SUPREME COURT OF NOVA SCOTIA
Citation: *Crouch v. Snell*, 2015 NSSC 340

Date: 20151210
Docket: Hfx No. 434423
Registry: Halifax

Between:

Giles W. Crouch

v.

Robert (Bruce) Snell

D E C I S I O N

Judge:	The Honourable Justice Glen G. McDougall
Heard:	August 25 & 27, 2015, in Halifax, Nova Scotia
Counsel:	Barry Mason, Q.C. and Laura Veniot, Esq., for Giles Crouch Ian Dunbar, Esq. and David Fraser, Esq., for Robert Snell Edward Gores, Q.C. and Debbie Brown, Esq., for the Attorney General of Nova Scotia

By the Court: McDougall, J.

CONSIDER:

[1] Giles Crouch (the "Applicant" or "Mr. Crouch") applied for a protection order under s. 5(1) of the *Cyber-safety Act*, S.N.S. 2013, c. 2 (the "*Act*"). The application was filed on December 8, 2014.

[2] The protection order was granted by a Justice of the Peace on December 11, 2014 (the "Protection Order"). In compliance with ss. 11(1) and 12(1) of the *Act*, the Protection Order was served on the respondent, Robert (Bruce) Snell (the "Respondent" or "Mr. Snell"), and was forwarded to the Supreme Court of Nova Scotia for review.

PROCEDURAL HISTORY IN THE SUPREME COURT OF NOVA SCOTIA:

[3] On December 17, 2014, a judge of this Court reviewed, then confirmed, the Protection Order. That same day, the Respondent filed a request for a hearing under s. 13(1) of the *Act*.

[4] The matter first came before me on January 6, 2015. In order to give counsel for Mr. Snell time to file a notice of contest and to provide notice to the Attorney General of Nova Scotia (the "Attorney General") of a constitutional challenge to s. 3(b) and Part I of the *Act*, and also to allow time for Mr. Crouch to retain legal counsel, a motion for directions was set for January 12, 2015.

[5] A notice of constitutional issue was filed on the Respondent's behalf on January 7, 2015, followed by a notice of contest filed on January 20, 2015.

[6] The motion for directions was heard on the assigned date. By then both parties were represented by legal counsel, and the Attorney General, after having received the notice of constitutional question, had arranged to have her agent attend.

[7] In addition to setting aside two days to hear the application to decide the merits of the Protection Order and to determine the constitutional validity of certain aspects of the *Act*, deadlines were set for filing and for other necessary pre-hearing procedural steps.

[8] During the motion for directions, counsel for Mr. Crouch raised a concern regarding the ability of Mr. Snell's counsel to continue to represent Mr. Snell due to conflict of interest. The court left this issue with counsel for further discussion. If the issue could not be resolved then it was left to counsel for Mr. Crouch to bring a motion before the assigned hearing judge prior to the hearing of the application.

[9] On April 29, 2015, Mr. Crouch filed a motion for an order to have Mr. Snell's counsel—specifically Mr. David Fraser and Ms. Jane O'Neill as well as any other lawyer at McInnes Cooper—removed due to conflict of interest. This was only three weeks prior to the beginning of the hearing of the application, set to begin on May 20, 2015.

[10] Given the tight timeframes and the deadlines that had been previously set for filing briefs, counsel for the Attorney General requested an adjournment of the hearing of the application together with a request to set a new deadline for filing his brief. The requests were granted.

[11] The original dates for the hearing of the application were used to hear the motion for disqualification. After hearing the submissions of Mr. Mason on behalf of Mr. Crouch and Mr. Charles Ford who had been retained to represent Mr. Snell for purposes of this motion, the Court reserved its ruling first to May 26, 2015, and then to June 5, 2015. The motion to disqualify counsel was denied.

[12] The hearing of the application countenanced by s. 13 of the *Act* was set for two days commencing on June 29, 2015. Affidavits sworn by each of the parties were filed. In addition, the Respondent filed the affidavit of Michael MacKinnon, officer, director and shareholder of Mediabadger Public Affairs Ltd. ("Mediabadger"), a company co-founded by Mr. Crouch and Mr. Snell.

[13] The Attorney General filed an affidavit of Mr. Roger Merrick, the Director of Public Safety for the Nova Scotia Department of Justice. In that capacity, Mr. Merrick is responsible for attending to the management of Nova Scotia's CyberSCAN Unit pursuant to the provisions of the *Act* (see Part I, ss. 26A to 26X of the *Safer Communities and Neighbourhoods Act*, S.N.S. 2006, c. 6 (as amended)).

[14] Mr. Merrick's attendance for cross-examination was not required. The other three affiants were called for that purpose.

[15] Counsel for the Attorney General did not play an active role in the hearing to decide if the Protection Order should be re-confirmed, varied or revoked. They did, however, argue to have the constitutionality issue bifurcated until after the Court had ruled on the merits of the Protection Order. Counsel for Mr. Snell was opposed to this approach. The Court reserved its decision on bifurcation until July 21, 2015, at which time an oral decision was delivered granting the requested relief. Counsel for Mr. Snell was given the opportunity to present further submissions on August 7, 2015, to tie together his arguments pertaining to the merits of the application proper, leaving the issue of mootness of constitutional issues to a later day. Counsel for the Attorney General reserved the right to seek a further ruling that the constitutional challenge should be declared moot if the protection order was revoked. Counsel were asked to be ready to address this issue should the court, after hearing the evidence of both parties, decide to revoke the order.

[16] On August 27, 2015, I delivered an oral decision wherein the Protection Order was re-confirmed. I briefly discuss my reasons at paras. 73 to 81 of this decision. As it turned out, the Court did not have to hear from counsel on the issue of mootness, and we moved directly into oral argument on the constitutional issues. After hearing the arguments, I reserved my decision. This is my decision on the constitutional issues.

FACTUAL BACKGROUND:

[17] Mr. Crouch and Mr. Snell were founders of and former business partners in a company called Mediabadger, which was incorporated in or around May 2011. Their business relationship ended in late 2013 when Mr. Crouch resigned from Mediabadger and forfeited half of his shares in the venture.

[18] Mr. Crouch attributes his resignation to an inability to work with Mr. Snell, whom he describes an immature, unprofessional, and prone to unprovoked fits of rage. Mr. Snell and Mr. MacKinnon, another partner in Mediabadger, say Mr. Crouch resigned after it was discovered that he had misappropriated funds.

[19] Mr. Crouch resigned on or around December 20, 2013, effective January 9, 2014. On January 9, 2014, he entered into an Employee/Founder Separation and Release Agreement (the "Separation Agreement") with Mediabadger. The Separation Agreement included a mutual non-disparagement clause.

[20] For the balance of 2014, Mr. Snell and Mr. MacKinnon tried unsuccessfully to salvage Mediabadger. They eventually decided to wind down the company.

[21] Mr. Crouch and Mr. Snell are both avid users of social media. Their platforms of choice include Facebook, Twitter, Google+ and LinkedIn. Mr. Snell's Twitter account has 1,900 followers, and he has tweeted more than 27,000 times. Mr. Snell also writes a blog in which he shares insights from his experience running a business.

[22] Mr. Crouch says in the months following his resignation from Mediabadger, Mr. Snell began a "smear campaign" against him on social media that continued until December 11, 2014, when a Justice of the Peace granted the Protection Order against Mr. Snell. The Protection Order was granted on an *ex parte* basis, without notice to Mr. Snell.

[23] The Protection Order included the following prohibitions:

> 1. The respondent be prohibited from engaging in cyberbullying of the subject.
> 2. The respondent be restricted (or prohibited) from directly or indirectly communicating with the subject.
> 3. The respondent be restricted (or prohibited) from, directly or indirectly, communicating about the subject. ….
> 7. Any comments on any social media sites whereby the respondent has made reference to the applicant, either directly or indirectly, are to be removed. Further, any comments on any social media sites directed toward an unnamed or unspecified person(s) are to be removed.

[24] In his affidavit filed in support of the Protection Order application, Mr. Crouch stated that he began working with Mr. Snell in 2008 when the two men founded a partnership called Intevix, a business that assisted corporate and governmental clients to better understand and use social media. The name of the business was later changed to Mediabadger.

[25] According to Mr. Crouch, Mr. Snell was a difficult man to work with. At times, he experienced unprovoked fits of rage that made Mr. Crouch fear for his own safety. On three occasions, Mr. Snell's rage culminated in the destruction of office furniture.

[26] Mr. Crouch said his relationship with Mr. Snell began to deteriorate in 2011, due to Mr. Snell's unprofessional behaviour. Mr. Snell's transgressions included failing to establish a proper set of books for Mediabadger, failing to raise capital or attract new clients, clashing with a particular investor and business advisor, and criticizing potential investors on social media.

[27] Mr. Crouch said he was in control of Mediabadger's finances until 2012 when the partners decided Mr. Snell should assume that responsibility while Mr. Crouch focused on other aspects of the business. Mr. Crouch denied having ever used company funds for personal expenses without making it known to the other partners. He said he was always open and transparent with Mr. Snell and Mr. MacKinnon about any company money he required. He indicated that prior to June 2014, Mr. Snell never communicated any concerns to him about Mediabadger's finances.

[28] The alleged cyberbullying of Mr. Crouch by Mr. Snell began in June 2014. After Mr. Crouch's resignation from Mediabadger, he began a contract position with T4G, another technology company. On June 5, 2014, Mr. Snell sent a text message to the Vice President of Human Resources for T4G, Peter Moorehouse, indicating that Canada Revenue Agency was searching for Mr. Crouch. Mr. Moorehouse told Mr. Snell that he would prefer Mr. Snell communicate with Mr. Crouch directly. Mr. Crouch believes that by sending these messages, Mr. Snell intended to embarrass him and damage his reputation with his new employer.

[29] According to Mr. Crouch, in July 2014, Mr. Snell began posting vague comments about him on various social media platforms in an attempt to intimidate him and ruin his reputation. Mr. Crouch said that given what he described as Mr. Snell's "past violent behaviour", the tweets and posts made him fear for his safety. Mr. Snell posted the first comment on Google+ on July 9, 2014:

> Surprises continue to creep up…. Looking forward to what is coming for someone.

[30] On August 13, 2014, Mr. Crouch stated that he saw Mr. Snell in downtown Halifax as he drove by him on Lower Water Street. Shortly thereafter, Mr. Snell posted the following on Twitter:

> You see someone and want to clothesline them…. That is normal right?

[31] On or about August 27, 2014, Mr. Snell tweeted:

> Received my weekly call where Agency X is looking for an idiot. Passed on the info & had a laugh. I'm going to miss these calls.

[32] On September 15, 2014, Mr. Snell posted the following on Google+:

> Getting burned in business…. So much more to this and one must learn, grow from it and ensure it doesn't happen again.

[33] Two weeks later, on September 29, 2014, Mr. Snell posted a blog entry that stated, in part:

> So this next post is around challenges I've encountered over the years within start ups from Scotland to Nova Scotia. Daily challenges will occur in the start up world, some that will challenge your will to continue down the path of self employment bliss and others that will provide a laugh. Outside of the paperwork and other not so exciting challenges I've faced, the two that have had the biggest impact would be the winding up of a company and firing a co-founder.

[34] Mr. Crouch believed the comment about "firing a co-founder" was a reference to him.

[35] On October 4, 2014, Mr. Crouch was scheduled to appear on CTV News to discuss cyber security. That same day, Mr. Snell posted on Google+:

> That is brilliant, almost like asking a plumber for medical advice. #news

[36] On October 23, 2014, Mr. Snell posted the following on Twitter:

> Working on the next blog post…. Internet and the rise of the fake. From companies to people and it even happens locally.

[37] In November of 2014, Mr. Crouch began receiving emails from an anonymous email service. The subject line of the first email, received on November 5, was "Nice BS". The body of the email stated, "Can you be honest with people or is it easier to just bs them?" Convinced that Mr. Snell sent the email, Mr. Crouch says he felt increasingly intimidated and fearful for his personal safety.

[38] Another email from an anonymous source was received by Mr. Crouch on November 15, 2014. The subject line read, "Worried?" The email stated, "Do you think you will ever be honest?"

[39] Also in November 2014, someone changed the login information for Mr. Crouch's Twitter account. Mr. Crouch believed it was Mr. Snell, because the Twitter account was linked to his Mediabadger email address, which Mr. Snell had control over.

[40] On November 23, 2014, Mr. Crouch received a third anonymous email. The subject line was "Nice", and the email stated, "Passion is important, but not as important as honesty. Give it a try in 2015."

[41] On or about November 27, 2014, Mr. Snell posted the following blog entry:

> First I will start this post off apologizing to anyone that was either confused, annoyed or puzzled by my Twitter feed in 2014. It was likely a confusing time for many if they read my random posts done in frustration (and there was a lot of that) and it all stems from a company I am involved with (and someone that was involved). I've had all of 2014 to stew and subject others to my frustration (which was likely annoying).
>
> Thankfully I have some great friends & family and the general consensus is that the chapter needs to be closed on this book. So that being said, the year is drawing to an end and this too needs to come to an end. Yesterday really was interesting. I was sent a few screen shots of someone playing the victim on Facebook and he claimed that someone was trying to sell his company from under him. Most frustratingly people were buying into it, people I know. With that, there is no company for sale, I wish there was. We've spent the last year working with professionals trying to sort out the indiscretions of one person going back to late 209 (when the company was actually founded) and the other nonsense is just that.
>
> Over the next couple of weeks this escapade will be wrapped up with December and 2015 looking good. New and continuing opportunities working with some great start ups, my own opportunities and looking forward to the 2015 golf season.
>
> Till next time.

[42] On cross-examination, Mr. Crouch admitted that this post seemed like a response to the following post he made on his own Facebook profile:

> The frustrating moment when you discover your former business partner and "friend" had been trying to sell your business out from under you and planning to work for your competitor. Wow.

[43] On December 3, 2014, Mr. Crouch visited webconomist.ca, a site that Mr. Snell had set up for him in 2010, and which Mr. Crouch had regularly used to post material. On December 3, however, the site displayed the following message:

> This was a clients domain at one point, however they decided not to pay their bills. We've found a new use for this domain and keeping in line with its past we will tell a story here.
>
> Stay tuned for what's next. It will be exciting and a learning experience for many.

[44] Prior to this, believing that Mr. Snell had changed his Twitter login information, Mr. Crouch emailed Mr. Snell to request he relinquish control of the @webconomist.ca account. According to Mr. Crouch's affidavit, the response he got from Mr. Snell stated:

> No idea what you're talking about, haven't touched at [*sic*] thing (with the exception of suspending email/hosting accounts). Not sure what the issue is as you still appear to be active with your twitter account.

[45] On December 1, 2014, Mr. Crouch received an email from an anonymous source. It read, "Was any of your work real or was it all faked?"

[46] On December 2, 2014, Mr. Snell posted the following on Google+:

> Seeing someone take the piss on tax audits, when really should be audited….. 10 years of tax avoidance or stupidity and they are still going.

[47] According to Mr. Crouch's affidavit, this post was made shortly after he and another individual engaged in a public Twitter exchange about the Federal Government's move to audit certain non-profit organizations for suspected political activities.

[48] After posting an article on LinkedIn about how technology companies are using digital tools to disrupt other businesses, Mr. Crouch noticed the following post made by Mr. Snell on Twitter: "Digital Disruptor. I know someone that was a Business Disrupter…."

[49] Mr. Crouch believed this to be a direct reference to him. He also believed that Mr. Snell was the source of another anonymous email he received on December 5, 2014. The subject line stated: "Governance from a crook?" It went on to state:

> Interesting insights on governance coming from you it is laughable. It will be interesting to see the reactions of people when you are outed as a fraud.

