

# **PEOPLE WHO STALK PEOPLE**

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## PEOPLE WHO STALK PEOPLE

### Introduction

Stalking is one of those activities that conjures up a host of brutal images. When a cat stalks its prey, it likes to play with the victim for a while, tormenting it for an agonizing few minutes before finally killing it. Likewise, the human stalker plunges his victim into a world of fear and terror by repeatedly following and attempting to contact the victim despite pleas to stay away. The obsessive efforts of the stalker to control and intimidate often escalate into violence, including the death of the victim.

Stalking activities were first thrust into the public limelight during the 1980's when a series of well-known celebrities suddenly found themselves the target of one or more adoring, but obsessed fans. Singer Anne Murray was pursued relentlessly by a Saskatchewan farmer despite several court orders directing him to stop.<sup>1</sup> David Letterman was stalked by a woman who, claiming to be his wife, went to his residence several times, and, on one occasion, broke in and stole his car.<sup>2</sup> In 1989, Rebecca Schaeffer, a star on the television show "My Sister Sam" was murdered at her Los Angeles

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<sup>1</sup> In recent years, the chronology of events can be summarized in this way. In July, 1990 Charles Robert Kieling was convicted of several counts of wilfully failing to comply with a probation order made in 1988. The violations involved telephoning Anne Murray at her place of work. At trial, Mr. Kieling was fined a total of \$2,000. On appeal, the Court of Queen's Bench increased the sentence to 60 days imprisonment and further directed that upon release Mr. Kieling must comply with a probation order. The relevant part of the probation order read: "The accused will not make any contact anywhere in Canada or in any other jurisdiction outside of Canada at any time with Anne Murray or any member of her family including husband, children, siblings, aunts and uncles, or anyone of any other degree of kinship under any circumstances whatsoever. The accused will not phone them, correspond with them by mail, attend at their place of residence or telephone their place of residence or workplace or recreation place or any other place in Canada or elsewhere, where they are or might reasonably be expected to be found for any reason at any time under any circumstances whether invited by them or otherwise." That order subsequently was breached in February of 1992 and in July, 1992 Mr. Kieling once again was convicted of five further counts of attempting to contact Anne Murray at her workplace. The trial court's sentence of four months' imprisonment subsequently was increased to nine months, together with a further order that upon release he comply with a probation order containing the same terms as before. (Q.B. No. 194/92).

<sup>2</sup> Kathleen G. McAnaney, Laura A. Curliss and C.E. Abeyta-Price, "*From Imprudence to Crime: Anti-Stalking Laws*", 68 Notre Dame L. Rev. 819 (1993) at p. 821.

apartment by an obsessed fan who had pursued her for two years.<sup>3</sup> More recently, an obsessed fan of pop singer Madonna entered her home at Los Angeles despite protective court orders forbidding him from doing so. In April, 1995 Robert Dewey Hoskins said he was either going to "marry her, or kill her", by "slitting her throat from ear to ear." Two months later, he entered her house carrying a wooden heart that read "Love to my wife Madonna," and kept security personnel at bay for several minutes as he ran around the property, swam in the pool, and insisted that the guards "leave my property." After a scuffle, he was shot by one of the guards and charged with stalking the controversial singer despite her absence from the house at the time of the incident.

In most stalking cases, however, the victim is not a celebrity or even a public figure. A 1993 U.S. Task Force on Stalking reported that most victims are former lovers, former spouses or the current spouse of the perpetrator.<sup>4</sup> Another recent U.S. study has chillingly suggested that 200,000 people in the United States are stalking someone.<sup>5</sup> Stalking, as a form of human behavior, exists in all walks of life; it cuts all age and gender barriers, and knows no class distinctions.

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<sup>3</sup> Her murderer, Robert Bardo, not only had followed her for two years, but hired a detective to get her address, and repeatedly sent her letters and gifts. Subsequent analysts have attributed the explosion of anti-stalking legislation to the murder of this popular television actress: *Ibid*, at p. 821; Mathew J. Gilligan, "Stalking the Stalker: Developing New Laws to Thwart Those who Terrorize Others," 27 *G.A. L. Rev.* 285 (1992); Robert P. Faulkner and Douglas H. Hsiao, "And Where You Go I'll Follow: The Constitutionality of Antistalking Laws and Proposed Model Legislation," 31 *Harv. J. on Leg.* 1 (1994); *Stalkers*, by Jean Ritchie (London: Harper Collins Publishers, 1994), at p. 73 - 77. Some courts have agreed with this view as well: *People v. Payton*, 612 N.Y.S. 2d 815 (1994).

<sup>4</sup> This study was conducted by the National Criminal Justice Association, a Washington, D.C. based organization, under the direction and oversight of the National Institute of Justice, the Research and Development Agency of the U.S. Department of Justice. The United States Congress had directed the U.S. Attorney General, through the National Institute of Justice, to develop and distribute among the states a "constitutional and enforceable" model anti-stalking code. This work was carried out with a project resource group composed of individuals from the American Bar Association, American Civil Liberties Union, the Police Executive Research Forum, National District Attorneys' Association, National Victim Centre, Threat Management Unit of the Los Angeles Police Department, National Governors' Association, the National Conference of State Legislatures, individual Prosecutors, Defence Attorneys and Probation Officers, as well as other public and special interest groups: *Project to Develop a Model Anti-Stalking Code for States*, a final summary report presented to the National Institute of Justice, October, 1993, at p. 40.

<sup>5</sup> Kathleen G. McAnaney, et al *supra*, footnote 2 at p. 823, Faulkner, *supra*, footnote 3 at p. 4; *Stalkers*, by Jean Ritchie, *supra*, at p. 1.

Nor is the problem of stalking confined to the United States: In 1991, an Ontario man stalked his estranged wife, Patricia Allen, over a period of several months, then shot her to death through the chest with a crossbow, in broad daylight, on a busy Ottawa city street.<sup>6</sup>

In 1992, Ronald Bell stepped out from behind two buildings in Winnipeg, walked behind an unsuspecting twenty-year old Terri-Lyn Babb and fired a lethal shot into the back of her head. It was the middle of the afternoon and at the time Babb had been waiting for a ride at a bus stop. Evidence at Bell's trial showed that a year-and-a-half earlier Babb had suffered from bouts of depression and had been a patient at the hospital where Bell worked. Bell became infatuated with the pretty young patient, and after Babb spurned his advances, he posted hand bills in the hospital and in her neighbourhood, detailing her emotional problems. Bell then followed her over a period of several months, recording in a diary her daily movements, what she was wearing, and who she was with. The notebook, tendered in evidence during the court proceedings, shows the mind of a man becoming increasingly more obsessed with a woman. After almost two years of torment, Babb obtained two peace bonds, ordering Bell to stay away from her. Within eight months, Babb was dead. Bell subsequently pleaded guilty to her murder and on May 30, 1994, was sentenced to life imprisonment with no parole for eighteen years.<sup>7</sup>

In 1993, Sherry and Maurice Paul were murdered by Andre Ducharme at their farmhouse outside of Winnipeg, Manitoba.<sup>8</sup> Shortly afterward, Ducharme killed himself. Maurice Paul and Andre

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<sup>6</sup> Stalking: The Crossbow Murder Reconsidered, *The Globe and Mail*, January 29, 1994 at p. 2, authored by Selwyn M. Smith, a psychiatrist who was called by the Crown as the psychiatric expert at the trial of the assailant, Colin McGregor. Mr. McGregor was found guilty of first degree murder, and subsequently has brought an appeal against that conviction to the Ontario Court of Appeal.

<sup>7</sup> (Unrep, Man. QB, May 30, 1994, Court File CR 93-01-13845). Originally, Bell was charged with first degree murder. That was reduced to second degree by the Crown on the basis that while the evidence demonstrated elements of stalking, it did not establish planning and deliberation. The Attorney General of Manitoba subsequently recommended that stalking (criminal harassment) form one of the predicate offences that could support a first degree conviction under s.231(5) of the Criminal Code. The Federal Minister of Justice is presently considering this proposal. See "Concluding remarks", *infra*.

<sup>8</sup> The facts concerning this case are drawn from the report of an inquest held before Provincial Court Judge C.K. Newcombe pursuant to the Manitoba *Fatality Inquiries Act*: "The Fatality Inquiries Act,

Ducharme had grown up together and Sherry Paul "inherited" him as a friend when she married Maurice. Ducharme visited the Paul home on many occasions and ultimately became obsessed with Sherry. Spurned in his advances, Ducharme told Sherry: "You're not going to live to see your next birthday and I'm not going to live to see my next birthday". Ducharme was known to own a firearm. He was charged with uttering threats contrary to section 264.1 of the Criminal Code, and was released from custody on condition that he not communicate with Sherry or come anywhere near her residence.

Before and after making this threat, Ducharme had spoken about killing Sherry and himself to his landlady and to others. On some occasions, he discussed these thoughts while under the influence of alcohol; on others, he was sober. Sherry was told about these threats, but did not take them seriously at the time.

A week before Sherry's death, an incident with an incredible twist of irony occurred which changed Sherry's approach to Ducharme's comments. Terri-Lyn Babb was gunned down outside the hospital where Sherry worked. On duty at the time, Sherry ran to the scene to see if the victim's hair color was similar to her own. She believed, apparently, that Ducharme may have shot a stranger by mistake, believing it to be her. Sherry immediately instructed that the uttering charge, previously agreed to be dealt with on a non-judicial basis, be proceeded with in the usual way before the criminal courts. Six days later, however, Sherry's worst fears materialized. Andre Ducharme, the man who had been stalking her, finally killed his target.

Most stalkers do not, however, kill their victims. They follow and terrorize them. The case of Colleen Kelly is perhaps the best illustration of the lengths to which stalkers will go to control and terrorize their prey.

Colleen, an attractive young Australian school girl, was delighted to be asked out by the curly-haired and more sophisticated boy from next door. She did not expect, however, that Mark Harrison's appalling behaviour would dominate and dictate her life for the next decade.

After dating for a while, Colleen called off the relationship. Harrison was furious. He beat her up savagely, and often. Out of sheer terror, Colleen remained with him. After one particularly vicious assault, which lasted for an hour and a half, and hospitalized Colleen, she decided to break free from Harrison. Colleen changed her job, her address, and left strict instructions with her family not to pass any information to him. Outraged, Harrison roamed the streets searching for Colleen. He broke into her parents' house three times, looking for her. He tried to run her over at work with his motorcycle. For that, he was arrested, charged, bound over to keep the peace, and released, only to resume stalking Colleen.

Harrison then hatched an incredible plan to watch her every move. He tunnelled under the floor boards of her parents bungalow, coming up through the floor of a closet and, when the house was empty, made his way into the attic. From above, he drilled holes into the ceiling of every room, and tapped into the telephone. For three months, Colleen and her family had no idea that he was spying and eavesdropping on their every move. On occasion, when the house was vacant, he would descend to leave telltale clues that someone - perhaps he - had been in the house. But each time he retreated to his lair, where he made himself comfortable with an old mattress and a supply of tinned food.

To her horror, Colleen's mother found Harrison hidden in a closet one day. He fled, and the family mistakenly assumed that he had broken into the house using a key. The truth did not emerge until later on, when police searched the house as a result of a hostage taking incident involving Harrison and Colleen's father. It was, for all of them, an horrific discovery. This time, Harrison was jailed for eight months.

Colleen moved to England, and her family moved to a secret location in Australia. The prison term did not, however, dampen Harrison's obsession with Colleen. After his release, he broke into the home of one of Colleen's friends and found letters bearing her new address in London. He then conned his parole officer into getting a visa allowing him to visit England, and then left to pursue Colleen.

A few days later, Colleen, now working under a different name, looked out of her London window and saw a shadowy six foot tall figure standing at the corner, looking up at her. It was Harrison. Colleen barricaded herself in her apartment, and called the police. Harrison eluded arrest, and fled to France. Shortly after, he tried to re-enter England, but was arrested at Heathrow and was subsequently deported to Australia. British authorities concluded, however, that he could not be charged with any offence in England "because he had not broken the law there".

Until recently, this type of conclusion almost became the norm in the United States, Canada, England and Australia because, as I shall soon show, Anglo-based criminal law focusses on the prohibition of specific incidents - such as assault or threat - not a course of conduct that is threatening. Legislation clearly was required to deal with this type of insidious behaviour.

Twenty-one months after Patricia Allen was killed with a crossbow in Ottawa, and after the deaths of several other women at the hands of male stalkers, Canada enacted its first anti-stalking law. Section 264 of the Criminal Code, headed "Criminal Harassment", provides the following:

264. (1) No person shall, without lawful authority and knowing that another person is harassed or recklessly as to whether the other person is harassed, engage in conduct referred to in subsection (2) that causes that other person reasonably, in all the circumstances, to fear for their safety or the safety of anyone known to them.

(2) The conduct mentioned in subsection (1) consists of

(a) repeatedly following from place to place the other person or anyone known to them;

- (b) repeatedly communicating with, either directly or indirectly, the other person or anyone known to them;
  - (c) besetting or watching the dwelling-house, or place where the other person, or anyone known to them, resides, works, carries on business or happens to be; or
  - (d) engaging in threatening conduct directed at the other person or any member of their family.
- (3) Every person who contravenes this section is guilty of
- (a) an indictable offence and is liable to imprisonment for a term not exceeding five years; or
  - (b) an offence punishable on summary conviction.

In this article, I will examine the legal framework that existed to deal with stalking activities before the passage of this law. My starting point will be England during the 1700's, where much of our criminal law was first developed. I will move quickly to the post-Confederation situation in Canada, tracing the relevant laws that have been passed by Parliament from the late 19th Century to the present time. I will next consider the legislative history underlying section 264 of the Criminal Code, including testimony before a Parliamentary Committee in 1993 that led to two pivotal changes to the original Bill.

Before dealing with any of these issues, however, I intend to describe four categories or "profiles" of people who stalk people, as well as something of their behavioral patterns. I do this for three reasons. First, an understanding of the type of person most likely to become involved in stalking activities may provide some insight into the risks that individual stalkers pose to their victims. Second, an understanding of the peculiar nature of this offence, and the offenders behind them, tend to shed some light on the social factors that prompted Parliament to act in the first place. Finally, these profiles, when used as a backdrop, can assist in understanding the sometimes bizarre actions and motives of individual stalkers in individual cases.

### **Profile of a Stalker**

In general, stalking involves one person's obsessive behaviour toward another person. The stalker's actions may be motivated by an intense affection for or an extreme dislike of the victim. Stalking behaviour may be overtly irrational or violent, or be anchored on benign acts that in another context might be welcomed or considered flattering by the recipient.

Many stalkers are not violent, but all are unpredictable. The irrational mania that drives them to pursue their quarry is beyond interpretation within the normal framework of social behavior. It is the unpredictability that generates the most fear, coupled with the knowledge that, in some cases, the stalker's behaviour may, without warning or apparent reason, turn rapidly violent. Escalation in the level of threat forms one of the most common features of stalking.<sup>9</sup>

Psychological, psychiatric, and forensic experts have concluded that at least four different categories or "profiles" of stalkers exist.<sup>10</sup> Their motives and behaviours may differ, and the potential for aggressive behaviour may differ between individuals within categories.<sup>11</sup> Moreover, these categories do not represent air-tight compartments. Some stalkers may exhibit characteristics associated with two or more of the categories or profiles of the four "typical" stalkers.

***a) Erotomania: The Delusional Erotomaniac***

The American Psychiatric Association defines erotomania as the presence of a persistent "erotic delusion that one is loved by another". The "other person" may not even know, and often does not know of the existence of the person operating under the delusion.<sup>12</sup> The erotomaniac often fantasizes the existence of a romantic or spiritual love with someone who typically is of a higher

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<sup>9</sup> U.S. Task Force Report on Stalking, *supra*, footnote 4 at pp. 1, 46 and 49; and, generally, see *Stalkers*, by Jean Ritchie, *supra*, footnote 3 at pp. 1-16.

<sup>10</sup> McAnaney *et al*, *supra*, footnote 2 at p. 831; and see Faulkner, *supra*, footnote 3 at p. 4 *et seq.*

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

<sup>12</sup> McAnaney *et al*, *ibid*, p. 832, and see U.S. Task Force Report on Stalking, *supra*, footnote 4 at p. 92.

social status or is in a position of authority relative to the erotomaniac individual.<sup>13</sup> Sexual attraction is not required, though the erotomaniac often seeks to establish an intimate relationship with the object of his or her fantasy.<sup>14</sup> As a consequence, an accused stalker may not "intend" to cause fear; instead, he or she may simply "intend" to establish a relationship with the victim.<sup>15</sup> This becomes a pivotal consideration when framing legislation that is going to be effective and enforceable.

Erotomania generally includes the stalking behaviours typically observed in the delusional erotomaniac. These include repeated efforts to contact the fantasized individual by telephone, letter, gifts, attempted visits and physical surveillance.<sup>16</sup> One of the most publicized instances of male erotomania can be found in the case of *Tarasoff vs. Regents*.<sup>17</sup> There, Prosenjit Proddar was accused of the murder of Tatiana Tarasoff. At trial, the evidence established that Proddar interpreted a New Year's Eve kiss by Tarasoff as an indication that she loved him. After repeated, but failed attempts to gain Tarasoff's attention and affection, Proddar attempted to orchestrate a dangerous situation from which he could rescue Tarasoff; he assumed that his heroism would reveal to her the depth of *her* feelings for him. His plan went awry, and Proddar fatally stabbed Tarasoff.

The goal of an erotomaniac is to advance a relationship with the object of his or her fantasy.<sup>18</sup> The key element here is the flagrant misperception of reciprocity: the delusional erotomaniac believes

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<sup>13</sup> *Ibid.*

<sup>14</sup> *Ibid.*, p. 832-833.

