

**SUPREME COURT OF NOVA SCOTIA**  
**Citation:** *Fraser v. Crossman*, 2022 NSSC 8

**Date:** 20220105  
**Docket:** Hfx. No. 509599  
**Registry:** Halifax

**Between:**

Adam Fraser

*Applicant*

v.

Ellen Crossman

*Respondent*

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**DECISION**

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**Judge:** The Honourable Justice John Keith

**Heard:** January 4, 2022

**Oral Decision:** January 5, 2022

**Parties:** Adam Fraser, self-represented Applicant  
Perry Yung for the Respondent, Ellen Crossman

**By the Court:**

[1] On October 8, 2021 the Applicant, Adam Fraser, filed a Notice of Application in Chambers seeking certain declaratory relief, related orders, damages and costs under the *Intimate Images and Cyber-Protection Act*, SNS 2017, c. 7 (the “*Act*”). In support of his application, Mr. Fraser filed an Affidavit sworn October 8, 2021 and a further Affidavit sworn December 29, 2021.

[2] The Respondent, Ellen Crossman, filed her Notice of Contest on December 14, 2021. She asks that the claim be dismissed with costs. In support of her contest, Ms. Crossman filed her own Affidavit sworn December 14, 2021 together with an Affidavit of Kevin Crowell sworn December 13, 2021.

[3] At the hearing, counsel for Ms. Crossman cross-examined Mr. Fraser. Mr. Fraser waived the right to cross-examination.

[4] The dispute originates in a series of incidents that occurred on Seapoint Road in Dartmouth, Nova Scotia in an area referred to locally as Harbour Isle. Those incidents resulted in Ms. Crossman posting two messages on her Facebook page – one on September 3, 2020 and the second on September 4, 2020. Mr. Fraser alleges that these two Facebook posts constitute “cyber-bullying” under the *Act*.

[5] The messages were removed by Ms. Crossman on April 20, 2020 – about seven months after they were first posted. Their removal did not satisfy Mr. Fraser. He commenced this proceeding about six months later, in October 2020 although, in fairness, any delay may be attributed to the pandemic.

[6] The precise details regarding the two Facebook posts are set out below, although some basic background leading up to the Facebook posts is needed.

[7] The Applicant, Adam Fraser, was employed as a site foreman for Elm Construction, a construction company engaged in building a new high-rise and townhouse residential complex at 48 Seapoint Drive called “The Camden”.

[8] Across the street from The Camden was a completed high-rise and townhouse residential complex called “The Hazelton”. The Respondent, Ellen Crossman, resides in The Hazelton at 47 Seapoint Drive.

[9] Ms. Crossman testifies that she moved into The Hazelton on October 1, 2019. She soon began receiving catcalls, whistles, and lewd remarks from certain

unidentified members of the construction crew (not Mr. Fraser) working at The Camden.

[10] Ms. Crossman testifies in her Affidavit that the behaviour of the work crew “amplified” to the point that she felt concern for her safety and would take steps to avoid the construction site and defend herself. However, she had enough when on or about August 17, 2020, a construction worker yelled “Hey, it’s that girl from 47” (i.e., 47 Seapoint Drive, where Ms. Crossman lives). An Affidavit sworn by The Hazelton’s building manager, Kevin Crowell, corroborates that this statement was made. By itself, the statement may appear innocuous; however, based on her experience, Ms. Crossman saw this as evidence that her harassment complaints were being ignored and she was being targeted.

[11] Ms. Crossman immediately complained to Madison Byrne, a superintendent employed on the construction site.

[12] The next day, August 18, 2020, Mr. Byrne provided Ms. Crossman with a printout of an email which he said was sent that day. The email was attached as an exhibit to Ms. Crossman’s Affidavit. It states:

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We have an issue with a residence [sic] at the Hazelton, she is complaining that people are catcalling, yelling, cussing and other nonsense. Apparently, this is a regular occurrence. IT NEEDS TO STOP.

[13] Ms. Crossman testifies that the harassment did not stop. Her Affidavit states that she spoke with other unnamed “senior officials at the construction company”. Ms. Crossman did not name these individuals or provide details of the alleged continuing harassment. The evidence is hearsay, and, for the purposes of this decision, I do not accept the statement for the truth but, rather, as context for the events which followed.

[14] On the morning of September 3, 2020, Ms. Crossman left The Hazelton with her partner. A barricade had been placed in front of her car. She moved the barricade and was driving off from The Hazelton when she noticed a construction worker (not Mr. Fraser) “filming in the direction of us”. Given the history, she says this put her on “high alert”.