[50] There is no evidence directly linking Mr. Snell to any of the anonymous emails. Mr. Crouch acknowledged that the only way to determine the source is by having access to the computer used to send the message.

[51] After being cross-examined on his affidavit, Mr. Snell testified on re-direct that he had offered to give Halifax Regional Police access to his computers. According to Mr. Snell they passed on the opportunity to do so. It would require sheer speculation, on my part, to ascribe any blame to Mr. Snell for these anonymously sent emails. I am not prepared to give in to that temptation. While receipt of these emails might have contributed to Mr. Crouch's feelings of intimidation and fear or humiliation, insofar as these particular anonymous emails are concerned, Mr. Snell cannot be held responsible for them on the evidence before me.

[52] That said, there are a number of other emails, tweets and posts authored by Mr. Snell that leave little doubt as to whom he is referring to. Indeed, Mr. Snell admits that in some instances, although he does not mention Mr. Crouch by name, he was directing his comments sometimes to and sometimes about Mr. Crouch.

[53] As previously indicated, Mr. Crouch is not entirely innocent in all this. He admitted to posting the following entry to his Facebook page:

> That frustrating moment when you discover your former business partner and "friend" had been trying to sell your business out from under you and planning to work for a competitor. Wow.

[54] On cross-examination, Mr. Crouch denied he was referring to Mr. Snell. He suggested he was referring to a member of a Lodge he belonged to. In argument, counsel for Mr. Snell submitted that even if this comment was not about Mr. Snell, it at the very least demonstrated that Mr. Crouch was not averse to "dishing it out" on the Internet.

[55] Mr. Crouch also admitted that he had provided an incomplete picture of a conversation that Mr. Snell had with another individual on the Internet. Mr. Crouch had provided the following excerpt from Mr. Snell's side of the conversation: "Someone's getting hurt later …." On examining the surrounding messages (see Exhibit 10), it is clear the conversation is about the other individual's daughter's disillusionment with Santa Claus. The comment had

nothing whatsoever to do with a threat and certainly not one directed at Mr. Crouch. Yet, he used this to support his *ex parte* application to a Justice of the Peace.

[56] These examples are not intended to focus attention away from Mr. Snell nor to justify his actions, but rather, to show that neither party to this application is beyond reproach.

[57] I will now briefly refer to the evidence provided by Mr. MacKinnon who first joined Mediabadger as a consultant prior to its incorporation in 2011. Mr. MacKinnon is now a Vice-President and Director of the company, and he considers himself a co-founder.

[58] Mr. MacKinnon confirmed that he and others associated with Mediabadger, including Mr. Snell, were concerned when they first learned of the extent of the unauthorized withdrawals made from Mediabadger by Mr. Crouch. One report prepared by Mr. Snell and Bradley Jardine, an advisor to one of the company's investors, set the amount at $85,530.36. This report was produced on October 8, 2014, and purports to cover the period from January 1, 2008, to October 8, 2014.

[59] This amount was cited in a demand letter sent by Mr. MacKinnon to Mr. Crouch on July 24, 2014. In this letter Mr. MacKinnon characterizes the amount owing as a shareholders' loan but he makes it clear that it brings into question "the potential that company funds were being used personally and that such loans and personal expenses were made without written authorization, knowledge or consent of the directors of the company." (For the entire letter sent by Mr. MacKinnon to Mr. Crouch see Exhibit 1 attached to the affidavit of Michael MacKinnon sworn on March 2, 2015.)

[60] The Court is not being asked to decide if Mr. Crouch owes money to Mediabadger, or if Mr. Crouch withdrew money without authorization for his personal expenses. These matters are simply referred to in an effort to provide context to the events surrounding Mr. Crouch's departure from the company.

[61] Mr. MacKinnon provided some additional testimony regarding Mr. Crouch's alleged concerns about Mr. Snell's anger issues. It is apparent that Mr. Snell is not a violent person. On a couple of occasions he smacked a desk and on another occasion he hit a filing cabinet leaving a small dent. Different people react to situations in different ways. These few instances over a four- or five-year period do not amount to violent behaviour. The behaviour was perhaps a little over the

top, and with the benefit of hindsight, excessive in the circumstances. But the behaviour was not directed toward another individual. At most it resulted in minor damage to office furniture, and likely a sore hand.

[62] One must not overlook the several lapses in candour exhibited by Mr. Crouch when he first applied for the Protection Order before the Justice of the Peace. Nor should one forget the messages he authored in which he appeared to be taking "cyber-shots" at Mr. Snell, albeit, he says, out of frustration at what was being sent to him or what he perceived was being said about him online by Mr. Snell.

[63] Mr. Snell for his part took ownership of some of the things he communicated but pointed out that he never used Mr. Crouch's name in any of the public posts.

[64] Mr. Snell, despite the existing protection order, had done nothing to remove any of the comments posted even those he admitted were about Mr. Crouch. His efforts to explain away some of his posts such as suggesting he was referring to a former business partner and otherwise downplaying the potential impact on Mr. Crouch, were quite disingenuous. He showed very little, if any, remorse for his conduct although in his November 27, 2014, blog post (attached as Exhibit "I" to the Giles Crouch affidavit sworn February 9, 2015) he offered an apology "to anyone that was either confused, annoyed or puzzled by [his] Twitter feed in 2014." He attributed his posts to frustration. If he had stopped there he might have garnered some sympathy but instead he went on to make further negative references to his former business associate and "someone playing the victim on Facebook." There can be no doubt these comments were about Mr. Crouch even though he was not identified by name.

[65] Then there are Mr. Snell's alleged efforts to alert Mr. Crouch of Canada Revenue Agency's attempts to contact him. Instead of contacting Mr. Crouch directly, Mr. Snell sent a text message to Mr. Crouch's employer. I find this to be particularly distasteful. This was an obvious attempt on Mr. Snell's part to cause embarrassment to Mr. Crouch.

[66] Mr. Snell's post on Google+ after Mr. Crouch announced that he would be appearing on CTV News, where Mr. Snell likened Mr. Crouch's TV appearance to "asking a plumber for medical advice", is another example of Mr. Snell's efforts to embarrass his former business partner.

THE *CYBER-SAFETY ACT*:

[67] I have reviewed the procedural history and factual background. Before going on to briefly explain my decision to re-confirm the Protection Order, and then to address the constitutional challenge, I wish to set out the relevant provisions of the *Cyber-safety Act* and the case law considerations of the statute to date. The relevant provisions of the *Act* are as follows:

> 2 The purpose of this Act is to provide safer communities by creating administrative and court processes that can be used to address and prevent cyberbullying.
>
> 3 (1) In this Act,
>
> (a) "Court" means the Supreme Court of Nova Scotia and includes a judge of the Court;
>
> (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 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;
>
> …
>
> PART I
>
> Protection Orders
>
> 5 (1) An application for a protection order may be made to a justice, without notice to the respondent, in the form and manner prescribed by the regulations, by
>
> (a) the subject, if the subject is not a minor; or
>
> (b) where the subject is a minor,
>
> (i) the subject's parent,
>
> (ii) a person designated by the regulations for this purpose, or
>
> (iii) a police officer.
>
> (2) Subject to subsection (3), an application for a protection order must name as a respondent any person associated with an electronic device, Internet Protocol address, website, username or account, electronic-mail address or other unique identifier, identified as being used for cyberbullying, or a parent of the person if the person is a minor.

(3) Where the name of the respondent is unknown and cannot easily be ascertained, an application for a protection order may identify the respondent by an Internet Protocol address, website, username or account, electronic-mail address or other unique identifier, identified in the application as being used for cyberbullying.

(4) An application for a protection order may be submitted

(a) in person, by the applicant; or

(b) in person or by telephone or other means of telecommunication, by a lawyer, a police officer or a person designated by the regulations for this purpose, with the applicant's consent.

(5) Evidence adduced in support of an application for a protection order must be given under oath.

…

12 (1) As soon as practicable after making a protection order and in any event within two working days, the justice shall forward a copy of the order and all supporting documentation, including a transcript or recording of the proceedings, to the Court in the prescribed manner.

(2) Within such period as the regulations prescribe of the receipt of the protection order and all supporting documentation by the Court, the Court shall review the order and, where the Court is satisfied that there was sufficient evidence before the justice to support the making of the order, the Court shall

(a) confirm the order; or

(b) vary the order,

and the order as confirmed or varied is deemed to be an order of the Court.

(3) Where, on reviewing the protection order, the Court is not satisfied that there was sufficient evidence before the justice to support the making of the order, the Court shall direct a hearing of the matter in whole or in part before the Court.

(4) Where the Court directs that a matter be heard, the clerk of the Court shall

(a) issue a summons in the prescribed form requiring the respondent to appear before the Court; and

(b) give notice of the hearing to the subject or, where the subject is a minor, a parent of the subject,

and the subject or, where the subject is a minor, a parent of the subject, is entitled to attend and may fully participate in the hearing personally or by counsel.

(5) The evidence that was before the justice must be considered as evidence at the hearing.

> (6) Where the respondent fails to attend the hearing, the protection order may be confirmed in the respondent's absence.
>
> (7) At the hearing, the Court may confirm, terminate or vary the protection order. Court may confirm, vary or revoke order
>
> 13 (1) Where satisfied that it is fit and just to do so, the Court, upon
>
> application at any time after a protection order is confirmed or varied by the Court,
>
> may by order
>
> (a) remove or vary any term or condition in the order;
>
> (b) add terms and conditions to the order; or
>
> (c) revoke the order.
>
> 14 (1) The respondent or the applicant may appeal to the Nova Scotia Court of Appeal a decision made under Section 12 or 13, on a question of law, in accordance with the Civil Procedure Rules.
>
> (2) An appeal does not operate as a stay of proceedings, and the protection order under appeal may be enforced as though no appeal were pending unless a judge of the Supreme Court of Nova Scotia or the Nova Scotia Court of Appeal otherwise orders.

[68] In *Nova Scotia (Public Safety) v. Lee*, 2015 NSSC 71, [2015] N.S.J. No. 95 [*Lee*], the Honourable Justice Arthur J. LeBlanc noted that while the *Act* is a comprehensive regime in its own right, it also amended other statutes, including the *Safer Communities and Neighbourhoods Act*, S.N.S. 2006, c. 6 (the "*SCNA*"). This particular case addressed a prevention order under the *SCNA* rather than a protection order under the *Cyber-safety Act*, but many of LeBlanc J.'s findings are relevant to both regimes.

[69] Applications for prevention orders under the *SCNA* are made directly to the Court. At the hearing of the application, LeBlanc J. heard submissions from the applicant, but the respondent did not participate. The prevention order was granted. In his written decision, LeBlanc J. made the following comments respecting the purpose of cyberbullying legislation:

> **1** Cyberbullying is a destructive phenomenon. By its nature, it involves the use of electronic platforms and methods that pose serious challenges for the law. The Nova Scotia Legislature has addressed this problem by means of the *Cyber-safety Act*, S.N.S. 2013, c. 2 (the CSA). The CSA is a comprehensive regime in its own right, but it also amended other statutes, including the *Safer Communities and Neighbourhoods Act*, S.N.S. 2006, c. 6 (the SCNA).

…

19 The Nova Scotia legislature passed the CSA partly in response to a report written by Professor A. Wayne MacKay, Q.C, of Dalhousie University (*Respectful and Responsible Relationships: There's No App for That* (Halifax: Nova Scotia Task Force on Bullying and Cyberbullying, 2012)). Professor MacKay discussed the causes, scope, and effects of cyberbullying, which, he observed "knows no boundaries and it permeates all aspects of the victims' lives. It is also corrosive for the bullies and the bystanders as well, and one role sometimes morphs into another" (p. 1). Professor MacKay noted the spatial and temporal dimensions of the internet and the challenges they pose to civil relations, at p. 84:

> Cyberbullying poses a particular challenge to the community because it happens in a sort of "no man's land". The cyber-world is a public space which challenges our traditional methods of maintaining peace and order in public spaces. It is too vast to use traditional methods of supervision. It easily crosses jurisdictional boundaries. It takes place 24 hours a day, seven days a week, and does not require simultaneous interaction for communication to take place. If we continue to rely on traditional methods of responding to bullying, these challenges will be too daunting.

20 During the second reading of the bill, the Minister responsible for the Advisory Council on the Status of Women Act explained the purpose of the bill, emphasizing the dangers of cyberbullying in relation to young people: Nova Scotia, Legislative Assembly, Hansard, 61st Leg, 5th Sess, (26 April 2013) at 1482-1484 (Marilyn More). However, cyberbullying is not specific to any age group, nor is the legislation so limited. People of all ages are grappling with the challenges posed by social media.

21 The purpose of the SCNA amendments was described in the CSA as "to provide safer communities by creating administrative and court processes that can be used to address and prevent cyberbullying": CSA, s. 2. Cyberbullying is defined in s. 3 (1)(b) of the CSA and s. 2 (1)(ba) of the SCNA:

> "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...

22 There are two avenues available to cyberbullying victims under the legislation. Under the ss. 5 and 6 of the CSA itself, a complainant can apply to a justice of the peace for a protection order. Pursuant to s. 9, the justice of the peace can grant an order if he or she is satisfied on a balance of probabilities that (a) the

respondent has 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. Pursuant to s. 12, the justice of the peace must forward a copy of the order and all supporting documentation to the Court, which may confirm, vary, or terminate the order.

23 The second avenue -- which Ms. Murray has pursued in this case -- arises from the provisions added to the SCNA by way of the CSA amendments. Pursuant to s. 26A(1), a person can make a complaint to the Director:

> 26A (1) A person who wishes an order to be made under this Act to deal with cyberbullying shall first make a complaint to the Director stating that the person believes that the person or another person is being subjected to cyberbullying.

…

27 The CSA is new legislation. It has only been applied by this court once, by Robertson J in *Director of Public Safety v Prosper* (11 February 2014), Halifax 423784. The CSA and cyberbullying in general have been considered by the Provincial Court in two reported decisions. The first such decision was *R. v C.L.*, 2014 NSPC 79, a sentencing decision of a youth offender convicted of offences including sexual assault, harassment, and assault with a weapon. Although in *obiter*, Whalen J noted in her decision that much of the offender's behavior towards the victim constituted cyberbullying under the CSA:

> 53 A few days later between December 6th and December 8th, 2014 C.L. began a long, insulting, misogynist diatribe on Facebook towards A.B. The repetitive, vil [*sic*] nature clearly shows he wanted to cause harm, fear and humiliation.
>
> 54 There are 22 references to words like "dead", "die" or "death", clearly trying to provoke A.B. to commit suicide. There are 25 references to "pedo" and "bitch". There are 27 incidents of C.L. calling A.B. a "ho".
>
> ...
>
> 57 C.L.'s behavior meets the definition of cyberbullying ... cited by the Crown but his behavior went well beyond that to criminal behaviour. He exhibited a "complete breakdown in respect for others", particularly the three victims.

