



## Cyberbullying: a legal crisis in the age of technology

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### **Résumé**

Malgré le fait que l'intimidation ne soit pas un phénomène récent, celle-ci est passée à un tout autre niveau depuis les deux dernières décennies. Avec l'émergence et la prolifération des technologies de l'information, le cyberspace est devenu un nouveau terrain de jeu pour l'intimidateur, offrant une profusion de nouveaux outils pour nuire aux victimes. Au Canada, l'augmentation des suicides liés à la cyberintimidation a suscité un appel à l'examen de la criminalisation d'un tel comportement. Bien que la plupart des actes englobés dans la sphère de la cyberintimidation se retrouvent dans le *Code criminel* du Canada, la majorité de ces infractions existantes sont obsolètes, ou n'ont pas été intentionnellement créées pour faire face à la complexité du phénomène. Ceci suggère ainsi que l'état actuel du droit criminel canadien est mal adapté pour répondre à la réalité de la cyberintimidation. Bien que les modifications au *Code criminel* du Canada apportées par la *Loi sur la protection des Canadiens contre la cybercriminalité* aient soulevé des préoccupations concernant la protection des renseignements des citoyens, cet article soutient qu'elles permettent de lutter contre les actes graves de cyberintimidation, et feront en sorte de renforcer la réponse globale de la société à la cyberintimidation.

### **Abstract**

Although bullying is not a new occurrence, it has evolved into a whole different type of monster in the last couple of decades. With the emergence and proliferation of information technologies, the cyber world has become the bully's new playground and it serves up a profusion of new tools for harming victims. The increasing number of Canadian suicides linked to cyberbullying has prompted a call for the examination of the criminalisation of such behaviour. Although many of the acts encompassed within the sphere of cyberbullying can be found in the *Criminal Code* of Canada, the majority of these existing offences are outdated or were not intentionally created to deal with the complexities of the phenomenon, hinting that the current state of Canadian criminal law is ill-adapted to respond to it. Although concerns regarding citizens' informational privacy have been raised with the *Protecting Canadians from Online Crime Act's* proposed amendments to the *Criminal Code* of Canada, this article argues that, on balance, they are a positive step that targets the most egregious forms of cyberbullying and that they will strengthen the overall societal response to cyberbullying.

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## INTRODUCTION

It has been more than twenty years since the adoption of the United Nations' *Convention on the Rights of the Child*<sup>1</sup> in 1989; yet, to this day, countries struggle with one of the most significant threats to children. For years, states have concentrated on protecting children from physical and psychological prejudice caused by adult offenders, as it was recognized that children are often helpless in these situations. However, what has been brushed off, disregarded and underestimated for far too long is the damage that a child is capable of causing to another child. Teasing, taunting, name calling and insulting merely scratch the surface of the vicious phenomenon referred to as bullying. Although bullying is not a new occurrence, it has evolved into a whole different type of monster in the last couple of decades. With the emergence and proliferation of information technologies, the cyberworld has become the bully's new playground and it serves up a profusion of new tools for harming victims. The fact that the number of Canadian suicides linked to cyberbullying is rapidly increasing, has caused the old adage that "sticks and stones may break my bones but words will never hurt me" to be called into question. Growing concerns emanating from lawyers, parents, police, schools, teens and government policy-makers have prompted a call for the examination of the criminalisation of such behaviour. This article has three goals: to establish that cyberbullying is a distinct form of bullying with serious consequences; to point out that the current state of Canadian criminal law is ill-adapted to respond to cyberbullying; and, finally, to assess the strengths and weaknesses of the federal government's proposed amendments to the *Criminal Code*<sup>2</sup> found in the *Protecting Canadians from Online Crime Act*,<sup>3</sup> also referred to as Bill C-13. More specifically, I argue in this article that, on balance, Bill C-13 is a positive step that targets the most egregious forms of cyberbullying and that it will strengthen the overall societal response to cyberbullying.

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<sup>1</sup> [1992] T.S.C. no. 3 and 1577 T.S.N.U. 3.

<sup>2</sup> *Criminal Code* (R.S.C. 1985, c. C-46) (Cr.C.).

<sup>3</sup> Bill C-13, *Protecting Canadians from Online Crime Act*, 41<sup>st</sup> Parl., 2<sup>nd</sup> Sess., 2011, (Introduction and First Reading in the House of Commons 20 November 2013).

Before proceeding, it is important to make two distinctions regarding the direction and scope of the article. There is no contesting the fact that schools play an important role in the fight against cyberbullying and that they provide ample awareness as well as implement preventative programs. I mention this because some argue that criminalisation is not the answer, despite the fact that cyberbullying is negatively impacting on Canadian society. For some experts, like Dr. Shaheen Shariff, the general idea of criminalising cyberbullying is problematic. Dr. Shariff is a professor of education at the University of McGill who has become one of the nation's most respected authorities on cyberbullying. She is sceptical about the government's tough love approach and thinks that criminalisation will potentially do more damage to teens. Rather, Shariff believes that the answer to fighting cyberbullying lies in creating more awareness and properly educating youth.<sup>4</sup> More specifically, on her new website "Define the Line," Shariff strives to clarify the blurred lines between cyberbullying and digital citizenship, emphasizing the need to train youth to be more responsible online:

The challenge lies in helping youth come to their own recognition of ethical and legal boundaries when encountering negative forms of online information, and fostering leadership among all stakeholders, young and old, towards social responsibility and digital citizenship.<sup>5</sup>

Shariff's initiative stems from her research on the topic and her underlying belief in education and preventative measures. This belief is evident in the 2007 article she co-wrote with Dianne L. Hoff,<sup>6</sup> entitled "Cyber bullying: Clarifying Legal Boundaries for School Supervision in Cyberspace."<sup>7</sup> Shariff and Hoff argued that "initial judicial and school responses tacitly condone cyber bullying and perpetuate the problem [cyberbullying]."<sup>8</sup>

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<sup>4</sup> "Cyberbullying Laws Already Exist", *The Calgary Herald*, 13 July 2008, [www.canada.com/calgaryherald/news/theeditorialpage/story.html?id=f5493c36-fb20-4b3e-a8fa-cd73b5601c67](http://www.canada.com/calgaryherald/news/theeditorialpage/story.html?id=f5493c36-fb20-4b3e-a8fa-cd73b5601c67).

<sup>5</sup> Shaheen Shariff, "Definition of Digital Citizenship", January 2014, *Define the Line* [definetheline.ca/dtl/definition-of-digital-citizenship/](http://definetheline.ca/dtl/definition-of-digital-citizenship/).

<sup>6</sup> Dianne L. Hoff has written several peer-reviewed articles concerning the issue of cyberbullying and is a professor at the University of Maine's Education department.

<sup>7</sup> Shaheen Shariff and Dianne L. Hoff, "Cyber Bullying: Clarifying Legal Boundaries for School Supervision in Cyberspace" (2007) 1 No. 1 *IJCC* 76-118 [on line].

<sup>8</sup> *Id.*, 79.