[15] When Ms. Crossman returned home to The Hazelton later that same morning, she approached the worker who she saw taking a video of her. She asked for his name and an explanation. The workman did not respond. The lack of

response concerned Ms. Crossman. She took a photograph of the unnamed workman on her cellphone.

[16] Mr. Fraser intervened in the exchange between Ms. Crossman and the unnamed worker. This would have been the first time Mr. Fraser and Ms. Crossman interacted with one another regarding the construction site or her concerns around harassment. Ms. Crossman acknowledges that Mr. Fraser had absolutely no involvement in any of the alleged harassment or offending behaviours that Ms. Crossman said she previously experienced. Having said that, Ms. Crossman does argue that Mr. Fraser became aware of her concerns and that, certainly as of September 3, 2020, he became part of what she perceived to be a general inclination within the construction company to minimize or even make light of her complaints around harassment.

[17] As to the details of the September 3, 2020 conversation between Mr. Fraser and Ms. Crossman, Ms. Crossman was upset that a workman would be filming her and questioned the use of barricades around her car. As mentioned, she had a heightened sensitivity or “amplified” fear given her recent complaints of harassment. Based solely on the information contained in Ms. Crossman’s sworn Affidavit, the fear appears to have been fueled by a concern that she was being singled out.<sup>1</sup>

[18] Mr. Fraser was concerned that, earlier in the day, Ms. Crossman failed to park in a designated parking area and further ignored attempts by the construction crew to secure the construction site (and protect Ms. Crossman’s car) by placing a barricade in front of her car. He explained that a major concrete pour was expected to occur later that day. Mr. Fraser subsequently observed Ms. Crossman taking photographs of the construction site and removing the barricade before driving off. Mr. Fraser testified to his “ire” that somebody would park outside the designated parking area and remove the safety barricades.

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<sup>1</sup> The specific examples of harassment mentioned by Ms. Crossman are around cat calls, whistles, lewd remarks together with the workman’s comment on August 17, 2020 “Hey, it’s that girl from 47”. I am not prepared to make any additional findings regarding Ms. Crossman’s concerns and note that Ms. Crossman’s Affidavit does not specifically explain what gave rise to her “amplified” fear for her safety. I do note that the September 3, 2020 Facebook post which ultimately triggered this proceeding contains certain additional details that are not confirmed in her sworn Affidavit. For example, in the Facebook post, Ms. Crossman states that in October 2019 (i.e., shortly after she moved into The Hazelton) she “filed a formal complaint” and that “a day or two later, the back windshield of her car was smashed in.” The implication is that the damage to her car was retribution for her complaint. However, Ms. Crossman neither discusses nor confirms this specific and somewhat alarming incident in her affidavit. Moreover, Ms. Crossman does not include details of this “formal complaint” in October, 2019 (or provide a copy of supporting documents if the formal complaint was made in writing).

[19] Mr. Fraser also argues that Ms. Crossman was herself taking photographs or videos of the construction site. Given that Ms. Crossman was photographing the construction site and the tension which had arisen, the workman's decision to reciprocate by creating his own video record was a justifiable measure designed not to harass but, on the contrary, to defend against allegations of harassment.

[20] Unfortunately, neither side was able to muster the empathy or patience to accept or understand their competing explanations and concerns. The conversation devolved when Ms. Crossman personally insulted Mr. Fraser. Mr. Fraser says she called him "stupid". Ms. Crossman says her words were to the effect, "I'm 10 times smarter than you [i.e., Mr. Fraser]." Mr. Fraser's reaction did not help. He told her to go fuck herself and then left.

[21] A few hours later, at 2:13 p.m. and again feeling her concerns were being ignored, Ms. Crossman sent a copy of the photo she took of the unnamed workman to his employer (WSP Global) on its Instagram site. Attached to the photo she inserted the caption: "Is it normal for your employees to take videos of women leaving their houses in the morning, or just when they are on the job? Just wondering." She did not mention and presumably did not accept the explanations she had been given by Mr. Fraser.

[22] At around the same time on September 3, 2020, Ms. Crossman posted a relatively lengthy description of the encounter on her private Facebook page. It is this single post that formed the primary basis for this proceeding. As such, it is necessary to reproduce the post in its entirety:

LONGSHOT: Does anyone have any experience, both professional or personal with Elm Developments and WSP?

With Adam Fraser site foreman or any other applicable information?