28 The second decision is *R. v. Avery*, 2014 NSPC 40, [2014] N.S.J. No. 322, another sentencing decision, where the offender was convicted of assault causing bodily harm. The accused had begun anger management prior to sentencing, but made questionable progress as evidenced by a Facebook post that Atwood J found to constitute cyberbullying:

> 6 Mr. Avery's level of remorse and commitment to rehabilitation are questionable. He approached anger management with what was described by the program facilitator in the pre-sentence report as "a bad attitude", but

> appeared to adapt positively. However, one must question seriously Mr. Avery's commitment to rehabilitation and anger management given the social-networking post published by Mr. Avery shortly after the court adjourned 20 May 2014. That post was exhibited before the court and reads as follows:
>
> > It should just have dropped considering I will already have done about 8 months house arrest. Two nights in Burnside and wrongfully accused of assaulting a girl and breaking into a house. All for beating someone up who a majority would say deserved it just in my opinion.
>
> 7 This, in my view, displays a singular lack of empathy and a certain lack of reality. In fact, at the point in time that Mr. Avery composed that message, he had been subject to approximately six and a half months of house arrest rather than the eight referred to by Mr. Avery and the eight to nine mentioned at the sentencing hearing. Furthermore, making public such a comment-- "all for beating someone up who a majority would say deserved it"-- causes me to draw the inference that Mr. Avery continues to pose a threat to Mr. Watt, if not of actual physical harm, then of psychological harm, as comments of this nature clearly constitute cyberbullying within the definition of para. 3(1)(b) of the *Cyber-Safety Act*.
>
> **29** Although the foregoing remarks were *obiter*, these decisions demonstrate a recognition by the courts of the seriousness of cyberbullying in the eyes of the Legislature. I note as well that the definition of "cyberbullying" in s. 2(1)(ba) of the SCNA indicates that an objective standard is to be applied: the definition refers to electronic communication "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" (emphasis added).

[70] LeBlanc J. concluded at para. 30 that the respondent's conduct amounted to cyberbullying:

> Mr. Lee repeatedly sent messages and made posts that he either intended or reasonably ought to have expected to cause fear, intimidation, humiliation, distress or other damage or harm to Ms. Murray's health, emotional well-being, self-esteem *and* reputation. This is clear from the content of the messages, the harm described by Ms. Murray, and the timing of the campaign, being immediately after their mother's death.

[71] The only significant decision to directly address an application for a protection order under the *Cyber-safety Act* is *Self v. Baha'i*, 2015 NSSC 94,

[2015] N.S.J. No. 126 [*Self*]. In deciding to revoke the protection order granted by the Justice of the Peace, the Honourable Justice Gerald R.P. Moir looked at the purpose of the *Act* and found it to be at odds with what he called "the mild meanings apparent in the definitions when read literally" (see paras. 28 and 29). Moir J. noted a "disconnect between the ordinary meaning of [cyberbullying] and the literal definition" (see para. 24). He described cyberbullying as being a loaded word and concluded that "despite the literal definition, 'cyberbullying' is intended in this statute to include malice" (para. 31).

[72] In deciding *Self*, *supra*, Moir J. noted that the power of the court under s. 13(1) of the *Cyber-safety Act* is broader than that of a Justice of the Peace under ss. 8 and 9. He also noted that "[A] judge who hears both sides is given a broad discretion, and must consider the adverse impacts on free speech and property rights in addition to the possibilities for continuation of malicious 'cyberbullying'" (para. 32). It should be noted that in the *Self* case, *supra*, Moir, J. was not presented with a constitutional challenge as in the present case.

CONSIDERATION OF THE PROTECTION ORDER:

[73] Assuming the *Cyber-safety Act* to be *Charter* compliant, I had no difficulty concluding Mr. Snell had engaged in cyberbullying of Mr. Crouch as that term is defined in the *Act*, and the behaviour was likely to continue. I was therefore satisfied the Protection Order should be confirmed, but with the addition of the following conditions under para. 7:

> That the Cyber-safety Protection Order first issued on the 11th day of December, 2014 and subsequently confirmed by a Justice of the Supreme Court of Nova Scotia on the 17th day of December, 2014 is hereby amended as follows but remains subject to a further review in order to consider the constitutional validity of Part I of the *Cyber-safety Act* under the *Canadian Charter of Rights and Freedoms*:
>
> - Any comments on any social media sites whereby the respondent has made reference to the applicant, either directly or indirectly, are to be removed.
> - Further, any comments on any social media sites directed towards an unnamed or unspecified person(s), that might reasonably lead one to conclude that they refer to the applicant, are to be removed.
> - The Protection Order is subject to further variation, or revocation, after this Court decides the merits of a Constitutional challenge to certain provisions of Part I of the Cyber-safety Act and the definition of "cyberbullying" contained in Section 3(b) of that Act, based on alleged infringements of ss. 2(b) and 7 of the Canadian Charter of Rights and Freedoms.

[74] My decision to re-confirm was guided by the wording of the *Act*, as well as this Court's reasons in *Lee* and *Self*. I did, however, take a different view of the meaning of cyberbullying than that taken by Moir J. in *Self*. As noted, Moir J. read in a requirement for malice; that is, in order to find the respondent engaged in cyberbullying, it would be necessary to find the respondent acted maliciously. In deciding to re-confirm the Protection Order issued against Mr. Snell, I declined to adopt this approach, for the following reasons.

[75] In *Sullivan On the Construction of Statutes*, 6th ed. (Markham, Ont.: LexisNexis Canada Inc., 2014), Ruth Sullivan distinguishes between exhaustive and non-exhaustive statutory definitions. At para. 4.33 on page 72 she writes:

> §4.33 Statutory definitions are conventionally classified as exhaustive or non-exhaustive, and the courts rely on this distinction in interpreting them. The

> distinction itself is simple enough: exhaustive definitions displace the ordinary (or technical) meaning of the defined term whereas non-exhaustive definitions do not. As illustrated below, however, this classification does not fully capture the complexity of statutory definitions and can be misleading.

[76] At paras. 4.34 and 4.38, the author provides further help in distinguishing between the two classifications:

> §4.34 ***Exhaustive definitions.*** Exhaustive definitions declare the complete meaning of the defined term and completely displace whatever meanings the defined term might otherwise bear in ordinary or technical usage. An exhaustive definition is generally introduced by the verb "means"…
>
> §4.38 ***Non-exhaustive definition***. Non-exhaustive definitions do not purport to displace the meaning that the defined term would have in ordinary usage; they simply add to, subtract from or exemplify that meaning. Non-exhaustive definitions are generally introduced by "includes" or "does not include"…

[77] The definition of cyberbullying set out at s. 3(1)(b) of the *Act* is an exhaustive statutory definition. The Legislature chose a definition that says "'cyberbullying' *means*", not "'cyberbullying' *includes*". In so doing, the Legislature declared the complete meaning of cyberbullying, and it displaced the ordinary meaning. While the ordinary meaning of cyberbullying might include malice, this ordinary meaning was displaced by the statutory definition.

[78] I distinguish *Rasa v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 670 [*Rasa*], *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606, [1992] S.C.J. No. 67 [*Nova Scotia Pharmaceutical*], and *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, 2004 SCC 4, [2004] S.C.J. No. 6 [*Canadian Foundation*], on the basis that in all of those cases, the statutory term in question was not a defined term. This gave the Court a wider discretion to use various techniques of statutory interpretation to ascribe meaning to the impugned term.

[79] Furthermore, on examining the meaning of "malice", I find it to be incompatible with the statutory definition of cyberbullying. "Malice" is defined in Collins Canadian Dictionary, 1st ed., 2010 to mean:

> The desire to do harm or cause mischief to others.

And in *Black's Law Dictionary*, 9th ed., it is defined as:

> The intent, without justification or excuse, to commit a wrongful act. 2. Reckless disregard of the law or of a person's legal rights. 3. Ill will; wickedness of heart.

[80] It is clear malice means acting with culpable intent. Yet the statutory definition of cyberbullying includes conduct where harm was not intended, but ought reasonably to have been expected. As was noted by LeBlanc J. in *Lee, supra* at para. 29, this part of the definition sets an objective standard. The statutory definition has both subjective and objective elements, but reading in a requirement for actual malice ignores the objective element.

[81] Thus, my decision to re-confirm the Protection Order issued against Mr. Snell was based on the wording of the *Act*, assuming it to be *Charter* compliant and without reading in a requirement for malice.

[82] I will now proceed to examine the constitutionality of the *Cyber-safety Act*, and in particular, whether the definition of cyberbullying at s. 3(1)(b) and the protection order process set out in Part I infringe ss. 2(b) or 7 of the *Canadian Charter of Rights and Freedoms* (the "*Charter*"). If any part of the *Act* is found to violate the *Charter*, I must consider whether the offending provisions are saved by s. 1. Based on the results of this analysis, the fate of the Protection Order remains to be determined.

ISSUES:

[83] The issues to be determined are as follows:

1. Does the *Cyber-safety Act* infringe s. 2(b) of the *Charter*, and if so, is this infringement saved by s. 1?
2. Does the *Cyber-safety Act* infringe s. 7 of the *Charter*, and if so, is this infringement saved by s. 1?
3. If necessary, what is the appropriate remedy?

Preliminary Issue: Admissibility of MacKay Report

[84] Before proceeding, I wish to address a preliminary issue. The Attorney General seeks to rely on a report of the Nova Scotia Task Force on Bullying and Cyberbullying as evidence of the purpose of the *Cyber-safety Act*. The Respondent argues the Task Force Report is inadmissible. He relies on *Gay v. New Brunswick*

(Regional Health Authority 7), 2014 NBCA 10, [2014] N.B.J. No. 117, aff'g 2010 NBQB 128, [2010] N.B.J. No. 130. In that case, the plaintiffs sued Dr. Menon, the Chief of Pathology and Director of Clinical Laboratory Services at the Regional Hospital in Miramichi, New Brunswick, for professional negligence. The plaintiffs also sued the Hospital for deficient hiring processes and lack of quality control in the Hospital's pathology laboratory. At the certification motion, the plaintiffs sought to introduce the report of a Commission of Inquiry that had been established to investigate into the Hospital's pathology services. The plaintiffs relied on s. 43 of the New Brunswick *Evidence Act*, R.S.N.B. 1973, c. E. 11, which provides:

> 43 Any report, publication or statement on any matter of science, technology, geography, population, natural resources, engineering or other matter of fact or fact and opinion purporting to have been prepared by or under the authority of any department or branch of the Government of Canada or of the Province or of any other province is, in so far as relevant, admissible as evidence of the matters stated therein

[85] Ouelette J. found as follows:

> 12 The Court is of the opinion that the Inquiry Report is a public document for the purpose of public reference and is a report that was prepared after the issuance of an Order-in-Council by a proper authority. For those reasons, it could be admitted in a court of law under section 43 of the *Evidence Act* for the purpose intended by the plaintiff for certification.

[86] In finding the report to be admissible, Oulette J. distinguished *Robb v. St. Joseph's Health Care Centre* (1998), 87 O.T.C. 241, [1998] O.J. No. 5394 (Ct. J. (Gen. Div.)), aff'd (2001), 152 O.A.C. 60, [2001] O.J. No. 4605 at paras. 209-210 (C.A.). In *Robb*, a plaintiff sought to have admitted into evidence a report of the Royal Commission of Inquiry into Blood Services and a report of the Information Commissioner, as *prima facie* proof of the subject matter contained therein. The reports would assist the plaintiff with establishing liability. The plaintiff argued the documents were admissible under the public documents exception to the hearsay rule.

[87] MacDonald J. reviewed the public documents exception:

> 10 The public documents exception to the hearsay rule permits into evidence statements contained in public documents. The statements are admissible without proof because of their "inherent reliability or trustworthiness and because of the inconvenience of requiring public officials to be present in the court to prove

> them." See *R. v. AP.*, [1996] O.J. No. 2986(C.A.). To my mind, this is the fundamental basis which gives rise to the doctrine.
>
> 11 Sopinka, Lederman and Bryant, *The Law of Evidence in Canada*, 2d ed. (Butterworths: 1992) at 231 sets forth the basis for public documents exception to the hearsay rule:
>
> > Founded on the belief that public officers will perform their tasks properly, carefully, and honestly, an exception to the hearsay rule was created for written statements prepared by public officials in the exercise of their duty. When it is part of the function of a public officer to make a statement as to a fact coming within his [or her] knowledge, it is assumed that, in all likelihood, he [or she] will do his [or her] duty and make a correct statement. The circumstances of publicity also adds another element of trustworthiness. Where an official record is necessarily subject to public inspection, the facility and certainty with which errors would be exposed and corrected provides an additional guarantee of accuracy. Before this exception to the hearsay rule comes into play, the following preconditions, cumulatively providing a measure of dependability, must be established:
> >
> > > (1) The subject matter of the statement must be of a public nature;
> > >
> > > (2) The statement must have been prepared with a view to being retained and kept as a public record;
> > >
> > > (3) It must have been made for a public purpose and available to the public for inspection at all times;
> > >
> > > (4) It must have been prepared by a public officer in pursuance of his duty.

[88] MacDonald J. concluded that the reports could not be admitted under the public documents exception to the hearsay rule because the conclusions and opinions contained therein were based on a record not before the court, and were not based on the civil standard of proof (paras. 19 & 25). Furthermore, to admit the reports would be to turn the inquiry process "into something that it was never intended to be" (para. 24). The Ontario Court of Appeal affirmed the decision.

[89] Ouellette J. distinguished *Robb* because, *inter alia*, "the object of the plaintiffs at bar in filing the Inquiry Report is not for the purpose of determination of liability" (paras. 15-16). Rather, the plaintiffs sought to use the report for purposes of class definition and other certification requirements (para. 21). The decision was upheld on appeal, Drapeau C.J.N.B. and Deschenes J.A. concluding at para. 18:

> In due course, the Commission, chaired by the Honorable Paul S. Creaghan, produced a comprehensive report, which was received in evidence at the hearing in the court below. The motion judge's decision on admissibility is reported at 2010 NBQB 128, 361 N.B.R. (2d) 1. While that ruling was challenged in the Regional Hospital's written submission on appeal, the issue was not forcefully pressed at the hearing. The fact is that the disposition of the present appeal does not turn on any controversial feature of the Commission's report and, in any event, we have not been persuaded that the motion judge's admissibility ruling is unsustainable, having regard to the limited purpose for which the report was received.

[90] However, the Respondent relies on Robertson J.A.'s dissenting opinion, where he stated:

> 181 In my view, the Hospital's objection is well-founded. Like the motion judge, I am of the view that none of the findings or observations contained within the Report can be used to establish the Hospital's or Dr. Menon's liability. Correlatively, those findings cannot be used in proceedings leading up to the trial, even if those findings are offered for the limited purpose of reinforcing the case for certification. This view is consistent with Robb Estate v. St. Joseph's Health Care Centre, [1998] O.J. No. 4419 (Ont. Ct. J.) (QL); Rintoul v. St.Joseph's Health Centre, [2001] O.J. No. 4605 (C.A.) (QL);Farrow v. Canadian Red Cross Society, [1998] O.J. No. 5394 (QL), aff'd [2001] O.J. No. 4605 (C.A.) (QL).
>
> 182 In *Robb Estate*, the plaintiff at trial moved to have the Report of the Royal Commission of Inquiry on the Blood System in Canada (the Krever Report) and the Report of the Information Commissioner John W. Grace admitted into evidence as *prima facie* proof of the subject matter contained in both reports. The plaintiffs claimed the reports were public documents and, as such, were admissible as an exception to the hearsay rule. The trial judge disagreed, noting that "the public documents exception to the hearsay rule was never intended to be applied to admit into evidence at a trial documents such as the Krever Report" (para. 20). His rationale was twofold: First, to the extent that the Reports' conclusions relied on evidence which may be inadmissible in a civil trial, the defendants would be prejudiced. They would not have the opportunity to test the evidentiary findings contained in the Reports, could not cross examine the Reports, and could not know the evidence upon which the particular findings contained in the Reports were based (para. 23). Second, it would be contrary to public policy. Admitting the Reports into evidence in a subsequent civil proceeding would convert "a commission of inquiry into something that it was never intended to be" (para. 24). Inquiries are intended to inform the government on a particular issue; they could not "have the collateral purpose of providing evidence in civil proceedings" (para. 24).
>
> 183 In brief, the mandate of a Commission of Inquiry and the inquisitorial nature of administrative proceedings are inimical to the civil rules of evidence and

> the burden of proof which rests on plaintiffs in civil actions, seeking to impose liability on a defendant for breach of a legal duty. At the same time, the existence of the Commissioner's Report is matter of public knowledge, as are its recommendations and ultimate findings. Hence, it should be permissible to refer to the Report to the extent those references do not embrace matters that are directed at establishing critical or controversial facts and any legal conclusions eventually made. In the present case, the Report is of limited relevance. It tells us that the Government of the day recognized the seriousness of the problem over the delivery of pathology services at the Hospital and of the need for fundamental reform. We also know that the Government formally responded to the Report. More importantly, the Report also explains why the appellants have been persistent in tying their class action to a novel duty/standard of care: a duty of professional competence and a corresponding duty to hire only those who so qualify.

