions were not directly at issue in *Crouch v. Snell*. However, Justice McDougall, in striking down the entire Act, commented at para. 220 that: "The remaining parts of the Act cannot survive on their own. They are inextricably connected to the offending provisions, in particular the definition of cyberbullying."

> The Minister of Education first announced the Task Force in April 2011 in response to the growing public concern about bullying and cyberbullying among Nova Scotia's children and youth and the tragic consequences that can flow from this misconduct. In particular, there were some high-profile student suicides which appeared to be linked, at least in part, to bullying and cyberbullying.[7]

The Task Force reported on February 29, 2012. Its recommendations for legislative reform were directed at the *Education Act* and Regulations, and school board policies.[8] The focus was therefore on the school context — which, of course, is the environment where Nova Scotians would have expected most "bullying" to occur.

And yet the *Cyber-safety Act* ended up with a much broader focus than the schoolyard and communications between students. It did not just amend the *Education Act*, but created a process for obtaining protection orders and pursuing a claim tort of cyberbullying, applicable to all Nova Scotians.[9]

Even a cursory look at *Hansard* from April and May 2013[10] reveals why such broad strokes were used. As has been widely reported, the Legislature was responding to the tragic death of Rehtaeh Parsons a few weeks before (coming only months after British Columbia teenager Amanda Todd tragically died),[11] and passed the *Act* with all-party support. Minister Marilyn More opened the Second Reading debate:

> We're all aware that a very tragic incident in our province has touched a chord with every Nova Scotian. Over the last number of years, a

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7 A. Wayne MacKay, Chair, "Respectful and Responsible Relationships: There's No App for That" — The Report of the Nova Scotia Task Force on Bullying and Cyberbullying (29 February 2012) at 23 ["Task Force Report"], available online: < http://antibullying.novascotia.ca/sites/default/files/Respectful%20and%20Responsible%20Relationships%2C%20There%27s%20no%20App%20for%20That%20%20Report%20of%20the%20NS%20Task%20Force%20on%20Bullying%20and%20Cyberbullying.pdf > .

8 Task Force Report, *ibid* at 63-65.

9 The potential liability for *parents* of minors who have engaged in cyberbullying shows that the Legislature was still thinking within the paradigm of school-age offenders and victims, even though it legislated more broadly than that: *Cyber-safety Act*, *supra* note 1, s. 3(2); s. 22(3)-(4).

10 During Second and Third Reading of Bill 61 (which became the *Cyber-safety Act*). See Nova Scotia, House of Assembly, *Hansard*, 61st Assembly, 5th Sess, 13-22 (26 April 2013) beginning at 1482 (Second Reading). And see Nova Scotia, House of Assembly, *Hansard*, 61st Assembly, 5th Sess, 13-32 (10 May 2013) beginning at 2513 (Third Reading).

11 As summarized in Julia Nicol & Dominique Valiquet, Legislative Summary of Bill C-13: An Act to amend the *Criminal Code*, the *Canada Evidence Act*, the *Competition Act* and the *Mutual Legal Assistance in Criminal Matters Act*, Publication No 41-2-C13-E (11 December 2013, revised 28 August 2014), online: Library of Parliament < http://www.lop.parl.gc.ca/About/Parliament/LegislativeSummaries/bills_ls.asp?Language = E&ls = c13&Parl = 41&Ses = 2&source = library_prb > .

> number of these incidents have happened, and there's always been a level of response and trying to improve the situation. But this last one, I would have to say, created an anger and frustration and a general collective will that we need to be a better province in terms of how we look after one another. Nova Scotians want us to work together to prevent situations like this from happening in the future.[12]

On Third Reading, Minister More noted that "emotions are high."[13] The statute that resulted, then, was explicitly an emotional response to a tragic incident.