They have cat called, yelled, called names, yelled amongst themselves about what house number I lived in, called me derogatory names amongst other things I'm not going to put on Facebook, causing me to feel extremely unsafe when I'm home alone

When bringing these issues up with the construction company they said there is nothing they can do because the workers they hire rarely have a great 12 education and that's just their mentality. In fact, the site manager Madison (cool name for a guy) smirked the entire time I tried to express my concerns for my safety. When filing reports with the police, they said there's nothing they can do because it's not a police issue.

When I filed a formal complaint back in October last year, a day or two later my back windshield was completely smashed in.

This crew of 50 – 60+ men work every single day maybe 30 steps from my front porch and nobody will do anything about their behaviour. People wonder why women are so scared and paranoid all the time THIS IS WHY”

When does it become a police matter? Once it's too late?

This is the guy who [sic] I came out of my home this morning, I saw was videotaping me from a distance. When I confronted him about why and what his name, he refused to give me that information so I took this photo.

[23] Again, Ms. Crossman neither mentioned nor presumably accepted Mr. Fraser's explanations.

[24] As mentioned, this message was posted to Ms. Crossman's personal or "private" Facebook account. I accept that she did not intend for it to be distributed to the general public and she believed it would only be available to those people who Ms. Crossman accepted as Facebook "friends". That said, it is clear that any of Ms. Crossman's Facebook "friends" could repost or distribute the information. The world has become smaller with the internet. Mr. Fraser became aware of Ms. Crossman's post (and the comments which it attracted) within hours.

[25] On September 4, 2020, Mr. Fraser faced questions at work regarding Ms. Crossman's Facebook post.

[26] At about 7:11 p.m. on September 4, 2020, Mr. Fraser called the police to complain. The police told Mr. Fraser that this was a civil matter and that they could not intervene. Mr. Fraser asked that they speak with Ms. Crossman and, as will be seen below, it appears they did.

[27] At about 7:23 p.m. on September 4, 2020, Ms. Crossman received the following message from WSP Global:

Thank you for reaching out. There seems to have been a misunderstanding as our employee you photographed was taking footage for project-related actions. Should you want to discuss so that we can clarify the matter, please feel free to reach us at [ethics@wsp.com](mailto:ethics@wsp.com).

[28] Still later that evening, a Constable Steven Mason from the local police contacted Ms. Crossman. Ms. Crossman provided her side of the story about the workmen on site and how her multiple complaints had been ignored. She did not attribute any improper behaviour to Mr. Fraser.

[29] The police advised both Mr. Fraser and Ms. Crossman to not contact or engage one another.

[30] Immediately after speaking with the police and still feeling aggrieved, Ms. Crossman posted an update on her Facebook page. It says:

UPDATE: someone from my Facebook relayed this post one of the individuals named in my post for his actions and he called the police on me for harassment. He was upset that I called him out for his actions and was upset that people knew what he did. The cop couldn't believe it and neither can I. But if you're ever wondering why people don't come forward. THIS IS WHY. I will not be mentioning his name any further but you can imagine the level of anger that I feel that I feel the need to censor myself to accommodate someone's feelings who acts this way. I'll also pretend I don't know the person who sent me the SS<sup>2</sup> – congrats you've jeopardized my sense of security even further.

[31] About six weeks later, on October 20, 2020 and despite the police recommending no contact, Mr. Fraser approached Ms. Crossman while she was sitting in her car outside The Hazelton. He wanted to discuss the September 3 - 4, 2020 posts because they remained live on Ms. Crossman's Facebook account. Ms. Crossman recorded their discussion on her cell phone and the recording was placed into evidence.

[32] The recording was a video recording; however, the video only showed the inside of Ms. Crossman's car. It appears that her purpose was to make an audio recording. Mr. Fraser was not aware the conversation was being recorded.

[33] The following information was exchanged during the conversation:

- Mr. Fraser pointed out that he was the only individual whose complete full name (first and last name) was mentioned. The post referred to his supervisor (Madison), but no surname was given. Mr. Fraser said that his name is now associated with all of the other allegations contained in her message. Mr. Fraser indicated that he thought it was unfair to be attacked personally because he was not actually responsible for any of the harassing behaviours identified in the post – and, more specifically, in the paragraph which directly follows Mr. Fraser's name. Mr. Fraser asked Ms. Crossman to remove his name and that, if she has an issue with the construction company's response, she should take it up with them. He mentioned that this was affecting his job and his livelihood;

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<sup>2</sup> "SS" is an acronym for "screen shot".

