

## A Delicate Balance: Defining the Line Between Open Civil Proceedings and the Protection of Children in the Online Digital Era

Courtney Retter and Shaheen Shariff\*

He thought of the telescreen with its never-sleeping ear. They could spy upon you night and day, but if you kept your head you could still outwit them. [. . .] They could lay bare in the utmost detail everything that you had done or said or thought; but the inner heart, whose workings were mysterious even to yourself, remained impregnable.

— George Orwell, 1984<sup>1</sup>

On Thursday September 27, 2012, a few months after our paper was written, the Supreme Court of Canada solidified the rights of children victimized by cyberbullying in the landmark decision of *AB (Litigation Guardian of) v Bragg Communications Inc.*<sup>1a</sup> The unanimous decision overturned the holding of the Nova Scotia Court of Appeal in part. The justices agreed with the contention that objectively discernible harm would result to the 15-year-old female plaintiff who was victimized by online sexualized bullying, if she was forced to proceed in a legal action against her cyber-perpetrators under her real name.

Writing on behalf of the court, Justice Abella held that, “. . . common sense and the evidence show that young victims of sexualized bullying are particularly vulnerable to the harms of revictimization upon publication, and since the right to protection will disappear for most children without the further protection of anonymity, the girl’s anonymous legal pursuit of the identity of her cyberbully should be allowed.”<sup>1b</sup> Justice Abella argued, in other words, that while the open court principle mandates that court proceedings presumptively remain open and accessible to the media and the public, there were sufficiently compelling interests in this case, namely, the protection of children and their privacy, to warrant restrictions on freedom of the press and openness.<sup>1c</sup> The Supreme Court did not grant, however, the child-plaintiff’s request for a publication ban of the allegedly defamatory material contained in a fake Facebook profile in her name. Instead, the court held that such a confidentiality order would be excessive, given that her name could no longer be connected to the information.

---

\* Courtney Retter, BCL/LLB, and Shaheen Shariff, PhD, Associate Professor McGill University, Affiliate Scholar for the Centre for Internet and Society, Stanford Law School.

<sup>1</sup> George Orwell, *Nineteen Eighty-Four* (London: Penguin, 2000) at Part 2, ch 7.

<sup>1a</sup> 2012 SCC 46 [*AB v Bragg*].

<sup>1b</sup> *Ibid.* at para 27.

<sup>1c</sup> *Ibid.* at para 13.

## INTRODUCTION

The open court principle is at least as old as the common law itself.<sup>2</sup> With references that can be traced back beyond inscrutable records, the principle has always stood for the danger of conducting the administration of justice under a veil of secrecy.<sup>3</sup> Indeed, in addition to being a mechanism for scrutinizing judges, the openness principle provided a way for local constituents to *see* truth organically emerge.<sup>4</sup> In fact, at a time when few places existed for community recreation and entertainment, attending court and watching judicial procedures unfold constituted a theatrical and engaging pastime for people in Elizabethan England:

[The people] derived amusement from the technicalities of property lawsuits and were impressed by political trials and public executions. [. . .] Law for the Elizabethans took the place of politics and sports as a main interest. Cases in court furnished a mirror in which the whole of English life from high to low could be observed. [. . .] When the courts were in session, lawyers, litigants, and observers swelled London's population.<sup>5</sup>

In 2012, the courtroom scene remains largely unchanged. Judges still sit behind a bench. Lawyers conduct their cases from their respective counsel table. Witnesses recount their testimony in a witness box and observers listen from pews behind the bar. What is radically different — though imperceptible — in today's courtroom, however, is the expanded participating audience of court proceedings.<sup>6</sup> More specifically, while in theory court proceedings were open to the public, as a practical matter they were closed to everyone but those who bothered to attend court or who were literate and capable of following cases in newspapers.<sup>7</sup> In today's digital era of information technology, however, an audience of infinite size with unlimited access can tune into the courtroom world with the click of a button,

<sup>2</sup> Paul Schabas, "What Happens at a Bail Hearing Anyway? The Supreme Court's Troubling Retreat from the Openness Principle in *Toronto Star v Canada*" (2011), 54 SCLR (2d) 197 at 199 [Schabas].

<sup>3</sup> *Richmond Newspapers, Inc v Virginia*, 448 US 555 at 565 (1980) (The openness principle fundamentally contributed to the development of the English justice system: "In the 17th century, Charles I's use of the Star Chamber, which operated in private, was a source of complaint in the years leading to the English Civil War," Schabas, *supra* note 2 at 199) [*Richmond Newspapers, Inc*].

<sup>4</sup> *Ibid.* (For instance, in the reports of the Eyre of Kent — a general court held in 1313-1314 — the importance of public attendance in judicial proceedings is emphasized: "[T]he King's will was that all evil doers should be punished after their deserts, and that justice should be ministered indifferently to rich as to poor; and for the better accomplishing of this, he prayed the community of the county by their attendance there to lend him their aid in the establishing of a happy and certain peace that should be both for the honour of the realm and for their own welfare," Sir W Holdsworth, *History of English Law* (London: Methuen, 1927) at 268) [Emphasis Added].

<sup>5</sup> Daniel Kornstein, *Kill All the Lawyers?: Shakespeare's Legal Appeal* (Princeton: Princeton University Press, 1994) at 13 [Kornstein].

<sup>6</sup> The Right Honourable Beverley McLachlin, "Courts, Transparency and Public Confidence — To the Better Administration of Justice" (2003) 8 Deakin Law Review 1 at 2 [McLachlin].

<sup>7</sup> *Ibid.*

thus creating new tensions and dilemmas for the open court principle and its underlying values as they inform judicial decisions. Karen Eltis highlights the potential impact of digital media on judicial independence and the need to address the evolving tensions between privacy and open court principles:

The “Digital Age,” and unfettered usage and access to digital information, will have untold effects on core values of judicial independence, impartiality and the delicate balance between privacy and the “open court” principle. Technology — as well as the dramatically increased availability of information of all kinds and quality — is distorting the judicial process and its outcomes. It is of primary importance, therefore, to identify the broad issues that emerge from the growing use of technology, and to provide a theoretical basis for adjudicating the ongoing tensions between privacy and transparency in the judicial setting. *Too often the judiciary pits privacy against the “open court” principle and accepts a culturally narrow view of what constitutes privacy and how it affects the judicial process* [Emphasis added].<sup>8</sup>

Our paper will examine the delicate balance between the open court principle and the reasonable expectation of privacy of parties participating in the judicial process, particularly when cyber-bullying cases are involved. Specifically, we will delineate how, in a cyber-bullying context, the open court principle can damage the lives and reputations of children seeking to hold their perpetrators accountable in court.<sup>9</sup> Traditionally, Canadian courts have pitted the right to privacy *against* the right of the public to open courts, and, more often than not, privacy has yielded to openness.<sup>10</sup> We will argue, however, that the modern day reality of digital information necessitates a more nuanced and complex understanding of the relationship between openness and privacy.<sup>11</sup> Accordingly, rather than conceptualize the two principles as value competitors, privacy should instead be considered an ally of

<sup>8</sup> Karen Eltis, “The Judicial System in the Digital Age: Revisiting the Relationship Between Privacy and Accessibility in the Cyber Context” (2011) McGill LJ 56(2) 1 at 7 [Eltis].

<sup>9</sup> Shaheen Shariff & Leanna Johnny, “Cyber-Libel and Cyber-Bullying: Can Schools Protect Student Reputations and Free-Expression in Virtual Environments?” (2007) 16 Educ & LJ 307 at 311-12 (While there is presently no consensus on the exact formulation of the definition of cyber-bullying, the authors define the term as follows: “Cyber-bullying consists of covert, psychological bullying, conveyed through electronic mediums such as cell phones, web logs and websites, online chat rooms, “MUD” rooms (multi-user domains where individuals take on different characters and false names) and Xangas and myspace.com (online personal profiles where some adolescents create lists of people they dislike). It is verbal (over the telephone or cell phone), or written (flaming threats, racial, sexual or homophobic harassment) using the various mediums available. Most cyber-bullying is covert, insidious and anonymous because perpetrators are shielded by screen names”) [Shariff & Johnny].

<sup>10</sup> Judges Technology Advisory Committee, *Open Courts, Electronic Access to Court Records, and Privacy* (Ottawa: Canadian Judicial Council, 2003), online: Canadian Judicial Council <[http://cjc-ccm.gc.ca/cmslib/general/news\\_pub\\_techissues\\_Open\\_Courts\\_20030904\\_en.pdf](http://cjc-ccm.gc.ca/cmslib/general/news_pub_techissues_Open_Courts_20030904_en.pdf)> at 2 [JTAC].

<sup>11</sup> McLachlin, *supra* note 6 at 9.

openness in the judicial process.<sup>12</sup> In order to demonstrate how the presumption of openness can operate to produce unsatisfactory results that threaten both the privacy and safety of litigants in court, our paper will evaluate a particular strain of jurisprudence as it relates to cyber-bullying.

To date, the open court principle has been first and foremost about *courts*.<sup>13</sup> Put in another way, the open court principle concomitantly entails that: [1] the public and the press have unrestricted access to courts of justice and are entitled to attend and observe any hearing; [2] court records and documents are made available for public examination; and [3] the reasons provided for judicial decisions are public, and, therefore, subject to the scrutiny of legal parties, the reporting media, the bar, academics and, most importantly, the public at large.<sup>14</sup> Accordingly, the open court principle is *not* about the parties seeking justice in a judicial venue; nor is it uniquely premised on the rights of journalists reporting on court activities.<sup>15</sup> What modern technology has essentially done, however, is blur and distort the original parameters of the principle in such a way that openness can now operate to prejudice rather than promote the integrity of the administration of justice.<sup>16</sup> More specifically, while a presumption of openness must continue to exist, unfettered usage and access to digital judicial information can work to ensure, “rather than prevent, the abuse of judicial power, can create unacceptable risks of a miscarriage of justice, and can cause unnecessary harm to the safety and privacy of individuals.”<sup>17</sup>

As this paper is being written, the Supreme Court of Canada [“SCC”] will have heard an appeal regarding the rights of a child-plaintiff, victimized by online bullying, to anonymously sue the creator of a fake Facebook profile in her name, and obtain a publication ban on the statements she alleges to be defamatory contained therein.<sup>18</sup> In *AB (Litigation Guardian of) v Bragg Communications Inc* [“*AB v Bragg*”], the Nova Scotia Court of Appeal denied the plaintiff’s application to proceed in the defamation action under a pseudonym and to impose the publication ban on the alleged defamatory materials.<sup>19</sup> While the court acknowledged that children are uniquely vulnerable in legal proceedings, it still held that:

To initiate an action for defamation, one must present oneself and the alleged defamatory statements before a jury *and in open court*. To be able to

<sup>12</sup> Eltis, *supra* note 8 at 1.

<sup>13</sup> Jennifer Stoddart, Privacy Commissioner of Canada, “Open Courts and Privacy; Privacy Law in Canada” (Remarks at the Supreme Court of British Columbia Education Seminar, 9 November 2011), online: [http://www.priv.gc.ca/media/sp-d/2011/sp-d\\_20111109\\_e.asp](http://www.priv.gc.ca/media/sp-d/2011/sp-d_20111109_e.asp) [Stoddart].

<sup>14</sup> McLachlin, *supra* note 6 at 2.

<sup>15</sup> Stoddart, *supra* note 13.

<sup>16</sup> McLachlin, *supra* note 6 at 11.

<sup>17</sup> Peter A Winn, “Online Court Records: Balancing Judicial Accountability and Privacy in an Age of Electronic Information” (2004) 79 *Washington Law Review* 307 at 308 [Winn].

<sup>18</sup> *AB (Litigation Guardian of) v Bragg Communications Inc*, (13 October 2011) 2011 CarswellNS 694 (SCC).

