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Nova Scotia Legislature – Law Amendments Committee
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Honourable Members:

Thank you for the opportunity to provide my views on Bill 27, the *Intimate Images and Cyber-protection Act*.

I am a lawyer with McInnes Cooper whose practice is focused on internet and privacy law matters. I need to emphasise from the outset that these are my own personal and professional comments, and do not necessarily represent the views of my firm, its clients or any other organizations with which I am associated. I have been practicing in this area of law for over fifteen years. In this context, I am perhaps best known as being a vocal critic of the *Cyber-Safety Act* and being the lawyer who argued in Court that the old Act was unconstitutional.

If I could first comment on a matter of process, I am disappointed that I am not able to appear before the committee and answer any questions you may have. When this bill was first considered on October 16, 2017, I had less than one business day's notice of the hearing and was scheduled to be out of town. I was then advised on Thursday, October 19 that the Bill would again be before the committee on Monday, October 23. That's one and a half day's notice and I will again be out of town on Monday. If the government were serious about getting this right, surely it would make it easier for experts to appear on the Bill. I am sure the Committee would benefit from testimony from Canadian Civil Liberties Association or the Canadian Bar Association, but these organizations can't just drop tools, consult with their stakeholders and develop a coherent and helpful position with that kind of notice. I can name at least five people who have immense expertise in the field of civil rights, cyberbullying, restorative justice and youth suicide who this Committee and Nova Scotians should hear from, but none will have a chance to provide their well-informed and expert views. I do not know if this

is peculiar to this bill, but it certainly was the case with the original *Cyber-Safety Act* and Nova Scotians have suffered as a result.

In the meantime, the government has had a number of targeted consultations. I did meet with Justice officials to provide my views, with the final meeting commenting on a draft of the bill. I had some misgivings then which I will share with you today.

While the law was formally and officially declared unconstitutional on December 10, 2015, it was unconstitutional on the day it was introduced on April 25, 2013, fewer than three weeks after the tragic death of Rehtaeh Parsons.

I stood up in court and called the *Cyber-Safety Act* a "dumpster fire". Justice McDougall called it, much more politely, a "colossal failure" as far as the *Charter* is concerned.

I argued, and the Court agreed, that the law had two principal failures. The first was that the definition of "cyberbullying" was far, far too broad and would include anything that could hurt someone's feelings (including legitimate, political speech). The second failure was that a complainant could get a protection order without the alleged cyberbully ever having an opportunity to defend themselves. The justice of the peace would make a decision on the basis of only hearing one side of the case. And the first that the respondent would hear of it would be when a police officer would show up at their house -- usually at night -- and serve them with the order.

Both of these issues have been addressed in the new Bill. The definition of "cyberbullying" raises the bar much, much higher. It may be too high, by requiring "malice", but it does capture communications that are intended to harm the victim. The issue of procedural fairness has certainly been addressed, but I am afraid the pendulum may have swung too far the other way.

The way the Bill sets it out, a victim of cyberbullying has only one option: to commence an application in the Supreme Court of Nova Scotia following the Nova Scotia *Civil Procedure Rules*. I have 100% confidence in the fairness of a judge of the Supreme Court and the court's processes. But forcing a victim of cyberbullying to start a conventional lawsuit will represent a huge barrier to access to justice.

What I am saying is completely contrary to my own pecuniary self interests. I am a lawyer who practices law in this area. My law partners much prefer that I charge clients for my time and for my services. While we have a great *pro bono* program -- I think it's one of the best in the country of any law firm that I am familiar with -- I am not able to take on the cases of all victims of cyberbullying. To my knowledge, none of these proceedings would fall within the scope of Nova Scotia Legal Aid.

Going to the Supreme Court requires that a victim understand and follow the *Civil Procedure Rules*. They'll have to read and understand Rules 4, 5, and 6. They have to prepare a notice of application in court and an affidavit, all according to the rules. They'll have to hire a process server to serve the documents on the respondent. They likely have to be in court across from their tormentor to schedule the next steps and the court

hearing. They get a written affidavit from the respondent. They can then maybe file another response affidavit. They can maybe cross-examine the respondent outside of Court, assuming they are in a position to pay a court reporting service to transcribe the cross-examination on an expedited basis. Then they have to file their brief. And then they have their day in Court, except they never get to directly tell a judge their story. They don't get to testify on their own behalf, since their testimony is only in their affidavit.

I would expect it would cost at least $10,000 for me to represent an applicant in this process. That is daunting. But what's equally daunting is the prospect of a traumatized cyberbullying victim having to find, understand and precisely follow, the *Civil Procedure Rules*. That greatly troubles me and I think it should trouble you.

The legislature should seriously consider a different approach. I do not think I have all the answers, but I would suggest that the legislature should consider a less formal approach that still preserves the procedural fairness that was lacking in the old *Cyber-safety Act*. While the current procedure for a peace bond is not without its shortcomings, there should be a procedure through which an applicant can go to court and tell their story. The respondent has the same right to know what is being alleged, to appear, to present their story and possible justification. If neither adduced evidence about some of the essential factors to be considered under the *Act*, the judge can ask them questions. And a decision follows. This can be before the Supreme Court of Nova Scotia or a judge of the Provincial Court.

I do agree with sidelining the CyberSCAN unit from enforcement of the law. In my experience and in my opinion, they were the wrong tool for the job. While perhaps not representative of all the people with whom they interacted, I consistently heard from and about people whose political or legitimate *Charter*-protected speech was removed from the internet because members of CyberSCAN bullied the people into removing it under threat of unspecified "legal action" that could include removing their internet access. It may have been a matter of who they hired for the role or how they were led, but the CyberSCAN unit was part and parcel of the speech suppression that the law represented. When I asked Roger Merrick how the CyberSCAN unit took the *Charter* into account in doing their jobs, I was told that the legislature took it into account when the bill was passed by this House. That was clearly incorrect.

I do think the CyberSCAN unit or some replacement of it could go good things. Education and awareness are important. Providing support to victims is important. I am sure that victims will need a lot of help in figuring out how to have their day in court, and CyberSCAN can be a resource for that.

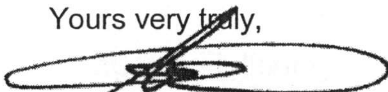
One final concern that I have is that the legislation says that if the victim is a minor, their parent or guardian has to commence the application on their behalf. There should be a mechanism by which a minor can do this on their own. First of all, there may be a case related to intimate images where the minor does not want to tell their parents. Secondly, I can imagine a scenario where the parent is either the perpetrator or is unwilling to help

the child. Some safeguard needs to be in place to give a child direct access to the courts.

I do want to take the opportunity to praise the manner in which the non-consensual distribution of intimate images is treated in the statute. By separating this from the definition of cyberbullying, it will effectively shield this from being struck down if the conventional cyberbullying aspect is found to be unconstitutional.

Again, I regret that there was not enough notice for me to appear in person and answer any questions by the Committee. However, I am easy to find and I would be pleased to discuss this important matter with any Committee members or their staffers.

Yours very truly,



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