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Canadian Legal Approaches to 'Cyberbullying' and Cyberviolence: An Overview

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Abstract

As early as the mid 1990s Canadian economic and social policy prioritized getting young people connected to what was then referred to as the "information super highway". By the late 1990s policy discourse had expanded to include the negative consequences of connectivity, including technologically facilitated harassment and violence, frequently referred to as "cyberbullying". This overview canvasses the legal responses that have followed at the national, provincial and territorial level, including human rights, education, civil, administrative/regulatory and criminal law responses. It concludes that the complexity of the issues, as well as the underlying equality issues that are often at stake, necessitate a multi-pronged approach more heavily weighted in favour of human rights and educational responses.

Keywords: Cyberbullying, Cyberviolence, Human Rights, Criminal Law, Education Law, Privacy



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¹ The term “cyberbullying” is often used to describe a remarkable variety of situations and behaviours. Widespread use of the term risks obscuring fundamental differences between those situations and behaviours. In particular, applying the term “cyberbullying” to situations of sexual, racial, and other forms of online harassment can eclipse underlying systemic structures of discrimination that expose members of particular groups to attack and violence: Jane Bailey, “Time to Unpack the Juggernaut?: Reflections on the Canadian Federal Parliamentary Debates on ‘Cyberbullying’” (2014) 37:2 Dal LJ 661 at 663 fn 2 [Bailey, “Time to Unpack the Juggernaut?”].

· Professor, University of Ottawa Faculty of Law, co-leader of The eQuality Project, a 7 year partnership grant focused on the impacts of the algorithmic sort on young Canadians’ online interactions, including with respect to online harassment and violence. Thanks to SSHRC for funding the Project and to Sara Shayan, Paula Ethans, Jordanna Lewis, Michaela Chen, and Sobika Sadacharam for their excellent research assistance.

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INTRODUCTION

Some of the earliest discussion about the internet in Canadian federal political discourse began in 1993-4, when the Liberal Party discussed what was then referred to as the information highway (or information superhighway) in one of its pre-election policy books. The so-called Red Book² set the stage for parliamentary discussions about the information highway that began in 1994. Parliamentarians were eager to connect Canadians—and especially Canadian youth—to the information highway, seeing the new technology as an important economic tool, and the key to future growth and prosperity. Youth, in particular, were seen as the drivers of a new information economy, with the information highway serving as an important hub for communication and commerce.³

The Canadian government made several early investments in Canada's high-tech future in the mid-1990s. The Canadian Network for the Advancement of Research Industry and Education (CANARIE) was founded in 1993 to promote Canada's knowledge and innovation infrastructure.⁴ In April 1994, the federal government appointed the Information Highway Advisory Council to develop plans and review policies relating to the internet.⁵ Industry Canada launched the Community Access Program (stylized C@P) in 1994 to connect people in rural locations to the information highway and provide internet access at community locations, such as libraries.⁶ SchoolNet, a program designed to link all Canadian schools to the internet, was also established in 1994 with a goal to connect all schools by March 31, 1999.⁷

² Liberal Party of Canada, *Creating Opportunity: The Liberal Plan for Canada* (Ottawa: Liberal Party of Canada, 1993).

³ See *House of Commons Debates*, 35th Parl, 1st Sess, No 115 (27 October 1994) at 7318 (Hon Art Eggleton): "Some \$27 million of infrastructure money is going into high technology infrastructure mainly in our school systems in New Brunswick, Saskatchewan, Manitoba and Ontario. It is not only helping in terms of better communications but it is helping to improve the education system to help prepare our young people for the future."

⁴ See generally CANARIE, "About Us" (undated), *CANARIE*, online: <www.canarie.ca/about-us>.

⁵ See generally Health Canada, "Canada's Health Infostructure: Information Highway Advisory Council", *Health Canada* (1 October 2004), online: <www.hc-sc.gc.ca/hcs-sss/ehealth-esante/infostructure/ihac_ccai-eng.php>.

⁶ See Industry Canada, "Final Evaluation of the Community Access Program (CAP)" (14 May 2010), online: <www.ic.gc.ca/eic/site/ae-ve.nsf/eng/03127.html>.

⁷ SchoolNet, "What is SchoolNet?" (archived from original on 12 December 2002), online: <<http://web.archive.org/web/20021216040750/http://www.schoolnet.ca/home/e/whatis.asp>>.

In Parliamentary debates, SchoolNet was touted as “vital in keeping Canada globally competitive” and “providing youth with the technological skills which will soon be considered mandatory to doing business throughout the world.”⁸ Moreover, getting Canadian youth connected quickly was considered particularly important on the world stage, especially for ensuring that Canada beat targets set by the United States.⁹ In fact, Canadian youth turned out to be very early adopters of the internet from a global perspective, which has made Canada a country of interest for study about the internet and its impacts on the international stage.¹⁰

By the late 1990s, the Canadian policy focus had expanded to include the negative consequences of digitized communications. This was despite a pervasive (though misplaced) sentiment painting Canadian youth as technology savvy “digital natives” with little or no need for adult support.¹¹ Although policymakers introducing these issues into debate were often careful to continue to attest to their commitment to the internet as a lynch pin for Canada’s economic future, issues relating to online hate speech, luring, online child pornography, and more recently, sexting and cyberbullying, soon began to make their way into Canadian policymaking and debate.¹²

⁸ *House of Commons Debates*, 35th Parl, 2nd Sess, No 18 (21 March 1996) at 1031 (Derek Wells).

⁹ See *House of Commons Debates*, 35th Parl, 1st Sess, No 137 (5 December 1994) at 8640 (John Manley): “a continuation of the SchoolNet program [...] will see all of Canada's 16,500 schools and 3,400 libraries connected to the information highway by 1998, a full two years before the target set by vice-president Gore for the United States.”

¹⁰ See generally Jane Bailey and Valerie Steeves, “Will the Real Digital Girl Please Stand Up?” in Greg Wise & Hille Koskela, eds, *New Visualities, New Technologies: The New Ecstasy of Communication* (Farnham, Surrey, UK: Ashgate Publishing, 2013).

¹¹ See *House of Commons Debates*, 35th Parl, 2nd Sess, No 121 (3 February 1997) at 7598 (Werner Schmidt): “To put this into the context of a child, ask this question: What is technology to a kid? One of the Apple people, Alan Kay, once said that technology is technology only for people who are born after it is invented. Twelve-year-old Niki Tapscott would agree. [...] When asked if she would participate in a consumer of the future panel at a technology conference she lectured her father: ‘Okay, Dad. I will do it if you want me to, but I do not understand why you adults make such a big deal about technology. Kids use computers to do stuff. We do not think of them as technology. Like a fridge does stuff. It is not technology. When I go to the fridge I want food that is cold. I do not want to think about the technology that makes the food cold’”; *House of Commons Debates*, 35th Parl, 2nd Sess, No 121 (3 February 1997) at 7601 (John Williams): “We of the older generation have a hard time catching up and keeping up with the young folks. At the same time this government has a hard time keeping up with the changing world we live in. The changing world is a competitive world”.

¹² See generally Hannah Draper, “Canadian Policy Process Review 1994–2011” (March 2012), *eGirls Project*, online: <www.egirlsproject.ca/research/research-memosbackgrounders/2013-policy-discourses-jurisdictions/#CdnFed>.

A variety of legal responses have been proposed and adopted to address these issues at the federal, and the provincial and territorial levels. These have included criminal,¹³ human rights, civil, and education law approaches. While some responses to online issues have been based on pre-existing laws, regulations, and policies, others have been created directly in response to internet-related developments. This non-comprehensive overview focuses on key legal approaches and developments related to cyberbullying.

Part I begins by discussing “cyberbullying,” online hate propagation, and cyberviolence, including the relationships among them. Part II focuses on current legal responses, including human rights, education, civil, administrative/regulatory, and criminal law approaches. The Conclusion argues that the complexity of these issues—and the underlying equality issues often at stake—necessitate adopting a multi-pronged approach. Furthermore, when these issues affect young people, responses ought to be weighted more strongly in favour of human rights and educational approaches, rather than criminal law responses.

I. Overview: Cyberbullying, online hate propagation, and cyberviolence

A. Bullying and Cyberbullying

Swedish researcher Dan Olweus coined the term “bullying” to describe a kind of conflict between young people which has three elements. By his classic definition, bullying involves (i) *repeated* acts, of (ii) *intentional* aggression, (iii) in a relationship where there is a *power imbalance* that makes it “difficult for the student being bullied to defend himself or herself.”¹⁴ Others have suggested that bullying can take a variety of forms, including proactive or reactive aggression and bias-based attacks (such as attacks based on racist, sexist, or homophobic prejudices).¹⁵ Bullying carried out through electronic means is commonly referred to as “cyberbullying.”¹⁶

Two main issues have arisen in discussions around “cyberbullying” and its definition. The first is whether the term should be applied to behaviours between adults, or reserved for situations involving young people. The second is whether or not the term should be applied to behaviours that involve already-recognized crimes and human rights violations (such as hate propagation on prohibited grounds, criminal harassment, and

¹³ See *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 91(27) (establishing that Canadian criminal law is exclusively within the power of the federal government).

¹⁴ Dan Olweus, *The Olweus Bullying Questionnaire* (Centre City, MN: Hazeldean, 2007) at 2.

¹⁵ See e.g. Nathaniel Levy et al., “Bullying in a Networked Era: A Literature Review” (September 2012) Berkman Center Research Publication No 2012-17 at 9, online: <www.cyber.law.harvard.edu/publications/2012_kbw_bullying_in_a_networked_era>.

¹⁶ See Bill Belsey, “Cyberbullying: An Emerging Threat to the ‘Always On’ Generation” (undated), *cyberbullying.ca*, online: <www.cyberbullying.ca>.

threats). With respect to the first of these issues, the Center for Disease Control in the United States recently suggested a “cyberbullying” definition that confines the term to behaviours between young people and excludes behaviours between siblings and current dating partners.¹⁷ With respect to second, using the term “cyberbullying” to describe violent and discriminatory harassing behaviours carried out through technology risks obfuscating and/or minimizing underlying issues of prejudice and hatred disproportionately experienced by members of equality-seeking groups, including women, members of LGBTQ communities, and racialized people.¹⁸

The unfortunate effect of such obfuscation may be to lead to “solutions” that only address symptoms of problems, and do not address root causes for discriminatory violence and harassment.¹⁹ For these reasons, those working on the issue of violence against women and girls (VAWG) have encouraged recognizing and properly labeling technologically-facilitated VAWG as a form of violence, rather than airbrushing this reality with the term “cyberbullying.”²⁰

B. Media Reporting and Canadian Task Forces on Bullying

Bullying and cyberbullying have been widely reported in Canadian media in the last several years, especially in relation to teens who have committed suicide after being targeted by these behaviours.²¹ A number of formal reviews have been convened in relation to these issues, including the proceedings of the Standing Senate Committee on

¹⁷ Centers for Disease Control and Prevention, “Youth Bullying: What Does the Research Say?” (12 July 2016), online:

<www.cdc.gov/violenceprevention/youthviolence/bullyingresearch/index.html>.

¹⁸ See generally West Coast LEAF, “#Cybermisogyny: Using and strengthening Canadian legal responses to gendered hate and harassment online” (June 2014) at 7, online:

<www.westcoastleaf.org/wp-content/uploads/2014/10/2014-REPORT-CyberMisogyny.pdf> [LEAF #Cybermisogyny Report].

¹⁹ See Jane Bailey, “‘Sexualized Online Bullying’ Through an Equality Lens: Missed Opportunity in *AB v Bragg?*” (2014) 59:3 McGill LJ 709 at 737 [Bailey, “Sexualized Online Bullying”].

²⁰ Jordan Fairbairn, “Rape Threats and Revenge Porn: Defining Sexual Violence in the Digital Age” in Jane Bailey & Valerie Steeves, eds, *eGirls, eCitizens* (Ottawa: Ottawa University Press, 2015) 229 at 230-1 [Fairbairn].

²¹ See e.g. CBC News, “B.C. girl’s suicide foreshadowed by video”, *CBC News* (11 October 2012), online: <www.cbc.ca/news/canada/british-columbia/b-c-girl-s-suicide-foreshadowed-by-video-1.1217831>; CBC News, “Gay Ottawa teen who killed himself was bullied”, *CBC News* (18 October 2011), online:

<www.cbc.ca/news/canada/ottawa/gay-ottawa-teen-who-killed-himself-was-bullied-1.1009474>; CBC News, “Rape, bullying, led to N.S. teen’s death, says mom”, *CBC News* (12 April 2013), online: <www.cbc.ca/news/canada/nova-scotia/rape-bullying-led-to-n-s-teen-s-death-says-mom-1.1370780> [CBC News].

Human Rights with respect to cyberbullying in 2011,²² the Nova Scotia Task Force on Bullying and Cyberbullying that reported in 2012,²³ and the Coordinating Committee of Senior Officials, Cybercrime Working Group that reported in 2013.²⁴ All three of these reports emphasized the importance of multi-pronged approaches, rather than simply focusing on criminal law responses. In particular, the Senate Standing Committee and the Nova Scotia Task Force endorsed proactive, human rights-based, educational responses designed to help build healthy respect for diversity, civility, and responsible digital citizenship, while minimizing criminal law responses by reserving them for the most egregious kinds of cases.

Since “cyberbullying” is a broad term that can be applied to a wide variety of behaviours, existing laws can sometimes be used to respond. Nova Scotia is the only jurisdiction in Canada to pass legislation that specifically defined and aimed to address cyberbullying. As discussed below, that legislation was recently struck down as unconstitutional.

C. Research on Online Hate Propagation and Cyberviolence

Many have written about the propagation of hatred against identifiable groups and their members through digital communications technologies and networks.²⁵ Much of the

²² Senate, Standing Committee on Human Rights, *Cyberbullying Hurts: Respect for Rights in the Digital Age* (December 2012) (Chair: Hon Mobina SB Jaffer), online: <www.parl.gc.ca/Content/SEN/Committee/411/ridr/rep/rep09dec12-e.pdf>.

²³ Nova Scotia, Task Force on Bullying and Cyberbullying, *Respectful and Responsible Relationships: There's No App for That: The Report of the Nova Scotia Task Force on Bullying and Cyberbullying* (29 February 2012) (Chair: A Wayne MacKay), online: <www.nssba.ca/archived-enews/doc_download/58-nova-scotia-task-force-on-bullying-and-cyber-bullying>.

²⁴ Coordinating Committee of Senior Officials, Cybercrime Working Group, *Report to the Federal/Provincial/Territorial Ministers Responsible for Justice and Public Safety: Cyberbullying and the Non-consensual Distribution of Intimate Images* (June 2013), online: <www.publicsafety.gc.ca/lbrr/archives/cnmcs-plcng/cn32485-eng.pdf>.