<sup>19</sup> 2011 NSCA 26 [*AB v Bragg*].

proceed with a defamation claim under a cloak of secrecy, strikes me as being contrary to the quintessential features of defamation law.<sup>20</sup>

With respect, the above position fails to take into account or appreciate the grave reality of cyber-bullying, online harassment, and its devastating consequences for young people.<sup>21</sup> While disclosing personal and embarrassing information might be typical in cases where a plaintiff seeks damages for harm to reputation,<sup>22</sup> it fails to capture the resonating essence of disparaging statements made online — remarks, in other words, that are potentially accessible to an audience of incalculable numbers, for an indefinite duration, and which magnify the harm every single instance the information is viewed, retrieved, and saved.<sup>23</sup>

The problems of bullying and cyber-bullying are considered to be some of the largest and most complicated issues in contemporary Canadian society.<sup>24</sup> It is estimated that there are over 252, 000 cases of bullying per month in Canadian high schools.<sup>25</sup> Furthermore, the ubiquity and broad reach of modern technology has made bullying quicker, easier, more rampant, and crueler than ever before.<sup>26</sup> The negative short-term and long-term consequences of (cyber-)bullying for victims range from loss of self-esteem to fear at school, anxiety, and, at the more extreme end of this spectrum, substance abuse problems and ultimately, suicide.<sup>27</sup> Despite its increasing prevalence, only half of all victims are willing to report being bullied;<sup>28</sup> in fact, a majority of targeted children would only consider coming forward with their stories if they could do so *anonymously*.<sup>29</sup> In light of these observations, it is disappointing that the Nova Scotia Court of Appeal chose to pit openness

<sup>20</sup> *Ibid* at para 80 [Emphasis Added].

<sup>21</sup> Stoddart, *supra* note 13.

<sup>22</sup> *AB v Bragg*, *supra* note 19 at para 82.

<sup>23</sup> A Wayne MacKay, on behalf of the Nova Scotia Task Force on Bullying and Cyber-bullying, *Respectful and Responsible Relationships: There's No App for That* (Halifax: Nova Scotia Task Force on Bullying and Cyber-bullying, 2012) at 11 [*There's No App for That*].

<sup>24</sup> *Ibid* at 4.

<sup>25</sup> *Ibid* (as cited in a presentation by Bullying.org to the Senate Human Rights Committee on Cyberbullying).

<sup>26</sup> *Ibid* at 11.

<sup>27</sup> *Ibid* at 10 (Suicide is the second leading cause of death for Canadian teenagers aged 15–19-years, Canadian Psychiatric Association (2012), online: <<http://publications.cpa-apc.org/browse/documents/20>>. One in five Canadian teenagers suffers from some kind of mental illness; despite this alarming statistic, less than 10% of teens who require mental health or drug and alcohol services will receive them in Canada, “Mental Health Status and Prevalence of Mental Health Problems in Canadian Children and Adolescents” (2010), online: <<http://www.canadianschoolhealth.ca/page/The+Mental+Health+Status+%26+Prevalence+of+MH+Problems+in+Canadian+Children+%26+Adolescents>>).

<sup>28</sup> *Ibid* at 10.

<sup>29</sup> Shaheen Shariff & AH Churchill, *Truths and Myths of Cyber-bullying: International Perspectives on Stakeholder Responsibility and Children's Safety* (New York: Peter Lang Publishing, Inc, 2010) [Shariff & Churchill].

against privacy without engaging in a more contextualized analysis of the competing interests at stake. Put in another way, openness “is not a matter of all or nothing, one or the other. It is rather a matter of finding the right equilibrium, or balance, on a [. . .] case-by-case basis.”<sup>30</sup>

Using *AB v Bragg* as its centerpiece, our paper will argue that the open court principle cannot act as the taken for granted starting point in cases involving child-plaintiffs victimized by cyber-bullying.<sup>31</sup> More specifically, we will demonstrate that the underlying purpose of openness, namely, preserving the integrity of the administration of justice, is defeated when litigants, particularly children, are [a] deterred from accessing the courts, [b] scared that their privacy is endangered, and [c] forced to confront outdated principles that have not properly evolved to reflect the current status quo.<sup>32</sup> We will begin by detailing how modern technology has radically changed the relationship between open courts and privacy in the judicial system. In particular, we will focus on how the shift from paper records to electronic judicial records has occurred without sufficient safeguards, resulting in the celebration of the abstract philosophy of free-flowing judicial information at the expense of the privacy and safety of litigants participating in the judicial process (Section I).<sup>33</sup> In order to understand why openness necessitates a more nuanced analysis in the context of cyber-bullying, we will proceed with an evaluation of the facts and reasoning provided in *AB v Bragg*. Furthermore, we will consider values superordinate to openness in this case, namely, the protection of children, the right to privacy, and access to justice (Section II). The paper will conclude by arguing that litigious efforts against individual perpetrators of harm will not solve a complex and multifaceted issue such as cyber-bullying; instead, children need to be provided with ethical tools that will help them navigate the online world responsibly (Section III).<sup>34</sup>

## I. DEFINING THE LINE BETWEEN OPENESS AND PRIVACY IN THE DIGITAL ERA

Technology has irrevocably changed the way the Canadian judicial system conducts business. At one time, in the not-so-distant past, access to judicial proceedings required some effort; it involved actually *going* to the courthouse to watch a proceeding unfold, hunting through a plethora of specialized legal texts or waiting in line to pay for copies of court documents.<sup>35</sup> Today, by contrast, access to judicial records is an effortless process that often involves nothing more arduous than a free Google search of a legal concept and a party’s name. Indeed, an increasing number

<sup>30</sup> McLachlin, *supra* note 6 at 10.

<sup>31</sup> Eltis, *supra* note 8 at 19.

<sup>32</sup> McLachlin, *supra* note 6 at 9-10.

<sup>33</sup> Winn, *supra* note 17 at 315.

<sup>34</sup> *There’s No App for That*, *supra* note 23 at 5.

<sup>35</sup> Stoddart, *supra* note 13 (The Privacy Commissioner humourously noted in her speech, “[s]ome of us [. . .] are old enough to remember trips to musty basement record rooms not so long ago”).

of courts provide remote electronic retrieval of docket information,<sup>36</sup> post reasons for judicial decisions electronically on court websites or through commercial publishers,<sup>37</sup> and invite cameras into the courtroom, making legal drama a staple of the nightly supertime news.<sup>38</sup> At its core, what differentiates public access to judicial records today from in the past is that access is now *paperless*. Contemporary accessibility, in other words, is premised on electronic court documents being available in a cyber world where privacy can no longer be spatially bounded and where courts are increasingly less capable of controlling how their own materials are used.<sup>39</sup> This conversion from paper to electronic records is irrefutably associated with efficiency benefits for lawyers, judges, and ultimately, the populace;<sup>40</sup> that being said, paperless access still comes equipped with radical — and often misunderstood — implications for the judicial process and its governing principles.<sup>41</sup>

The following section will demonstrate how paperless access to judicial records distorts the traditional balance between openness and competing principles of interest. More specifically, the section will articulate why it is problematic to apply the same rules designed for paper records to electronic ones, and how assumptions of parity represent a serious misapprehension of the differences between

---

<sup>36</sup> JTAC, *supra* note 10 at 22 (Docket information is “used to include documents prepared manually by court staff or automatically by data entered into a computer such as a listing of court records in a court file.” For instance, the SCC website, [www.scc-csc.gc.ca](http://www.scc-csc.gc.ca), includes an online tracking system which allows users to obtain a list of all of the documents filed, the party responsible for filing them, and the date and a description of events which have occurred in that court).

<sup>37</sup> *Ibid* at 22 (In some jurisdictions, the court provides an electronic version of judgments to the Canadian Legal Information Institute [“CanLII”] ([www.canlii.org](http://www.canlii.org)). Not *all* judicial decisions are available online and there is inconsistency in the availability of reasons for decisions in family law cases. For instance, the Court of Queen’s Bench in Alberta stopped posting family law cases to its court website and stopped sending electronic versions to CANLII).

<sup>38</sup> McLachlin, *supra* note 6.

<sup>39</sup> Eltis, *supra* note 8 at 14–16 (For instance, many court documents contain personal information, including social security numbers, bank accounts, medical records, trade secrets, and criminal records. Kristen M Blankley, “Are Public Records Too Public? Why Personally Identifying Information Should Be Removed from Both Online and Print Versions of Court Documents” (2004) 65 Ohio St. L.J. 413 at 414 [Blankley]. “Courts must ensure that those who encounter the legal system — voluntarily as well as involuntarily — do not face exploitation of their personal information by commercial information brokers or become the victims of cyber-criminals or electronic peeping toms,” Winn, *supra* note 17 at 318).

<sup>40</sup> Winn, *supra* note 17 at 314 (For instance, in the US, federal electronic filing systems offer the following benefits: “24-hour access to case files over the Internet, ability to file pleadings electronically with the court, automatic e-mail notice of case activity, ability to download and print up-to-date documents directly from the court system, no waiting in line, expanded search and reporting capacities, the elimination of the cost of expensive courier services, and an overall reduction in the physical storage space needs of the courts”).

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

paper and electronic records.<sup>42</sup> In particular, we will consider the following three broad impacts of paperless records on privacy: [a] breadth of access; [b] permanence of records; and [c] outdated legal protections.<sup>43</sup>

### (a) Breadth of Access

The first broad impact of paperless records on privacy refers to the extent to which documents are now subject to unlimited, unparalleled, and unchecked dissemination.<sup>44</sup> Prior to the advent of modern digital technologies, court documents, while technically public, were still private in nature because they reflected what has come to be known as the doctrine of practical obscurity.<sup>45</sup> In the world of paper-based judicial records, personal information was accessible to the public in the sense that anyone with a desire to access a court document could view it; the costs of retrieval, however, limited access as a practical matter.<sup>46</sup> Put in another way, only individuals with a strong personal interest in a particular court matter would take the necessary amount of time required out of their day to travel to the local courthouse, wait in line at the clerk's office, fill out the requisite paperwork, and pay the copying costs.<sup>47</sup> Electronic court documents, by contrast, are universally accessible and virtually cost-free. Once a court record is published online, "computerized compilers can search, aggregate, and combine the information with information from many other public filings to create a profile of a specific individual in a matter of minutes, at minimal cost."<sup>48</sup> In short, paper documents operated in favour of privacy by shielding litigants from the harm that could potentially result from indiscriminate access to and use of information contained in a document connected with a court proceeding.<sup>49</sup>

Case examples are the best way of illustrating the extent to which openness is distorted by the breadth of access of paperless court documents. In *JL v AN* [*"JL"*],<sup>50</sup> for instance, a Quebec woman sued a former sexual partner for damages after being infected with a sexually transmitted disease for which that partner had failed to disclose his carrier status. In consequence of the disturbing and embarrass-

---

<sup>42</sup> *Ibid* at 315.

<sup>43</sup> Chantal Bernier, Assistant Privacy Commissioner of Canada, "The Adjudicative Process in the Internet Age: A New Equation for Privacy and Openness" (Presentation at the Canadian Institute for the Administration of Justice National Roundtable, 28 May 2010), online: <[http://29717.vws.primus.ca/speech/2010/sp-d\\_20100528\\_cb\\_e.cfm](http://29717.vws.primus.ca/speech/2010/sp-d_20100528_cb_e.cfm)> [Bernier].

<sup>44</sup> Eltis, *supra* note 8 at 15.

<sup>45</sup> This doctrine was first articulated in *United States Dep't of Justice v Reporters Comm for Freedom of the Press*, 489 US 749, 762, 780 (1989).

<sup>46</sup> Winn, *supra* note 17 at 316.

<sup>47</sup> Blankley, *supra* note 39 at 417.

<sup>48</sup> Winn, *supra* note 17 at 316 ("Information in many different locations can be combined and aggregated in ways that previously were impossible, permitting entirely new uses of the information that could never have been intended before").

<sup>49</sup> *Ibid* at 320.