<sup>15</sup> U.S. Task Force Report on Stalking, *supra*, footnote 4 at p. 48.

<sup>16</sup> McAnaney *et al*, *supra*, footnote 2, at p. 833-834. The 1993 U.S. Task Force Report on Stalking said: "The most frequently used methods of harassment are following, making harassing statements and threats by phone, sending unwanted letters, vandalism, verbal and physical threats, showing up at the victim's work place, innocuous phone calls, and assaults. Other forms may include sending unwanted gifts, leaving dead animals, making false accusations, and leaving notes on victims' cars." *supra*, footnote 4 at p. 41.

<sup>17</sup> 551 P.2d 334 (Cal. 1976).

<sup>18</sup> McAnaney *et al*, *supra*, footnote 2 at p. 834.

that the target reciprocates an intensity of emotion and desire for union despite the absence of any sort of *actual* relationship or emotional reciprocity.

***b) Borderline Erotomaniacs***

This category is different from delusional erotomania in two basic ways. First, and most importantly, borderline erotomaniacs have developed intense emotional feelings towards other individuals who they know do not reciprocate their feelings.<sup>19</sup> Second, unlike delusional erotomaniacs, borderline erotomaniacs usually have some history of actual emotional engagement with the object of their attention.<sup>20</sup> It may have been quite trivial; an innocuous glance at a social gathering may be sufficient.<sup>21</sup>

The actual behaviour of the borderline erotomaniac may not differ significantly from that of the delusional erotomaniac, i.e., they may both repeatedly write letters, send gifts, make phone calls, and follow their targets. The borderline erotomaniac, however, does not presume the target reciprocates his or her feeling of affection.<sup>22</sup>

***c) Former Intimate Stalkers***

Former Intimate Stalkers have an actual history of emotional dependence upon their target partner that is severed when the relationship is terminated.<sup>23</sup> This element distinguishes the Former Intimate Stalker from both of the previous categories. These stalkers do not fantasize reciprocal idealized love. They have, in fact, previously had an intimate relationship with their targets.<sup>24</sup>

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<sup>19</sup> *Ibid*, p. 835.

<sup>20</sup> *Ibid*, p. 836.

<sup>21</sup> *Ibid*, p. 836.

<sup>22</sup> *Ibid*, p. 838.

<sup>23</sup> *Ibid*, p. 840.

<sup>24</sup> *Ibid*, p. 839.

Not surprisingly, Former Intimate Stalkers often have had a previous history of abusive relationships.<sup>25</sup> Many are jealous of real or imaginary infidelities; as a consequence, they demonstrate a strong need to control their former partner.<sup>26</sup> As one U.S. study has noted: "He (the stalker) is so dependant on her that he would kill her rather than let her go and not be able to live without her."<sup>27</sup>

Not insignificantly, the Los Angeles Police Department, who seem to deal with more stalking cases than any other investigative agency, estimate that 48 percent of their caseload consists of this type of stalker.<sup>28</sup> It should also be observed that Former Intimate Stalkers sometimes target the current lover

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<sup>25</sup> *Ibid*, p. 839. Statistics concerning the interrelationship between domestic violence, stalking, and spousal homicide is unavailable in Canada at the moment. We do, however, know this: 29% of women currently or previously married in Canada have experienced at least one incident of physical or sexual violence at the hands of a marital partner (*Wife Assault: The Findings of a National Survey*, Canadian Centre for Justice Statistics, Juristat Service Bulletin, Vol. 14, # 9, March, 1994, at p. 4). 39% of all female homicide victims were killed by their spouse (*Homicide in Canada - 1993*, Canadian Centre for Justice Statistics, Statistics Canada, Juristat Service Bulletin, Vol. 14, # 15, August 1994, at p. 13). Fully 43% of all domestic homicides flowed from previous domestic violence which was known to police (*Homicide in Canada - 1993*, supra, at p. 13) and in a study of the Family Violence Court in Winnipeg, the majority (67%) of spousal abuse cases involved couples in an ongoing relationship as a marital or common law partner, or boyfriend/girlfriend (*The Winnipeg Family Violence Court*, Juristat Service Bulletin, Canadian Centre for Justice Statistics, Vol. 14, No. 12, p. 7, released May 1994). Over the 19 year period 1974 - 1992, a married woman was 9 times as likely to be killed by her spouse as by a stranger (*Spousal Homocide*, Canadian Centre for Justice Statistics, Juristat Service Bulletin, Vol. 14, # 8, at p. 4). And finally, the rate of husbands killing wives is elevated six- fold in the aftermath of a separation (*Spousal Homocide*, supra, at p. 7).

<sup>26</sup> *Ibid*, p. 840. In the report on *Spousal Homicide* released by the Canadian Centre for Justice Statistics in March, 1994 (Juristat Service Bulletin, Statistics Canada, Vol. 14, No. 8 at p. 5), the following was said: "Evidence from various sources, including police files, psychiatric reports, case law, and interview studies from several countries, suggests that a large majority of wife killings are precipitated by the husband accusing the wife of sexual infidelity, by her unilateral decision to terminate the relationship, and/or by his desire to control her". Police sources in the same report suggest that 52% of the spousal homicides in 1991-92 were attributed to an "argument or quarrel", and a further 24% to "jealousy" (p. 5-6).

<sup>27</sup> *Ibid*, p. 840.

<sup>28</sup> *Ibid*, p. 839; and see Faulkner, supra, footnote 3, at p. 12, and *Stalkers*, by Jean Ritchie, supra, footnote 3 at pp. 30 and 323. This estimate is quite consistent with preliminary data gathered in Canada. In April, 1995 the Winnipeg Police Service released a report on investigations conducted and charges laid respecting criminal harassment in Winnipeg during 1994. Ninety percent of all stalking victims were known to their assailants. More significantly, however, 47.6% of those charged were "intimate partners, past or present."

or spouse of the victim in an attempt to eliminate the person they perceive to be the principal obstacle to reunification.<sup>29</sup> Taken to the extreme, this can result in the classic double murder and suicide of the entire love triangle, as in the case of Sherry and Maurice Paul, and Andre Ducharme, discussed *supra*.

#### ***d) Sociopathic Stalkers***

Two important features distinguish Sociopathic Stalkers from the other three categories. First, they, in general, do not seek to initiate or maintain an interpersonal relationship with their victim. Second, they generally formulate the characteristics of the "ideal victim", then seek an acceptable example that fits the criteria selected.<sup>30</sup>

The Sociopathic Stalker sometimes becomes a serial murderer or a serial rapist. The case of Charles Ng provides a good example. Ng and his associate, Leonard Lake, are said to have sought out, tracked then killed their victims for one of two reasons: either the target had a desired asset; or the target had a desired "personal characteristic". I should explain this bizarre case a bit further.<sup>31</sup>

When he fled from California to Calgary in 1985, Ng faced thirteen counts of murder. Most were sex related and all were gruesome. The Supreme Court of Canada described them as "a series of offences of an almost unspeakable nature."<sup>32</sup>

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<sup>29</sup> *Ibid*, p. 840; and see *Stalkers*, by Jean Ritchie, *supra*, footnote 3 at p. 273.

<sup>30</sup> *Ibid*, p. 842.

<sup>31</sup> Charles Ng fled from California to Canada in 1985. He resisted extradition for five years, but was transported from a Canadian jail to San Francisco in 1991 to stand trial on nineteen counts, including twelve of murder. In chronological sequence, the reported cases on both sides of the border are: *Re Ng* (1988), 93 A.R. 204, affirmed 97 A.R. 241 (C.A.), lv ref [1989] 2 S.C.R. 1X, further considered in Canada in *Reference re Ng Extradition* (Can.) (1991), 67 C.C.C. (3d) 61 (S.C.C.), now before the courts in the State of California: *Ng v. Superior Court*, 840 P.2d 961 (Sup. Ct. of Calif., 1992).

<sup>32</sup> In *Reference re Ng Extradition* (Can.) (1991), 67 C.C.C. (3d) 61 (S.C.C.), further considered in *Kindler v Canada (Minister of Justice)* (1991), 67 C.C.C. (3d) 1 (S.C.C.), at p. 12-13.

In one instance, Ng is alleged to have located a San Francisco homosexual through a sex trade magazine, went to his residence, entered on the pretext of purchasing sex, then killed the target. In a second case, Ng once again allegedly tracked his target through newspaper ads. He needed video equipment, Harvey Dubs had some, and was advertising it for sale. Ng responded to the ad, kidnapped Dubs and his family, killed them and took the video equipment. In the third case, Ng sought to find someone who looked like Lake so that the victim's driver's licence could be taken and a new identify established for Lake. Such a victim was located, he was shot in the head and both the victim's driver's licence and his car were taken.

In yet another instance, Ng reportedly telephoned his young female victim where she worked. She did not know Ng. He lured her into his car by saying that her boyfriend was in trouble. He then kidnapped her, raped her, videotaped her in confinement, killed her and burned her body.

Further counts involved tracking co-workers down, and killing them because they posed a threat to Ng's desire to climb the corporate ladder at work. After a five-year battle fighting extradition in the Canadian courts, Ng was ordered to the United States and now faces the death penalty in California.

Ng's stalking behavior formed an important -- perhaps essential -- part of his crime. At no time did he seek to establish a "relationship" with any of his victims; he sought something from them, and stalked them to obtain it. Killing the victim simply became a necessary part of the evidentiary cover-up that allowed him to avoid detection for over a year.

## **The Legal Framework**

### ***a) Early English Law***

Stalking scenarios involve a series of individual and sometimes quite unrelated acts, such as repeatedly following someone, then slashing their car tires and leaving a dead animal at their doorstep.<sup>33</sup> The acts, though done individually and at different times and in different locations, build

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U.S. Task Force Report on Stalking, *supra*, footnote 4 at p. 41.

on one another. Stalking, therefore, is quite different from most crimes. By nature, it is not a single occurrence. It involves a course of conduct that may extend over several days, weeks, or even years.

Early English law, on the other hand, focussed primarily on the punishment of specific prohibited acts, such as theft, murder and robbery. Stalking as a form of human behaviour was not itself an offence, although some aspects of it were used to establish the commission of offences such as assault. Early law thus treated stalking as a precursor to another crime or, in some cases, as evidence of its *mens rea*.

Murder provides a good example. Under the common law, the difference between murder and manslaughter rested in the degree of *mens rea* present. Murder required "malice forethought". Amongst other things, malice could be proven by showing an intention to harm someone else. "The evidences of such a malice", Hale said in 1736<sup>34</sup> and Blackstone repeated in 1771<sup>35</sup> "must arise from external circumstances discovering that inward intention, as lying in wait, menacings antecedent, former grudges, (etc)." In the case of a homicide, therefore, "lying in wait" for the victim provided evidence of an intention to commit murder. In other instances, lying in wait formed an essential ingredient of the offence itself, as in the case of the statutorily-created crime of "mayhem" (maiming).<sup>36</sup>

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<sup>34</sup> The History of the Pleas of the Crown ("Historia Placitorum Coronae"), by Sir Matthew Hale (London: 1736), Vol. 1 at p. 451.

<sup>35</sup> *Commentaries on the Laws of England*, by Sir William Blackstone (Dublin: 1770), Book IV, at p. 199.

<sup>36</sup> The offences of mayhem included the crime of "maim," which was punishable under both the common law and by statute. At common law, maim consisted of injuring a man's body in such a way that he was less able to defend or attack an adversary. (Blackstone, *supra*, at p. 205 W. Hawkins, *Pleas of the Crown* (London: 1824, 8th ed., Vol. 1, p. 107); Coke, 3 Institutes 62, 118). By statute, maim consisted of cutting out the tongue, putting out an eye, slitting the nose, lip or a limb "on purpose and of malice forethought, and by lying in wait." (22 & 23 Car. 2, chapter 1, discussed in Hawkins, Vol. 1, at p. 108). Curiously, the concept of "lying in wait" subsequently was propelled into both Canadian and American common law, and has found its way into modern stalking laws in three American states (Connecticut, Vermont and West Virginia): Conn. Gen. Stat. 53a-181-(c) & (d); Vt. Stat. Ann. Tit 13, 1061-1063; W. Va. Code. 61-2-9a (1993 Revisions) 61-2-9a to 61-2-9k.

Early English law did, however, provide victims some relief on two fronts: prosecution for sending threatening letters, and by requiring potential lawbreakers to enter into a "surety of the peace". I will briefly consider the effectiveness of both of these procedures.

In response to a wave of terrorist-style activity in England during the early 1700's, the Parliament at Westminster outlawed sending letters that threatened the recipient with death or the burning of property unless a sum of money was paid.<sup>37</sup> In 1754, Parliament extended the law to include the sending of non-demanding but threatening letters.<sup>38</sup> Both offences required imposition of the death penalty, as was the case for virtually all felonies in England at the time.<sup>39</sup> There is no evidence in the law reports, however, that this law was used to suppress stalking behaviour; rather, it appears that it was used primarily to counter extortion, for the law only prohibited *written* threats. Moreover, except for the most egregious situations, the acquittal rate appears to have been high -- not an uncommon result during that era for non-violent crimes that carried the ultimate punishment.<sup>40</sup>

However, the principal English criminal law remedy designed to prevent stalking was giving "sureties of the peace".<sup>41</sup> On application, a respondent stalker could be required to give a certain amount of money as security to ensure that he (or she) would keep the peace.<sup>42</sup> The purpose of this procedure was to prevent breaches of the peace *before* they occurred. As Blackstone said:<sup>43</sup>

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<sup>37</sup> 9 Geo. 1, Chapter 22 (1722); see Hawkins, *supra*, Vol. 1, at pp. 539-542.

<sup>38</sup> 27 Geo. 2, Chapter 15 (1754); and see E. East, *Pleas of the Crown*, (London: 1803), Vol. 2 at pp. 1104-1126.

<sup>39</sup> In Blackstone's era, no less than 160 offences carried the death penalty: Blackstone, *supra*, Vol. IV at p. 18.

<sup>40</sup> *Ibid.*, at p. 18-19.

<sup>41</sup> As a remedy, sureties of the peace can be traced back to at least A.D. 1360: *Lansbury v. Riley*, [1914] 3 K.B. 229; and see Blackstone, *supra*, Book IV, at pp. 248-254.

<sup>42</sup> Blackstone, *supra*, Book IV at p. 251.

<sup>43</sup> Blackstone, *supra*, Book IV footnote 35, at p. 248; and see *MacKenzie v. Martin* (1954), 108 C.C.C.

"... it is an honour, and almost a singular one, to our English laws, that they furnish a title of this sort ["of the means of PREVENTING offences"]; since preventive justice is upon every principle of reason, of humanity, and of sound policy, preferable in all respects to *punishing* justice ...."

An applicant could obtain a surety of the peace by providing a Justice of the Peace with an assurance, on oath, that he or she had been threatened by the respondent with bodily harm.<sup>44</sup>

Hawkins, a leading contemporary authority on the subject (1739) said that:<sup>45</sup>

"It seems clear, that wherever a person has just cause to fear that another will burn his house, or do him a corporal hurt, as by killing or beating him, or that he will procure others to do him such mischief, he may demand the surety of the peace against such persons; and that every Justice of Peace is bound to grant it upon the parties giving him satisfaction upon oath that he is actually under such fear; and that he has just cause to be so, by reason of the others having threatened to beat him, or lain in wait for that purpose; and that he does not require it out of malice, or for vexation."

There was, however, some doubt about whether anyone was entitled to apply for a surety of the peace. Some authorities questioned whether Jews or Pagans could apply, for instance.<sup>46</sup> "However", Hawkins observed, "it is certain that a wife may demand it against her husband threatening to beat her outrageously, and that a husband also may have it against his wife."<sup>47</sup> However, a few authorities added that if a wife respondent could not find sureties, she should herself be committed, "so . . . a man may be rid of a shrew".<sup>48</sup>

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305 (S.C.C.), especially pages 310-313; and for an historical review, see "Power of Justices and Magistrates to Dispense "Preventive Justice", by C.R. Magone, K.C., 93 C.C.C. 161 (1949).

<sup>44</sup> Hawkins, *Pleas of the Crown, supra*, footnote 36, Vol. 1 at p. 479.

<sup>45</sup> *Ibid*; to the same effect see also Blackstone, Book IV, *supra*, at p. 255.

<sup>46</sup> *Hawkins, supra*, Vol. 1, at p. 478; Blackstone, *supra*, Book IV at p. 250.

<sup>47</sup> *Ibid*, p. 478; and see Blackstone, *supra*, Book IV, at p. 251.

<sup>48</sup> *The Justice of the Peace and Parish Officer*, by Richard Burn (London: 1755), Vol. II at p. 431; subsequently adopted in Canada: *The Justice of the Peace*, 2nd Edition, by John George Marshall (Halifax: 1846), at p. 600.

If the applicant had not previously been assaulted or threatened, she (or he) was required to allege a fear for personal safety, and outline a reasonable basis for that fear.<sup>49</sup> Blackstone contended that this burden of proof could be satisfied by showing the respondent's "menaces", or by establishing that the respondent had "lain in wait" for the applicant.<sup>50</sup>

The surety would be forfeited if the respondent committed any act of violence, including an assault toward the applicant.<sup>51</sup> There were, however, limitations: a bare trespass on the lands of the applicant, without any accompanying breach of the peace, would not provide an appropriate basis for a forfeiture.<sup>52</sup> Nor would mere disparaging remarks, such as calling the applicant a liar.<sup>53</sup>

The case of Richard Dunn, decided by the English courts in 1840, is an important one for several reasons.<sup>54</sup> First, it may well be the first case of stalking in the Anglo-Canadian law reports. Second, the case demonstrates, in cold terms, that stalking is not at all a new phenomenon. Finally, it provides yet another example of how Victorian judges were prepared to sacrifice a case that screamed for justice simply on the basis that the pleadings had been imperfectly drawn.