²⁵ See generally Jane Bailey, “Private Regulation and Public Policy: Toward Effective Restriction of Internet Hate Propaganda” (2004) 49 McGill LJ 59-103 (discussing online hate propaganda in the United States and Canada); Jessie Daniels, *Cyber-Racism: White Supremacy Online and the New Attack on Civil Rights* (New York: Rowman & Littlefield, 2009) (discussing manifestations of white supremacy online); Joel Reidenberg, “Yahoo and Democracy on the Internet” (2002) 42 Jurimetrics J 261-280 (examining a French court order requiring Yahoo to restrict access to Nazi memorabilia online); Southern Poverty Law Center, “Misogyny: The Sites,” *Southern Poverty Law Center Intelligence Report* 145 (Spring 2012), online: <www.splcenter.org/get-informed/intelligence-report/browse-all-issues/2012/spring/misogyny-the-sites> (discussing popular online sites that propagate misogyny) [SPLC]; Simon Wiesenthal Center, *Digital Terrorism and Hate* (2016), online: <www.digitalhate.net> (reporting on terrorism, anti-Semitism, and other hate speech online) [Wiesenthal]; League for Human

existing body of research focuses on organized hate groups such as the Ku Klux Klan and Anti-Semitic Holocaust denial groups.²⁶ The targeting of individuals on the basis of their identifiability (or perceived identifiability) as a member of an equality-seeking group has generally been a lesser focus of the literature in this area, although it is clear that identity-based prejudices can play an integral role in attacks on individuals.²⁷

A related and growing body of work focuses on cyberviolence, often examining the consequences for equality-seeking groups such as women and girls.²⁸ This research draws attention to international definitions of violence against women and girls (VAWG) that incorporate physical, sexual, and psychological violence, and include sexual harassment.²⁹ It also recognizes how using generic terms such as “cyberbullying” can minimize or create confusion about how best to meaningfully respond to conduct that is grounded in discriminatory prejudices, and which can have devastating effects on members of equality-seeking groups. In the context of VAWG, for example, digital communications tools can play a significant role in perpetuation and escalation of domestic violence and conflict.³⁰

Rights of B’nai B’rith Canada, *Audit of Anti-Semitic Incidents*, online: <www.bnaibrithaudit.ca/> (reporting on incidents of anti-Semitism in Canada) [B’nai B’rith],

²⁶ See Weisenthal, B’nai B’rith, and SPLC, *ibid*.

²⁷ See e.g. Melissa Delgado et al., “Discrimination and Mexican-Origin Adolescents Adjustment: The Moderating Roles of Adolescents’, Mothers’, and Father’ Cultural Orientations and Values” (February 2011) 40:2 *Journal of Youth and Adolescence* 125-39 (finding that perceived discrimination was positively associated to depression, risky behaviours, and deviant peer affiliations among Mexican youth); Danielle Keats Citron, “Cyber civil rights” (2009) 89:1 *Boston University Law Review* 61-125 (discussing how online hate against women, people of color, and other traditionally disadvantaged classes should be understood and addressed as civil rights violations).

²⁸ See e.g. Fairbairn *supra* note 20; LEAF #Cybermisogyny Report *supra* note 18. Also see: Jordan Fairbairn & Dillon Black, *Cyberviolence against Women & Girls* (Ottawa: Ottawa Coalition to End Violence Against Women, 2015) <http://www.octevaw-cocvff.ca/sites/default/files/CyberViolenceReport_OCTEVAW.pdf> [OCTEVAW]; Alma Estable & Mechthild Meyer, *Project Shift: Needs Assessment Summary* (Toronto: Young Women’s Christian Association Canada, 2015), online: <www.ywcacanada.ca/data/documents/00000460.pdf>.

²⁹ Fairbairn, *supra* note 20 at 231.

³⁰ See e.g. Safety Net Canada, *Assessing Technology in the Context of Violence against Women & Children: Examining Benefits & Risks* (Vancouver: Safety Net Canada, 2013), online: <www.bcsth.ca/sites/default/files/SNC/SNC_AssessingTechVAWC-ES-2013.pdf>; Safety Net Canada, “Technology Misuse and Violence against Women: Survey”, online: <http://bcsth.ca/sites/default/files/SNC/SNC_TechMisuse-Infograph2013-English.pdf>; Safety Net Canada, *Safety Net Canada Summary Report Survey of Canadian Anti-Violence Workers on Technology Abuse 2012*, online: <<http://bcsth.ca/sites/default/files/SNC/SNCTechAbuseSurveySummary2013Final.pdf>>.

II. LEGAL & POLICY RESPONSES

A. Human Rights Law

a. Online hate propagation

Since cyberbullying research indicates that disabled, racialized, and LGBTQ youth are disproportionately targeted online, and since girls are more likely to be targets of sexualized online attacks than boys,³¹ laws relating to identity-based hate propagation may be applicable to cases otherwise misleadingly-labeled “cyberbullying.” Both federal and provincial governments have responded to hate propagation (including online hate propagation) through human rights law provisions. As such, hate propagation provisions in provincial human rights laws could be used to address certain behaviours that fall under the broad umbrella of “cyberbullying” where individuals or groups are targeted based on their membership (or perceived membership) in an identifiable group, and where attacks expose those targeted to hatred. Unfortunately, as discussed below, a federal human rights provision that might well have been helpful to young people targeted by homophobic, misogynistic, racist, and other oppressive online attacks is no longer in force.

i. Federal

Until 2013, the *Canadian Human Rights Act* (CHRA) included a provision that specifically applied to *internet* hate propagation (although the provision itself predated the internet).³² Section 13(1) of the CHRA made it a discriminatory practice to use, among other things, a computer to repeatedly communicate any matter likely to expose a person or persons to hatred or contempt by reason of their identifiability on a prohibited ground such as gender, race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, or disability. A person found to have so communicated could be ordered to cease and desist, to compensate their victim, and/or to pay a penalty.³³

After numerous s 13 cases in which remedies were ordered against online hate propagators,³⁴ and notwithstanding both the constitutionality of the provision (discussed

³¹ See e.g. Bailey, “Sexualized Online Bullying” *supra* note 19; Bailey, “Time to Unpack the Juggernaut?” *supra* note 1.

³² *Canadian Human Rights Act*, RSC 1985, c H-6, s 13 as it appeared on 1 January 2013.

³³ *Ibid*, s 54(1); See Jane Bailey, “Twenty Years Later *Taylor* Still Has It Right: How the Canadian Human Rights Act’s Hate Speech Provision Continues to Contribute to Equality” (2010) 50 *SCLR* (2d) 349 at 352 [Bailey, “Twenty Years Later”].

³⁴ See e.g. Bailey, “Twenty Years Later”, *ibid*, at 378 fn 44; *Citron v Zündel*, [2002] CHRC No 1, 44 CHRR D/274 at 303 [*Citron*]; *Schnell v. Machiavelli and Associates Emprize Inc.*, 2002 CanLII 1887 (CHRT) at para 161; *McAleer v Canada* (Canadian

in iii. below) and the emerging problem of identity-based cyberviolence,³⁵ s 13 was repealed in 2013.³⁶ Its repeal followed a report to the Canadian Human Rights Commission (CHRC) recommending repeal largely on the grounds that the extreme vitriol involved in the kinds of cases successfully dealt with ought to be reserved to the purview of criminal prosecution in order to better protect the reputations and expressive freedoms of those exposing others to hatred or contempt.³⁷

Section 13's repeal occasioned a significant loss from the remedial toolkit for addressing identity-based online attacks. It flew in the face of statistics showing growth in hate crimes and online hate propagation targeting members of marginalized groups, as well as expert recommendations in favour of proactive, human rights-based approaches to such behaviours, especially in the context of "cyberbullying" between young people.³⁸ Unlike criminal law responses, human rights law approaches do not require proof of intention because they aim at remediating discriminatory effects, rather than punishing violators. In short, they focus primarily on future-oriented approaches that aim to provide remedies for targets and stem the tide of identity-based attacks in future.³⁹ Moreover, unlike *Criminal Code* hate propagation provisions which require Attorney General approval to prosecute, complaints under s 13 of the *CHRA* could be made by any member of the public.

ii. Provincial/territorial

All Canadian provinces⁴⁰ and one territory⁴¹ have human rights code provisions forbidding discriminatory displays, broadcasts, or publications, which might arguably be

Human Rights Commission), [1999] FCJ No 1095 (FCA) (holding that the *Taylor* reasoning applied equally to grounds of hatred or contempt other than race and religion, including sexual orientation).

³⁵ See Jane Bailey, "Submission to the Standing Senate Committee on Human Rights Regarding Bill C-304" (25 June 2013) at 3, online: <<https://egirlsproject.files.wordpress.com/2013/06/bailey-submissions-on-c-304.pdf>> [Bailey, Senate].

³⁶ Canada, Bill C-304, *An Act to amend the Canadian Human Rights Act (protecting freedom)*, 1st Sess, 41st Parl, 2013, s 2 (assented to 26 June 2013).

³⁷ See e.g. Bailey, "Twenty Years Later" *supra* note 33 at 350; Richard Moon, *Report to the Canadian Human Rights Commission Concerning Section 13 of the Canadian Human Rights Act and the Regulation of Hate Speech on the Internet* (October 2008) at 42, online: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1865282>.

³⁸ See Bailey, Senate *supra* note 35 at 4.

³⁹ See Bailey, "Twenty Years Later" *supra* note 33 at 371; Jeff Brunner, "Canada's Use of Criminal and Human Rights Legislation to Control Hate Propaganda" (1999) 26 *Man LJ* 299 at 315.

⁴⁰ *Human Rights Act*, PEI H-2, s 12 [Prince Edward Island *HRA*]; *Human Rights Code*, RSBC 1996, c 210, s 7 [BC *HRC*]; *Alberta Human Rights Act*, RSA 2000 A-25.5, s 3 [AHRA]; *The Saskatchewan Human Rights Code*, SS 1979, c S-24.1, s 14 [SHRC];

applicable to certain cases of online hate propagation. For example, s 14 of Saskatchewan's *Human Rights Code*⁴² prohibits, among other things, publication or display of any representation exposing to hatred, or affronting the dignity of any person or class of persons on a prohibited ground (e.g. religion, sex, sexual orientation, disability, colour, age, race, gender identity). Violators can be ordered to cease and desist from such behaviour and to compensate an injured complainant.⁴³ Unfortunately, at least one provincial human rights tribunal has ruled that only the federal government can regulate communication over the internet, so that provincial human rights code restrictions on hate propagation cannot be applied to online hate (*Elmasry and Habib v Roger's Publishing and MacQueen (No. 4)* 2008 BCHRT 378 (para 50)).

Both criminal and human rights laws against hate propagation have been subjected to and survived constitutional challenges, alleging that they trench too far on the freedom of expression.

iii. Constitutional challenges

In the 1990s, both the willful promotion of hatred provision in the *Criminal Code* and s 13(1) of the *CHRA* were alleged to be unconstitutional violations of the freedom of expression guaranteed by the *Canadian Charter of Rights and Freedoms* (the *Charter*).⁴⁴ In both cases, the Supreme Court of Canada (SCC) concluded that although the provisions limited expression, the limitations imposed were justified in a free and democratic society.

In *Keegstra*, the SCC concluded that the *Criminal Code* prohibition on the willful promotion of hatred limited expression that was far from core democratic values. The provision also served pressing objectives such as promoting equality of opportunity unhindered by attacks based on one's membership in a marginalized group.⁴⁵ In *Taylor*, a decision released at the same time as *Keegstra*, the SCC concluded that the limitation on free expression produced by s 13(1) of the *CHRA* was justified for similar reasons. The Court noted that s 13(1) applied only to extreme expression likely to stir "detestation, calumny, vilification," and was part of a conciliatory human rights scheme aimed at

Human Rights Code, RSM c H-175, s 18 [Manitoba HRC]; *Human Rights Code*, RSO 1990, c H-19, s 13 [Ontario HRC]; *Charter of Human Rights and Freedoms*, RSQ c C-12, s 11 [Quebec Charter]; *Human Rights Act*, RSNB 2011 c 171, s 7 [NB HRA]; *Human Rights Act*, RSNS 1989, c 214, s 7 [NS HRA]; *Human Rights Act*, SNL 2012 c H-13.1, s 19 [Nfld HRA].

⁴¹ *Human Rights Act*, SNWT 2002, c 18, s 13 [NWT HRA].

⁴² *SHRC*, *supra* note 40.

⁴³ *Ibid*, ss 35(1), 38(1).

⁴⁴ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [Charter].

⁴⁵ *R v Keegstra*, [1990] 3 SCR 697. See generally Bailey, "Twenty Years Later" *supra* note 33 at 353.

remedying discrimination, rather than punishing wrongdoers.⁴⁶ Subsequently, in the first internet-based s 13(1) case, the Canadian Human Rights Tribunal rejected a challenge to s 13(1) premised in part on the argument that its application to the internet rendered it too broad.⁴⁷

In 2013, the SCC again confirmed its analysis of human rights law restrictions on hate propagation in a case involving anti-LGBTQ pamphlets distributed in several neighbourhoods in Saskatchewan. In *Whatcott*, the SCC found that s 14(1) of the Saskatchewan *HRC*'s restrictions on publicly displaying hate propagation were largely justifiable in a free and democratic society because they served the purpose of reducing the harmful effects and social costs of discrimination against, and degradation of, individuals and groups merely because of their identifiability on a prohibited ground, such as sexual orientation.⁴⁸

In 2014, the Federal Court of Appeal again confirmed the constitutionality of s 13(1) of the *CHRA*, although by then it had already been repealed. In *Lemire*, the Court held that s 13 withstood constitutional muster, notwithstanding the fact that the section had been modified to state that it explicitly applied to the internet and that penalties could be ordered as a remedy, and that s 13(1) cases were not as frequently subject to mediation as other kinds of *CHRA* disputes.⁴⁹

Despite this series of findings in favour of the constitutionality of tailored restrictions on hate propagation in criminal and human rights law, Parliament voted to repeal s 13(1) of the *CHRA* in 2013. As a result, it is no longer part of the repertoire for dealing with identity-based cyberviolence.

b. Institutional liability for bullying under human rights codes

Other human rights law provisions, however, have been successfully used by targets of non technology-based bullying to hold schools and school boards responsible for addressing identity-based harassment. For example, Azmi Jubran complained under s 8(1) of the *BC Human Rights Code*⁵⁰ that the North Vancouver School Board had violated its obligation not to discriminate on the basis of sexual orientation in the provision of education services to the public when it failed to adequately respond to students' repeated homophobic attacks against him.⁵¹ The British Columbia Court of Appeal ruled in Jubran's favour, concluding that the Board had failed to foster an environment free from discriminatory harassment.

⁴⁶ *Canada (Human Rights Commission) v Taylor*, [1990] 3 SCR 892 at 928.

⁴⁷ *Citron supra* note 34 at 207, 242.

⁴⁸ *Saskatchewan (Human Rights Commission) v Whatcott*, 2013 SCC 11 at 71.

⁴⁹ *Lemire v Canada (Human Rights Commission)*, 2014 FCA 18.

⁵⁰ *BC HRC, supra* note 40.

⁵¹ *School District No. 44 (North Vancouver) v Jubran*, 2005 BCCA 201.