[91] I do not find the dissenting reasons of Robertson J.A. to be particularly relevant to the circumstances before me. The Attorney General seeks to rely on the Task Force Report not for the truth of its contents as evidence of liability, but as evidence of legislative history for the purpose of determining the Act's objective. In *Constitutional Law of Canada*, 5th ed. (Toronto: Carswell, 2007) at 60-3, Peter Hogg writes that legislative history is routinely admitted for the purposes of determining whether a statute is justified as a reasonable limit under s. 1, citing *R. v. Edwards Books and Art*, [1986] 2 S.C.R. 713 (law reform commission report) [*Edwards Books*], and *Irwin Toy v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, [1989] S.C.J. No. 36 [*Irwin Toy*] (parliamentary debates). He explains:

> Legislative history is admitted, not for the purpose of proving the truth of any facts contained in the material, but for the purpose of proving the considerations that were taken into account by the legislative body that enacted a statute.

[92] As to proving the material:

> Because legislative history takes the form of publicly available documents, the Court does not require proof by sworn testimony, but will take judicial notice of the material (60-3 to 60-4).

[93] Furthermore, the very Task Force Report in issue in this proceeding was admitted by the Supreme Court of Canada in *A.B. v. Bragg Communications Inc.*, 2012 SCC 46, [2012] S.C.J. No. 46 at paras. 20-24, as evidence that cyberbullying is "psychologically toxic" and causes extensive harm, and as evidence that a bullied child may not pursue responsive legal action without adequate protections. In *Lee*, LeBlanc J. relied on the Task Force Report for the very reasons the

Attorney General seeks to introduce it in this case. For all of these reasons, I find the Task Force Report to be admissible.

[94] I distinguish *Sweetland v. Glaxosmithkline Inc.*, 2014 NSSC 216, [2014] N.S.J. No. 368, wherein the Honourable Justice Wood found a Staff Report prepared by staff of the Committee on Finance of the United States to be inadmissible on a certification motion. The plaintiffs sought to use the Staff Report to show "some basis in fact" for some of the certification requirements. The plaintiffs submitted the Staff Report was relevant to the determination of common issues, class definition and preferable procedure. Wood J. found the plaintiffs had failed to establish the Staff Report was relevant, and further, the Report was "rife with opinion on factual, medical and legal issues", and he had "no information with respect to the identity or qualification of the authors and no evidence with respect to the mandate or authority under which the report was prepared": paras. 16 & 22. I distinguish this case because, among other reasons, using a report as evidence of the truth of its contents to support a certification motion is very different from using it to show legislative history.

[95] In *Barton v. Nova Scotia (Attorney General)*, 2014 NSSC 192, [2014] N.S.J. No. 266, the Honourable Justice Chipman allowed a Royal Commission and the Government of Nova Scotia Response to Recommendations of the Royal Commission to be used as authority for the plaintiff's pre-trial brief, but did not allow the reports to be entered as exhibits. He reasoned as follows:

> 99 … The plaintiff also sought to have entered into evidence the Royal Commission on the Donald Marshall, Jr., Prosecution ("Marshall Report") as well as the Government of Nova Scotia Response to the Recommendations of the Royal Commission on the Donald Marshall, Jr. Prosecution ("N.S. Government Response Report"). …
>
> 100 The plaintiff appended the two reports to his pre-trial brief and during the pre-trial conference I allowed that Mr. Barton could rely on the Marshall Report and the N.S. Government Response Report as authority. The subsequent request that they be entered as exhibits, however, is an entirely different matter.
>
> …
>
> 102 In any case, having reviewed the jurisprudence, I am particularly drawn to *Robb v. St. Joseph's Healthcare Centre*,(1998), 87 O.T.C. 241, [1998] O.J. No. 5394, (Ont Ct. J. (Gen. Div.)), affirmed at 152 O.A.C. 60, [2001] O.J. No. 4605 (Ont. C.A.), where Justice MacDonald considered whether the report of the Royal Commission of Inquiry into the Blood System, prepared by Commissioner Krever, should be admitted into evidence in an action for damages arising from

tainted blood transfusions. The Court found that the Krever Report met the "public document" test, but declined to admit it into evidence because it was unreliable. The Commission's record was not before the Court and the civil trial standard of proof had not been applied. The Court set out the following rationale at paras. 20-24:

> . . . The public documents exception to the hearsay rule was never intended to be applied to admit into evidence at a trial documents such as the Krever Report.
>
> . . .
>
> To the extent that Commissioner Krever relied on evidence which may be inadmissible in a civil trial to come to his conclusions, the defendants would be prejudiced by the introduction of such evidence. If the report were admitted, the defendants would be unable to have the opportunity to test the evidentiary findings which are contained in the report. They could not cross examine the report. They cannot know the evidence upon which the particular findings contained in the report are based. This was never a purpose for which the Krever Commission was intended.
>
> There are also public policy considerations which prevent the Krever Report from being admitted into evidence. To admit the Krever Report as evidence in this trial would have the effect of converting a commission of inquiry into something that it was never intended to be. A commission of inquiry is a means by which the executive branch of the government can be informed on a particular issue. A commission of inquiry cannot have the collateral purpose of providing evidence in civil proceedings. If I were to so find, parties in future civil proceedings could attempt to make use of the findings of a commission of inquiry for that purpose.

103 The Robb decision has been repeatedly followed. Canadian courts have been emphatic that documents such as Royal Commission reports, public inquiry reports, R.C.M.P. public complaint commission reports, Senate Committee reports and ombudsman reports cannot be admitted for the truth of their contents without proof.

104 Even when there is a close nexus between the subject matter of the report and the litigation, courts have consistently refused to admit such reports. In *Robb*, *supra*, the Court refused to admit the Krever report in a civil trial for harm caused by tainted blood. In *Rumley v. British Columbia*, 2003 BCSC 234, at para. 52, the B.C. Supreme Court refused to admit a special prosecutor's report about abuse at a school for the blind in class action litigation seeking compensation for students abused at the school. In *Ernewein v. General Motors of Canada Ltd.*, 2005 BCCA 540, leave to appeal refused,[2005] S.C.C.A. No. 545 (S.C.C.) at para. 8, the B.C. Court of Appeal upheld a decision refusing to admit a report about a truck defect prepared by the US Secretary of Transportation in litigation to recover damages caused by that defect.

> 105 Given the authorities, neither the Marshall Report nor the N.S. Government Response Report should be admitted into evidence.
>
> 106 The reports have been relied upon by the plaintiff as authority, but they provide limited assistance to this Court. They are not probative of the facts in issue and do not help the Court to determine whether a negligent investigation and/or a breach of s. 7 and/or s. 12 of the Charter occurred.

[96] In the present case, the Attorney General seeks to rely on the Task Force Report as authority on the legislative history of the *Cyber-safety Act*. The Attorney General does not assert that the facts stated therein are true, only that the Report discloses what was in the Legislature's mind when it drafted the *Cyber-safety Act*. I find the Task Force Report is admissible for this purpose.

Issue 1: Does the *Cyber-safety Act* violate s. 2(b) of the *Charter*?

[97] Section 2(b) of the *Charter* states:

> 2. Everyone has the following fundamental freedoms:
>
> …
>
> (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
>
> …

[98] Mr. Snell argues that the definition of "cyberbullying" in s. 3(1)(b) of the *Act*, and the procedures for obtaining a protection order set out in Part I of the *Act*, infringe upon the fundamental freedom of expression protected under s. 2(b) of the *Charter*.

[99] The burden of establishing that the *Act* is *prima facie* unconstitutional rests with the person challenging its constitutionality: *R. v. Collins*, [1987] 1 S.C.R. 265 at paras. 21-22. If Mr. Snell succeeds in this regard, the burden shifts to the Attorney General to show the infringement is justified under s. 1 of the *Charter*.

[100] In *Irwin Toy*, *supra*, and *R. v. Keegstra*, [1990] 3 S.C.R. 697, [1990] S.C.J. No. 131 at paras. 29-31 [*Keegstra*], the Supreme Court of Canada adopted a two-step inquiry to determine whether freedom of expression is infringed. The first step involves determining whether the activity in question falls within the sphere of conduct protected by freedom of expression. If it does, the second step is to determine whether the purpose or effect of the government action is to restrict the expressive activity.

Is the expression protected by s. 2(b)?

[101] The Attorney General says that the impugned provisions do not violate s. 2(b) of the *Charter* because communications that come within the definition of "cyberbullying" are, due to their malicious and hurtful nature, low-value communications that do not accord with the values sought to be protected under s. 2(b). The Respondent submits that the nature of the expression and its proximity to the core of the *Charter* values are not relevant at this stage.

[102] The Supreme Court of Canada in *Irwin Toy, supra*, affirmed that any activity that conveys or attempts to convey meaning is constitutionally protected expressive activity: "all expressions of the heart and mind, however unpopular, distasteful or contrary to the mainstream" are deserving of *Charter* protection (para. 41). The only type of expression that receives no *Charter* protection is violent expression: *ibid*. at para. 42; *R. v. Khawaja*, 2012 SCC 69, [2012] S.C.J. No. 69 at paras. 67-71. Indeed, hate propaganda, defamatory libel, and publishing false news have all been found to fall within the ambit of s. 2(b): *Keegstra, supra*; *R. v. Lucas*, [1998] 1 S.C.R. 439, [1998] S.C.J. No. 28 [*Lucas*]; *R. v. Zundel*, [1992] 2 S.C.R. 731, [1992] S.C.J. No. 70.

[103] The Supreme Court of Canada elaborated on this principle in *Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825, [1996] S.C.J. No. 40:

> 60 Apart from those rare cases where expression is communicated in a physically violent manner, this Court has held that so long as an activity conveys or attempts to convey a meaning, it has expressive content and prima facie falls within the scope of the guarantee of freedom of expression; see *Irwin Toy*, *supra*, at p. 969. The scope of constitutional protection of expression is, therefore, very broad. It is not restricted to views shared or accepted by the majority, nor to truthful opinions. Rather, freedom of expression serves to protect the right of the minority to express its view, however unpopular such views may be; see *Zundel*, *supra*, at p. 753. The wide ambit of s. 2(b) is underscored by the following passage from McLachlin J.'s reasons in that case, at pp. 752-53:
>
> > The purpose of the guarantee is to permit free expression to the end of promoting truth, political or social participation, and self-fulfilment. That purpose extends to the protection of minority beliefs which the majority regard as wrong or false: *Irwin Toy*, *supra*, at p. 968. Tests of free expression frequently involve a contest between the majoritarian view of what is true or right and an unpopular minority view. As Holmes J. stated over sixty years ago, the fact that the particular content of a person's speech might "excite popular prejudice" is no reason to deny it protection for "if there is any principle of the Constitution that more imperatively

> calls for attachment than any other it is the principle of free thought -- not free thought for those who agree with us but freedom for the thought that we hate": *United States v. Schwimmer*, 279 U.S. 644 (1929), at pp. 654-55.

[104] Some types of expression will, of course, lie closer to the core of freedom of expression than others. The Supreme Court of Canada in *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712, [1988] S.C.J. No. 88, identified the three core values underlying freedom of expression: individual self-fulfillment, truth attainment, and political discourse. The Court went on to state at para. 57:

> While these attempts to identify and define the values which justify the constitutional protection of freedom of expression are helpful in emphasizing the most important of them, they tend to be formulated in a philosophical context which fuses the separate questions of whether a particular form or act of expression is within the ambit of the interests protected by the value of freedom of expression and the question whether that form or act of expression, in the final analysis, deserves protection from interference under the structure of the Canadian Charter and the Quebec Charter. <u>These are two distinct questions and call for two distinct analytical processes.</u>
>
> [Emphasis added]

[105] Errol Mendes and Stéphane Beaulac in *Canadian Charter of Rights and Freedoms*, 5th ed. (Markham, Ont.: LexisNexis Canada Inc., 2013) at 435, state their belief that the Court's findings in *Ford* reflect well the structure of analysis that has been adopted in freedom of expression cases. They note that although the Supreme Court of Canada recognizes and embraces the distinction between high- and low-value expression, the former being expression that lies closer to the core values, the distinction is relevant "not in the determination of whether the activity is protected expression, but in the determination of whether a governmental interference is justified" (at 435).

[106] I find this approach to be the correct one. At this step of the analysis, we must ask whether the conduct in question—in this case, cyberbullying as that term is defined in the *Act*—is expressive, i.e. does it involve conduct that conveys or attempts to convey meaning. I find that it does. To the extent that cyberbullying falls short of violence or threats of violence, it is within the sphere of conduct protected by s. 2(b).

Does the purpose or effect of the legislation restrict the applicant's freedom of expression?

[107] The second step of the s. 2(b) analysis requires me to consider whether the purpose or effect of the government activity is to restrict the expressive activity in question.

[108] The Supreme Court of Canada in *Irwin Toy* held if the government's purpose is to restrict: (a) the content of expression by singling out particular meanings that are not to be conveyed; (b) a form of expression in order to control access by others to the meaning being conveyed; or (c) one's ability to convey meaning, the government "necessarily limits the guarantee of free expression". On the other hand, where the government aims to control only the physical consequences of certain human activity, regardless of the meaning being conveyed, for example a prohibition against littering, the purpose is not to control expression: *Irwin Toy*, *supra* at para. 49.

[109] Even if the government's *purpose* is not to control or restrict expression, the court must still decide whether the legislation nonetheless has this *effect*. If the applicant can demonstrate that the legislation has the effect of controlling or restricting expression that promotes at least one of the core values underlying freedom of expression, the applicant will have succeeded in showing that s. 2(b) is engaged: *ibid*. at paras. 52-53. In this regard, the value of the expression can be relevant at the second step of the s. 2(b) analysis. The Supreme Court of Canada in *Irwin Toy*, *supra* at para. 53, put it this way:

> 53 We have already discussed the nature of the principles and values underlying the vigilant protection of free expression in a society such as ours. They were also discussed by the Court in Ford (at pp. 765-67), and can be summarized as follows: (1) seeking and attaining the truth is an inherently good activity; (2) participation in social and political decision-making is to be fostered and encouraged; and (3) the diversity in forms of individual self-fulfillment and human flourishing ought to be cultivated in an essentially tolerant, indeed welcoming, environment not only for the sake of those who convey a meaning, but also for the sake of those to whom it is conveyed. In showing that the effect of the government's action was to restrict her free expression, a plaintiff must demonstrate that her activity promotes at least one of these principles. It is not enough that shouting, for example, has an expressive element. If the plaintiff challenges the effect of government action to control noise, presuming that action to have a purpose neutral as to expression, she must show that her aim was to convey a meaning reflective of the principles underlying freedom of expression. The precise and complete articulation of what kinds of activity promote these

> principles is, of course, a matter for judicial appreciation to be developed on a case by case basis. But the plaintiff must at least identify the meaning being conveyed and how it relates to the pursuit of truth, participation in the community, or individual self-fulfillment and human flourishing.
>
> [Emphasis added]

[110] Thus, it is only in the case of content-neutral laws that might, in their effect, restrict free expression, that the applicant must demonstrate that the expressive activity promotes or reflects at least one of the principles underlying the guarantee: Mendes & Beaulac, *supra* at 437-38. Mendes & Beaulac go on to explain that although this second inquiry shifts the burden of proof to *Charter* claimants, the threshold will not typically be a burdensome one (at 438):

> Though this second inquiry shifts the burden of proof to Charter claimants, it might not be thought of as burdensome in many cases. Just as "all expressions of the heart and mind, however unpopular or distasteful" … will qualify for protection under section 2(b), it often should not be too difficult to show that he activity promotes one of the underlying values (438).

