

CASE COMMENT

AB v Bragg Communications

Law's Next Steps: Should Bullying be a Tort ... or Even a Crime?

D O N N S H O R T *

I. INTRODUCTION

The Supreme Court of Canada's recent decision in *Bragg*¹ is best characterized by its equilibrium. This valuable approach comes during a period of sometimes volatile debates surrounding bullying as the conversations shift more and more to cyberbullying and proposed solutions become, in the view of some, "aggressive", not "worth the price"² – or even "draconian".³ What often – but not always – distinguishes cyberbullying is that it occurs away from schools, and yet its impact on students is severe.⁴ How then do administrators, teachers, and others "do something" about a form of harassment that often takes place off site? Hence, at one end of the

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¹ *AB v Bragg Communications Inc*, 2012 SCC 46, 350 DLR (4th) 519 [*Bragg*].

² "Legislators should ask if Nova Scotia's aggressive Cyber-safety Act is worth the price", *The Globe and Mail* (6 May 2013) online: *The Globe and Mail* <<http://www.theglobeandmail.com/commentary/editorials/legislators-should-ask-if-nova-scotias-aggressive-cyber-safety-act-is-worth-the-price/article11738974/>>.

³ "Destructive cruelty, draconian reaction", *The Globe and Mail* (7 May 2013) online: *The Globe and Mail* <<http://www.theglobeandmail.com/commentary/editorials/legislators-should-ask-if-nova-scotias-aggressive-cyber-safety-act-is-worth-the-price/article11738974/?service=mobile>>.

⁴ See Nova Scotia, Nova Scotia Task Force on Bullying and Cyberbullying, *Respectful and Responsible Relationships: There's No App for That* (Nova Scotia, 2012) (Chair: Wayne MacKay) [*MacKay Report*].

spectrum, there have been calls by many to criminalize bullying in cyberspace. On April 25, 2013, Nova Scotia became the first province to introduce a bill dealing with cyberbullying. That province's *Cyber-safety Act*⁵ was proclaimed on August 6, 2013 making cyber-bullying a tort. The legislation, among other things, enables a victim of cyberbullying to obtain a protection order and provides sanctions for those violating the protective orders. Section 19 of the Act contains the following relevant provisions:

- (1) Any person who fails to comply with a protection order is guilty of an offence.
- (2) Any person who, knowing that a protection order has been made, causes, contributes to or permits activities that are contrary to the order, is guilty of an offence.
- (3) A person who is guilty of an offence under subsection (1) or (2) is liable on summary conviction to a fine of not more than \$5,000 or to imprisonment for a term of not more than six months, or both.⁶

Through amendments to the *Education Act*,⁷ the *Cyber-Safety Act* includes provisions which impose liability on parents of cyberbullies who are minors, if it is found that the parents were not properly supervising their child's online activities. As well, the Act creates a CyberSCAN unit to investigate complaints of cyberbullying, the first such unit in Canada. On the other hand, Wayne MacKay, law professor at Dalhousie University, a respected education law scholar who has written about bullying and cyberbullying for years, applauded the recently-adopted legislation, overall, suggesting a few "tweaks".⁸

For its part, Ontario, in 2007, chose to amend its *Education Act*⁹, merely to gain jurisdiction over cyberbullying. The province did so by giving schools authority over "a school-related activity or in other circumstances where engaging in the activity will have an impact on the school climate".¹⁰ Its 2009 amendments included language that related to student activity that "is likely

⁵ SNS 2013, c 2; *Bill No 61, An Act to Address and Prevent Cyberbullying*, 5th Sess, 61st General Ass, Nova Scotia, 2013 (Third Reading With Committee Amendments, 10 May 2013) [*Cyber-Safety Act*].

⁶ *Ibid*, ss 19(1)-(3).

⁷ SNS 1995-1996, c 1.

⁸ "Cyber-bullying bill positive but could use tweaks: prof", *CBC News* (26 April 2013) online: *CBC News* <<http://www.cbc.ca/news/canada/nova-scotia/story/2013/04/26/ns-mackay-cyber-safety-act.html>>.

⁹ *Education Act*, RSO 1990, c E.2.