Not only has this approach produced minimally effective results in her opinion, but it has also led to criminalising youth and adding a burden to the justice system.<sup>9</sup>

Luke Tryl, British politician, advisory member of the Anti-Bullying Alliance, gay rights activist, and author of “Education will beat bullying, not prison,” echoes Shariff and Hoff’s views and claims that research has indicated that the criminalisation of activities like bullying fails to serve as a deterrent to young people, who respond more to their surroundings than to adults. As a consequence, Tryl believes that laws such as Bill C-13 will make it even harder for young people to engage in society, as they will be labelled as criminals.<sup>10</sup>

Although the anti-criminalisation stance is a compelling one, I consider it to be somewhat utopian. In my opinion, without some sort of criminalisation, bullying has minimal consequences. I am uncomfortable with the idea of placing cyberbullying entirely in the hands of schools and preventative programs. The fact that the perpetrator of severe degrees of cyberbullying merely faces a suspension from school is not very reassuring. As I will suggest later on this article, I believe that bullying and cyberbullying need to be addressed in a much more comprehensive manner and by using a variety of resources and sectors.

Furthermore, when an individual is bullied and suffers prejudice due to the unacceptable behaviour of another person, there are two possible types of legal consequences that the perpetrator may face. The victim may seek damages through a civil liability suit against the bully, or, in the case of a youth, against the parents who are responsible for that youth. The second form of recourse against the perpetrator lies in the hands of the state. More specifically, in the situation where the victim would like to press charges, the police and Crown may require that the bully faces criminal repercussions. In this article, I will be analyzing and discussing the latter of these two types of responses and will, therefore, solely be dealing with the relationship between bullies and Canadian criminal law as opposed to civil liability legislation.

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<sup>9</sup> Id., 88.

<sup>10</sup> Luke Tryl, “Education Will Beat Bullying, Not Prison”, *Times Educational Supplement Magazine*, 9 August 2013, [www.tes.co.uk/article.aspx?storycode=6347190](http://www.tes.co.uk/article.aspx?storycode=6347190).

Now that the subject matter has been introduced and that the aim of the article has been established, the following paragraphs will be dedicated to the criminal charges that a cyberbully can be accused of in Canada. More specifically, the following section will define bullying and its new branch in the cyberworld, as well as put the issue into a Canadian context. Section III will hone in on the current way in which Canadian criminal law on cyberbullying is applied. Finally, a general overview and examination of Bill C-13, the *Protecting Canadians from Online Crime Act*, can be found in Section IV.

## **I. HISTORICAL BACKGROUND & EVOLUTION**

### **A. Definition**

#### *1. Bullying*

Throughout Canada there is an entire spectrum of methods for dealing with bullying, mainly because there is a variety of ways of defining and framing it. For quite some time, bullying was considered to take the very basic form of one child repeatedly physically harming another child. The scope of this simplistic type of definition has since been broadened, specified and refined. More recently, the Supreme Court of Canada referred to a Nova Scotia report for purposes of establishing a comprehensive definition.<sup>11</sup> The report, entitled *Respectful and Responsible Relationships: There's No App for That*, was created by a Task Force chaired by Professor Wayne Mackay. It defined bullying as:<sup>12</sup>

behaviour that is intended to cause, or should be known to cause, fear, intimidation, humiliation, distress or other forms of harm to another person's body, feelings, self-esteem, reputation or property. Bullying can be direct or indirect, and can take place by written, verbal, physical or electronic means, or any other form of expression.

This definition may seem to have a rather far-reaching and broad scope, but it is a necessary evil if all of the critical elements of bullying are to be addressed and considered. In addition, the fact that Supreme Court Justice Abella considers the definition to prevail

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<sup>11</sup>*A.B. v. Bragg Communications Inc.* (S.C. Can., 2012-09-27), 2012 SCC 46, SOQUIJ AZ-50897620, 2012EXP-3468, J.E. 2012-1858, [2012] 2 S.C.R. 567, para. 20.

<sup>12</sup> Nova Scotia Department of Justice, *Respectful and Responsible Relationships: There's No App for That*. Nova Scotia: Task Force on Bullying and Cyberbullying, 2012. P. 39-40 (Chair: Wayne MacKay).

over others is a good indication that the Task Force was successful in properly framing the term.

## 2. *Cyberbullying*

Because the focus of this paper is on cyberbullying, weight must be given to the term “electronic means” as set out in the Task Force’s definition. Cell phones, computers and the internet have all changed the way our world interacts. With the advancements in the telecommunication industry and the mastering of the smartphone, new applications not only diversify the possible means of networking, but also make today’s communication instantaneous. Cyberbullying encompasses all of the following types of technologies: text messaging; smartphone applications like SnapChat and Tinder; Social Networking platforms like Facebook, MySpace and Twitter; as well as e-mails and discussion forum posts. It is important to state that this list is by no means exhaustive, as the evolutionary nature of this discipline allows for new creations on a daily basis. Being ultra-connected has its obvious benefits but it also comes with a price, especially in the case of cyberbullying.

Although the core elements found in cyberbullying parallel those found in the more classic means of bullying, some characteristics are exclusive to the former and cause it to intensify. As will become apparent, not only do these particular features distinguish the cyberversion of bullying from its long existing archetype, but they also make its effects far more harmful.

The anonymity of cyberbullying essentially creates a protective veil for the perpetrator and often renders him or her unidentifiable to the victim. In a survey published in 2011 by Statistics Canada (please refer to Figure 1 in the Appendix), 21% of Canadian youth who had been victims of cyberbullying reported that they did not know the identity of their online bully.<sup>13</sup> Unlike the schoolyard bully who can be recognized and avoided, the unidentifiable online bully cannot be circumvented, nor can his or her attacks be predicted, leaving the victim in a constant state of anxiety and stress. Moreover, anonymity can have a disinhibiting effect on a bully’s behaviour. In their article entitled “Cyberbullying:

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<sup>13</sup> Samuel Perreault, *Self-Reported Internet Victimization in Canada, 2009*. Ottawa: StatCan, 2011. P. 11-12 Statistics Canada, [www.statcan.gc.ca/pub/85-002-x/2011001/article/11530-eng.pdf](http://www.statcan.gc.ca/pub/85-002-x/2011001/article/11530-eng.pdf).

Another main type of bullying?”,<sup>14</sup> psychology professors at the University of London and experts in the field of cyberbullying, Robert Slonje and Peter K. Smith explain how this effect distinguishes traditional bullying from its cyberderivative:<sup>15</sup>

Following on from this [invisibility and at times anonymity], compared to most traditional bullying, the person carrying out cyberbullying may be less aware or even unaware of the consequences caused by his or her actions. Without such direct feedback there may be fewer opportunities for empathy or remorse and there may also be less opportunity for bystander intervention.

Echoing this notion is Bill Belsey, Canadian politician and sought-after speaker and presenter on the topics of bullying, cyberbullying and technology integration. On 12 December 2011, The Standing Senate Committee on Human Rights<sup>16</sup> met to study the issue of cyber-bullying in Canada with regard to Canada's international human rights obligations under Article 19 of the *Convention on the Rights of the Child*. It was in front of this Committee that Belsey so effectively explained the articular characteristic of cyberbullying that was coined “disinhibition”:<sup>17</sup>

The second reason that cyber-bullying happens is what psychologists call “disinhibition.” You do not see the face of the person that you are hurting. Kids who are normally very nice, generally speaking, may do or say things online that they would never do in real life. Online, you do not see the face of the person you are hurting. That distance gives people a false sense of having a licence to say or do online whatever they want. They do not understand that although these are virtual worlds, there are real life consequences for them and for others.

As Slonje, Smith and Belsey suggest, this sense of detachment that cyberbullies benefit from while behind their computer screens allows for the potential of a greater degree of reprehensible behaviour compared to situations where they are face to face with their victim. As one Nova Scotia student who had suffered cyberbullying explained to the Task Force: “People become brave on Facebook; they become keyboard warriors.”<sup>18</sup>

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<sup>14</sup> Robert Slonje and Peter K. Smith. “Cyberbullying: Another Main Type of Bullying?”, (2008) 49 *Scandinavian Journal of Psychology* 147-154.