- Ms. Crossman responded that her life was also being affected. She denied that her post attributed any of the harassing behaviours to Mr. Fraser and acknowledged that any such connection between Mr. Fraser and the harassing behaviours would be untrue. She repeatedly insisted that there was “zero” in the post which would directly connect Mr. Fraser as having committed the behaviours but said “whether it’s tied to your company or not, that’s not my problem”.
- Mr. Fraser apologized for anything that might be attributed to people within his company. Ms. Crossman said that his apology “goes a long way” and apologized if Mr. Crossman felt she was attributing any untoward behaviour to him – while again insisting that the post did not actually accuse Mr. Fraser of harassment.
- Mr. Fraser said “I believe that you fully understand what I’m asking...” Ms. Crossman asked if that was a threat although, in fairness, it was difficult to interpret the comment as threatening. In any event, Mr. Fraser repeated that “I’ve asked that you take it down and it’s affecting me personally.” She then asked for clarity and Mr. Fraser again explained that he wanted his name removed from her post.
- At one point, Ms. Crossman accused Mr. Fraser of making light of the situation and laughing. If Mr. Fraser did laugh during the conversation, it was not audible. However, by the same token, it is telling that Mr. Fraser did not deny laughing when Ms. Crossman made the observation. Rather, he responded by asking what he was supposed to do and concluding that he simply wanted this problem to go away. Ms. Crossman said she felt the same.
- The conversation ended with Mr. Fraser saying “I just want to leave it at that. Sorry to bother you.”

[34] Bearing in mind that Mr. Fraser would have surprised Ms. Crossman by approaching her car and initiating contact contrary to the police recommendation, I listened carefully to the recording of the October 20, 2020 conversation and am entirely satisfied that Mr. Fraser did not speak in a way that belied any anger or involved threats or intimidation. In the end, Mr. Fraser asked that his name be removed so that he would no longer be associated with the kind of harassing behaviour described in the post.



[35] In April 2021, about five months after that (and about seven months after the Facebook post in question was created) Ms. Crossman deleted the post to, in her words, “put all this behind me and move on for my mental health”.

[36] With those facts, I turn to the law and begin with the *Act*.

[37] Section 2 of the *Act* defines its purpose by referring to three distinct goals:

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

[38] Section 5(1) further confirms that: “An individual whose intimate image was distributed without consent or who is or was the victim of cyber-bullying may apply to the court for an order under Section 6.”

[39] In short, while giving due deference to certain fundamental freedoms, the *Act* seeks to address two offending behaviours: non-consensual sharing of intimate images and cyber-bullying.

[40] In this case, there is no allegation regarding the non-consensual sharing of intimate images. Rather, Mr. Fraser’s complaint centres on the allegation of cyber-bullying in relation to Ms. Crossman’s initial Facebook post of September 3, 2020 and her “UPDATE” on September 4, 2020. Mr. Fraser also refers to various supportive comments these messages attracted from Ms. Crossman’s Facebook “friends”.

[41] The term “cyber-bullying” is specifically defined in section 3(c) of the *Act* as follows:

“Cyber-bullying” means an electronic communication, direct or indirect, that causes or is likely to cause harm to another individuals health or well-being where the person responsible for the communication maliciously intended to cause harm to another individuals health or well-being or with reckless with regard to the risk of harm to another individuals health or well-being, and may include:

- i. creating a webpage, blog or profile in which the creator assumes the identity of another person,

- ii. impersonating another person as the author of content or message,
- iii. disclosure of sensitive personal facts or breach of confidence,
- iv. threats, intimidation or menacing conduct,
- v. communications that are grossly offensive, indecent, or obscene,
- vi. communications that are harassment,
- vii. making a false allegation,
- viii. communications that insight or encourage another person to commit suicide, new communications that denigrate another person because of any prohibited ground of discrimination listed in Section 5 of the *Human Rights Act*, or
- ix. communications that incite or encourage another person to do any of the foregoing.

[42] As is clear from this definition and as Justice Arnold confirmed in Nova Scotia’s leading case *Candelora v. Feser*, 2019 NSSC 370 (“*Candelora*”), there are four distinct elements to this statutory cause of action based on “cyber-bullying”. They are:

- 1. the information in question must be an electronic communication;
- 2. electronic communication may be direct or indirect;
- 3. electronic communication must cause or be likely to cause harm to another individual’s health or well-being; and
- 4. the person responsible for the communication must maliciously intend to cause harm to another individual’s well-being or was reckless with regard to the risk of harm to that individual’s health or well-being.