¹⁰ *Bill 212, An Act to amend the Education Act in respect of behaviour, discipline and safety*, 2nd Sess, 38th Leg, Ontario, 2007, (assented to 4 June 2007), SO 2007, c 14.

to have a negative impact on the school climate”¹¹ again capturing behavior whether or not it occurs at school.

On the national level and following Amanda Todd’s death in October, 2012, a motion was introduced in the House of Commons by NDP Member of Parliament Dany Morin. This motion calls for the creation of a House of Commons committee to develop a national bullying prevention strategy which would, *inter alia*, examine the prevalence and impact of bullying and search for ways to prevent it.

Most recently in Manitoba, Progressive Conservative Education Critic Kelvin Goertzen introduced a private members bill to deal with cyberbullying.¹² Goertzen’s bill would allow victims of cyberbullying to obtain protection orders and would allow for the seizure of electronics used in connection with cyberbullying.¹³

It is in this context and amidst these ongoing debates and wildly differing solutions to the problem of cyberbullying that the Supreme Court of Canada released its decision in *Bragg*. If there is a take away from *Bragg*, it is a caution to find balance and solutions that work, bearing in mind the obvious message that current approaches have not worked and that more needs to be done. Is criminalization the answer?

II. BACKGROUND

A. Facts

A fifteen year-old girl, AB, discovered on March 4, 2010, that someone had published a fake Facebook profile purporting to be hers. The profile employed a slight variation of her real name and contained a picture of her, unflattering observations about her physical appearance, including her weight, as well as sexually-explicit references to her. AB was able to learn from Facebook that the IP address of the creator of the fake Facebook page was located in Dartmouth, Nova Scotia. The IP address was associated with Eastlink, Inc, an internet provider, owned by Bragg Communications, Inc.

¹¹ *Bill 157, Education Amendment Act (Keeping Our Kids Safe at School)*, SO 2009 c 17, s 300.4 (1).

¹² “Goertzen introduces own bill on bullying”, *Winnipeg Free Press* (10 July 2013) online: *Winnipeg Free Press* <<http://www.winnipegfreepress.com/local/Goertzen-introduces-own-bill-against-bullying-214955281.html?device=mobile>>.

¹³ *Ibid.*

1. *Nova Scotia Supreme Court*

AB, represented by her father as litigation guardian, initiated an action in the Nova Scotia Supreme Court seeking damages for defamation. The action was against an unknown person who had created a fake Facebook profile of AB. AB and her father sought an order compelling a local internet provider, Bragg Communications, Inc. (“Bragg”) to disclose the IP address of the person who published the fake Facebook page, as well as an order to proceed using a pseudonym (their initials) and a publication ban. Bragg did not oppose the request to release the IP address information so long as the company was authorized by court order to do so.

Two media groups in Nova Scotia, Halifax Herald Limited and Global Television opposed the application for the publication ban and the request by AB and her father, CD, to proceed by way of initials. Beyond Borders: Ensuring Global Justice for Children sought and received Intervener status in the matter.

The Nova Scotia Supreme Court (LeBlanc J, Chambers) ordered Bragg to disclose the identity of the IP address in question, on the basis that a *prima facie* case of defamation had been made out and that no other means of identifying the person who published the defamation was available. LeBlanc J, however, denied AB’s request to pursue a claim of defamation under a pseudonym (by way of initials) and her request for a partial publication ban because there was insufficient evidence of specific harm to AB.¹⁴ LeBlanc J ruled that a publication ban was not appropriate in the circumstances as there was no actual evidence of a threat to AB’s “physical, psychological, emotional or mental” health.¹⁵ The Chambers Judge also made this observation, which should be noted and compared with the Supreme Court of Canada’s comments later in this article:

I believe that bullying and this type of pernicious conduct should be exposed and condemned by society. Only if the public know the extent of such conduct and its likely result, will society speak up for better control of such conduct arising from free and unlimited ability to publish such material on internet sites.¹⁶

In considering AB’s request to proceed anonymously, LeBlanc J made the same ruling:

¹⁴ *AB v Bragg Communications Inc*, 2010 NSSC 215, 293 NSR (2d) 222.

¹⁵ *Ibid* at para 34.

¹⁶ *Ibid* at para 33.