<sup>15</sup> *Id.*, 148.

<sup>16</sup> Canada, Senate, Standing Senate Committee on Human Rights, “Cyberbullying Hurts: Respect for Rights in the Digital Age”, *Parliament of Canada*, [www.parl.gc.ca/Content/SEN/Committee/411/ridr/rep/rep09dec12-e.pdf](http://www.parl.gc.ca/Content/SEN/Committee/411/ridr/rep/rep09dec12-e.pdf).

<sup>17</sup> *Id.*, 21.

<sup>18</sup> Nova Scotia, Department of Justice, *Respectful and Responsible Relationships: There's No App for That*. Nova Scotia: Task Force on Bullying and Cyberbullying, 2012. P. 34 (Chair: Wayne MacKay).

Another trait that is emblematic to cyberbullying cases is the unlimited access that the bully has to the victim.<sup>19</sup> Generally, bullying takes place in the hallway, locker rooms, classrooms or playgrounds of a school. The child is exposed to approximately eight hours a day where there is a possibility of being bullied. This restriction is completely lifted when it comes to cyberbullying as the perpetrator has access to the victim twenty-four hours a day, seven days a week. The bullying penetrates the youth's home, a place where he or she is supposed to feel safe and secure.

It is no surprise that with the rapid diffusion of information and the facility of communication comes an exponential increase in the number of spectators or bystanders in the digital realm. Whereas the bully of twenty years ago had an audience of ten to twenty kids, the cyberbully of today benefits from the potential of viewers from all around the globe. This, in turn, has the result of making the bullying all the more humiliating and embarrassing for the victim.

One starts to realize that the aforementioned 'price' that is being paid as a consequence of the increasingly connected world is that when used for the wrong purposes, technology can breed a new type of extremely damaging bullying.

### **B. Impacts, Consequences and Cases**

Bullying was brushed off by school officials using phrases like "boys will be boys" for quite some time in Canada. However, in the last five years interest has surfaced in bullying's negative impacts. Following several high profile suicides by adolescents who had been bullied, the media has amplified its coverage on bullying and its consequences. But awareness has also been due to other factors like the evolution of bullying itself. We hear about it on the news every day, mainly because its degree, frequency and consequences have also changed: they have all intensified. Trends in prevalence of general bullying over 12 years in North American and European countries were examined in a 2009 study entitled, "Cross-national time trends in bullying behaviour 1994-2006: findings from

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<sup>19</sup> Justin W. Patchin and Sameer Hinduja, «Bullies Move Beyond the Schoolyard: A Preliminary Look at Cyberbullying», (2006) 4 No. 2 *Youth Violence and Juvenile Justice* 148-169, 150: "This is no longer the case thanks to the increased prevalence of the Internet, personal computers, and cellular phones. Now, would-be bullies are afforded technology that provides additional mediums over which they can manifest their malice."

Europe and North America.”<sup>20</sup> While the researchers found consistent decreases in the prevalence of bullying between 1993 and 2005 in most countries, they did come across an interesting geographic pattern:<sup>21</sup>

Geographic patterns show consistent decreases in bullying in Western European countries and in most Eastern European countries. An increase or no change in prevalence was evident in almost all English speaking countries participating in the study (England, Scotland, Wales, Ireland and Canada, but not in the USA).

However, when examining the relationship between cyberbullying and suicide, John C. LeBlanc, a professor of the psychology department at Dalhousie University, conducted an interesting study entitled “Cyberbullying and Suicide: A Retrospective Analysis of 41 Cases.”<sup>22</sup> In his study LeBlanc analyzed a total of 41 North American cases where cyberbullying had been linked to suicide and found that:<sup>23</sup>

Incidence of reported cases increased over time with 56% having occurred from 2003 to 2010 compared to 44% from 2011 to the study end-date of 2012.

Although LeBlanc’s research suggests that there is an increase in reported suicides linked to cyberbullying, it also indicated that cyberbullying was not the sole factor that led to those suicides.<sup>24</sup> Even if he did not establish direct causation was not established (which can be a difficult task), in my view, LeBlanc’s findings are still somewhat concerning.

There is no doubt that bullying can take a toll on the physical integrity of the child. Up until the emergence of cyberbullying, no particular interest was placed on the damage caused to the child’s general and psychological wellbeing. The Supreme Court of Canada’s reference to Professor Mackay’s Report is quite significant in relation to the amount of prejudice that a bullying victim can suffer:<sup>25</sup>

Its [bullying’s] harmful consequences were described as “extensive”, including loss of self-esteem, anxiety, fear and school drop-outs. Moreover, victims of

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<sup>20</sup> Michal Molcho et al., “Cross-National Time Trends in Bullying Behaviour 1994-2006: Findings from Europe and North America”, (2009) 54 *Int. J. Public Health* 225-234.

<sup>21</sup> *Id.*, para. 1.

<sup>22</sup> John C. LeBlanc, *Cyberbullying and Suicide: A Retrospective Analysis of 41 Cases*. USA: American Academy of Pediatrics, 2012.

<sup>23</sup> *Ibid.*

<sup>24</sup> In many of the cases analyzed by LeBlanc, mental illness as well as face-to-face bullying had been reported.

<sup>25</sup> *Supra*, note 11, para. 21.

bullying were almost twice as likely to report that they attempted suicide compared to young people who had not been bullied.

As Supreme Court Justice Abella points out, while mild forms of cyberbullying can cause anxiety, academic problems and depression, its effects can be even more disastrous if sustained over a period of time. Suicide, delinquency, loss of control and the use of weapons are all consequences that are not uncommon in respect of a victim who has been taunted over a significant period of time, as the recent high profile Canadian suicides of Amanda Todd, Rehtaeh Parsons and Todd Loik have suggested. They have also raised multiple questions concerning the current justice system. In addition to suicide and depression, cyberbullying can cause its victims to lash out and to commit criminal acts – behaviour that is generally not expected from that person. This tendency can be seen just south of the border in the Columbine Case and in the more recent acts of Bryce McMillan in a Manitoba case. In the following subsections I will provide details surrounding the aforementioned Canadian cases and also establish the context from which the criminalisation movement has emerged.

### *1. Amanda Todd Case*

The Amanda Todd case is essentially the landmark cyberbullying story of Canada. Stemming from British Columbia, this tale tells of a 15 year-old girl who committed suicide in October of 2012 after being taunted and humiliated with the use of social media and a nude photo. Prior to her suicide and in an obvious cry for help, Todd posted a video on YouTube telling her story using a series of flash cards. Entitled, “My Story: Struggling, bullying, suicide and self-harm,” the video explained her torment over a period of three years. In 2009, she had been using online video chats to meet new people online. An unknown male individual had lured her into displaying her breasts for him during a chat and had then threatened to expose the image unless she continued to give him “shows.” Amanda ended up moving in with her mother and changing schools. The individual then created a Facebook account, using her nude photo as a profile picture and adding students from her new school. Being teased and labelled as a “slut,” Amanda turned to drugs and alcohol to suppress her anxiety and panic disorders as well as her depressive state of mind. The family moved, and once again Amanda changed schools, but the individual continued to spread the nude photo wherever she went. Todd attempted suicide by drinking bleach

but was unsuccessful, compounding the bullying even more.<sup>26</sup> A month after posting her video on YouTube, Todd successfully hung herself and was found dead in her room. In the days following her death, the video got international exposure, receiving more than 1,600,000 views.<sup>27</sup> Today, Amanda Todd's video has had over 9,000,000 views, making it one of the most prominent cases of suicide linked to cyberbullying. What is more troubling is the inefficiency of the authorities to prevent the online bullying. The RCMP, as well as the police of British Columbia, were made aware of the situation back in 2011 and were notified every time the young girl was extorted, as well as every time the perpetrator created a new Facebook account. Both claimed that there was nothing they could do.<sup>28</sup> This story exemplifies some of the central characteristics of cyberbullying mentioned above, in that her accessibility and anonymous nature of the bullying allowed the perpetrator to torment the young girl despite the lapse of several years and her changing of schools. It also allowed for the continual spread of the compromising picture of Amanda to many spectators, such as students, teachers, and even parents, ultimately tainting whatever new beginning she attempted to make.

