A Handbook for Police and Crown Prosecutors on Criminal Harassment

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A Handbook for Police and Crown Prosecutors on Criminal Harassment

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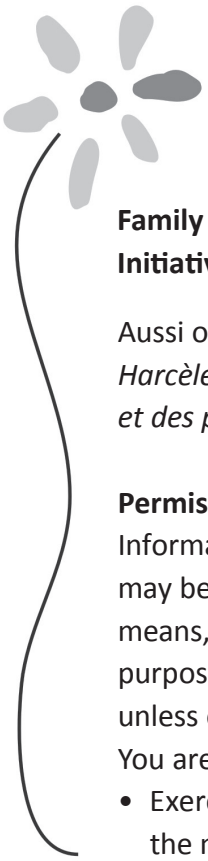

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Part 1

Introduction

Criminal harassment, which includes "stalking," is a crime. While many crimes are defined by conduct that results in a very clear physical outcome (for example, murder), the offence of criminal harassment prohibits deliberate conduct that is psychologically harmful to others. Criminal harassment often consists of repeated conduct that is carried out over a period of time and that causes its targets to reasonably fear for their safety but does not necessarily result in physical injury. It may be a precursor to subsequent violent and/or lethal acts.

CRIMINAL HARASSMENT

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.

Prohibited conduct

(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.

Punishment

(3) Every person who contravenes this section is guilty of
- (a) an indictable offence and is liable to imprisonment for a term not exceeding ten years; or
- (b) an offence punishable on summary conviction.

Factors to be considered

(4) Where a person is convicted of an offence under this section, the court imposing the sentence on the person shall consider as an aggravating factor that, at the time the offence was committed, the person contravened
- (a) the terms or conditions of an order made pursuant to section 161 or a recognizance entered into pursuant to section 810, 810.1 or 810.2; or
- (b) the terms or conditions of any other order or recognizance made or entered into under the common law or a provision of this or any other Act of Parliament or of a province that is similar in effect to an order or recognizance referred to in paragraph (a).

Reasons

(5) Where the court is satisfied of the existence of an aggravating factor referred to in subsection (4), but decides not to give effect to it for sentencing purposes, the court shall give reasons for its decision.

1.1 Purpose of This Handbook

The purpose of this handbook is to provide police and Crown prosecutors with guidelines for the investigation and prosecution of criminal harassment cases and to promote an integrated criminal justice response to stalking. *It is intended to be a starting point for police and Crowns. Police and Crowns are encouraged to adapt these guidelines to reflect the particular needs and circumstances of each jurisdiction and each case.*

The Handbook was developed by a working group of federal/provincial/territorial criminal justice officials in consultation with criminal justice professionals. It was first published in 1999 and updated in 2004. The development of these guidelines was prompted by the findings and recommendations of the 1996 Department of Justice Canada review of the criminal harassment provisions in the *Criminal Code*. The updates have been published in response to positive feedback regarding the usefulness of the Handbook and requests for more current information.

1.2 Legislative History of Criminal Harassment

Criminal harassment is not new, but recognition of it as a distinct criminal behaviour is relatively recent. Before 1993, persons who engaged in stalking conduct might have been charged with one or more of the following offences: intimidation (section 423 of the *Criminal Code*); uttering threats (section 264.1); mischief (section 430); indecent or harassing phone calls (section 372); trespassing at night (section 177); and breach of recognizance (section 811).[1]

On August 1, 1993, the *Criminal Code* was amended to create the new offence of criminal harassment in section 264.[2] It was introduced as a specific response to violence against women, particularly to domestic violence against women. However, the offence is not restricted to domestic violence and applies equally to all victims of criminal harassment. Section 264 was amended, effective May 1997, to make the commission of an offence of criminal harassment in violation of a protective court order an aggravating factor for sentencing purposes, and effective July 23, 2002, to double the maximum sentence for the offence of criminal harassment to 10 years' imprisonment for an indictable offence. Also effective in May 1997, murder committed in the course of criminally harassing the victim, was added to the list of conduct in section 231 classified as first degree murder, irrespective of whether it was planned and deliberate.

A number of other sections of the *Criminal Code* have been amended over the years to refer to criminal harassment as one of the offences for which certain procedural protections or dispositions are triggered:

[1] In 2005, the offence of voyeurism was also enacted to prohibit the secret viewing or recording of another person when there is a reasonable expectation of privacy in three specific situations and to prohibit the intentional distribution of voyeuristic material. This offence may also be applicable in some types of "stalking" cases.

[2] See Part 3.2, *"Criminal Code* Provisions."

1. Under subsection 109(1), where an offender is convicted, or discharged under section 730, of criminal harassment, they are subject to a mandatory weapons prohibition order.

2. Under subsection 515(4.1), where an accused is charged with criminal harassment, when releasing an accused on interim release, the justice shall add a condition prohibiting the accused from possession any weapons, unless the justice determines that this condition is not required for anyone's safety.

3. Under section 486.3, trial judges are required to appoint a lawyer to conduct the cross-examination upon the application of the prosecutor or the victim where a self-represented accused is on trial for criminal harassment (prior to this last amendment, the accused could further intimidate the complainant by personally cross-examining her/him when s/he appeared as a witness in the criminal trial).

4. Lastly, effective November 2012, paragraph 742.1(f) states that conditional sentences are not available when the offender is convicted of criminal harassment, prosecuted by way of indictment.