I repeat that there is no evidence before the court of the harm that counsel for the applicant says will occur. While counsel suggests that no evidence of potential harm is necessary, I cannot agree. This conclusion does not depend entirely on the lack of evidence respecting future harm. The Facebook profile was published in March and this application was heard in late May, yet there was no evidence offered respecting any effects the publication had in the interim. I appreciate the contention by the applicant's counsel that if she were to proceed with a defamation suit and succeeded, she would be entitled to a presumption of damages that would follow from the finding of defamation. However, it is my view that this is not sufficient to establish the harm, actual or potential, required to grant for this type of order.¹⁷

LeBlanc J, therefore, denied AB's application for a publication ban and the right to proceed by way of initials and stayed that part of his order requiring Eastlink to disclose the identity of the publisher of the fake Facebook page pending an appeal or until such time as AB filed a draft order using the real names of herself and her father.

2. Nova Scotia Court of Appeal

AB, through her litigation guardian, appealed to the Nova Scotia Court of Appeal. She alleged "the judge erred by failing to take into account the special vulnerability of children, and by ignoring an obvious and serious risk of harm."¹⁸ The Court of Appeal considered the two-pronged *Dagenais/Mentuck* test in considering AB's appeal. While a discussion of the test is left for the section on the Supreme Court of Canada, below, as well as a discussion of the open courts principle, generally, suffice to say that the Court of Appeal rejected any argument based on harm or privacy:

A litigant seeking damages for alleged injury or harm will often assert an interest in keeping his or her matters private. However, public embarrassment or a stated interest in privacy is not sufficient.¹⁹

The publication ban was denied, once again, on the grounds, *inter alia*, that AB had failed to establish that there was real and substantial harm to her that justified restricting media access:

It 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 A.B.

¹⁷ *Ibid* at para 37.

¹⁸ *AB v Bragg Communications Inc*, 2011 NSCA 26 at para 16, 301 NSR (2d) 34 [*Bragg* at NSCA].

¹⁹ *Ibid* at para 73.

thereby offering evidence of past harm, which would then assist the court in predicting future harm or, at least, evaluating the risk of harm.²⁰

Confirming the Chambers Judge, the Court of Appeal made these very similar observations. First, in relation to the need to prove harm, the Court said as follows:

The fact that damage will be presumed at trial once the plaintiff has proved these three essential elements, does not serve as a substitute for producing evidence of harm when applying for a prohibition ban under the test established in *Dagenais/Mentuck*. The two situations are very different. One is a presumption which may 'rise at the end of the plaintiff's case in a defamation trial. The other is an obligation to meet a high standard for legal proof. In other words, presumed damage to reputation after the plaintiff has established the prerequisites for liability in a defamation trial, will not satisfy Justice Iacobucci's explicit directive that to obtain a publication ban or confidentiality order, the real and substantial risk of serious threat to the proper administration of justice must be "well-grounded in the evidence." Justice LeBlanc appreciated this important distinction. His rejection of the appellant's position was correct.²¹

With regard to the effect a denial of a motion to proceed anonymously could have on future litigants, the Court made this observation in dismissing AB's appeal:

... I am not persuaded by the appellant's argument that to dismiss this appeal will produce a chilling effect, such that people will be reluctant to complain about on-line Internet bullying. It would be speculative to suppose such a result. One could just as easily imagine a salutary result in being required to pursue an action in defamation, by name and in public. Such will serve the public interest by both alerting social networking players to the inherent risk of sharing very personal information among "friends", while at the same time deterring would-be bullies with the threat of retribution once unmasked.²²

3. Supreme Court of Canada

i. Dagenais/Mentuck Test

Through her litigation guardian, AB appealed to the Supreme Court of Canada. In its consideration of AB's request for a publication ban and permission to proceed by way of initials – two restrictions on the open courts principle. The basis of AB's appeal was that the Nova Scotia Supreme Court and the Court of Appeal had failed to balance properly the competing

²⁰ *Ibid* at para 93.

²¹ *Ibid* at para 96.