## 2. *Rehtaeh Parsons Case*

In a case similar to the preceding one, the Rehtaeh Parsons story also resulted in the tragic suicide of a distressed young girl. In 2009, at the age of 15, Parsons was allegedly raped at a party after consuming alcohol. One boy took photographs while another proceeded to engage in non-consensual sexual acts with Parsons, even turning to the camera and giving a thumbs-up in one of the photos. It was this very photo that was then posted on Facebook, leading to the torment and humiliation of Rehtaeh. Police were notified and neither the Nova Scotia police nor the RCMP found enough evidence to make any arrests. After consulting with the Crown no charges were laid. In April of 2013, Rehtaeh hung herself, leaving her in an irreversible coma. Following her suicide, the RCMP reopened her case, reporting they had obtained new evidence that did not originate

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<sup>26</sup> Amanda Todd, "My Story: Struggling, Bullying, Suicide and Self-Harm", *YouTube*, 7 September 2012, [www.youtube.com/watch?v=vOHXGNx-E7E](http://www.youtube.com/watch?v=vOHXGNx-E7E).

<sup>27</sup> "Online Bullying of B.C. Teen Continues Amid Police Probe", *CTV NEWS*, 13 October 2012, [www.ctvnews.ca/canada/tormenters-target-amanda-todd-s-online-memorials-amid-police-probe-1.994594](http://www.ctvnews.ca/canada/tormenters-target-amanda-todd-s-online-memorials-amid-police-probe-1.994594).

<sup>28</sup> The Fifth Estate, "Amanda Todd Suicide: RCMP Repeatedly Told of Blackmailer's Attempts", *CBC News*, 15 November 2013, [www.cbc.ca/news/canada/amanda-todd-suicide-rcmp-repeatedly-told-of-blackmailer-s-attempts-1.2427097](http://www.cbc.ca/news/canada/amanda-todd-suicide-rcmp-repeatedly-told-of-blackmailer-s-attempts-1.2427097).

from the internet.<sup>29</sup> Subsequently, in August of 2013, child pornography charges were filed against two boys. One faces two charges of distributing child pornography and the other faces both the distribution and making of child pornography. The names of the accused men have not been revealed as they were minors at the time of the commission of the crimes and their identities are thus protected under the *Youth Criminal Justice Act*.<sup>30</sup> The case was due back in court on 31 March 2014, with the release of one of the accused from jail for breach of conditions stemming from an unrelated conviction.<sup>31</sup>

The suicides previously mentioned involve the cyberbullying of young girls; however, as the following case suggests, young boys are not impervious to the effects of this.

### 3. *Todd Loik Case*

In September of 2013, Todd Loik, a 15 year-old Saskatchewan boy, took his life after being bullied at school and then subsequently via social media sites as well as text messages. The RCMP investigation was long and arduous as it was reported that it had taken dozens of hours to gain access to Loik's information and several hundred more to examine it. The police claimed to have analyzed over 16,000 text messages, hundreds of images and about 30 videos, and contended that they had found no evidence of Todd being bullied prior to killing himself.<sup>32</sup> Despite the fact that both Loik's mother and school counsellor disagreed – both had seen some of the vicious messages in question – the RCMP's conclusions led to the closing of the case.

Stories like the Loik case not only reveal the difficulties that the police force face in gaining legal access to informational data and personal accounts in order to obtain sufficient evidence for criminal charges, but also the need for a legal framing of the terms 'bullying' and 'cyberbullying'.

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<sup>29</sup> "Rehtaeh Parsons Case to Be Reopened by Police", *CBC News*, News Release, 12 April 2013, [www.cbc.ca/news/canada/nova-scotia/rehtaeh-parsons-case-to-be-reopened-by-police-1.1309465](http://www.cbc.ca/news/canada/nova-scotia/rehtaeh-parsons-case-to-be-reopened-by-police-1.1309465).

<sup>30</sup> S.C. 2002, c 1.

<sup>31</sup> "Teen Accused in Rehtaeh Parsons Case Does Jail Time", *Toronto Sun*, News Release, [www.torontosun.com/2014/03/19/teen-accused-in-rehtaeh-parsons-case-does-jail-time](http://www.torontosun.com/2014/03/19/teen-accused-in-rehtaeh-parsons-case-does-jail-time).

<sup>32</sup> "I Know in My Heart What Happened: Teen's Mom Disappointed by RCMP's Findings", *The Star Phoenix*, News Release, [www.thestarphoenix.com/technology/know+heart+what+happened+teen+disappointed+RCMP+findings/9359014/story.html](http://www.thestarphoenix.com/technology/know+heart+what+happened+teen+disappointed+RCMP+findings/9359014/story.html).

#### 4. *Bryce McMillan Case*

While depression and suicide are very troubling effects of cyberbullying, when the news broke on 20 April 1999 that Eric Harris and Dylan Klebold had shot and killed 13 people and had injured 24 others at their school in Columbine, the message became rather clear for Americans and Canadians alike: severe bullying can cause an individual to lash out and perform very atrocious retaliatory acts. Harris and Klebold had been very gifted students and had faced four years of bullying prior to the high school massacre.<sup>33</sup>

Canadians are not immune from instances of lashing out due to bullying, as the recent *McMillan* case reveals. Although not as devastating as the massacre at Columbine, this case is worth mentioning because it suggests that the tendency of the bullied individual to excessively retaliate is not unique to the United States – it is also happening on Canadian soil.

In 2013, the Court of Queen's Bench of Manitoba had the arduous task of contemplating the minimum sentence imposed by section 244.2(1)(a) Cr.C. for intentionally discharging a firearm into a place in the knowledge that, or being reckless as to whether, another person was in that place. What makes *R. v. McMillan* of great interest to this article is the fact that Bryce McMillan, the accused, had been bullied for a period of 2 years by T.M., the boy whose house he had shot at. The bullying involved taunts, physical confrontations, graffiti in public locations and postings on Facebook.<sup>34</sup> In his decision, Justice Menzies took into account the preceding victimization of the accused and disagreed with the Crown as to whether it could be considered as a mitigating factor in the sentencing process. He also took the time to discuss the effects of bullying and the recent attention that public authorities have been paying to this issue. Justice Menzies mentioned the tragic suicide of Rehtaeh Parsons in Nova Scotia and stressed that bullying can affect the victim in many ways.<sup>35</sup> According to him, being subjected to prolonged harassment may not only cause the victim to be severely depressed, which can lead to suicide, as seen in the *Parsons*

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<sup>33</sup> "Columbine High School" *New York Times*, News Release, 17 April 2008, [http://topics.nytimes.com/top/reference/timestopics/organizations/c/columbine\\_high\\_school/index.html](http://topics.nytimes.com/top/reference/timestopics/organizations/c/columbine_high_school/index.html).