[111] Applying these principles to the Cyber-safety Act, I must first consider whether the purpose of the *Act* is to restrict expression. The purpose of the *Act* is set out at s. 2:

> 2 The purpose of this Act is to provide safer communities by creating administrative and court processes that can be used to address and prevent cyberbullying.

[112] Prevention of cyberbullying is a purpose that aims to restrict the content of expression by singling out particular meanings that are not to be conveyed, i.e. communication that is intended or ought reasonably 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. Therefore, the purpose of the *Act* is to control or restrict expression.

[113] It is not necessary for me to consider whether the *Act* also has the effect of restricting expression that promotes at least one of the core freedom of expression values, although I find that it does.

[114] The Attorney General submits that the effect of the *Act* is to limit harmful expression only after review by a Justice of the Peace or a Justice of the Supreme Court, and only upon issuance of a protection order. This is not, the Attorney

General says, the type of effect which is contrary to the *Charter*. The Attorney General further submits that the type of speech in question is far removed from the core values, because it is nothing more than malicious personal attacks on an ex-business partner with the intention of harming him. The Attorney General argues that if the communications in question are harmful to Mr. Crouch, that type of expression is far removed from the core values sought to be protected by s. 2(b). The Attorney General likens the communication to defamation or hate speech, and says that this Court must balance this low-value expression with the Applicant's right to protect his reputation, which has been described as a fundamental value.

[115] With respect, I find this approach, which confines the analysis to only the expression at issue in this case, to be too narrow. I must consider all the types of expression captured by the *Act*. The *Act* restricts "any electronic communication through the use of technology … that is intended or ought reasonably 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". It is not difficult to come up with examples of expressive activity that falls within this definition, and at the same time promotes one of the core freedom of expression values. Moir J. did just that in *Self*, *supra* at para. 25:

> A neighbour who calls to warn that smoke is coming from your upstairs windows causes fear. A lawyer who sends a demand letter by fax or e-mail causes intimidation. I expect Bob Dylan caused humiliation to P.F. Sloan when he released "Positively 4th Street", just as a local on-line newspaper causes humiliation when it reports that someone has been charged with a vile offence. Each is a cyberbully, according to the literal meaning of the definitions, no matter the good intentions of the neighbour, the just demand of the lawyer, or the truthfulness of Mr. Dylan or the newspaper.

[116] In conclusion, I find that the *Act* has both the purpose and effect of controlling or restricting freedom of expression.

Issue 2: If the *Cyber-safety Act* infringes s. 2(b), is the infringement saved under s. 1?

[117] Having found that the Cyber-safety Act restricts freedom of expression in both purpose and effect, the next step is to determine whether the infringement is justified under s. 1 of the *Charter*, which states:

> 1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

[118] Thus, constitutional rights and freedoms are not absolute. They can be limited as long as the limit is prescribed by law, reasonable, and demonstrably justified in a free and democratic society.

[119] The party seeking to uphold the limitation—in this case, the Attorney General—bears the onus of proof. The presumption is that the rights and freedoms are guaranteed unless the party invoking s. 1 can bring itself within the exceptional criteria which justify their being limited. This is further substantiated by the use of the word "demonstrably" which clearly indicates that the onus of justification is on the party seeking to uphold the limit: *R. v. Oakes*, [1986] 1 S.C.R. 103, [1986] S.C.J. No. 7 at paras. 66-67 [*Oakes*].

[120] The framework for determining whether a constitutional infringement is reasonable and demonstrably justified was laid out by the Supreme Court of Canada in *Oakes*. First, the objective of the legislation must be pressing and substantial. Second, the means chosen to attain this legislative end must be reasonable and demonstrably justified in a free and democratic society. This means: (1) the measures chosen must be rationally connected to the legislative objective; (2) the measures must impair the *Charter* guarantee as little as possible (minimum impairment); and (3) there must be proportionality between the deleterious and salutary effects of the chosen measures: *Oakes*, *supra* at paras. 69-70.

[121] The Oakes analysis is highly contextual: *R. v. Sharpe*, 2001 SCC 2, [2001] S.C.J. No. 3 at para. 157 [*Sharpe*]. For example, there is a distinction to be drawn between legislation that "acts as the 'singular antagonist of the individual'" (e.g. criminal justice legislation) and legislation that mediates between different groups (e.g. social legislation). A lower standard of justification and a greater degree of judicial deference is required for the latter because "courts are not specialists in the realm of policy-making" and the Legislature is in a better position to weigh and assess the competing interests in society: *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, [1995] S.C.J. No. 68 at paras. 68-70 [*RJR-MacDonald*]; *Harper v. Canada (Attorney General)*, 2004 SCC 33, [2004] S.C.J. No. 28 at paras. 86-87 [*Harper*]. I find that the *Cyber-safety Act* is social legislation that requires me to afford a greater degree of deference to the Legislature.

Prescribed by Law

[122] Section 1 requires that any limit be "prescribed by law". Typically, where the limit is set out in a duly enacted legislative provision, this requirement is easily satisfied: *R. v. Oakes*, [1986] 1 S.C.R. 103 at para. 62. Here, we are dealing with legislative provisions, but the Respondent submits those provisions are too vague to qualify as a limit prescribed by law. Even if we import a requirement for malice, the Respondent says, the definition of cyberbullying is too broad and too all-encompassing to provide an intelligible standard. The Respondent cites the following passage from Peter Hogg's *Constitutional Law of Canada*, *supra* at 38-16:

> It is a principle of fundamental justice in Canada, and of due process in the United States, that a statute is "void for vagueness" if its prohibitions are not clearly defined. A vague law offends the values of constitutionalism. It does not provide sufficiently clear standards to avoid arbitrary and discriminatory applications by those charged with enforcement. It does not provide reasonable notice of what is prohibited so that citizens can govern themselves safely. Indeed, as American judges have noted, a vague law may lead citizens to steer far wider of the unlawful zone than they would if the boundaries are clearly marked.
>
> In Canada, the idea that a law may be void for vagueness is also implicit in the requirement that a limit on a Charter right be prescribed by law. That follows from the rule described above that precision is one of the ingredients of the prescribed-by-law requirement.

[123] The Supreme Court of Canada in *Irwin Toy*, *supra* at para. 63, articulated the following standard:

> Absolute precision in the law exists rarely, if at all. The question is whether the legislature has provided an intelligible standard according to which the judiciary must do its work. The task of interpreting how that standard applies in particular instances might always be characterized as having a discretionary element, because the standard can never specify all the instances in which it applies. On the other hand, where there is no intelligible standard and where the legislature has given a plenary discretion to do whatever seems best in a wide set of circumstances, there is no "limit prescribed by law".

[124] I must consider whether the legislation provides sufficient guidance to those responsible for considering and reviewing protection orders, e.g. justices of the peace and justices of this Court, so as to avoid arbitrary and discriminatory decision-making. In addition to the definition of cyberbullying, I must consider the following provisions of the *Act*:

> 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.
>
> …
>
> 12 (1) As soon as practicable after making a protection order and in any event within two working days, the justice shall forward a copy of the order and all supporting documentation, including a transcript or recording of the proceedings, to the Court in the prescribed manner.
>
> (2) Within such period as the regulations prescribe of the receipt of the protection order and all supporting documentation by the Court, the Court shall review the order and, where the Court is satisfied that there was sufficient evidence before the justice to support the making of the order, the Court shall
>
> (a) confirm the order; or
>
> (b) vary the order,
>
> and the order as confirmed or varied is deemed to be an order of the Court.
>
> (3) Where, on reviewing the protection order, the Court is not satisfied that there was sufficient evidence before the justice to support the making of the order, the Court shall direct a hearing of the matter in whole or in part before the Court.

[125] The justice of the peace considering the application for a protection order must consider two questions: did the respondent engage in conduct that comes within the definition of cyberbullying, and are there reasonable grounds to believe the respondent will engage in such conduct in the future?

[126] The Respondent says the definition of cyberbullying is void for vagueness because it is too overbroad and all-encompassing. However, to say a law is vague because it is overbroad is an oversimplification. Vagueness and overbreadth are distinct concepts. The Supreme Court of Canada considered the distinction in *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606, [1992] S.C.J. No. 67 at paras. 18-37 [*Nova Scotia Pharmaceutical*]. Gonthier J. for the Court concluded as follows:

> 36 The relationship between vagueness and "overbreadth" was well expounded by the Ontario Court of Appeal in this oft-quoted passage from R. v. Zundel (1987), 58 O.R. (2d) 129, at pp. 157-58:
>
> > Vagueness and overbreadth are two concepts. They can be applied separately, or they may be closely interrelated. The intended effect of a

> statute may be perfectly clear and thus not vague, and yet its application may be overly broad. Alternatively, as an example of the two concepts being closely interrelated, the wording of a statute may be so vague that its effect is considered to be overbroad.

I agree. A vague law may also constitute an excessive impairment of Charter rights under the Oakes test. This Court recognized this, when it mentioned the two aspects of vagueness under s. 1 of the Charter, in Osborne and Butler.

37 For the sake of clarity, I would prefer to reserve the term "vagueness" for the most serious degree of vagueness, where a law is so vague as not to constitute a "limit prescribed by law" under s. 1 in limine. The other aspect of vagueness, being an instance of overbreadth, should be considered as such.

[127] Continuing at para. 63, Gonthier J. stated:

> A vague provision does not provide an adequate basis for legal debate, that is for reaching a conclusion as to its meaning by reasoned analysis applying legal criteria. It does not sufficiently delineate any area of risk, and thus can provide neither fair notice to the citizen nor a limitation of enforcement discretion. Such a provision is not intelligible, to use the terminology of previous decisions of this Court, and therefore it fails to give sufficient indications that could fuel a legal debate. It offers no grasp to the judiciary. This is an exacting standard, going beyond semantics. The term "legal debate" is used here not to express a new standard or one departing from that previously outlined by this Court. It is rather intended to reflect and encompass the same standard and criteria of fair notice and limitation of enforcement discretion viewed in the fuller context of an analysis of the quality and limits of human knowledge and understanding in the operation of the law.

[128] I adopt this reasoning. Vagueness deals with whether the provision is sufficiently clear to delineate a risk zone, while overbreadth considers whether the risk zone that has been delineated is an appropriate one.

[129] I have yet to consider whether the definition of cyberbullying is overbroad. With respect to vagueness, I find that the definition of cyberbullying is sufficiently clear to delineate a risk zone. It provides an intelligible standard. Therefore, the definition of cyberbullying is not void for vagueness.

[130] However, I have difficulty with the second branch of s. 8, which requires there to be reasonable grounds to believe the respondent will engage in cyberbullying in the future. The *Act* provides no guidance on what kinds of evidence and considerations might be relevant here. The *Act* provides no standard so as to avoid arbitrary decision-making.

[131] The requirement for reasonable grounds to believe the respondent will engage in cyberbullying in the future is reminiscent of the criminal law sentencing principle of deterrence. The principle of deterrence says that those at a higher risk of re-offending should receive harsher sentences in order to promote deterrence. In assessing the likelihood that the offender will re-offend, a judge will consider the offender's record and attitude, his motivation, and his reformation and rehabilitation: *R. v. Morrissette*, [1970] S.J. No. 269 at para. 10.

[132] Of similar effect is the *Criminal Code*, R.S.C. 1985, c. C-46, provision regarding sentencing for long-term offenders:

> 753.1 (1) The court may, on application made under this Part following the filing of an assessment report under subsection 752.1(2), find an offender to be a long-term offender if it is satisfied that
>
> > (a) it would be appropriate to impose a sentence of imprisonment of two years or more for the offence for which the offender has been convicted;
> >
> > (b) there is a substantial risk that the offender will reoffend; and
> >
> > (c) there is a reasonable possibility of eventual control of the risk in the community.

[133] Section 753.1 goes on to provide guidance on how a judge should determine whether there is a substantial risk that the offender will reoffend. Furthermore, the Crown must seek a threshold psychiatric evaluation of the offender, and the parties will often introduce additional expert evidence: *R. v. Lalo*, 2004 NSSC 154, [2004] N.S.J. No. 299.

[134] There are, therefore, several distinctions between the criminal law principle of deterrence and the *Cyber-safety Act* requirement of reasonable grounds to believe the respondent will engage in cyberbullying in the future. First, risk of re-offending is not itself an element of criminal offences; it is a sentencing principle that does not need to be proven on a particular standard. Second, at a sentencing hearing, the Crown and defence will introduce evidence of the offender's record and attitude, his motivation, and his reformation and rehabilitation. In the case of long-term offender applications, a psychiatric assessment will be performed, and the parties will often introduce additional expert evidence regarding the offender's propensity to re-offend. A Justice of the Peace hearing a protection order application will have no such evidence.

[135] The present case is illustrative. The Justice of the Peace had the following information before him: Form A – Application for a Protection Order; Form B1 –

Evidence in Support of Application for a Protection Order, which includes the Mr. Couch's sworn statement of reasons he believes the Respondent will cyberbully him in the future; a timeline document prepared by Mr. Crouch including screenshots and excerpts of the Respondent's electronic communications; a mutual non-disparagement agreement; excerpts of third party materials on the subject of cyber-bullying; listing of Mr. Crouch's experience in news media interviews and studies on the topic of social media. Mr. Crouch's sworn statement indicates as follows:

> I believe that the respondent will cyberbully me in the future because Mr. Snell has become fixated on me. He is unemployed and is seeking to disparage me. With this fixation he has already ignored a non-disparagement agreement signed in January 2014. He is a sophisticated technical person with the ability to use technology in innovative ways.

[136] It is impossible to know on what basis the Justice of the Peace concluded that the Respondent was likely to continue with the alleged cyberbullying. I can assume that his conclusion was based on the number of instances of alleged cyberbullying in combination with Mr. Crouch's sworn statement. However, it is not clear how Mr. Crouch's statement indicates that the Respondent's conduct is likely to continue. Further, it will not be every case that there are multiple instances of alleged cyberbullying. The definition of cyberbullying says the electronic communication will be *typically*—but not always—repeated or with continuing effect. A protection order may be granted based on a single instance.

[137] In this regard, I find that the *Act* provides no intelligible standard according to which Justices of the Peace and the judiciary must do their work. It does not provide sufficiently clear standards to avoid arbitrary and discriminatory applications. The Legislature has given a plenary discretion to do whatever seems best in a wide set of circumstances. There is no "limit prescribed by law" and the impugned provisions of the Act cannot be justified under s. 1. In the event I am wrong, I will perform the balance of the *Oakes* analysis.

Pressing and Substantial Objective

[138] The legislative objective must be of sufficient importance to warrant overriding a constitutionally protected right or freedom. The *Cyber-safety Act* contains the following statement of its purpose:

> 2 The purpose of this Act is to provide safer communities by creating administrative and court processes that can be used to address and prevent cyberbullying.