<sup>50</sup> [2007] RJQ 1998 (Sup Ct) (see also *Telbani v Canada (Procureur général)*, 2008 CF 1318; *X v Société Canadienne de la Croix-Rouge*, [1992] RJQ 2735 (CA)) [*JL*].



ing nature of the sexual and medical details involved in the case, the plaintiff asked the court to exercise its discretionary power and redact sensitive information.<sup>51</sup> The court, however, refused to grant the plaintiff a publication ban on the grounds that the issues at bar were not family law related; rather, they were private law matters not sufficiently exceptional to justify encroaching on the open court principle.<sup>52</sup>

Interestingly, legal databases such as SOQUIQ *voluntarily* agreed to redact the disturbing sexual and medical details provided in *J.L.* even though they were at liberty to publish them.<sup>53</sup> Irrespective of this fact, once information is made available online redaction is virtually impossible and outside the control of the courts.<sup>54</sup> The co-existence of a partially redacted court file with an official and complete court decision does nothing to assuage the impact of egregious intimate facts floating around online in infamy. Furthermore, the identities of anonymous parties can still be ascertained in Quebec by matching the action number on the reasons for decision with the action number provided on [www.azimut.soquij.qc.ca](http://www.azimut.soquij.qc.ca), the official website of the SOQUIQ legal database.<sup>55</sup> Anyone with access to a computer, consequently, is a click away from accessing the [1] names, and [2] medical and sexual information disclosed by parties involved in cases such as *J.L.*

#### (b) Permanence of Records

The second broad impact of paperless records on privacy reflects the temporal and spatial characteristics that differentiate the lifespan of a paper document from an electronic one. Like humans, paper records are organic.<sup>56</sup> More specifically, both humans and paper records experience a natural evolution of decay and change.<sup>57</sup> With the passing of time, paper-based documents accumulate and grow old, thus ensuring the consistent disposal of materials to make room for new documents.<sup>58</sup> Electronic records, on the other hand, are inorganic; they never grow old, nor do they get relocated to warehouses or physically get destroyed.<sup>59</sup> Instead, defying any commonsense understanding of the progressive degeneration of docu-

<sup>51</sup> Eltis, *supra* note 8 at 22.

<sup>52</sup> *J.L.*, *supra* note 50 (Legislation attempts to exclude certain subject matters from the general principle of openness. For instance, in Quebec, all family law cases uniformly have initials in the style of cause. Specifically, section 815.4 of the *Code of Civil Procedure* states: “No information that would allow the identification of a party to a proceeding or of a child whose interest is at stake in a proceeding may be published or broadcast unless the court or the law authorizes it or unless that publication or broadcast is necessary to permit the application of an Act or a regulation. *Furthermore, the judge may, in a special case, prohibit or restrict, for such time and on such conditions as he may deem fair and reasonable, the publication or broadcast of information pertaining to a sitting of the court.*” RSQ, ch C-25 [Emphasis Added]).

<sup>53</sup> Eltis, *supra* note 8 at 22.

<sup>54</sup> *Ibid.*

<sup>55</sup> JTAC, *supra* note 10 at 23.

<sup>56</sup> Winn, *supra* note 17 at 316.

<sup>57</sup> *Ibid.*

<sup>58</sup> *Ibid.*

<sup>59</sup> *Ibid.* at 317.

ments over time, paperless records have the capacity to be stored for long periods of time. Although digital data degrade over time, they are more likely to be retrieved and resurface when stored in more than one computer hard-drive, server or data base.<sup>60</sup> Given the possible indefinite duration of their existence, paperless documents challenge one of the foundational principles of court accessibility. Specifically, electronic records undermine a court's ability to control its own documents.<sup>61</sup>

In *MacIntyre v. Nova Scotia (Attorney General)*, the SCC held that, at every stage of the judicial process, courts have a supervisory and protecting power over their own records.<sup>62</sup> Furthermore, it is the authoring judge — and not the publisher — who is ultimately responsible for the contents of a judgment.<sup>63</sup> When documents are no longer confined to their physical incarnation, however, it is substantially harder to manage, firstly, who is viewing a record, and secondly, the purpose for which a record's content is being used.<sup>64</sup> Once a record is available online, it can be republished quickly and easily and reproduced infinitely with no mechanism for regulating how that document is subsequently modified or where it ends up in cyberspace.<sup>65</sup> In the virtual realm, in other words, the concepts of both document control and authorship are disturbingly skewed:

Once a [document] enters cyberspace, millions of people worldwide can gain access to it. Even if the [document] is posted in [an online] forum frequented by only a handful of people, any one of them can republish the [document] by printing it or, as is more likely by forwarding it instantly to a different [. . .] [online] forum. And if the [document's content] is suffi-

---

<sup>60</sup> *Ibid.*

<sup>61</sup> Eltis, *supra* note 8 at 15.

<sup>62</sup> *MacIntyre v. Nova Scotia (Attorney General)*, [1982] 1 SCR 175 at 189 [*MacIntyre*].

<sup>63</sup> See Kate Welsh, "Court Records Access in Canada" (Presentation delivered at the 6th Conference on Privacy and Public Access to Court Records, Williamsburg, 6-7 November 2008) at 15, online: The Center for Legal and Court Technology <privacy.legaltechcenter.net/privacy/Privacy%20Documents/Court%20Records%20Access%20in%20Canada.ppt>, citing *MacIntyre*, *supra* note 62.

<sup>64</sup> Winn, *supra* note 17 at 317 (The author argues that online access has a dark side. For instance, "[i]dentity theft is now reaching epidemic proportions and has left millions of innocent victims little, if any, means of redress. In health care, the electronic revolution has created new opportunities for advances in medicine, but it also has begun to undermine the relationship of trust between physician and patient").

<sup>65</sup> Shariff & Johnny, *supra* note 9 at 318 (The world is no longer dominated by paper: "The world produces between 1 and 2 exabytes of unique information per year, which is roughly 250 megabytes for every man, woman, and child on earth. An exabyte is a billion gigabytes[.] [. . .] *Printed documents of all kinds comprise only .003% of the total.* Magnetic storage is by far the largest medium for storing information and is the most rapidly growing with shipped hard drive capacity doubling every year. Magnetic storage is rapidly becoming the universal medium for information storage." Also see William A Fenwick & Robert D Brownstone, "Electronic Filing: What Is It? What Are Its Implications?" (2002) 19 Santa Clara Computer & High Tech LJ 181 at 182 [Emphasis Added]).

ciently provocative, it may be republished again and again.<sup>66</sup>

The Israeli case of *Doe v Doe (Ploni v Almoni)* [“*Ploni*”]<sup>67</sup> is an unparalleled illustration of how judicial dominion over court records is eroded online.<sup>68</sup> In *Ploni*, a man sued an Internet dating website after the company refused to delete postings made by a former lover who usurped the plaintiff’s online identity — a pseudonym deliberately chosen to keep his sexual orientation a secret — in order to disclose his true identity and fabricate lies regarding his HIV status. Following standard protocol, the court system automatically posted the pleadings at bar, including the maligned and damaging details regarding the plaintiff’s orientation, preferred sexual acts, and overall health that initiated the suit in the first place.<sup>69</sup> While the judge subsequently ordered that a redacted version be posted online excluding the inflammatory details, the original copy of the pleadings were left floating around in the abyss of cyberspace, never to be located or effectively removed.<sup>70</sup> The circumstances in *Ploni* are unfortunately not exceptional. Lawyers and judges alike are slowly evolving to recognize the possible ramifications of including sensitive information in court documents intended for online publication; at a minimum, legal actors’ reaction time is remarkably slower than the pace at which documents can be posted online and distributed globally.<sup>71</sup>

### (c) Outdated Legal Protections

Courts are held to protect the discretionary privacy rights of parties participating in the judicial process even when that duty is at odds with accessibility.<sup>72</sup> Accordingly, the third broad impact of paperless records on privacy reflects the inadequacy of traditional mechanisms used to limit openness in warranted cases.<sup>73</sup> More specifically, electronic records challenge the efficacy of existing methods for sealing files and anonymization, including requests for publication bans, sealing orders, and applications to use a pseudonym or initials in the style of cause of a proceeding.<sup>74</sup> Indeed, legal tests articulated by the courts for many of the above discretion-

<sup>66</sup> LB Lidsky, “Silencing John Doe: Defamation and Discourse in Cyberspace” (2000) 49 Duke LJ 855 at 862–865 [Lidsky].

<sup>67</sup> *Doe v Doe (Ploni v Almoni)* (2006), Tel Aviv Magistrate Court 06/17485.

<sup>68</sup> Eltis, *supra* note 8 at 15.

<sup>69</sup> *Ibid.*

<sup>70</sup> *Ibid.* (“Of course counsel’s tardy realization that the statement of claim would be posted online in accordance with the court’s standard practice was presumably at least partially to blame for the lamentable result”).

<sup>71</sup> *Ibid.*

<sup>72</sup> *Ibid* at 21.

<sup>73</sup> Eltis, *supra* note 8 at 19 (Circumstances which warrant an encroachment on the presumption of openness include, but are not limited to, “young offenders, family matters, the protection of innocent third parties, interim publication bans, and in some cases, confidential commercial information.”)

<sup>74</sup> JTAC, *supra* note 10 at 35 (Succinctly, a sealing order is an order by which a document filed in a civil proceeding is treated as confidential and does not form part of the public record; a publication ban, by contrast, is an order to restrict or ban publication of cer-

ary orders preceded the Internet age and the ubiquity of electronic media. The digital era of information technology has transformed the world so rapidly that there has been an insufficient amount of time to develop case law that appropriately takes the differences between electronic and paper records into account, thus reconfiguring the balance between openness and the protection of privacy.<sup>75</sup> Courts, in other words, are left with no other alternative but to apply legal rules to factual realities that no longer adequately cover or reflect the ways in which privacy can be challenged today.<sup>76</sup>

For the purposes of our paper, the questionable utility of publication bans in the era of Internet technology is particularly instructive. Indeed, while in the past publication bans effectively shielded the protected content of an order both within and outside the territorial scope of its application,<sup>77</sup> today's publication bans are governed by a new rule of thumb, namely, the bigger the case, the more futile the ban.<sup>78</sup> Court ordered publication bans are strictly enforceable within *Canadian* borders. When a case attracts international attention, however, it is increasingly difficult to prevent the dissemination of information protected under a ban from being published abroad. For instance, the value of a ban is seriously undermined when a blogger or news outlet across the U.S. border can publish details of a proceeding revealed in open court without sanction.<sup>79</sup> Furthermore, as stated earlier in our paper, it is virtually impossible to supervise how information is used and where it is posted online once it becomes available. In short, in many instances a publication ban is nothing short of a license for anyone with Internet connection to distort facts and participate in an online circus of speculation regarding the outcome of a case and its proceedings.<sup>80</sup>

---

tain information during a proceeding. This order could prevent the media from reporting on certain issues or the proceeding.)

<sup>75</sup> Winn, *supra* note 17 at 319.

<sup>76</sup> *Ibid* at 315.

<sup>77</sup> Bernier, *supra* note 43.

<sup>78</sup> Kirk Makin, "Internet Wreaks Havoc on Publication Bans" (5 April 2005) *The Globe and Mail*, online: The Globe and Mail <<http://www.theglobeandmail.com/news/technology/article876596.ece>>.

<sup>79</sup> *Ibid*. (For instance, "[a] ban on testimony at the Commission of Inquiry into the Sponsorship Program and Advertising Activities ["Gomery inquiry"] had barely been issued [. . .] before it was massively breached [. . .] by U.S. bloggers whose websites are easily accessible to Canadians." The Gomery inquiry was appointed by Paul Martin's government on February 19th, 2004. Justice John Gomery of the Superior Court of Quebec was the sole commissioner appointed to investigate the misuse of funds by the federal sponsorship program).

<sup>80</sup> Globe Editorial, "This Ban Goes Too Far" (30 April 2010) *The Globe and Mail*, online: The Globe and Mail <http://www.theglobeandmail.com/news/opinions/editorials/this-ban-goes-too-far/article1553384/> (The SCC itself has acknowledged that blog postings and other online media are "potentially more ephemeral and more ubiquitous than traditional print media," *Grant v Torstar Corp*, [2009] 3 SCR 640 at para 97 [*Grant*]).