While the Legislature had the 2012 Task Force Report in hand well before this point, and legislators referred to it in debate, that Report covered a narrower context than the *Act* ended up addressing. The Legislature perhaps did not give itself the usual breathing room to fully contemplate the constitutionality of the *Act*, particularly as it related to freedom of expression under section 2(b) of the *Canadian Charter of Rights and Freedoms*, and the section 7 protection for liberty.[14]

For privacy expert and Halifax lawyer David Fraser (who successfully represented the respondent in *Crouch v. Snell*), enacting a statute in this atmosphere made for bad law:

> In my view, it was created in haste in the immediate, emotional aftermath of the tragic death of a young woman who had been sexually assaulted and had photos of the assault circulated around the community. The government of the day – which was heading for an election – was not willing to throw the police and the prosecution service under the bus for no charges being laid, so instead created the appearance of doing something by creating and passing a very poorly executed law.[15]

In fact, Justice McDougall in *Crouch v. Snell* went so far as to call the *Act* a "colossal failure"[16] for the relatively unlimited way in which it infringed freedom of expression.

When the Legislature enacts such a sweeping piece of legislation and the court strikes down the whole thing with immediate effect, it could impede the so-

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[12] Nova Scotia, House of Assembly, *Hansard*, 61st Assembly, 5th Sess, 13-22 (26 April 2013) at 1482 (Hon Marilyn More).

[13] Nova Scotia, House of Assembly, *Hansard*, 61st Assembly, 5th Sess, 13-32 (10 May 2013) at 2513 (Hon Marilyn More).

[14] Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), c. 11.

[15] David Fraser, "Nova Scotia's cyberbullying law declared to be unconstitutional and a 'colossal failure'", *Privacy Law Blog* (17 December 2015), online: <http://blog.privacylawyer.ca/2015/12/nova-scotias-cyberbullying-law-declared.html>.

See also David Fraser, "New cyberbullying law half-baked", *The Chronicle Herald* (15 August 2013), online: <http://thechronicleherald.ca/opinion/1147871-new-cyberbullying-law-half-baked>.

[16] *Crouch v. Snell, supra* note 3 at para. 165.

called "dialogue" between lawmakers and the judiciary about achieving legislative objectives within constitutional boundaries. This is because there may not be much nuance coming from either side to shape the dialogue about the kind of tweaking and tailoring that would have made the *Act* better. So what happens when both sides are so far apart?

It is certainly possible for a dialogue still to be had. If and when the Legislature goes back to the drafting board, it can find guidance in *Crouch v. Snell*. Despite calling the *Act* a "colossal failure," Justice McDougall nevertheless offered some important clues for developing any new cyberbullying statute.

II. A SUMMARY OF *CROUCH V. SNELL*—CLUES FOR A NEW ACT?

Two points should be made at the outset, on the assumption that the Legislature will wish to enact a new statute based on a continuing desire to address the kind of conduct that led Rehtaeh Parsons and Amanda Todd to end their lives.

First, "cyberbullying" is not an ideal label for the type of behaviour and communications that should be targeted. As Diana Whalen (now the Honourable Diana Whalen) stated during Second Reading debates on the *Cyber-safety Act*: "The very word 'bullying' might underestimate or somehow downplay the seriousness of what we're talking about. We're talking about activities that can and do ruin lives . . . "[17]

The term is also inherently overbroad: "Bullying captures a wide range of behaviour, most of which does not amount to criminal conduct, for example, name calling, teasing, belittling and social exclusion."[18] This behaviour would not, and should not necessarily result in civil liability either — at least not liability that respects constitutional boundaries. Any new legislation should focus on the worst forms of the behaviour known as "cyberbullying" and should track accepted definitions of hate speech and harassment.

Secondly, a different and more descriptive label would also be consistent with a widely applicable statute — *i.e.*, one that is not limited to the school context, but applies to all Nova Scotians whatever their age or stage of life. On this note, *Crouch v. Snell* did not involve the 'paradigm' cyberbullying scenario — say, one teenager sending hateful messages or sexualized images to another. Instead, it was a dispute between two adults who were former business partners. Ironically enough, their business was about helping "clients to better understand and use social media."[19]

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[17] Nova Scotia, House of Assembly, *Hansard*, 61st Assembly, 5th Sess, 13-22 (26 April 2013) at 1497 (Diana Whalen).