In another case, Jeremy Dias relied on a similar provision in a prior version of the Ontario *Human Rights Code*⁵² to file a 2002 complaint against a Sault Ste Marie high school and the Algoma District School Board for refusing to allow him to start school clubs aimed at encouraging a “more positive environment for non-heterosexual students.”⁵³ Dias had been targeted because of his sexual orientation, and proposed the clubs as a proactive response to that harassment. He ultimately settled the case and used the settlement funds to set up a scholarship fund and the advocacy organization Jer’s Vision (which later became the Canadian Centre for Gender and Sexual Diversity).⁵⁴

Similar provisions in human rights codes across Canada prohibit those providing services to the public, such as schools, from discriminating on the basis of prohibited grounds such as race, sexual orientation, and gender.⁵⁵ These provisions could be relied upon to make complaints where schools and school boards fail to adequately address identity-based cyberbullying. In addition, a number of provinces and territories have revised education legislation and policies to directly address bullying and cyberbullying. These new initiatives include reactive punitive measures, as well as proactive initiatives designed to address discriminatory prejudices and stereotypes that are at the root of identity-based attacks and to build young people’s empathy and healthy relationship skill sets.

B. Education Law

All provinces and territories except for Nunavut specifically address, or require school boards and schools to address, bullying and cyberbullying in school codes of conduct or other related policies (such as acceptable use of electronic communications systems policies). In Nunavut, although bullying and cyberbullying are not specifically mentioned in legislation or official underlying policies, these behaviours clearly fall within broader Indigenous laws, principles, and expectations set out in policies and statements relating to students’ rights and responsibilities. Further, all provinces and territories have explicitly committed themselves to promoting respect for equity and diversity through safe, caring, and accepting schools policies or through the articulation of principles requiring respect

⁵² Ontario *HRC*, *supra* note 40.

⁵³ See James Moran, “Jeremy Dias creates scholarship with rights settlement”, *Daily Xtra* (15 June 2005), online: <www.dailyxtra.com/ottawa/news-and-ideas/news/jeremy-dias-creates-scholarship-with-rights-settlement-11555>.

⁵⁴ See Letter from Renu Mandhane, Chief Commissioner, Ontario Human Rights Commission (April 2016), in The Canadian Centre for Gender and Sexual Diversity, “Implementing the Accepting Schools Act: The 2nd Annual Ontario Educators Conference” (29 April 2016), online: <ccgsd-ccdgs.org/wp-content/uploads/2015/12/Accepting-school-act-conference-booklet.pdf>.

⁵⁵ *AHRA*, *supra* note 40, s 4; *SHRC*, *supra* note 40, s 13(1); *Manitoba HRC*, *supra* note 40, s 13(1); *Ontario HRC*, *supra* note 40, s 1; *Quebec Charter*, *supra* note 40, s 12; *Nfld HRA*, *supra* note 40, s 11(a); *NB HRA*, *supra* note 40, s 6(1)(a); *NS HRA*, *supra* note 40, s 5(1); *PEI HRA*, *supra* note 40, s 2(1); *Northwest Territories* *supra* note 41, s 11(1).

for difference. Newfoundland, Nova Scotia, Ontario, and Saskatchewan, in particular, have some of the most current and comprehensive approaches to bullying and cyberbullying, incorporating not just disciplinary provisions, but also respect for diversity initiatives.

While education legislation from across Canada incorporates general provisions with respect to student conduct and punishment that could be applied to certain behaviours falling under the umbrella of “cyberbullying,” the provinces of Alberta, Manitoba, New Brunswick, the Northwest Territories, Nova Scotia, Ontario, and Quebec explicitly refer to bullying and/or “cyberbullying” in their education legislation. Education legislation, however, barely scratches the surface in terms of understanding how cyberbullying is being addressed in Canadian schools. Layered below legislation are regulations, provincial policies and program memoranda, school board codes and policies, and school codes and policies.

Below I sketch out the relevant legislation for each province and territory. Where possible, I expand on that by referencing any underlying regulations, ministerial directives, and provincial school board and school policies.

a. Alberta

Alberta’s *Education Act* defines bullying as “repeated and hostile or demeaning behaviour by an individual in the school community where the behaviour is intended to cause harm, fear, or distress to one or more other individuals in the school community, including psychological harm or harm to an individual’s reputation.”⁵⁶ The *Act* imposes on students the responsibility to “report and not tolerate bullying” directed toward others, whether in school or electronically,⁵⁷ and requires school boards to establish and implement policies to provide welcoming and respectful learning environments, including establishing codes of conduct that address bullying.⁵⁸ The *Act* further establishes a bullying awareness and prevention week, and mandates school support for student organizations intended to promote welcoming and respectful learning environments, such as gay-straight alliances and anti-racism clubs.⁵⁹ Private schools in Alberta are also required to abide by requirements to provide safe and inclusive environments.⁶⁰

Codes of conduct, technology or internet use guidelines, and more specific bullying and cyberbullying policies are used in Alberta to address bullying and cyberbullying behaviours in schools. Section 33 of the *Act*, in particular, states that student codes of conduct must be made publicly available, contain statements describing acceptable and

⁵⁶ *Education Act*, SA 2012, c E-0.3, s 1(d).

⁵⁷ *Ibid*, s 31.

⁵⁸ *Ibid*, s 33(2).

⁵⁹ *Ibid*, ss 35, 35.1.

⁶⁰ *School Act*, RSA 2000, c S-3, s 28.

unacceptable behaviour, and be reviewed every year. In November 2014, the province issued a document reviewing code of conduct provisions in the *Act*, and providing guidance to school boards developing effective student codes of conduct.⁶¹ With regard to bullying and cyberbullying policies, a 2013 study of school board bullying and cyberbullying policies available online found only 5 policies, but noted many schools had technology or internet use guidelines.⁶² The Calgary School Board of Education's bullying prevention policy provides one useful example of such a policy, and is available online.⁶³

b. British Columbia

While British Columbia's *School Act*⁶⁴ does not refer to bullying, it nonetheless offers tools for schools and school boards to address bullying and cyberbullying behaviours. Under the *Act*, all school boards must establish student codes of conduct which are consistent with standards established by the provincial Education Minister.⁶⁵ School boards are also empowered to make rules governing student suspensions,⁶⁶ and to compel students to comply with school rules (authorized by school principals) and board-issued policies and codes of conduct.⁶⁷ Regulations related to the *Act* require teachers to ensure that all students understand and comply with school rules and policies, as well as board-issued codes of conduct.⁶⁸

In 2007, British Columbia's Minister of Education issued an order reaffirming that the *School Act* requires all schools boards to establish codes of conduct.⁶⁹ In accordance with that Ministerial Order, codes of conduct should (i) address, among other things, "acts of bullying, harassment, intimidation, [and] physical violence"; (ii) include a statement of purpose focused on "safe, caring and orderly school environments"; and (iii) provide

⁶¹ See Society for Safe and Caring Schools & Communities, "Alberta's Education Act: Developing an Effective Student Code of Conduct" (November 2014), online: <www.asba.ab.ca/wp-content/uploads/2014/11/ts_develop_code_conduct.pdf>

⁶² Nikki Nosworthy & Christina Rinaldi, "A Review of School Board Cyberbullying Policies in Alberta" (Winter 2013), 58:4 Alberta Journal of Educational Research 509 at 514, online: <<http://ajer.journalhosting.ucalgary.ca/index.php/ajer/article/viewFile/1000/926>>.

⁶³ Calgary Board of Education, "School Culture & Environment: Bullying Prevention" (20 June 2016), online: <www.cbe.ab.ca/about-us/school-culture-and-environment/Pages/Healthy-Relationships.aspx>.

⁶⁴ *School Act*, RSBC 1996, c 412.

⁶⁵ *Ibid*, s 85(1.1).

⁶⁶ *Ibid*, s 85(2)(c)(ii).

⁶⁷ *Ibid*, s 6(1).

⁶⁸ *School Regulation*, BC Reg 265/1989, s 4.

⁶⁹ British Columbia, BC Ministry of Education, *Ministerial Order M276/07*, online: <www2.gov.bc.ca/assets/gov/education/administration/legislation-policy/legislation/schoollaw/e/m276_07.pdf> [Order M276/07].

statements that clearly convey expectations of student behaviour. Some examples of positive student behaviours include helping to make school a safe, caring, and orderly place by, for example, telling adults of incidents of bullying, harassment, intimidation, or other safety concerns.⁷⁰ Codes of conduct must also specify that disciplinary action, wherever possible, will be preventative and restorative rather than punitive.⁷¹ A companion guide to the Order suggests, among other things, definitions for “bullying behaviour” and “cyberbullying” for schools to use in their codes of conduct, although use of these definitions is discretionary.⁷²

Various British Columbia school boards have developed policies and regulations relating to bullying and cyberbullying behaviours in schools. These policies provide for disciplinary action related to bullying and cyberbullying, as well as more broad-based plans aimed at improving diversity. For example the Vancouver School Board has issued a Student Code of Conduct Policy,⁷³ endorses lesson plans on the Charter for Compassion,⁷⁴ and offers tools for developing empathy in high school students.⁷⁵ Some British Columbia school regulations and policies relating to acceptable use of electronic communications systems also provide for disciplinary action for misuse of technology resources, such as offensive and threatening language,⁷⁶ or failing to demonstrate digital

⁷⁰ British Columbia Ministry of Education, *Safe, Caring and Orderly Schools: A Guide* (November 2008) at 17, online: <www.bced.gov.bc.ca/sco/guide/scoguide.pdf> [BC Safe, Caring and Orderly Schools Guide].

⁷¹ Order M276/07, *supra* note 69, s 7(a).

⁷² British Columbia Ministry of Education, *Developing and Reviewing Codes of Conduct: A Companion* (British Columbia: August 2007), online: <www.bced.gov.bc.ca/sco/resourcedocs/facilitators_companion.pdf>. See generally Gillian Angrove, “She’s Such a Slut!: The Sexualized Cyberbullying of Teen Girls and the Education Law Response” in Jane Bailey & Valerie Steeves, eds, *eGirls, eCitizens* (Ottawa: University of Ottawa Press, 2015) 307 at 319-20 [Angrove].

⁷³ Vancouver School Board, “JGD: District Student Code of Conduct Policy” (7 June 2016), *Vancouver School Board*, online: <<https://www.vsb.bc.ca/district-policy/jgd-district-student-code-conduct-policy>>.

⁷⁴ Vancouver School Board, “Compassion in Action” (undated), *Vancouver School Board*, online: <www.vsb.bc.ca/compassion-action>; Karen Armstrong, “Charter for Compassion” (2009), *Vancouver School Board*, online: <www.vsb.bc.ca/sites/default/files/publications/Charter%20of%20Compassion.pdf>.

⁷⁵ Vancouver School Board, “Lesson Plan: Developing Empathy” (undated), *Vancouver School Board*, online: <www.vsb.bc.ca/sites/default/files/publications/Developing%20Empathy.pdf>

⁷⁶ See e.g. Greater Victoria School District, “Expectations for Students using School or District Electronic Communications Systems” (undated), *Greater Victoria School District*, online: <<https://district.public.sd61.bc.ca/wp-content/uploads/sites/91/2014/08/Regulation-5131.9a-Student-Acceptable-Use-of-Electronic-Communications-Systems-in-Schools.pdf>>; Greater Victoria School District, “Regulation 5131.9: Student Acceptable Use of Electronic Communications Systems in

citizenship by “conducting all related activities in a responsible, ethical, legal and respectful manner.”⁷⁷

British Columbia’s *Safe, Caring and Orderly Schools Strategy* provides further guidance on responses to bullying and cyberbullying in the province. The *Strategy* was developed following recommendations for improving school safety issued by the Safe Schools Task Force in 2003. The guide to the *Strategy*, issued in 2008, states that BC schools work to build “community,” and foster respect, “inclusion, fairness and equity.”⁷⁸ It also recommends that schools regularly create opportunities for students to “learn about and celebrate human rights, diversity [...] and other key elements of caring schools.”⁷⁹ In the same year, the BC Ministry of Education also issued *Diversity in BC Schools: A Framework*, which expresses commitments to multiculturalism, human rights, employment equity and social justice, and promotes creating school cultures that value diversity and learning environments free from discrimination, harassment and violence.⁸⁰

In 2012, the BC Minister of Education introduced the Expect Respect and a Safe Education (ERASE) prevention and intervention strategy for bullying, which includes an intervention program and an anonymous online reporting tool. The ERASE strategy also provides resources and information for parents, as well as a multi-level training program for educators and community partners.⁸¹ The Ministry’s Digital Literacy Framework for school curriculum further addresses topics such as cyberbullying, self-image and identity, legal and ethical issues, and awareness of communication technology in society.⁸²

Schools” (26 September 2005), *Greater Victoria School District*, online: <<https://district.public.sd61.bc.ca/wp-content/uploads/sites/91/2014/08/Regulation-5131.9-Student-Acceptable-Use-of-Electronic-Communications-Systems-in-Schools.pdf>>.

⁷⁷ See Central Okanagan School Board, “486: Student Use of Electronic and Social Media Communication” (26 November 2014), *Central Okanagan School Board*, online: <www.sd23.bc.ca/Board/Policies/Section%204%20%20Students/486.pdf>.

⁷⁸ BC Safe, Caring and Orderly Schools Guide, *supra* note 70, at 9.

⁷⁹ *Ibid* at 31. See generally Angrove, *supra* note 72 at 318.

⁸⁰ British Columbia, Ministry of Education, *Diversity in BC Schools: A Framework* (British Columbia: November 2008), online: <www.bced.gov.bc.ca/diversity/diversity_framework.pdf> at 1, 4.

⁸¹ British Columbia Ministry of Education, “ERASE Bullying: Policy to Action”, online: <www.erasebullying.ca/policy/policy.php>; Office of the Information and Privacy Commissioner of BC, “Cyberbullying: Empowering children and youth to be safe online and responsible digital citizens” (November 2015) at 21-22, online: <www.oipc.bc.ca/special-reports/1882> [OIPC].

⁸² OIPC, *ibid*, at 21.

c. Manitoba

The Manitoba *Public Schools Act* explicitly defines bullying and includes “cyberbullying” within that definition.⁸³ It requires that school employees report cyberbullying to their principal, and mandates that schools have technology use policies,⁸⁴ establish codes of conduct (that address, among other things, bullying and discrimination),⁸⁵ promote inclusivity, and establish respect for diversity policies (which must accommodate student groups seeking to promote an inclusive school environment).⁸⁶ The Winnipeg School Division’s Code of Conduct⁸⁷ and appropriate use of communications devices policy⁸⁸ provide useful examples of these types of responses to bullying and cyberbullying behaviours.

In 2005, Manitoba Education, Citizenship and Youth issued *A Whole School Approach to Safety and Belonging*,⁸⁹ a report that outlines a seven-step school plan to engage the whole community in creating a comprehensive plan for preventing violence and bullying in schools. The report also includes resources for teachers and school administrators, including sample lesson plans,⁹⁰ incident report forms, suggested whole-school activities that highlight safety and belonging, and student surveys that allow students to anonymously report on whether or how often they have been bullied.

d. New Brunswick

The New Brunswick *Education Act* defines a positive learning and working environment as one that is, among other things, “free from bullying, cyberbullying and harassment.” In 2012, amendments to the *Education Act* provided definitions of bullying and

⁸³ *The Public Schools Act*, CCSM c P250, s 1.2(2).

⁸⁴ *Ibid*, s 41(1)(b.2).

⁸⁵ *Ibid*, s 47.1(2).