1.3 What Do We Know About Criminal Harassment in Canada?

1.3.1 Police and Court Reported Data

The most current Statistics Canada police and court data relating to criminal harassment reveal the following facts:

- In total, just over 20,000 criminal harassment incidents were reported to the police in 2009, representing almost 5% of all violent crimes reported to police. Data from a subset of police services indicate that the rate of reported criminal harassment has been gradually increasing over the past decade, including a 57% increase from 2008 to 2009.[3]
- Of the cases reported to police in 2009, females accounted for three-quarters of all victims (76%) of criminal harassment, compared with about half (51%) of victims of violent crime overall.[4]
- In 2009, men accounted for 78% of those accused of criminal harassment, with a large proportion of both females and males being harassed by male perpetrators (85% of females and 64% of males).[5]

[3] Shelly Milligan, "Criminal Harassment in Canada, 2009" (2011) Juristat, Canadian Centre for Justice Statistics, catalogue no. 85-005-x.
[4] *Ibid*.
[5] UCR2 incident-based survey, Canadian Centre for Justice Statistics, May 2011 extraction.

- In 2009, female victims were almost twice as likely as male victims to be stalked by a former or current intimate partner (51% of females and 23% of males). Male victims were most commonly stalked by a casual acquaintance (37%).[6]
- In 2007, current spouses were nearly twice as likely as ex-spouses to be the victims of common or major assault, while criminal harassment or threats were much more likely to be committed against ex-spouses.[7, 8]
- In 2009, threats (38%) or physical force (12%) were more often used against targets of criminal harassment than were weapons (3%).[9]
- Most targets of criminal harassment (69%) were harassed in their own home or at another residence, such as a friend's home; 16% of victims were harassed in commercial or corporate areas; 11% at outdoor public locations, such as on the street or in a parking lot; and 4% at schools or universities.[10]
- In 2008/2009, Canada's adult criminal courts completed about 3,200 cases in which criminal harassment was the most serious charge. Of these cases, over half (52%) resulted in a finding of guilt, similar to the proportion of violent cases in general (54%). The remaining criminal harassment cases were stayed or withdrawn (37%); resulted in an acquittal (7%); or resulted in another type of decision, such as not criminally responsible (4%).[11]
- In 2009, over a quarter of criminal harassment incidents (27%) reported to police involved other offences. Among these, uttering threats was the most common associated offence.[12]
- Between 1997 and 2009, criminal harassment was the precipitating crime in a total of 68 homicides—for example, a female was stalked (and subsequently killed) by a recently separated intimate partner. This translates to an average of five such homicides per year over the 13-year period.[13]

From 1999 to 2009, the number of victims of criminal harassment reported to a subset of police services[14] increased by 65%, from 6,411 victims in 1999 to 10,589 victims in 2009.[15] Such an increase is

[6] Milligan, *supra* note 3 at 3–4.

[7] Andrea Taylor-Butts, "Fact sheet—Police-reported spousal violence in Canada" in *Family Violence in Canada: A Statistical Profile, 2009* (Ottawa: Statistics Canada, 2009, catalogue no. 85-224-X), online: <http://www.statcan.gc.ca/pub/85-224-x/85-224-x2009000-eng.pdf> (accessed 13 April 2011) at 26. Note that at p. 59, this publication defines "common assault" as the type of assault falling under section 265 of the *Criminal Code*, as follows: "This includes the *Criminal Code* category assault (level 1). This is the least serious form of assault and includes pushing, slapping, punching, and face-to-face verbal threats." This publication defines "major assault levels 2 and 3" as assault falling under sections 267 and 268, as follows: "This includes more serious forms of assault, i.e. assault with a weapon or causing bodily harm (level 2) and aggravated assault (level 3). Assault level 2 involves carrying, using or threatening to use a weapon against someone or causing bodily harm. Assault level 3 involves wounding, maiming, disfiguring or endangering the life of someone."

[8] This can likely be largely explained by the fact that current spouses are more likely to have the physical access to one another that is needed to commit assault, whereas ex-spouses wishing to harm the other may only be able to do so through criminal harassment.

[9] Milligan, *supra* note 3 at 4.

[10] *Ibid*.

[11] *Ibid*.

[12] *Ibid*.

[13] Homicide Survey, Canadian Centre for Justice Statistics, May 2011 extraction.

[14] This represents police services that serve 57% of the population of Canada.

[15] UCR2 Trend Database, Canadian Centre for Justice Statistics, April 2011 extraction.

not uncommon following the introduction of a new law. It is difficult to assess, however, whether the rise is due to an increase in the number of criminal harassment incidents, increased reporting by victims, or a change in the way police respond to and record such incidents.

1.3.2 Victim/Survivor Survey Reports

Given that over half of the people who are criminally harassed do not report this crime to police,[16] it is helpful to look at sources other than police-reported data to get a more complete picture of criminal harassment in Canada. Statistics Canada's General Social Survey (GSS) on Victimization provides self-reported data on criminal victimization. It is an important complement to crime rates, as it measures both crime incidents that come to the attention of the police and those that are unreported. The 2004 GSS reveals the following facts about criminal harassment:[17]

- In the survey, 11% of women and 7% of men (for a total of 9% of Canadians 15 years of age and over) indicated that they had been stalked in the five years prior to the survey. This amounts to 2.3 million Canadians.[18]
- For the majority of victims, the stalker was male (80%), regardless of the sex of the victim. The stalker was female in very few situations, for both female (9%), and male (5%) victims.[19]
- Results from the 2004 GSS survey show that most victims knew their stalkers, 23% of whom were friends, 17% current or former intimate partners, 14% individuals known by sight only, and 18% co-workers, neighbours or relatives. Less than one in four victims was harassed by a total stranger. Female victims were most often harassed by a friend (22%), or a current or former intimate partner (20%). On the other hand, male victims reported being harassed by a friend in 25% of cases, a person known by sight only in 16% of cases, and a current or former intimate partner in only 11% of cases.[20]
- Just over 1 in 10 (11%) stalking targets sought a protective or restraining order against the stalkers. Just under half of the orders were violated (49%).[21]

Risk Factors

- The majority of stalking victims are young women between the ages of 15 and 24 (19% of total population). Among male victims, the highest rates were among young men aged 15 to 17 (6%) and 18 to 24 (4%). The risk of being a victim of stalking was found to decrease with age.[22]

[16] In the 2004 General Social Survey (GSS), 63% of those who reported being stalked did not report the stalking to police.