[18] CCSO Cybercrime Working Group, Report to the Federal/Provincial/Territorial Ministers Responsible for Justice and Public Safety, "Cyberbullying and the Non-consensual Distribution of Intimate Images" (Department of Justice: June 2013) at 8, online: <http://www.justice.gc.ca/eng/rp-pr/other-autre/cndii-cdncii/pdf/cndii-cdncii-eng.pdf>.

The Applicant, Crouch, had applied for and received an *ex parte* protection order under the *Act* in December 2014, (a) to prevent his former business partner, the Respondent Snell, from cyberbullying him, and communicating *with or about* him in any way, and (b) to require the Respondent to remove any *direct or indirect* comments he'd made about the Applicant on social media sites.[20] Both parties had been writing vague and not-so-vague posts about each other on their social media, although Snell's posts seemed to be more prolific.[21]

Applying the legislation on the assumption it was constitutional,[22] Justice McDougall "re-confirmed" the protection order that was initially issued by a justice of the peace and then confirmed on review by the Supreme Court.[23] However, Justice McDougall ultimately found the *Act* to be unconstitutional in its entirety.

This comment will focus, first, on the substantive problems that the court found with the definition of "cyberbullying," before moving on to the procedural problems with the protection order regime. The decision will also be examined for directions that the Legislature could heed in drafting new legislation.

The broad definition of "cyberbullying" will be reproduced here for convenience:

> (b) "cyberbullying" means any electronic communication through the use of technology including, without limiting the generality of the foregoing, computers, other electronic devices, social networks, text messaging, instant messaging, websites and electronic mail, typically repeated or with continuing effect, that is intended or ought reasonably [to] be expected to cause fear, intimidation, humiliation, distress or other damage or harm to another person's health, emotional well-being, self-esteem or reputation, and includes assisting or encouraging such communication in any way[.]

As this definition was the foundation for the *Act's* protection order procedure and the new tort of cyberbullying, it was not a stretch for the court to conclude that "the *purpose* of the *Act* is to control or restrict expression." This meant it violated the guarantee of freedom of expression in section 2(b) of the *Charter*, which *prima facie* protects most expression short of violence. The *Act* also, the court found, had "the *effect* of restricting expression that promotes at least one of the core freedom of expression values. . ."[24]

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19 *Crouch v. Snell, supra* note 3 at paras. 17, 24.

20 *Crouch v. Snell, supra* note 3 at paras. 22- 23; see also para. 73.

21 Detailed in *Crouch v. Snell, supra* note 3 at paras. 28-66.

22 After some procedural wrangling, the court considered this issue first; as the Attorney General pointed out, the *Charter* challenge could have been moot if the protection order was revoked (*Crouch v. Snell, supra* note 3 at para. 15).

23 *Crouch v. Snell, supra* note 3 at paras. 2-3, 16, 22, 81.

24 *Crouch v. Snell, supra* note 3 at paras. 112-113. See also para. 116. Italics added.

To refresh, there are three core values: "individual self-fulfillment, truth attainment, and political discourse."[25]

The Attorney General argued that expression that meets the definition of "cyberbullying" is not aligned with any of these core values, so deserves less protection under section 2(b). But, as Justice McDougall reiterated, the Supreme Court has emphasized that most expression is protected under section 2(b)'s broad umbrella, including "hate propaganda, defamatory libel, and publishing false news. . ."[26] So, as long as cyberbullying does not include actual "violence or threats of violence," it conveys sufficient meaning to warrant section 2(b) protection.[27]

Pausing here: Justice McDougall acknowledged that "threats of violence" will not attract section 2(b) protection. This is an important reminder for legislative drafters, because much objectionable online expression is comprised of threats of violence (for example, threats of rape).[28]

How else might the court's section 2(b) analysis from *Crouch* influence the development of a new statute? Admittedly, it must be difficult for legislators to draft a definition of offending conduct knowing it is likely to violate the *Charter* guarantee of freedom of expression, while looking ahead to justifying that definition under section 1 of the *Charter*. But there is something to the Attorney General's submission that cyberbullying does nothing to advance the *values* underlying freedom of expression — this idea should be explored by the Legislature (and perhaps should have been given more consideration in *Crouch v Snell*).