⁸⁶ *Ibid*, s 41(1)(b.1).

⁸⁷ Winnipeg School Division, “Code of Conduct: For Students, Staff and Parents/Guardians” (6 October 2014), *Winnipeg School Division*, online: <<https://www.winnipegssd.ca/Parents/safe-schools/Documents/WSD%20Code%20of%20Conduct.pdf>>.

⁸⁸ Winnipeg School Division, “Policy JFCBA: Appropriate Use of Communication Devices and Online Information Resources” (6 October 2014), *Winnipeg School Division*, online:

<<https://www.winnipegssd.ca/Governance/policy/Documents/FINAL%20COPY-%20JFCBA-Appropriate%20Use%20of%20Communication%20-%20Policy.pdf>>.

⁸⁹ Manitoba Education, Citizenship and Youth, *A Whole-School Approach to Safety and Belonging: Preventing Violence and Bullying* (2005), online: <www.edu.gov.mb.ca/k12/docs/support/guidance/WholeSchoolApproachComplete.pdf>.

⁹⁰ See e.g. *Ibid* at 52 (providing a guide for teachers to create a social contract for their classrooms).

cyberbullying.⁹¹ The *Act* now also includes bullying and cyberbullying as behaviours that may constitute “serious misconduct.”⁹² Under the *Act*, school principals must ensure that their schools are safe and positive learning environments, and must report any incidents of serious misconduct to the superintendent of the school district.⁹³

The New Brunswick Department of Education’s Policy 703 provides a framework for creating positive learning and working environments.⁹⁴ The Policy requires school districts and individual schools to develop positive learning and working environment plans that, among other things, address misconduct that includes bullying and cyberbullying.⁹⁵ The province also has an anti-bullying awareness week, conducts surveys on bullying, and collaborates with the Canadian Centre for Child Protection to provide safe and responsible internet use training.⁹⁶

e. Newfoundland

Newfoundland’s *School Act* empowers the Minister of Education to issue policy directives with respect to safe and caring learning environments. These directives must include a code of conduct template, a definition of bullying, and a bullying intervention protocol.⁹⁷ The *Act* further empowers principals and teachers to suspend students in accordance with school board by-laws, and empowers directors to expel students for behaviour that is likely to “injuriously affect the proper conduct of the school” or is persistently disobedient or defiant.⁹⁸ It also requires that school boards (i) adopt by-laws that relate to student suspensions,⁹⁹ (ii) promote a safe and caring learning environment in schools, and (iii) ensure that ministerial policies and guidelines are followed.¹⁰⁰

⁹¹ Bill 45, *An Act to Amend the Education Act*, 2nd Sess, 57th Leg, New Brunswick, 2012 (assented to 13 June 2012).

⁹² *Education Act*, SNB 1997, c E-1.12, s 1.

⁹³ *Ibid*, s 28(2)(c), (c.2).

⁹⁴ New Brunswick, Department of Education and Early Childhood Development, “Policy 703: Positive Learning and Working Environment” (1 April 1999, last revised December 2013), online: <www2.gnb.ca/content/dam/gnb/Departments/ed/pdf/K12/policies-politiques/e/703A.pdf>.

⁹⁵ *Ibid*, s 6.3.

⁹⁶ New Brunswick, Education and Early Childhood Development, “Annual Report on Bullying 2013-2014: Promoting Diversity and Respect in New Brunswick Schools” (New Brunswick: 2015), online: <www2.gnb.ca/content/dam/gnb/Departments/ed/pdf/Publications/AnnualReportOnBullying2013-2014.pdf>.

⁹⁷ *Schools Act*, SNL 1997, c S-12.2, s 177(b)(vii.1).

⁹⁸ *Ibid* at ss 36, 37.

⁹⁹ *Ibid* at s 74.

¹⁰⁰ *Ibid* at ss 75 (1)(c.1), (d).

In 2013, the Newfoundland Department of Education revised its policy relating to safe and caring school environments following an external review in 2012.¹⁰¹ The new *Safe and Caring Schools Policy* aims to set clear expectations for all members of the school community, encourage proactive and preventative measures, and provide remedial and restorative approaches in response to problems.¹⁰² It defines a safe school as one that, among other things, is free from bullying, harassment, intimidation, and discrimination, and has a code of conduct with consistent expectations and consequences.¹⁰³ A caring and inclusive school promotes, among other things, celebration of diversity, belonging and connectedness, equity, and equality.¹⁰⁴

The Policy recognizes that developing and maintaining a safe, caring, and inclusive school environment implicates all stakeholders of a school community (including the Department of Education, school districts, schools, students, and parents). Schools, in particular, are responsible for consistently responding to bullying and other inappropriate behaviours, as outlined in school codes of conduct.¹⁰⁵ They must also implement violence and bullying prevention initiatives, follow the *Department's Bullying Intervention Protocol*,¹⁰⁶ develop and implement plans to teach digital citizenship, and promote acceptance and inclusion of all individuals (regardless of, among other things, national or ethnic origin, body image, sexual orientation, gender or gender identity).¹⁰⁷ Schools must further promote social and emotional learning, and help students develop life skills relating to, among other things, respecting self and others, maintaining healthy, positive relationships, and showing ethical and social responsibility.¹⁰⁸

The Department of Education's *Safe and Caring Schools Procedure 3: Bullying Intervention Protocol* defines bullying as behaviour that is generally repeated and intended to cause harm in a situation involving a power imbalance.¹⁰⁹ It also identifies forms of bullying which include electronic bullying. The Procedure establishes a five-part protocol for school staff responding to bullying incidents, requiring staff to (i) intervene, (ii) investigate, (iii) contact the affected students' parents, (iv) subject the bully to

¹⁰¹ Goss Gilroy Inc., "Report on the Evaluation of The Department of Education's Safe and Caring Schools Policy and its Implementation" (31 August 2012), online: <www.ed.gov.nl.ca/edu/k12/safeandcaring/eval_safe_caring_schools_policy.pdf>.

¹⁰² Newfoundland and Labrador, Department of Education, "Safe & Caring Schools Policy: Revised 2013" (2013) at 3, online: <www.ed.gov.nl.ca/edu/k12/safeandcaring/policy.pdf>.

¹⁰³ *Ibid* at 4.

¹⁰⁴ *Ibid*.

¹⁰⁵ *Ibid*.

¹⁰⁶ *Ibid* at 11.

¹⁰⁷ *Ibid* at 12.

¹⁰⁸ *Ibid* at 13.

¹⁰⁹ Newfoundland and Labrador, Department of Education, "Safe & Caring Schools: Procedure 3: Bullying Intervention Protocol" (2013) at 1-2, online: <www.ed.gov.nl.ca/edu/k12/safeandcaring/procedure_3.pdf>.

consequences, and (v) document all incidents of bullying. While the Protocol states that consequences need not always be punitive, they should nonetheless be formative to correct the behaviour, prevent reoccurrence, protect and support the target, and take corrective action.¹¹⁰ Consequences should be premised on school codes of conduct and take contextual considerations into account. Contextual considerations may include the age and maturity of the students involved, with an orientation toward ensuring the student who bullies reflects on their behaviour, learns pro-social skills, and makes amends to their target.¹¹¹ The Protocol further notes that some bullying behaviours are illegal and can constitute criminal harassment, threats, mischief, assault, and sexual assault offences under the *Criminal Code*.¹¹²

The Department's *Safe and Caring Schools Procedure 5: Teaching Digital Citizenship* defines digital citizenship as "norms of safe, respectful and responsible behaviour with regard to the use of technology" and refers teachers to resources¹¹³ for teaching digital citizenship.¹¹⁴ The Procedure promotes Ribble's nine elements of digital citizenship,¹¹⁵ and recommends relevant resources for educators, parents, and the public.

¹¹⁰ *Ibid* at 3.

¹¹¹ *Ibid*.

¹¹² *Ibid* at 2.

¹¹³ See e.g. MediaSmarts, "Passport to the Internet", online: <<http://mediasmarts.ca/teacher-resources/licensed-resources/passport-internet-student-tutorial-internet-literacy-grades-4-8/passport-internet-description>> (teaching students to use online tools and websites in secure and ethical ways); MediaSmarts, "MyWorld: A digital literacy tutorial for secondary students", online: <<http://mediasmarts.ca/teacher-resources/licensed-resources/myworld-digital-literacy-tutorial-secondary-students>> (helping students in Grades 9-12 develop digital media literacy); MediaSmarts, "Web Awareness Workshop Series", online: <<http://mediasmarts.ca/teacher-resources/licensed-resources/web-awareness-workshop-series>> (for professional development workshops targeted to parents and educators); Atlantic Ministers Responsible for the Status of Women, "Cybersafe Girl" *Cybersafe Girl*, online: <www.cybersafegirl.ca> (providing information to girls, parents, and educators about how girls can be safe online).

¹¹⁴ Newfoundland and Labrador, Department of Education, "Safe & Caring Schools: Procedure 5: Teaching Digital Citizenship" (2013) at 1, online: <www.ed.gov.nl.ca/edu/k12/safeandcaring/procedure_5.pdf>.

¹¹⁵ These elements include digital health and wellness (recognizing physical issues ranging from poor ergonomics to internet addiction), digital commerce (including legally and illegally obtaining goods and services online), digital communications (discussing decision-making when communicating online), digital access (recognizing that not all individuals have equal access to technology), digital etiquette (learning to act appropriately online), digital security (advocating for hard-drive backups, virus protection, and other digital security measures), digital rights and responsibilities (defining basic digital rights, including rights to privacy and free speech), digital literacy (including teaching about technology and how it may be used) and digital law (discussing responsibility for one's actions online, and the ethics of technology use within a society):

The Department's *Code of Conduct Guidelines and Template* provides a provincial template for school codes of conduct.¹¹⁶ The Guidelines specify expected standards of behaviour for students which relate not only to behaviour on school property, but also on buses, in extra-curricular activities, during off-site school sponsored activities, and during any activity "which will have an impact on the school climate."¹¹⁷ The Template lists inappropriate behaviours which include any violent or bullying behaviour (including electronic) that intentionally harms another person. This includes using violent, profane or discriminatory language,¹¹⁸ and using technology to intentionally abuse or bully another person.

The Template groups bullying behaviours into tiers: Level 1 behaviours are those which can be dealt with by a teacher, while Level 2 behaviours are those which must be addressed by an administrator. It then lists both proactive and reactive strategies for dealing with Level 1 and Level 2 behaviours, ranging from discussing appropriate behaviours with students, adult modelling of appropriate behaviours, curricular and extra-curricular programs to promote social skill development (such as Gay Straight Alliances), "verbal reminders," and out-of-school suspensions.¹¹⁹

School board and school-level initiatives also reflect the priorities set by the Department of Education. For example, the Newfoundland and Labrador English School District's website includes access to Department of Education policies and also incorporates "My Anti-Bully Pledge", a form that can be completed and submitted online. Students signing the Anti-Bullying Pledge must identify themselves and commit to standing up for victims of bullying and taking steps to prevent bullying from happening in the first place.¹²⁰

f. Northwest Territories

The Northwest Territories' *Education Act* was amended in 2013 to explicitly define "bullying" to include online behaviours such as impersonation or sharing harmful content,¹²¹ and to require regulations establishing a Territorial School Code of Conduct

Ibid at 4-5. See generally Mike Ribble, *Nine Elements of Digital Citizenship*, online: <www.digitalcitizenship.net/Nine_Elements.html>.

¹¹⁶ Newfoundland and Labrador, Department of Education, "Safe and Caring Schools: Procedure 2: Code of Conduct Guidelines and Template" (2013), online: <www.ed.gov.nl.ca/edu/k12/safeandcaring/procedure_2.pdf>.

¹¹⁷ *Ibid* at 1.

¹¹⁸ *Ibid* at 3.

¹¹⁹ *Ibid* at 3-5.

¹²⁰ Newfoundland and Labrador English School District, "My Anti-Bullying Pledge: Complete Your Pledge" (2015), online: <<https://www.nlesd.ca/MemberServices/AntiBullyingPledge>>.

¹²¹ *Ibid* at s 1.

promoting a positive learning environment.¹²² Moreover, a Territorial Safe Schools Plan is currently in development. The plan responds to a motion calling for a territory-wide campaign against bullying,¹²³ and would aim to foster healthy relationships and eliminate bullying.¹²⁴

g. Nova Scotia

The Nova Scotia *Education Act*¹²⁵ specifically refers to bullying and cyberbullying in relation to teachers' duties to maintain order and discipline,¹²⁶ principals' duties to investigate and respond to reports of disruptive behaviour,¹²⁷ and staff members' duty to report severely disruptive behaviour.¹²⁸ The *Act* also empowers the Minister of Education to establish regulations defining bullying and cyberbullying,¹²⁹ and establish a provincial school code of conduct that relates, among other things, to those behaviours.¹³⁰ While regulations under the *Act* previously set out a regional school code of conduct policy to be established by school boards which defined "bullying" and "cyberbullying,"¹³¹ the relevant section containing those definitions was repealed in 2015 to allow for passage of a new code.¹³²

The new Nova Scotia Provincial School Code of Conduct Policy establishes expectations for student standards of behaviour province-wide. It contains a code of conduct which sets out acceptable standards of behaviour, including in relation to respecting diversity, responsibly using information and communications technology,¹³³ and refraining from bullying, cyberbullying, intimidation, racism and discrimination.¹³⁴ The Policy also sets out responses to unacceptable behaviour, including suspension for specifically-listed

¹²² *Ibid* at s 34(1).

¹²³ Northwest Territories, "Response to Motion 5-17(2): Anti-Bullying Measures" (13 June 2012), online: <www.assembly.gov.nt.ca/sites/default/files/12-06-13td33-173.pdf>.

¹²⁴ Northwest Territories, Education Culture and Employment, "Fact Sheet: Safe Schools Plan" (January 2015), online: <<https://www.ece.gov.nt.ca/files/pages/770/factsheet-safeschoolsjan2015nt.pdf>>

¹²⁵ *Education Act*, SNS 1995-6, c 1.

¹²⁶ *Ibid*, s 26.1(l).

¹²⁷ *Ibid*, s 26.1(2)(ea).

¹²⁸ *Ibid*, s 40(1).

¹²⁹ *Ibid*, s 145(1)(pa).

¹³⁰ *Ibid*, s 141(1)(ja).

¹³¹ *Ministerial Education Act Regulations*, NS Reg 80/97 (as amended to NS Reg 266/2015), online: <www.novascotia.ca/just/regulations/regs/edmin.htm>.

¹³² *Ibid*; See Nova Scotia, Education and Early Childhood Development, "Amendments Clear Way for New Provincial Code of Conduct" (24 April 2015), online: <www.novascotia.ca/news/release/?id=20150424001>.

¹³³ See *Cyber-safety Act*, SNS 2013 c 2 [*Cyber-safety Act*].