[17] All of the facts in this section are gleaned from Kathy AuCoin's representation of the 2004 GSS in "Stalking-criminal harassment" in Kathy AuCoin, ed., *Family Violence in Canada: A Statistical Profile, 2005* (Ottawa: Statistics Canada, 2005, catalogue no. 85-224XIE), online: <http://www.statcan.gc.ca/pub/85-224-x/85-224-x2005000-eng.pdf> (accessed 13 April 2011). The 2009 GSS on victimization did not include the questions on criminal harassment.

[18] *Ibid* at 34.

[19] *Ibid* at 36.

[20] *Ibid* at 35-36.

[21] *Ibid* at 43.

[22] *Ibid* at 37.

- Aboriginal people were twice as likely (7%) as non-Aboriginal people (3%) to have experienced some form of stalking that made them fear for their lives in the previous 12 months.[23] Aboriginal victims of stalking were also more likely than non-Aboriginal victims to be physically attacked or grabbed by the person stalking them (26% versus 16%) and to contact the police to report the stalking (41% versus 37%).[24]
- Divorced or single women tended to experience a higher rate of stalking (7% and 6%, respectively) than other individuals did, based on those who reported stalking in the previous 12 months).[25]

Characteristics of the Stalking

- Over half (52%) of female victims reported receiving repeated or obscene phone calls from their stalkers. One-third reported being spied on (34%), or being intimidated or threatened (34%). In contrast, over half (56%) of male victims reported being intimidated or threatened, and over one-third (39%) reported receiving repeated phone calls. One-quarter (24%) of male victims reported threats to hurt their pets or damage their property.[26]
- The more familiar the stalker is with the victim, the more likely s/he is to employ multiple forms of stalking. Female (67%) and male victims (54%) stalked by intimate partners[27] were more likely to experience multiple forms of stalking. Both males and females who were stalked by a stranger were more likely to be subjected to only one form of stalking (38% of female victims and 27% of males).[28]
- In 2004, 21% of victims reported stalking behaviour that persisted for over one year. Most female victims (29%) reported the stalking lasted between one and six months (as opposed to 21% of male victims), whereas most male victims (31%) reported the stalking lasted one week or less.[29]
- The length of time that the stalking lasted appears to be related to the nature of the relationship between the victim and the stalker. The stalking lasted over a year for 61% of survey respondents who were stalked by an ex-spouse, and for 26% of those stalked by an ex-boyfriend or girlfriend. Where the victim and stalker had not had an intimate relationship, the stalking most often lasted one to six months (for 34% of victims stalked by a co-worker, 30% of victims stalked by a friend and 31% of victims who only knew their stalkers by sight). When victims were stalked by a stranger, it was most often for under a week (41%). Neighbours and non-intimate relatives, however, most often stalked for over a year (43% and 39%, respectively), falling between ex-spouses and ex-daters.[30]
- Just over one-quarter of stalking victims reported that they had been stalked by more than one person (28%). Males were slightly more likely than females to report this (33% versus 25%).[31]

[23] Use with caution; the coefficient of variation is high.
[24] AuCoin, *supra* note 17 at 39.
[25] *Ibid* at 37.
[26] *Ibid* at 35.
[27] Intimate partner stalking includes victims stalked by a current or former spouse, boyfriend or girlfriend.
[28] Aucoin, *supra* note 17 at 36.
[29] *Ibid* at 38.
[30] *Ibid*.
[31] *Ibid* at 34.

- The likelihood of stalking victims being attacked or grabbed (16% of all stalking victims) increased when they had had an intimate relationship with their stalker (36% of those stalked by a current partner and 34% of those stalked by a former partner, versus 13% of those whose stalker was not an intimate partner).[32]

Impact on Victims

- Almost one in three victims (31% of female victims and 27% of male ones) feared for their lives as a result of stalking. Both male and female victims were most likely to fear for their lives when being harassed by an ex-spouse (60% of female victims stalked by an ex-spouse and 44% of male victims). Female victims stalked by an ex-boyfriend (41%) or an "other relative" (40%) were also likely to fear for their lives, as were male victims stalked by co-workers (39%).[33]
- Among victims, 80% of females and 62% of males changed their lifestyle in an attempt to avoid being victimized by their stalker, by doing things such as avoiding certain places or people; getting an unlisted phone number, call display, call screening or call blocking; not going out alone; and changing their residence.[34]

1.4 Impact of Criminal Harassment on the Victim

The cumulative effect of harassment causes victims to experience intimidation, as well as psychological and emotional distress. Psychologically, stalking can produce an intense and prolonged fear among victims. This fear usually includes an increasing fear that the frequency and nature of the conduct will escalate (for example, from non-violent to life threatening) and is accompanied by a feeling of loss of control over the victim's life. The constant fear and stress can result in mental and physical exhaustion, which can in turn lead to various health problems.[35] In addition, stalking targets may face considerable financial consequences as a result of the need for psychological treatment or therapy, and time taken off work.[36]

Some common responses by victims to the trauma of being stalked include the following:

- self-reproach
- feelings of shame and lowered self-esteem
- a tendency to downplay the impact of the stalking
- interpretation of the stalking as a "private matter"
- a sense of betrayal and stigma
- anxiety, fear and long-term distress due to the unpredictability of the stalker's conduct

[32] *Ibid* at 39.
[33] *Ibid* at 40.
[34] *Ibid* at 41.
[35] Jill Arnott, Deb George & Stacey Burkhart, *Bridging the Gap: Criminal Harassment Victimization and the Criminal Justice Response (Phase II)* (Regina: Family Service Regina, 2008) at 28.
[36] P. Bocij, *Cyberstalking: Harassment in the Internet Age and How to Protect Your Family* (Westport, Connecticut: Praeger Publishers, 2004) at 73–88.