[139] The Attorney General says that the *Act* was enacted in 2013 largely in response to teen suicides that were believed to be the result of bullying and cyberbullying, and pursuant to the recommendations set out in the Task Force Report. In the Preface of the Task Force Report Professor MacKay notes:

> Bullying is a major social issue throughout the world and is one of the symptoms of a deeper problem in our society: the deterioration of respectful and responsible human relations. The magnitude of the problem is daunting and there are no simple solutions on the horizon. There are, however, some effective strategies.
>
> The advance of technology and the prevalence of social media are profoundly changing how we communicate, and in so doing, they are also changing who we are. While the mandate of the Task Force is to focus on youth, the underlying problems are not unique to them (p. 1).

[140] And at Chapter 3:

> Bullying can best be defined as typically repeated and harmful behaviour that is deliberate and harassing. It is intended to cause, or should be known to cause, fear, intimidation, humiliation, distress and/or harm to another person's body, feelings, self-esteem or reputation. Bullying occurs in a context where there is a real or perceived power imbalance between the people involved and can be significantly intensified by encouragement from a peer group or bystanders. In fact, the participation of others can be a key factor in increasing the negative impact on the victim. Bullying can take many forms, including physical, relational (verbal and social) and can be delivered personally or electronically. All bullying has a damaging psychological impact. Early in the Task Force's deliberations we concluded that cyberbullying is a form of bullying and not a separate concept, as some have argued. Even though the consequences of cyberbullying can be more devastating it is a variation on bullying and not a stand-alone problem.
>
> Cyberbullying, which is also referred to as electronic bullying or online bullying, occurs through the use of technology and includes spreading rumours, making harmful comments and posting or circulating pictures or videos without permission. This can include sexting (sending nude or suggestive photos) and other less dramatic invasions of privacy. Cyberbullying can be done by means of a variety of forms of technology using social networks, text messaging, instant messaging, websites, email or other electronic media. Cyberbullying can be particularly destructive, because it can spread to many people very quickly and it can be done anonymously or through impersonation. As well, harmful comments and pictures can remain posted online and continue to be viewed and circulated

> for an indefinite period of time. The victimized person is faced daily with the hurtful material and often feels that many other people share the views of the perpetrator, often resulting in overwhelming psychological pressure (p. 39).

[141] The Attorney General submits the goal was to create administrative and court processes to deal with cyberbullying in a timely and efficient manner. The legislation was created to fill a gap in our existing laws. It was created to provide alternatives to a civil suit for defamation. Timeliness was seen to be an important characteristic because of the speed with which messages can spread on the Internet. A low-cost alternative to a civil suit for defamation was also seen to be important, enabling greater access to justice to victims of cyberbullying who otherwise may not have been able to afford to bring a defamation suit.

[142] The Attorney General also makes reference to commentary during the reading of the Bill in the Legislature, and says that the Legislature was responding to an urgent need for a process to address cyberbullying in a timely and all-encompassing fashion.

[143] Another facet of the legislation was to change attitudes about bullying and cyberbullying:

> One of the important roles of law in society is to change attitudes and values about what is inappropriate and blameworthy conduct. … When bullying is widely regarded by students, school authorities and people in general as being unacceptable and ultimately unthinkable, the incidents of bullying and cyberbullying will greatly diminish. … (Task Force Report at p. 48).

[144] Regarding the importance of protecting one's reputation, the Supreme Court of Canada stated in *Lucas, supra*:

> 48 Is the goal of the protection of reputation a pressing and substantial objective in our society? I believe it is. The protection of an individual's reputation from wilful and false attack recognizes both the innate dignity of the individual and the integral link between reputation and the fruitful participation of an individual in Canadian society. Preventing damage toreputation as a result of criminal libel is a legitimate goal of the criminal law.
>
> 49 In *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130, it was emphasized that it is of fundamental importance in our democratic society to protect the good reputation of individuals. On behalf of a unanimous court it was observed at p. 1175:
>
> > Although much has very properly been said and written about the importance of freedom of expression, little has been written of the

> importance of reputation. Yet, to most people, their good reputation is to be cherished above all. A good reputation is closely related to the innate worthiness and dignity of the individual. It is an attribute that must, just as much as freedom of expression, be protected by society's laws. …
>
> Democracy has always recognized and cherished the fundamental importance of an individual. That importance must, in turn, be based upon the good repute of a person. ... A democratic society, therefore, has an interest in ensuring that its members can enjoy and protect their good reputation so long as it is merited.

[145] The Supreme Court of Canada in *Hill v. Church of Scientology*, [1995] 2 S.C.R. 1130, [1995] S.C.J. No. 64, considered whether the common law of defamation was consistent with freedom of expression. Though the *Charter* does not apply directly to the common law, common law rules are to be interpreted in a manner consistent with *Charter* values: Mendes & Beaulac, *supra* at 511. The Court remarked that "the protection of reputation remains of vital importance"; it serves the important purpose of fostering our self-image and sense of self-worth (para. 117). The Court quoted with approval the following passage from *Rosenblatt v. Baer* (1966), 383 U.S. 75:

> The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being -- a concept at the root of any decent system of ordered liberty.

[146] The Court went on to say at para. 121:

> The protection of a person's reputation is indeed worthy of protection in our democratic society and must be carefully balanced against the equally important right of freedom of expression.

[147] For the foregoing reasons, I find that the objectives of the *Act*—to create efficient and cost-effective administrative and court processes to address cyberbullying, in order to protect Nova Scotians from undue harm to their reputation and their mental well-being—is pressing and substantial.

Rational Connection

[148] The measures chosen by the Legislature must be rationally connected to the previously identified pressing and substantial legislative objective. In *Oakes*, *supra* at para. 70, Dickson C.J. explained:

> … [T]he measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective.

[149] Put another way, the provisions must specifically address a targeted mischief: *Lucas*, *supra* at para. 53.

[150] A rational connection is to be established, on a civil standard, through reason, logic or simply common sense: *RJR-MacDonald*, *supra* at para. 184.

[151] The *Oakes* case itself provides an example of legislation that was deemed unconstitutional because it failed to meet the rational connection requirement. At issue was the validity of a provision of the federal *Narcotic Control Act*, R.S.C. 1970, c. N-1, which provided that proof the accused was in possession of a narcotic raised the presumption the accused was in possession for the purpose of trafficking. This "reverse onus" provision infringed the presumption of innocence guaranteed under s. 11(d) of the *Charter*. The Supreme Court of Canada went on to consider whether the infringement was justified under s. 1. The Court found the law's purpose—to protect society from drug trafficking—was pressing and substantial, but the law was not rationally connected to that purpose:

> In my view, s. 8 does not survive this rational connection test. As Martin J.A. of the Ontario Court of Appeal concluded, possession of a small or negligible quantity of narcotics does not support the inference of trafficking. In other words, it would be irrational to infer that a person had an intent to traffic on the basis of his or her possession of a very small quantity of narcotics. The presumption required under s. 8 of the *Narcotic Control Act* is overinclusive and could lead to results in certain cases which would defy both rationality and fairness.

[152] Part I of the *Cyber-safety Act* has been criticized because it allows for an application for a protection order to be made *ex parte*. The Attorney General advances several arguments in defence of this criticism. First, the Attorney General says that the availability of an *ex parte* process is in recognition of two factors: the respondent's identity may not be known or easily identifiable; and when it comes to electronic communications, speed of dissemination is a real

concern. An *ex parte* process, the Attorney General says, is "considered necessary in those unique situations in cyberbullying conduct where a victim may not always know the identity of the bully". The Attorney General points out that the *Civil Procedure Rules* recognize the need for *ex parte* proceedings in certain circumstances (see Rules 5, 22, 23, 28 and 30). The Attorney General says the processes in Part I are consistent with the processes set out in the Rules for *ex parte* proceedings.

[153] Second, the Attorney General submits that it will not always be the case that a protection order will be obtained on an *ex parte* basis; the *Act* merely provides this as a possibility.

[154] Third, the Attorney General points to the various procedural safeguards in place. On granting a protection order, the Justice of the Peace must within two days forward to this Court a copy of all evidence filed in support of the application, along with a copy of the transcript and the order. This Court is required to review the evidence and the order, and if it is not satisfied that there was sufficient evidence before the Justice of the Peace to support the making of the protection order, it may direct a *de novo* hearing of the entire, or only part of, the matter. A *de novo* hearing may also be held at the request of any person served with a protection order. Either party may appeal to the Court of Appeal on any question of law.

[155] The Attorney General's first argument is problematic because the Legislature could have, but chose not to, restrict the availability of *ex parte* proceedings to situations where the respondent's identity is not known or easily identifiable. As the Respondent correctly points out, each of the referenced *Civil Procedure Rules* are reserved for minor procedural matters or exceptional circumstances, such as emergencies or matters not affecting another person. The *Cyber-safety Act* does not limit the ability to proceed on an *ex parte* basis to emergencies or other extraordinary circumstances.

[156] In response to the Attorney General's second argument, i.e. that not all protection order applications will be made without notice, the Respondent submits s. 5(1) of the *Act* actually *requires* applicants to proceed without giving notice, rather than giving them a choice in the matter. The Respondent says interpreting s. 5(1) as giving applicants a choice in whether to give notice leads to the untenable conclusion that applicants also have a choice in whether to make their application to a Justice of the Peace, and in whether to make their application in the form and

manner prescribed by the regulations. I agree. Section 5(1) must be read as requiring protection order applications to be made without notice to the respondent. I also agree with the Respondent's submission that even if s. 5(1) did give applicants a choice in the matter, it would be a rare case indeed where an applicant would choose to give notice.

[157] Finally, with respect to the Attorney General's reliance on the various procedural safeguards set out in the *Act*, the reality is that while the respondent waits for the opportunity to be heard at a *de novo* hearing, his or her *Charter*-protected rights and freedoms will continue to be infringed upon. This will be on the basis of a proceeding that most likely occurred without notice to the respondent, and without the respondent having had an opportunity to be heard.

[158] I find the process set out in s. 5(1) of the *Act* is not rationally connected to the legislative objectives. The process does not specifically address a targeted mischief.

Minimum Impairment

[159] To be reasonably and demonstrably justified, the measures must restrict the infringed right or freedom as little as possible. The oft-cited statement of the appropriate standard was set out in *RJR-MacDonald, supra* at para. 160:

> As the second step in the proportionality analysis, the government must show that the measures at issue impair the right of free expression as little as reasonably possible in order to achieve the legislative objective. The impairment must be "minimal", that is, the law must be carefully tailored so that rights are impaired no more than necessary. The tailoring process seldom admits of perfection and the courts must accord some leeway to the legislator. If the law falls within a range of reasonable alternatives, the courts will not find it overbroad merely because they can conceive of an alternative which might better tailor objective to infringement. … On the other hand, if the government fails to explain why a significantly less intrusive and equally effective measure was not chosen, the law may fail.

[160] And in *Saskatchewan (Human Rights Commission) v. Whatcott*, 2013 SCC 11, [2013] S.C.J. No. 11 [*Whatcott*]:

> 101 … I am mindful that while it may "be possible to imagine a solution that impairs the right at stake less than the solution Parliament has adopted" there is often "no certainty as to which will be the most effective": JTI, at para.

> 43, per McLachlin C.J. Provided the option chosen is one within a range of reasonably supportable alternatives, the minimal impairment test will be met:
>
> …
>
> 108 Having concluded that the words "ridicules, belittles or otherwise affronts the dignity of" in s. 14(1)(b) are not rationally connected to the objective of prohibiting speech which can lead to discrimination, I also find them constitutionally invalid because they do not minimally impair freedom of expression.
>
> 109 Restricting expression because it may offend or hurt feelings does not give sufficient weight to the role expression plays in individual self-fulfillment, the search for truth, and unfettered political discourse. Prohibiting any representation which "ridicules, belittles or affronts the dignity of" protected groups could capture a great deal of expression which, while offensive to most people, falls short of exposing its target group to the extreme detestation and vilification which risks provoking discriminatory activities against that group. Rather than being tailored to meet the particular requirements, such a broad prohibition would impair freedom of expression in a significant way.

[161] In *RJR-MacDonald*, *supra*, a federal ban on all advertising of tobacco products was held to go too far as a means of curtailing the consumption of tobacco. In *Thomson Newspapers*, *supra*, prohibiting the publication of opinion polls in the final three days of an electron campaign was held to be too drastic a means of protecting voters from inaccurate information.

[162] The Supreme Court of Canada in *Edwards Books*, *supra*, recognized that legislatures must be afforded some level of deference. In considering whether an Ontario Sunday-closing law satisfied the requirement of minimally impairing freedom of religion, Dickson C.J. for the majority stated at para. 142:

> A "reasonable limit" is one which, having regard to the principles enunciated in Oakes, it was reasonable for the legislature to impose. The courts are not called upon to substitute judicial opinions for legislative ones as to the place at which to draw a precise line.

[163] Dickson C.J., Lamer J. and Wilson J. similarly stated in *Irwin Toy*, *supra* at para. 74:

> Where the legislature mediates between the competing claims of different groups in the community, it will inevitably be called upon to draw a line marking where one set of claims legitimately begins and the other fades away without access to complete knowledge as to its precise location. If the legislature has made a reasonable assessment as to where the line is most properly drawn, especially if

> that assessment involves weighing conflicting scientific evidence and allocating scarce resources on this basis, it is not for the court to second guess. That would only be to substitute one estimate for another.

[164] In determining whether the impugned provision goes too far, I can consider factors such as alternative methods of furthering the Legislature's objectives; overbreadth; requirements for proof of intent or harm; and any available defences: *Whatcott, supra* at paras. 125-144 . However, in *Whatcott*, the Supreme Court of Canada held that the lack of defences was not fatal to the constitutionality of the impugned provision prohibiting hate speech (paras. 136-140). Further, a prohibition that does not require proof of actual harm is not necessarily overbroad. The Court explained at paras. 132-133, "A court is entitled to use common sense and experience in recognizing that certain activities … inflict societal harms," where, for example, "the very nature of the expression in question undermines the position of groups or individuals as equal participants in society".

[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, [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 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* at para. 25, are instructive:

> 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.

Proportionality

[167] The requirement of proportionality is the fourth and final step in the *Oakes* analysis. The Supreme Court of Canada in *Lucas*, *supra* at para. 88, stated:

> It is at this stage that the analysis can be undertaken to determine whether an appropriate balance has been struck between the deleterious effects of the impugned legislative provisions on the infringed right and the salutary goals of that legislation. When freedom of expression is at issue, it is logical that the nature of the violation should be taken into consideration in the delicate balancing process. …

[168] Hogg elaborates at 38-43:

> Although this fourth step is offered as a test of the means rather than the objective of the law, it has nothing to do with means. The fourth step is reached, it must be remembered, only after the means have already been judged to be rationally connected to the objective (second step), and to be the least drastic of all the means of accomplishing the objective (third step). What the requirement of proportionate effect requires is a balancing of the objective sought by the law against the infringement of the Charter. It asks whether the *Charter* infringement is too high a price to pay for the benefit of the law.

[169] It is at this stage that I must consider the value of the expression that is being restricted, and how close the expression is to the core of the freedom of expression values. The level of protection given to expression in any given case will depend on the nature of the expression. The further the expression is from core values, the easier it will be to justify a restriction: *Lucas*, *supra* at para. 34.

