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1. INTRODUCTION

There is now a reported decision under Nova Scotia's new *Intimate Images and Cyber-protection Act*,[1] which came into force in July 2018 after the previous legislation, the *Cyber-safety Act*,[2] was struck down as unconstitutional.[3]

The case, *Candelora v. Feser*,[4] was set against the backdrop of a bitter family law dispute. Dawna Candelora (the Applicant), alleged that her former spouse Trevor Feser and his new partner Sonia Dadas (the Respondents) were cyber-bullying her through an unrelenting stream of negative Facebook posts.

Justice Joshua Arnold of the Supreme Court of Nova Scotia found that the Respondents had engaged in cyber-bullying and issued an order requiring them to, among other things, remove the offending Facebook posts.

Before discussing the case in more detail, this commentary will first look at the *Intimate Images and Cyber-protection Act* to see if it solves some of the problems of the *Cyber-safety Act*. The concluding section will discuss what the New Act means for access to justice for people harmed by online expression.

Part I: The *Intimate Images and Cyber-protection Act*

The purpose of the *Intimate Images and Cyber-protection Act* is set out in section 2:

> 2 The purpose of this Act is to
>
> (a) create civil remedies to deter, prevent and respond to the harms of non-consensual sharing of intimate images and cyber-bullying;
>
> (b) uphold and protect the fundamental freedoms of thought, belief, opinion and expression, including freedom of the press and other media of communication; and
>
> (c) provide assistance to Nova Scotians in responding to nonconsensual sharing of intimate images and cyber-bullying.

The legislation has a broader goal than the *Cyber-safety Act*, addressing not only cyber-bullying but also "the non-consensual sharing of intimate images."

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1 *Intimate Images and Cyber-Protection Act*, S.N.S. 2017, c. 7 [*Act* or New Act].

2 *Cyber-safety Act*, S.N.S. 2013, c. 2 [Former Act], formally repealed by section 16(1) of the New Act.

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

4 *Candelora v. Feser*, 2019 NSSC 370, 2019 CarswellNS 905 (N.S. S.C.).

Practically, it makes sense to target both kinds of online misconduct (which may happen together) in the same legislation. More broadly, the Legislature should be commended for providing a legal mechanism for victims of non-consensual image distribution (sometimes crassly, and inappropriately, called "revenge porn") to seek recourse.

The Act defines "cyber-bullying" in section 3(c), as:

> an electronic communication, direct or indirect, that causes or is likely to cause harm to another individual's health or well-being where the person responsible for the communication maliciously intended to cause harm to another individual's health or wellbeing or was reckless with regard to the risk of harm to another individual's health or well-being[.]

The subsection then lists examples of what may constitute cyber-bullying:

> (i) creating a web page, blog or profile in which the creator assumes the identity of another person,
>
> (ii) impersonating another person as the author of content or a message,
>
> (iii) disclosure of sensitive personal facts or breach of confidence,
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> (iv) threats, intimidation or menacing conduct,
>
> (v) communications that are grossly offensive, indecent, or obscene,
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> (vi) communications that are harassment,
>
> (vii) making a false allegation,
>
> (viii) communications that incite or encourage another person to commit suicide,
>
> (ix) communications that denigrate another person because of any prohibited ground of discrimination listed in Section 5 of the *Human Rights Act*, or
>
> (x) communications that incite or encourage another person to do any of the foregoing.

Subsection (f) defines "intimate image" to include "a photograph, film or video recording":

> (i) in which a person depicted in the image is nude, is exposing the person's genital organs, anal region or her breasts, or is engaged in explicit sexual activity,

> (ii) that was recorded in circumstances that gave rise to a reasonable expectation of privacy in respect of the image, and
>
> (iii) where the image has been distributed, in which the person depicted in the image retained a reasonable expectation of privacy at the time it was distributed[.]

Section 5 of the Act allows a person "whose intimate image was distributed without consent or who is or was the victim of cyber-bullying" to "apply to the Court for an order under Section 6." (Note that "Court" is defined as the Supreme Court of Nova Scotia — unlike the Former Act, proceedings under the New Act do not go before a justice of the peace.)

Section 6 provides for two types of orders.

Section 6(2) applies where it is clear that cyber-bullying or non-consensual image distribution has occurred, but it is unclear who is responsible. This provision allows the Court to "order any person" (likely an internet service provider, web hosting service, or social media company) to provide the applicant with information that may help identify who is responsible, such as an IP address or other electronic identifiers; "take down or disable access to an intimate image or cyber-bullying communication"; or take other "just and reasonable" action. Section 6(1) outlines the Court's powers where it is "satisfied that a person has engaged in cyber-bullying or has distributed an intimate image without consent." This is the remedial meat of the legislation.