¹³⁴ Nova Scotia, "Provincial School Code of Conduct Policy" (September 2015) at 4, online: <www.cbv.ns.ca/welcome/modules/mastop_publish/files/files_55e4bbf064ce7.pdf>.

behaviours including bullying, cyberbullying, and discriminatory behaviour,¹³⁵ all of which are explicitly defined in the Policy.¹³⁶ Furthermore, the Policy emphasizes meting out consequences in a way that does not disproportionately affect equality-seeking groups, and promotes using restorative methods where appropriate.¹³⁷

The policies and commitments at the provincial level are reflected in school board and school-level policies. For example, Halifax Regional School Board has a Safe Schools division that is tasked with, among other things, helping schools promote healthy relationships and address cyberbullying.¹³⁸ Yarmouth's Regional School Board policy on mobile device use by students requires students to exhibit the same good behaviour expected of them offline in their online interactions, and provides for disciplinary action where mobile devices are used to violate the privacy of other students.¹³⁹

h. Nunavut

Nunavut's *Education Act*¹⁴⁰ does not incorporate any specific provisions with respect to bullying, cyberbullying or harassment. However, the education framework in Nunavut is governed by Inuit laws of relationships to the environment and to people, the cycle of life

¹³⁵ *Ibid* at 5.

¹³⁶ “Bullying means behaviour, typically repeated, that is intended to cause or should be known to cause fear, intimidation, humiliation, exclusion, distress, or other harm to another person’s body, feelings, self-esteem, reputation or property, and can be direct or indirect and includes assisting or encouraging such behaviour in any way [...] 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 to 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. [...] Discriminatory behaviour includes any discrimination based on race, culture, ethnicity, religion, creed, sex, sexual orientation, gender, gender identity, gender expression, physical disability or mental disability, mental illness, age, national or aboriginal origin, socio-economic status or appearance” [emphasis added]: *Ibid* at 7.

¹³⁷ *Ibid* at 1-2.

¹³⁸ Halifax Regional School Board, “Safe Schools”, online: <www.hrsb.ca/about-our-schools/parents/safe-schools>.

¹³⁹ Tri-County Regional School Board, “Procedure under Policy No 760: Mobile Device Use by Students” (5 May 2015), *Tri-County Regional School Board*, online: <www.tcrsb.ca/School%20Board%20Policies/700%20-%20Students/760%20Mobile%20Device%20Use%20by%20Students.pdf>.

¹⁴⁰ *Education Act*, S Nu 2008, c 15.

and the cycle of seasons.¹⁴¹ Essential to Inuit Maligait (natural laws) is the interconnectedness in the world, underpinned by working for the common good (emphasizing unity and social responsibility), being respectful of all living things, maintaining harmony, and continually preparing for a better future.¹⁴² Inuit Piqujangit (communal laws) include Inuuqatigiitsiarniq (caring and respect for others), Tunnganarniq (being welcoming and open to others, and building positive relationships), and Piliriqatigiingniq (working together for a common purpose).¹⁴³ These laws form core overarching competencies to be learned within the Nunavut curriculum.¹⁴⁴ The curriculum therefore requires that students learn to develop core competencies in, among other things, accepting new students, respecting differences, and not making fun of others.¹⁴⁵

In terms of discipline, s 62(1) of the Nunavut *Education Act* permits a principal to suspend a student for conduct that is “injurious to the physical or mental well-being of other students” or contrary to the Inuuqatigiitsiarniq policy (as described above). This disciplinary power could be used in relation to bullying or cyberbullying behaviours, although the *Act* does not explicitly refer to them.

i. Ontario

In 2008, Ontario amended its *Education Act* to explicitly extend the power to suspend and expel students not only in relation to activities at school, but to school-related activities and activities that would have an impact on school climate.¹⁴⁶ Bullying was specifically added to the list of infractions for which suspension was discretionary, and a mandate was issued requiring school officials to consider an expanded list of mitigating factors prior to issuing a discretionary suspension (or to determining the duration of a mandatory suspension).¹⁴⁷ The province also issued policy/program memoranda (PPM) on bullying prevention and intervention, progressive discipline, and promoting positive behaviour, and revised its existing PPM on codes of conduct to include a statement against hate propagation and hate or bias motivated behaviours.¹⁴⁸

¹⁴¹ Nunavut Department of Education, Curriculum and School Services Division, *Inuit Qaujimagajatuqangit Education Framework* (2007) at 24, online: <www.gov.nu.ca/sites/default/files/files/Inuit%20Qaujimagajatuqangit%20ENG.pdf>.

¹⁴² *Ibid* at 27-8.

¹⁴³ *Ibid* at 32-33.

¹⁴⁴ *Ibid* at 44.

¹⁴⁵ *Ibid* at 47.

¹⁴⁶ *Education Amendment Act (Progressive Discipline and School Safety)*, SO 2007, c 14, s 4 (enacting new s 306(1)).

¹⁴⁷ *Ibid* at s 4 (enacting new ss 306(2), 310, and O/Reg 472/07).

¹⁴⁸ Ontario, Ministry of Education, *Shaping a Culture of Respect in Our Schools: Promoting Safe and Healthy Relationships*, (Ontario: 11 December 2008) at 3, online: <www.edu.gov.on.ca/eng/teachers/RespectCulture.pdf>.

In the same year, the government-appointed Safe Schools Action Team delivered a report entitled *Shaping A Culture of Respect in Our Schools: Promoting Healthy Relationships*,¹⁴⁹ which focused on, among other things, the impacts of identity-based harassment and “bullying” on equality-seeking groups (such as girls, racial minorities, the poor, and sexual minority students).¹⁵⁰ The report was an influential factor in the province’s subsequent transition toward understanding safety in terms of equity and inclusion, recognizing that marginalization of students from equality-seeking groups undermined their sense of safety and belonging.¹⁵¹

In 2012, after a series of high profile teen suicides, the province passed the *Accepting Schools Act*.¹⁵² The new *Act* explicitly defines bullying¹⁵³ and cyber-bullying,¹⁵⁴ and also mandates professional development for teachers on bullying prevention and programming.¹⁵⁵ It requires that the Ministry of Education develop a model bullying intervention and prevention plan for use by school boards in developing their own plans for schools to implement.¹⁵⁶ It further requires that schools have equity and inclusive education policies,¹⁵⁷ calls for school boards to support students seeking to establish Gay

¹⁴⁹ *Ibid.*

¹⁵⁰ *Ibid* at 6.

¹⁵¹ Ontario, Ministry of Education, *Ontario’s Equity and Inclusive Education Strategy*, (2009), online: <<https://www.edu.gov.on.ca/eng/policyfunding/equity.pdf>>.

¹⁵² *Education Act*, RSO 1990 c E-2, as amended by the *Accepting Schools Act* SO 2012 c 5, s 1.0.0.2.

¹⁵³ The *Act* defines “bullying” as: aggressive and typically repeated behaviour by a pupil where,

(a) the behaviour is intended by the pupil to have the effect of, or the pupil ought to know that the behaviour would be likely to have the effect of,

(i) causing harm, fear or distress to another individual, including physical, psychological, social or academic harm, harm to the individual’s reputation or harm to the individual’s property, or

(ii) creating a negative environment at a school for another individual, and

(b) the behaviour occurs in a context where there is a real or perceived power imbalance between the pupil and the individual based on factors such as size, strength, age, intelligence, peer group power, economic status, social status, religion, ethnic origin, sexual orientation, family circumstances, gender, gender identity, gender expression, race, disability or the receipt of special education: *Ibid* at s 1(1). Further, the *Act* specifies that “bullying” behaviour could incorporate physical, verbal, electronic, written or other means: *Ibid* at s 1(1.0.0.1).

¹⁵⁴ The *Act* defines “cyberbullying” as “bullying by electronic means,” including web pages or blogs created and falsely attributed to another person, impersonating someone as the author of content online, and communicating material to or posting information online that is available to more than one person: *Ibid*, s 1(1.0.0.2).

¹⁵⁵ *Ibid* at ss 169.1(7.1), (7.2).

¹⁵⁶ *Ibid* at ss. 303.2 and 303.3.

¹⁵⁷ *Ibid* at s 29.1.

Straight Alliances or other organizations against bullying and support positive school climate,¹⁵⁸ requires that School Climate surveys be administered biannually,¹⁵⁹ and establishes an annual Bullying Awareness and Prevention Week.¹⁶⁰ With regard to school suspensions, the new *Act* makes suspension mandatory for bullying infractions where the student had previously been suspended for bullying, and where their presence created an unacceptable safety risk to another person.¹⁶¹ It also introduces mandatory suspension for bias-motivated infractions.¹⁶²

Following passage of the *Accepting Schools Act*, the Ministry also released a Model Bullying Prevention Plan developed by PREVNet with the Accepting Schools Expert Panel.¹⁶³ The Plan is intended to help school boards develop their own bullying intervention and prevention plans. Among other things, it recommends

- i. incorporating the “bullying” definition from the *Act*;
- ii. identifying the ways that bias, prejudice, and hate can lead to bullying;
- iii. developing awareness of the factors contributing to a safe and accepting environment;
- iv. making students aware of how they can help address bullying;
- v. using school climate surveys to evaluate strengths and weaknesses with respect to school plans for addressing bullying as a basis for improving plans in future;
- vi. clearly communicating procedures with respect to bullying and harassment; and
- vii. fostering a positive learning and teaching environment to help reduce harassment and bullying incidents.

Each school board in Ontario, therefore, should have a bullying prevention plan in place, and each school should have an equity and inclusive education policy in place.

In 2015, Ontario issued a revised Health and Physical Education Curriculum for grades 1-8 and 9-12.¹⁶⁴ These curricula implement part of the equity and inclusive education

¹⁵⁸ *Ibid* at s 303.1(1)(d).

¹⁵⁹ Ontario, Ministry of Education, “School Climate Surveys” (4 September 2013), online: <<https://www.edu.gov.on.ca/eng/safeschools/climate.html>>.

¹⁶⁰ *Accepting Schools Act*, *supra* note 152, s 300.0.2(1).

¹⁶¹ *Ibid* at s 310(1)(7.1)(i)(ii), 7.2.

¹⁶² *Ibid* at s 310(1)(7.1)(i)(ii), 7.2.

¹⁶³ Ontario, Ministry of Education, “Model Bullying Prevention & Intervention Plan” (January 2013), online: <<https://education-leadership-ontario.ca/en/resource/model-bullying-prevention-plan/>>

¹⁶⁴ Ontario Ministry of Education, *The Ontario Curriculum Grades 1-8: Health and Physical Education* (Revised 2015), online: <www.edu.gov.on.ca/eng/curriculum/elementary/health1to8.pdf> [Revised Curriculum 1-8]; Ontario Ministry of Education, *The Ontario Curriculum Grades 9-12: Health and*

guidelines referred to above, requiring that issues such as self-protection from cyberbullying, understanding media stereotypes, healthy relationships, and respect for diversity be incorporated into classroom learning.

j. Prince Edward Island

Prince Edward Island's *School Act*¹⁶⁵ does not refer specifically to bullying or cyberbullying. In terms of discipline, s 73(1) of the *Act* empowers principals and teachers to suspend or expel students (subject to the policy of a school board), while s 72(1) provides that school discipline is to be "similar to that administered by a kind, firm and judicious parent, but shall not include corporal punishment." Discipline for bullying and cyberbullying appears to fall under this power. In 2012, a motion was presented to the provincial government encouraging the province to adopt anti-bullying legislation.¹⁶⁶

The policies of both the English Language School Board¹⁶⁷ and La Commission scolaire de langue française¹⁶⁸ in Prince Edward Island recognize broad responsibilities to abide by human rights obligations, and express commitments to challenging prejudice and discrimination while promoting acceptance and respect for all people. Before being given access to communications technologies, students and parents receive "Expectations for Students" and an Acceptable Use Agreement for students, the latter of which must be signed by a parent or guardian and by all students in grades 4-12.¹⁶⁹ The Agreement specifies that, among other things, students must not use these technologies for "illegal activities, [or] to harass (cyberbully)." Further, students must report threatening or hurtful messages to the school and keep copies of offending content, and they must not use

Physical Education (Revised 2015), online:

<www.edu.gov.on.ca/eng/curriculum/secondary/health9to12.pdf>.

¹⁶⁵ *School Act*, RSPEI 1988, c S-2.1.

¹⁶⁶ Prince Edward Island, Legislative Assembly, "Motion 14: Encourage Government in the Adoption of Anti-Bullying Legislation in Prince Edward Island", 64 Leg, 2nd Sess (17 April 2012) at 286, online:

<www.assembly.pe.ca/sittings/2012spring/motions/14.pdf>.

¹⁶⁷ Prince Edward Island, English Language School Board, "Operational Policy: Race Relations, Cross Cultural Understanding and Human Rights in Learning" (10 June 2014), online: <www.gov.pe.ca/edu/elsb/files/2014/07/403_Race_Relations_Cross_Cultural_Understanding_and_Human_Rights_in_Learning.pdf>.

¹⁶⁸ Prince Edward Island, La Commission scolaire de langue française, "Politique Gen-305" (17 June 2009), online:

<www.edu.pe.ca/cs1f/documents/Les%20politiques/300%20-%20GÉNÉRAL/GÉN-305.pdf>.

¹⁶⁹ Prince Edward Island, Department of Education, Early Learning and Culture, "Minister's Directive MD No. 2012-02: Acceptable Use of Communication and Information Technology" (2012), online:

<www.gov.pe.ca/eecd/index.php3?number=1043875&lang=E>.

technology in a way that interferes with other users.¹⁷⁰ Penalties for misuse can include cancelled access, searches/seizures of personal devices, any other disciplinary measure, and/or calling the police.¹⁷¹

k. Quebec

Quebec's *Education Act*,¹⁷² as modified by Bill 56,¹⁷³ provides a definition of bullying that includes behaviours occurring in cyberspace.¹⁷⁴ It requires that students "conduct themselves in a civil and respectful manner toward their peers and personnel" and also requires schools to provide "a healthy and secure learning environment."¹⁷⁵ Furthermore, pursuant to s 75.1 of the *Act*, all schools in Quebec must have an anti-bullying and anti-violence plan in place that includes prevention measures, reporting procedures, and a set of actions to be taken in response to bullying or violence. St. Vincent Elementary School's Anti-Bullying & Anti-Violence Action Plan, which also explicitly refers to "cyberbullying," provides a useful example of a school-level plan issued pursuant to the requirements of the *Act*.¹⁷⁶

Since 2012, private educational service providers in Quebec must also have an anti-bullying plan in place which specifies the form and nature of the undertakings to be given to bullied students or their parents.¹⁷⁷ Private educational institutions must also set up an anti-bullying team to collaborate in implementing their respective plan,¹⁷⁸ and the governing board of private schools in Quebec must annually evaluate progress in dealing with bullying and violence.¹⁷⁹

Some school board and school-level policies and codes of conduct in Quebec also address bullying, cyberbullying, discrimination and harassment specifically. For example, the English Montreal School Board's "Safe Schools and Centres" Policy specifically addresses harassment, bullying, and intimidation in its section on disciplinary action.¹⁸⁰

¹⁷⁰ *Ibid*, Schedule B.

¹⁷¹ *Ibid*.

¹⁷² *Education Act*, CQLR, c I-13.3.

¹⁷³ Bill 56, *An Act to prevent and stop bullying and violence in schools*, 2nd Sess, 39th Leg, Quebec, 2012.

¹⁷⁴ *Education Act*, *supra* note 172, s 13(1.1).