<sup>34</sup> *R. v. McMillan*, 2013 MBQB 229, para. 41.

<sup>35</sup> *Id.*, para. 42.

case, but also to the victim experiencing an episode of lashing out, as seen in this case.<sup>36</sup> Although the court considered the relationship in terms of background to the crime, it did point out that the previous bullying could not justify taking justice into one's own hands and that society needs to be protected from people who react in a violent manner. That being said, the Judge found that the minimum sentence of four years as required by section 244.2(1) Cr.C. violated section 12 of the *Canadian Charter of Human Rights and Freedoms*<sup>37</sup> in that it constituted cruel and unusual punishment and could not be saved under section of the Charter. In the end, Bryce McMillan was sentenced to only one year of incarceration.<sup>38</sup>

### 5. *Canada's Response*

The preceding cases hint at the notion that cyberbullying and bullying in general do indeed affect our country. In fact, the federal government recently launched a national television and online ad campaign to bring awareness to the subject. Justice Minister Peter MacKay's "Stop Hating Online" project not only brings awareness to cyberbullying, but also warns its audiences of the possible legal consequences of tormenting people, including being charged with criminal offences.<sup>39</sup> When launching the campaign in January of this year, MacKay stated that the intent was to reach out and empower youth to take responsibility for their actions and to truly understand the consequences of hitting 'send'.<sup>40</sup> Public statements of high ranking government officials and the broadcasting of various cautionary advertising campaigns all point to the notion that cyberbullying has indeed become of great national concern in the age of technology. For others, however, it is the cost of the campaign that speaks the loudest. The sheer fact that the Canadian government has decided to invest four million dollars in an awareness campaign illustrates that it has finally decided to tackle cyberbullying head-on.<sup>41</sup> In addition to this campaign, the Harper

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<sup>36</sup> *Id.*, para. 46.

<sup>37</sup> S.R.C. 1985, app. II, no. 44, schedule B, part I.

<sup>38</sup> *Id.*, para. 84.

<sup>39</sup> Canadian Press Halifax, News Release, "Stop Hating Online: Tories Craft ad Campaign in Attempt to Stamp out Cyberbullying", *National Post* <http://news.nationalpost.com/2014/01/09/stop-hating-online-tories-craft-ad-campaign-in-attempt-to-stamp-out-cyberbullying/>.

<sup>40</sup> The Spec, News Release, "Stop Hating Online: Feds Launch New Campaign Against Cyberbullying", *Canadian Press*, 9 January 2014, [www.thespec.com/news-story/4307778-stop-hating-online-feds-launch-new-campaign-against-cyberbullying/](http://www.thespec.com/news-story/4307778-stop-hating-online-feds-launch-new-campaign-against-cyberbullying/).

<sup>41</sup> *Ibid.*

government is in the process of passing Bill C-13, entitled: “*Protecting Canadians from Online Crime Act*.”<sup>42</sup> The proposed Act has been introduced to Parliament and had its first reading in the House of Commons in November of last year.

## II. CURRENT LEGAL APPROACH TO CYBERBULLYING

### A. Current *Criminal Code* Applications

#### 1. *Lack of specific section*

The act of cyberbullying is not criminally recognized in Canada, let alone bullying as such. To be more specific, nowhere in the *Criminal Code* is there a section that expressly mentions an offence entitled ‘bullying’ or ‘cyberbullying.’ However, many of the acts encompassed within the sphere of cyberbullying can be found in the *Criminal Code*. When the bullying or cyberbullying is of a more serious nature, the following criminal provision could potentially apply: criminal harassment (s. 264); uttering threats (s. 264.1); intimidation (s. 423.1); mischief in relation to data (s. 430.1(1)); unauthorized use of computer (s. 342.1); identity fraud (s. 403); extortion (s. 346); false messages and indecent or harassing telephone calls (s. 372); inciting suicide (s. 241); defamatory libel (s. 298-301); incitement of hatred (s. 319); and child pornography offences (s. 163.1). While cyberbullying can affect a person of any age, children and youth under the age of eighteen are the most common targets, as well as perpetrators of this type of behaviour.<sup>43</sup> It then becomes important to mention that although the specific sections in the *Criminal Code* indicate adult sentences, the offences also apply in respect of youth members. The youth sentencing options and criteria outlined in the *Youth Criminal Justice Act* allow for the Attorney General to apply that an adult sentence be ordered for youths over 14 years of age who have committed a serious crime that is punishable by two or more years of imprisonment for adults (s. 64).

The majority of the current *Criminal Code* offences that are somewhat applicable to bullying and cyberbullying suffer from at least two major defects. First, many of these

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<sup>42</sup> *Id.*, *supra*, note 3.

<sup>43</sup> Canada, House of Commons, Coordinating Committee of Senior Officials (CCSO), 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” *Justice Canada*, May 2013, p. 3, [www.justice.gc.ca/eng/rp-pr/other-autre/cndii-cdncii/pdf/cndii-cdncii-eng.pdf](http://www.justice.gc.ca/eng/rp-pr/other-autre/cndii-cdncii/pdf/cndii-cdncii-eng.pdf).

sections are outdated and are almost completely inapplicable to modern forms of communications, an aspect that I will address in further detail while discussing Bill C-13. The second failing that I see with regards to the existing sections of the *Criminal Code* is that they were not intentionally created nor are they specifically tailored to cover the complexities of bullying or cyberbullying; rather, they were intended to deal with acts that are sometimes components of the greater picture that is bullying and cyberbullying.

## 2. *The Cybercrime Working Group Report*

At a meeting following the deaths of Amanda Todd and Rehtaeh Parsons, federal, provincial and territorial Ministers responsible for Justice and Public Safety came to the consensus that an inquiry into possible gaps between cyberbullying and the provisions of the current *Criminal Code* was necessary. This mandate was given to the Coordinating Committee of Senior Officials' subgroup, called the Cybercrime Working Group (CWG). Their report was submitted in May of 2013 and reviewed cases of cyberbullying throughout the whole country. They also placed a significant focus on the non-consensual distribution of intimate images, as their findings indicated that it played a major role in the cyberbullying of today's teens. Through its nine recommendations,<sup>44</sup> the CWG insisted that Canada maintain its multi-faceted approach toward cyberbullying and that it make amendments to the *Criminal Code*. Concerning the reform of the *Criminal Code*, it suggested the modernization of section 372, so as to insert more robust electronic investigative powers as well as to create a new section for the non-consensual distribution of intimate images.<sup>45</sup> I support the Working Group's recommendations as well as their grounded objective of giving prosecutors and law enforcement the appropriate flexibility to deal with modern crime while also maintaining the integrity of existing and related offences. Interestingly enough, not only did the CWG's submission emphasize the growing disparity between new cyber-offences and the existing *Criminal Code*, but, as we are about to discover, it also initiated the criminalisation movement.

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<sup>44</sup> Loc. cit. *supra*, note 43, p. 2.

<sup>45</sup> Id., p. 11.

### III. CRIMINALISING CYBERBULLYING: CANADA'S BILL C-13

#### A. Protecting Canadians from Online Crime Act (Bill C-13)

Following the recommendations of the CWG in November of 2013, the federal government introduced Bill C-13, entitled the *Protecting Canadians from Online Crime Act*. The Bill's first reading has been completed and it is expected to be adopted. As the following paragraphs reveal, the substantive elements of this Bill are, for the most part, great at modernizing the *Criminal Code* in order to properly treat cyberbullying. That being said, I will balance this view with a discussion of some of the problems surrounding Bill C-13 as well as the resulting concerns.