**(d) Summary Analysis**

In their 2003 report, *Open Courts, Electronic Access to Court Records, and Privacy* [“Report”], the Judges Technology Advisory Committee [“JTAC”] reported the following conclusions to the Canadian Judicial Council on the relationship between privacy and openness in the modern digital era:

1. The right of the public to open courts is an important constitutional rule.
2. The right of an individual to privacy is a fundamental value.
3. The right to open courts generally *outweighs the right to privacy*.<sup>81</sup>

It is not an exaggeration to state that the legal landscape under consideration nine years ago in the JTAC Report is radically different from the present Canadian status quo. For starters, in 2004, a year after the Report’s publication, social networking site Facebook was launched and irreversibly changed the way Canadians communicate. In 2012, there are reported to be 18 million Canadians on Facebook — a statistic representing more than half of the country’s population.<sup>82</sup> Furthermore, blogging websites with the exclusive purpose of tracking Canadian cases are now commonplace;<sup>83</sup> the Canadian Legal Information Institute publishes judicial decisions with the option of sharing holdings automatically via Twitter or LinkedIn;<sup>84</sup> and evidence from text messages, voicemail, and social media in general, are increasingly being introduced as exhibits in court.<sup>85</sup> In short, while both the right of the public to open courts and to individual privacy remain important fundamental principles, judicial assessments which presumptively place more weight on openness without engaging in a more nuanced and contextual analysis of the competing values at stake are out of touch with the reality of the online judicial

<sup>81</sup> JTAC, *supra* note 10 at 18 [Emphasis Added].

<sup>82</sup> Vito Pilioci, “Is Social Media Harming our Mental Health, Researchers Wonder?” (25 March 2012) *National Post*, online: nationalpost.com <<http://news.nationalpost.com/2012/03/25/is-social-media-harming-our-mental-health-researchers-wonder/>> (“More than 12 million [Canadians] visit the site daily. On a per-capita basis, Canada has the highest number of Facebook users in the world”).

<sup>83</sup> See, for instance, Slaw, Canada’s online legal magazine ([www.slaw.ca](http://www.slaw.ca)), and Lawblogs.ca, an open directory of Canadian blogging lawyers, law librarians, marketers, IT professionals and paralegals (<http://www.lawblogs.ca>).

<sup>84</sup> See, for instance, the “Share” link under the official citation for *AB v Bragg* on the CanLII website: <http://www.canlii.org/eliisa/highlight.do?text=Facebook&language=en&searchTitle=Nova+Scotia&path=/en/ns/nsca/doc/2011/2011nsca26/2011nsca26.html>.

<sup>85</sup> See, for instance, Kathryn R Brown, “The Risks of Taking Facebook at Face Value: Why the Psychology of Social Networking Should Influence the Evidentiary Relevance of Facebook Photographers” (2012) 14 *Vand J Ent & Tech L* 357 at 360 (“The average Facebook user creates ninety pieces of content each month, representing a potential gold mine for lawyers seeking information about their clients or adversaries. In recent years, US and Canadian courts have grappled with questions about the discoverability and admissibility of Facebook content in litigation. For example, criminal prosecutors have sought to prove a defendant’s lack of remorse by presenting Facebook photographs that portray the defendant as mocking the law”).

realm;<sup>86</sup> in fact, such assessments can threaten, rather than preserve, the integrity of the administration of justice.<sup>87</sup>

Section I of our paper demonstrated the extent to which electronic records have shifted the balance away from privacy. Although electronic court records and their wide dissemination facilitate public access to case law, the balance away from privacy complicates, if not compromises, the accountability of judges in the judicial process.<sup>88</sup> Rather than furthering the principle of open courts, paperless documents have resulted in transaction costs ranging from excessive infringements on privacy to a diluted capacity on behalf of the courts to supervise their own materials.<sup>89</sup> These costs are not trivial. Unlimited access to court records online will not increase public respect for the Canadian judicial system. Without the appropriate safeguards, it will instead erode the faith and confidence traditionally enjoyed by the courts:<sup>90</sup>

In addition to the embarrassment it can generate, free-for-all admission to court records online significantly facilitates witness — litigant bullying, and may even nourish an intimidation industry. This is certainly not to suggest that litigants could not be embarrassed, or that witnesses could not be “reached” prior to the Internet age; it is merely that these pre-existing difficulties are *exponentially worsened* by the indiscriminate posting of court records online, due to the nature of the networked environment.<sup>91</sup>

In the section that follows, we will concretely examine how judicial analyses that presumptively prioritize openness over privacy can exponentially worsen the degree of harm experienced by a litigant in court. More specifically, using *AB v Bragg* as our anchor, we will consider the ramifications of a court pitting the principle of open courts against privacy to the detriment of a child-plaintiff victimized by cyber-bullying, thus failing to reconcile these primordial objectives in a fair and principled way.<sup>92</sup> The section will begin by providing a brief description of the facts and judicial history of *AB v Bragg*. It will follow by considering the values superordinate to openness in this case, namely, [1] the protection of children, [2] the right to privacy, and [3] access to justice.<sup>93</sup>

## II. DEFINING THE LINE BETWEEN OPEN CIVIL PROCEEDINGS AND THE PROTECTION OF CHILDREN IN *AB v BRAGG*

For sixteen years, the *Dagenais/Mentuck* test has repeatedly served as the barometer for gauging when and how courts exercise their discretion of limiting the

---

<sup>86</sup> McLachlin, *supra* note 6.

<sup>87</sup> Eltis, *supra* note 8 at 19.

<sup>88</sup> Winn, *supra* note 17 at 315.

<sup>89</sup> Eltis, *supra* note 8 at 14.

<sup>90</sup> Winn, *supra* note 17 at 315.

<sup>91</sup> Eltis, *supra* note 8 at 13.

<sup>92</sup> McLachlin, *supra* note 6.

<sup>93</sup> *AB (Litigation Guardian of) v Bragg Communications Inc* (10 May 2012), Ottawa 34240 (SCC) (Factum of the Appellant at paras 69–95) [Factum of the Appellant].

principle of open courts in favour of values of superordinate importance.<sup>94</sup> The test, first articulated in *Dagenais v Canadian Broadcasting Corp.*,<sup>95</sup> and subsequently modified in *R v Mentuck*,<sup>96</sup> mandates that publication bans — and other discretionary orders which encroach on the public’s right to know what happens in court — should only be ordered when:

(a) such an order is necessary in order to prevent a serious risk to the proper administration of justice because reasonably alternative measures will not prevent the risk; and

(b) the salutary effects of the publication ban outweigh the deleterious effects on the rights and interests of the parties and the public, including the effects on the right to free expression, the right of the accused to a fair and public trial, and the efficacy of the administration of justice.<sup>97</sup>

The above test is regarded as a flexible and contextual endeavor.<sup>98</sup> In fact, the SCC has explicitly condemned judicial interpretations of the test that endorse a hierarchical approach to rights, presumptively placing some principles over others when developing the common law and construing sections of the *Canadian Charter of Rights and Freedoms* [“Charter”].<sup>99</sup> When the protected rights of two individuals come into conflict, in other words, as is often the case when discretionary orders are granted, Charter principles necessitate a balanced analysis that fully appreciates the importance of *both* sets of rights.<sup>100</sup>

*AB v Bragg* is an example of a case whereby two sets of values, namely, [1] the right of the press to report on court proceedings, and [2] the protection of children, collide and require that a court engage in a principled and fair analysis of the competing values at stake.<sup>101</sup> As will be discussed below, however, we will advance the argument that the court failed to adequately weigh the principles engaged under the *Dagenais/Mentuck* test. Specifically, we will demonstrate why the imperatives to grant the child-plaintiff’s request in this case for anonymity and a partial publication ban are of superordinate importance than the public’s unrestricted ac-

<sup>94</sup> Schabas, *supra* 2 at 205.

<sup>95</sup> [1994] SCJ No 104 [*Dagenais*].

<sup>96</sup> [2001] SCJ No 73 [*Mentuck*].

<sup>97</sup> *Ibid* at para 32.

<sup>98</sup> *Toronto Star Newspapers Ltd v Ontario*, [2005] SCJ No 41, ¶31.

<sup>99</sup> *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the Canada Act 1982 (UK), 1982, c 11 (In *Edmonton Journal v Alberta (Attorney General)*, [1989] SCJ No 124 the SCC explicitly recognized the constitutional dimensions of the principle of openness under the Charter. Specifically, the court recognized that openness is a component of freedom of expression protected by section 2(b) of the Charter: “[t]he more complex society becomes, the more important becomes the function of the courts. As a result of their significance, the courts must be open to public scrutiny and to public criticism of their operation by the public. [ . . . ] The press must be free to comment upon court proceedings to ensure that the courts are, in fact, seen by all to operate openly in the penetrating light of public scrutiny,” at paras 5, 9) [*Charter*].

<sup>100</sup> *Dagenais*, *supra* note 95 at para 72.

<sup>101</sup> *AB v Bragg*, *supra* note 19.

cess to the proceedings at bar. In particular, we will delineate how the public's interest in open courts is not ultimately threatened by suppressing the plaintiff's identity and identifying details; rather, such facts are but a "sliver of information" withheld from the public and the press and represent a minimal intrusion on the principles of open courts and freedom of expression.<sup>102</sup>

### (a) The Facts

At the heart of this case lies the "tension between a young person's claim to privacy following the posting of derogatory information on the social networking website, Facebook, and the constitutionally guaranteed right to freedom of the press in Canada, when viewed in the context of a planned action for defamation."<sup>103</sup> More specifically, after AB, a fifteen-year old girl, discovered the creation of a fake Facebook profile her in name that included scandalous sexual commentary of a private and intimate nature ["Fake Profile"], she looked to the courts to help her in identifying the anonymous cyber-perpetrator(s).<sup>104</sup> With Facebook's cooperation, AB and her litigation guardian/father, CD, were provided with the Eastlink internet protocol ["IP"] address associated with the account in Dartmouth, Nova Scotia.<sup>105</sup> While the Fake Profile was immediately removed from Facebook's site after the company became cognizant of the situation, AB applied in Chambers for an order requiring Eastlink to disclose the identity of the person who authored the alleged defamatory statements.<sup>106</sup> AB said she planned to unmask the identity of the anonymous poster.<sup>107</sup> In an effort to protect her reputation and limit the possible harm resulting from the defamatory publication, AB sought [1] a partial publication ban of the words contained in the Fake Profile, and [2] an order that would allow her to advance the litigation under pseudonymous initials.<sup>108</sup>

After AB's request for a publication ban and anonymity order were published on the Nova Scotia Publication Ban Media Advisory Web Site as an automated advisory, the *Halifax Herald Limited* ["Herald"] and *Global Television* sought leave to intervene; both media outlets advised the court that they opposed AB's two claims for relief which infringed upon on their Charter-guaranteed rights and freedoms.<sup>109</sup> Nancy Rubin, who challenged the bans on behalf of the *Herald*, argued that anonymity is anathema to a defamation action: "If you have a reputation, you

<sup>102</sup> *N (F), Re*, [2000] 1 SCR 880, ¶12.

<sup>103</sup> *AB v Bragg*, *supra* note 19 at para 1.

<sup>104</sup> *Ibid* at para 7 (The profile additionally included a photograph of AB, a modified version of her name, and commentary related to AB's physical appearance and weight).

<sup>105</sup> *Ibid* at para 11 (Bragg Communications Limited owns Eastlink; it is a Canadian cable television and telecommunications company and provider of Internet and entertainment services in Atlantic Canada).

<sup>106</sup> *Ibid* at para 10 (The profile was saved and forwarded to AB by at least one person. AB argues that all those who have seen it will immediately be able to identify her as AB if it is republished, Factum of the Appellant, *supra* note 93 at para 22).

<sup>107</sup> *Ibid* at para 12.