²² *Ibid* at para 99.

interests in the case – the harm that would be caused in compelling AB to reveal her true name, on the one hand, and the risk of harm to the open courts principle, on the other. The Supreme Court of Canada framed the inquiry in terms of the *Dagenais/Mentuck* test.²³ The first question was whether or not each of the measures requested by AB (the right to proceed anonymously and the publication ban) were necessary to protect an important legal interest.²⁴ The next question was whether or not they impaired freedom of expression as little as possible. If no reasonably alternative measures were available, the inquiry then would turn to whether or not the proper balance was achieved between AB’s privacy rights and the open courts principle.²⁵

The interests which AB alleged justified restricting access under the open courts principle and freedom of expression were privacy and the protection of children from cyberbullying. Abella J, writing for a unanimous Court, stressed that freedom of the press and the open courts principle had been well established in Canadian jurisprudence and that a free press was a “hallmark of a democratic society”.²⁶ Where there was room for more consideration was in relation to “privacy” and “protection of children from cyberbullying”, the interests AB argued justified the restrictions she was seeking.²⁷

ii. Privacy

Abella J framed AB’s privacy interest as “not merely a question” of privacy, *per se*, but of “privacy from the relentlessly intrusive humiliation of sexualized online bullying.”²⁸ In this context, AB’s privacy interests are viewed not just in terms of her age – a requirement which is well established in jurisprudence²⁹ – but also in terms of “the nature of the victimization she seeks protection from.”³⁰

²³ *Dagenais v Canadian Broadcasting Corp*, [1994] 3 SCR 835, 120 DLR (4th) 12; *R v Mentuck*, 2001 SCC 76, [2001] 3 SCR 442.

²⁴ *Bragg*, *supra* note 1 at para 11.

²⁵ *Ibid*.

²⁶ *Vancouver Sun (Re)*, 2004 SCC 43 at para 23, [2004] 2 SCR 332, citing *Bragg*, *supra* note 1 at para 11; see also *Edmonton Journal v Alberta (Attorney General)*, [1989] 2 SCR 1326, 64 DLR (4th) 577.

²⁷ *Bragg*, *supra* note 1 at para 13.

²⁸ *Ibid* at para 14.

²⁹ *R v DB*, 2008 SCC 25 at paras 41, 61 84-87, [2008] 2 SCR 3; *R v Sharpe*, 2001 SCC 2 at paras 170-174, [2001] 1 SCR 45 citing *Bragg*, *supra* note 1 at para 17.

³⁰ *Bragg*, *supra* note 1 at para 14.

In considering AB's privacy interest, in the view of the Supreme Court of Canada, both the Nova Scotia Supreme Court and the Court of Appeal erred in failing to consider the "objectively discernible harm" to AB's privacy by relying exclusively on the absence of specific evidence of such harm:

...[W]hile evidence of a direct, harmful consequence to an individual applicant is relevant, courts may also conclude that there is objectively discernible harm. ...
 ... In other words, absent scientific or empirical evidence of the necessity of restricting access, the court can find harm by applying reason and logic.³¹

With regard to AB's age, Abella J emphasized the "consistent and deep roots" in Canadian law establishing the "inherent vulnerability" of children:

As a result, in an application involving sexualized cyberbullying, there is no need for a particular child to demonstrate that she personally conforms to this legal paradigm. The law attributes the heightened vulnerability based on chronology, not temperament.³²

The Supreme Court's words on the psychological effects were crucial, but have, I believe, implications for future decisions regarding potential competing *Charter*³³ rights in the future:

It is logical to infer that children may suffer harm through cyberbullying. Such a conclusion is consistent with the psychological toxicity of the phenomenon described in the Report of the Nova Scotia Task Force on Bullying and Cyberbullying, chaired by Prof A Wayne MacKay, the first provincial task force focused on online bullying.

....

... Its harmful consequences were described as "extensive", including loss of self-esteem, anxiety, fear and school drop-outs. Moreover, victims of bullying were almost twice as likely to report that they attempted suicide compared to young people who had not been bullied.³⁴

I believe these words are hugely significant. Elsewhere, I have argued that provincial legislation aimed at targeting bullying, particularly homophobic bullying, either does not violate *Charter* rights based upon freedom of religion (or freedom of expression) or, alternatively, are reasonable burdens.³⁵

³¹ *Ibid* at paras 15-16.

³² *Ibid* at para 17.

³³ *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.

³⁴ Bragg, *supra* note 1 at paras 20-21.