- feelings of anger, helplessness and loss of control over their lives
- a lack of confidence in police, resulting in a failure to report
- changing their lifestyle or location, rather than expecting that the police will put an end to the harassing conduct[37]
- loss of trust in other people in the victim's life, as well as the world at large
- a sense of isolation stemming from difficulty in convincing others that they are in danger
- attempts to reason with the stalker (which are likely to backfire and encourage the harassing conduct)
- inaction or delay in involving the criminal justice system, due to a lack of awareness that the conduct is criminal
- denial or embarrassment

1.5 What Do We Know About Stalkers?

> *More so than almost any other form of violence, stalking is highly personal, bound up in the relationship between the perpetrator and victim. Indeed, in a very real sense, the relationship is the violence; perpetrators attempt to establish or maintain a relationship—whether amorous or angry—against the victims' wishes.*[38]

No single psychological profile exists for stalkers. Stalking and harassing behaviour can take many forms. A popular portrayal of criminal harassment is the stalking of a celebrity or public figure. However, most targets of harassment are ordinary people. In Canada, it appears that the primary motivation for stalking another person is more often a desire to control a former partner. The potential severity of stalking should not be underestimated. The psychological impact on the victim alone can be debilitating and life-altering. And, unfortunately, in far too many cases, the victim's fear of being seriously injured or killed has been realized.[39]

On its own, the individual conduct that makes up criminal harassment often appears innocent and harmless. The simple act of sending a dozen roses to a woman on Valentine's Day seems romantic to many people. However, to a woman who has been abused by the sender and has attempted to keep her location secret from him, it can be a terrifying message that he knows where she is and that she cannot escape him.

[37] Emma Short & Isabella McMurray, "Mobile Phone Harassment: An Exploration of Students' Perceptions of Intrusive Texting Behaviour" (2009) 5:2 An Interdisciplinary Journal on Humans in ICT Environments 163 at 172.

[38] P.R, Kropp, S.D. Hart & D.R. Lyon, *Guidelines for Stalking Assessment and Management (SAM)* (Vancouver: ProActive ReSolutions Inc., 2008).

[39] See J. McFarlane *et al.*, "Stalking and Intimate Partner Femicide" (November 1999) 3:4 Homicide Studies, which reported at 308 that "Seventy-six percent of femicide and 85% of attempted femicide respondents reported at least one episode of stalking within 12 months of the violent incident" whereas fewer femicide or attempted femicide victims had experienced physical assault in that time period (67% and 71%, respectively). See also Office of the Chief Coroner (2010) *Annual Report of the Domestic Violence Death Review Committee*, Toronto, ON., which describes harassing conduct on the part of the perpetrator, prior to the homicide, in many of the 18 cases reviewed.

Individuals who harass and stalk may possess one or more of a variety of psychological difficulties, ranging from personality disorders to major mental illnesses. Since the introduction of the first anti-stalking law in the United States, there have been a number of attempts to create stalking typologies from both the psychiatric and the law enforcement perspectives. Regardless of the typology, however, most individuals who stalk are engaging in obsessional behaviour. They are obsessional in the sense that they have persistent thoughts and ideas regarding the victim. They do not necessarily fulfill the diagnostic criteria for any serious psychiatric disorder. However, many have prior criminal, psychiatric and drug abuse histories that fall under Axis 1 diagnosis.[40] The most common include alcohol dependency, mood disorders and schizophrenia.

1.5.1 Typologies of Criminal Harassment

Although no typology is all-inclusive, the one developed by the Los Angeles Police Department (LAPD) Threat Management Unit[41] has been used as a theoretical framework in threat assessments by the Behavioural Sciences Branch of the Royal Canadian Mounted Police (RCMP). The relationship and context-based stalking typology (RECON) proposed by Mohandie[42] is also used by the Behavioural Sciences Branch of the RCMP and the Threat Assessment Unit of the Behavioural Sciences and Analysis Section of the Ontario Provincial Police (OPP) and is also increasingly used elsewhere in Canada and the United States. These two typologies are used in assessing risk and determining risk management strategies.

(a) LAPD Framework (Zona 1993)

The LAPD Framework sorts stalking behaviour into three categories: erotomanic, love obsessional and simple obsessional stalker.

As established in the Diagnostic Statistical Manual, 4th ed., erotomania is a delusional disorder in which the central theme is that another individual is in love with the stalker. **Erotomanic stalkers** are convinced that the object of their attention, usually someone of the opposite sex, fervently loves them and would return the affection if it were not for some external influence. The person about whom this conviction is held is usually of a higher status than the stalker but is often not a celebrity. The victim could be their supervisor at work, their child's paediatrician, their church minister or the police officer who stopped them for a traffic violation but did not charge them. Sometimes it can be a complete stranger.

[40] The American Psychiatry Association's Diagnostic and Statistical Manual of Mental Disorders (DSM-IV-TR) categorizes each psychiatric diagnosis it contains along five dimensions (axes). Axis 1 contains clinical disorders, including major mental disorders, learning disorders, and substance abuse disorders.

[41] M.A. Zona, K.S. Sharma & J. Lane, "A Comparative Study of Erotomanic and Obsessional Subjects in a Forensic Sample" (July 1993) 38:4 Journal of Forensic Sciences 894–903.

[42] K. Mohandie *et al.*, "The RECON Typology of Stalking: Reliability and Validity Based Upon a Large Sample of North American Stalkers" (Jan. 2006) 51:1 Journal of Forensic Sciences 147–155.