There is a growing recognition that expression that fits the definition of cyberbullying can actually *prevent* attainment of the self-fulfillment, truth, and political discourse objectives of section 2(b). By protecting the bully's expression, we may diminish the victim's expression, and there is no gain for *Charter* rights as a result.[29] As the general counsel of Twitter has put it: "Freedom of expression means little as our underlying philosophy if we continue to allow voices to be silenced because they are afraid to speak up."[30]

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[25] *Crouch v. Snell, supra* note 3 at para. 104.

[26] *Crouch v. Snell, supra* note 3 at para. 102.

[27] *Crouch v. Snell, supra* note 3 at para. 106. See also *Whatcott v. Saskatchewan Human Rights Tribunal*, 2013 SCC 11, 2013 CarswellSask 73, 2013 CarswellSask 74 (S.C.C.) at para. 112, reconsideration / rehearing refused 2013 CarswellSask 236, 2013 CarswellSask 237 (S.C.C.) ["*Whatcott*"].

[28] See generally West Coast LEAF, "#CyberMisogyny: Using and strengthening Canadian legal responses to gendered hate and harassment online" (June 2014), online: <http://www.westcoastleaf.org/wp-content/uploads/2014/10/2014-REPORT-CyberMisogyny.pdf> ["#CyberMisogyny report"].

[29] Paraphrasing *Whatcott, supra* note 27 at para. 114.

[30] Vijaya Gadde, "Twitter executive: Here's how we're trying to stop abuse while preserving free speech", *The Washington Post* (16 April 2015), online: PostEverything <https://www.washingtonpost.com/posteverything/wp/2015/04/16/twitter-executive-heres-how-were-trying-to-stop-abuse-while-preserving-free-speech/>.

West Coast LEAF has made a similar point about the online "harassment and abuse" that often targets women and minorities, noting that "cyber misogyny acts to silence women's voices and push their perspectives out of the discussion."[31] As stated in the West Coast LEAF report, cyberbullying is often discriminatory — and therefore contrary to other *Charter* values and protections:

> . . . too often, analyses of the problem of "cyberbullying" erase its sexist, racist, homophobic, transphobic, and otherwise discriminatory nature, and ignore the context of power and marginalization in which it occurs. The term "cyberbullying" also suggests that online harassment and abuse is only a problem for children and youth, when we know that misogynist hate speech and threatening behaviour online greatly affects adult women, too. Research on "cyberbullying" clearly demonstrates the extent to which members of minority ethnic groups, the LGBTQ community, and people with disabilities are disproportionately targeted for online bullying.
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> . . .
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> Misogynist and hateful expression is not the kind of free speech Canada's *Charter of Rights and Freedoms* seeks to protect; instead, these forms of expression undermine women's participation in public spaces and discourse, violate their rights to equality and freedom from discrimination, and contribute to a culture in which violence and hatred against women are normalized. These outcomes are the very antithesis of the reasons we protect freedom of expression in our Constitution. It is a perversion of the intent of the *Charter* to use the rights it contains to create a safe space for the exploitation and abuse of women and girls.[32]

It could be a progressive development for the section 2(b) jurisprudence to include more of a cost-benefit, *Charter* values-based analysis, even though the Supreme Court has maintained that one right (like equality) should not be used to limit the scope of another (like expression).[33] In any event, similar ideas are captured in the section 1 analysis.

According to the court in *Whatcott*:

> [65] The justification of a limit on freedom of expression under s. 1 requires a contextual and purposive approach. The values underlying freedom of expression will inform the context of the violation: see *Taylor*, *Keegstra* and *Sharpe*. McLachlin C.J., writing for the majority in *Sharpe*, explained succinctly the values underlying freedom of expression first recognized in *Irwin Toy*, being "individual self-

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[31] #CyberMisogyny report, *supra* note 28 at 8. See also *Whatcott, supra* note 27 at para. 104.

[32] #CyberMisogyny report, *supra* note 28 at 7-8.

[33] *Whatcott, supra* note 27 at para. 154. A full analysis of the consequences of doing so is beyond the scope of this case comment.