¹⁷⁵ *Ibid*, s 18.1.

¹⁷⁶ Central Quebec School Board, St Vincent Elementary School, "Anti-bullying and Anti-Violence Action Plan" (2015), *Central Quebec School Board*, online: <www.cqsb.qc.ca/Elementary_School/StVincent/Documents/Bullying/Bullying%20-actionplan-svs-final%20copy-2014-15.pdf>.

¹⁷⁷ *An Act Respecting Private Education*, CQLR c E-9.1, s 63.2.

¹⁷⁸ *Ibid*, s 63.5.

¹⁷⁹ *Ibid*, s 83.

¹⁸⁰ English Montreal School Board, "Policy: Safe Schools and Centres", *English Montreal School Board*, online:

Beaconsfield High School's Code of Conduct lists freedom from physical and verbal harassment as a student right, and respect for the rights of others as a student responsibility. It further defines harassment to include bullying, cyberbullying, racial/ethnocultural, and sexual discrimination.¹⁸¹

1. Saskatchewan

Saskatchewan's *Education Act*¹⁸² does not specifically refer to bullying or cyberbullying, and principals' suspension powers are limited to a list of quite specific offences. Some bullying and cyberbullying incidents may implicitly fall within school principal's powers to suspend students for persistent opposition to authority or for "engaging in any other type of gross misconduct."¹⁸³

In 2006, the Saskatchewan Ministry issued a model bullying prevention plan under its Safe, Caring and Respectful Schools policy.¹⁸⁴ The Prevention Plan sets out a procedure for dealing with bullying, including taking all reports seriously, doing everything possible to stop bullying behaviour when it happens, and holding bullies responsible in an age and context-appropriate way.¹⁸⁵ The Plan also provides that where bullying crosses the line into criminal behaviour, police may become involved.¹⁸⁶

In 2013, the Saskatchewan Ministry of Education developed *Saskatchewan's Action Plan to Address Bullying and Cyberbullying*.¹⁸⁷ The Plan defines bullying¹⁸⁸ and

<www.emsb.qc.ca/en/governance_en/pdf/BoardPolicies/CommunityServices/SafeSchoolsAndCentres.pdf>.

¹⁸¹ Beaconsfield High School, "Code of Conduct 2014-2015" (2015), *Lester B Pearson School Board*, online: <www.beaconsfield.lbpsb.qc.ca/Documents/CodeofConduct.pdf>.

¹⁸² *Education Act*, SS 1995, c E-0.2.

¹⁸³ *Ibid* at s 154.

¹⁸⁴ Saskatchewan Learning, "Caring and Respectful Schools: Bullying Prevention: A Model Policy" (September 2006), online: <<http://publications.gov.sk.ca/documents/11/85695-bully-prevention-model-policy.pdf>>.

¹⁸⁵ *Ibid* at 12.

¹⁸⁶ *Ibid* at 13.

¹⁸⁷ Saskatchewan, Ministry of Education, *Saskatchewan's Action Plan to Address Bullying and Cyberbullying* (November 2013), online: <www.gov.sk.ca/adx/asp/adxGetMedia.aspx?mediaId=584fefe2-c769-4c12-a91a-fa3e49353b11&PN=Shared>.

¹⁸⁸ *Ibid* at 1: "Bullying is a relationship issue where one person or group repeatedly uses power and aggression to control or intentionally hurt, harm or intimidate another person or group. It is often based on another person's appearance, abilities, culture, race, religion, ethnicity, sexual orientation or gender identity. Bullying can take many forms: physical, emotional, verbal, psychological or social. It can occur in person or through electronic communication."

cyberbullying,¹⁸⁹ and provides six key recommendations for the Saskatchewan government to use to address bullying. In particular, the Plan recommends that the province (i) collaborate with education sector partners to create consistent policies, (ii) align priorities across government agencies, (iii) support students to develop responsible online behaviour, and (iv) engage youth in creating solutions to build positive relationships.¹⁹⁰ It also states that the province should take a restorative approach to incident response through the renewal of the Caring and Respectful Schools Policy, and engage the Office of the Advocate for Children and Youth.¹⁹¹ Further, it recommends that the province partner with SaskTel's "I am Stronger Campaign" to put an anonymous reporting tool on SaskTel's website, and also encourages the province to provide teachers with support and student resources to teach appropriate online behaviour.¹⁹² Key concepts from the Plan are reflected in some school and school board policies.¹⁹³

Saskatchewan schools also promote digital citizenship education at all grade levels.¹⁹⁴ The Ministry has issued an education policy statement confirming the government's commitment to safe school environments (where students feel included, protected, and respected), and further expressing support for alliances for sexual and gender diversity.¹⁹⁵ A number of school board and school policies reflect these commitments.¹⁹⁶

¹⁸⁹ *Ibid* at 11: "Cyberbullying is emotional, psychological, or social bullying that occurs using technology to forward or spread hurtful messages and/or images through email, texting, social media or other forms of electronic communication."

¹⁹⁰ *Ibid*.

¹⁹¹ *Ibid* at 13.

¹⁹² *Ibid* at 14.

¹⁹³ See e.g. Warman Elementary School, "Bullying Prevention Policy" (undated), *Prairie Spirit School Division*, online: <www.blogs.spiritsd.ca/wes/bus-information/wes-student-handbook/bullying-prevention-policy>.

¹⁹⁴ Saskatchewan, Ministry of Education, *Digital Citizenship Education in Saskatchewan Schools: A Policy Planning Guide for School Divisions and Schools to Implement Digital Citizenship Education from Kindergarten to Grade 12*, by Alec Couros & Katia Hildebrandt (Saskatchewan: Ministry of Education, 2015), online: <www.publications.gov.sk.ca/documents/11/83322-DC%20Guide%20-%20ENGLISH%202.pdf>.

¹⁹⁵ Saskatchewan, Ministry of Education, *Deepening the Discussion: Gender and Sexual Diversity* (2015), online: <www.publications.gov.sk.ca/documents/11/84995-Deepening%20the%20Discussion_Saskatchewan%20Ministry%20of%20Education%20Oct%202015%20FINAL.pdf>.

¹⁹⁶ See, for example: Regina Public Schools, "School Division #4", online: <www.rbe.sk.ca/school-division>; Saskatoon Public Schools, "Board Policy Manual: Policy 15 - Human Right Equity" (Last revised 11 October 2005), online: <www.spsd.sk.ca/Board/manual/Documents/Policy%2015%20Human%20Rights%20Equity%20Oct1105.pdf>; Saskatoon Public Schools, "Safe Caring and Accepting Schools", online: <<https://www.spsd.sk.ca/division/safeandcaringschools/Pages/default.aspx>>.

m. Yukon

Yukon's *Education Act*¹⁹⁷ does not explicitly refer to bullying or cyberbullying. It does, however, specify a host of student duties, including the duty to respect the rights of others and observe school rules. It further empowers principals to suspend students for breaching those duties.¹⁹⁸

The Yukon Education "Safe and Caring Schools Policy 1101,"¹⁹⁹ adopted in 2008, confirms a commitment to diversity and equity, while also defining bullying,²⁰⁰ harassment, and discrimination. The Policy requires schools to send a clear message that these latter three behaviours will not be tolerated,²⁰¹ and sets out procedures for reporting and dealing with incidents (noting the possibility of suspension under the *Education Act*). This approach is reflected in school codes of conduct within the Yukon.²⁰² Some schools also expressly incorporate Indigenous laws and principles such as belonging, generosity, and independence into their school handbooks.²⁰³

In 2012, Yukon Education issued a policy on sexual orientation and gender identity which affirmed a commitment to valuing diversity and addressing, among other things, homophobic and gender-based comments, discrimination, and bullying.²⁰⁴ The policy provides for a range of responses, including prohibitions on discriminatory language, adult modelling of respect for LGBTQ students and families, intervention on and

¹⁹⁷ *Education Act*, RSY 2002, c 61.

¹⁹⁸ *Ibid*, ss 38, 39.

¹⁹⁹ Yukon Education, "Safe and Caring Schools Policy 1011" (31 January 2008), online: <www.education.gov.yk.ca/pdf/policies/safe_caring_schools.pdf>

²⁰⁰ *Ibid* at 3: "Bullying is a pattern of repeated aggressive behaviour, with negative intent, directed from one person to another, or from one group to another. In many cases bullying occurs when there is a power imbalance. Repeated bullying behaviors can take many forms and are not limited to; physical (e.g. pushing, tripping), verbal (e.g. name calling, put-downs), social (e.g. social isolation, gossip), intimidation (extortion, defacing property of clothing) or cyber bullying (threats or harmful and demeaning text messages, photos or videos distributed or published to the internet)".

²⁰¹ *Ibid* at 4.

²⁰² See Watson Lake Secondary School, "Conduct Policy" (undated), *Yukon Education Student Network*, online: <www.yesnet.yk.ca/schools/wlss/pdf/11-12/conduct.pdf>; Elijah Smith Elementary School, "School Handbook (2015-2016)" at 15-16, *Yukon Schools*, online: <http://ese.yukonschools.ca/uploads/4/8/3/3/48336245/eses_handbook_2015-2016.pdf> [Elijah Smith].

²⁰³ Elijah Smith, *ibid*, at 15.

²⁰⁴ Yukon Education, "Policy Subject: Sexual orientation and gender identity policy" (5 September 2012), online: <www.education.gov.yk.ca/pdf/policies/sexual_orientation_and_gender_identity_policy.pdf>.

consequences for discriminatory acts (regardless of intent), in-class education reflecting accomplishments and contributions of LGBTQ persons, and training for staff on issues of sexual orientation and gender identity.²⁰⁵

C. Civil Litigation

It is possible to start a lawsuit against an online attacker²⁰⁶ in order to recover money to compensate for injuries sustained as a result of an attack. However, hiring a lawyer can be expensive, the process can be lengthy, and it may be that the online attacker has no money or assets to pay for any compensation ordered. Certain forms of online attack may also be addressed through a regulatory body, such as a federal or provincial privacy commissioner. In this section, I discuss three ways that certain cyberbullying behaviours may be addressed through civil litigation. I then discuss failed experiments in Nova Scotia and Manitoba to create a right to sue for “cyberbullying,” as defined in specific legislation.

a. Privacy and intimate images

Women and girls are disproportionately affected by the non-consensual distribution of intimate images, a form of cyberviolence that is sometimes mistakenly referred to as “cyberbullying.”²⁰⁷ This form of cyberviolence seriously intrudes on the target’s privacy and dignity, and often exposes them to further risks of violence, harassment, and conflict with employers, family, and peers.²⁰⁸ Below, I discuss three avenues of civil legal recourse available in British Columbia, Ontario, and Manitoba.

i. British Columbia, Manitoba, Newfoundland and Saskatchewan Privacy Acts

The *Privacy Acts* in British Columbia, Manitoba (RSM 1987, c. P125), Newfoundland (RSN 1990, c. P-22) and Saskatchewan (RSS 1978, c P-24) create a right to sue for invasion of privacy. In British Columbia, s 1(1) of the *Privacy Act* makes it a tort for a person to, willfully and without claim of right, violate the privacy of another person.²⁰⁹ The *Act* specifies that a person is entitled to the nature and degree of privacy that is reasonable in the circumstances, having regard for others’ lawful interests, the nature,

²⁰⁵ *Ibid.*

²⁰⁶ It may also be possible to sue an online service provider for failing to remove or appropriately address discriminatory and harassing content posted online. However, in most cases online service providers (such as Facebook) protect themselves from being sued in clauses that are included in the terms of use contracts that subscribers “agree” to when they sign up for services.

²⁰⁷ LEAF #Cybermisogyny Report, *supra* note 18 at 10-12.

²⁰⁸ See e.g. Mary Anne Franks, “Expert Report on Non-Consensual Distribution of Intimate Images Submitted to the Canadian Judicial Council Re: Complaint Regarding Associate Chief Justice Lori Douglas” (28 September 2014) at 2.

²⁰⁹ *Privacy Act*, RSBC 1996, c 373.

incidence and occasion of the violating act(s), and any relationship between the parties.²¹⁰ Eavesdropping and surveillance are both forms of conduct that can violate privacy under the *Act*.²¹¹

In 2016, in *TKI v TMP*, the British Columbia Supreme Court ordered a man to pay \$93,850 to his stepdaughter for surreptitiously observing and video-recording her while she was undressed in the bathroom,²¹² relying in part on s 1 of the *Act*. Although this case did not involve online distribution, it demonstrates that the *Act* may allow recovery for cyberbullying and cyberviolence incidents that involve invasions of privacy.

ii. Manitoba

In 2016, Manitoba passed *The Intimate Image Protection Act*²¹³ which makes it a tort to “distribute an intimate image²¹⁴ of another person knowing that the person depicted in the image did not consent to the distribution, or being reckless as to whether or not that person consented to the distribution.”²¹⁵ An online attacker that engages in this conduct can be ordered to, among other things, pay the plaintiff damages, give the plaintiff any profit they earned in distributing the image, and cease and desist from that behaviour.²¹⁶ In a lawsuit for non-consensual distribution of intimate images, the court can prohibit publication of the name of any party to the action (or any identifying information) if the court determines that making that order is in the interests of justice.²¹⁷ As discussed in subsection (iv) below, a full or partial publication ban can offer a plaintiff important protections, preventing them from being further victimized by publicity from the case.

²¹⁰ *Ibid* at ss 1(2), (3).

²¹¹ *Ibid* at s 1(4).

²¹² *TKL v TMP*, 2016 BCSC 789.

²¹³ *The Intimate Image Protection Act*, CCSM c I87.

²¹⁴ The *Act* defines “intimate image” as “a visual recording of a person made by any means, including a photograph, film or video recording,

(a) in which the person depicted in the image

(i) is nude, or is exposing his or her genital organs or anal region or her breasts, or

(ii) is engaged in explicit sexual activity;

(b) which was recorded in circumstances that gave rise to a reasonable expectation of privacy in respect of the image; and

(c) if 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”: *Ibid* at s 1(1).

²¹⁵ *Ibid* at s 11(1).

²¹⁶ *Ibid* at s 14(1).

²¹⁷ *Ibid* at s 14(2).

iii. Ontario

In *Doe 464533 v ND*²¹⁸ the Ontario Superior Court of Justice held that a woman whose ex-boyfriend posted an intimate video of her on a pornography website without her knowledge or consent was entitled to damages of \$100,000 (including aggravated and punitive damages), costs of over \$36,000, and an injunction to prevent him from repeating the conduct or from contacting her or her family.²¹⁹ Although this case was decided in Ontario, it could be a helpful precedent in other provinces and territories in Canada. The Court concluded that the defendant was liable for breach of confidence,²²⁰ intentional infliction of mental distress²²¹ and invasion of privacy (public disclosure of private facts). The Court also found that the ex-boyfriend had invaded Ms Doe's privacy by publicly disclosing her private life, because the act of publication would be highly offensive to a reasonable person and is not of legitimate concern to the public.²²²

iv. Supreme Court of Canada (SCC)

One of the key drawbacks to bringing a lawsuit in a cyberbullying or cyberviolence case is the risk that further publicizing attacks will potentially expose the person targeted to further victimization. Subject to a few limited exceptions, the open court principle requires that parties to a dispute have their names in public record. The open court principle also provides that there should be public access to court documents relating to a case.²²³ In 2012, the SCC mitigated the risk of revictimization through publicity for children targeted by sexualized cyberbullying in *AB v Bragg Communications Inc.*²²⁴

In that case, a 15-year-old girl had been the target of insulting and sexually explicit online attacks posted by a fake Facebook profile that used her picture, a slightly modified

²¹⁸ *Doe 464533 v ND*, 2016 ONSC 541.