[43] Section 3(c) goes on to describe a number of types of communication that may satisfy the definition of cyber-bullying and are described in Justice Arnold’s decision as “Other 3 (c ) Considerations”.

[44] I note that the specific examples of problematic communications or “other considerations” listed in section 3(c) do not constitute “cyber-bullying” by themselves (i.e., in the absence of the other statutory preconditions that comprise the elements of “cyber-bullying”). For example, and among other things, a communication which may contain a false statement, but it must also be an *electronic* communication (direct or indirect) to constitute “cyber-bullying”. Similarly, even if an electronic communication (direct or indirect) contains a false

statement, the author must also have maliciously intended to cause harm to another individual's health or well-being or be reckless with regards to the risk of such harm. In short, each element of the claim must still be proven. And the burden of proof obviously rests with the person alleging to have been a victim of "cyber-bullying".

[45] I turn now to the four statutory preconditions set out in section 3(c) of the *Act* (i.e. the statutory definition of "cyber-bullying").

### **Electronic Communications**

[46] The parties agreed that the two Facebook posts in question are electronic communications.

[47] Having said that, Mr. Fraser's Affidavit refers to communication that is problematic.

[48] Mr. Fraser complains that an insult which Ms. Crossman made during the "initial incident" became a catchphrase among his colleagues and subjected Mr. Fraser to teasing within the workplace. His Affidavit describes the effect as being hurtful and that "its continued use has had a cumulative damaging effect on my well being".

[49] Mr. Fraser does not specifically describe either the "insult" or the "catchphrase" which damaged his well-being. This is problematic because the only time Mr. Fraser specifically refers to an "insult" from Ms. Crossman is in the context of her calling him "stupid" during the verbal discussions on the morning of September 3, 2020. This insult was made verbally (not through an electronic communication); and verbal, non-electronic communications do not qualify as "cyber-bullying" under the *Act*.

[50] The burden of proof is on the Applicant, Mr. Fraser, to prove this element of the statutory claim (i.e., electronic communications causing harm or risk of harm to his health or well-being). I am not satisfied on the balance of probabilities that the "insult" alleged to have caused Mr. Fraser harm constitutes an electronic communication for the purposes of grounding a "cyber-bullying" claim under the *Act*.

**Direct or indirect Communications**

[51] Ms. Crossman denies that these electronic communications are either direct or indirect mainly because she only intended them to be available to her Facebook “friends”, as opposed to having an open account available to anybody.

[52] Respectfully, Ms. Crossman’s intent is not relevant to this element of the statutory claim. By posting on Facebook Ms. Crossman not only directly communicated with her Facebook friends (the number and scope of which was not disclosed) but, the evidence shows, the posts were indirectly communicated to others, including Mr. Fraser who received a screen shot even though he was not one of Ms. Crossman’s Facebook Friends. As made clear in paragraphs 51 – 55 of *Candelora*, posting on a private Facebook account neither immunizes nor shields the author from potential liability under the *Act*.

[53] Ms. Crossman’s Facebook postings on September 3 and 4, 2020 were both direct and indirect communications, satisfying this element of the claim.

**Caused harm or is likely to cause harm to another individual’s health or well-being**

[54] Mr. Fraser’s affidavit evidence is that:

1. He received immediate inquiries from “several friends ... concerned about the serious nature of the allegations” and that, in the following weeks, he continued “to receive inquiries regarding the false allegations in the Facebook posts from people in my workplace, personal circles, my volunteer fire unit, and even acquaintances from out of province who were able to see the respondent’s post”. Mr. Fraser says that he was improperly forced to defend himself against false allegations of harassment;
2. Mr. Fraser’s “supervisor” or “site superintendent” commented “now they know who you are”. Mr. Fraser says this comment was in “reference to an earlier conversation about the Covid pandemic preventing proper introductions with our Toronto based project team, who had at this point received a number of complaints about me, provided to them *en masse* in a manner suggested in the comments of the respondent’s post”;

3. Ms. Crossman's allegations of harassment, intimidation, and vandalism would be grounds for his dismissal. Mr. Fraser goes on to say that his "supervisor" or "site superintendent" advised that because of the follow-up from this incident and the complaints that were received from the head office no advancement potential existed. Mr. Fraser says that he responded by immediately resigning and he blames Ms. Crossman for his forced resignation;
4. Mr. Fraser emphatically maintains the Respondent's allegations are false and no evidence exists to support them. He generally says that the false allegations caused him great personal duress and have irreparably damaged his reputation.