##### 1. Goal and Raison d'être

As I have previously mentioned, Canada was in a situation of necessity following a series of high profile suicides involving cyberbullying. In addition, the CWG's report recommended that more be done on the legal front in order to better remedy this issue. The Canadian Department of Justice has stressed the imperative character of the Bill and has explained that its goals are to create a new offence, to modernize the *Criminal Code* and to provide police and prosecutors with effective tools to investigate technology-based offences. In addition, it supports the importance of the latter goal, providing police with appropriate investigative tools with the compelling argument that there is no point in creating a law without giving law enforcement access to the very tools that they need to investigate the offence.<sup>46</sup>

##### 2. Benefits

The drafters of Bill C-13 included a proposal to add an entirely new section to the *Criminal Code* that would deal with what is considered to be the most damaging component of cyberbullying: the distribution of intimate images. Found at section 3 of the Bill, the new section 162.1(1) Cr.C. would make it a criminal offence to knowingly publish, distribute, transmit, sell, make available or advertise an intimate image of a person, knowing that the person depicted in the image did not give his or her consent to that

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<sup>46</sup> Department of Justice of Canada, "Bill C-13, *Protecting Canadians from Online Crime Act: Myths and Facts*" Canada: Department of Justice Canada, 2013, [www.justice.gc.ca/eng/news-nouv/nr-cp/2013/doc\\_33002.html](http://www.justice.gc.ca/eng/news-nouv/nr-cp/2013/doc_33002.html).

conduct. The accused could also be found guilty under s. 162.1(1) Cr.C. if he or she was reckless as to whether or not that person consented to the conduct in question. If convicted under this section, the perpetrator could be liable for imprisonment of up to five years. In my opinion, the inclusion of this specific provision is beneficial for two reasons. First, the section is better tailored to deal with the legal issue in question, which is whether or not the perpetrator was in violation of someone's privacy and if that violation resulted in the victim's humiliation and embarrassment. In addition, I believe that the addition of section 162.1 Cr.C. could possibly ease the difficulties experienced by the police and Crown prosecutors in respect of the application of child pornography charges in cases of cyberbullying where an intimate image is used. These difficulties arise mainly from the stigma and the serious sentencing consequences that accompany a charge under s. 163.1 Cr.C. In a real world situation such as the Rehtaeh Parsons case, the Crown would have been able to take a more aggressive and speedy approach against the culprits if section 162.1 Cr.C. had been in effect at the time. Since this was not the case, prosecutors were forced to act more hastily in bringing child pornography charges against the perpetrators, due to the fact that no criminal offence that accurately described the unfavourable behaviour illustrated by the two young men existed at the time.

If the *Criminal Code* is going to punish individuals for distributing intimate images of someone without their consent, then it must define what such an image may consist of. The *Protecting Canadians From Online Crime Act* suggests that section 162.1(2)(a) Cr.C. would define an intimate image as:<sup>47</sup>

- [...] a visual recording of a person made by any means including a photographic, film or video recording,
- a) in which the person is nude, is exposing his or her genital organs or anal region or her breasts or is engaged in explicit sexual activity;
  - b) in respect of which, at the time of the recording, there were circumstances that gave rise to a reasonable expectation of privacy; and
  - c) in respect of which the person depicted retains a reasonable expectation of privacy at the time the offence is committed.

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<sup>47</sup> Ibid.

Another promising improvement introduced by Bill C-13, is the updating of the section dealing with “Forgery and Offences Resembling Forgery.” More specifically, section 18 of the Bill proposes the modernization of four outdated offences that do not apply to cyberbullying due to the fact that they list old means of communications. For a comprehensive overview of the said modifications, I suggest referring to the table listed as Figure 2 in the Appendix.

The first of these changes consists of transforming section 371 Cr.C. from “Telegram, etc. in a false name” to “Message in a false name.” The amended section would replace the current exhaustive list of means of communicating under a false name, namely a telegram, a cablegram or a radio message, with the general term “message.” It is quite rare nowadays for an individual to send a telegram, cablegram or radio message in order to communicate. It is even more improbable that a bully will use a false name to protect his true identity using one of those technologies. The reality is that these methods have been replaced with text messages using smartphones and online social networks. Research indicates that a total of three charges have proceeded to court between 1996 and 2006 under section 371 Cr.C., with none of them leading to convictions,<sup>48</sup> putting its usefulness into question. Note that I am not implying that section 371 Cr.C. can be said to be obsolete; however, with the recent shifts in technology, I suggest that it is being rendered less and less useful as time goes on. Cyberbullies do, in fact, hide behind the veil of false accounts or names on the internet. Therefore, I believe that the change proposed by Bill C-13 could be extremely useful for authorities that are possibly looking to applying such an offence to newer forms of communications but cannot do so because they are not specifically referenced in the provision in question.

Similarly, the Act proposes changing section 372.1 Cr.C. from “False Message” to “False Information.” The new section would replace “letter, telegram, telephone, cable, radio or otherwise” with “letter or any means of telecommunication,” thus broadening the scope of the offence to include anyone who conveys false information electronically. Although the modified section would replace an already non-exhaustive list, the fact that

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<sup>48</sup> Dennis Baker and Benjamin Janzen, “Commentary. Is It Time to Overhaul the *Criminal Code of Canada*?”, McDonald Laurier Institute Publication, May 2013. P. 9, [www.macdonaldlaurier.ca/files/pdf/2013.05.25-Commentary-Criminal\\_Code\\_Overhaul-vFinal-web.pdf](http://www.macdonaldlaurier.ca/files/pdf/2013.05.25-Commentary-Criminal_Code_Overhaul-vFinal-web.pdf).

it encourages a more liberal interpretation and puts less pressure on the Crown is very appealing to me.

The third proposed modification, seen at section 372.2 Cr.C. would update “Indecent Phone Calls” to “Indecent Communications”. It would not only extend the scope by swapping out the word “telephone” and replacing it by “a means of telecommunication”, but it would also provide for the situation where the perpetrator communicates indecent information to a third party (a common occurrence in modern-day cyberbullying) through the addition of the words “or to any other person.

Lastly, the drafters of the Bill included a modification to section 372.3 Cr.C. They propose to changing the section from “harassing telephone calls” to “harassing communication”, once again broadening the scope of the section from just telephone calls to any means of communication.

### 3. *Difficulties & Concerns*

#### a) Enforcement of Prohibition Order under section 162.2 Cr.C.

By virtue of the Act’s creation of section 162.2 Cr.C., the court that sentences an offender convicted under s. 162.1 Cr.C. for distributing an intimate image can make an order prohibiting the offender from using the internet or other digital networks.<sup>49</sup> Much like the offence of impaired driving results in a court-ordered prohibition period for operating a motor vehicle, this section would attempt to punish the individual who has abused the privilege of using the internet in an unlawful manner. Although the legislative intent is commendable, the enforcement of such a prohibition order seems rather unrealistic. Unlike the visible act of an individual illegally driving a motor vehicle on a public road during a period of prohibition, detecting an individual convicted under the new section 162.2 Cr.C. could prove to be a very difficult mandate for the enforcement agencies, as the internet is extremely accessible.