<sup>108</sup> *Ibid*.

<sup>109</sup> *Ibid* at para 14.



have to vindicate it publicly. [. . .] And when you're dealing with publication bans in the context of the open-court principle, and freedom of the press, there is an evidentiary burden [to be satisfied]."<sup>110</sup> Put in another way, speculation about hurt feelings is a natural byproduct of a judicial system founded on the open court principle and insufficiently justifies encroaching on that fundamental value.<sup>111</sup>

### (b) Trial Decision

Justice LeBlanc, the motions judge at trial, ordered Eastlink to disclose the identity of the owner of the IP address behind the Fake Profile and held that such an order was the only way AB could hope to determine who created the account; he refused, however, AB's separate requests for confidentiality protections.<sup>112</sup> After applying the *Dagenais/Mentuck* test to the facts at bar, Justice LeBlanc concluded that AB could neither proceed by pseudonymous initials, nor would the court order a partial publication ban on any of the information published in the Fake Profile; this decision was ultimately grounded on the lack of affidavit evidence filed by AB and CD corroborating claims that AB would suffer future harm if she was required to reveal her identity and the alleged defamatory statements contained in the Fake Profile:

I am satisfied that a publication ban would not be justified in the circumstances. [. . .] *The affidavit filed by the guardian and by counsel on behalf of A.B. does not make any reference to the effect, whether physical, psychological, emotional or mental that this Facebook profile has had on the applicant.*<sup>113</sup>

The resulting effect of Justice LeBlanc's decision is that AB is entitled to receive information from Eastlink that would help her in identifying the author(s) of the alleged defamatory statements published in the Fake Profile. The catch-22 of this conclusion, however, is that the receipt of Eastlink's information concomitantly entails that AB disclose her full name in court and grant access to the media to report on and publish the content of the alleged defamatory statements made about her in the Fake Profile. Justice LeBlanc was urged to take judicial notice of harm to AB, given her age, her inherent vulnerability and the nature of the Fake Profile; however, he refused to do so.<sup>114</sup> AB appealed Justice LeBlanc's decision

<sup>110</sup> Dean Jobb, "No Publication Ban for 15-year-old in Facebook Defamation Claim" (25 March 2011) *The Lawyers Weekly*, online: *The Lawyers Weekly* <<http://www.lawyersweekly-digital.com/lawyersweekly/3043?pg=15#pg15>>.

<sup>111</sup> *Ibid.*

<sup>112</sup> *AB (Litigation Guardian of) v Bragg Communications Inc* (2010), 2010 NSSC 215 (Justice LeBlanc, sitting in Chambers, delivered his decision orally in May 2010 [Chambers Decision]; the decision was reduced to written reasons in June 2010. Justice LeBlanc additionally held that while the Charter values of freedom of expression and privacy came into play in relation to the anonymous cyber-perpetrator(s), the "public interest in disclosing the information identifying the Fake Profile creator prevailed," Factum of the Appellant, *supra* note 93 at para 25).

<sup>113</sup> Factum of the Appellant, *supra* note 93 at para 27 (as quoted in Chambers Decision, Appellant's Record at 37) [Emphasis Added].

<sup>114</sup> *Ibid* at paras 28-29.

on the ground that he erred by failing to take into account the special vulnerability of children, and by ignoring the obvious and serious risk of harm that AB would suffer if forced to disclose her identity.<sup>115</sup>

### (c) Court of Appeal Decision

The Nova Scotia Court of Appeal upheld Justice LeBlanc's refusal to grant AB two discrete orders for confidentiality protection.<sup>116</sup> The court's determination was largely premised on the following three arguments: [1] AB is "not so marked by disability as to trigger the court's obligation to protect her through the exercise of *parens patriae*;"<sup>117</sup> [2] the constitutional principles of freedom of the press and open courts trump the need to protect AB's privacy because she insufficiently demonstrated by affidavit evidence that harm would result in the absence of the court granting her a partial publication ban and permission to advance the litigation anonymously;<sup>118</sup> and [3] defamation actions, by definition, require that plaintiffs present themselves and the alleged defamatory statements before a jury and in open court.<sup>119</sup>

#### (i) *Parens Patriae*

The first argument is premised on the inherent discretion of Canadian courts to exercise their *parens patriae* jurisdiction — a common law duty vested in judges out of a necessity to act for the protection of those who cannot care for themselves, including children.<sup>120</sup> For instance, in *R v Sharpe*, the SCC concluded that Canadian courts have long shown an interest in protecting the rights and interests of children.<sup>121</sup> Indeed, given their physical, mental and emotional immaturity, children comprise one of the most vulnerable groups in Canadian society and are thus deserving of a heightened form of protection.<sup>122</sup>

In *AB v Bragg*, however, Justice Saunders refused to exercise the court's discretionary power to intervene and protect AB. This refusal was grounded in part on

<sup>115</sup> *AB v Bragg*, *supra* note 19 at para 16.

<sup>116</sup> *Ibid* at para 3.

<sup>117</sup> *Ibid* at para 59.

<sup>118</sup> *Ibid* at para 94.

<sup>119</sup> *Ibid* at para 80.

<sup>120</sup> *Eve, Re*, [1986] 2 SCR 388 at paras 72–75 (Justice LaForest provides a detailed history of the genesis and scope of *parens patriae* jurisdiction: "From the earliest time, the sovereign, as *parens patriae*, was vested with the care of the mentally incompetent. This right and duty, as Lord Eldon noted in *Wellesley v Duke of Beaufort* [. . .] is founded on the obvious necessity that the law should place somewhere the care of persons who are not able to take care of themselves. In early England, the *parens patriae* jurisdiction was confined to mental incompetents, but its *rationale* is obviously applicable to children and, following the transfer of that jurisdiction to the Lord Chancellor in the seventeenth century, he extended it to children under wardship, and it is in this context that the bulk of the modern cases on the subject arise") [*Eve, Re*].

<sup>121</sup> *R v Sharpe*, [2001] 1 SCR 45 [*Sharpe*].

<sup>122</sup> *Ibid* at paras 170–174.

the fact that, firstly, AB never invited the motions judge to exercise his jurisdiction during the Chambers hearing,<sup>123</sup> and secondly, AB's initial application was filed in accordance with the rules of civil procedure — an area of the law, in other words, void of legislative gaps that trigger the need to exercise the common law doctrine. Justice Saunders stated that, in his opinion, “Civil Procedure Rules provide a comprehensive and complete framework in which the issues in this case may be resolved.”<sup>124</sup> In short, the Nova Scotia Court of Appeal appears to be of the position that, unless invited to do so, the court does not need to exercise its discretionary power to protect children, a group of individuals already characterized in Canadian law as inherently vulnerable, when there is a legislative regime already in place to protect minors such as AB.<sup>125</sup>

To ignore the inherent vulnerability of a 15-year-old girl is completely incongruent with Canadian jurisprudence dealing with the court's discretionary power to exercise its jurisdiction in favour of children. Time and time again, the common law, premised on the *parens patriae* jurisdiction, has acknowledged the power of state institutions to intervene to protect at-risk children.<sup>126</sup> Furthermore, the instances under which the jurisdiction can be exercised to protect children are never closed; rather, as societal conditions change and vulnerable populations confront new and unforeseen challenges, courts have broadened the scope of *parens patriae* to adequately cover the new legal landscape.<sup>127</sup> Given the insidious and increasingly pervasive nature of cyber-bullying today among Canadian youth, it is not a far stretch to presume that cases such as *AB v Bragg* — while novel at their core — are appropriately within the scope of the jurisdiction's reach.<sup>128</sup>

(ii) *Insufficient Affidavit Evidence*

The second argument is premised on the proper application of the *Dagenais/Mentuck* test. More specifically, after interpreting the first prong of the test, namely, that confidentiality orders should only be granted when the risk of harm is “real, substantial, and *well-grounded in the evidence*,”<sup>129</sup> Justice Saunders concluded that AB's failure to produce any evidence of harm or risk of harm were fatal to both confidentiality protection requests.<sup>130</sup> In the absence of such convincing evidence, the court argued that it could not logically limit the fundamental con-

<sup>123</sup> *AB v Bragg*, *supra* note 19 at para 55.

<sup>124</sup> *Ibid* at paras 60-61.

<sup>125</sup> Factum of the Appellant, *supra* note 93 at para 76.

<sup>126</sup> *Sharpe*, *supra* note 121 at para 174.

<sup>127</sup> *Eve, Re*, *supra* note 120.

<sup>128</sup> Factum of the Appellant, *supra* note 93 at para 74.

<sup>129</sup> *Mentuck*, *supra* note 96 at para 34 [Emphasis Added].

<sup>130</sup> *AB v Bragg*, *supra* note 19 at paras 91–94 (Justice Saunders argued that, “[i]t should have been a relatively easy thing for the appellant to produce evidence showing harm. A parent, a relative, a teacher, a nurse, or a doctor might easily have sworn an affidavit which would document the noticeable changes perceived in AB thereby offering evidence of past harm, which would then assist the court in predicting future harm or, at least, evaluating the risk of harm”).

stitutional values of freedom of the press and open courts. In addition, it was held that AB's age did not establish any kind of special vulnerability that would justify the court weighing her interests above the constitutional rights of others: "While context is always important, AB's age [is] simply a circumstance, among many other factors, for the judge to take into account when performing the necessary analysis to decide whether any kind of confidentiality order ought to be granted."<sup>131</sup>

Accordingly, after a formalistic application of the *Dagenais/Mentuck* test's first prong, the Nova Scotia Court of Appeal disregarded the easily acceptable and logical conclusion that AB, a victim of cyber-bullying, would be exposed to additional harm if forced to forever link her identity with the maligned Fake Profile.<sup>132</sup> Indeed, despite the fact that [1] Canadian courts have previously determined that a risk that "children could be subjected to undue stress is sufficient to restrict the publication of disputes involving [. . .] children,"<sup>133</sup> and [2] presiding judges can make determinations of the interests at play without evidentiary material being presented by a party,<sup>134</sup> the court refused to grant AB's confidentiality orders in the absence of evidence corroborating the future harm that might occur should her anonymity not be protected. Importantly, case law exists whereby publication bans were denied on the basis that no affidavit of harm was filed before the court; just as importantly, however, none of those said cases involved children.<sup>135</sup>

### (iii) *The Nature of Defamation Actions*

The third argument is premised on the quintessential features of defamation law. More specifically, given that defamation is a claim that one's reputation has been lowered in the eyes of the public, it is a logical extension of that claim that in order to vindicate one's reputation one must do so in open court by identifying one's name and the statements which hurt you.<sup>136</sup> Put in another way, the pursuit of a defamation action under pseudonymous initials, and with a ban of the alleged disparaging statements, is counterintuitive and challenges the very spirit of this field of law.<sup>137</sup> Consequently, as soon as AB chose to "avail herself of the court process in the pursuit of damages for defamation, she submitted to whatever public scrutiny attaches to civil litigation and must accept the attendant diminished expectation of privacy."<sup>138</sup> In fact, it was submitted by Justice Saunders that by coming forward and disclosing her identity, AB would be celebrated for her courage in defending her good name and weeding out on-line perpetrators who hide in the bushes, behind nameless IP addresses.<sup>139</sup>

---

<sup>131</sup> *Ibid* at para 68.

<sup>132</sup> Factum of the Appellant, *supra* note 93 at para 6.

<sup>133</sup> *Radtke v Gibb*, 2009 SKQB 440, ¶36.

<sup>134</sup> *R v Canadian Broadcasting Corp*, 2010 ONCA 726.

<sup>135</sup> Factum of the Appellant, *supra* note 93 at para 66.

<sup>136</sup> *AB v Bragg*, *supra* note 19 at para 80.

<sup>137</sup> *Ibid*.

<sup>138</sup> *Ibid*.

<sup>139</sup> *Ibid* at para 102.