Love obsessional stalkers, on the other hand, can be obsessed in their love without believing that their target loves them.[43] Very often, the love obsessional stalker suffers from a major psychiatric illness, such as schizophrenia or mania, and wants to "win" the love of their victim.

The **simple obsessional stalker** is similar to what has been described, in other typologies, as the intimate partner stalker. Most of these stalkers have been in some form of relationship with their target. The contact may have been minimal, such as a blind date, but more commonly it is a prolonged dating relationship, common-law union or marriage. The perpetrator refuses to recognize that the relationship with the other person is over and the prevailing attitude is "If I can't have her (or him), then no one else will." The stalker mounts a campaign of harassment, intimidation and psychological terror. The motivation for the harassment and stalking varies from revenge to the false belief that the stalker can convince or coerce the victim back into the relationship. Most simple obsessional stalkers are not mentally ill. Many have longstanding personality disorders.

(b) RECON (Relationship and context-based stalking typology), 2004

The RECON proposes four types of stalking categories, based on whether there is a prior relationship between the perpetrator and target: intimate, acquaintance, public figure and private stranger.[44]

The RECON typology responds to the desire for a simple-to-use typology whose categorization labels are linked to the degree of risk.[45] After reviewing existing typologies, Mohandie and Meloy found that "[i]t is clear from research on obsessional following that there is a difference between those who stalk public and private figures, and that the degree of prior relationship intimacy is an important variable, especially as it relates to risk for violence."[46] They also found that other typologies based on mental health diagnoses and motivation mostly served to complicate typologies and resulted in overlapping categories. Furthermore, some stalking relationships may vacillate between categories over time, as motivation and emotions change. The RECON typology was found to be easy to apply, does not require an ability to evaluate the state of the stalker's mental health or motivation, and has predictive value.[47] Here are the four categories:

I. Previous relationship/private figure context
   A. Intimate marriage, cohabiting or dating/sexual relationship (Intimate)
   B. Non-intimate employment-related, affiliative/friendship or customer/client (Acquaintance)

II. No prior relationship or limited/incidental contact
   A. Public figure context, pursuit of a public figure victim (Public Figure)
   B. Private figure context-pursuit of a private figure victim (Private Stranger)

[43] Zona *et al.*, *supra* note 41.
[44] K. Mohandie, "Stalking behavior and crisis negotiation" (2004) 4 Int J. Police Crisis Negotiations, 23–44.
[45] Mohandie *et al.*, *supra* note 42 at 147–155.
[46] *Ibid* at 147.
[47] *Ibid* at 148.

In a large study, Mohandie and Meloy gathered the following information about stalking cases falling into the four RECON categories.

Intimate stalkers are the most dangerous. They often have criminal records for violence and abuse of stimulants and/or alcohol. The frequency and intensity of their stalking often increases, and they frequently approach their targets. Over half of the group in this study physically assaulted their target, and most of them reoffended. This study confirmed the findings of other studies that sexual intimacy substantially increases the risk that stalkers will be violent toward their targets. The authors advise that "[r]isk management should emphasize the use of intensive probation or parole supervision; heightened danger in the days and weeks immediately following separation from the intimate; the likelihood of domestic violence and emotional domination before separation; and the minimal effectiveness of psychotherapy and pharmacotherapy."[48]

Acquaintance stalkers are violent half as often as intimate stalkers, though approximately one-third will assault their target or damage their property. When acquaintance stalkers in the study threatened their target, they did so repeatedly. On the one hand, a less intense bond with their target may make violence less likely, but on the other hand, these stalkers have a "ravenous" desire to initiate a relationship with the target. Risk management of this group should combine both law enforcement intervention and mental health treatment (based on careful psychiatric diagnosis).[49]

Public figure stalkers generally include a greater proportion of female stalkers and male targets than other categories, but this group is still made up of more male stalkers than female, and more female targets than male. Compared to Mohandie's other categories, these stalkers tend to be older, have a less violent criminal record, are more likely to be psychotic and are less likely to threaten the target. However, when public figure stalkers use violence, it tends to follow a perceived rejection or humiliation, and the violence is usually "planned, purposeful, and emotionless (predatory), and involves a weapon, usually a firearm." Mohandie and Meloy recommend that risk management of this group involve professional protection of the target (since injury is likely to be more serious if violence does occur) and mental health professionals, who can tailor psychiatric and psychological interventions to mitigate risk. Prosecution with forensic hospitalization frequently results in the most helpful outcome.[50]

Only a very small proportion (10%) of the group of stalkers Mohandie and Meloy studied were **private stranger stalkers**. Many of these stalkers were mentally ill men, with more than 1 in 10 showing suicidal thinking or behaviour, but they were less likely than intimate stalkers to have violent criminal records or to be abusing drugs. Half of the private stranger stalkers in the study did threaten their targets, and almost one-third were violent toward their target or their target's property. There is a moderate risk of recidivism. The authors recommend risk management focusing on psychiatric treatment and aggressive

[48] *Ibid* at 153.
[49] *Ibid*.
[50] *Ibid*.

prosecution. Given the intensity of the pursuit in this category, despite the lack of any type of relationship, mental illness is likely to be an aggravating factor for violence risk in this category.[51]

Other Factors and Typologies

As mentioned earlier, many typologies have been proposed, focusing on factors that identify characteristics of the perpetrator, the motivation behind the stalking and the manner in which the stalking is being carried out. Although it may be easy enough for properly qualified professionals to classify stalkers into the categories below, these particular labels are not as accessible to the average criminal justice system professional, nor are they as helpful as the RECON categories in identifying the type of intervention needed to stop the stalking and prevent further harm. Some areas that leading experts in the mental health and risk assessment fields have focused on are perpetrator characteristics associated with violent recidivism in other, better studied areas of violence, such as sexual violence and intimate partner violence. One such example is psychopathy.

