

Member's Quarterly

Summer 2016 Edition

Feature

Virtual Punches: Cyberbullying in the Workplace

Update your harassment policies and procedures

Name calling, teasing, joking, harassing — whatever you want to call it, bullying has a new meaning. As technology evolves, so does the world of bullying and governments are rushing to action. Ontario, Quebec, Alberta and New Brunswick have all amended their respective Education Acts to address cyberbullying.

Nova Scotia took a more drastic step. In light of the tragic death of Nova Scotia teen, Rehtaeh Parsons, who was allegedly sexually assaulted in 2011 at the age of 15 and then bullied when a digital photo of the alleged assault was passed around her school, the Nova Scotia government enacted the *Cyber-safety Act* (the "Act") in 2013. The Act defines cyberbullying as:

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.

Not long after coming into force, the Act was put under the microscope. The constitutionality of the Act was challenged in *Crouch v Snell*, 2015 NSSC 340 ("Crouch"). The implementation of the Act was prompted by a very different set of circumstances than those in *Crouch*. In *Crouch*, former business partners, Mr. Crouch and Mr. Snell became entangled in internet exchanges that amounted to cyberbullying based on the definition in the Act. Mr. Crouch sought and was granted a protection order pursuant to the Act, prohibiting Mr. Snell from cyberbullying Mr. Crouch and restricting Mr. Snell's communication with, and making reference to Mr. Crouch on social media.

Mr. Snell sought a review of the order and challenged the constitutionality of the Act based on s.2(b) – Freedom of expression and s.7 – Life, liberty and security of the person under the Charter:

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;...

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.

Justice Glen McDougall determined the Act was unconstitutional for infringing both ss.2(b) and 7 of the *Charter* and struck down the Act in its entirety. In his December 2015 decision, Justice McDougall highlighted the wide variety of expressive activity that could be caught under the definition of cyberbullying, including various incidents of day to day disagreements between individuals.



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Feature continued

This high profile case serves as a reminder to employers of their obligations regarding workplace harassment, as expressed in the article of Dr. Martin Shain, "Tracking the Perfect Legal Storm", Mental Health Commission of Canada, May 2010:

The duty to provide and maintain a psychologically safe workplace is expressed and acted upon in different ways across the country (Canada) and in different branches of the law, but the unmistakable common thread is the increasing insistence of judges, arbitrators and commissioners upon more civil and respectful behaviour in the workplace and avoidance of conduct that a reasonable person should foresee as leading to mental injury.

While the Crouch case received significant attention for striking down the provisions of an overly broad cyberbullying prohibition, this does not mean that employers can now turn a blind eye to incidents of bullying or harassment in their workplace. In Canada, employers have obligations to address bullying and harassment in the workplace pursuant to the common law, employment standards legislation, human rights, occupational health and safety legislation and, in unionized workplaces, collective agreements. With the rapid rise in cyberbullying in and outside the workplace, employer obligations continue. As technologies advance, employers should consider implementing or updating workplace harassment prevention plans, investigation and resolution policies and procedures to ensure they align with the realities of new-age bullying.

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