The Court may simply make an order "declaring that an image is an intimate image" or "a communication is cyber-bullying", which could offer a meaningful sense of vindication to the victim. Beyond these declaratory orders, the court may (inter alia) issue an order prohibiting the person responsible from distributing the intimate image or "making communications that would be cyber-bullying"; prohibiting the person from contacting the applicant; and/or "requiring the person to take down or disable access to an intimate image or communication."

Section 6(7) lists multiple factors for the Court to consider before making a remedial order, including the content of the image or communication at issue; the age and vulnerability of the victim; the age and maturity of the person responsible; the purpose or intention of the person responsible; and the context and extent of the distribution or communication. (Perhaps redundantly, the *Charter of Rights and Freedoms* is one of the listed factors for the Court to consider.)

In a 2016 article for this journal,[5] the author suggested several ways a new statute could address the problems with the *Cyber-safety Act* — which Justice McDougall described in *Crouch v. Snell* as a "colossal failure" for its overly broad definition of cyber-bullying and its unfair procedures[6] — while still providing redress for victims of harmful online speech.[7]

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[5] Jennifer Taylor, "Minding the Gap: Why and How Nova Scotia Should Enact a New *Cyber-safety Act*" (2016) 14:1 C.J.L.T. 157.

These included suggestions that any new statute should explicitly limit the definition of cyber-bullying to harmful communications; require the applicant to prove they had suffered harm as a result of the communications; specify that the person responsible must have intended to cause harm; and provide for defences. The New Act stacks up relatively well when measured against these proposals. The definition of "cyber-bullying" is now limited to a communication that "causes or is likely to cause harm to another individual's health or well-being." A pattern of communication is not required; the *Act* accepts that a single activity (like "creating a web page, blog or profile in which the creator assumes the identity of another person")[8] can rise to the level of cyber-bullying. That said, "the extent of the distribution of the intimate image or cyber-bullying" is a factor for the Court to consider under section 6(7).

The definition of cyber-bullying has a built-in mental element: the person responsible must have "maliciously intended to cause harm to another individual's health or well-being" or been "reckless with regard to the risk of harm to another individual's health or well-being." There is also a similar mental element required to prove that someone has distributed an intimate image without consent: the definition of "distribute without consent" means the distributor must have known that "the person in the image did not consent to the distribution" or acted recklessly in that regard.[9]

The applicant does not necessarily have to prove they have suffered harm, but "the nature and extent of the harm caused" is on the list of factors that may be relevant when the court is determining whether to make an order under section 6.[10]

Finally, the New Act includes several defences, in section 7. It is a defence if the respondent can show that the distribution of the image or the communication was "in the public interest," or made with the victim's (express or implied) consent. It is also a defence if the respondent is a peace officer or public officer, and the distribution or communication was necessary to fulfill their duties. Lastly, subsection 7(2)(b) incorporates several defences from the law of defamation, including fair comment, responsible journalism, and privilege.

Part II: The Case of *Candelora v. Feser*

The impetus for the Former Act was the Rehteah Parsons tragedy in 2013. Parsons died at 17 following a suicide attempt, after a photo of her being sexually assaulted was repeatedly shared online among her high school peers.[11]

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6 *Crouch v. Snell*, *supra* note 3 at para. 165.

7 Taylor, *supra* note 5 at 167-168.

8 New Act, *supra* note 1 at s. 3(c)(i).

9 New Act, *supra* note 1 at s. 3(d).

10 *Ibid* at s. 6(7)(c).

11 Elizabeth Chiu, "The Legacy of Rehteah Parsons" *CBC* (6 April 2018), online: < https://newsinteractives.cbc.ca/longform/five-years-gone > .

In light of these tragic circumstances, it seemed a bit strange when the first case litigated under the Former Act involved a dispute between former business partners, both adult men.

The parties in *Candelora*, the first case decided under the New Act, were all adults, too.

The Applicant (Ms. Candelora) and Mr. Feser (one of the Respondents) were "in the midst of protracted proceedings in the Family Division regarding custody, access and child support" following the dissolution of their 11-year marriage. Mr. Feser was living in Alberta with the other Respondent, his new partner Ms. Dadas.