> fulfilment, finding the truth through the open exchange of ideas, and the political discourse fundamental to democracy" (para. 23).
>
> [66] We are therefore required to balance the fundamental values underlying freedom of expression (and, later, freedom of religion) in the context in which they are invoked, with competing *Charter* rights and other values essential to a free and democratic society, in this case, a commitment to equality and respect for group identity and the inherent dignity owed to all human beings: s. 15 of the *Charter* and *R. v. Oakes*, [1986] 1 S.C.R. 103, at p. 136; *Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825, at para. 78; and *Taylor*, at pp. 916 and 920.

The court stated further:

> Violent expression and expression that threatens violence does not fall within the protected sphere of s. 2(b) of the *Charter: R. v. Khawaja*, 2012 SCC 69, [2012] 3 S.C.R. 555, at para. 70. However, apart from that, not all expression will be treated equally in determining an appropriate balancing of competing values under a s. 1 analysis. That is because different types of expression will be relatively closer to or further from the core values behind the freedom, depending on the nature of the expression. This will, in turn, affect its value relative to other *Charter* rights, the exercise or protection of which may infringe freedom of expression.[34]

For now, then, most of the work in a section 2(b) case will continue to be done under section 1.[35] It will be about justifying the limit on the expression, rather than narrowing the *prima facie* protection for the expression. A key issue in this respect will be minimal impairment — whether the legislative limit infringes the right as little as possible.

Returning to *Crouch v. Snell*, Justice McDougall relied on the Supreme Court's decision in *Whatcott* for his minimal impairment analysis.[36] This is where he made the "colossal failure" comment:

> [165] I need to consider all of the types of expression that may be caught in the net of the *Cyber-safety Act*, and determine whether the Act unnecessarily catches material that has little or nothing to do with the prevention of cyberbullying: *R. v. Sharpe*, 2001 SCC 2 (CanLII), [2001] S.C.J. No. 3 at para. 95. In this regard, the *Cyber-safety Act*, and the definition of cyberbullying in particular, is a colossal failure. The Attorney General submits that the Act does not pertain to private communication between individuals, but rather, deals with "cyber messages or public communications". With respect, I find that the Act restricts both public and private communications. Furthermore, the Act provides no defences, and proof of harm is not required. These

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34 *Whatcott, supra* note 27 at para. 112.

35 *Whatcott, supra* note 27 at para. 154.

36 *Crouch v. Snell, supra* note 3 at para. 160.

> factors all culminate in a legislative scheme that infringes on s. 2(b) of the *Charter* much more than is necessary to meet the legislative objectives. The procedural safeguards, such as automatic review by this Court and the respondent's right to request a hearing, do nothing to address the fact that the definition of cyberbullying is far too broad, even if a requirement for malice was read in. Moir J.'s comments in *Self, supra* [2015 NSSC 94] at para. 25, are instructive:
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> > The next thing to note is the absence of conditions or qualifications ordinarily part of the meaning of bullying. Truth does not appear to matter. Motive does not appear to matter. Repetition or continuation might ("repeated or with continuing effect") or might not ("typically") matter.
>
> [166] In conclusion, the *Cyber-safety Act* fails the "minimum impairment" branch of the *Oakes* test.

This analysis reads like a list of "don'ts" for the Legislature. But the "don'ts" can be translated into "dos" for legislators contemplating a new statute. *Whatcott* provides further guidance here, as does a recent case about criminal harassment; each will be discussed, culminating in a list of suggested changes to a new definition of harmful online communications.

Whatcott involved complaints made under the hate speech provision of Saskatchewan's *Human Rights Code*, after the respondent distributed flyers (with titles like "Keep Homosexuality out of Saskatoon's Public Schools!") alleged to have "exposed persons to hatred and ridicule on the basis of their sexual orientation."[37]The provision defined hate speech as, *inter alia*, "any representation . . . that exposes or tends to expose to hatred, ridicules, belittles or otherwise affronts the dignity of any person or class of persons on the basis of a prohibited ground."[38]

Justice Rothstein, for the court, read out "expression that 'ridicules, belittles or otherwise affronts . . . dignity'" as not "rationally connected to the legislative purpose of addressing systemic discrimination of protected groups."[39]

Of course, the *Cyber-safety Act* did not share this same legislative purpose, but a similar idea should apply to any revamped definition — that the harm caused by the impugned communications may need to rise above the level of "humiliation" or "damage or harm to . . . emotional well-being [or] self-esteem" in order to pass constitutional muster.[40] Hurt feelings will not be actionable.