Richard Dunn was a lawyer, practicing in Middlesex County in England. Around 1838, he became infatuated with Angela Georgina Burdett Coutts, who, at the time, was single and had no interest in Mr. Dunn. In fact, she didn't even know him. Dunn initially wrote to Ms Coutts, using language that the court described as "strange". Coutts simply tossed the letters aside, evidently on the basis that they appeared to have been written by someone who was insane. Over the next two years, Dunn's activities towards Coutts escalated. He followed her when she was travelling. He

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<sup>49</sup> Hawkins, *Pleas of the Crown, supra*, Vol. 1 at p. 479.

<sup>50</sup> Blackstone, *supra*, Book IV, at p. 252.

<sup>51</sup> *Ibid.*

<sup>52</sup> *Ibid.*

<sup>53</sup> *Ibid.*

<sup>54</sup> *R. v. Dunn* (1840), 113 E.R. 939

approached her, hoping to start up a conversation. He wrote more letters. Finally, Ms Coutts sought and obtained a surety of the peace on the basis that she feared for her personal safety.

Dunn was arrested, and held in custody. After a period of time, Ms Coutts decided to discontinue legal proceedings and Dunn was released from jail. Imprisonment did not, however, stop Dunn. On his release, he wrote further letters, left his business card, and asked to meet with Ms Coutts. He started to follow her again, watching where she was going, and what she was doing. A second surety was sought and obtained. This time, Dunn became violent and had to be restrained by court officials. He was sent to jail, but later was released because of a defect in the warrant of committal.

On the loose again, Dunn started writing letters to Coutts, and repeatedly went to her house. He followed her to church. He waited for her, on the roadway, waving at her and made gestures towards her. He then wrote to her, asking to meet. In the letter, he said: "If you refuse this request, you will, when it is too late, repent a course, the consequences of which will sooner or later fall on yourself and your family".

Dunn persisted further, and raised the stakes. He accosted Ms Coutts directly while she was walking with a friend in the middle of the afternoon. A servant was summoned to protect her. Dunn then followed Coutts to a house where she had taken refuge. Police were called in, and Dunn was, once again, taken into custody and asked to enter into a surety of the peace. That application was granted by the court, and was challenged by Dunn on the basis of a motion for a writ of *habeas corpus*.

All of the elements of stalking were present. Persistent, but unwanted advances. Letters written. Coutts was repeatedly followed and watched. Dunn's activities escalated as time went on. Dunn threatened Coutts and her family with bodily harm. Coutts began to fear for her safety. She changed her lifestyle, as well as her daily patterns. She sought the only legal remedy available, but to no avail. A former police officer confirmed to the court that, based on his investigation, Ms Coutts had a reasonable basis to fear for her safety. The case seemed pretty strong, at least by 20th century standards.

Lord Denman, C.J., heard the application for an order of *habeas corpus* along with Littledale, Williams and Coleridge, J.J. Their decision was unanimous. Jurisdiction to hear a request for a surety of the peace, said Denman, C.J., is anchored on the facts alleged. If a threat is not alleged, a surety cannot issue.

The court noted that there was little in the way of case law that could help on the application. The evidence in the case did not, however, allege a threat against Coutts. That could only be inferred from Dunn's course of conduct. The court, Denman, C.J. concluded, should not be asked to infer a threat.<sup>55</sup>

"This case may then be said to prove that the threats need not be by word of mouth directed against the exhibitant, but that looks, gestures, and conduct may express them with equal force; and this is not to be denied: but the invariable rule is that, where reliance is placed on a general fact which may be inferred from particular facts, but does not flow from them by necessary implication, the party shall draw that inference himself, and swear to his belief of its correctness, and not leave the Court to draw the inference instead of him."

The application was allowed, and Dunn was released from custody again. Incredibly, Denman, C.J. blamed the law for the obvious injustice that had occurred. Perhaps he forgot that the law in the area was largely judge-made, not statutorily based. Nonetheless, he comforted himself by concluding the judgment of the court in the following words:<sup>56</sup>

"Perhaps the law of England may be justly reproached with its inadequacy to repress the mischief, and obviate the danger, which the prisoner's proceedings render too probable; and we may naturally feel surprise if none of the numerous Police Acts have made specific provisions for that purpose. But, the power of the sessions and of the justice of the peace to make the order now challenged before us depending wholly on the words of the commission;

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<sup>55</sup> *Ibid*, at p. 948.

<sup>56</sup> *Ibid*, at pp. 948-9.

and those words not being satisfied by the articles exhibited, we are bound to decide that the prisoner must be discharged."

Curiously, a different result occurred in the case that immediately follows the report of the Dunn case. In the *King vs Stanhope*,<sup>57</sup> the applicant was the Marquis of Hertford, and the respondent was the Honourable Augustus Stanhope. As in the case of Dunn, the respondent in this case raised a series of technical objections to defeat the application. He said that affidavits could not be used on the application. More importantly, as in the case of Dunn, he argued that the materials filed were insufficient in the sense that they did not actually state that the defendant was in fear of bodily harm. Rather, it was argued, the applicant only spoke of his fear that the respondent would make him (the applicant) commit a breach of the peace.

The decision of the court was delivered by Chief Justice Abbott. He noted that the respondent had said that he would do everything in his power to annoy Lord Hertford, short of actual violence. Chief Justice Abbott was not moved. He said: "It is impossible for a man to keep within the strict line he has laid down for his own conduct". The court concluded that it was its "imperative duty" to require that the security issue. In response to the suggestion that the respondent would contain himself and would fall short of violence in his attempts to "annoy" the applicant, the court said this:

"We should be poor guardians of the public peace, if we could not interfere until an actual outrage had taken place, and perhaps fatal consequences ensued."

That surely was the correct law. An applicant need not demonstrate that a *prima facie* case of assault has already occurred. The purpose of this procedure was to ensure that a breach of the peace did not occur *in the future*. That sentiment certainly animated the Supreme Court of Canada over 100 years later in the case of *MacKenzie v Martin*.<sup>58</sup> Whether or not requiring a surety of the peace actually achieves this objective is, however, debatable and whether or not a surety of this sort can deal with the fear instilled by a stalker is even less clear.

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<sup>57</sup> (1826), 113 E.R. 949.

<sup>58</sup> (1954), 108 C.C.C. 305 (S.C.C.).

I will discuss in the next part how this legal framework, with all of its warts and imperfections, was transposed to the Canadian Colonies during the 19th century, and remained in effect until Parliament intervened over 100 years later to deal specifically with the threat posed by people who stalk people.

### ***b) Transition to Canada***

English criminal law rooted quickly in the early Canadian colonies. Common law principles were, for the most part, adopted by colonial legislatures during the latter part of the eighteenth century and during the following century the Parliament at Westminster provided a steady stream of prototypes for the Canadian statute book.<sup>59</sup>

As a result, English legal institutions and English precedent became a convenient if not an obligatory starting point for early Canadian courts. Textbooks and reported cases from this era amply demonstrate this.

The first two Canadian textbooks on the criminal law emerged in rapid succession during the 1830's -- the first at Toronto and the second at Halifax.<sup>60</sup> Both were intended to assist the magistracy in the discharge of their many duties, and were modelled after Burn's highly successful work on the *Justice of the Peace*, first published in England in 1755.<sup>61</sup>

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<sup>59</sup> *The British Tradition in Canadian Law*, by B. Laskin (London: Stevens and Sons, 1969) at pp. 1-10 and 49-51; J. Ll. J. Edwards, "The Advent of English (Not French) Criminal Law and Procedure into Canada -- A Close Call in 1774" (1983-84) 26 Cr. L. Q. 464; J.E. Cote, "The Introduction of English Law into Alberta" (1964) 3 Alta. L.R. 262; Dale and Lee Gibson, *Substantial Justice* (Winnipeg: Penguin Publishers, 1972) at pp. 41-42, 56, 71-72, 119 and 159-160; G. Blaine Baker, "The Reconstitution of Upper Canadian Legal Thought in the Late-Victorian Empire", 3 *Law and History Review* 219 (1985).

<sup>60</sup> The first Canadian book on the criminal law was *The Provincial Justice*, by W. C. Keele (Toronto: U.C. Gazette Office, 1835). That was followed shortly afterward by John George Marshall's *The Justice of the Peace* (Halifax: Gossip and Coade, 1837). Marshall was the Chief Justice of the Courts of Common Pleas. In turn, those were followed by the first Canadian book on the criminal law in the French language: J. Cremazie, *Les Lois Criminelles Anglaises* (Quebec: Frechette et Cie, 1842).

<sup>61</sup> Burn, *supra*, footnote 48, proceeded through 30 London editions from 1755 to 1869.

The first of these works, entitled *The Provincial Justice*, was published in 1835 by William Conway Keele. Born in England in 1798, Keele emigrated to Canada and settled near Toronto. He practised law in southern Ontario and published several books on various aspects of the law, although he is best known for his study of the criminal law.

Because it was the first, Keele's text assumes a special importance in understanding the transition of the law from England to Canada. His analysis expressly reflected the writings of the leading English authorities such as Hawkins, Blackstone and Coke. Keele described some common law offences that, in theory, could be used as a basis for countering some aspects of the stalking spectrum such as abduction, assault, extortion and maim. However, the two most promising areas were the same as those in England: prosecution for threatening someone, and the granting of judicial sureties of the peace.

Concerning threats, he said:<sup>62</sup> "With respect to *threats* of personal violence, or any other threats by which a man is put in fear, and by means of which money or other property is actually extorted from him, these we have already seen amount to the crime of "robbery". . . . but the threats which we have now chiefly to deal with are those contained in *letters or other writing*, sent or delivered to the party threatened, by which he is menaced with death or the burning of his house, or with the infliction of any other dire calamity, when accompanied with a demand of money; or with an accusation of having committed some heinous crime for the purpose of extorting money. This was formerly considered so great an offence that it was made high treason by the statute of 8 H.5. c. 6."

Respecting sureties, Keele said:<sup>63</sup> "Whenever a person has just cause to fear that another will burn his house, or do him or his wife or children, a corporal hurt, or unlawfully imprison any of them, or that he will procure others to do so, he may exhibit *articles of the peace* against the person from

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<sup>62</sup> Keele, *supra*, footnote 60, at pp. 445-446. Almost one hundred and fifty years later, the Supreme Court of Canada confirmed that, at common law, only written and not oral threats were culpable: *R. v. Nabis* (1974), 18 C.C.C. (2d) 144 (S.C.C.), at pp. 152-154.

<sup>63</sup> *Ibid*, p. 41.

whom he apprehends such mischief, either in the courts of Chancery or King's Bench, or before a justice of the peace; and such court or justice is bound to require the party to find sureties to keep the peace towards the exhibitant, upon the latter making oath that he is actually under such fear from the other person, and that he has just cause to be so, and that he does not require such surety out of malice or vexation . . . A wife may demand it against her husband, and a husband against his wife."

Significantly, the form provided by Keele for a surety suggests the existence of domestic violence in the pre-Victorian Canadian provinces:

"C.D. wife of E.D. of \_\_\_\_\_ in the said district, labourer, prays surety of the peace against the said E.D. her said husband, for fear of death or bodily injury.

First -- this informant on her oath saith that she intermarried with her said husband about \_\_\_\_\_ years ago, since which time he hath often in a cruel, barbarous, and inhuman manner, beat, abused and ill-treated this informant, and frequently threatened to take away her life.

Secondly -- this informant saith that on the \_\_\_\_\_ day of \_\_\_\_\_, last past, her said husband in a violent passion (state the particular acts of cruelty).

Lastly -- this informant saith, that she is actually afraid her said husband will do her some bodily injury, if not murder her, should she return home again to him; and saith that she doth not make this complaint against her said husband out of any hatred, malice or ill-will which she hath or beareth towards him, but purely for the preservation of her life and person from further danger."

The book has been out of print for well over 100 years, and few copies have survived to the present.<sup>64</sup> Most Canadian law schools have a copy of at least one of the five editions in their academic library, and York University has permitted their copy of the third edition (1851) to be microfilmed as part of the CIHM/ICMH Microfiche Series (collected and organized by the Canadian Institute for Historical Microreproductions in Ottawa), also available at most large academic research libraries in Canada.

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A leading bibliography, the National Union Catalogue, has verified locations for four copies of the 1st edition (1835); five copies of the 2nd edition (1843); three copies of the 3rd edition (1851); two copies of the 4th edition (1858); and two copies of the 5th edition (1864).

Canada's second textbook on the criminal law, entitled *Justice of the Peace*,<sup>65</sup> was published in 1837 by John George Marshall, the Chief Justice of the Courts of Common Pleas at Halifax, Nova Scotia. It became a standard textbook for local magistrates and was used in Nova Scotia throughout much of the 19th century.<sup>66</sup>

Marshall agreed with Keele's analysis of the law on most points. He could point to no further mechanisms for controlling stalking activities. His treatment of peace sureties was, however, a bit more detailed:<sup>67</sup>

" . . . wherever a person has just cause to fear that another will burn his house, or do him a corporal hurt, as by killing or beating him, or that he will procure others to do him such mischief, he may demand the surety of the peace against such person, and that every Justice of the Peace is bound to grant it upon the party's giving him satisfaction upon oath that he is actually under such fear, and that he has just cause to be so, by reason of the other's having threatened to beat him, or laid in wait for that purpose; and that he doth not require it out of malice or for vexation....."

Note also, the surety of the peace shall not be granted but where there is a fear of some present or future danger, and not merely for a battery or trespass that is past, or for any breach of the peace that is past; for this surety of the peace is only for the security of such as are in fear; but the party wronged may punish the offender by indictment, and the Justice if he see cause, may bind over the affrayer to answer unto the indictment."

Criminal law in the Canadian Colonies thus tracked the common law in England. Stalking activities were not *per se* an offence. Some activities on the stalking spectrum were unlawful, but the law was not particularly well-suited to dealing with stalking as a threatening course of conduct. Sureties of the peace were available to women who were being harassed or threatened, but the burden of proof

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<sup>65</sup> *The Justice of the Peace, and County and Township Officer, in the Province of Nova Scotia*, by John George Marshall (Halifax: Gossip and Coade, 1837).

<sup>66</sup> *Dictionary of Canadian Biography*, edited by Marc La Terre (Toronto: University of Toronto Press), Vol. X, at pp. 496-7; *Old Sydney*, by J.G. MacKinnon (Public Archives of Nova Scotia, M.G. I Vol. 1548, No. 15(a), originally printed in 1918), suggests at pp. 57-58 that Marshall's book was looked upon as "the standard" as late as 1918. That may, however, be somewhat of an over-statement as nothing else points to its use during the 20th century.

<sup>67</sup> Marshall, *Justice of the Peace*, *supra*, footnote 60, at p. 531-2.

was high. And prosecution for making a threat - - the only charge realistically available -- was confined to situations where the threat had been made in writing.

***c) Canada's First Criminal Code, and subsequent statutory developments***

Before Confederation, the provinces of Canada and each of the Crown colonies were responsible for enacting their own criminal laws. Even afterwards, the criminal law consisted of twenty different statutes, each with its own particular subjects, such as procedure,<sup>68</sup> accomplices,<sup>69</sup> perjury,<sup>70</sup> forgery,<sup>71</sup> and offences against the person.<sup>72</sup> Penal law of the day provided a reflection of Confederation itself: an amalgam of laws, derived from a common law base, but adapted over a number of years to meet local circumstances. Sir John A. Macdonald advocated uniformity in the criminal law, evidently believing that it would help unify the colonies. He did not, however, have immediate plans for a national *Criminal Code*, feeling that in the circumstances it was prudent to move slowly on the idea.<sup>73</sup>

Canada's first Criminal Code of 1892 demonstrated no further ability to control stalking than the common law. Sureties of the peace continued to be available. Abduction<sup>74</sup> was an offence. So was assault cause bodily harm.<sup>75</sup> It was unlawful to maim.<sup>76</sup> It was also an offence to send letters which demanded money failing which property would be burned or people would be murdered.<sup>77</sup>

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<sup>68</sup> *Procedure Act* R.S.C. 1886, chapter 174.

<sup>69</sup> *Accessories Act*, R.S.C. 1886, chapter 145.

<sup>70</sup> *Perjury Act*, R.S.C. 1886, chapter 154.

<sup>71</sup> *Forgery Act*, R.S.C. 1886, chapter 165.

<sup>72</sup> *Offences Against the Person Act*, R.S.C. 1886, chapter 162.

<sup>73</sup> Graham Parker, "The Origins of the Canadian Criminal Code", *Essays in the History of Canadian Law*, edited by David H. Flaherty (Toronto: University of Toronto Press, Vol. II, 1981), at p. 252.

<sup>74</sup> *The Criminal Code*, 1892, 55-56 Vict., c. 29, s. 281.

<sup>75</sup> *Ibid*, s. 262.

Few, if any, helpful changes were made to the Criminal Code during the following nine decades. Sureties were sometimes resorted to in cases where one person was harassing another, although the procedure does not appear to have been widely used. In *R. v. Faustman*,<sup>78</sup> the accused was bound over to keep the peace for one year in a "Peeping Tom" case. In *R. v. Poffenroth*,<sup>79</sup> the jurisdiction in preventive justice was exercised where a man had been following after and annoying a woman on a city street. In 1954 the Supreme Court of Canada confirmed that the procedure in preventive justice was in force in Canada and had not been interfered with by any provisions of the *Criminal Code*. In *MacKenzie v. Martin*<sup>80</sup> Mr. Justice Kerwin said the following:<sup>81</sup>

"In *R. v. County of London Quarter Sessions*, [1948] 1 All E.R. 72 at page 74, Lord Goddard, C.J. pointed out that *Lansbury v. Riley* was clear authority that Justices can bind over whether the person is, or is not, of good fame. Later he stated: "In the case of the present statute there is a consensus of opinion to be found in the books extending back for some four hundred years that this Act, which was described by both Coke and Blackstone as an Act for preventive justice, does enable Justices at their discretion to bind over a man, not because he has committed an offence, but because they think from his behaviour he may himself commit or cause others to commit offences against the King's peace. It is abundantly clear that for several centuries Justices have bound by recognizances persons whose conduct they consider mischievous or suspicious, but which could not, by any stretch of imagination, amount to a criminal offence for which they could have been indicted.