The online turmoil apparently began in the summer of 2018, when "Ms. Candelora called Ms. Dadas a 'prostitute'" during a custody exchange. Shortly thereafter (and you can't make this stuff up), Ms. Candelora learned that "Ms. Dadas actually might be a sex trade worker, under the alias of Sophie French." This issue was a common theme in the impugned Facebook posts, but Justice Arnold made clear that he did "not need to make a ruling as to whether Ms. Dadas is actually involved in the sex trade" as the parties asked him to ignore anything in the materials on this issue.[12]

The parties filed several affidavits between them (including five from the Applicant). All three testified at the hearing. Almost 50 pages of Justice Arnold's 75-page decision are taken up with excerpts from the evidence, including many of the objectionable Facebook posts (which were either public, or available to Ms. Dada's almost 5,000 Facebook friends) and a negative review that Ms. Dadas left on the website of Remax, Ms. Candelora's employer.

A representative post by Ms. Dadas: "You should've never [f*cked] with me Dawna[.] Your whole affidavit is a pack of lies just like your 11 year marriage. Expose all!"

Ms. Dadas and Mr. Feser evidently wanted their Facebook "friends" to take their side in the ongoing family law proceedings, the developments of which were described in their posts.[13]

The Applicant and her lawyer repeatedly asked the Respondents to remove the postings, to no avail.

The Applicant also acknowledged sending her affidavit from this proceeding to Frank magazine after the magazine inquired about the Applicant's arrest. (It appears the Applicant was charged with uttering threats against Mr. Feser, but the underlying circumstances are unclear and, in any event, this did not seem to affect Justice Arnold's decision.)

This case did not involve a constitutional challenge to the New Act, as Justice Arnold noted.[14] Justice Arnold's task was to consider the abundance of evidence

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[12] *Candelora* at para. 5.

[13] See e.g. *Candelora v. Feser*, *supra* note 4 at para. 55.

[14] *Ibid* at para. 41.

and determine whether the communications constituted cyber-bullying[15] and, if so, to make an appropriate order.

The communications were found to meet the definition of cyber-bullying:[16]

- Facebook posts are "electronic communications";
- the posts involved public communications about the Applicant — even though the Applicant was "blocked" from directly accessing the Respondents' Facebook pages, the Court found the Respondents intended the Applicant and her lawyer to see them;
- the Applicant experienced harm, namely "significant psychological stress" which impacted her physical health;
- the Respondents had the requisite malicious intent (or recklessness), in trying "to dissuade Ms. Candelora from pursuing the proper course of litigation through repeated venomous postings . . . The whole point of those postings was to bully Ms. Candelora so that she would feel psychologically pressured into reversing her legal position";
- the Respondents shared personal information, including the Applicant's tax returns and other financial information, "in an effort to embarrass and humiliate her";
- the Respondents used "offensive and degrading" language; and
- the communications were a form of harassment.

In the result, the Court was satisfied that the Respondents "engaged in cyber-bullying as defined in s. 3(c) of the *Act*."[17]

Many of the same factors informed Justice Arnold's consideration of remedy, pursuant to section 6(7). He found that "Ms. Dadas posted prolifically about Ms. Candelora" (often based on information fed to her by Mr. Feser), in an effort to stop "Ms. Candelora from referencing her belief that Ms. Dadas was a sex trade worker and to curtail the litigation between Ms. Candelora and Mr. Feser regarding custody, access, and child support."[18] The distribution of the posts was "significant", given Ms. Dadas's 4,900 Facebook friends.[19] The Respondents "did nothing to minimize harm" to the Applicant.[20]

On whether the communications were true or false (one of the factors in section 6(7)), Justice Arnold stated:

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[15] The Former Act created a "tort" of cyber-bullying. The New Act does not; section 10 explicitly preserves "any right of action or remedy available to that person under common law or by statute." Justice Arnold nevertheless referred to a "claim under the *Act*" (at para. 43; see also para. 46) and "liability" for cyber-bullying (at paras. 93 and 111).

[16] *Candelora v. Feser*, *supra* note 4 at paras. 50-67.

[17] *Ibid* at para. 67.

[18] *Ibid* at para. 74.

[19] *Ibid* at para. 76.

[20] *Ibid* at para. 79.