With respect, the above position reflects a misapprehension of the information already available to the public in this case. Succinctly, the public is cognizant of the following information: [1] AB is a victim of cyber-bullying; [2] the cyber-bullying occurred on Facebook after a fake profile was created in AB's name by an anonymous cyber-perpetrator; [3] the Fake Profile contained disparaging statements that were sexual and allegedly defamatory in nature; [4] AB can only identify her cyber-perpetrator if Eastlink provides her with the IP address linked to the Fake Profile; [5] Eastlink has identified who the IP address belongs to; [6] AB is seeking a court order to compel Eastlink to disclose the IP address to her; and [7] the court has exercised its discretion to grant the order.<sup>140</sup> The *only* information withheld from the public, in other words, are [1] AB's real name, and [2] the exact words used by the cyber-perpetrator(s) on the Fake Profile.<sup>141</sup> However, given the frequency with which the news media reports on cyber-bullying cases involving demeaning sexual terms directed at young girls, the hackneyed slurs likely aimed at AB are hardly beyond the public's imagination.<sup>142</sup>

The open court principle is grounded in the presumption that every court case is a matter of public interest, whether it involves, hypothetically, the prime minister of Canada under investigation for corruption, or, as in the case at hand, a 15-year-old girl victimized by the sexualized content of a fake Facebook profile page in her name. It is this presumption that lends itself to rebuttal in a digital context. AB's name, whatever it may be, is irrelevant; it neither adds nor takes away from the accountability of judges in administering their duties in open court.<sup>143</sup> The public certainly has a justifiable interest in knowing the legal issues raised by *AB v Bragg*, and its attending consequences for minors seeking to hold their cyber-perpetrators accountable in court. Beyond such issues, however, the public's interest in this case cannot possibly extend as far as needing to know the name of AB and the sensitive personal information that caused her harm.<sup>144</sup> When there is no public interest in disclosing the identity of a party, the judicial process does not mandate the full disclosure of personal information.<sup>145</sup>

#### (d) Analysis

In 2011, the SCC granted leave to appeal the Nova Scotia Court of Appeal's

<sup>140</sup> Factum of the Appellant, above note 93 at para 114.

<sup>141</sup> *Ibid* at para 115.

<sup>142</sup> See, for instance, Jane Bailey & Mouna Hanna, "The Gendered Dimensions of Sexting: Assessing the Applicability of Canada's Child Pornography Provision" (2011) CJWL/RFD 23 405; Clay Calvert, "Sex, Cell Phones, Privacy, and the First Amendment: When Children Become Child Pornographers and the Lolita Effect Undermines the Law" (2009) 18 CommLaw Conspectus 1; Amanda Lenhart, "Teens and Sexting: How and Why Minor Teens Are Sending Sexually Suggestive Nude or Nearly Nude Images Via Text Messaging," Pew Internet and American Life Project (Washington: Millennials, 2009), online: Pew Internet, [http://www.pewinternet.org/~media/Files/Reports/2009/PIP\\_Teens\\_and\\_Sexting.pdf](http://www.pewinternet.org/~media/Files/Reports/2009/PIP_Teens_and_Sexting.pdf).

<sup>143</sup> *Ibid*.

<sup>144</sup> Factum of the Appellant, *supra* note 93 at para 15.

<sup>145</sup> Bernier, *supra* note 43.

decision in *AB v Bragg*.<sup>146</sup> In fact, by the time our paper is published, the SCC will have heard the appeal and will have had the opportunity, for the first time, to provide guidance on the balance that should be struck between openness and the rights of children to anonymously sue their cyber-perpetrators in court without having to subject themselves to further public scrutiny and humiliation.<sup>147</sup> The second prong of the *Dagenais/Mentuck* test serves as the barometer for engaging in this balancing exercise; specifically, it mandates that courts engage in a principled and fair analysis of the discrete values engaged by the facts of a case. In particular, the second prong stipulates that a court consider whether or not the salutary effects of granting a confidentiality order outweigh the “deleterious effects on the rights and interests of the parties and the public,” including the effects on openness and the administration of justice.<sup>148</sup>

We submit that values superordinate to openness are triggered by the facts in *AB v Bragg* and justify a court granting both of AB’s confidentiality requests, namely, permission to advance the litigation anonymously, and a partial publication ban of the content contained in the Fake Profile. More specifically, [1] the protection of children, [2] the right to privacy, and [3] access to justice are superordinate social values that outweigh the deleterious effects on the rights and interests of the parties and public involved in this case.<sup>149</sup> Furthermore, a nuanced and contextualized analysis of the issues at bar indicate that both protection orders minimally impair the openness of judicial proceedings.<sup>150</sup> As will be demonstrated below, the benefits of granting both orders to AB are transparently clear; the deleterious consequences on the parties and the public resulting from such orders, by contrast, are less obvious.<sup>151</sup>

(i) *The Protection of Children*

In many ways, children are sophisticated users of online technology.<sup>152</sup> Unlike their parents, today’s generation of youth can navigate through a barrage of online tools and social communication networks as reflexively as they breathe. Accordingly, today’s generation of youth is categorized as a population of “digital natives”; for not only are they born into a world characterized by chronic connectivity, children today have trouble differentiating between their virtual and actual existence.<sup>153</sup> Despite their proficiency with the online world, children often fail to

---

<sup>146</sup> *AB (Litigation Guardian of) v Bragg Communications Inc* (13 October 2011) 2011 CarswellNS 694 (SCC).

<sup>147</sup> Factum of the Appellant, *supra* note 93 at para 36.

<sup>148</sup> *Mentuck*, *supra* note 96 at para 32.

<sup>149</sup> Factum of the Appellant, *supra* note 93 at para 96.

<sup>150</sup> *Ibid* at para 99.

<sup>151</sup> *Ibid* at para 98.

<sup>152</sup> PW Agatston, R Kowalski & S Limber, “Students’ Perspectives on Cyber bullying” (2007) 41(6) *Journal of Adolescent Health* 41 at 59-60.

<sup>153</sup> Shariff & Churchill, *supra* note 29 at 275.

understand the lasting repercussions of their online behaviour.<sup>154</sup> More specifically, coupled with their physical, mental, and emotional immaturity, the online world affords children with a level of independence that runs counter to their actual developmental needs, namely, guidance and supervision when making decisions that potentially impact others and themselves.<sup>155</sup> The recognition of the inherent vulnerability of children constitutes a primary objective of Canadian lawmakers; in fact, this goal is repeatedly reaffirmed in all facets of this country's law, including its common law, legislation, and international commitments.<sup>156</sup>

Canada's ratification of the *United Nations Convention on the Rights of the Child* ["Convention"] serves as one of the clearest indicators of the country's recognition that children are deserving of a heightened form of legal protection.<sup>157</sup> In the context of cyber-bullying in general, and *AB v Bragg* in particular, article 3(1) of the Convention bears repeating:

In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, *the best interests of the child shall be a primary consideration*.<sup>158</sup>

While the SCC has made clear that international norms are not binding on Canada absent explicit legislative implementation, they are still considered to be "relevant sources for interpreting rights domestically."<sup>159</sup> In light of this conclusion, it is clear that, as per article 3(1) of the Convention, any decision affecting AB *should* be made in her best interests. Furthermore, a child's best interests include, but are not limited to, ensuring that a child is "protected from harm, whether caused by others or self-inflicted, and, importantly, seeking to foster the healthy development of the child to adulthood."<sup>160</sup>

In order to understand why the healthy development of AB to adulthood necessitates that both of her confidentiality requests be granted, it is imperative that

<sup>154</sup> F Mishna, *et al.*, "Cyber Bullying Behaviors Among Middle and High School Students" (2010) 80(3) *American Journal of Orthopsychiatry* 362 at 362.

<sup>155</sup> AK Liao, A Khoo, & PH Ang, "Parental Awareness and Monitoring of Adolescent Internet Use" (2008) 27 *Current Psychology* 217 at 217.

<sup>156</sup> *Sharpe, supra* note 121 at paras 170–174 (see for instance, s 163.1(4) of the *Criminal Code* — the child pornography provision — which explicitly recognizes the vulnerability of children: "Every person who possesses any child pornography is guilty of (a) an indictable offence and liable to imprisonment for a term not exceeding five years and to a minimum punishment of imprisonment for a term of forty-five days; or (b) an offence punishable on summary conviction and liable to imprisonment for a term not exceeding eighteen months and to a minimum punishment of imprisonment for a term of fourteen days" RSC, 1985, C c-46).

<sup>157</sup> *United Nations' Convention on the Rights of the Child*, 20 November 1989, Can TS 1992 No 3 [*Convention on the Rights of the Child*].

<sup>158</sup> *Ibid* at art 3(1) [Emphasis Added].

<sup>159</sup> *Sharpe, supra* note 121 at para 175.

<sup>160</sup> *Ibid* at para 174.

we distinguish cyber-bullying from its more traditional predecessor.<sup>161</sup> Without question, cyber-bullying and traditional bullying share common attributes. For instance, in both of its manifestations, the following characteristics are present: [1] the harassment is unwanted and uninvited; [2] it is relentless; and [3] a victim is singled out for the abuse.<sup>162</sup> Furthermore, traditional and cyber-bullying are both deeply rooted in societal attitudes of discrimination such as sexism, homophobia, racism, and ableism; bullying behaviours, as such, are informed by ignorance, intolerance and disrespect.<sup>163</sup> Lastly, the dynamics of bullying are, without exception, the product of more than just the relationship between target and perpetrator; instead, they mirror the ecological framework in which children operate, including their peer groups, the classroom, and the community at large.<sup>164</sup>

Despite their commonalities, cyber-bullying is a different brand of abuse and discrimination. Indeed, technology has forever changed the nature and scope of bullying:

[B]ullying may begin at school, but cyber-bullying follows you home and into your bedroom; you can never feel safe, it is “non-stop bullying.” [. . .] [C]yber-bullying is particularly insidious because it invades the home where children feel safe, and it is constant and inescapable because victims can be reached *at all times and in all places*.<sup>165</sup>

The above passage alludes to the main features that differentiate cyber-bullying from traditional bullying. Specifically, the cyber-world provides perpetrators with a vast and unsupervised virtual playground<sup>166</sup> whereby instances of abuse can [a] take place before an audience of infinite size, [b] result in the permanent publication of harmful expression, and [c] involve multiple and anonymous instigators.<sup>167</sup>

### (A) An Infinite Audience

Traditionally, unless onlookers/bystanders were *physically* present at the scene of abuse — for instance, a school playground — they could not witness or participate in a bullying situation. Research on traditional bullying has found that 30% of

<sup>161</sup> In this context, “traditional predecessor” refers to non-cyber related forms of abuse; for instance, face-to-face schoolyard bullying would qualify as an instance of traditional bullying.

<sup>162</sup> Shaheen Shariff, *Confronting Cyber-bullying: What Schools Need to Know to Control Misconduct and Avoid Legal Consequences* (New York: Cambridge University Press, 2009) at 34 [*Confronting Cyber-bullying*].

<sup>163</sup> *Ibid* at 22 (“Bullying behaviour expresses a dislike for others considered worthless, inferior or undeserving of respect. From a sense of entitlement, intolerance toward difference and a sense of freedom to exclude and isolate those not worthy, bullies are able to harm others without empathy, compassion or shame,” *There’s No App for That*, *supra* note 23 at 9).

<sup>164</sup> *There’s No App for That*, *supra* note 23 at 16.

<sup>165</sup> *Ibid* at 11 [Emphasis Added].

<sup>166</sup> *Ibid* at 12.