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[37] *Whatcott, supra* note 27 at paras. 3-9.

[38] See *Whatcott, supra* note 27 at para. 12.

[39] *Whatcott, supra* note 27 at paras. 89 and 92.

[40] The struck-down definition of "cyberbullying" also included "assisting or encouraging such communication in any way." This was not explored in any detail in *Crouch v. Snell*, but may be another example of overbreadth that should be narrowed or perhaps even eliminated in a new Act.

The more recent and much publicized criminal case of *R. v. Elliott* is enlightening, too.[41] The defendant was acquitted of criminal harassment following comments he had made to two women, who were feminist activists, on Twitter.[42]

As reviewed in *Elliott*, the elements of criminal harassment can be summarized as: (a) repeated communications, whether direct or indirect, that (b) "caused the complainant to fear for her safety . . . " where (c) this fear was reasonable in all of the circumstances, and (d) the defendant "knew that the complainant was harassed or was reckless or wilfully blind as to whether the complainant was harassed."[43] Again, the focus is on a heightened type of harm—fear—that the defendant intended or otherwise wanted to cause through repeated communications. This is the kind of conduct that a new civil statute should protect against.

This brief review of *Whatcott* and *Elliott*, then, suggests that concepts underlying (a) hate speech provisions in human rights legislation and (b) criminal harassment can offer valuable comparators for civil legislation intended to address harmful online communications.[44]

Pulling together this discussion of *Crouch*, and also *Whatcott* and *Elliott*, into a list of "dos" to guide development of a new statute, the Legislature could:

- Explicitly prohibit threats of violence that give rise to a "reasonable apprehension of harm."[45]
- Limit the definition to harmful communications. The communications would be considered harmful because, due to the content of the communications and/or the context in which they were made, the communications reasonably cause(d) the applicant fear, severe emotional distress, and/or physical or psychological harm.[46]
  Adding the qualifier of "reasonably" would allow a subjective/objective test to be applied. But it should be emphasized that the "reasonable person" standard "must be informed by contemporary norms of

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41 *R. v. Elliott*, 2016 ONCJ 35, 2016 CarswellOnt 631, [2016] O.J. No. 310 (Ont. C.J.).

42 On the facts of *Elliott*, the court found that the Crown had not established the complainants' fears were reasonable in all the circumstances, e.g. in light of the history of their Twitter communications.

43 *Elliott, supra* note 41 at paras. 41-43 (QL).

44 See also Appendix I to the Task Force Report, *supra*, which draws inspiration from other areas of law but, again, focuses on the education context: Chair Wayne MacKay & Prof Elizabeth Hughes, *The Legal Dimensions of Bullying and Cyberbullying* (20 February 2012), online: <http://antibullying.novascotia.ca/sites/default/files/Appendices%20-to%20Respectful%20and%20Responsible%20-%20There%27-s%20No%20App%20for%20That%20-%20Report%20of%20the%20Task%20Force.pdf>.

45 See *Whatcott, supra* note 27 at para. 132.

46 See also the #Cybermisogyny report, *supra* note 28 at 83.

behaviour, including fundamental values such as the commitment to equality provided for in the *Canadian Charter of Rights and Freedoms*. For example, it would be appropriate to ascribe to the ordinary person relevant racial characteristics if the accused were the recipient of a racial slur . . . "[47]

- Require the applicant to prove they have suffered one of these listed consequences, and that the harm was caused by the impugned communications. This is narrower than a requirement to show that the communication was "intended or ought reasonably to be expected" to cause one of the listed harms. It would involve showing that it actually *did*.
- Clearly specify the requisite mental element. This mental element should be linked to the actionable harms that may be suffered by the applicant: Intent to cause the applicant fear, severe emotional distress, and/or physical or psychological harm, or wilful blindness or recklessness regarding that outcome.[48]
- Limit the definition to repeated/continued communications (unless there are exigent or extreme circumstances). This would remove the " . . . or with continuing effect" part of the definition, which is redundant in light of the harm requirement suggested above.
- Provide for defences if determined to be appropriate (e.g. that the communications were not actually directed at the applicant; were made in service of a broader public interest; etc.).