> Much of the information posted by the respondents consisted of insults.
>
> Some of the postings referred to personal information about Ms. Candelora made available to the respondents through the course of litigation and some postings referred to information made known to Mr. Feser through his marriage to Ms. Candelora and during the dissolution of the marriage. Some of the postings may have referenced truthful information, but were being used to harass and intimidate Ms. Candelora. Any actual truth or falsity to what was said was only incidental to the true purpose of the postings.[21]

Although the *Charter* was not directly at issue, Justice Arnold was "mindful that the allegations should be considered" consistently with freedom of expression as protected by section 2(b) of the *Charter*.[22] Nevertheless, Justice Arnold rejected all of the Respondents' defences, including truth (which is not expressly included in the Act as a defence)[23] and public interest (based on the Applicant's position as a realtor).[24]

The Respondents' defence of consent, based on the Applicant providing her affidavit to Frank magazine, was rejected as well:

> Section 7(2)(a) of the Act says that a victim[']s express or implied consent is a defence to cyber-bullying. The respondents claim that because Ms. Candelora forwarded an affidavit containing many of the postings to Frank magazine she implicitly consented to the making of their communications. While it was nonsensical for Ms. Candelora or her counsel to forward the respondents' postings to Frank in these circumstances (while simultaneously complaining about the public nature of the respondents' postings), such ex post facto activity in an effort to implement some sort of ill-advised damage control strategy did not provide retroactive implied consent to the postings by Ms. Dadas or Mr. Feser. The actions of Ms. Candelora or her counsel in this regard go only to damages.[25]

As a remedy, Justice Arnold ordered the Respondents to remove all of the offending communications and prohibited them "from making any further communications that would be cyber-bullying" and communicating with Ms. Candelora "except through legal counsel or for the purpose of arranging access."[26]

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21 *Ibid* at paras. 77-78.

22 *Ibid* at paras. 84-85.

23 *Ibid* at para. 91.

24 *Ibid* at para. 96.

25 *Ibid* at para. 100.

26 *Ibid* at para. 102.

Ms. Candelora also sought damages, including punitive and aggravated damages. The Respondents had not made detailed submissions on damages, so the Court gave them time to do so. A follow-up decision may be forthcoming.

2. CONCLUSION

A case like *Candelora* could be read as an indictment of today's social media landscape and could, perhaps, be seen as a waste of the court's time.[27] But *Candelora* can also be read as affirming something profound: that there is access to justice for victims of harmful online behaviour. Dismissing cases like this as frivolous would miss the broader point that online abuse can cause real harm, and those responsible are not entitled to impunity just because their misconduct happens behind a screen.

In *Candelora*, the Respondent Ms. Dadas made some telling comments about what she thought she could get away with online — comments like, "I will share my journey under the Canadian charter of rights and freedom"; "I talk about my life under the charter of right of expression and people comment on the post and I can't control what people say"; and "I'm actually under the Charter of Expression, I'm expressing some women, which means in general, some women when things go wrong in the divorce and you get a vindictive ex-wife, these things happen."

But there is no *Charter* right to be a bully. And now, thanks to the *Intimate Images and Cyber-protection Act,* there can be real-life consequences for bad behaviour online. There is an order of the Supreme Court of Nova Scotia against Ms. Dadas and Mr. Feser, and they may be ordered to pay damages to Ms. Candelora.

In a recent interview, American lawyer Carrie Goldberg (an expert in the non-consensual distribution of intimate images) called the court system "the great equalizer" in responding to cases of online misconduct.[28] This is a useful way to understand the New Act. The court's role as referee in a social media fight between adults may not seem as weighty as it would be in a complex commercial dispute or constitutional case, but it is just as meaningful for someone whose life has been turned upside down by online harassment.

Courts are used to being arbiters of messy disputes — and making sense of the messiness. The *Intimate Images and Cyber-protection Act* is a new way for the courts to do what they have always done: provide access to justice for those who may not have anywhere else to turn.

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[27] It is still expected that most cases will be resolved informally "with the help of the CyberSCAN Unit at the Department of Justice": see Supreme Court of Nova Scotia, Practice Memorandum No. 13: Intimate Images and Cyber-Protection (22 June 2018), online: <https://www.courts.ns.ca/Civil_Procedure_Rules/cpr_practice_memos/PM13_Intimate_Images_Cyberprotection.htm#PM13>.

[28] Michel Martin, "'This Isn't Speech': Attorney Carrie Goldberg on Revenge Porn" *NPR* (16 November 2019), online: <https://www.npr.org/2019/11/16/779720295/this-isnt-speech-attorney-carrie-goldberg-on-revenge-porn>.