Psychopathic stalkers belong to a category of offenders that has been linked to a significant risk factor for violent crimes. Psychopathy is characterized by an arrogant demeanour, impulsiveness, shallow emotions, a refusal to take responsibility, a lack of remorse for one's actions and a tendency to engage in antisocial behaviour. The motivations behind the conduct of psychopathic stalkers are markedly different from those of the majority of non-psychopathic stalkers, who seek some form of intimacy with the victim. This type of stalker often targets strangers and can resort to threats and the use of weapons. Although much research remains to be done on the specific link between psychopathy and stalking behaviour, recent findings point to several important considerations.[52]

While it appears that only a small percentage of stalkers exhibit psychopathic traits, it is important to keep in mind that this category may present the highest risk of serious physical or psychological harm to the victim. Since psychopathy implies a lack of empathy, as well as an inability or lack of desire to form or maintain close relationships, the behaviour of psychopathic stalkers is more consistent with the typology of the "sadistic stalker," the "resentful stalker," the "predatory stalker" or the "grudge stalker." Possible motivations include establishing dominance and control over the victim, retaliating for a perceived insult, bullying or humiliating the victim, or satisfying sadistic desires. Psychopathic stalkers are also more likely to target strangers or superficial acquaintances, while non-psychopathic stalkers usually pursue those they know well, such as family members, friends and former intimate partners. In addition, psychopathic stalkers often select emotionally or financially vulnerable victims, and the frequency and intensity of harassing conduct tend to escalate with time. In view of these particular traits, law enforcement professionals should be aware not only of the potential for serious violence, but

[51] *Ibid* at 154.

[52] Jennifer E. Storey, Stephen D. Hart, J. Reid Meloy & James A. Reavis, "Psychopathy and Stalking" (2009) 33 Law and Human Behavior at 237–246.

also of the need to develop management strategies tailored to avoid provoking violent behaviour in this category of stalkers.[53]

Paraphillic (sexually deviant) stalkers are another recognized but not well-studied group of stalkers. These offenders stalk as a component of their paraphilic (sexually deviant) focus. Some rapists and paedophiles stalk because stalking is incorporated into their sexually deviant fantasies and offending.[54] Some sexual sadists will go through "behavioural try-outs" that include stalking.[55]

Physically violent stalkers, according to the results of a 2008 study comparing violent and non-violent stalkers in Canada, are more likely to:

- have a strong previous emotional attachment to the victim
- exhibit an intense obsession with, or fixation on, the victim, resulting in more frequent contact and more persistent harassment
- harbour a higher degree of negative emotion toward the victim, manifested by outbursts of anger, jealousy and hatred
- verbally threaten the victim
- have a history of domestic abuse toward the victim

The underlying motivations appear to be insecurity, anger, vengeance, emotional arousal and projection of blame. It would seem that the extent of emotional attachment between the victim and the perpetrator may be crucial to understanding stalker conduct. The study concluded that the above factors are much more accurate predictors of violence than the presence of mental illness or a personality disorder, a prior criminal record, or a history of substance abuse.[56, 57]

Knowledge and expertise in Canada surrounding risk assessment and management have been steadily increasing and are becoming more widely accessible. Risk assessment tools are carefully tailored to specific situations, so the best tool to use in determining how to best assess and manage risk when criminal harassment is involved is one designed for this purpose, as opposed to one created to predict the risk of re-assault of an intimate partner, for example.

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[53] *Ibid*.

[54] P.I. Collins, "The Psychiatric Aspects of Stalking" in J. Cornish, K. Murray, & P.I. Collins, eds., *The Criminal Lawyers' Guide to the Law of Criminal Harassment and Stalking* (Aurora, Ontario: Canada Law Book, 1999).

[55] M.J. McCullough *et al.*, "Sadistic Fantasy, Sadistic Behaviour and Offending" (July 1983) 143 British Journal of Psychiatry at 20–29.

[56] Kimberley A. Morrison, "Differentiating Between Physically Violent and Nonviolent Stalkers: An Examination of Canadian Cases" (2008) 53 J Forensic Sci 742 at 747–748. The study was conducted using a sample of 103 perpetrators charged with criminal harassment from nine provinces (Ontario, British Columbia, Alberta, Saskatchewan, Newfoundland and Labrador, Manitoba, Prince Edward Island, Nova Scotia and Quebec). The nine predictor variables were degree of indications of likely obsession/fixation, degree of perceived negative affect/emotion in actions, explicit verbal threat/no threat status toward the victim, strength of emotional attachment, known substance abuse/dependency, presence of a personality disorder, presence of a major mental disorder, prior domestic violence and presence of a criminal record.

[57] See also Barry Rosenfeld, "Violence Risk Factors in Stalking and Obsessional Harassment: A Review and Preliminary Meta-Analysis" (2004) 31 Criminal Justice and Behavior 9. The strongest correlates of violence were found to be prior intimate relationship, threats, substance abuse and absence of psychosis. Weaker correlates were prior criminal and violence history, and personality disorder diagnosis.

For more information, see 2.10 Threat and Risk Assessments or consider contacting one of the specialized police units listed in Appendix A: Experts: Police Specialists for assistance in determining the type of stalker with which you are dealing and framing the appropriate response.