This returns the analysis to a suggestion made earlier: that any revised statute should target "the worst of the worst" — the extreme online communications[49] that align with accepted definitions of hate speech and/or harassment.

A tightened-up, tailored definition would then provide a more solid foundation for an applicant seeking a protection order and/or a plaintiff suing in tort (assuming a fresh statute would also include a similar Part I and Part II).

Moving to procedure — can we take any clues from *Crouch v. Snell* regarding what a new protection order regime should look like?[50] This comment proposes that the ability to obtain a protection order is, presumptively, a good thing, as a productive and efficient way of addressing harmful and harassing online communications. If it is done properly, of course. As the West Coast

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47 *R. v. Tran*, 2010 SCC 58, 2010 CarswellAlta 2281, 2010 CarswellAlta 2282 (S.C.C.) at para. 34.

48 See e.g. *Self v. Baha'i*, 2015 NSSC 94, 2015 CarswellNS 224 (N.S. S.C.) at para.. 31.

49 This comment does not challenge the technological side of the Legislature's definition of "cyberbullying" but uses the catch-all term "online" to encompass electronic communications over the internet and/or cellphone networks (e.g. for SMS messages). Any updated technical definition will have to be broad enough to encompass new and emerging technologies.

50 This section will also use the terms "applicant" and "respondent."

LEAF report on cyber misogyny points out, civil procedures can empower victims of harmful online communications, who would not have control over criminal proceedings but retain some measure of control in civil court.[51]

Nevertheless, Justice McDougall was extremely critical of the protection order procedure in the *Act*, including the fact that an order could be obtained *ex parte*.[52] Another procedural problem for Justice McDougall was that the failure to comply with a protection order was a summary conviction offence that carried the possibility of imprisonment.[53] The liberty interest protected under section 7 of the *Charter* was therefore threatened, so the Court had to go on to consider whether this possible deprivation of liberty was consistent with the principles of fundamental justice.[54] It was not.

In particular, Justice McDougall found, the *Act* was arbitrary and procedurally unfair; overbroad; and vague. Framing the procedural discussion in terms of these principles of fundamental justice, Justice McDougall concluded:

- **Arbitrariness**: An applicant's ability to proceed under the *Act* without notice to the alleged cyberbully was "not rationally connected to the Act's objective" of providing a dedicated procedure to address cyberbullying; *ex parte* proceedings were not necessary to achieve that goal — especially because the Legislature could have limited *ex parte* proceedings to, say, "emergencies or other extraordinary circumstances"[55] and "situations where the respondent's identity is not known or easily identifiable", but did not.[56] For similar reasons, the scheme also did not accord with the principles of fundamental justice that protect procedural fairness.
  Yet it is not clear why an *ex parte* application process is inherently problematic, at least if the possibility of imprisonment is removed from the statute; it is a notion quite common to civil procedure. If the respondent will be (a) served with any resulting protection order,[57] and (b) given an opportunity to challenge the order (e.g. by raising one of the new defences that could be included),[58]then there would be a stronger connection between that procedure and the need to protect the applicant from further harmful communications. (This connection would only be stronger in light of the more harm-based definition discussed above.)

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51 #Cybermisogyny report, *supra* note 28 at 26.

52 *NB*: Justice McDougall applied the *Oakes* test under section 1 of the *Charter* after finding the section 2(b) violation. He then applied many of the same factors to his section 7 analysis. This case comment adjusts the analytical order, for conceptual clarity.

53 *Cyber-safety Act*, *supra* note 1, s. 19.

54 *Crouch v. Snell, supra* note 3 at paras. 179-181.

55 *Crouch v. Snell, supra* note 3 at para. 155.