²¹⁹ *Ibid* at para 1, 64-5, 69.

²²⁰ To prove breach of confidence, Ms Doe had to show that (i) the information that was used had a "necessary quality of confidence about it"; (ii) the information was initially shared in circumstances indicating an obligation of confidence (e.g. that it was not supposed to be shared with others); and (iii) there was unauthorized use of the information to Ms Doe's detriment, as she was the person who first communicated it to her ex-boyfriend: *Ibid* at 21.

²²¹ To prove intentional infliction of mental distress, Ms Doe had to show that the defendant's conduct was (i) flagrant and outrageous; (ii) calculated to produce harm; and (iii) resulted in visible and provable injury: *Ibid* at 26.

²²² The Court also held that invasion of privacy could be made out where the private facts publicized would themselves be highly offensive to a reasonable person and were not of concern to the general public: *Ibid* at 46.

²²³ See Jacqueline Burkell and Jane Bailey, "Revisiting presumptive accessibility: Reconceptualizing the open court principle in an era of online publication" [forthcoming, copy available from author].

²²⁴ *AB v Bragg Communications Inc*, 2012 SCC 46.

version of her name, and other identifying information. AB was unable to determine who had posted the profile, and she requested that the Nova Scotia Supreme Court (NSSC) order an internet service provider to disclose the subscriber information related to the account used to post the profile. At the same time, she also requested that the NSSC order a publication ban so that the details of her case would not be publicly reported.

Although AB lost her bid for the publication ban in the Nova Scotia courts, she was partially successful at the SCC. The SCC found that young victims of sexualized bullying are particularly vulnerable when their names are republished, and held that allowing them to use initials instead of their full names is necessary to ensure that they may come to the courts for remedies without fear of being revictimized in the press.

b. Defamation

Those targeted by untruthful attacks online may be able to recover damages for defamation. In *Lord Selkirk School Division v Warnock*, a school division and two teachers were awarded damages for false online postings about them made by a former student.²²⁵ To prove that they were defamed, the plaintiffs had to show that (i) the words spoken or written about them would tend to lower their reputations in the eyes of a reasonable person; (ii) the words in fact referred to them; and (iii) the words were communicated to another person.²²⁶

While not all cases of cyberbullying or cyberviolence involve *false* statements about the target, in situations where false statements are part of online attacks, a claim for defamation is a possibility. Once defamation is proven, damages are presumed, and can be increased by aggravating circumstances. In the context of internet defamation, aggravating circumstances include recognition of the “ubiquity, universality, and utility of that medium.”²²⁷ In addition, where there has been an “ongoing campaign of defamation and a likelihood that it will continue,” an ongoing order prohibiting further publication can be made.²²⁸

c. Copyright

Subject to certain exceptions,²²⁹ distributing of a copy of another person’s original work²³⁰ without their consent can infringe their copyright,²³¹ subjecting the distributor to liability

²²⁵ *Lord Selkirk School Division v Warnock*, 2015 MBQB 195.

²²⁶ *Ibid* at para 37.

²²⁷ *Ibid* at para 42, citing *Awan v Levant*, 2014 ONSC 6890 at para 193.

²²⁸ *St Lewis v Rancourt*, 2015 ONCA 513 at para 16.

²²⁹ Exceptions include fair dealing with the purposes of research, private study, education parody or satire: *Copyright Act*, RSC 1985, c C-42, s 29.

²³⁰ The original works covered by copyright include dramatic, musical and artistic works of authors who are citizens of a treaty country: *Ibid*, s 5(1).

²³¹ *Ibid*, s 27(1).

under the *Copyright Act*²³² which applies across Canada. The individual whose copyright is infringed may be entitled to orders enjoining the infringer from continuing to infringe, and damages, among other things.²³³ A person whose copyright is infringed may also choose to receive statutory damages of \$5000-\$20000 for commercial infringements and \$100-\$5000 for non-commercial infringements.²³⁴

Where cyberbullying or cyberviolence involves distribution of a copy of an original work by the person targeted (for example, a photo that an individual took of themselves), that person may be able to sue and recover for copyright infringement.

d. Torts of cyberbullying and non-consensual distribution

i. Nova Scotia

In 2013, following the suicide of Canadian teen Rehtaeh Parsons,²³⁵ Nova Scotia enacted the *Cyber-safety Act*²³⁶ to address and prevent cyberbullying. Section 3(1)(b) of the *Act* defined “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.²³⁷

Under the *Act*, those who engaged in cyberbullying as defined could, among other things, be sued in court for damages. If the attacker was a minor, his or her parents could also be held responsible for any damages awarded, unless the parents could show they had appropriately supervised their child and had reasonably tried to discourage their child from engaging in that behaviour.²³⁸ Online attackers could also be subjected to protection orders issued by a court that could, among other things, prohibit the attacker from continuing to cyberbully, restrict them from contacting the target, subject them to

²³² *Ibid*, s 34(1).

²³³ *Ibid*.

²³⁴ *Ibid* at s 38.1.

²³⁵ Rehtaeh Parsons died following a suicide attempt after being harassed when a photograph depicting her being sexually assaulted was circulated online: CBC News *supra* note 21.

²³⁶ *Cyber-safety Act*, *supra* note 133.

²³⁷ *Ibid*, s 3(1)(b).

²³⁸ *Ibid*, ss 21 and 22.

confiscation of their electronic devices, and/or prohibit them from communicating electronically.²³⁹

The *Act* was not restricted to protecting minors from cyber attacks and was ultimately struck down as unconstitutional in 2015. In *Crouch v Snell*, a case involving two adult men who were former business partners,²⁴⁰ the court found that the *Act*'s definition of cyberbullying was too broad and therefore unduly restricted freedom of expression under s 2(b)²⁴¹ and threatened individuals' liberty contrary to s 7²⁴² of the Canadian *Charter of Rights and Freedoms*.²⁴³

ii. Manitoba

In Manitoba, a private member's bill that proposed introducing parallel legislation in Manitoba in 2012-2013 is no longer being proceeded with following the *Crouch* decision described above.²⁴⁴ Instead, Manitoba has taken a different approach by creating a tort of non-consensual distribution of intimate images. Under the *Intimate Image Protection Act*, "a person who distributes an intimate image of another person knowing that the person depicted in the image did not consent to the distribution, or being reckless as to whether or not that person consented to the distribution, commits a tort against that other person" and can be sued without having to prove that they suffered damage.²⁴⁵ If a claim is successful, a court can, among other things, order the defendant to pay damages to the plaintiff, account to the plaintiff for any profits they made as a result of the non-consensual distribution, and issue an injunction to stop the defendant from distribution.²⁴⁶ The *Act* also empowers the court to make an order prohibiting publication of the name of the plaintiff or any information that might identify them.²⁴⁷

e. Negligence

Students targeted by bullying may also be able to bring civil lawsuits against schools and

²³⁹ *Ibid*, s 8.

²⁴⁰ *Crouch v Snell*, 2015 NSSC 340.

²⁴¹ *Ibid* at para 187.

²⁴² *Ibid* at para 205.

²⁴³ *Charter*, *supra* note 40, s 7.

²⁴⁴ Bill 214, *The Cyberbullying Prevention Act*, 2nd Sess, 40th Leg, Manitoba, 10 July 2013 (subsequently reintroduced as Bill 206, *The Cyberbullying Prevention Act*, 3rd Sess, 40th Leg, Manitoba, 10 October 2014; as Bill 204, *The Cyberbullying Prevention Act*, 4th Sess, 40th Leg, Manitoba, 3 December 2014; and as Bill 204, *The Cyberbullying Prevention Act*, 5th Sess, 40th Leg, Manitoba, 25 February 2016.)

²⁴⁵ *Intimate Image Protection Act*, *supra* note 213, s 11(1). This language parallels the crime of non-consensual distribution found in s 163.1 of the *Criminal Code* which is discussed in E. below.

²⁴⁶ *Ibid*, s 14(1).

²⁴⁷ *Ibid*, s 15.

school boards that negligently handle their complaints. To prove negligence, the student plaintiff must show, among other things, that his or her school authorities failed to meet the appropriate standard of care: that of a reasonably prudent parent.²⁴⁸ To be successful, the plaintiff must also show, on a balance of probabilities, that he or she would not have suffered loss “but-for” the school or school board’s negligence.²⁴⁹

In 2012, Vania Karam and her teenage son Winston brought a negligence lawsuit against the Ottawa-Carleton District School Board for failing to take action following several serious bullying incidents.²⁵⁰ Winston Karam, then twelve years old, was assaulted, repeatedly choked, and targeted with racial slurs by two other young boys at Broadview Public School.²⁵¹ After months of torment, and despite repeated complaints to school administrators, Karam suffered a panic attack in class and eventually withdrew from the school. At trial, the Ontario Superior Court of Justice held that Winston had been bullied, but did not find that the school had inadequately supervised his attackers.²⁵² In a 2016 appeal, however, the Court found that the school board had breached the standard of care owed to Karam,²⁵³ and ordered the school board to pay \$3000 in damages (to cover costs of homeschooling and self-defence training). In a similar Australian negligence case, a bullied student was awarded over \$100,000 in damages after her school failed to uphold its anti-bullying policies and intervene when she was bullied.²⁵⁴

D. Regulatory/Administrative Law

a. Privacy commissioners

A number of privacy commissioners in Canada have become active on the issue of cyberbullying and online reputational harms, providing educational and outreach materials for members of the public.²⁵⁵ At the federal level, the Office of the Privacy

²⁴⁸ *Myers v Peel County Board of Education*, [1981] 2 SCR 21 at 31; *Karam v Ottawa-Carleton District School Board*, 2014 OJ No 2966 at para 1 [*Karam*].

²⁴⁹ *Clements v Clements*, 2012 SCC 32 at para 46.

²⁵⁰ *Karam*, *supra* note 248.

²⁵¹ *Ibid* at para 37; Mike De Souza, “His Ottawa School Failed to Prevent Racist Bullying. Then They Blamed Him.” *National Observer* (21 July 2016), online: <www.nationalobserver.com/2016/07/21/his-ottawa-school-failed-stop-racist-bullying-then-they-blamed-him>.

²⁵² *Karam*, *supra* note 248 at paras 51-52.

²⁵³ Trevor Pritchard, “Family wins lawsuit over claims school board ignored son’s bullying”, *CBC News* (22 July 2016), online: <www.cbc.ca/news/canada/ottawa/winston-vania-karam-bullying-ocdsb-broadview-1.3691086>.

²⁵⁴ *Oyston v St Patricks College*, [2013] NSWCA 135.

²⁵⁵ See e.g. Office of the Information and Privacy Commissioner of British Columbia & Representative for Children and Youth, *Cyberbullying: Empowering children and youth to be safe online and responsible digital citizens* (November 2015), online: <<https://www.oipc.bc.ca/special-reports/1882>>.

Commissioner of Canada (OPC) has dealt with complaints related to impersonation and non-consensual distribution of intimate images.²⁵⁶

Under the *Personal Information Protection and Electronic Documents Act (PIPEDA)*,²⁵⁷ the OPC oversees private sector organizations' compliance with rules that generally prohibit them from collecting, using, or disclosing personal information without consent, unless an exception to those restrictions applies.²⁵⁸ *PIPEDA* also gives individuals a right to access and ask for corrections to personal information that an organization has collected about them, and to file a complaint with the OPC if they believe the organization is not abiding by its responsibilities under the *Act*.²⁵⁹ However, these OPC powers are limited to organizations engaged in commercial activity, and to situations where there is a "real and substantial" connection to Canada, which may not always be the case if the organization is outside of Canada.²⁶⁰ If the OPC has jurisdiction, they can request that the organization (such as a social media provider like Facebook) remove content, although it may also have been posted or re-posted in other places online.

- b. Specialized cyberbullying investigatory/support units
 - i. Manitoba

Under the *Intimate Image Protection Act*,²⁶¹ the Canadian Centre for Child Protection (C3P) has been designated as an agency to assist Manitobans victimized by non-consensual distribution of intimate images. C3P may get involved with respect to removing and deleting images, contacting individuals who distributed an intimate image (or their parents), and engaging the police if appropriate.²⁶² C3P is authorized to act both with respect to actual and threatened distributions of images where the victim is identifiable and nude, or engaged in sexual activity and had a reasonable expectation of

²⁵⁶ Office of the Privacy Commissioner of Canada, "Online Reputation: What are they saying about me?", Discussion Paper (January 2016), online: <https://www.priv.gc.ca/information/research-recherche/2016/or_201601_e.asp#heading-0-0-6> [OPC]. Similar provisions in provincial and territorial privacy legislation may also empower information and privacy commissioners to intervene in similar ways within their own jurisdictions.

²⁵⁷ *Personal Information Protection and Electronic Documents Act*, SC 2000, c 5 [PIPEDA].

²⁵⁸ OPC, *supra* note 256 at 7.

²⁵⁹ *Ibid* at 6.

²⁶⁰ *Ibid*.

²⁶¹ *Intimate Image Protection Act*, *supra* note 213, ss 3-4.

²⁶² *Ibid*, ss 3-4; Manitoba, "Province Announces New Law in Force Helps Victims of Revenge Porn, Unwanted Distribution of Sexual Pictures" (18 January 2016), online: <news.gov.mb.ca/news/index.html?item=37330> [Manitoba, "New Law"].

privacy at the time the image was created. The agency can also address situations where others receive and distribute such images without consent.²⁶³

ii. Nova Scotia

In 2013, Nova Scotia created its CyberSCAN Investigation Unit, in tandem with the *Cyber-safety Act*²⁶⁴ that, as noted above, was eventually struck down as unconstitutional. Originally, the Unit investigated complaints of cyberbullying as defined under the *Act*, including complaints of harassment or threats. Following the demise of the *Act*, the Unit now focuses on education and public awareness, but will continue to provide advice and “redirect [...] cases to the appropriate authority or agency for help.” The Unit will immediately refer all cases involving criminal behaviour to the police, although its website cautions that “[p]olice will not deal with cyberbullying unless it has a criminal element.”²⁶⁵

E. Criminal Law

Criminal prosecutions are possible responses to behaviours that are most accurately referred to as forms of cyberviolence, rather than cyberbullying. However, the burden of proof in criminal cases is high (“beyond a reasonable doubt”) and the case is controlled by the Crown, rather than by the person who was targeted or their families. Being a complainant and a witness in a criminal case can be a difficult process, especially in cases involving sexual VAWG.²⁶⁶

A variety of criminal offences may apply to particular instances of cyberviolence, depending on the circumstances involved. All carry with them the possibility of imprisonment upon conviction, although the potential lengths of imprisonment vary from offence to offence. Ultimately, the sentence imposed will be based on an assessment of the circumstances, including mitigating and aggravating factors, unless the offence is one where a mandatory prison sentence is imposed (e.g. for child pornography offences).