[170] In *Keegstra*, *supra*, the Court identified the "core" values fundamental to s. 2(b) as including the search for political, artistic and scientific truth, the protection of individual autonomy and self-development, and the promotion of public participation in the democratic process (see also *RJR-MacDonald*, *supra* at para. 72). When the form of expression being examined falls farther from the "core" of the freedom of expression values, restrictions on such expression will be less difficult to justify: *RJR-MacDonald*, *supra* at paras. 72-73. For example, hate propaganda contributes little to the aspirations of Canadians or Canada in either the quest for truth, the promotion of individual self-development or the protection and fostering of a vibrant democracy, and thus, restrictions on expression of this kind might be easier to justify than other infringements of s. 2(b): *Keegstra*, *supra* at para. 94.

[171] The extent of the freedom of expression infringement must be balanced against the salutary effects of the government action; in this case, the salutary effects include the protection of one's reputation and emotional well-being. Our Courts have often been called upon to balance freedom of expression on the one hand with protection of a person's reputation on the other, and in doing so, have recognized the close association between a person's reputation and their dignity and ability to function within society (see *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130; *Lucas*, *supra*). A person's right to protect his reputation has been described as a fundamental value: *Lucas*, *supra* at paras. 15 & 57; *Equustek Solutions Inc. v. Google Inc.*, 2015 BCCA 265, aff'g 2014 BCSC 1063. The Supreme Court of Canada has said, "The enjoyment of a good reputation in the community is to be valued beyond riches": *Lucas*, *supra* at para. 94.

[172] The *Cyber-safety Act* seeks to balance an individual's right to free speech against society's interests in providing greater access to justice to victims of cyberbullying. The question is whether the *Act* strikes the appropriate balance. While there is no question that protection against cyberbullying is an important objective, there is a difference between a statute's *objectives* and its *effects*. The Attorney General has not put forward any concrete evidence of the *Act*'s effects, salutary or otherwise. That said, the Supreme Court of Canada has recognized that in some contexts, it may be difficult or impossible to measure or show evidence of the effects of government action. In *Sauvé v. Canada (Chief Electoral Officer)*, 2002 SCC 68, [2002] S.C.J. No. 66 at para. 61, McLachlin C.J. for the majority noted that the trial had relied, perhaps too heavily, on the absence of concrete evidence of benefit of denying inmates the right to vote. In his dissenting opinion, Gonthier J. elaborated on this idea at para. 177:

> 177 In Harvey, supra, at para. 48, La Forest J. stated that "[t]he final step in the *Oakes* analysis is to determine if the effects of s. 119(c), the removal of the appellant as the member for Carleton North and his five-year disqualification from running as a candidate, are proportional to the section's objective of ensuring the integrity of the electoral process." Thus, La Forest J. did not go on to balance salutary and deleterious effects *per se*; the emphasis was only on weighing the proportionality of the deleterious effects to the objectives of the provision. While Linden J.A. did not definitively prefer the *Harvey* approach in this case, he noted at para. 133 that it "highlights that the context of the particular case is paramount in the Oakes analysis". Further, he noted at para. 134 that "it is hard to speak of salutary effects in the context of the penal sanction, especially in an age where there is little evidence proving that the penal sanction is effective in reducing or deterring crime, or in reducing recidivism". I agree and am of the view that regardless of which test is engaged, given the nature of the evidence and the fact

that the objectives have clear symbolic effect, that the proportionality analysis is nonetheless satisfied.

178 It is my view that the arguments in this dimension of the analysis are basically either persuasive or not. If the objectives are taken to reflect a moral choice by Parliament which has great symbolic importance and effect and which are based on a reasonable social or political philosophy, then their resulting weight is great indeed. Over all, while the temporary disenfranchisement is clear, the salutary effects and objectives are, in my view, of greater countervailing weight. Generally, I agree with the analysis of Linden J.A. at the Federal Court of Appeal below to this effect.

179 The trial judge considered this dimension of the *Oakes* test despite having found that the impugned provision was not minimally impairing. He discussed the current situation across Canadian provinces with regard to prisoner enfranchisement for the purpose of provincial elections. He noted that four provinces (I note that it is now five) permit all prisoners to vote in provincial elections, others place some limits, while yet others provide for complete disenfranchisement. He then found that the Crown did not provide any evidence of harm flowing from instances where prisoners had exercised the right to vote, such as provincial elections or referenda. He also noted that the Crown did not provide any evidence of harm flowing from prisoner voting in other countries. I do not find this reasoning persuasive: the harm which flows from serious offenders voting is obviously not empirically demonstrable. As long as one holds democracy to be an abstract good, to find that empirically measurable harm flows from the result of any fair democratic process is an impossible argument to make.

180 The salutary effects in the case at bar are particularly difficult to demonstrate by empirical evidence given their largely symbolic nature. On this point, I note that it would be difficult for the Crown to justify all penal sanctions, if scientific proof was the standard which was required. I discussed this above, and would like to reiterate that many core values of the Canadian community might suffer if put to such a test. In such cases, the weighty merit of the objectives themselves must be considered with the social, legislative and factual context in mind. In this case, a central dimension of the context is Parliament's choice of a particular social or political philosophy on which the justification for the limitation of the right is based. As Bastarache J. noted in *Thomson Newspapers*, *supra*, at para. 125, this third phase of the proportionality prong of the *Oakes* test is unique in that it

> provides an opportunity to assess, in light of the practical and contextual details which are elucidated in the first and second stages, whether the benefits which accrue from the limitation are proportional to its deleterious effects as measured by the values underlying the Charter.

181 Linden J.A. found that the primary salutary effect was that the legislation, intrinsically, expresses societal values in relation to serious criminal

> behaviour and the right to vote in our society. He thus concluded, at para. 137, that it has more than symbolic effect:
>
> > This legislation sends a message signalling Canadian values, …
>
> Linden J.A. suggested that value emerges from the signal or message that those who commit serious crimes will temporarily lose one aspect of the political equality of citizens. Therefore, "the enactment of the measure is itself a salutary effect" (para. 138). I agree. As can be drawn out from the overview of the arguments which were placed before this Court, one is forced to either accept the objectives, and consequently grant them weight at this stage of the analysis, or discount them. I am of the view that the salutary effects and objectives must be granted the respect of this Court.

[173] I believe this to be the correct approach. While the number of protection orders issued might provide some indication of the need for such a scheme, it is difficult if not impossible to measure with any precision the *Act*'s effectiveness in preventing and addressing cyberbullying. Presumably, the Act has had some positive impact in this regard. However, I am not persuaded that the *Act*'s presumed salutary effects are sufficient to outweigh the Act's deleterious effects on freedom of expression.

[174] The Attorney General submits that the *Act* strikes an appropriate balance because it only restricts expression that is malicious, and therefore low-value. The Respondent says this Court must instead balance an individual's right to express *any* sort of speech captured in the definition of "cyberbullying" against the objectives of the *Act*. The Respondent says the *Act* prevents an individual from telling the truth if it hurts another person's feelings or harms their self-esteem, and it does not provide any defences. The *Act* does not accommodate expression that relates to individual self-fulfillment, truth-finding or political discourse. The Respondent submits that the *Act* can therefore "limit speech that cuts to the core of *Charter* values". The Respondent distinguishes *Lucas* on the basis that the libel provisions in the Criminal Code were upheld because they prohibit only falsehoods that are known by the defendant to be false.

[175] It is clear that many types of expression that go to the core of freedom of expression values might be caught in the definition of cyberbullying. These deleterious effects have not been outweighed by the presumed salutary effects.

Issue 3: Does the *Cyber-safety Act* violate s. 7 of the Charter?

[176] Section 7 of the *Charter* states:

> 7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

[177] Mr. Snell argues that the definition of "cyberbullying" in s. 3(b) of the *Act*, and the procedures for obtaining a protection order set out in Part I of the *Act*, are an infringement of the right to life, liberty and security of the person, protected under s. 7 of the *Charter*.

[178] Section 7 does not guarantee that the state will never interfere with a person's life, liberty or security of the person, only that it will not do so in a way that violates the principles of fundamental justice: *Carter v. Canada (Attorney General)*, 2015 SCC 5, [2015] S.C.J. No. 5 at para. 71 [*Carter*]. Thus, determining whether there is an infringement of s. 7 of the *Charter* is a two-step process. First, the applicant must show that his right to life, liberty or security of the person is infringed. Second, the applicant must show that this infringement was not in accordance with the principles of fundamental justice.

Infringement of Life, Liberty or Security of the Person

[179] Any offence for which the legislature has made a term of imprisonment a possible consequence puts a person's liberty at stake and therefore must comply with the principles of fundamental justice: Mendes & Beaulac, *supra* at 704.

[180] The consequences of non-compliance with a protection order can include imprisonment:

> 19 (1) Any person who fails to comply with a protection order is guilty of an offence.
>
> (2) Any person who, knowing that a protection order has been made, causes, contributes to or permits activities that are contrary to the order, is guilty of an offence.
>
> (3) A person who is guilty of an offence under subsection (1) or (2) is liable on summary conviction to a fine of not more than $5,000 or to imprisonment for a term of not more than six months, or both.

[181] The *Cyber-safety Act* therefore poses a threat to the right to liberty, and its provisions must be found to comply with the principles of fundamental justice.

The principles of fundamental justice are to be found in "the basic tenets of our legal system": *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] S.C.J. No. 3 at para. 45 [*Suresh*]. A definitive list of the principles of fundamental justice has not been created. In *Carter*, *supra* the Supreme Court of Canada identified three central principles of fundamental justice:

> While the Court has recognized a number of principles of fundamental justice, three have emerged as central in the recent s. 7 jurisprudence: laws that impinge on life, liberty or security of the person must not be arbitrary, overbroad, or have consequences that are grossly disproportionate to their object (para. 72).

[182] In addition to arbitrariness, overbreadth, and gross disproportionality, I will consider vagueness, infringement of another *Charter* right, and fair proceedings.

Arbitrariness

[183] The idea that laws must not be arbitrary is closely related to the s. 1 "rational connection" analysis. McLachlin C.J. and Major J. in *Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35, [2005] S.C.J. No. 33, explained:

> 130 A law is arbitrary where "it bears no relation to, or is inconsistent with, the objective that lies behind [it]". To determine whether this is the case, it is necessary to consider the state interest and societal concerns that the provision is meant to reflect …
>
> 131 In order not to be arbitrary, the limit on life, liberty and security requires not only a theoretical connection between the limit and the legislative goal, but a real connection on the facts. The onus of showing lack of connection in this sense rests with the claimant. The question in every case is whether the measure is arbitrary in the sense of bearing no real relation to the goal and hence being manifestly unfair. The more serious the impingement on the person's liberty and security, the more clear must be the connection. …
>
> …
>
> 134 As discussed above, interference with life, liberty and security of the person is impermissibly arbitrary if the interference lacks a real connection on the facts to the purpose the interference is said to serve.
>
> [Emphasis added]

[184] I have already found, at paras. 148 to 158 above, that the ability to proceed without notice to the respondent, even in circumstances where the respondent's identity is known and there are no other circumstances to justify an ex parte

proceeding, is not rationally connected to the *Act*'s objective. For the same reasons, I find that this component of the *Act* is arbitrary and not in accordance with the principles of fundamental justice.

Overbreadth

[185] It is a principle of fundamental justice that laws must not be overbroad. The Supreme Court of Canada in *Carter*, *supra*, said this:

> 85 The overbreadth inquiry asks whether a law that takes away rights in a way that generally supports the object of the law, goes too far by denying the rights of some individuals in a way that bears no relation to the object: *Bedford*, at paras. 101 and 112-13. Like the other principles of fundamental justice under s. 7, overbreadth is not concerned with competing social interests or ancillary benefits to the general population. A law that is drawn broadly to target conduct that bears no relation to its purpose "in order to make enforcement more practical" may therefore be overbroad (see *Bedford*, at para. 113). The question is not whether Parliament has chosen the least restrictive means, but whether the chosen means infringe life, liberty or security of the person in a way that has no connection with the mischief contemplated by the legislature. The focus is not on broad social impacts, but on the impact of the measure on the individuals whose life, liberty or security of the person is trammelled.

[186] Overbreadth concerns situations where the state action infringes a s. 7 right in manner that goes beyond what is needed to accomplish the governmental objective: *R. v. Heywood*, [1994] 3 S.C.R. 761, [1994] S.C.J. No. 101 at para. 52.

[187] I have already found that the *Act*, and in particular the definition of cyberbullying, is overbroad. By casting the net too broadly, and failing to require proof of intent or harm, or to delineate any defences, the *Act* limits the right to liberty in a way that has no connection with the mischief it seeks to address.

Gross Disproportionality

[188] This principle of fundamental justice says the consequences of a prohibition cannot be grossly disproportionate to its objective. See *Suresh*, *supra* at para. 47; *R. v. Malmo-Levine*, 2003 SCC 74; [2003] S.C.J. No. 79 at paras. 141-143 [*Malmo-Levine*].

[189] The Supreme Court of Canada addressed gross disproportionality in the *Malmo-Levine* case. The issue was the criminalization of the possession of

marijuana, and specifically, whether the prohibition of possession was too extreme a response, i.e. grossly disproportionate, to the legitimate state interest of controlling the use of this mind-altering drug. The majority of the Court found that it was not. Gonthier and Binnie JJ. reasoned at para. 175:

> We agree that the effects on an accused person of the criminalization of marihuana possession are serious. They are the legitimate subject of public controversy. They will undoubtedly be addressed in parliamentary debate. Applying a standard of gross disproportionality however, it is our view that the effects on accused persons of the present law, including the potential of imprisonment, fall within the broad latitude within which the Constitution permits legislative action.

[190] In the result, the prohibition was found to comply with s. 7 of the *Charter*.

[191] I have already found that the *Act*'s wide-sweeping restriction on a person's freedom of expression is disproportionate to the *Act*'s salutary effects. However, the *Act* restricts a respondent's liberty only in circumstances where a protection order has been confirmed by this Court, and the respondent either did not appeal, or their appeal was unsuccessful, and the respondent has now refused to comply with the protection order. I do not find this impact on liberty to be grossly disproportionate to the *Act*'s laudable objectives.

Vagueness

[192] It is a principle of fundamental justice that a law must not be overly vague. A vague law offends two values that are fundamental to the legal system. First, the law does not provide fair notice of what is prohibited, which makes it difficult for people to comply with the law. Second, the law does not provide clear standards for those entrusted with enforcement, which may lead to arbitrary enforcement: Hogg, *supra* at 47-64.

[193] McLachlin C.J. for the Supreme Court of Canada in *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, 2004 SCC 4, [2004] S.C.J. No. 6 [*Canadian Foundation*], articulated the standard for vagueness as follows:

> 15 A law is unconstitutionally vague if it "does not provide an adequate basis for legal debate" and "analysis"; "does not sufficiently delineate any area of risk"; or "is not intelligible". The law must offer a "grasp to the judiciary": *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606, at pp. 639-40. Certainty is

not required. As Gonthier J. pointed out in *Nova Scotia Pharmaceutical*, *supra*, at pp. 638-39,

> conduct is guided by approximation. The process of approximation sometimes results in quite a narrow set of options, sometimes in a broader one. Legal dispositions therefore delineate a risk zone, and cannot hope to do more, unless they are directed at individual instances.

> 16 A law must set an intelligible standard both for the citizens it governs and the officials who must enforce it. The two are interconnected. A vague law prevents the citizen from realizing when he or she is entering an area of risk for criminal sanction. It similarly makes it difficult for law enforcement officers and judges to determine whether a crime has been committed. This invokes the further concern of putting too much discretion in the hands of law enforcement officials, and violates the precept that individuals should be governed by the rule of law, not the rule of persons. The doctrine of vagueness is directed generally at the evil of leaving "basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application": *Grayned v. City of Rockford*, 408 U.S. 104 (1972), at p. 109.