"Lord Goddard expressed the view that the catalogue of the large number of instances which would justify sureties for good behaviour being taken, given in Dalton's *Countrey Justice* was not intended to be exhaustive. In my view the common law preventive justice was in force in Ontario: ss(2) of Section 748 or any other provision of the Code to which our attention was directed does not interfere with the use of that jurisdiction; and the respondent was intending to exercise it. He, therefore, had jurisdiction over the subject matter of the complaint and did not exceed it."

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<sup>76</sup> *Ibid*, s. 241.

<sup>77</sup> *Ibid*, ss. 233, 403, 405 & 487.

<sup>78</sup> Reported in the Royal Canadian Mounted Police Gazette, October 16, 1940.

<sup>79</sup> (1942), 78 C.C.C. 181 (Alta. Pol. Ct.).

<sup>80</sup> (1954), 108 C.C.C. 305 (S.C.C.).

<sup>81</sup> *Ibid*, p. 313.

That, then, describes the legal framework as Canada moved towards the 21st century. Our ability to control and deter stalking can be summarized in two words: spotty, and ineffective. Available legal mechanisms could scarcely keep up with classic stalking activities such as repeatedly following or telephoning someone. Although existing laws could deal with single incidents, they were not created to combat repeated threatening or harassing behaviour, a dominant characteristic of stalking. Moreover, existing law was hopelessly inadequate in dealing with the "new wave" of stalkers who harass by video, fax, voice-mail, E-mail or on the Internet.<sup>82</sup> What was needed was a law that prohibited ongoing conduct which instilled fear on the part of the target victim.

Canada's hand was finally forced in 1993, in the wake of several terrible cases of unrelenting stalkers who finally killed their targets. In the next part I will discuss the backdrop to the enactment of Canada's first anti-stalking legislation, and will then consider its effect on Canadian law.

### **Legislative History of Section 264 of the Criminal Code**

#### ***a) The U.S. Backdrop***

California enacted the first anti-stalking legislation in 1990. Since then a virtual torrent of similar legislation has swept across the United States. Forty-nine states and the District of Columbia now have anti-stalking legislation. Only one -- the State of Maine -- has failed to act. Maine uses its terrorizing statute to deal with stalking behaviour.<sup>83</sup>

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<sup>82</sup> In May, 1994 Andrew Archambeau was charged under Michigan's Anti-Stalking legislation for continuing to send a woman computer messages after being told by police and the woman to stop. Their relationship was hi-tech from the beginning. She chose him from a video dating service. They were both interested in computers. They exchanged computer code names, and sent more than a dozen computer messages back and forth. One message started to worry her. Archambeau left a message on her answering machine, telling her he had secretly watched her leave work. She complained to police, who told Archambeau to leave her alone. Archambeau continued. He sent an E-Mail message saying that he had been attempting to "court" her, not "stalk" her. She responded via E-Mail, demanding to be left alone. He then threatened to E-Mail their story to all her computer friends on America Online, and mail it to her family and old boyfriends. [Winnipeg Free Press, May 27, 1994, p. A5, Associated Press account prepared by Julia Prodis].

<sup>83</sup> U.S. Task Force Report on Stalking, *supra*, footnote 4, at p. 13. Since this report was published, Arizona, which it noted was one of only two holdouts, enacted legislation in 1995.

While alike in their purposes, American state statutes differ in their definitions and in their elements. Typically, states define stalking as wilful, malicious and repeated following and harassing of another person. Three states proscribe "lying in wait". Many stalking statutes prohibit non-consensual communication. Seven states include "surveillance" in the description of stalking behaviour. Many states require a pattern of conduct. Provisions often require that the victim have a reasonable fear for his or her safety or a fear of death or bodily injury. Texas requires that, in order for an accused to be charged, some of the stalking behaviour must occur *after* the victim has reported the conduct to law enforcement authorities.

The American experience has suggested that four main issues must be considered in the development of anti-stalking legislation. First, what level of threat should be required? Fourteen states require the perpetrator to make a threat against the victim. Three states require a threat which is then acted upon by the perpetrator. Thirteen states require the perpetrator to have had the intent and/or the apparent ability to carry out the threat. The majority of the states -- 33 -- include in the definition of stalking actions that would cause a reasonable person to feel threatened, even if there has been no verbal threat made by the perpetrator.<sup>84</sup>

The second issue concerns the intent of the perpetrator. Should legislation require that the perpetrator intends to cause fear in the victim? What about delusional lovers? As noted earlier, they don't intend to instill fear; rather, they want to establish a relationship with the victim. Is it sufficient, as in the states of Mississippi and New Jersey, that the perpetrator simply intends to cause alarm or annoyance? A significant number of the states do not require the perpetrator to have the intent to cause fear; rather, it is sufficient if he (or she) intends to do an act that *results* in fear. Should that subjective approach be tempered with an *objective* test -- i.e. is the fear, though honestly held, *reasonable in all of the circumstances*?

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<sup>84</sup>

*Ibid.*

The third issue concerns whether and to what extent a course of conduct must be shown. In general terms, the crime of stalking does not amount to a single, isolated incident; rather, it consists of a series of actions taken together. Some of the state statutes specify how many actions must occur and over what period of time. Illinois, for instance, refers to "acts done on at least two occasions . . ." Michigan requires a "series of two or more separate, non-continuous acts". Laws in several of the states simply require incidents "on more than one occasion".

The final issue concerns how wide the net of criminal liability should be. At the heart of this issue is the fact that, of necessity, anti-stalking legislation seeks to criminalize behaviour that would otherwise be quite lawful and, in some circumstances, perfectly acceptable.

There is nothing inherently wrong with following someone. Nor is there anything inherently wrong with telephoning someone repeatedly. Police investigators do it all the time. So do those who serve subpoenas or a statement of claim. The same can be said for insurance company investigators retained to detect malingering, newspaper reporters who pursue a story, private investigators hired to gather evidence in domestic disputes, picketers in labour disputes, and citizens who pursue drunk drivers so that they may be reported to police on a "tips" line.

To do these tasks efficiently, persistence counts. And, in some circumstances, you must pursue the person repeatedly. Anti-stalking statutes, however, criminalize what otherwise would be legitimate behaviour based upon the fact that the behaviour induces a fear on the part of the victim. Just how you define the activity you seek to criminalize without, on the one hand, being too restrictive, effectively emasculating the legislation and, on the other, being vague or overbroad, thus rendering the statute susceptible to constitutional challenges, becomes the principal challenge to law makers.

In general, American courts have upheld the constitutional validity of anti-stalking legislation despite vigorous challenges anchored on arguments that the legislation is vague, overbroad, infringes on the right to freedom of expression or deprives defendants of their right to due process.<sup>85</sup>

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*State v. Culmo*, 642 A. 2d 90 (Conn. Super. 1993); *Pallas v. State*, 636 So. 2d 1358 (Fla. Ct.

In 1993, the U.S. Congress asked the Attorney General of the United States to develop and distribute to the States a "constitutional and enforceable" model anti-stalking code. A Task Force was established composed of individuals from the National Governors' Association, the National Conference of State Legislatures, the American Bar Association, the Police Executive Research Forum, the American Civil Liberties Union and other public and special interest groups. In October 1993, the Task Force presented its final report. It recommended the following model anti-stalking legislation:<sup>86</sup>

"The Model Anti-Stalking Code for the States

Section 1. For purposes of this code:

- (a) "Course of conduct" means repeatedly maintaining a visual or physical proximity to a person or repeatedly conveying verbal or written threats or threats implied by conduct or a combination thereof directed at or toward a person;
- (b) "Repeatedly" means on two or more occasions;
- (c) "Immediate family" means a spouse, parent, child, sibling, or any other person who regularly resides in the household or who within the prior six months regularly resided in the household.

Section 2. Any person who:

- (a) purposefully engages in a course of conduct directed at a specific person that would cause a reasonable person to fear bodily injury to himself or herself or a member of his or her immediate family or to fear the death of himself or herself or a member of his or her immediate family; and

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App.1994); *People v. Heilman*, 25 Cal. App. 4th 391 (1994); *Commonwealth v. Kwiatkowski*, 637 N.E. 2d 854 (Mass. 1994); *State v. Benner*, 644 N.E. 2d 1130 (Ohio Ct. App. 1994); *State v. Saunders*, 886 P. 2d 496 (Okla. Crim. App. 1994); *Johnson v. State*, 449 S.E. 2d 94 (Ga. 1994); *Woolfolk v. Commonwealth*, 447 S.E. 2d 530 (Va. Ct. App. 1994); *Culbreath v. State*, 1995 WL 217573 (Ala. Cr. App. 1995); *Bouters v. State*, 1995 WL 242403 (Fla. 1995); *Johnson v. State*, 1995 WL 126325 (Ind. Ct. App.); *Commonwealth v. Urrutia*, 653 A. 2d 706 (Pa. Super. 1995); *Luplow v. State*, 1995 WL \_\_\_\_\_ (WYO. 1995).

<sup>86</sup>

U.S. Task Force Report on Stalking, *supra*, footnote 4, at pp. 43-44.

(b) has knowledge or should have knowledge that the specific person will be placed in reasonable fear of bodily injury to himself or herself or a member of his or her immediate family or will be placed in reasonable fear of the death of himself or herself or a member of his or her immediate family; and

(c) whose acts induce fear in the specific person of bodily injury to himself or herself or a member of his or her immediate family or induce fear in the specific person of the death of himself or herself or a member of his or her immediate family;

is guilty of stalking."

In reality, however, legislators were busily passing anti-stalking legislation during the period of time that the Task Force was doing its work.<sup>87</sup> In that sense, the horses may well have bolted before anyone even thought about the barn door. Nonetheless, several states have demonstrated a willingness to strengthen anti-stalking laws by passing amending legislation that refined the original attempt.<sup>88</sup> Whether and to what extent the Model will shape future policy development remains to be seen, although it is bound to be persuasive given its background, composition of the Task Force and the mandate from Congress.

### ***b) The Canadian Backdrop***

As outlined earlier, stalking-related killings which occurred in 1991 and 1992 prompted the Government of Canada to undertake a review of the law to see if improvements were needed. The key issue was whether section 423 of the Criminal Code, concerning intimidation, adequately dealt with the problem of people who stalk people.<sup>89</sup>

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<sup>87</sup> The Task Force reported in 1993. California passed the first law in 1990. Twenty-nine states passed anti-stalking legislation in 1992, and 18 did in 1993. One did in 1995. Only Maine has not, so far.

<sup>88</sup> Ohio, South Dakota, Washington and West Virginia recently have passed amending legislation.

<sup>89</sup> S.423 of the Cr. Code concerns compelling someone to do something: by resort to threats or violence; through intimidation; by persistently following someone; by besetting or watching someone; or by blocking a highway.

A resolution put forward by Saskatchewan at the 1992 Uniform Law Conference was perhaps the first public step that was taken to control stalking activities under the *Criminal Code*. In August, 1992 representatives from all ten provinces, both territories, Canada, the Canadian Bar Association and the Defence Bar met in Cornerbrook, Newfoundland to consider various proposals for reform to the *Criminal Code*. Saskatchewan proposed "that section 423 (c) and ( f) be redrafted to prohibit the activities listed therein, where the person knew or was reckless as to whether his or her actions would harass or cause fear to the complainant". After debate, the resolution was carried. Although at this stage the proposed reform was directed to section 423, some of the seeds for the legislation that resulted had thus been planted.

On September 23, 1992, the Attorney General of Manitoba, the Honourable James McCrae, wrote to the Federal Minister of Justice, the Honourable A. Kim Campbell, urging action in the area of violence against women, especially the issue of stalking. Ms Campbell responded on December 14, 1992. She said, in part:

" As you are aware, the treatment of women in our society and the question of violence against women are issues of grave concern to me and should be of concern to all Canadians. In order to improve the situation, we must look not only to our laws, but also to our beliefs and attitudes toward women and their role in Canadian society.

Canadian women are saying that they are afraid of violence and we must address these fears. Certainly the issue you have raised in this context, that is "stalking", is important and should be given serious consideration."

In the midst of these discussions, a private member's Bill was tabled in the House of Commons on December 10, 1992, by George Rideout, the Opposition Justice critic.<sup>90</sup> Tracking almost verbatim the language found in many of the American state anti-stalking statutes, the Bill proposed that the Criminal Code be amended by adding, immediately after s. 246, the following new section:

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<sup>90</sup> Bill C-390, "An Act to Amend the Criminal Code (Stalking)", The House of Commons of Canada, 3rd Session, 34th Parliament, 40 - 41 Eliz. II, 1991-1992.

246.1(1) Every one who wilfully, maliciously, and repeatedly follows or harasses another person and who makes a credible threat with the intent to place that person in reasonable fear of death or great bodily injury is guilty of an indictable offence . . ."

The proposed offence would have carried a maximum \$1,000 fine and/or one year in jail for a first offence, increased to \$5,000 and/or two years imprisonment for subsequent offences. An enhanced penalty equal to those reserved for subsequent offences was also available for accused who, while stalking, had violated a protective court order which had previously been granted in favour of the victim. The Bill proceeded no further, however, as it was about to be overtaken by events that were soon to occur.

Over the next few months, the Federal Department of Justice consulted on the stalking issue with the provinces and other interest groups. On April 6, 1993, the Department hosted an "Exchange of Information Meeting on Stalking" in Ottawa. A background briefing note circulated to those in attendance described the problem in the following terms:<sup>91</sup>

"Stalking is a phenomenon that is increasingly attracting media attention in Canada and the United States. More and more cases are being reported of women being stalked by men they used to be involved with and from whom they may be trying to escape. Recent cases in various Canadian cities in which women were stalked and killed by men they knew have greatly increased the public concern directed at this issue."

The note also commented on the mechanisms then available to counter stalking.<sup>92</sup>

"In Canada, there are several sections in the Criminal Code that, to varying degrees, already cover the behaviour usually included in the term stalking. Section 177 prohibits loitering or

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<sup>91</sup> Unpublished document entitled: "Department of Justice: Exchange of Information Meeting on Stalking." For additional comments on this document and on the meeting, see: "The Criminalization of Stalking: An Exercise in Media Manipulation and Political Opportunism," by Rosemary Cairns Way, 39 *McGill L.J.* 379 (1994), at pp. 390-391.

<sup>92</sup> *Ibid.*

prowling at night on another person's property near a dwelling house. Section 264.1 prohibits knowingly uttering a threat to cause death or serious bodily harm to someone.

The definition of mischief in section 430 includes wilfully obstructing or interfering with someone's lawful enjoyment or operation of property. Section 372 prohibits making repeated telephone calls to someone with the intent to harass him."

Much of the note, however, focussed on the effect of section 423 of the *Criminal Code*:<sup>93</sup>

"Section 423, which prohibits intimidation, is often described as being Canada's main anti-stalking provision. Generally, section 423 prohibits using violence or threats of violence against someone or his spouse or children, or intimidating someone by threats that violence will be done to him or his relatives, or persistently following someone about, or watching where he lives or works, for the purpose of compelling him not to do anything that he has a lawful right to do, or compelling him to do anything that he has a lawful right not to do."

The note also observed that s.423 had been criticized by victims and various other interest groups for several reasons. First, it was too complicated and hard to prove. Second, it provided for a summary conviction procedure, and was not punishable upon indictment. Finally, and perhaps most importantly, to establish liability under this section, "the accused must not only have done one of the acts described, he must also have done it for the reason described in the section. These can be difficult motives to prove."

The briefing note concluded by describing several issues intended for discussion at the consultation meeting. Included were: should section 423 simply be amended, or should there be a new section of the *Criminal Code* prohibiting stalking? Should legislation require a threat to kill or seriously hurt someone? What *mens rea* is appropriate for this offence? Should recklessness be included as a form of *mens rea*? Should the fear felt by the victim be assessed subjectively or objectively? Should the offence only protect the victim or should the section be broad enough to cover harm directed towards the victim's family or new companion? Finally, what should the maximum penalty be?

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<sup>93</sup>

*Ibid.*

Three weeks later, on April 27, 1993, the Minister of Justice, the Honourable Pierre Blais, tabled Bill C-126 in Parliament. Amongst other things, it contained a provision dealing with stalking, headed "Criminal Harassment". It provided:<sup>94</sup>

"264.(1) No person shall, without lawful authority and with intent to harass another person or recklessly as to whether the other person is harassed, engage in conduct referred to in subsection (2) that causes that other person reasonably to fear for their safety or the safety of anyone known to them.

(2) The conduct mentioned in subsection (1) consists of

- (a) repeatedly following from place to place the other person or anyone known to them;
- (b) repeatedly communicating with, either directly or indirectly, the other person or anyone known to them;
- (c) besetting or watching the dwelling-house, or place where the other person, or anyone known to them, resides, works, carries on business or happens to be; or
- (d) engaging in threatening conduct directed at the other person or any member of their family.

(3) Every person who contravenes this section is guilty of

- (a) an indictable offence and is liable to imprisonment for a term not exceeding five years; or
- (b) an offence punishable on summary conviction."