³⁵ Donn Short, "Bill 18's infringements on religious belief are 'reasonable'", *Winnipeg Free Press* (19 March 2013) online: [Winnipeg Free Press](http://www.winnipegfreepress.com/opinion/analysis/bill-18s-infringements-on-religious) <http://www.winnipegfreepress.com/opinion/analysis/bill-18s-infringements-on-religious>

I would argue that these words by Abella J establish clearly the direction of the Supreme Court in terms of balancing competing rights in the context of sexual orientation claims, on the one hand, and section 2 claims on the other, most particularly when confronted with legislation aimed at resolving the problem of bullying and harassment in schools. The Court has, for some time, been creating a clearer judicial picture of the limits on freedom of conscience and religion and solidifying the principle that burdens must be “significant” in order to constitute infringements.³⁶

And, finally, contrast these words of Abella, J, finding support for her observations from the *MacKay Report*,³⁷ with the very different observations of the courts in Nova Scotia, set out above, in relation to possible impact on potential future claimants who might be required to proceed without anonymity. Abella J stated:

In addition to the psychological harm of cyberbullying, we must consider the resulting inevitable harm to children – and the administration of justice – if they decline to take steps to protect themselves because of the risk of further harm from public disclosure.

Professor MacKay’s Report is consistent with the inference that, absent a grant of anonymity, a bullied child may not pursue responsive legal action. It does not take much of an analytical leap to conclude that the likelihood of a child protecting himself or herself from bullying will be greatly enhanced if the protection can be sought anonymously. ...

... If we value the right of children to protect themselves from bullying, cyber or otherwise, if common sense and the evidence persuade us that young victims of sexualized bullying are particularly vulnerable to the harms of revictimization upon publication, and if we accept that the right to protection will disappear for most children without the further protection of anonymity, we are compellingly drawn in this case to allowing AB’s anonymous legal pursuit of the identity of her cyberbully.³⁸

iii. Open courts principle

In response to the other side of the balancing inquiry, the harms to freedom of the press and the open courts principle, Abella J pointed to

belief-are-reasonable-198912371.html ; Donn Short, “*Bound for Glory: Bill 18, The Public Schools Amendment Act (Safe and Inclusive Schools)*,” (2013) 36:2 Man LJ 115 [Short, *Bound for Glory*].

³⁶ See Short, *Bound for Glory*, *ibid*; see also *Syndicat Northcrest v Amselem*, 2004 SCC 47 at paras 46-49, [2004] 2 SCR 551; *SL v Commission scolaire des Chênes*, 2012 SCC 7 at para 49, [2012] 1 SCR 235.

³⁷ *MacKay Report*, *supra* note 4.

³⁸ *Bragg*, *supra* note 1 at paras 23-27 [emphasis added].

Canadian Newspapers,³⁹ a case dealing with a constitutional challenge to portions of the Criminal Code barring disclosure of the names of sexual assault complainants. Lamer J remarked:

While freedom of the press is nonetheless an important value in our democratic society which should not be hampered lightly, it must be recognized that the limits imposed by [prohibiting identity disclosure] on the media's rights are minimal. ... Nothing prevents the media from being present at the hearing and reporting the facts of the case and the conduct of the trial. Only information likely to reveal the complainant's identity is concealed from the public.⁴⁰

iv. Publication Ban re: content of Facebook page

Having granted AB's request to proceed by way of initials in pursuit of her claim of defamation and by granting a partial publication ban in relation to her identity and the identity of her father, the Supreme Court saw no reason to prohibit publication of the content of the Facebook page in question in the defamation action.

In short, the Supreme Court took a very balanced approach, excising only the information necessary to protect the privacy interests of a child and the interests of freedom of expression and the open courts principle.

III. CONCLUSION

I have argued against an emphasis on punitive responses/criminalizing bullying and cyberbullying because a focus on punishment emphasizes an after-the-fact approach and does nothing to address the cultural changes that need to be undertaken in schools.⁴¹ I have suggested that the responsive and punitive aspects of these measures lets our culture "off the hook"; instead, I have argued that solutions to bullying and cyberbullying are to be found in conceptualizing bullying as an educative issue.⁴² While I believe and have argued that responsive and punitive pieces may be necessary, they are limited. The Criminal law is a mostly ineffective way to achieve the cultural transformation of schools that is needed to deal with harassment based on

³⁹ *Canadian Newspapers Co v Canada* (Attorney General), [1988] 2 SCR 122, 52 DLR (4th) 690.