1.6 Using Technology to Criminally Harass (a.k.a. Cyberstalking, Online Criminal Harassment, and Cyberbullying)

Criminal harassment can be conducted through a computer system, including the Internet.[58] The elements of the offence remain the same, it is just that technological tools are used to commit the offence. There is considerable debate in the legal and academic literature about how to best define cyberstalking, online harassment and cyberbullying, and the extent to which existing legislation provides adequate protection against these types of offences.[59]

1.6.1 Online Criminal Harassment, Cyberstalking and a Related Typology

The terms "cyberstalking" and "online harassment" are often used to refer to three types of activities: direct communication through e-mail or text messaging; Internet harassment, where the offender publishes offensive or threatening information about the victim on the Internet; and unauthorized use, control or sabotage of the victim's computer.[60] In some cyber-stalking situations, criminal harassment charges may be appropriate; however, depending on the activity involved, charges under the following sections of the *Criminal Code* should also be considered:

- 162 (voyeurism)
- 163.1 (distribution of child pornography)
- 172.1 (Internet luring)
- 241 (counselling suicide)
- 298-302 (defamation)
- 319(2) (wilful promotion of hatred)
- 346 (extortion)
- 342.1 (unauthorized use of a computer)
- 372(1) (conveying false messages)
- 423 (intimidation)
- 430(1.1) (mischief in relation to data)

[58] A useful definition of "cyber-crime" is used in a 2002 Statistics Canada publication: "a criminal offence involving a computer as the object of the crime, or the tool used to commit a material component of the offence." See Melanie Kowalski, *Cyber-Crime: Issues, Data Sources, and Feasibility of Collecting Police-Reported Statistics* (Ottawa: Statistics Canada, 2002), online: <http://www.statcan.gc.ca/pub/85-558-x/85-558-x2002001-eng.pdf>.

[59] See Neal Geach & Nicola Haralambous, "Regulating Harassment: Is the law fit for the social networking age?"(2009) 73 Journal of Criminal Law 241–257; and Naomi Harlin Goodno, "Cyberstalking, a new crime: Evaluating the effectiveness of current state and federal laws" (2007) 72 Missouri Law Review 125–197.

[60] Louise Ellison & Yaman Akdeniz, "Cyber-Stalking: The Regulation of Harassment on the Internet" (December 1998) Criminal Law Review at 29.

- 402.2(1) (identify theft)
- 403(1) (identity fraud)

As new technologies have been increasing, the ways in which technology can be used to criminally harass, or facilitate the harassment, has been greatly expanding, and include the following:

- Sending harassing messages (sometimes forged in the victim's name) through e-mail or text message to the victim or to the victim's employers, co-workers, students, teachers, customers, friends or family.[61]
- Gathering or attempting to gather information about the victim, including private information relating to his or her home address, employment, financial situation and everyday activities, or using spyware to track website visits or record keystrokes the victim makes.
- Attempting to destroy the victim's reputation by engaging in "cyber-smearing", i.e., sending or posting false or embarrassing intimate information about or, supposedly, on behalf of the victim.[62]
- Tracking a victim's location using GPS technology (on telephones, cameras and other devices).[63]
- Watching or listening to a victim through hidden cameras or listening or monitoring devices.[64]
- Sending viruses to the victim's computer, such as software that automatically transmits messages over a period of time.
- Creating websites about the victim that contain threatening or harassing messages, or provocative or pornographic photographs.
- Encouraging others to harass the victim.[65]
- Constructing a new identity to entice the target to befriend the perpetrator.[66]

Online and offline criminal harassment are closely linked yet distinct types of behaviour, and online harassment often turns into offline harassment.[67] The most alarming difference between the two is the ease with which the perpetrator is able to collect information about the target on the Internet, as well as access his or her private online accounts.[68] Technology also enables stalkers to cause a great deal of

[61] J.A. Hitchcock, "Cyberstalking and Law Enforcement" (2003) 70:12 Police Chief 16–27.

[62] Paul E. Mullen, Michele Pathé & Rosemary Purcell, *Stalkers and their victims,* 2nd ed. (Cambridge, U.K.: Cambridge University Press, 2009) at 153.

[63] Office of the Chief Coroner. (2010) *Annual Report of the Domestic Violence Death Review Committee*. Toronto, ON, at p. 35; and C. Southworth et al. (2005) A High-Tech Twist on Abuse: Technology, Intimate Partner Stalking, and Advocacy. Violence Against Women Online Resources, online: <http://nnedv.org/docs/SafetyNet/NNEDV_HighTechTwist_PaperAndApxA_English08.pdf> (accessed 7 February 2012).

[64] *Ibid*.

[65] Mullen, Pathé & Purcell, *supra* note 62 at 154.

[66] *Ibid* at 20.

[67] Bocij, *supra* note 36 at 78.

[68] Mullen, Pathé & Purcell, *supra* note 62 at 5, 12, 15.

distress without leaving their home, which emboldens those who would not engage in offline harassment to stalk online. Moreover, the ability of the perpetrator to hide behind the mask of anonymity or to take on a false identity can make it very difficult, if not impossible, to tell the perpetrator to stop the harassment.[69]

The 2010 Annual Report of Ontario's Domestic Violence Death Review Committee (DVDRC) states that it has been finding increasing evidence that information and communication technologies are being used to harass, stalk and abuse domestic homicide victims, prior to their deaths.

The use of information and communication technologies continues to be a major theme of cases reviewed by the DVDRC. Some cases involved victims that met through online dating forums. The perpetrator in one case used the dating site to threaten and harass his victim(s). In other cases reviewed, perpetrators were known to tamper with the victim's email, including the dissemination of slanderous messages to individuals on the victim's address list and the distribution of threatening, abusive and/or excessive messages to the victim and others using email and text services. Other cases reviewed by the DVDRC identified perpetrators that downloaded tracking devices and/or "spyware" to monitor their victim's activities. Additional cases reviewed by the DVDRC identified perpetrators who monitored their victim's online journal and other social networking activities.[70]