[55] I deal first with an evidentiary concern arising in relation to the first two allegations of harm and the comments which Mr. Fraser attributes to a "supervisor" or "site superintendent". As indicated, Mr. Fraser alleges that:

1. A "supervisor" or "site superintendent" said "now they know who you are". From this comment, Mr. Fraser deduced that a "Toronto based project team" directly connected him to a "number of complaints" being received "*en masse*". He further says that Ms. Crossman's posts led to a "coordinated effort from a wide group with no firsthand knowledge of what happened [to] flood my head office with complaints." In short, Mr. Fraser says that Ms. Crossman's Facebook comments triggered an avalanche of complaints that the "Toronto based project team" could use to hold Mr. Fraser responsible for the alleged harassment, in whole or in part;
2. A "supervisor" or "site superintendent" told Mr. Fraser in November, 2020 that "because of the fall out from the incident and the complaints that were received from [the] head office, no advancement potential existed." Faced with this severe restriction on his career, Mr. Fraser says that he immediately resigned from the company.

[56] Mr. Fraser asks that these statements be accepted for their truth and, more specifically, as proof of the harm caused by Ms. Crossman's Facebook posts.

[57] The statements attributed to an unnamed "supervisor" or "site superintendent" are inadmissible hearsay. Indeed, the information attributed to a "Toronto based project team" is double-hearsay at best and speculative, at worst. I

note that Mr. Fraser relies upon this information for the inference that his reputation was irreparably harmed among unknown individuals at the Toronto head office and/or that these same persons could improperly believe that the false statements made against Mr. Fraser were true.

[58] “Hearsay is an out-of-court statement that is offered to prove the truth of its contents. The essential defining features of hearsay are: (1) the fact that an out-of-court statement is adduced to prove the truth of its contents and (2) the absence of a contemporaneous opportunity to cross-examine the declarant” (*R v Khelawon*, 2006 SCC 57, at paragraph 35).

[59] The concerns surrounding hearsay evidence are made worse in this case because the individuals to whom this evidence is attributed are not only unavailable for cross-examination but are unnamed. Moreover, if the alleged “flood” of complaints actually were sent to and received by either “head office” or the “Toronto based project team”, none were introduced into evidence – and it is also unclear whether either of these entities actually used the alleged “flood” of complaints against Mr. Fraser.

[60] None of the exceptions to the rule which otherwise excludes hearsay evidence applies. In the end, I can give this evidence no weight.

[61] As to Mr. Fraser’s statement that he was forced to respond to inquiries from various individuals who expressed concern over false Facebook posts, the statutory requirement of harm or the likelihood of harm to one’s health or well-being requires more than generalized statements around great distress or irreparable damage to reputation. Some meaningful, illuminating, and admissible evidence sufficient to satisfy the evidentiary burden is required.

[62] In *Candelora*, Justice Arnold found: “Ms. Candelora testified that Ms. Dadas' Facebook postings caused her significant psychological stress. This psychological stress affected her ability to work and had some impact on her physical health, exacerbating a pre-existing medical condition.” (at paragraph 57) By way of comparison, Mr. Fraser does not provide any additional evidence regarding the impact of having to respond to these inquiries beyond the basic statements that Ms. Crossman’s “false” allegations caused him “great personal distress” and “irreparably damaged [his] reputation”. Respectfully, something more is required.

[63] As to Mr. Fraser’s allegation that Ms. Crossman’s false statements caused him great personal distress and irreparable damage to his reputation, again, generalized statements around harm or risk of harm are insufficient. Under the definition of “cyber-bullying”, harm (or the likelihood of harm) as required under the *Act* is not implied simply because an electronic statement is proven to be false. Some meaningful and admissible evidence as to the harm caused (or likely to be caused) is required.

### **Malicious Intent or Recklessness**

[64] Even if I were to find that the communications in question caused Mr. Fraser harm or a risk of harm as required under the *Act*, I am not satisfied that Ms. Crossman maliciously intended to harm Mr. Fraser’s health or well-being or was reckless with regard to the risk of such harm.