On May 6th, 1993, during debate on second reading of the Bill, the Minister of Justice described the background to the legislation, as well as its intended scope, in these words:<sup>95</sup>

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<sup>94</sup> The briefing note circulated to those at the Information Session consistently refers to the conduct as "stalking"; the legislation, on the other hand, inexplicably focusses on "criminal harassment". One author contends, probably with some merit, that the change took place at the Information Session: "Justice officials were informed of the offensiveness of the term 'stalking', which creates an image of hunter and hunted, contributes to the objectification of the victim and sensationalizes the behavior": Rosemary Cairns Way, *supra*, footnote 91, at p. 380.

"Bill C-126 will introduce a new criminal harassment section to the Criminal Code. The new section is called criminal harassment because we believe this best describes the nature of the crime although the acts are more commonly known as stalking.

More and more cases are being reported of women being stalked by men they used to be involved with and from whom they may be trying to escape.

There have been several cases in Canada recently in which women have been stalked and seriously injured or killed. These cases made it clear that a new provision in the Criminal Code was urgently needed to explicitly criminalize these types of acts.

A recent public opinion survey shows that more than eight in ten Canadians would support a law that would prohibit the persistent harassment and intimidation of another person.

What is commonly called stalking includes such things as repeatedly following someone; spending extended periods of time watching someone's home or place of work; making repeated telephone calls to someone or her friends; making contact with someone's neighbours or co-workers; and contacting and possibly threatening someone's new companion, spouse or children. Any or all of these actions result in the causing of fear for safety.

To a certain extent several sections in the Criminal Code already cover the behaviour involved in these cases. These current provisions have been criticized by victims and various groups for several reasons, such as difficulty of proof and inadequacy of coverage. The offence proposed in the bill addresses these concerns.

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I believe we have created a new offence that will capture the sort of behaviour that we, as a society, want to prevent without interfering unjustifiably with anyone's rights or freedoms as guaranteed under the Charter.

Undoubtedly, people have the right to move about freely and to communicate freely. But no one has the right to deliberately harass another person in a way that causes the other person to fear for their safety. The bill makes a clear statement that this is a crime."

Two issues immediately arise from this legislative history. Will the legislation be effective if it requires the Crown to establish that the perpetrator *intended to harass* the victim, rather than

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<sup>95</sup> *House of Commons Debates*, Official Report, 3rd Session, 34th Parliament, 42 Eliz. II, Vol. XV, 1993, pp. 19015-6.

requiring the Crown to show that he or she intended to commit certain acts? Second, the Bill had an objective test: was the fear of the victim "reasonable"? By what standard? And on the basis of what facts or information?

Attorneys General subsequently expressed concern that the legislation would not deal adequately with the problem of stalking. It was too narrow, they said. Other groups protested that the legislation was too broad. A legislative committee was struck to consider the Bill. In May and June, 1993 the Committee met on five occasions, and heard witnesses representing 19 different groups. On May 27, 1993, it heard the evidence of three witnesses: the Ontario Minister responsible for Women's Issues and Attorney General, the Honourable Marion Boyd, a representative from the Canadian Bar Association, Michelle Fuerst, and the Assistant Deputy Attorney General for the Province of Manitoba, Stuart Whitley.

The Attorney General of Ontario commenced her testimony by making the following observations:<sup>96</sup>

"To illustrate why I believe further discussions are required, I have a number of comments and specific suggestions as to the ways in which clause 2 can be substantially improved. Before discussing the specific amendments I am proposing, I would like to make some comments about the context within which women experience criminal harassment.

This legislation must be informed by the reality of women's lives. The control many men wield over women's lives must be seen on a continuum. Control through persistent harassment of women has often been labelled excessive expressions of love, or just the obsessive behaviour of ex-partners or spurned lovers. These forms of harassment, however, at the very least, poison women's lives on a daily basis by inhibiting their movement and removing any sense of security and control over their own lives."

She had three principal concerns respecting the Bill. First, it lacked a preamble which could contextualize the reality of women's experience in this area, and in the area of criminal law generally. Second, she expressed the view that the Bill set an unrealistically high standard for

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<sup>96</sup> Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-126, House of Commons, Issue No. 3, Thursday, May 27, 1993, published under the authority of the Speaker of the House of Commons by the Queen's Printer for Canada, at p. 5.

successful prosecution because it required the Crown to prove that the accused specifically intended to harass the victim, or was reckless as to that fact. On this point, she said:<sup>97</sup>

"... as drafted, the Crown must prove a subjective state of mind on the part of the accused. The inclusion of the recklessness component to this offence does not alleviate this problem. It too contemplates a subjective state of mind. This requirement fails to realize the reality of the crime. Many men who engage intentionally in the type of conduct set out in proposed subsection 264.(2) do not believe they are harassing the object of their intentions. They often explain their actions as the expression of love or concern for the safety of the victim and her, and perhaps his, children or concern for the protection of their property. This is the main reason why the proposed offence is little or no better than the existing Criminal Code offence of intimidation, section 423, which also includes a specific intent that has proved virtually impossible to successfully prosecute."

Finally, the Attorney General said that the "reasonableness" component of the legislation was "an invitation to thwart the intent of the legislation:"<sup>98</sup>

"Women have complained that their concerns and fears are often trivialized by police and other actors in the criminal justice system as paranoid and histrionic. The inclusion of an objective component in this provision will perpetuate this insidious ethos. A reasonableness standard will also have the effect of shifting the focus of the inquiry onto the victim's character and background. Our experience in the field of sexual assault has demonstrated that this type of systemic dynamic removes the faith of women in the criminal justice system. The government should build on this experience and recognize that the reasonableness requirement is undesirable and should be removed."

The Chair of the Criminal Justice Section of the Canadian Bar Association testified next. She made two points. First, inclusion of the term "harass" made the section overly broad. "Harass," she said, included any behaviour that was "annoying". Second, while the reasonableness standard should remain, it should not be assessed from a strictly male perspective. When asked how the test could be broadened to include the experience of women, she said:<sup>99</sup>

"I think one thing you could do is to say "to reasonably fear in all of the circumstances", for example. One of the circumstances, of course, is the gender of the complainant or victim. Another of the circumstances is going to be the history of the relations between the parties. I

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<sup>97</sup> *Ibid*, at p. 6-7.

<sup>98</sup> *Ibid*, at p. 8.

<sup>99</sup> *Ibid*, at p. 26.

think you can perhaps build some wording into the section while leaving the reasonableness requirement."

The final witness was the Assistant Deputy Attorney General of Manitoba. In opening comments, he observed that "in the past two months, six people have been murdered in Manitoba and one is nearly dead as a result of stalking behaviour reaching its gruesome extreme." His evidence focussed on two issues: the need to intervene quickly, and the ability to prosecute even where the accused contended that he did not intend to harm the victim.<sup>100</sup>

"What we want as law enforcement officials is the ability to intervene quickly and early. At that level the accused is likely to respond that harassment is the furthest thing from his mind. In other words, if we, through the police, intervene with an individual, he will not say anything close to what the proposed legislation suggests we need. He will say that he loves her, that she is the only one for him, that he can't live without her, or that he is just looking after her, making sure she doesn't hang out with the wrong types. All the kinds of bizarre, morbid, obsessive behaviour that we see is in the accused's mind well intended and not criminally intended and certainly not intended to cause fear. We feel this insistence of the federal government on a specific intent or at least an adverting to the risk that's required in recklessness may defeat the social purposes of the law."

The legislative committee subsequently reported Bill C-126 back to the House of Commons with amendments on June 3, 1993 and, after passage at third reading, the Bill was sent to the Senate for its consideration. The Senate reported the Bill without amendment on June 22, and Bill C-126 received Royal Assent on June 23, 1993.<sup>101</sup>

Two pivotal changes were incorporated into the Bill. First, it was no longer necessary to show that the accused intended to harass the victim. It was sufficient to show that the accused knew that the victim was being harassed, or that he(she) was reckless as to whether the victim was being harassed. Second, the objective test respecting the victim's fear was to be measured against "all of the circumstances" of the case. Both of these amendments reflected views expressed before the Legislative Committee: the changes respecting intent arguably respond to concerns expressed by

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<sup>100</sup> *Ibid*, at p. 28.

<sup>101</sup> Bill C-126 was proclaimed into force on August 1, 1993.

Ontario and Manitoba, and the changes to the reasonableness standard not only reflected Canadian Bar Association concerns but they adopted the Association's suggested wording verbatim.

*c) Elements of the Legislation*

In the preceding parts of this article, I have outlined some of the legal, political and social factors that helped shape Canada's anti-stalking law. Against that backdrop, it seems evident that s. 264 of the Criminal Code raises several important interpretive issues. They can be grouped as follows:

- i) Engage in (specified) conduct;*
- ii) That causes the (other person/victim), reasonably, and in all the circumstances, to fear for their safety;*
- iii) Knowing/reckless that the other person is harassed;*
- iv) Without lawful authority;*
- v) Repeatedly following (the victim) from place to place;*
- vi) Repeatedly communicating (with the victim);*
- vii) Besetting or watching the dwelling house or place of work (of the victim);*
- viii) Engaging in threatening conduct.*

- i) Engage in (specified) conduct*

Under subsection 264(1) of the *Criminal Code*, it is an offence to engage in harassing conduct as defined in subsection (2). Two further elements must be present: the accused must have known that the victim was being harassed (or be reckless in that respect), and the circumstances must have been such that the victim reasonably feared for his or her safety or the safety of anyone known to them.

The scheme of this provision lends itself to several immediate conclusions. First, and most importantly, the scope of activity sought to be prohibited by the section is not open-ended. It is expressly confined to those activities listed in subsection (2) (repeatedly following or communicating, besetting the dwelling house of the victim, etc.). This may be contrasted with the U.S. Model Code, where it was concluded by the Task Force on stalking that legislation should *not*

list specifically prohibited acts "because ingenuity on the part of an alleged stalker should not permit him to skirt the law".<sup>102</sup>

Whether and to what extent the legislation requires a course of conduct,<sup>103</sup> or repeated acts, therefore, falls to a consideration of the particular paragraph in subsection (2), discussed *infra*. Some are clear, such as paragraphs (a) and (b), which prohibit "repeatedly" following or communicating with the victim. Others are less clear, such as paragraph (c) which lists "watching" a dwelling house, and paragraph (d) which prohibits "engaging in threatening conduct".

It also seems apparent that the Crown's evidence need not establish more than one of the classes or categories of conduct referred to in subsection (2). On this basis, therefore, it is sufficient to show that the accused repeatedly followed the victim, *or* engaged in threatening conduct, *or* repeatedly communicated with the victim. As an example, evidence which demonstrates that the accused telephoned the victim "again and again"<sup>104</sup> will support a conviction providing that the other elements of the offence, such as the intent of the accused and the causing of fear, are also established in evidence.

ii) *That causes the victim, reasonably, and in all the circumstances, to fear for their safety.*

This phrase establishes both a subjective and an objective test: did the victim fear for his or her safety (or the safety of someone known to the victim), *and* was that fear a reasonable one in all the circumstances? These twin elements are pivotal, for the statute criminalizes behaviour that could

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<sup>102</sup> U.S. Task Force Report on Stalking, *supra*, footnote 4, at p. 44.

<sup>103</sup> A phrase expressly used in some American legislation, for instance in New York: *People v. Payton*, 612 N.Y.S. 2d 815 (1994). The model statute also uses this phrase: U.S. Task Force Report on Stalking, *supra*, footnote 4, at p. 43.

<sup>104</sup> The dictionary definition of "repeatedly": *Webster's Ninth New Collegiate Dictionary* (Markham: Thomas Allen and Son Limited, 1987), at p. 998.

otherwise be quite legitimate based on the fact that the accused's conduct induced a fear for personal safety.

At the outset, it should be observed that predicate conduct (such as a threat) that does *not* generate fear on the part of the victim, or does not come to the attention of the victim, will not support conviction under this section. The case of Roberto Alomar, a baseball player with the Toronto Blue Jays, provides a good illustration of this<sup>105</sup>.

A 31 year old Alomar "fan", Tricia Miller, travelled to Toronto and stayed at the SkyDome Hotel, where the star player lived during the baseball season. Over a period of several days, she endeavored without success to contact him by telephoning his room on a number of occasions. She also sent a package of gifts to his room. No response from Alomar. Frustrated in her attempt to "develop a relationship," Miller finally turned herself in to authorities, admitting that she had intended to kill Alomar, then commit suicide. She had possession of a loaded revolver, which was cocked and ready to be fired.

Although Miller was charged with several firearms offences, and uttering a threat, a stalking count was not laid. Under the law as presently framed, it is immaterial whether the victim knew that he or she was being threatened on a charge of uttering,<sup>106</sup> but knowledge of the threat and the resultant fear for safety form essential elements in a prosecution for criminal harassment.

The *level* of fear induced by the accused is also an important element of the offence. Acts which are simply annoying or which cause emotional distress are probably not enough.<sup>107</sup> On the other hand, it is not necessary for the evidence to rise to the level required in the U.S. Model Code: namely, a fear

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<sup>105</sup> "Alomar was Her Prey", *Winnipeg Free Press*, July 3, 1995, at p. D-1; "Woman in Jail, Alomar Shaken", *Globe and Mail*, July 4, 1995 at p. A-11.

<sup>106</sup> *R. v. Nabis* (1974) 18 C.C.C. (2d) 144 (S.C.C.), at p. 154; *R. v. Carons* (1978), 42 C.C.C. (2d) 19 (Alta. C.A.); *R. v. Rémy* (1993), 82 C.C.C. (3d) 176 (Que. C.A.); *R. v. Tibando* (1994), 88 C.C.C. (3d) 229 (Ont. C.A.).

<sup>107</sup> In the U.S., the lowest test can be found in the legislation passed in Missouri and New Jersey (causing alarm or annoyance): U.S. Task Force Report on Stalking, *supra*, footnote 4, at p. 21.

of death or bodily injury. Conduct in between can suffice. For instance, fear that the stalking may lead to a sexual assault almost certainly will be sufficient.<sup>108</sup> So will fear by the victim of the prospects of a hostage-taking, kidnapping or child-trafficking, even though the latter is not, at the moment, a criminal offence.<sup>109</sup> The key here is whether the victim fears for his or her "safety", or the safety of anyone known to them.<sup>110</sup>

Where the "fears for the safety" element is satisfied, the court must next consider the second issue: was the fear reasonable in all the circumstances? This test is an objective one, and should serve to exclude from consideration fears that are imaginary, or arise from a sense of paranoia, as well as those which are based entirely on trivial matters or facts which simply did not exist.

The court should, however, be vigilant to ensure that the test of reasonableness is not applied from a purely male or traditional perspective. That was the point made during the Legislative Committee hearings that resulted in the addition of the words "in all the circumstances" to the original Bill.<sup>111</sup>

The decision respecting "reasonableness" must have regard to the whole of the circumstances of the case, and could in individual cases include:

- ◆ the specific behaviour of the accused, placed into its proper context;
- ◆ whether the accused and the victim previously had had a relationship and, if they had, the nature and history of that relationship;

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<sup>108</sup> See the analysis in *R. v. McCraw* (1991), 66 C.C.C. (3d) 517 (S.C.C.).

<sup>109</sup> Commissioners at the Uniform Law Conference recently have recommended that the Criminal Code be amended to include a provision prohibiting trafficking in children (Minutes of the 1993 Uniform Law Conference, Edmonton, Alberta, August, 1993, carried by a vote of 12-0, with seven abstentions).

<sup>110</sup> "Safe" is generally defined to mean: "Freed from harm or risk; secure from threat of danger, harm or loss". *Webster's Dictionary*, *supra*, footnote 104, at p. 1036. For a consideration of who "them" is, see footnote 157, *infra*.

<sup>111</sup> Minutes of Proceedings, *supra*, footnote 96, at pp. 25-26. And see footnote 99, and accompanying text.

- ◆ any obvious power imbalance between the accused and the victim;
- ◆ what the victim perceived, given his or her situation and experience in life;<sup>112</sup>
- ◆ expert evidence concerning the nature of stalking: "(Stalkers) may be obsessive, unpredictable and potentially violent. They often commit a series of increasingly serious acts, which may become suddenly violent, and result in the victim's injury or death."<sup>113</sup>

iii) *Knowing/reckless that the Other Person is Harassed*

Anti-stalking statutes, almost by definition, are vulnerable to constitutional attack on the basis that they are overbroad because they sweep innocent and acceptable conduct into their net of culpability.<sup>114</sup> The challenge to the legislative draftsman, and ultimately to legislators,<sup>115</sup> is to craft a law that does not focus simply on the conduct of the accused (such as following someone): it must incorporate, additionally, an element or elements that demonstrate the sinister nature of the prohibited act, and the circumstances that instill fear in the victim.

That is precisely what section 264 of the *Criminal Code* seeks to do. It prohibits certain conduct, such as following someone or repeatedly communicating with them. However, it incorporates three further elements of proof to ensure that the "morally innocent"<sup>116</sup> fall outside of its provisions: the accused must have known of or be reckless to the fact that the victim was being "harassed"; the conduct must have caused fear in the victim; and the accused must have had no lawful authority for what he or she did.

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<sup>112</sup> Wilson, J. on behalf of the Supreme Court of Canada in *R. v. Lavallee* (1990), 55 C.C.C. (3d) 97,(S.C.C.), at pp. 114-115, and p. 120.

<sup>113</sup> U.S. Task Force Report on Stalking, *supra*, footnote 4, at p. 49.

<sup>114</sup> This certainly has been the focus of challenges to legislation in the United States: see *supra*, footnote 85.

<sup>115</sup> See "How to Stop the Stalker: State Antistalking Laws, by Kenneth R. Thomas, 29 *Crim. L. Bull.* 124-36 (1993). In this article, Mr. Thomas, a legislative attorney, proposes legislative language that he says will survive constitutional scrutiny in the U.S. Faulkner, *supra*, footnote 3, does the same thing.