56 *Crouch v. Snell, supra* note 3 at para. 152.

57 *Cyber-safety Act*, *supra* note 1, s. 11.

58 *Cyber-safety Act*, *supra* note 1, ss. 12-13.

- **Overbreadth**: Justice McDougall's concerns about the "net" being cast "too broadly, and failing to require proof of intent or harm, or to delineate any defences" were discussed earlier, in proposing limits on the definition of harmful online communications (or whatever new term might be adopted). Procedurally speaking, these concerns of overbreadth could be minimized in an additional way, at least vis-à-vis the liberty interest protected under section 7, if there was no possibility of imprisonment. It is not clear from *Crouch v. Snell* why the government thought this to be necessary in the first place.
- **Vagueness**: The problem here was not the definition of cyberbullying itself — although this definition was certainly problematic, as has been reviewed. The problem was that a justice of the peace who issued a protection order had to not only accept that the respondent *has* cyberbullied, but must also have had "reasonable grounds to believe the respondent will engage in" cyberbullying *in the future* — even though there were no criteria in the *Act* to guide this preventative exercise.[59]

In that respect, on what grounds should a protection order be issued? Section 8 of the *Cyber-safety Act* provided:

> Grounds for protection order
>
> 8 Upon application, a justice may make a protection order, where the justice determines, on a balance of probabilities, that
>
> (a) the respondent engaged in cyberbullying of the subject; and
>
> (b) there are reasonable grounds to believe that the respondent will engage in cyberbullying of the subject in the future.

As mentioned, section 8(b) was constitutionally problematic because it provided no criteria to inform the justice's exercise of discretion. But it may also have been redundant, from a practical perspective. If the applicant proves, on the normal civil standard of a balance of probabilities, that "the respondent engaged in" harmful online communications directed against the applicant then should the applicant not be entitled to a remedy?

Perhaps the real problem is the *nature* of the remedy. Note the vast array of conditions that a justice could include in a protection order:

> Protection order may include
>
> 9 (1) A protection order may include any of the following provisions that the justice considers necessary or advisable for the protection of the subject:

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[59] *Crouch v. Snell, supra* note 3 at paras. 125-137, 197.

> (a) a provision prohibiting the respondent from engaging in cyberbullying;
>
> (b) a provision restricting or prohibiting the respondent from, directly or indirectly, communicating with or contacting the subject or a specified person;
>
> (c) a provision restricting or prohibiting the respondent from, directly or indirectly, communicating about the subject or a specified person;
>
> (d) a provision prohibiting or restricting the respondent from using a specified or any means of electronic communication;
>
> (e) an order confiscating, for a specified period or permanently, any electronic device capable of connecting to an Internet Protocol address associated with the respondent or used by the respondent for cyberbullying;
>
> (f) an order requiring the respondent to discontinue receiving service from an Internet service provider;
>
> (g) any other provision that the justice considers necessary or advisable for the protection of the subject.
>
> (2) A justice may make a protection order for a period not exceeding one year.

Several of these possible conditions stand out as especially problematic in their overbreadth, notably, (d), (e), and (f).[60] Surely the ultimate desired remedy is a combination of (b) and (c): making the harmful communications that have been directed at and/or about the applicant stop — and ensuring that any offending comments are removed from online or physical spaces. Going beyond that remedy to prohibit the respondent from using the internet seems excessive and procedurally unfair, whether or not his or her liberty interest is at stake.

In the end, though, Justice McDougall's procedural concerns overlapped with his substantive concerns about the overly broad definition of "cyberbullying," so it is hoped that a refined definition of harmful online communications would alleviate some of the procedural problems.

III. CONCLUSION

This topic elicits passionate debate on both sides: those willing to protect freedom of expression at most costs, and those seeking to curb certain expression to prevent cyberbullying. A new *Cyber-safety Act* must strike a reasonable balance between these two legitimate positions, with a more comprehensive appreciation of what is constitutionally permissible from a substantive and a procedural perspective. The Legislature should mind the gap in the law — but act reasonably, and responsively, in filling it.

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[60] And this is without addressing the potential procedural complications of involving internet service providers.