Another difficulty experienced with the application of section 162.2 Cr.C. is related to the consequences that it may have for the punished individual. Even if this section is properly enforced, one must ask whether or not an individual can successfully live in

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<sup>49</sup> *Id.*, *supra*, note 27.

today's society without access to the internet or a digital network. The internet and the consortium of digital networks have been so deeply entrenched into our workplaces, schools, friendships, pastimes and many other significant areas of our lives. To forbid and prevent someone from accessing these mediums of communication could have troublesome consequences for all of those dynamics. It is doubtful that this section would be successful and I find it especially disadvantageous when considered in terms of the offender's rehabilitation and re-integration into society, as it essentially ensures the opposite to these principles and ultimately puts its constitutionality into question.

#### b) Consent in a Connected World

As discussed above, the illegal character set out in section 162.1 Cr.C. revolves around the person depicted's absence of consent. When considered in light of the array of different networking options, this concept of consent becomes somewhat problematic. The section could very easily be applied to the usual situation where an individual distributes nude photos of their ex-partner as revenge following a break-up. However, the concept of consent becomes blurred when the accused individual is several steps removed from the situation, which is usually the case on the internet and on social networks. People frequently share photos that they find on the internet with their friends. If that image happens to depict someone in an intimate manner and to have been posted by a vengeful ex-partner on Facebook or on any other website open to the public, all circumstances of which the third party does not bear knowledge, is such third party then to be considered as a criminal? Was he necessarily reckless if he did not inquire into the source of the picture before posting it somewhere else online or tweeting it on Twitter? These are all challenging questions that the courts will have to answer carefully if Bill C-13 is passed successfully. They are also scenarios that lead us further away from black and white answers and closer to a legal spectrum characterized by shades of grey.

#### c) Investigative Powers and Privacy Infringements

Peace officers have complained for quite some time now that they lack the proper investigative tools required in this age of technology. Bill C-13 offers a remedy by awarding police and public officers a range of warrants and preservation orders. Section 20 of the Bill details the creation of a preservation demand for computer data in a new

section 487.03. Section 20 of Bill C-13 also creates a series of specific production orders for the following information: tracing communications under a new section 487.015.; transmission data under a new section 148.016; tracking or location data under a new section 487.017; and finally, financial data under a new section 487.018. As if these were not enough, the drafters of Bill C-13 also included a warrant authorizing the secret installation of tracking devices on objects or persons under section 492.1 Cr.C.

Whereas other warrants set out in the current *Criminal Code* require the officer making the demand to possess reasonable grounds for believing that a crime has been committed or will be committed, the proposed investigative tools mentioned above merely require reasonable grounds of suspicion. The lowered threshold required for a peace officer to obtain a preservation order, a production order or a warrant regarding an individual's data is a major concern. In the recent Supreme Court of Canada decision *R. v. Chehil*<sup>50</sup>, Justice Karakatsanis elaborated as follows on the nature of the reasonable suspicion standard:

Thus, while reasonable grounds to suspect and reasonable and probable grounds to believe are similar in that they both must be grounded in objective facts, reasonable suspicion is a lower standard, as it engages the reasonable possibility, rather than probability, of crime. As a result, when applying the reasonable suspicion standard, reviewing judges must be cautious not to conflate it with the more demanding reasonable and probable grounds standard.

In my opinion, the likely consequence of merely requiring a possibility of uncovering criminality rather than the probability of doing so, facilitates intrusions on individuals' digital privacy. Although one could easily dedicate an entire article to digital privacy and despite the fact that it is a topic that is situated at the limits of the reasonable scope of this article, I believe it is necessary to briefly touch on it.

Section 8 of the *Canadian Charter of Human Rights and Freedoms* establishes that everyone has the right to be secure against unreasonable search or seizure. While the main difficulty with section 8 lies in drawing the line of reasonableness, Justice Sopinka provided the following guidance in the Supreme Court decision of *R. v. Plant*<sup>51</sup>:

In fostering the underlying values of dignity, integrity and autonomy, it is fitting that s. 8 of the Charter should seek to protect a biographical core of

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<sup>50</sup> (S.C. Can., 2013-09-27), 2013 SCC 49, SOQUIJ AZ-51004480, 2013EXP-3100, J.E. 2013-1694, [2013] 3 S.C.R. 220, para. 27.

<sup>51</sup> (S.C. Can., 1993-09-30), SOQUIJ AZ-93111114, J.E. 93-1673, [1993] 3 S.C.R. 281, 293.

personal information which individuals in a free and democratic society would wish to maintain and control from dissemination to the state. This would include information which tends to reveal intimate details of the lifestyle and personal choices of the individual.

The federal government's response to the concerns about the lower standard relies on the argument that this type of metadata is not very revelatory or invasive and therefore does not benefit from a high expectation of privacy.<sup>52</sup> This stance is problematic for Canadian privacy lawyer David Fraser, who in his law blog disagrees with the drafters' opinion that the sort of information that would be produced is not sensitive and should not be afforded a high level of protection.<sup>53</sup> The story of Malte Spitz, a member of the Executive Committee of the German Green Party, seems not only to support Fraser's concerns, but also to emphasize the actual revelatory nature of metadata, contrary to the government's claims. As Spitz's main responsibilities entail new media policies, civil liberties and privacy issues, he decided to acquire six months of personal metadata from his telecommunications provider in order to evaluate its significance. With the help of a newspaper, *Die Zeit*, Spitz was able to translate the coding into a very detailed account of those six months of his life. Perhaps the most chilling part of Spitz's presentation is where he warns us about the possible consequences of facilitating access to our metadata:

You can see how your people are communicating with each other, what times they call each other, when they go to bed ... If you have access to this information, you can see what your society is doing. If you have access to this information, you can control your society.<sup>54</sup>

The Malte Spitz story suggests that metadata can in fact provide a comprehensive profile of an individual, mapping out their travels, contacts, habits, preferences and many more intimate details of their life.

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<sup>52</sup> "Bullying 2.0: Omnibus Bill C-13 Tackles Cyberbullying by Eroding Digital Privacy" *The McGill Daily*, News Release, 9 January 2014, [www.mcgilldaily.com/2014/01/bullying-2-0/](http://www.mcgilldaily.com/2014/01/bullying-2-0/).

<sup>53</sup> David Fraser, «Some Comments on the New Canadian Cyberbullying Bill, aka Bill C-13 Protecting Canadians from Online Crime Act», *Canadian Privacy Law Blog*, 20 November 2013 [blog.privacylawyer.ca/2013/11/some-comments-on-new-canadian.html](http://blog.privacylawyer.ca/2013/11/some-comments-on-new-canadian.html).

<sup>54</sup> Malte Spitz, "Your Phone Company is Watching", *TED Talks*, June 2012, [www.ted.com/talks/malte\\_spitz\\_your\\_phone\\_company\\_is\\_watching](http://www.ted.com/talks/malte_spitz_your_phone_company_is_watching).

More recently, in the 2013 Supreme Court of Canada case of *R. v. Vu*<sup>55</sup>, the Court had to determine whether the traditional legal framework of search and seizure applied to the protection of the unique privacy interests that are at stake in computer searches. Speaking for the majority, Justice Cromwell emphasized the sensitivity of information contained on a computer:<sup>56</sup>

[...] most browsers used to surf the Internet are programmed to automatically retain information about the websites the user has visited in recent weeks and the search terms that were employed to access those websites. Ordinarily, this information can help a user retrace his or her cybernetic steps. In the context of a criminal investigation, however, it can also enable investigators to access intimate details about a user's interests, habits, and identity, drawing on a record that the user created unwittingly.