> 17 *Ad hoc* discretionary decision making must be distinguished from appropriate judicial interpretation. Judicial decisions may properly add precision to a statute. Legislators can never foresee all the situations that may arise, and if they did, could not practically set them all out. It is thus in the nature of our legal system that areas of uncertainty exist and that judges clarify and augment the law on a case-by-case basis.

[194] In *Rasa v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 670 [Rasa], the Federal Court emphasized that a law is not overly vague simply because it needs to be interpreted. It is the Court's role to interpret and give meaning to words in a statute. If the use of statutory interpretation processes allows the Court to give meaning to the words in question, then the vagueness doctrine will not apply (paras. 33-35).

[195] In *Canadian Foundation*, *supra*, the Supreme Court of Canada reiterated the preeminent principle of statutory interpretation: "the words of the statute must be considered in context, in their grammatical and ordinary sense, and with a view to the legislative scheme's purpose and the intention of Parliament" (para. 20). The Court then concluded that the impugned phrase, "reasonable under the circumstances", was not void for vagueness:

> 40 When these considerations are taken together, a solid core of meaning emerges for "reasonable under the circumstances", sufficient to establish a zone in which discipline risks criminal sanction. … a consistent picture emerges of the

> area covered by s. 43. It is wrong for law enforcement officers or judges to apply their own subjective views of what is "reasonable under the circumstances"; the test is objective. The question must be considered in context and in light of all the circumstances of the case. …
>
> 41 The fact that borderline cases may be anticipated is not fatal. As Gonthier J. stated in *Nova Scotia Pharmaceutical*, *supra*, at p. 639, "it is inherent to our legal system that some conduct will fall along the boundaries of the area of risk; no definite prediction can then be made. Guidance, not direction, of conduct is a more realistic objective".
>
> 42 Section 43 achieves this objective. It sets real boundaries and delineates a risk zone for criminal sanction.

[196] Thus, the threshold of precision that a law must pass is not high. A law must set an intelligible standard and give fair notice of its contents to citizens: Mendes & Beaulac, *supra* at 682.

[197] The prohibition against cyberbullying is not overly vague. But for the reasons discussed at paras. 130 to 137, the added requirement that the respondent be deemed likely to engage in cyberbullying in the future is incredibly vague and not in accordance with the principles of fundamental justice.

Fair Proceedings

[198] For certain proceedings, the principles of fundamental justice require that various procedural and substantive conditions—at a minimum, the procedural guarantees required under common law principles of natural justice and fairness—be in place: Mendes & Beaulac, *supra* at 687.

[199] What is required by the duty of fairness is to be decided with reference to the "context of the statute involved and the rights affected": *Suresh*, *supra* at para. 115. A court should consider the nature of the decision and the decision-making process, the nature and terms of the statutory scheme, the importance of the decision to the individual affected, the legitimate expectations of the challenger, and the choices of procedure made by the decision-maker: *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, [1999] S.C.J. No. 39 at paras. 23-27.

[200] The *Cyber-safety Act* calls for a quasi-judicial process. The justice of the peace receives and hears the applicant's evidence, and must make findings of fact and apply the law to the facts to arrive at a decision. The nature of the decision-

making process thus militates in favour of greater procedural protection. In addition, the decision of the justice of the peace can have a direct and serious impact on a respondent's *Charter*-protected right to liberty and their freedom of expression. Furthermore, the justice of the peace has no particular expertise in cyberbullying.

[201] On the other hand, the nature of the statutory scheme, which provides for automatic review of the initial protection order decision and the opportunity for a full hearing, as well as a right of appeal on a question of law, suggests that lesser procedural protections are needed at the stage of the initial protection order decision.

[202] There is no evidence of legitimate expectations of the Respondent, and I find that this factor has no bearing on the analysis, one way or the other.

[203] On balance, I find that the protection order procedure set out in the *Cyber-safety Act* is not procedurally fair. The biggest deficiency lies in the failure to provide a respondent whose identity is known or easily ascertainable with notice of and the opportunity to participate in the initial protection order hearing.

Infringement of Another Charter Right

[204] A deprivation of a s. 7 right which has the effect of infringing a right guaranteed elsewhere in the *Charter* will rarely be in accordance with the principles of fundamental justice: *R. v. Morgentaler*, [1988] 1 S.C.R. 30, [1988] S.C.J. No. 1 at para. 248; Mendes & Beaulac, *supra* at 686. The *Cyber-safety Act* restricts freedom of expression contrary to s. 2(b) of the *Charter*. This weighs heavily against a finding that the impugned law accords with the principles of fundamental justice.

[205] This, combined with the findings set out above, compels me to the conclusion that the definition of cyberbullying and the process for obtaining a protection order under Part I threaten a person's right to liberty in a manner that offends the principles of fundamental justice.

Issue 4: If the *Cyber-safety Act* infringes s. 7, is this infringement saved under s.1?

[206] Where there is a breach of s. 7 that is not in accordance with the principles of fundamental justice, the impairment of the right will rarely be justifiable under s. 1: *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, [1985] 2 S.C.R. 486 at para. 104, per Wilson J. concurring; *Gosselin v. Quebec (Attorney General)*, 2002 SCC 84, [2002] S.C.J. No. 85 at para. 389. Typically a finding of a s. 7 breach ends the government's case, although courts will sometimes perform a s. 1 analysis in any event: Mendes & Beaulac, *supra* at 690; *Morgentaler*, *supra* at para. 255.

[207] I do not find it necessary to perform a second s. 1 analysis with respect to the s. 7 infringements. I find that these infringements are not justifiable under s. 1.

Issue 5: Remedy

[208] Having found the *Cyber-safety Act* limits ss. 2(b) and 7 of the *Charter*, and those limits are not saved by s. 1, I must determine the appropriate remedy. The Supreme Court of Canada has repeatedly said that remedies for violations of *Charter* rights should vindicate the purpose of the right violated and provide full and effective remedies: Mendes & Beaulac, *supra* at 520.

[209] The provisions of the *Constitution Act, 1982* dealing with remedies are as follows:

> 24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.
>
> …
>
> 52. (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.
>
> …

[210] Section 52 of the Charter requires any law that is inconsistent with the Charter to be struck down, but only to the extent of its inconsistency. The Supreme Court of Canada explained in *Schachter v. Canada*, [1992] 2 S.C.R. 679, [1992] S.C.J. No. 68 at para. 25 [*Schachter*]:

> A court has flexibility in determining what course of action to take following a violation of the Charter which does not survive s. 1 scrutiny. Section 52 of the Constitution Act, 1982 mandates the striking down of any law that is inconsistent

> with the provisions of the Constitution, but only "to the extent of the inconsistency". Depending upon the circumstances, a court may simply strike down, it may strike down and temporarily suspend the declaration of invalidity, or it may resort to the techniques of reading down or reading in. In addition, s. 24 of the Charter extends to any court of competent jurisdiction the power to grant an "appropriate and just" remedy to "[a]nyone whose [Charter] rights and freedoms ... have been infringed or denied". In choosing how to apply s. 52 or s. 24 a court will determine its course of action with reference to the nature of the violation and the context of the specific legislation under consideration.

[211] Thus, when faced with legislation that is inconsistent with the Charter, a court may: (1) strike down the offending legislation; (2) strike down the legislation but suspend the declaration of invalidity; or (3) remedy the inconsistency through reading in or reading down the legislation.

[212] In addition, courts must decide whether to strike down the legislation in its entirety, or only certain provisions. Where only part of a statute offends the Charter, courts will sever only the offending parts and the remainder of the legislation will continue to stand. Severance is used so that courts interfere with legislation as little as possible: *Schachter*, *supra* at para. 26. As to when severance will be appropriate, the Supreme Court of Canada in *Schachter*, *supra*, explained:

> 29 Where the offending portion of a statute can be defined in a limited manner it is consistent with legal principles to declare inoperative only that limited portion. In that way, as much of the legislative purpose as possible may be realized. However, there are some cases in which to sever the offending portion would actually be more intrusive to the legislative purpose than the alternate course of striking down provisions which are not themselves offensive but which are closely connected with those that are. This concern is reflected in the classic statement of the test for severance in Attorney-General for Alberta v. Attorney-General for Canada, [1947] A.C. 503, at p. 518:
>
> > The real question is whether what remains is so inextricably bound up with the part declared invalid that what remains cannot independently survive or, as it has sometimes been put, whether on a fair review of the whole matter it can be assumed that the legislature would have enacted what survives without enacting the part that is ultra vires at all.
>
> 30 This test recognizes that the seemingly laudable purpose of retaining the parts of the legislative scheme which do not offend the Constitution rests on an assumption that the legislature would have passed the constitutionally sound part of the scheme without the unsound part. In some cases this assumption will not be a safe one. In those cases it will be necessary to go further and declare inoperative portions of the legislation which are not themselves unsound.

> 31 Therefore, the doctrine of severance requires that a court define carefully the extent of the inconsistency between the statute in question and the requirements of the Constitution, and then declare inoperative (a) the inconsistent portion, and (b) such part of the remainder of which it cannot be safely assumed that the legislature would have enacted it without the inconsistent portion

[213] Another option, closely connected to severance, is reading in. The Supreme Court of Canada in *Schachter*, *supra*, described reading in as follows:

> 32 This same approach should be applied to the question of reading in since extension by way of reading in is closely akin to the practice of severance. The difference is the manner in which the extent of the inconsistency is defined. In the usual case of severance the inconsistency is defined as something improperly included in the statute which can be severed and struck down. In the case of reading in the inconsistency is defined as what the statute wrongly excludes rather than what it wrongly includes. Where the inconsistency is defined as what the statute excludes, the logical result of declaring inoperative that inconsistency may be to include the excluded group within the statutory scheme. This has the effect of extending the reach of the statute by way of reading in rather than reading down.
>
> 33 A statute may be worded in such a way that it gives a benefit or right to one group (inclusive wording) or it may be worded to give a right or benefit to everyone except a certain group (exclusive wording). It would be an arbitrary distinction to treat inclusively and exclusively worded statutes differently. To do so would create a situation where the style of drafting would be the single critical factor in the determination of a remedy. This is entirely inappropriate. Rowles J. made this point in *Knodel v. British Columbia (Medical Services Commission)* (1991), 58 B.C.L.R. (2d) 356 (B.C.S.C.), at p. 388:
>
> > As stated previously, once a person has demonstrated that a particular law infringes his or her Charter rights, the manner in which the law is drafted or stated ought to be irrelevant for the purposes of a constitutional remedy. To hold otherwise would result in a statutory provision dictating the interpretation of the Constitution. Further, where B's Charter right to a[n equal] benefit is demonstrated, it is immaterial whether the subject law states : (1) A benefits; or (2) Everyone benefits except B.
> >
> > The first example would require the court to "read in" the words "and B," while the second example would require the court to "strike out" the words "except B." In each case, the result would be identical.
> >
> > Accordingly, whether a court "reads in" or "strikes out" words from a challenged law, the focus of the court should be on the appropriate remedy in the circumstances and not on the label used to arrive at the result.

> 34 There is nothing in s. 52 of the Constitution Act, 1982 to suggest that the court should be restricted to the verbal formula employed by the legislature in defining the inconsistency between a statute and the Constitution. Section 52 does not say that the words expressing a law are of no force or effect to the extent that they are inconsistent with the Constitution. It says that a law is of no force or effect to the extent of the inconsistency. Therefore, the inconsistency can be defined as what is left out of the verbal formula as well as what is wrongly included.

[214] The Court commented further on severance and reading in at paras. 37 & 38:

> 37 The logical parallels between reading in and severance are mirrored by their parallel purposes. Reading in is as important a tool as severance in avoiding undue intrusion into the legislative sphere. As with severance, the purpose of reading in is to be as faithful as possible within the requirements of the Constitution to the scheme enacted by the Legislature. Rogerson makes this observation at p. 288:
>
> > Courts should certainly go as far as required to protect rights, but no further. Interference with legitimate legislative purposes should be minimized and laws serving such purposes should be allowed to remain operative to the extent that rights are not violated. Legislation which serves desirable social purposes may give rise to entitlements which themselves deserve some protection.
>
> 38 Of course, reading in will not always constitute the lesser intrusion for the same reason that severance sometimes does not. In some cases, it will not be a safe assumption that the legislature would have enacted the constitutionally permissible part of its enactment without the impermissible part. For example, in a benefits case, it may not be a safe assumption that the legislature would have enacted a benefits scheme if it were impermissible to exclude particular parties from entitlement under that scheme.

[215] The preferred remedy in the context of freedom of expression violations has been the subject of some consideration. Mendes & Beaulac, *supra*, state at 520:

> In the freedom of expression context, it could be argued that the preference should be for remedies that do not preserve vague or potentially overbroad laws that may result in unjustified violations of freedom of expression. …
>
> At first, the Supreme Court of Canada gravitated towards striking down laws that violated freedom of expression, but more recently there has been a trend to saving laws that could impose unjustified restrictions on freedom of expression by reading them down in an attempt to ensure that they will only impose justified violations.

[216] To summarize, in determining which remedy is best, the first step is to determine the nature and extent of the inconsistency. The second step is to select the appropriate remedy, i.e. the remedy that interferes with the Legislature's purpose the least. If reading in or reading down would make the revised legislation inconsistent with the Legislative objective, these remedies would be inappropriate.

[217] Once the court has determined whether to strike down, sever, or read in or down, the court must then decide whether the declaration of invalidity should be temporarily suspended. A temporary suspension will be preferred where striking down the legislation would pose a danger to the public or threaten the rule of law, or the legislation was deemed unconstitutional because of underinclusiveness rather than overbreadth (so that striking down the legislation would result in the deprivation of benefits from deserving persons): *Schachter*, *supra* at para. 85.

[218] The Respondent has requested that this Honourable Court issue declarations of unconstitutionality for the *Cyber-safety Act*. The Respondent does not indicate whether his request is under s. 24(1) or s. 52(1), and he does not limit his request to certain provisions of the *Act*, or otherwise specify the remedy he seeks. The Attorney General submits the Respondent's request probably falls under s. 52 of the Charter, and it should be interpreted as a request to strike the *Act* in its entirety.

[219] The Attorney General submits the appropriate remedy would be to strike the offending portions of the legislation, or to read into the legislation where possible. The Attorney General further submits that this is an appropriate case to suspend the declaration of invalidity for a period of 12 months to allow the Legislature time to amend this "important social welfare legislation".

[220] Both parties confined their submissions to the definition of cyberbullying and Part I of the *Act*. I have identified a number of problems with both components. 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. Severance would not be appropriate. The *Act* being over-inclusive rather than under-inclusive, reading in also would not be an appropriate remedy. I have already explained why reading in a requirement for malice is not, in my view, appropriate or sufficient. The *Act* must be struck down in its entirety. The Attorney General has not persuaded me that a temporary suspension is warranted. To temporarily suspend the declaration of validity would be to condone further infringements of *Charter*-protected rights and freedoms. Further, the fact that the *Act* was enacted to fill a "gap" in the legislation does not mean that victims

of cyberbullying will be completely without redress in the time it takes to enact new cyberbullying legislation. They will have the usual—albeit imperfect—civil and criminal avenues available to them.

DISPOSITION:

[221] The *Cyber-safety Act* violates ss. 2(b) and 7 of the *Charter*. These violations are not saved under s. 1 of the *Charter*. The *Act* is struck down in its entirety. As a result, the Protection Order granted against the Respondent is void and of no effect.

[222] If counsel cannot reach an agreement on costs, I am prepared to receive their written submissions within 45 calendar days from the date of release of this decision.

Glen G. McDougall, J