[65] Referring back to the purpose of the *Act* under section 2, the legislation juxtaposes the potentially severe and tragic harms caused by “cyber-bullying” against such rights as the freedom of expression or opinion which help form the foundation of a free and democratic society. In attempting to achieve an appropriate balance, the *Act* holds persons responsible for the electronic communications which they create and disseminate; however, legal liability for the consequences associated with those communications requires an enhanced level of moral culpability. Thus, the person who created the electronic communication must either “maliciously intend” to cause harm to the health of well-being of another individual or be “reckless” with regard to the risk of harm.<sup>3</sup>

[66] These phrases (“maliciously intend” and “reckless”) relate to the state of mind of the person who created the impugned electronic communication. In further clarifying what these words mean in the context of “cyber-bullying”, I find that the jurisprudence around defamation is useful. See also *Candelora* at paragraph 51 which confirms that the law of defamation can be helpful by analogy when considering the scope of communications covered by the *Act*.

[67] Historically, a party alleging defamation was required to prove malice (Raymond E. Brown, *Defamation Law: A Primer* (2d ed), at p. 293). Over time, the Courts distinguished between “malice in law” and “malice in fact”. And “legal malice” (i.e. “malice” sufficient to ground a claim for defamation) was established by proof of the publication of defamatory words. In other words, “where a person

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<sup>3</sup> I emphasize that the requirement of “malicious intent” or “recklessness” with regard to harm is specific to the definition of “cyber-bullying” and not, for example, the non-consensual sharing of intimate images.

publishes a false and defamatory remark, the malice necessary to sustain the cause of action is presumed” (Raymond E. Brown, *Defamation Law: A Primer* (2d ed), at p. 293). There is no such presumption in the case of “cyber-bullying” under the *Act*. Malicious intent and/or reckless must still be proven under the *Act*. This is one of several differences between a claim under the *Act* and defamation.<sup>4</sup>

[68] Having said that, the law of defamation still requires proof of “malice” or “recklessness” in certain situations. In particular, where defamatory words are published in circumstances that are protected by privilege, the defence of privilege may be defeated by alleging and proving that the Defendant was motivated by actual or express malice or malice in fact (Raymond E. Brown, *Defamation Law: A Primer* (2d ed), at p. 294). In these circumstances, “recklessness” is a component of malice. In short, the meaning and content of “malice” and “recklessness” (as a component of malice) remains relevant to the law of defamation.

[69] While, in the context of a defamation claim, the concept of “malicious intent” or “recklessness” apply only in more narrow circumstances, I find the relevant defamation jurisprudence is still helpful in defining and shaping this particular element of “cyber-bullying” under section 3(c) of the *Act*.

[70] Without intending to be an exhaustive definition, a “malicious intent” under section 3(c) of the *Act* involves a consideration of the defendant’s predominant intent, as opposed to an incidental or collateral motivation. The purpose or plan must be to harm or injure the Plaintiff, and relevant factors may include the presence of hatred, spite, ill-will, resentment or revenge. (Raymond E. Brown, *Defamation Law: A Primer* (2d ed) summarizes the concept of “malice” at p. 297 – 298)

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<sup>4</sup> Other differences include, for example:

1. The default mechanism for hearing a defamation case in Nova Scotia is trial by jury;
2. The concepts of malice and recklessness are separate and distinct under the *Act*. “Malicious intent” under Section 3(c) relates to causing harm to another individual’s health or well-being. By contrast, “recklessness” under Section 3(c) is related to the *risk of* harm to another individual’s health or well being. Under the law of defamation “recklessness” is subsumed within the broader notion of malice;
3. “Recklessness” in defamation law relates to disregard to the truth. (Raymond E. Brown, *Defamation Law: A Primer* (2d ed), at p. 302). Under the *Act*, the concept of “recklessness” is related to the risk of harm to another’s health or well-being;
4. Under defamation law, the concepts of “malice” and “recklessness” arise when the defence of privilege arises in the context of a claim for defamation. Under the *Act*, “malice” and “recklessness” are specific components to the definition of “cyber-bullying”. The defence of privilege is a separate consideration and, in fact, constitutes a statutory defence (see Section 7(2) of the *Act*)



[71] As to being “reckless” with regard to the risk of harm under section 3(c) of the *Act*, the person responsible for the impugned communication must show strong proof of a wanton disregard for the risk of harming another individual. Bearing in mind the fundamental rights and freedoms recognized in section 2(b) of the *Act*, acting without guile and in a careless manner is insufficient. (Raymond E. Brown, *Defamation Law: A Primer* (2d ed) summarizes the concept of “recklessness” at pages 302 – 304)

[72] In this case, I am satisfied that Ms. Crossman’s statements on her Facebook could lead to a degree of confusion. All parties agree that Mr. Fraser was not involved in any of the alleged harassment (cat calls, vandalism, lewd comments etc.). Ms. Crossman acknowledges this fact. And yet, Ms. Crossman’s Facebook postings are not entirely clear on this point. For example:

1. She begins her September 3, 2020 post by asking her Facebook “friends” whether they have any personal or professional experience with ELM Developments, WSP Global or Adam Fraser. Adam Fraser is the only person she identifies by first and last name. Immediately after asking about ELM Developments, WSP Global or Adam Fraser, Ms. Crossman writes that “they have cat called, yelled, called names, yelled amongst themselves about what house number I lived in, called me derogatory names, amongst other things I’m not going to put on Facebook.”
2. The next day (September 4, 2020) after receiving a call from the police, Ms. Crossman again went to Facebook to post an “UPDATE”. In that message, Ms. Crossman said “one of the individual’s named in my post” called the police on her because “he was upset that I called him out for his actions and was upset that people knew what he did”. I note that the only other individual identified in Ms. Crossman’s earlier post was the site superintendent identified only as “Madison”. His last name was not provided.
3. In her September 4, 2020 “UPDATE”, Ms. Crossman also left hanging what specific actions the individual in question was “called out” for and what this individual “did”.
4. In October, 2020, Ms. Crossman was advised by Mr. Fraser that her posts were being interpreted as if Mr. Fraser himself was harassing her; and that it was affecting him. Ms. Crossman did not amend or

clarify her posts. Eventually, she removed the post in April, 2021, without amending it to provide additional clarity around Mr. Fraser's role.

[73] Ms. Crossman denies that her posts could be interpreted in a way which holds Mr. Fraser personally responsible for any of the actual harassment and says that there is "zero" in her posts which would directly connect him to the offending behaviours. She further denied any malicious intent to cause harm to Mr. Fraser's health or well-being or being reckless as to that risk.

[74] I find that Ms. Crossman's defence and interpretation of her Facebook posts are exaggerated. The posts in question were not perfect and allowed room for interpretation – or misinterpretation. However, I am not able to conclude on the balance of probabilities that she maliciously intended harm to Mr. Fraser's health or well-being or was reckless with regard to the risk of such harm.

[75] Rather, I find that Ms. Crossman was singularly focussed on her own safety and concerns around the alleged harassment that she faced and felt was being ignored. Mr. Fraser was not her predominant concern. Given her fixed position, Ms. Crossman could not accept the possibility that her posts could be misinterpreted as falsely accusing Mr. Fraser of harassment. In addition, Ms. Crossman felt Mr. Fraser (and, more generally, his employer) were failing to properly address her complaints. Thus, she says, Mr. Fraser is not entirely without fault and her posts reflect his more limited involvement.

[76] Ms. Crossman lacked the empathy necessary to shift her primary focus and better understand or address Mr. Fraser's concerns - particularly after Mr. Fraser explained them to her in October 2020 and calmly asked that she clarify the post. However, I do not find that she either maliciously intended to harm Mr. Fraser's health and well-being or was reckless as to the risk of such harm.

[77] In her singular passion, Ms. Crossman's actions could be considered careless or uncaring, particularly in the way she structured and worded her Facebook posts. However, based on the evidence before me, including Ms. Crossman's perception that her historic complaints were being ignored, I am unable to conclude on the balance of probabilities that she maliciously intended to harm Mr. Fraser's health or well-being; or was reckless in regard to that risk.

[78] In the circumstances, it is unnecessary to further address the “other considerations”, or specific forms of communication listed in section 3(c) of the *Act*.<sup>5</sup>

[79] Ultimately, neither Mr. Fraser nor Ms. Crossman could find it within themselves to move beyond their own issues and better understand the concerns being communicated by the other. However, a finding of “cyber-bullying” under the *Act* is serious and Mr. Fraser failed to tender sufficient evidence to prove the elements of “cyber-bullying” on the balance of probabilities. To find otherwise would, respectfully, do a disservice to the *Act* by diluting the importance of proving each element of “cyber-bullying” under the *Act* and potentially diminish the seriousness of being found liable under the *Act*.

[80] The Application is denied. Costs, if any, are to be determined.

Keith, J

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<sup>5</sup> In this case, the only additional specific forms of “communication” or “other considerations” listed in section 3(c) which may be potentially engaged in this case are: (1) Communications that are harassment (Section 3(c)(vi)); (2) Communications making a false allegation (Section 3(c)(vii)); and (3) Communications that incite or encourage another person to do any of the foregoing, including for example, continued harassment or continuing a false allegation (Section 3(c)(ix)). However, to repeat and for reasons given, it is not necessary to consider these provisions further.