<sup>116</sup> To borrow language from *R. v. Vaillancourt* (1987), 39 C.C.C. (3d) 118 (S.C.C.).

During the course of this article, I will consider each of these three elements of proof. Before doing that, however, it is important to consider the legislative history of this particular aspect of section 264.

(a) Legislative History

Section 264 requires the Crown to prove that the accused *knew* that the victim was being harassed, or was "reckless" to that fact. The original Bill was cast somewhat differently on this point.<sup>117</sup> It proposed that the Crown establish that the accused *intended to harass* the victim or was reckless as to whether the victim was being harassed. The difference, at least on the "no intent" prong, is slight, but potentially significant: Stalkers often suffer under a delusion that the victim is in love with him or that, if properly pursued, the victim will begin to love him. Subjectively, the accused may not actually *intend* to cause fear and in that sense intend to "harass"; instead, he may simply intend to establish a relationship with the victim.<sup>118</sup> As one accused defiantly screamed across the Old Bailey courtroom a few years ago: "I am not guilty of murder, I am guilty of love."<sup>119</sup>

Under the legislation as passed, it is sufficient to show that the accused knew that he or she was undertaking conduct that objectively was harassment in the circumstances -- by, for instance, repeatedly following the victim. On this basis, the conclusion by the accused that he only loved the victim and would never hurt her would not serve to act as a bar to prosecution. That conclusion, however, if established in evidence, could have defeated charges laid under the original Bill, as that proposed legislation would have required evidence showing an intention to harass, rather than simple knowledge of the facts constituting the harassment.

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<sup>117</sup> See *supra*, footnote 94 and accompanying text.

<sup>118</sup> U.S. Task Force Report on Stalking, *supra*, footnote 4, at p. 47-48; and see McAnaney et al, *supra*, footnote 2 at p. 907.

<sup>119</sup> *Stalkers*, by Jean Ritchie, *supra*, footnote 3, at p. 263-264.

The mental element's "lowest common denominator", however, "recklessness", remained a constant in both Bills.<sup>120</sup> The change from "intend" to "knowing" may therefore be more illusory in practice than it is real. Though it remains to be seen as the case law develops, it is entirely possible that most cases will turn on whether recklessness is demonstrated by the evidence.

All of this begs the two main questions, however: What amounts to harassment? And what amounts to recklessness?

### (b) Harassment

Unlike several American anti-stalking statutes,<sup>121</sup> the term "harass(ed)" is left undefined in the *Criminal Code*. In general, the ordinary meaning of a word should be used to interpret a statute unless there is something in the object of the Act or the context in which the words are used, that suggests otherwise.<sup>122</sup> There is, in my view, nothing in section 264 that suggests that the word "harass" ought to be given anything other than its normal meaning. In Webster's Dictionary,<sup>123</sup> harass is defined as "to annoy persistently". In Black's Law Dictionary,<sup>124</sup> harassment is said to be used in a variety of legal contexts to describe words, gestures and actions which tend to annoy, alarm and abuse (verbally) another person.

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<sup>120</sup> This may have been due, at least in part, to one of Saskatchewan's resolutions at the 1992 Uniform Law Conference. The resolution, which ultimately carried after some debate, recommended that the intimidation section of the *Criminal Code* (423) be redrafted to add recklessness as an alternative mental element. See my comments on this earlier, under the heading "The Canadian Backdrop".

<sup>121</sup> See the U.S. Task Force Report on Stalking, *supra*, footnote 4, at pp. 16-17.

<sup>122</sup> *R. v. McCraw* (1991), 66 C.C.C. (3d) 517 (S.C.C.), at p. 523; *R. v. Heywood* (1994), 94 C.C.C. (3d) 481 (S.C.C.), per Cory, J. for the Court.

<sup>123</sup> *Supra*, footnote 104, at p. 552.

<sup>124</sup> *Blacks Law Dictionary*, 5th ed. (St.Paul, Minn.: West Pub. Co., 1979), at p. 645.

In a similar vein, under subsection 372(3) of the *Criminal Code*, which prohibits harassing telephone calls, the New Brunswick Court of Queen's Bench held in the context of *repeated* telephone calls that the term "harassing" is synonymous with annoying.<sup>125</sup>

On this basis, therefore, the Crown is required to demonstrate that the accused undertook one of the actions enumerated in subsection (2) in a way that was, in fact, persistently annoying and instilled fear in the victim. In most cases, proof that the acts caused fear will, at the same time, satisfy the "persistently annoying" element as well.

### c) Recklessness

The concept of recklessness has been defined by the Supreme Court of Canada in the following way:<sup>126</sup>

"[Recklessness] is found in the attitude of one who, aware that there is danger that his conduct could bring about the result prohibited by the criminal law, nevertheless persists, despite the risk. It is, in other words, the conduct of one who sees the risk and who takes the chance."

However, the Court went on to note that "recklessness" should be distinguished from mere negligence ("the failure to take reasonable care"), the latter being a creature of the civil law that "forms no basis for the imposition of criminal penalties".<sup>127</sup>

Inclusion of "recklessness" as a basis for criminal liability under section 264 may be subject to attack on the grounds that it establishes a constitutionally insufficient mental element.<sup>128</sup> Decisions

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<sup>125</sup> *R. v. Sabine* (1990), 57 C.C.C. (3d) 209 (N.B.Q.B.).

<sup>126</sup> *R. v. Sansregret* (1985), 18 C.C.C. (3d) 223 (S.C.C.), at p. 233, re-affirmed in *R. v. Cooper* (1993), 78 C.C.C. (3d) 289 (S.C.C.), at p. 295.

<sup>127</sup> *R. v. Sansregret, ibid.*, at p. 233; but for some qualifications to this principle, see *R. v. Creighton* (1993), 83 C.C.C. (3d) 346 (S.C.C.), at p. 382; *R. v. Gosset* (1993), 83 C.C.C. (3d) 494 (S.C.C.).

<sup>128</sup> *R. v. Vaillancourt* (1987), 39 C.C.C. (3d) 118 (S.C.C.); *R. v. Martineau* (1990), 58 C.C.C. (3d) 353 (S.C.C.).

from the Supreme Court, however, strongly suggest that the section is, at least on this issue, constitutionally secure,<sup>129</sup> and it is perhaps not insignificant to observe that a number of other offences in the *Criminal Code* similarly describe twin mental elements, such as intentionally/recklessly,<sup>130</sup> wanton/reckless disregard,<sup>131</sup> causing an occurrence/being reckless whether the event occurs,<sup>132</sup> wilfully blind/reckless,<sup>133</sup> means to cause death/reckless on the issue.<sup>134</sup>

In practice, the Crown will usually seek to establish the mental element through evidence demonstrating that the accused *knew* that the victim was being harassed, at least in the case of sociopathic stalkers and former intimate stalkers. However, resort may have to be made to the "recklessly" prong of the mental element in the case of delusional or borderline erotomaniacs, where the stalker has developed a fixation, and contends that the object of the activity was to establish a "loving" relationship with the victim.<sup>135</sup>

*iv) Without lawful authority*

A "lawful authority" exclusion from criminal liability is necessary to prevent anti-stalking laws from being overbroad.<sup>136</sup> Without this type of exclusion the legislation could and almost certainly would

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<sup>129</sup> *R. v. Park* (1995), \_\_\_ C.C.C. (3d) \_\_\_ (S.C.C.); *R. v. Creighton, supra*; *R. v. Cooper* (1993), 78 C.C.C. (3d) 289 (S.C.C.), at p. 295; *R. v. Theroux* (1993), 79 C.C.C. (3d) 449 (S.C.C.), at pp. 458-60; *R. v. Sansregret* (1985), 18 C.C.C. (3d) 223 (S.C.C.), at p. 235; *R. v. Aiello* (1979), 46 C.C.C. (2d) 128, adopting 38 C.C.C. (2d) 485 (S.C.C.), at p. 488; *R. v. City of Sault Ste. Marie* (1978), 40 C.C.C. (2d) 353 (S.C.C.).

<sup>130</sup> SS. 433 and 434 Cr. Code.

<sup>131</sup> S. 219(1) Cr. Code.

<sup>132</sup> S. 429 Cr. Code.

<sup>133</sup> S. 273.2(a) Cr. Code.

<sup>134</sup> S. 229(b) Cr. Code.

<sup>135</sup> See the discussion of this issue: "*Profile of a Stalker*", *supra*.

<sup>136</sup> In the United States, several states have attempted to avoid an overbreadth challenge by exempting "constitutionally protected activity" or by limiting illegality to conduct that "serves no legitimate purpose." For a discussion of this issue, see Faulkner, *supra*, footnote 3, at pp. 19-20, and 27-28.

sweep into its net a range of activities that by almost any standard are appropriate, if not necessary in the public interest.

Consider the following scenarios: police investigators repeatedly follow a suspected drug trafficker from place to place, knowing that he suspects police surveillance, and under circumstances that could later expose him, if convicted, to a substantial term in prison. As a consequence, the suspect fears for his liberty. A process server seeks to locate and serve a subpoena on a witness to a crime, knowing that the witness is reluctant to testify for fear of retaliation by the accused or his associates. Other examples go beyond the criminal justice system: consider the licensed private investigator who conducts daily surveillance on an unfaithful spouse for the purpose of gathering evidence to support divorce proceedings<sup>137</sup>. Or the unlicensed insurance investigator who relentlessly pursues a suspected malingerer over a period of several weeks. Collection agencies routinely follow evasive debtors, many of whom fear the consequences of detection. And finally, consider the citizen who pursues a drunk driver down the highway with the intention of filing a report with the police; or the citizen's advocacy group that posts handbills on neighborhood telephone poles that describe and illustrate the "ten most wanted fugitives" in the community.

Each of these scenarios involves the pursuit of someone who has breached a criminal or civil law or standard. What are the criteria by which one determines if the "lawful authority" exception is triggered? Is there a difference between activities that some may consider "legitimate", on the one hand, and those that carry some form of lawful authority on the other?

It should be observed that the section does not refer to a lawful "excuse". Nor does it say lawful "justification". It requires the demonstration of some sort of lawful "authority". Cast in common

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In 1995, a Winnipeg woman sought to test the limits of Canada's anti-stalking law by seeking a peace bond against a licensed private investigator who, she claimed, was harassing her in a quest for evidence that could be used in a bitter custody dispute with her ex-husband. Amongst other things, the complainant alleged that the private investigator had been following her, harassing her friends and employer, and entered her home on a false pretext. At the time of writing, the action, *Kucera v. Duncan*, had been set down for trial in the Provincial Court of Manitoba. ["Private Eye 'Terrifies' Woman", *Winnipeg Free Press*, June 22, 1995].

law terms, the provision requires an "authorization by law".<sup>138</sup> In a practical sense, this probably means that before this can be raised as a defence the evidence must show that the accused acted pursuant to or in accordance with some principle of law -- either statutory (federal, provincial or municipal), or under the common law.<sup>139</sup>

Additionally, when raised, the fundamental question is not whether one part of the accused's conduct, if considered in isolation, might be said to be authorized by law; rather the court must consider whether the accused's *course of conduct*, considered in its entirety, was authorized by law.<sup>140</sup> The defence of lawful authority only arises as a potential issue once the Crown has first proved the *actus reus* and *mens rea* beyond a reasonable doubt.<sup>141</sup> The "lawful authority" does not, therefore, refer to or tend to disprove an element of the offence; rather, it refers to "matters which stand outside the requirements which must be met".<sup>142</sup> Accordingly, if the accused wishes to raise the defence of lawful authority, the burden of proving the defence rests upon the accused on a balance of probabilities.<sup>143</sup>

In practice, the Court will rarely reach this issue.<sup>144</sup> The Crown must prove its case. This means that the evidence must demonstrate that the accused knowingly "harassed" someone else or was

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<sup>138</sup> See *R. v. Holmes* (1988), 41 C.C.C. (3d) 497 (S.C.C.) at p. 522 (majority) and 508 (minority).

<sup>139</sup> ss. 8(3) and 25 Cr. Code; and see *R. v. Holmes, supra*; *R. v. Chartrand* (1994), 91 C.C.C. (3d) 396 (S.C.C.).

<sup>140</sup> *R. v. Natarelli and Volpe*, [1968] 1 C.C.C. 154 (S.C.C.), at p. 161.

<sup>141</sup> *R. v. Holmes* (1988), 41 C.C.C. (3d) 497 (S.C.C.), at p. 522; *Bergstrom v. R.* (1981), 59 C.C.C. (2d) 481 (S.C.C.), at p. 484.

<sup>142</sup> *Taraschuk v. R.* (1975), 25 C.C.C. (2d) 108 (S.C.C.), at p. 110; *R. v. Holmes, supra*, at pp. 506-507 and 522.

<sup>143</sup> *R. v. Holmes, supra*, per McIntyre, J. at pp. 522-523 on behalf of the majority; per Dickson, C.J.C. at pp. 507-509 on behalf of the concurring minority.

<sup>144</sup> And it is arguable that the phrase "without lawful authority" is unnecessary to begin with, given the provisions of s.25 of the Criminal Code: *R. v. Chartrand* (1994), 91 C.C.C. (3d) 396 (S.C.C.), at p. 410.

reckless as to whether the other person was being harassed. The case must also show that, *as a consequence*, the target reasonably feared for his or her safety. These are pivotal issues which, if proven, will in most cases tend to show that the accused lacked a "lawful authority" to begin with.

There is one major exception: the prosecution of a police officer or other person involved in the law enforcement process. In some of these cases, the central issue will be whether the accused was really enforcing the law as a peace officer, or whether he or she was on a personal but unlawful "frolic". Evidence detailing the nature of the relationship, if any, between the accused and the victim will be relevant, as will evidence showing whether the accused followed "normal" police practice in the pursuit of the victim -- such as preparing reports on the surveillance; reporting to superiors on the case; disclosing facts on the surveillance; seeking legal advice, and so on.

v) *Repeatedly Following the Victim From Place to Place*

The first conduct referred to in subsection 264(2) consists of repeatedly following from place to place the other person or anyone known to them. This is the classic and most common form of stalking behaviour.

Several points should be made. First, a course of conduct is clearly required. It is not sufficient to follow someone once, although evidence of a single following if coupled with other forms of impugned conduct, such as repeatedly communicating with the victim, may support conviction. Use of the word "repeatedly" suggests that the following must occur "again and again",<sup>145</sup> although no minimum number of occurrences is prescribed by the legislation.<sup>146</sup>

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<sup>145</sup> This is the dictionary definition of "repeatedly": See *supra*, footnote 104.

<sup>146</sup> Unlike American legislation, where several states specify how many acts must occur and over what period of time the conduct must occur. Illinois refers to "acts done on at least two occasions". Michigan requires a "series of two or more separate, non-continuous acts." Oklahoma's 1993 revised law calls for "two or more separate acts," and laws in Colorado, North Carolina, and Virginia say "on more than one occasion." *U.S. Task Force Report on Stalking, supra*, footnote 4, at p. 21.

Second, the "following" must be from one "place" to another. In the context of the words used in the section, this probably means from one *location* to another, avoiding the controversy over whether a "place" can be a public street or other public place.<sup>147</sup>

Third, the conduct proscribed by the legislation encompasses not just the following of the victim, but anyone *known to the victim* as well<sup>148</sup>. This contrasts with paragraph (d), concerning threatening conduct, which is confined to the victim or any member of the victim's family.

Finally, this provision is probably derived from paragraph 423(1)(c) of the *Criminal Code* (Intimidation), which traces its Canadian roots back to the original 1892 *Criminal Code*, and earlier to 1875 in England.<sup>149</sup> However, most of the case law that has developed under these provisions, both in England and in Canada, concerned picketing in labour disputes and is of questionable value in interpreting section 264.<sup>150</sup>

*vi) Repeatedly Communicating (with the Victim)*

Paragraph 264(2)(b) targets stalkers who repeatedly communicate with, either directly or indirectly, the victim or anyone known to the victim.

Some of the same considerations that arise in the case of "following" apply here. A course of conduct is required in the sense that the accused must be shown to have communicated "again and again"; as well, the communication can be with the victim, family members or other persons simply known to the victim.

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<sup>147</sup> *R. v. Stevens* (1983), 7 C.C.C. (3d) 260 (N.S. C.A.) [A street is not a "place"]; *R. v. Rodrigues* (1990), 60 C.C.C. (3d) 370 (Man. Q.B.) [issue discussed]; generally, concerning "place", see: *R. v. Rao* (1984), 12 C.C.C. (3d) 97 (Ont. C.A.); *R. v. Esau* (1983), 4 C.C.C. (3d) 530 (Man. C.A.).

<sup>148</sup> For a more complete discussion of this issue, see footnote 157, *infra*.

<sup>149</sup> *An Act for Amending the Law Relating to Conspiracy, and to the Protection of Property, and for other Purposes*, 38 & 39 Vict., c. 86, s.7.

<sup>150</sup> For instance, see: *Reners v. The King* (1926), 46 C.C.C. 14 (S.C.C.); *R. v. Richards* (1933), 61 C.C.C. 321 (B.C. C.A.); *Williams v. Aristocratic Restaurants* (1951), 101 C.C.C. 273 (S.C.C.); although the courts have concluded that the section is not confined to labor disputes as a matter of law: *Re Regina and Basaraba* (1975), 24 C.C.C. (2d) 296 (Man. C.A.).

However, two further points arise. The term "communicate", defined to mean the "transmission of information, thought or feeling so that it is satisfactorily received or understood",<sup>151</sup> has the potential to embrace a wide variety of methods of communication: for instance, by letter,<sup>152</sup> note, telephone, fax, e-mail,<sup>153</sup> computer,<sup>154</sup> by posting signs or notices,<sup>155</sup> and in person orally, or by making gestures,<sup>156</sup> signs and so on.