⁴⁰ Bragg, *supra* note 1 at para 28.

⁴¹ Donn Short, *Don't Be So Gay! Queers, Bullying, and Making Schools Safe* (Vancouver: UBC Press, 2013).

⁴² *Ibid.*

difference and the particular cultural license that surrounds homophobic bullying.⁴³ Taking into account the status as “other” that many victims of bullying occupy in their schools, research has shown that students themselves feel that bullying must be approached with significant room for impact on the school culture, in general, and not just as a phenomenon that is pursued in response to incidents of bullying and violence afterward. As with all punitive solutions, criminalizing bullying is a responsive approach, paying attention to undesirable behaviors only after the fact and ignoring transformative possibilities that implicate culture. Approaching bullying generically, and not in terms of homophobic and transphobic bullying, for example, and emphasizing criminal measures in response is simply a way for us, as a culture, to avoid confronting our cultural demons and avoiding our fears.

The movement to these kinds of sanctions, however, may be set. In addition to Nova Scotia, the UK has recently moved in that direction. Citing research that shows how pervasive bullying is in various social settings – schools, the workplace, etc. – Beatbullying, an established anti-bullying organization is now calling for the criminalization of bullying and cyberbullying. Anthony Smythe of Beatbullying recently stated the organization’s position:

[We are] ... calling for a children’s anti-bullying bill, known as “Ayden’s Law”. The proposed bill will focus on the right of a child or young person to attend school, and live in a community free from bullying and harassment. It will increase community-based bullying prevention, and ensure that all sections of society – including government, local government, communities and schools have clear roles and responsibilities when it comes to tackling bullying.⁴⁴

The bill’s key reforms would include better victim protection by making bullying and intimidation a criminal offence:

Bullying is not a crime in the UK and the criminal justice system will currently only intervene when bullying behaviour escalates into serious forms of criminality such as harassment. We are calling for the introduction of a new offence which, on most occasions, will be sanctioned through the use of youth out of court disposals, such as cautions, apologies or compensation. In this way, bullying behaviour can be addressed at a much earlier stage and the escalation into serious criminality

⁴³ Wayne MacKay & Elizabeth Hughes, *Appendix I: The Legal Dimensions of Bullying and Cyberbullying*, MacKay Report, *supra* note 4.

⁴⁴ Anthony Smythe, “Comment: Bullying Should Be A Crime”, online: politics.co.uk <<http://www.politics.co.uk/comment-analysis/2013/05/23/comment-bullying-should-be-considered-a-crime>>.

prevented. This means that only the most serious or repeat offenders would be referred to court for prosecution. Moreover, early intervention will mean victims no longer have to wait until they are at serious risk before the criminal justice system protects them from this harm. That is why we are asking for the prime minister to introduce a new statutory anti-bullying strategy for children, on which he will have to report progress to parliament each year. ... Bullying poses one of the greatest safeguarding risks to our children and we need respond now. That is why we have proposed these measures and are now calling on the prime minister to meet with us to discuss how this proposed bill can be introduced.⁴⁵

It will be very interesting to watch the outcomes on the ground of the *Cyber-Safety Act* in Nova Scotia, any legal challenges to that legislation, potential responses by the federal government under the criminal law power, as well as the UK bill, if implemented. Like Professor MacKay, I see places for concern and I have several reservations. I will observe, however, that one apparent benefit to the *Cyber-Safety Act* is that there is now an answer to the question posed by so many parents of victims of bullying and cyberbullying – “*What can I do to help my bullied child? The school refuses to do anything about it.*” There is now, in Nova Scotia, one proposed solution. Whether that solution is outweighed by any negative effects remains to be seen. The better way forward may be found in a different direction, such as Manitoba’s *Bill 18*,⁴⁶ a legal response that emphasizes inclusiveness and cultural change in schools instead of punishment and after-the-fact reactions.⁴⁷

⁴⁵ *Ibid.*

⁴⁶ *The Public Schools Amendment Act (Safe and Inclusive Schools)*, 2nd Sess, 40th Leg, 2013 (Assented to 13 September 2013) SM 2013, c 6.

⁴⁷ For further discussion, see Short, *Bound for Glory*, *supra* note 35.