<sup>167</sup> *Confronting Cyber-bullying*, *supra* note 162 at 44-45.



onlookers/bystanders support perpetrators over targets of abuse;<sup>168</sup> furthermore, the longer it persists, the more onlookers/bystanders will join in on the abuse.<sup>169</sup> On-line tools, by contrast, level the playing field.<sup>170</sup> In cyber-space, hundreds of perpetrators can get involved in the abuse, and classmates who may not otherwise engage in bullying behaviours have the opportunity to do so with less chance of getting caught.<sup>171</sup> In a virtual playground, perpetrators, victims, and bystanders are often interchangeable; yesterday's victim can be tomorrow's perpetrator.<sup>172</sup>

### (B) Permanence of Expression

Traditional bullying, more often than not, takes place in secluded locations, including washrooms and school buses, where hurtful forms of expression are ephemerally attached to victims. More specifically, if a perpetrator calls his or her victim demeaning sexual slurs in a hallway, those words do not escape that location unless shared by word of mouth. Internet communications, by contrast, are more permanent in nature. E-mails and defamatory material or modified photographs of a person are extremely difficult to remove after being posted online because millions of people can immediately download, save, retrieve, forward and re-post that material again.<sup>173</sup> In short, “the extraordinary capacity of the Internet to replicate almost endlessly any defamatory message lends credence to the notion that ‘the truth rarely catches up with a lie.’”<sup>174</sup>

### (C) Anonymity

The traditional bullying relationship is characterized by a power imbalance between the individual who bullies and the individual who is victimized. This asymmetry in power can result from a myriad of victim-characteristics, including size, age, physical strength, popularity, membership in a marginalized group, or

<sup>168</sup> C Salmivalli, “Group View on Victimization: Empirical Findings and their Implications” in J Juvonen & S Graham (eds) *Peer Harassment in School: The Plight of the Vulnerable and the Victimized* (New York: Guilford Press, 2001) at 398–419.

<sup>169</sup> NR Henderson, *et al.*, “Bullying as a Normal Part of School Life: Early Adolescents’ Perspectives on Bullying & Peer Harassment” (Paper Presentation at the Safe Schools Safe Communities Conference, Vancouver, BC, June 2002).

<sup>170</sup> *There’s No App for That*, *supra* note 23 at 8.

<sup>171</sup> *Confronting Cyber-bullying*, *supra* note 162 at 44 (Consider, for instance, the case of Ghyslain Reza, a Quebec teenager from Trois-Rivières. After Reza taped himself playing a character from *Star Wars* with a sabre in hand, he became known worldwide as the “Star Wars Kid.” Reza accidentally left his video in a media room at school. Shortly thereafter, the video was found and stolen by two classmates and uploaded onto a website. The site received over 15 million hits and more than 106 copies of the video were made. In fact, “Star Wars Kid” memorabilia were manufactured. Reza’s parents settled out of court with the two students who stole the video. However, Reza still had to switch schools and endure months of harassment).

<sup>172</sup> *There’s No App for That*, *supra* note 23 at 8 (As one Grade 11 student observed, “Anyone can be a cyber-[perpetrator]; even someone small can pick on someone big”).

<sup>173</sup> *Confronting Cyber-bullying*, *supra* note 162 at 44.

<sup>174</sup> Lidsky, *supra* note 66.

other known vulnerabilities.<sup>175</sup> Cyber-bullying, however, removes this traditional requirement for a power imbalance between perpetrator and victim. In the cyber-realm, *most* perpetrators are anonymous.<sup>176</sup> Shielded by screen names and untraceable IP addresses, cyber-perpetrators can inflict harm without revealing their identities and irrespective of their ascribed characteristics or status in school. Inflicting harm online is often accompanied with zero sense of consequence or impact; instead, it perpetuates cyber-bullying. Senders of electronic taunts or hate mail never have to see the reaction of their targeted recipients; consequently, online perpetrators are comfortably oblivious to the hurt they have caused.<sup>177</sup>

(ii) *The Right to Privacy*

Like the protection of children, the right to privacy is a fundamental social value echoed in multiple legal instruments in Canada, including the Charter, the common law, and through various statutory enactments.<sup>178</sup> The right to privacy is of primordial importance for *all* Canadians; for children, however, the constitutional dimensions of this right represent recognition on behalf of lawmakers that childhood, in and of itself, is entitled to special care and assistance.<sup>179</sup> Accordingly, this cognizance is made evident through a series of legislative provisions that mandate anonymity for children in legal proceedings where a child's identity would otherwise be exposed.<sup>180</sup> In fact, Canada's commitment to protecting the privacy rights of children is codified in law. For instance, the Preamble of the *Youth Criminal Justice Act* explicitly recognizes Canada's ratification of the Convention; and, for the purposes of privacy rights, article 16 of the Convention is particularly of critical importance: "No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, or correspondence, *nor to unlawful attacks on his or her honour and reputation.*"<sup>181</sup>

The potentially devastating consequences of stigmatizing children with life-long labels cannot be understated. In addition to impairing a child's developing sense of self-image and self-worth, attaching children with uninvited labels often

<sup>175</sup> D Pepler, *et al.*, "Girls Who Bully: A Developmental and Relational Perspective" in M Putallaz & KL Bierman (eds) *Aggression, Antisocial Behavior, and Violence Among Girls: A Developmental Perspective*. *Duke Series in Child Development and Public Policy* (New York: Guilford Publications, 2004) at 90–109.

<sup>176</sup> *Confronting Cyber-bullying*, *supra* note 162 at 44.

<sup>177</sup> *There's No App for That*, *supra* note 23 at 12.

<sup>178</sup> Section 7 of the Charter states: "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice," *Charter*, *supra* note 99.

<sup>179</sup> *R v Fox*, [2002] OJ No 3548, ¶75 (CJ).

<sup>180</sup> McLachlin, *supra* note 6 at 4 ("[O]ur justice systems are increasingly concerned with protecting children from the harmful consequences of publicizing child welfare hearings, custody battles and criminal proceedings involving young offenders." See, for instance, the *Youth Criminal Justice Act*, SC 2002, c 2; and s. 94 of the *Children and Family Services Act*, SNS 1990, c 5).

<sup>181</sup> *Convention on the Rights of the Child*, *supra* note 157 at art 16(1) [Emphasis Added].

represents an invasion of privacy that can never be repaired or restored:

Although it may appear trite to say so, [. . .] when a private document or record is revealed and the reasonable expectation of privacy therein is thereby displaced, the invasion is not with respect to the particular document or record in question. Rather, it is an invasion of the dignity and self-worth of the individual, who enjoys the right to privacy as an essential aspect of his or her liberty in a free and democratic society.<sup>182</sup>

In the context of electronic records, the above passage is especially revealing. For a majority of digital natives, their online reputations constitute a primary barometer for measuring their self-identity. This is a time in a child's life when his or her reputation among peers is of utmost importance; consequently, the slightest insult, jab, or derogatory statement can result in extreme feelings of shame and humiliation. Furthermore, such feelings of self-loathing are exacerbated and magnified as the offensive peer group increases in size.<sup>183</sup> In a digital era where an arsenal of technologies can potentially inflict social cruelty, children are especially in need of a judicial system that will help preserve — not erode — their dignity and self-worth.<sup>184</sup> Put in another way, in 2012, it is easier to conceive of privacy as an ally, not an opponent, of openness in protecting the administration of justice.<sup>185</sup>

(iii) *Access to Justice*

According to Chief Justice Beverley McLachlin, the most advanced judicial system in the world is a failure if it does not provide justice to the people it is meant to serve.<sup>186</sup> Without question, children constitute a group of people in need of the court's support and protection.<sup>187</sup> As the evidence currently stands before the SCC, however, one such child's access is conditionally based on the court awarding her confidentiality protection. More specifically, AB submitted to the SCC that, absent anonymity being granted to her, she would not proceed with her application and, as a result, would be unable to use the order granted to her at trial compelling Eastlink to disclose the identity of her cyber-perpetrator. The Court of Appeal explained to AB that, by choosing to defend her reputation in court, she would unexceptionally be subjected to the public scrutiny that attaches to civil litigation, including the disclosure of personal and potentially embarrassing details.<sup>188</sup> The Court of Appeal, in other words, left AB with a Hobson's choice: AB can either sue under her real name and forever be linked with the impugned Fake Profile in this case or not pursue her action at all, thus never having an opportunity to seek justice

<sup>182</sup> *R v O'Connor*, [1995] 4 SCR 411 at para 119 [*O'Connor*].

<sup>183</sup> Shariff & Johnny, *supra* note 9 at 308.

<sup>184</sup> *Ibid* at 309.

<sup>185</sup> Eltis, *supra* note 8 at 27.

<sup>186</sup> The Right Honourable Beverley McLachlin, "Judges of the Court" (Remarks delivered to the Empire Club of Canada, Toronto, Ontario, 8 March 2007), online: <<http://www.scc-csc.gc.ca/court-cour/ju/spe-dis/bm07-03-08-eng.asp>>.

<sup>187</sup> *Supra* note 158.

<sup>188</sup> *AB v Bragg*, *supra* note 19 at para 83.

against her cyber-perpetrator.<sup>189</sup>

As soon as a litigant is deterred from seeking justice in court in fear of being subjected to media scrutiny and further bullying the underlying principles of openness are undermined. The open court principle is not an end in itself; rather, it is a means of promoting the rule of law and the administration of justice.<sup>190</sup> Openness may yield, consequently, when the fundamental objective that it serves, namely, preserving the integrity of the administration of justice, so requires.<sup>191</sup> In cases such as *AB v Bragg*, privacy acts as a way of safeguarding against bringing the administration of justice into disrepute.<sup>192</sup> Indeed, a willingness to participate in a justice system is a marker of a healthy legal institution; as soon as openness overpowers justice by deterring litigants from accessing the courts, however, the principle no longer operates in favour of its underlying values.<sup>193</sup>

In summary, the protection of children, the right to privacy, and access to justice are all superordinate social values in *AB v Bragg* that trump openness. The salutary benefits of granting AB the partial publication ban and anonymity order are clear. If AB is permitted to advance the litigation under pseudonymous initials, she can avoid further public scrutiny by the media and her peers. Furthermore, she can safeguard her emotional health by severing the Fake Profile — and its accompanying sexualized language regarding her allegedly preferred sexual positions and acts — from her identity, thus ensuring that she can grow up absent the label of “victim of cyber-bullying.”<sup>194</sup> The public has an interest in *granting* AB’s confidentiality requests. As the evidence currently stands before the SCC, AB will not defend her reputation in court without such protection. The name of a target of cyber-bullying cannot possibly be of more public interest than seeing that victim access the courts and hold her perpetrator accountable for the harm suffered. Rather than give AB a Hobson’s choice, the court should prioritize providing her with *options* on how to protect and shield her developing sense of dignity and self-worth.<sup>195</sup>

### III. A WAY FORWARD: FOSTERING A POPULATION OF YOUNG DIGITAL CITIZENS

Fact patterns such as the one presented in *AB v Bragg* are unfortunately unexceptional in the modern era of digital technologies. Today, it seems as though one cannot turn on the television or read a newspaper without a new case of cyber-bullying being reported.<sup>196</sup> Sadly, the publicized incidents only represent the tip of

---

<sup>189</sup> Factum of the Appellant, *supra* note 93 at para 93.

<sup>190</sup> McLachlin, *supra* note 6 at 11.

<sup>191</sup> *Ibid.*

<sup>192</sup> Eltis, *supra* note 8 at 27.

<sup>193</sup> McLachlin, *supra* note 6 at 11.

<sup>194</sup> Factum of the Appellant, *supra* note 93 at para 98.

<sup>195</sup> O’Connor, *supra* note 182.

<sup>196</sup> See, for instance, CBC News, “Halifax Teen Speaks against Facebook Bully” *CBC News* (27 April 2012), online: CBCnews <<http://www.cbc.ca/news/canada/nova-scotia/story/2012/04/27/ns-facebook-bully.html>>; Dorie Turner & Greg Bluestein,

the iceberg; for every case of cyber-bullying mentioned in the media, another one slips through the cracks of cyberspace as a vast majority of incidents go unreported.<sup>197</sup> Cases such as *AB v Bragg* raise much needed awareness on the issue of cyber-bullying. Maintaining a spotlight on the issue, however, does not necessarily equate with assuaging the devastating consequences of the practice, nor does it expose the underlying roots of the problem. Indeed, research now confirms that bullying behaviours are not effectively eliminated by haphazard, case-by-case interventions.<sup>198</sup> Accordingly, court actions will not prove to be the ultimate panacea for a complex and multifaceted issue such as cyber-bullying — a reality that begs an obvious question, namely, what *will*?