To the extent that a communication simply includes the transmission of a thought or feeling that is satisfactorily received or understood, the section could also contemplate more subtle forms of communication such as leaving a dead animal on the victim's doorstep, or repeatedly sending unwanted gifts. In these latter cases, however, the acts may be closer to "threatening conduct" under paragraph (d), than a communication under (b). And in these cases the meaning of the act, if viewed as a communication, its context, as well as its authorship, will often be pivotal issues at trial. The communication can also take place *indirectly* with the victim or another person. Thus, the accused could be guilty of transmitting a message to the victim through an innocent third party such as a friend, relative or co-worker.

vii) *Besetting or Watching a Dwelling-House or Place of Work*

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<sup>151</sup> Webster's Dictionary, *supra*, footnote 104, at p. 266. Additionally, in quite a different context, namely, electronic surveillance, the courts have considered the concept of "communication" in: *Goldman v. The Queen* (1979), 51 C.C.C. (2d) 1 (S.C.C.), at p. 16; *R. v. Fegan* (1993), 80 C.C.C. (3d) 356 (Ont. C.A.).

<sup>152</sup> For instance, see *R. v. Dunn* (1840), 113 E.R. 939, discussed, *supra*. In *R. v. Poczik* (unrep., Man. Prov. Ct., Jan. 20, 1995), the accused was found "guilty" of criminal harassment for inundating his neighbour with thousands of letters, some threatening in nature. After hearing medical evidence, however, the court exempted the accused from criminal responsibility on account of mental disorder.

<sup>153</sup> See the case of Andrew Archambeau, discussed *supra*, footnote 82 .

<sup>154</sup> *Ibid.*

<sup>155</sup> See the case of Ron Bell, discussed *supra*, footnote 7 and accompanying text. And see the facts in *R. v. Stevens* (1995), 96 C.C.C. (3d) 238 (Man. C.A.).

<sup>156</sup> As in the case of *R. v. Dunn*, *supra*.

Paragraph 264(2)(c) denounces the predatory behaviour of besetting or watching the victim's dwelling house or place of work, as well as that of anyone who is know to the victim.<sup>157</sup> It tracks, virtually verbatim, the provisions of paragraph 423(1)(f) of the *Criminal Code* respecting intimidation, which in turn traces its Canadian roots to the original *Criminal Code* of 1892,<sup>158</sup> and earlier to a legislative prototype enacted by the Parliament at Westminster in 1875.<sup>159</sup>

In practice, this statutory provision, both in England and in Canada, was restricted almost entirely to the control of trade disputes, particularly strikes, although facially it is much wider than that.<sup>160</sup> Consequently, the case law that developed over the years in connection with the offence of intimidation is of limited assistance. A few cases are, however, helpful in understanding certain elements of section 264.

The purpose of the accused in watching or besetting is an essential ingredient of the offence. Of course, "purpose" can rarely be proven by direct evidence, and in most situations will be established, if at all, by inferences from the circumstances.<sup>161</sup> Additionally, if the circumstances, although they

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<sup>157</sup> Use of the phrase "or anyone known to them" in paragraph 264(2)(a), (b) and (c) (and subsection 264(1)) raises an interesting issue. At first blush, it seems to refer to someone else who is known to *both* the accused and the victim -- i.e., a mutual acquaintance. A further consideration of the section as a whole, however, leads to the conclusion that the term "them" refers to the victim alone, and probably was used for reasons of gender neutrality. Briefly put, the key is found in subsec. (1). The accused is the "person". The victim is described as "the other person." The last 13 words, concerning a fear about safety, clearly refer to "the other person", not the accused. More importantly, the fear is cast in terms of "their" safety, not "his" or "hers". Victims are thus described as a class or group of persons, and are not individualized in a way that in English, requires a declaration of gender. Thus, the "other person" referred to in par. 2(a), (b) and (c) refers to the victim in question and the "them" refers to victims, as a group, that are contemplated by the section.

<sup>158</sup> 55-56 Vict., c. 29 ("The Criminal Code, 1892"), s. 523.

<sup>159</sup> 38 and 39 Vict. (U.K.), c. 86, s. 7.

<sup>160</sup> *J. Lyons & Sons v. Wilkins*, [1899] 1 Ch. 255 (C.A.), per Chitty, L.J.; *Re Regina and Basaraba* (1975), 24 C.C.C. (2d) 296 (Man. C.A.), and see footnote 150, *supra*.

<sup>161</sup> Evidence of this sort may be proved either by direct evidence, or by the proof of objective, relevant and admissible facts from which a rational inference emerges irresistibly: *R. v. Kelly*, [1967] 1 C.C.C. 215 (B.C. C.A.), at p. 222; *R. v. Laurier* (1960), 129 C.C.C. 297 (Sask. C.A.), at p. 312; *R. v. Aiello* (1978) 38 C.C.C. (2d) 485 at p. 488, adopted 46 C.C.C. (2d) 128 n. (S.C.C.) Concerning the probative value of circumstantial evidence generally, see Reference re *R. v. Truscott*, [1967] 2 C.C.C. 285

are consistent with the purpose alleged by the Crown, are also consistent with another purpose which is innocent in nature, there can be no conviction, even though the watching and besetting is amply proved.<sup>162</sup>

A threshold question arises under paragraph 264(2)(c): Is it necessary for the Crown to establish a *course of conduct* by the accused, or will a single act of besetting or watching suffice? Paragraphs (a) and (b) clearly require a course of conduct. And for reasons that will be outlined later on, paragraph (d) probably does as well. The issue is far from clear, however, in the case of watching or besetting.

The ordinary meaning of "beset" is: "*constantly* present; or attacking". That tends to suggest a course of conduct. Alternatively, the accused must have been "watching". That is defined as "keeping a vigil, or keeping someone under close supervision". That does not necessarily suggest a course of action. Resort to the terms "dwelling house", "resides", "works", or "carries on business", all suggest some elements of permanence or changelessness in the target location, though not necessarily a course of conduct by the accused. The final element, however, "or happens to be", suggests neither permanence nor a course of conduct.<sup>163</sup>

There are two final considerations respecting the "course of conduct" issue: all of the activities referred to in subsection (2) are modified or at least qualified by the phrase "engage in conduct" in subsection (1). "Engage" is neutral on the issue, simply meaning "to take part, participate". "Conduct", however, is defined by the authorities to mean "the act, manner, *or process of carrying on*",<sup>164</sup> suggesting an ongoing process.

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(S.C.C.); *Cote v. The King* (1941), 77 C.C.C. 75 (S.C.C.).

<sup>162</sup> *R. v. Branscombe* (1956), 25 C.R. 88 (Ont. C.A.).

<sup>163</sup> See *Charnock v. Court*, [1899] 2 Ch. 35.

<sup>164</sup> Webster's Dictionary, *supra*, footnote 104, at p. 274. And, for whatever it is worth, when the Bill was first introduced in Parliament, and was being debated during second reading, the Minister of Justice said that the legislation was intended to deal with, amongst other things, those who "(spend) extended

As well, it is a rule of statutory interpretation that words which are coupled together "take their color from each other. That is, the more general is restricted to a sense analogous to the less general."<sup>165</sup> Paragraphs (a) and (b) concerning repeatedly following or communicating with the victim clearly involve a course of conduct and paragraph (d) concerning threatening behaviour probably does as well.<sup>166</sup> This legislative context lends at least some support to the "course of conduct" interpretation. In my view, the language used in paragraph 264(2)(c), the legislative context in which the words are used, the object of the legislation, and the "coloring" process referred to by the cases, tend to suggest that a single occurrence is insufficient, and that the Crown must demonstrate some sort of course of conduct which, when taken as a whole, amounts to besetting or watching. The issue is far from clear, however, and the case for requiring a course of conduct is probably weakest under this paragraph.

What does all of this mean in practical terms? If the accused stops in front of his ex-wife's house on a single occasion and from the sidewalk looks through a window for a few minutes, that is probably

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periods of time watching someone's home or place of work". See *supra*, footnote 95 and accompanying text.

<sup>165</sup> *R. v. Harrington & Scosky*, [1964] 1 C.C.C. 189 (B.C. C.A.); adopted in *R. v. Rogalsky* (1975), 23 C.C.C. (2d) 399 (Sask. C.A.).

<sup>166</sup> See *infra*, "Engaging in Threatening Conduct".

not enough in itself to support a conviction under this paragraph. If he does the same thing from a few feet away from the house, the same conclusion should probably be reached providing that he doesn't do anything to trigger another provision of the legislation, such as repeatedly making a threatening gesture. However, doing the same thing several times during the same day, or over a period of several days, could result in a conviction.

The same applies at the victim's place of work. A single act, even if bizarre, will not attract liability under this paragraph. In the result, the risk of a finding of culpability increases with the frequency of contact, particularly where the circumstances are such that it could be seen as threatening in nature. Trite though it may be to say, culpability under this paragraph will be very much rooted in the facts of individual cases. For this reason, it is difficult to paint scenarios that will in all instances be either criminal or non-criminal.

#### *viii) Engaging in Threatening Conduct*

The final predicate conduct referred to in subsection (2) consists of engaging in threatening conduct directed at the victim or any member of his or her family. Three principal issues arise: What amounts to a threat? Is a single threat sufficient, or is a course of conduct required? And who is in the circle of protected persons?

##### (a) What is a Threat?

In 1994, the Supreme Court of Canada accepted as useful the following definition of the term "threat"<sup>167</sup>:

"A denunciation to a person of ill to befall him; especially a declaration of hostile determination or of loss, pain, punishment, or damage to be inflicted in retribution for or conditionally upon some course; a menace."

Earlier case law emphasized three points concerning the concept of a threat. First, the threat (a term often used interchangeably with "menace")<sup>168</sup> must be such as would be reasonably calculated to

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<sup>167</sup> *R. v. Clemente* (1994), 91 C.C.C. (3d) 1 (S.C.C.)(9-0).

overcome the will of a man of "ordinarily firm mind".<sup>169</sup> Put another way, "It is of the very essence of a threat that it should be made for the purpose of intimidating or overcoming the will of the person to whom it is addressed."<sup>170</sup>

Second, the test is the *nature* of the conduct said to amount to a threat, not the state of nerves of the person threatened.<sup>171</sup> Finally, the issue of whether a threat occurred ought to be left to the jury for decision, as it is fundamentally a question of fact to be determined in light of all the circumstances and the context in which the utterance or conduct took place.<sup>172</sup>

In 1914, Lord Reading, C.J., after examining the earlier authorities, summed up the law in the following way:<sup>173</sup>

"The degree of fear or alarm which a threat may be calculated to produce upon the mind of the person on whom it is intended to operate may vary in different cases and in different circumstances. A threat to injure a man's property may be more serious to him and have a greater effect upon his mind than a threat of physical violence. When there is evidence of such a threat as is calculated to operate upon the mind of a person of ordinary firm mind, and the jury had been properly directed, it is for them to determine whether in fact the conduct of the accused has brought him within the section and whether in the particular case the "menace" is established. If the threat is of such a character that it is not calculated to deprive any person of reasonably sound or ordinarily firm mind of the free and voluntary action of his mind, it would not be a "menace" within the meaning of the section. In our judgment, when a man, with intent to steal, threatens either to do violence to the person of another or to

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<sup>168</sup> *R. v. Bloch-Hansen* (1977), 38 C.C.C. (2d) 143, (Sask. D.C.) at p. 146 and the cases reviewed.

<sup>169</sup> *R. v. Southerton* (1805), 102 E.R. 1235; *R. v. Walton* (1863), 9 Cox C.C. 268; *R. v. Boyle*, [1914] 3 K.B. 339, per Lord Reading, C.J. at p. 344; *R. v. Pacholko* (1941), 75 C.C.C. 172 (Sask. C.A.).

<sup>170</sup> *Wood v. Bowron* (1866), L.R. 2 Q.B. 21 (C.A.) per Lush, J. at p. 30.

<sup>171</sup> *R. v. Smith* (1850), 4 Cox C.C. 42 (C.A.); *R. v. McDonald* (1892), 8 Man. R. 491 (C.A.); *R. v. Pacholko*, *supra*; *R. v. Boyle*, *supra*.

<sup>172</sup> *R. v. Carruthers* (1844), 1 Cox C.C. 138; *R. v. Walton* (1863), 169 E.R. 1399 (C.A.); *R. v. McClure* (1957), 118 C.C.C. 192 (Man. C.A.), per Adamson, C.J.M.; *R. v. McCraw* (1989), 51 C.C.C. (3d) 239, (Ont. C.A.) at page 246-247, reversed on other grounds 66 C.C.C. (3d) 517 (S.C.C.).

<sup>173</sup> *R. v. Boyle*, *supra*, at p. 344-5.

commit acts calculated to injure the property or character of another, it is a "menace" within the meaning of the section."

In recent years, the Supreme Court of Canada, in a trilogy of cases<sup>174</sup> has further refined the concept of the criminal "threat". The act of threatening, the Court concluded, permits a person uttering the threat to use intimidation to achieve his or her objectives.<sup>175</sup> The threat need not, however, actually be carried out: the offence is complete once the threat has been made.<sup>176</sup>

A threat is a tool of intimidation which is designed to instill a sense of fear in its recipient.<sup>177</sup> The purpose of prohibitory legislation is, therefore, to protect against that sort of fear and intimidation.<sup>178</sup>

In enacting legislation, Parliament was moving to protect personal freedom of choice and action, a matter of fundamental importance to members of a democratic society.<sup>179</sup>

The nature of the threat must be looked at objectively, as it would be by the ordinary reasonable person, and within the context of all of the written words, conversations or actions in which they occurred.<sup>180</sup>

To be culpable, the threat must have been intended to be taken seriously.<sup>181</sup> And, consistent with the proposition that the context in which the words are spoken are important, the threat need not employ

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<sup>174</sup> *R. v. LeBlanc* (1988), 44 C.C.C. (3d) 18, trial judge's charge affirmed at 50 C.C.C. (3d) 192 (S.C.C.); *R. v. McCraw* (1991), 66 C.C.C. (3d) 517 (S.C.C.); and *R. v. Clemente* (1994), 91 C.C.C. (3d) 1 (S.C.C.).

<sup>175</sup> *R. v. McCraw, supra*, at p. 524.

<sup>176</sup> *R. v. McCraw, supra*, at p. 524; *R. v. Clemente, supra*, at p. 3; *R. v. LeBlanc, supra*, at p. 25-26.

<sup>177</sup> *R. v. McCraw, supra*, at p. 524; *R. v. Clemente, supra*, at p. 3.

<sup>178</sup> *R. v. McCraw, supra*, at p. 525.

<sup>179</sup> *R. v. McCraw, supra*, at p. 524-525; *R. v. Clemente, supra*, at p. 3.

<sup>180</sup> *R. v. McCraw, supra*, at p. 525; *R. v. Clemente, supra*, at pp. 3-4.

<sup>181</sup> *R. v. LeBlanc, supra*; and see *R. v. Nabis* (1974), 18 C.C.C. (2d) 144 (S.C.C.), per Pigeon, J., dissenting on other grounds; *R. v. Clemente, supra*, at pp. 3-4.

the traditional legal language of the *Criminal Code*. It is sufficient for the accused to have described the threat in the language of the street.<sup>182</sup>

(b) Is a Course of Conduct Required?

Is a single threat sufficient to trigger application of paragraph 264(2)(d), or is it necessary to show that the accused undertook a course of action which, when taken as a whole, amounted to threatening conduct?

The operative phrase in the paragraph is: "engaging in threatening conduct". The word "engaging" is neutral on the issue, simply meaning "to take part; participate".<sup>183</sup> The word "threatening", by itself, is neutral as well, for, as discussed above, a threat can involve a single event or a series of incidents. The phrase threatening *conduct*, however, does tend to suggest more than one incident: "Conduct" by itself is defined to mean "the act, manner *or process of carrying on*".<sup>184</sup> And, as noted earlier, use of the words "engage in conduct" in subsection 264(1), which colors the paragraphs that follow, likewise tends to suggest the need to show a course of conduct. Finally, section 264 can usefully be contrasted with other provisions in the *Criminal Code* that mention threats. Section 423 prohibits anyone who "uses . . . threats of violence . . ." or "intimidates . . . by threats". Section 264.1 provides that "everyone commits an offence who . . . causes any person to receive a threat . . ." Likewise, section 346 establishes the offence of extortion in the following words: "Everyone commits extortion who . . . with intent to obtain anything by threats, accusations, menaces . . . etc." Each of these provisions tends to suggest that proof of a single threat will suffice, as will multiple threats. None refer to "conduct", or the need to establish "threatening conduct".

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<sup>182</sup> *R. v. McCraw, supra*, at p. 528.

<sup>183</sup> Webster's Dictionary, *supra*, footnote 104, at p 412. .

<sup>184</sup> Webster's Dictionary, *supra*, footnote 104, at p. 274.

The language used in paragraph 264(2)(d), the legislative context in which those words are used, the object of the legislation and the "coloring" principles referred to earlier<sup>185</sup> all tend to suggest that a single threat is insufficient, and that the Crown must show that the accused undertook a course of action which, when taken as a whole, amounted to threatening conduct.

### (c) Who Is In The Circle of Protected Persons?

It is significant to note that paragraphs (a), (b) and (c), respecting following, communicating and besetting, respectively, describe conduct by the accused which is directed at either the victim *or* "anyone known to them". This could include friends of the victim, co-workers or members of the victim's family, amongst others.<sup>186</sup>

Paragraph (d), however, draws the net of protection much tighter. Only members of the *victim's family* fall into the protected category. The rationale for this policy shift is quite unclear and, at least on its face, seems somewhat inconsistent with the overall intent of the legislation.<sup>187</sup>

## **Concluding Remarks**

In this article, I have sought to show several things. First, the peculiar -- if not unique -- nature of stalking as a form of human behaviour. In my view, two characteristics are pivotal.