²⁶³ *Ibid* to Manitoba, “New Law”.

²⁶⁴ *Cyber-safety Act*, *supra* note 133.

²⁶⁵ Nova Scotia, *CyberSCAN*, online: <<http://cyberscan.novascotia.ca>>.

²⁶⁶ See e.g. SAN Ottawa, *The Ottawa Sexual Assault Protocol* (revised May 2012), at 30, online: <www.sanottawa.com/sites/default/files/pdf/SAN_ProtocolReport_En_Final.pdf> (for a description of some of these procedures); Holly Johnson, “Limits of a Criminal Justice Response: Trends in Police and Court Processing of Sexual Assault” in Elizabeth A Sheehy, ed, *Sexual Assault in Canada: Law, Legal Practice and Women’s Activism* (Ottawa: University of Ottawa Press, 2012) 613 at 626.

a. Online hate propagation

Criminal law responses to hate propagation predated the arrival of vitriolic attacks via the internet, although hate propagation provisions of the *Criminal Code*²⁶⁷ have been modified in response to internet-related developments. Three *Criminal Code* provisions relate specifically to hate propagation:

1. *advocating genocide* of a section of the public identifiable on the basis of certain grounds, including colour, race, religion, ethnic origin, sex, sexual orientation, mental or physical disability (punishable by up to 5 years in prison);²⁶⁸
2. *publicly inciting hatred* against an identifiable group in a way that is likely to lead to breach of the peace (punishable by up to 2 years in prison);²⁶⁹
3. *publicly communicating statements willfully promoting hatred* against an identifiable group (subject to defences of good faith, truth and others) (punishable by up to 2 years in prison).²⁷⁰

After the events of 9/11, the *Criminal Code* was amended to allow judges to order seizure of computer systems making hate publicly available, and to order deletion of hateful content from seized systems.²⁷¹

The number of criminal law prosecutions and the impacts of criminal law responses to hate propagation are limited by, among other things, the high threshold to be met (proof beyond a reasonable doubt), and the requirement to obtain Attorney General approval in order to prosecute.²⁷² As a result, relatively few cases of online hate propagation are prosecuted.

b. Criminal harassment

It is a crime under s 264 of the *Criminal Code* to knowingly harass another person (or be reckless as to whether they are harassed) by, among other things, (i) directly or indirectly communicating with that person, or anyone they know, repeatedly, and/or (ii) engaging in threatening conduct toward that person, or any member of their family, where doing so causes the other person to reasonably fear for their safety or the safety of anyone known to them.²⁷³

²⁶⁷ *Criminal Code*, RSC 1985 c C-46.

²⁶⁸ *Ibid*, s 318(1).

²⁶⁹ *Ibid*, s 319(1).

²⁷⁰ *Ibid*, s 319(2).

²⁷¹ *Ibid*, s 320(1).

²⁷² *Ibid*, s 320(7). See e.g. Bailey, “Twenty Years Later” *supra* note 33 at 371 fn 128.

²⁷³ *Code supra* note 267, s 264. See e.g. *R v Hassan*, 2009 CarswellOnt 1811, 83 WCB (2d) 34 (man found not guilty of harassment after distributing nude photos of his ex-girlfriend); *R v Elliott*, 2016 ONCJ 35 (accused found not guilty of harassment for statements made on Twitter); *R v BLA*, 2015 BCPC 203 (teen pled guilty to nine charges

c. Uttering threats

It is a crime under s 264.1 of the *Criminal Code* to in any manner knowingly utter, convey or cause any person to receive a threat to cause death or bodily harm to that person; to burn, destroy or damage real or personal property; or to kill, poison or injure an animal or bird that is the property of that person.²⁷⁴

d. Intimidation

It is a crime under s 423(1) of the *Criminal Code* to, among other things, use threats of violence or violence against another person for the purpose of compelling that other person to do something they have the lawful right not to do or to refrain from doing something they have the lawful right to do.²⁷⁵

e. Defamatory libel and extortion by libel

It is a crime under s. 298-299 of the *Criminal Code* to, among other things, publicly exhibit or cause to be read or seen without lawful justification or excuse any matter that is likely to injure a person's reputation by exposing them to hatred, contempt or ridicule or that is designed to insult the person about who the matter is published.²⁷⁶ If the matter published is known to be false, a higher punishment is available.²⁷⁷

of criminal harassment, among other things, after pursuing female video gamers, posting their addresses and personal information online, and sending SWAT teams to their homes); *R v Fader*, 2014 BCPC 327 (man pled guilty to harassment after breaking into his former partner's home, stealing devices he knew contained sexually explicit images and videos, and distributing those images to the victim's coworkers and family); *R v Kapoor*, 2012 ABPC 299 (man pled guilty to harassment after repeatedly making graphic and violent phone calls to his ex-girlfriend).

²⁷⁴ *Code, ibid*, s 264.1. See e.g. *R v LeSeelleur*, 2014 QCCQ 12216 (young woman found guilty of uttering threats after posting a Twitter message threatening to "bomb" then-Quebec Premier Pauline Marois).

²⁷⁵ *Code, ibid*, s 423(1). See e.g. *R v Samir*, 152 AR 309, 23 WCB (2d) 184 (man found not guilty of intimidation after following a woman on the street for ten minutes, making sexual advances, and twice blocking her path with his car).

²⁷⁶ *Code, ibid*, s 298-299. See e.g. *R v Simoes*, 2014 ONCA 144 (Ottawa restaurant owner found guilty of defamatory libel for online attacks targeting a customer who had posted negative restaurant reviews online).

²⁷⁷ *Code, ibid*, s 300. See e.g. *R v Maurer*, 2015 SKQB 175 (accused found not guilty of mischief in relation to data after recovering and disseminating nude images found while repairing the victim's computer).

f. Assault

It is a crime under s 265 of the *Criminal Code* to, among other things, threaten to apply force to another person without their consent, if you have or cause that other person to reasonably believe you have the present ability to carry out the threat.²⁷⁸

g. Mischief in relation to data

It is a crime under s. 430(1.1) of the *Criminal Code* to willfully: destroy or alter computer data; render computer data meaningless, useless or ineffective; obstruct, interrupt or interfere with lawful use of computer data; or to obstruct, interrupt or interfere with a person in the lawful use of computer data or deny access to computer data to a person who is entitled to access to it.²⁷⁹

h. Unauthorized use of a computer

It is a crime under s 342.1 of the *Criminal Code* to, among other things, fraudulently and without colour of right intercept or cause to be intercepted any function of a computer system; use a computer system to attempt to intercept a function of a computer system; or possess or traffick in a computer password that would allow someone else to carry out either of the previously mentioned activities.²⁸⁰

i. Identity fraud

It is a crime under s 403 of the *Criminal Code* to fraudulently impersonate another person (for example, by pretending to be them or by using their identity information as if it pertains to you) with intent to (i) gain advantage for yourself or another person; (ii) obtain property or an interest in property; (iii) cause disadvantage to the person being

²⁷⁸ *Code, ibid*, s 265. See e.g. *R v JD*, 2015 ONCJ 550 (two teens pled guilty to assault after violently beating a fellow student at school and taking a cell phone video of the assault).

²⁷⁹ *Code, ibid*, s 430(1.1). See e.g. *R v Charania*, 2012 ONCJ 637 (nursing home employee found guilty of mischief in relation to data after using his laptop computer to remotely access another employee's email account).

²⁸⁰ *Code, ibid*, s 342.1. See e.g. *Maurer, supra* note 277; *R c St-Martin*, 2012 QCCQ 575 (police captain found guilty of unauthorized use of a computer after using a police computer system to, among other things, search for information about an ex-spouse). Notorious revenge porn website operator Hunter Moore was charged in the United States for offences similar to those in provided in this section: LEAF #Cybermisogyny Report, *supra* note 18 at 21.

impersonated; or (iv) with intent to avoid prosecution or to obstruct the course of justice.²⁸¹

j. Extortion

It is a crime under s 346 of the *Criminal Code* to, without reasonable justification or excuse and with intent to obtain anything, threaten, accuse, menace, or use violence to induce or attempt to induce another person (whether or not they are the person threatened) to do anything or cause anything to be done.²⁸²

k. False messages, indecent or harassing phone calls

It is a crime under s 372 (1) of the *Criminal Code* to, with intent to injure or alarm a person, convey information you know is false or cause such information to be conveyed by letter or any means of telecommunication. It is also a crime under s 372(2) to, with intent to alarm or annoy another person, make an indecent communication to that person or any other person by means of telecommunication. Further, it is a crime under s 372(3) to, without lawful excuse and with intent to harass a person, repeatedly communicate or cause repeated communications to be made by means of telecommunication.²⁸³

l. Child pornography

It is a crime under s 163.1 of the *Criminal Code* to, among other things, possess, transmit, make available or distribute or possess for these purposes, a photo, film or other visual representation showing, among other things, a person who is under 18 and engaged or depicted as engaged in a sex act or the dominant characteristic of which is to depict for a sexual purpose a sexual organ or the anal region of a person under 18.²⁸⁴ Those convicted

²⁸¹ *Code, ibid*, s 403. See e.g. *R v Mackie*, 2013 ABPC 116 (man pled guilty to three counts of fraud, among other things, for hijacking the social media accounts of his child victims and impersonating them to solicit nude photos from other children).

²⁸² *Code, ibid*, s 346. See e.g. *BLA supra* note 273; *R v Walls*, 2012 ONCJ 835 (accused had shared nude webcam images with his long distance ex-girlfriend, claimed to have saved some of them, and threatened to disseminate images unless she had sex with him again).

²⁸³ *Code, ibid*, s 372. See e.g. *R v Howse* [2015], 124 WCB (2d) 78, 370 Nfld & PEIR 235 (man sentenced to a conditional discharge with twelve months probation after making repeated phone calls to his ex-wife); *R v Kelly* [2015], NJ No 111, 364 Nfld & PEIR 202 (police officer sentenced to ten months in jail for using his RCMP cell phone to make an indecent phone call to a woman he had seen on the street).

²⁸⁴ *Code, ibid*, ss 163.1(1), (2), (3), (4). See e.g. *R v Sharpe*, 2001 SCC 2 (holding that restrictions on child pornography constitute a violation of freedom of expression which is nonetheless justified in a free and democratic society); *R v Barabash*, 2015 SCC 29 (holding that the private use exception established in *Sharpe* cannot be used as defence when sexual activity depicted is unlawful for being exploitative).

of child pornography offences are subject to mandatory minimum sentences of imprisonment,²⁸⁵ although these mandatory minimums tend not to be applied to youthful offenders who are themselves under 18.

m. Non-consensual distribution of intimate images

It is a crime under s 162.1 of the *Criminal Code* to knowingly publish, transmit, sell, make available or advertise an intimate image of a person knowing the person depicted in the image did not give consent to that conduct or being reckless as to whether that person consented.²⁸⁶ “Intimate image” is defined as a visual recording of a person made by any means, where (i) the person is nude, exposing their genital organs or anal region or breasts or is engaged in explicit sexual activity; (ii) in respect of which, at the time of the recording, there were circumstances giving rise to a reasonable expectation of privacy; and (iii) in respect of which the person retains a reasonable expectation of privacy at the time the offence is committed.²⁸⁷ It is a defence to the charge if the distribution serves the public good.²⁸⁸

Upon conviction, in addition to the possibility of imprisonment, the court can prohibit the offender from using the internet.²⁸⁹ Further, as is the case with child pornography, the court can make a variety of orders with respect to seizure, forfeiture, and disposal of intimate images covered by the provision.²⁹⁰

CONCLUSION

In Canada, the breadth of behaviours and effects associated with conduct that falls within the umbrella of terms such as “cyberbullying,” online hate propagation, and cyberviolence can and have been addressed with an equally broad array of legal and policy responses.

- Human rights law responses may be particularly appropriate for online attacks grounded in prejudices against equality-seeking groups, but claims can only be initiated against those providing public services.
- Education law and policy responses in all 13 provinces and territories address cyberbullying and cyberviolence to varying degrees, often combining both

²⁸⁵ *Code, ibid.*

²⁸⁶ *Code, ibid.*, s 162.1. See e.g. Winnipeg Free Press, “Winnipeg man jailed for posting nude photos of ex on Facebook” (23 March 2016), <<https://www.thestar.com/news/canada/2016/03/23/winnipeg-man-jailed-for-posting-revenge-porn-photos-of-ex-on-facebook.html>>.

²⁸⁷ *Code, ibid.*, s 162.1(2).

²⁸⁸ *Ibid.*, s 162.1(3).

²⁸⁹ *Ibid.*, s 162.2(1).

²⁹⁰ *Ibid.*, s 164, 164.1, 164.2.

reactive punitive responses with more proactive initiatives aimed at addressing underlying problems such as homophobia. In the education area, Newfoundland has recently developed a particularly comprehensive approach.

- Civil litigation responses include lawsuits for invasion of privacy (BC and Ontario), non-consensual distribution of intimate images (Manitoba), defamation, and copyright infringement. Nova Scotia's attempt to create a tort of cyberbullying was recently struck down as unconstitutional. The Supreme Court of Canada has meaningfully contributed to civil litigation responses by making it easier for young victims of sexualized cyberbullying to proceed with their cases using pseudonyms to protect them from further publicity and exposure. However, from a practical perspective, bringing a civil claim can be quite time consuming, slow, and expensive. If a civil claim succeeds, however, the victim may be entitled to money damages, an injunction against further targeting, and to have the attacker reimburse them for a portion of their legal costs.
- Regulatory agencies can also play a role in responding to cyberbullying and cyberviolence. For example, privacy commissioners may be helpful in addressing online attacks that involve misuse of personal data by those involved in commercial undertakings. Further, specialized units have been set up in Manitoba (for non-consensual distribution of intimate images) and in Nova Scotia (for cyberbullying) to assist those targeted.
- Criminal law responses may also be applicable to a variety of behaviours that can be referred to as cyberbullying or cyberviolence, including prohibitions on online hate propagation (for targeting groups and individuals based on identity factors such as race, gender, etc.), criminal harassment, uttering threats, intimidation, defamatory libel, assault, mischief relating to data, unauthorized use of a computer, identity fraud, extortion, false messages, indecent or harassing phone calls, child pornography (in relation to sexual images of those under 18), and non-consensual distribution of intimate images. However, criminal law responses are often reserved for extreme situations and require proof beyond a reasonable doubt before an attacker can be convicted. While the person targeted does not have to hire their own lawyer, the Crown lawyer responsible for the case acts on behalf of the public and not the individual victim.

Meaningfully responding to cyberbullying and cyberviolence demands a multi-pronged approach that can address underlying issues of discrimination when and where they arise, while also holding individuals accountable for their actions and the harms they cause in a reasonable way. Research suggests that where young people are concerned, proactive educational responses aimed at developing greater respect for diversity and human rights, enhanced development of digital ethics, and improved understanding of healthy and

respectful relationships are more likely to promote positive long term change than are reactionary, punitive approaches.²⁹¹

²⁹¹ See e.g. Shaheen Shariff, *Sexting and Cyberbullying: Defining the Line for Digitally Empowered Kids* (Cambridge: Cambridge University Press, 2015).