The Court decided that when it came to warrants and prior authorization, computers should be given special treatment and not be conflated with other receptacles, such as filing cabinets or cupboards.<sup>57</sup> It held that police need specific authorization to search a computer not only because there is such a significant difference between computers and other receptacles that are governed by the traditional framework but also due to the fact that computer searches put forward particular privacy concerns that are not adequately addressed by that approach.

What I find somewhat ironic in all of this, is the fact that the *Protecting Canadians from Online Crime Act* strives primarily to punish those who violate an individual's privacy through the distribution of an intimate image without consent, yet with the array of investigative powers and lenient standards that it provides to public officers, the Act opens the door to this very same infringement of an individual's privacy.

## CONCLUSION

On the whole, it has become quite apparent that cyberbullying is a problem that increasingly affects Canadian teens negatively. This article has also illustrated how technology sometimes evolves at a greater speed than the law, which in the issue at hand has caused dangerous gaps between technology and the law, and the improper application

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<sup>55</sup> (S.C. Can., 2013-11-07), 2013 SCC 60, SOQUIJ AZ-51016143, 2013EXP-3567, J.E. 2013-1939, [2013] 3 S.C.R. 657.

<sup>56</sup> *Id.*, para. 42.

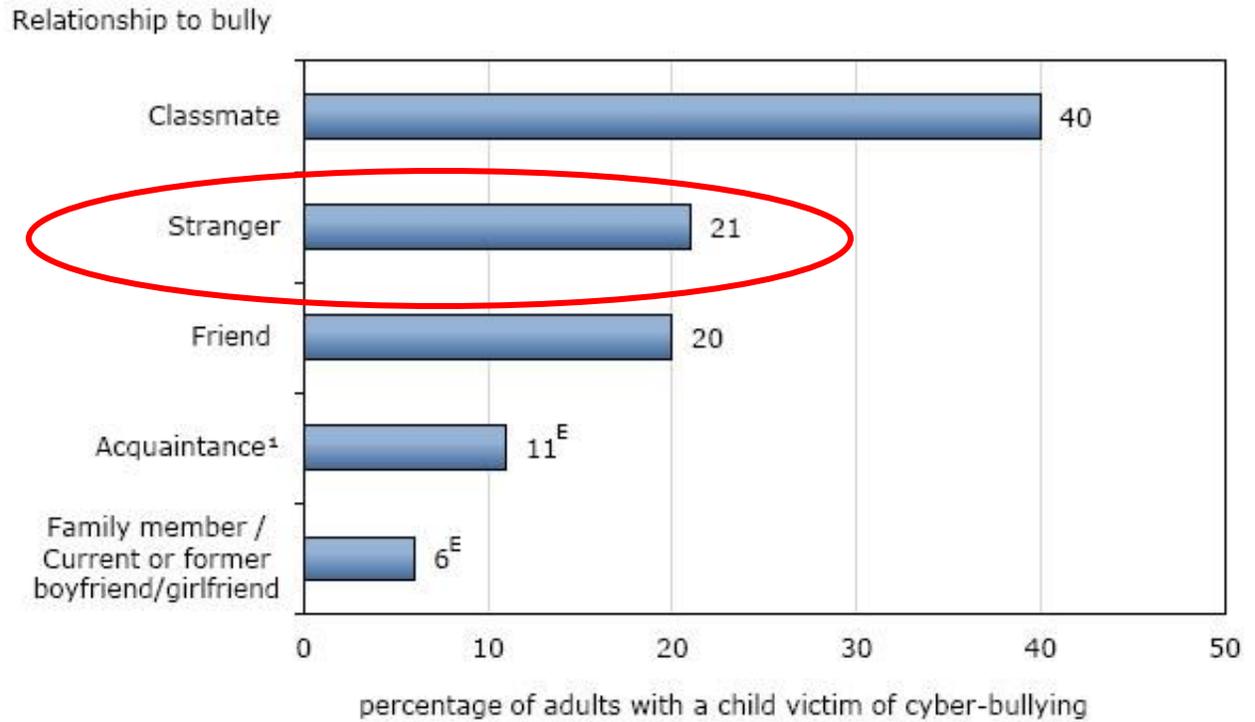
<sup>57</sup> *Id.*, paras. 2 and 3.

of the latter. As I have suggested in this article, Bill C-13's creation of a specific offence to deal with the distribution of intimate images as well as its modernization of several outdated sections in the *Criminal Code* will be an asset in combatting cyberbullying. Although the *Protecting Canadians from Online Crime Act* is intended to provide security for bullying victims, it creates some concerns regarding citizens' informational privacy. As the Spitz anecdote and the reasoning of Justice Cromwell in *R. v. Vu* suggest, metadata is of great importance and reveals a tremendous amount about our identity and daily lives. Society and the courts will have to decide how to balance the protection of youth with the intrusion into the private spheres of citizens. Commentators like Shariff and Tryl are raising more uncertainty with regards to the Bill in questioning whether criminalising cyberbullying will have positive effects on its prevention and deterrence. There is a legitimate fear that all that criminalisation will do, is to further alienate bullies from society. Not only will a criminal conviction prevent the bully from having a prosperous future, but it will also exacerbate the underlying problems that are at the core of their bullying tendencies. As previously stated, I disagree with that stance and I believe that after taking all of this into consideration, Bill C-13 is still a step in the right direction. This being said, I admit that criminalisation alone is not the best possible solution. Although I promote criminalisation in order to respond to serious cases of bullying and cyberbullying, I think that addressing the broader social problem of bullying will require more than just criminal law.

On a final and more optimistic note: if bullying has had one beneficial consequence at all, it would be that it has finally unified Canadians and provided a national consensus on the necessity for change. Although it is unfortunate that it has required several victims of tragic suicides due to cyberbullying to mobilize the masses, it is of some comfort to know that their suffering as well as the suffering of their respective families has not been without purpose or meaning.

**APPENDIX**

**Figure 1:** Adults with a child victim of cyber-bullying in their household, by relationship to the bully during the most recent incident, 2009<sup>58</sup>



<sup>58</sup> *Ibid.*, *supra*, note 3.

**Figure 2:** Modernisation of the Canadian Criminal Code proposed by the *Protecting Canadians from Online Crime Act* (Bill C-13)

Section	Current Criminal Code	Amendment (Bill C-13)	Change
s. 371	<u>Telegram, etc., in false name</u> A telegram, cablegram or radio message	<u>Message in false name</u> A message	<i>exhaustive list of rather outdated means of communications is replaced with "message"</i>
s. 372(1)	<u>False messages</u> Conveyed by letter, telegram, telephone, cable, radio or otherwise	<u>False information</u> Conveyed by letter or any means of telecommunication.	<i>Replaces non-exhaustive list with a general term of any means of telecommunications</i>
s. 372(2)	<u>Indecent telephone calls</u> Makes any indecent telephone call	<u>Indecent communications</u> Makes an indecent communication to that person or to any other	<i>Broadens the scope to any means of telecommunications</i>

		person by a means of telecommunication.	<i>Adds making indecent communication to third party about someone an offence</i>
<b>s. 372(3)</b>	<u>Harassing telephone calls</u> Repeatedly makes or causes to be made repeated telephone calls to that person	<u>Harassing communications</u> Repeatedly communicates, or causes repeated communications to be made, with them by a means of telecommunication.	<i>Broadens the scope from solely by telephone to any means of communications</i>