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<sup>185</sup> *Supra*, footnote 165, and accompanying text.

<sup>186</sup> For a comment on the use of the word "them" in this context, see *supra*, footnote 157.

<sup>187</sup> This difference may have to do with *Charter* concerns, especially notions of over-breadth and "void for vagueness". Paragraphs (a), (b) and (c) are directed to acts that are reasonably well-focused: "He followed her on three occasions, as follows: . . ."; or he communicated with her friend, Suzy, on the following occasions . . .; or, he watched her at the office on the following occasions . . . However, for the reasons outlined earlier, the "threatening conduct" contemplated by paragraph (d) may take many forms and could extend over a period of time. It may, therefore, have been thought by the legislators that it was necessary to reduce the potential scope of this paragraph to the victim's family to avoid application of the over-breadth and void-for-vagueness doctrines as discussed in: *U.N.A. v. Alberta (Attorney General)* (1992), 71 C.C.C (3d) 225 (S.C.C.); *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606; *R. v. Morales* (1992) 77 C.C.C. (3d) 91 (S.C.C.); and *R. v. Heywood* (1994), 94 C.C.C. (3d) 481 (S.C.C.); *R. v. Finta* (1994), 88 C.C.C. (3d) 417 (S.C.C.), per Cory, J. for the majority at p. 536, and per LaForest, J. for the minority at p. 475-476. *Ontario v. Canadian Pacific Ltd.*, [1995] S.C.R. \_.

Fundamentally, stalking is predatory in nature. The stalker focusses his or her activities on a single individual. This obsessive behaviour can last a short time -- a few days perhaps -- but more commonly will extend over weeks, months or even years. Persons targetted often find it necessary to change their entire lifestyle, such as where they work, reside, when they leave for work, return home, where they shop, and so on. The persistence of the stalker's conduct when coupled with its predatory nature makes stalking a particularly insidious form of conduct<sup>188</sup>. One stalking victim aptly described the resulting fear in this way:<sup>189</sup>

"It's the nights that are the worst. I don't know where he is, but my imagination tells me he is close at hand. In daylight I can keep the fears down; at night I am alone with the terror that he has created. If he rings me every ten minutes I think I will go mad with it; if he does not ring, I worry that he is outside, watching me."

A second characteristic of stalking adds to its uniqueness: the perpetrator usually undertakes, over a period time, a series of increasingly more serious acts which escalate the level of threat and the victim's level of fear. Stalkers often start with a relatively innocuous act; sending gifts and flowers, for instance. The gifts may be unwanted, but they are not particularly threatening and in the early stages they may even be considered somewhat flattering. Over time, however, and with the development of an obsession or fixation, the activities escalate and so does the level of threat. The victim may start to be followed or repeatedly telephoned. Comments and conduct evidencing the obsessive thoughts of the stalker are often conveyed to the victim. Fear starts to set in. Threat escalation thus forms a "hallmark" of stalking. And in some cases, the escalation factor quickly moves the situation from the level of a simple nuisance to a life-threatening attitude of, "If I can't have you, nobody will".

Having described the principal characteristics that set stalking apart from other forms of human behaviour, I next sought to place stalking within its proper legal context.

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<sup>188</sup> Generally, see the discussion of stalking as a form of human behavior in *Stalkers*, by Jean Ritchie, *supra*, footnote 3.

<sup>189</sup> *Ibid*, at p. 1.

Historically, stalking was never considered a crime; to many, it amounted to nothing more than a series of acts which, though annoying and provoking, were perfectly lawful if not quite acceptable. At worst, some elements of stalking were considered a precursor to another crime or, in some cases, evidence of its *mens rea*. The main control mechanism was Sureties of the Peace. But the burden of proof on the applicant victim was high, and few victims were given real protection in any event.

As Canada approached the 21st century, and a wave of protective legislation swept across the United States, innovative prosecutors in Canada and a receptive appellate judiciary sought to control stalking through "last resort" legal mechanisms, such as prosecutions for "threatening" contrary to section 264.1 of the *Criminal Code*.<sup>190</sup> Mechanisms of this sort did not, however, treat stalking as a form of culpable behaviour: rather, prosecutors sought to denounce the conduct by focussing on *one element* of the conduct (usually a threat or an assault). When this element was not present, and the behavior sought to be controlled consisted simply of harassing conduct and the resultant fear of bodily harm, the law failed miserably.

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See *R. v. McCraw* (1991), 66 C.C.C. (3d) 517 (S.C.C.) There, the proven facts clearly established criminal harassment (stalking), as it is now described in the Criminal Code. However, the offence occurred in 1987 so the charges focused on one aspect of the case: an alleged threat to cause serious bodily harm. Briefly, the accused had become infatuated with several Ottawa Roughrider cheerleaders, one in particular. He went to their practices; he phoned several, and asked if they would pose for photographs. He sent anonymous letters to them, describing sexual acts he intended to perform on them - with or without their consent. One letter indicated he knew where the victim lived. When arrested, he was found in possession of a list of the cheerleaders' names and telephone numbers. At trial, three victims testified that the letters had frightened them to the point of feeling quite unsafe when they were alone. The accused did not testify or call evidence. At trial, and on appeal, the case focussed, bizarrely in my view, on whether a threat to rape was necessarily a threat to cause serious bodily harm. The precise words of the accused were examined in detail. The Supreme Court had no difficulty affirming the proposition, though the judges below were split. The point is this: the facts of the case really disclosed a stalking. The threat simply formed an aspect of the overall narrative. Prosecution for criminal harassment (if it had been available) would have more accurately described the conduct requiring control. Instead, the litigation bogged down on semantics, and deflected away from the real issues facing the victims.

In early 1993, the federal cabinet instructed development of legislation to deal specifically with stalking. That initiative later found expression in a Bill tabled in the House of Commons the following spring, which passed and was proclaimed in force during the summer of 1993.<sup>191</sup>

I have taken some time, hopefully not too much, to describe some of the broader social, cultural, and political forces that have helped shape the law in this area. I have also discussed the elements which I believe need to be established by the Crown in a prosecution under this legislation. To be sure, the "criminal harassment" provision of the *Criminal Code* contains a myriad of difficult interpretive and constitutional issues. Thus far, trial courts, at least, have endeavoured to breathe life into the legislation by avoiding a restrictive interpretation,<sup>192</sup> and by supporting its constitutional validity.<sup>193</sup> Whether and to what extent appellate courts will continue this approach remains to be seen.

What I have said so far describes where we have been in the past and where we are right now. I propose at this stage to comment briefly on where we can go from here.

Now that Canada has recognized that stalking, as a form of human behaviour, is a crime, we need to turn our attention to the position -- and plight -- of the victim. Are there sufficient legal safeguards to protect those who are targeted by a stalker? Are government files and databanks potentially fertile fields for those who seek background information on a potential target? Are there mechanisms beyond the criminal law that can assist in controlling this type of threatening conduct?

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<sup>191</sup> S.C. 1993, c.45, s.2.

<sup>192</sup> See, for instance: *R. v. Lafreniere*, [1994] O.J. No. 437 (no injury or threat is required; women's experience, including difference in strength and size, are important considerations); *R. v. Gowing*, [1994] O.J. No. 1696 (fear for "safety" to be given a broad interpretation, including mental or emotional or psychological trauma; "the power imbalance throughout the years led to sore and terrible tragedies, and this legislation is a first step towards correcting that."); *R. v. Sanghera*, [1994] B.C.J. 2803 (B.C. Prov. Ct.) (criminal harassment can occur even when the parties are living together);

<sup>193</sup> *R. v. Hau*, [1994] B.C.J. No. 677 (B.C. Prov. Ct.) ("The stalking of another person intrinsically involves potential violence and its social consequences are appalling;" the legislation is neither vague nor overbroad); *R. v. Sillipp*, [1995] A.J. 615 (Alta. Q.B.) (legislation is neither vague nor overbroad; Parliament's objective here is of "great importance").

Several things can be done at the federal, provincial, and municipal levels of government. Some require legislation; others require significant administrative or policy shifts. All require consideration of the public resource implications and the extent to which any principle in the *Charter of Rights and Freedoms* may be triggered or violated.

**a) Potential Federal Initiatives**

Refinements to further protect the victim are available at both the front and the back end of the criminal justice system:<sup>194</sup>

- i) notify the victim if the stalker is released on bail or escapes from custody;
- ii) require an alleged stalker, on being charged, to surrender all firearms and Firearm Acquisition Certificates until the charges are dealt with;
- iii) require the accused to justify release on bail, in much the same way that those who are charged with drug offences now bear the burden of showing cause for release (subsection 515(6) *Criminal Code*);
- iv) add criminal harassment to the list of predicate offences that provide a foundation for first degree murder irrespective of whether the murder was planned and deliberate (subsection 231(5) *Criminal Code*);
- v) require an additional penalty when it is shown that the stalker, during the course of the offence, violated a protective court order such as a peace bond issued under section 810 of the *Criminal Code*, or a restraining order issued under provincial legislation.

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Manitoba has asked the Federal Government to enact the following reforms on several occasions. At the time of writing, Ottawa has indicated a willingness to act legislatively on the second and fifth recommendation, and to further consider the prospects of legislation on the fourth. The Honourable Alan Rock, Minister of Justice for Canada, has expressed the view that legislation is unnecessary on the first and third recommendation, preferring, instead, policy or administrative changes within Justice Ministries across the country. The second recommendation has, in fact, found expression in Bill C-68, the controversial "gun control" package. At the time of writing that Bill has passed the House of Commons, although its future in the Senate and, potentially, in the courts on a Reference, is a bit uncertain. Most recently, at the 1995 Uniform Law Conference held in August, 1995 at Quebec City, a resolution that called for stalkers who killed their targets to face first degree murder was debated, voted upon and carried.

## ***b) Potential Provincial/Municipal Initiatives***

Provincial and municipal governments should consider protective measures in at least three separate areas. First, it is apparent that both levels of government maintain personal databanks designed to support a range of regulatory schemes and social services. Some of these contain information about individuals that could assist stalkers in locating and tracking their victims. Examples include: drivers licence and vehicle registration schemes; land registry systems; tax rolls; voting records and so on<sup>195</sup>. Government at this level ought to consider whether and under what circumstances information of this nature ought to be freely available to the public, especially to those against whom there exists any form of protective or restraining order.<sup>196</sup>

Provincial governments also have responsibility for administering the courts and correctional systems.<sup>197</sup> Steps should be taken to ensure that court documents, such as subpoenas, do not include information which unnecessarily exposes an accused stalker's victim, such as telephone numbers and home addresses.<sup>198</sup> In the correctional field, provinces may wish to consider electronic monitoring bracelets to ensure that court-ordered "no contact" bail conditions are respected.<sup>199</sup>

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<sup>195</sup> On June 8, 1995 the Premier of Manitoba announced an intention to amend provincial legislation so that stalkers could not use voters lists to locate their targets. At the same time, the Minister of Justice advised the legislature that the Province was developing a strategy to deal with a wide range of Government-held information that could be of use to stalkers [Legislative Assembly of Manitoba, Debates and Proceedings (Hansard), Vol. XLV, No. 13, Thursday, June 8, 1995, at pp. 1101-1102]. Three weeks later, a Bill was introduced in the Legislature which received all-party support. It requires deletion of the name, address or other personal information of an eligible voter from the voters list if, during an election, the voter applies to an election officer to have that information omitted. The legislation also requires the Chief Electoral Officer to inform the public of this protection [S.M. 1995, Chapter 6,s. 5].

<sup>196</sup> In the U.S. Task Force Report on Stalking, *supra*, footnote 4, at p. 82, the following is said: "Potential stalkers may be able to gain access to personal information about their victims from public records, such as motor vehicle records and voter registration records. States may wish to examine their Privacy and Freedom of Information Statutes to determine whether amendments are needed to prevent information contained in public records from being used for illegal purposes. In examining these Statutes, States will need to balance the public's right to access government records with an individual's right to privacy and the State's duty to protect its citizens".

<sup>197</sup> The Constitution Act, 1867, subsection 92(6) "The establishment, maintenance, and management of public and reformatory prisons in and for the Province", and subsection 92(14) "The administration of justice in the Province ...".

<sup>198</sup> In the United States, three states( Minnesota, Montana and Wisconsin) allow the victim to keep his or

***(c) Civil Actions***

The physical and psychological damage suffered at the hands of a stalker may well found a civil action brought by the victim. In the United States, the stalking law enacted in the state of Oregon specifically provides that a civil action may be brought against the stalker to recover damages incurred as a result of stalking behaviour.<sup>200</sup>

In Canada, no legislation touches on the issue of civil liability, and the case law is scant. Judicial authority that does exist, however, tends to support a role for the civil courts.

In *Love v. Blanchard*,<sup>201</sup> the female plaintiff sued her father for damages for sexual abuse while she was between the ages of six and sixteen. The defendant father had previously pleaded guilty to criminal charges laid against him concerning the abuse. Schulman, J. assessed general damages at \$60,000, but added aggravated damages in a like amount because of, amongst other things, the "conduct of the defendant who stalked the plaintiff off and on for about four years after completing his jail sentence".

A year later, in March, 1995, Binks, J. of the Ontario Court of Justice (General Division) awarded \$105,000, including punitive and aggravated damages, against Anthony B. Buelow for stalking his

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her address confidential under certain circumstances: U.S. Task Force Report on Stalking, *supra*, footnote 4, at p. 36.

<sup>199</sup> Several of the States in the United States may require electronic monitoring of the accused as a condition of pre-trial release or probation, or as an alternative to jail. In the U.S. Task Force Report on Stalking, *supra*, footnote 4, at p. 51, the following is noted: "Several jurisdictions, including San Diego, California are testing the effectiveness of requiring convicted stalkers to wear an electronic arm-band. If the defendant approaches the victim's residence, a sensor within the house contacts the technology's vendor, who automatically contacts the police. Proponents of the electronic monitoring device note that there is no subjectivity involved in the program; if the sensor goes off, the stalker has violated the conditions of his probation. Critics of the arm-band technology point out that the sensor is not portable; therefore the victim is only protected while the victim is at home."

<sup>200</sup> Or. Rev. Stat. 133.310 (1993).

<sup>201</sup> Unrep., Man. Q.B., Jan. 6, 1994, CT. No. CI 92-01-63150.

former wife over a period of several months.<sup>202</sup> The court found that the defendant had followed his former wife by car and on foot, had continuously telephoned her during the day and night, left notes and letters at her house, threw things at her, tacked a used condom to a wall at her home, videotaped her through her bathroom window from a tree, and harassed her friends and professional advisors. As in *Love v. Blanchard, supra*, the defendant had previously been convicted of criminal charges involving the plaintiff as victim, including intimidation and trespass by night. In his reasons for judgment, Binks, J. described the former husband's conduct as "calculated, devilishly creative, and entirely reprehensible", adding that it "went far beyond the bounds of civilized behaviour."

***(d) An Uncynical Postscript***

Anti-stalking legislation in both Canada and the United States has been criticized on the basis that legislators hastily responded to a moral panic created by an exploitive and sensational media.<sup>203</sup> One critic has written:<sup>204</sup>

"In the end, the significant players in the stalking initiative were differentially rewarded. The media got a good story. The politicians got a chance to demonstrate publicly their commitment to the issue of violence against women without the significant expenditures of time, energy or money required to actually address the roots of the problem. And Canadian women ended up, through a process characterized by non-inclusion and non-responsiveness, with a new piece of criminal law, uncertain in impact and rooted in a failure to appreciate and acknowledge the systemic nature of violence against women."

Whether there is any merit to this criticism is at best debatable. There are, however, some realities that are simply beyond dispute: stalking behaviour has existed for decades, if not centuries. It strikes fear, if not terror, into the hearts of the victims. Traditional legal mechanisms failed to deal with this insidious behaviour. Stalking behaviour usually escalates, and sometimes results in the

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<sup>202</sup> *Mackay v. Buelow* [unrep., Ont. Ct. J. (Gen. Div.), Mar. 24, 1995, CT. No. 85425/94].

<sup>203</sup> Rosemary Cairns Way, "The Criminalization of Stalking: an Exercise in Media Manipulation and Political Opportunism", 39 McGill L.J. 379 (1994); Faulkner, *supra*, footnote 3, at p. 61-62.

<sup>204</sup> *Ibid*, Rosemary Cairns Way, at p. 400.

death of the victim. Anti-stalking legislation permits police and judicial intervention *before* fatal consequences occur.

We can, if we wish, debate endlessly about the fine points of the legislation, such as whether the law adequately describes the level of intent required and whether the "fear" issue ought to be assessed objectively or subjectively. We could also debate about whether Parliament moved too quickly, or too slowly for that matter, and whether there was sufficient consultation with interest groups and other stakeholders when the legislation was being developed.

The reality is that a control mechanism now exists that didn't exist before. Men (and some women) are now being arrested, charged, prosecuted and sentenced for conduct that previously would have been just as threatening but, in the eyes of the law, would have gone unnoticed.

The jurisprudential dust should, I think, be allowed to settle before rushing to the somewhat cynical conclusion that legislators totally missed the mark in an attempt to gain a good story in the weekend newspaper. I am not at all sure that Patricia Allen would have agreed with that proposition, if she had survived the attack by her husband, with a cross-bow, in broad daylight, on a busy Ottawa street after several months of being stalked. Nor would Terri-Lyn Babb have agreed. Nor Sherry Paul, or Colleen Kelly. Or Maurice Paul, for that matter.