In the following section, we will demonstrate why litigious efforts against individual perpetrators of harm will not eradicate the problem of cyber-bullying. We will do so by considering how [1] technology has changed the way people interact, and [2] children need to be taught about rights, responsibilities, and relationships both on *and* offline; digital natives, in other words, need to learn how to become socially responsible digital citizens.<sup>199</sup>

#### (a) Embracing Technology, Escaping Relationships

On March 16, 2012, Dharun Ravi — a former Rutgers university student accused of spying on and intimidating his gay roommate, Tyler Clementi, by use of a hidden webcam — was found guilty on all criminal counts, including privacy invasion, tampering with evidence, and bias intimidation.<sup>200</sup> News headlines around the world were quick to praise the jury verdict, celebrating the decision as a symbol for an end to cyber-bullying.<sup>201</sup> Reflexively, the conviction *felt* right. Indeed, while Ravi was not officially charged with causing Clementi's death, his suicide was ubiquitously present in the courtroom and in media reports on the case.<sup>202</sup> Upon

---

“Facebook Bullies Slapped with Libel Lawsuit by 14-year-old Schoolgirl” *The Star* (27 April 2012), online: thestar <<http://www.thestar.com/news/world/article/1169189—facebook-bullies-slapped-with-libel-lawsuit-by-14-year-old-schoolgirl>>; Danah Boyd & John Palfrey, “Stop the Cycle of Bullying” *The Huffington Post* (23 February 2012), online: *Huff Post* <[http://www.huffingtonpost.com/danah-boyd/dharun-ravi-jury\\_b\\_1298354.html](http://www.huffingtonpost.com/danah-boyd/dharun-ravi-jury_b_1298354.html)>.

<sup>197</sup> *There's No App for That*, *supra* note 23 at 11.

<sup>198</sup> Jamison Barr & Emmy Lugas, “Digital Threats on Campus: Examining the Duty of Colleges to Protect Their Social Networking Students” (2011) 33 *W New Eng L Rev* 757 at 773.

<sup>199</sup> *There's No App for That*, *supra* note 23 at 16.

<sup>200</sup> David Ariosto, “Guilty Verdict in Rutgers Webcam Spying Case” *CNN* (17 March 2012), online: CNNJustice <<http://www.cnn.com/2012/03/16/justice/new-jersey-rutgers-trial/index.html>>.

<sup>201</sup> danah boyd, “Reflecting on Dharun Ravi's Conviction” *Zephoría* (19 March 2012), online: *Zephoría* <[http://www.zephoría.org/thoughts/archives/2012/03/19/dharun-ravi-guilty.html?utm\\_source=feedburner&utm\\_medium=feed&utm\\_campaign=Feed%3A+zephoría%2Fthoughts+%28apophenia%29](http://www.zephoría.org/thoughts/archives/2012/03/19/dharun-ravi-guilty.html?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+zephoría%2Fthoughts+%28apophenia%29)> [boyd].

<sup>202</sup> Rosa Prince, “Tyler Clementi Case: Students ‘Freaked Out’ After Spying on Gay Roommate with Webcam” *The Telegraph* (27 February 2012), online: *The Telegraph*

deeper reflection, however, this conviction is more troubling than it is justice-serving. More specifically, while the evidence might have been sufficient to convince a jury of Ravi's guilt with respect to the particular charges at bar, it is premature to attribute any symbolic outcomes to this trial above and beyond the specific facts therein. As danah boyd persuasively argues in a reflection piece on the case, this verdict will not rid the world of cyber-bullying; instead, it will merely ruin the life of another human being:

This case is being hailed for its symbolism, but what is the message that it conveys? It says that a brown kid who never intended to hurt anyone because of their sexuality will do jail time, while politicians and pundits who espouse hatred on TV and radio and in stump speeches continue to be celebrated. [. . .] No teen that I know identifies their punking and pranking of their friends and classmates as bullying, let alone bias intimidation. Sending Ravi to jail will do nothing to end bullying. Yet, it lets people feel like it will and that makes me really sad.<sup>203</sup>

The above passage alludes to a fundamental contributing factor of cyber-bullying at all levels of society; specifically, in our rush to embrace technology, we have diminished the value we place on healthy and considerate relationships, thus eroding our sense of respect and responsibility towards others.<sup>204</sup> Put in another way, we have created a world filled with obstacles to making real-life human connections, including no-touch policies in school, excessive screen time, and conversations mediated through text messages and iChat.<sup>205</sup> When children are prevented from having high quality and positive human relationships, they cannot experience diversity, nor can they develop a fundamental skill of emotional competence, namely, empathy. Bullying, in all of its manifestations, is rooted in a "dislike for others considered worthless, inferior or undeserving of respect;"<sup>206</sup> and the Internet, for instance, with its protected screen names and vast virtual playground, has facilitated the speed and ease for which cruelty can be inflicted online without empathy for others.

---

<<http://www.telegraph.co.uk/news/worldnews/northamerica/usa/9110034/Tyler-Clementi-case-students-freaked-out-after-spying-on-gay-roommate-with-webcam.html>> ("Eighteen-year-old [Clementi] killed himself days after learning from social media sites that he had been seen in an intimate embrace in the room he shared at Rutgers University with [Ravi]. Molly Wei, another Rutgers student who was watching the webcam with Ravi when they glimpsed two seconds of Clementi and an unnamed guest "making out," told Middlesex County Courthouse they had not expected to see any sexual acts when they turned the camera on").

<sup>203</sup> boyd, *supra* note 201 (By "brown kid," boyd is referring to Ravi's ethnic origins; specifically, he is Indian).

<sup>204</sup> *There's No App for That*, *supra* note 23 at 7.

<sup>205</sup> *Ibid* at 9 (At the extreme end of the spectrum, schools have introduced policies banning children from having a best friend. For instance, in the UK, students are encouraged to play in large groups in order to avoid the emotional fall-out of losing a best friend, Harry Hawkins, "Schools Ban Children Making Best Friends" (19 March 2012) *The Sun*, online: *The Sun* <<http://www.thesun.co.uk/sol/homepage/news/4203460/Schools-ban-children-making-best-friends.html>>).

<sup>206</sup> *Ibid*.

Consciously or not, children are affected by their world saturated with graphic violence, aggression, and meanness disguised as humour.<sup>207</sup> Denigrating and insulting cyber-remarks are so commonplace today that they no longer register as remarkable; instead, they reflect a societal threshold for normalcy and acceptability.<sup>208</sup> In fact, when a malicious comment does clearly cross the line, many teens do not recognize the incident as cyber-bullying; instead they disregard the situation entirely and characterize it as nothing more than digital drama.<sup>209</sup> While cruelty can often be disguised as humour, the repercussions of online bullying are anything but funny.<sup>210</sup> Research now confirms that virtual threats are often perceived by victims as being as real as face-to-face confrontations.<sup>211</sup> Furthermore, misogynistic comments, including uninvited sexual harassment and sexual coercion, are rated as being *more* threatening and harassing when they are posted online.<sup>212</sup> In short, the growing problem of cyber-bullying, coupled with a diluted compassion for the pain caused to others, is indicative of an underlying societal illness that needs to be treated.<sup>213</sup>

### (b) From Digital Natives to Digital Citizens

Researchers have established that the teaching of social and emotional skills and competencies is of fundamental importance when educating children about how to engage in positive and constructive human relationships.<sup>214</sup> In the current social climate, “the evidence of bullying shows that many children may not be learning the skills and competencies necessary to engage positively and constructively in human relationships.”<sup>215</sup> Instead, children demonstrate an uncanny capacity to inflict harm on others with no remorse or understanding of the consequences of their actions. Children who bully online do so because cyberspace provides a virtual playground to act on their powerful emotions; many cyber-perpetrators choose to behave destructively online because they would never act that way in person. Put in another way, in the virtual realm, children feel as though they are freed from the shackles of adult supervision and rules; they can inflict pain without getting caught, and more disturbingly, without caring about it.<sup>216</sup>

For digital natives, participation in a virtual realm consisting of social net-

<sup>207</sup> *Ibid* at 14.

<sup>208</sup> *Ibid*.

<sup>209</sup> *Ibid* at 14.

<sup>210</sup> *Supra* note 27.

<sup>211</sup> Shariff & Johnny, *supra* note 9 at 315.

<sup>212</sup> Biber *et al.*, as cited in Jack Glaser & Kimberly Kahn, “Prejudice, Discrimination, and the Internet” in Y. Amichai-Hamburger (ed) *The Social Net: Human Behaviour in Cyberspace* (New York: Oxford University Press, 2003) at 247.

<sup>213</sup> *There’s No App for That*, *supra* note 23 at 14.

<sup>214</sup> Celene E Dimitrovitch, Rebecca C Cortez & Mark T Greenberg, “Improving Young Children’s Social and Emotional Competence: A Randomized Trial of the Preschool ‘PATHS’ Curriculum” (2007) 28(2) *The Journal of Primary Prevention* at 3.

<sup>215</sup> *There’s No App for That*, *supra* note 23 at 5.

<sup>216</sup> *Ibid* at 6.

works and informational tools will characterize their existence from the cradle to the grave.<sup>217</sup> Consequently, adult-stakeholders, including parents, teachers, and law enforcement, must work *with* children to help develop their ethical compass for human decency with respect to their cyber-behaviours. More specifically, children must be instilled with an emotional skill set that will help them recognize the limits and the differences between online fun and entertainment versus cruelty at the expense of others.<sup>218</sup> The underbelly of the technology beast is dark.<sup>219</sup> As such, it is tempting to blame technology for the insidious and pervasive nature of cyber-bullying today; in truth, however, you can never blame the medium — it is *always* the message. And the message that needs to be relayed to children, for instance, is as follows: our duty to behave as responsible citizens transcends physical reality; digital citizenship consists of the same rights and responsibilities that govern human behaviour in realtime and face-to-face.

## CONCLUSION

In the Elizabethan era, local constituents got their requisite fix of drama through the open court principle and its accompanying right of access to observe legal cases as they unfolded before judges.<sup>220</sup> In the digital era of today, by contrast, a new category of drama has emerged from which citizens can observe the trials and tribulations of their time. More specifically, cyber-drama in general, and cyber-bullying in particular, has placed before our courts novel legal questions never before anticipated by the original codifiers of fundamental rules of law, including the right of the public to open civil proceedings.<sup>221</sup> *AB v Bragg* stands for the principle that, absent evolution, the constitutional dimensions of openness will fail to protect those most in need of protection.<sup>222</sup> Indeed, as soon as children are deterred from accessing the courts in fear of the public scrutiny and harm attached to the disclosure of judicial information, the open court principle no longer operates in favour of its underlying objectives, namely, promoting the rule of law and the integrity of the administration of justice.<sup>223</sup> It is time to eradicate the hierarchical approach to rights. Rather than presumptively placing more weight on one right over another, courts should instead engage in more nuanced analyses which focus on how values can work together to protect the most vulnerable populations in our country.<sup>224</sup>

---

<sup>217</sup> Jill Scott, “The Internet and Protection of Children Online: Time for Change” (2011) 9 Can J L & Tech 1 at 1.

<sup>218</sup> Shaheen Shariff, “Defining the Line on Cyber-bullying: How Youth Encounter and Distribute Demeaning Information” (forthcoming publication).

<sup>219</sup> *There’s No App for That*, *supra* note 23 at 6 (Its upside, by contrast, is incredibly bright. Technology helps children learn and fosters their inner creativity and imagination).

<sup>220</sup> Kornstein, *supra* note 5 at 13.

<sup>221</sup> McLachlin, *supra* note 6 at 2.

<sup>222</sup> Eltis, *supra* note 8 at 7.

<sup>223</sup> McLachlin, *supra* note 6 at 11.

<sup>224</sup> *Ibid* at 10.