In 2003, McFarlane and Bocij collected information from cyberstalking victims to determine whether cyberstalkers fit into the existing offline stalker typologies, or whether a specific typology for cyberstalking was warranted.[71] They determined that it was useful to modify an existing typology, developed by Wright et al. in 1996, to better capture the true nature of cyberstalking. This typology divides cyberstalkers into 4 categories based on the nature of their relationship and their motivation for the online harassment: vindictive, composed, collective, and intimate. **Vindictive cyberstalkers** were the most ferocious in their pursuit of their targets. This harassment can be triggered by anything from a trivial debate to an active argument between the parties. These cyberstalkers use the widest range of technological methods to harass their victims, and tend to have a medium to high level of computer literacy. In Wright and Bocij's research, one third of vindictive cyberstalkers had a prior criminal record, and two-thirds of them were known to have victimized others before. **Composed cyberstalkers**

[69] *Ibid* at 11.
[70] Office of the Chief Coroner. (2010) *Annual Report of the Domestic Violence Death Review Committee*. Toronto, ON, at p. 35.
[71] Leroy McFarlane & Paul Bocij, "An Exploration of Predatory Behaviour in Cyberspace: Towards a Typology of Cyberstalkers" (2003) 1 First Monday 8 9., online: http://firstmonday.org/htbin/cgiwrap/bin/ojs/index.php/fm/article/view/1076/996) (accessed 5 May 2012).

generally issue threats in an attempt to annoy and irritate the targets. These cyberstalkers do not tend to have criminal records and have a medium to high level of computer literacy. **Intimate cyberstalkers** use e-mail, discussion groups, and electronic dating sites to try to woo, or at least gain the attention of, their targets. They might be ex-partners or ex-acquaintances of the victims, or infatuates looking for intimate relationships. Intimate cyberstalkers tend to have the widest range of computer literacy, from fairly low to high. Lastly, **collective cyberstalkers** were two or more individuals pursuing corporate or non-corporate victims. Collective corporate cyberstalkers typically have taken offence for the business dealings of the corporation and are trying to discredit or silence the victim. Collective cyberstalkers of non-corporate targets typically attempt to punish a victim they believe has wronged them. Such groups may attempt to recruit others to join them in the harassment, by doing things such as giving the address of the victim to the recruits.[72]

For information about how Canadian courts have ruled on use of technology to perpetrate criminal harassment, see Part 3 The Law.

1.6.2 Online Bullying and Cyberbullying

Cyberbullying "involves the use of information and communications technologies to support deliberate, repeated, and hostile behaviour by an individual or group, that is intended to harm others."[73] Cyberbullying is becoming a growing concern in many parts of the world. The definitions of cyberbullying (online bullying) and online harassment overlap one another and some situations that are labelled cyberbullying may also be criminal harassment under section 264 of the *Criminal Code*. To date, the term cyberbullying is most frequently used to describe hostile use of technology amongst students. Students may perceive cyberbullying to be much more harmful than offline bullying. This is due to the fact that the Internet empowers the bully by broadcasting recorded abuse to a wide audience. Furthermore, once a harmful message exists in cyberspace, it exists in perpetuity. Bullying often begins on the Internet,[74] as classmates who will not engage in bullying in the open are more likely to do so when invisibility and anonymity protect them from retaliation by their peers or disciplinary measures by teachers.[75]

[72] *Ibid.*
[73] Bill Belsey, educator, quoted online: www.cyberbullying.ca (accessed 29 August 2011).
[74] Jim Gibson, "The (Not-so) Brave New World of Bullies" *Times Colonist* (Victoria) (13 March 2010).
[75] Shaheen Shariff & Leanne Johnny, "Cyber-Libel and Cyber-Bullying: Can Schools Protect Student Reputations and Free-Expression in Virtual Environments?" (2007) 16 Educ. & L.J. 307 at 3–5.

Statistics Canada released in 2011 statistics on the prevalence of self-reported cyberbullying from the 2009 General Social Survey (GSS). The GSS definition of cyberbullying encompasses a wide range of online behaviour, so not all aspects of these activities would meet the definition of criminal harassment or other *Criminal Code* offences.[76] Nonetheless, this survey provides a useful picture of the prevalence of these types of incidents in Canada as victimization on the Internet is becoming more common. The survey found that 7% of Internet users aged 18 or older had been the victim of cyberbullying in their lifetime. The most common form of bullying involved threatening or aggressive e-mails or instant messages, reported by almost three-quarters (73%) of cyberbullying victims. The second most common form of bullying involved hateful comments, experienced by over half (55%) of victims. In addition, victims of a previous violent crime were more likely to report being the victim of cyberbullying than those who had not been violently victimized (20% versus 6%). In particular, victims of sexual assault or robbery and those who reported having been the victim of two or more violent incidents within the past 12 months were most likely to have been cyberbullied; about one-third of them self-reported having been cyberbullied.[77]

This survey also looked at child victims of cyberbullying by asking adult respondents whether any of the children (aged 8 to 17) living in their household had been the victim of cyberbullying or child luring. The results showed that slightly less than 1 in 10 (9%) adults living in a household that includes a child knew of a case of cyberbullying against at least one of the children in their household. The most common form of cyberbullying against children was threatening or aggressive e-mails or instant messages, reported by 78% of adults who knew of a case of cyberbullying against a child in their household. This was followed by hate comments sent by e-mail or instant messaging or posted on a website (67%), attempts to lure or sexually solicit children (19%), and use of the identity of the child to send threatening messages (14%). Among both adult and child victims of cyberbullying, very few incidents were ever reported to the police (7% of adults and 14% of children). The low reporting rates are likely linked to the fact that the definition of cyberbullying used encompasses a wide range of behaviours, from fairly trivial to much more serious incidents.[78]

[76] "Cyberbullying" was defined for the 2009 GSS as follows: "Ever previously received threatening or aggressive messages; been the target of hate comments spread through e-mails, instant messages or postings on Internet sites; or threatening e-mails sent using the victim's identity." Samuel Perreault, "Self-reported Internet victimization in Canada, 2009" (2011) Juristat, Canadian Centre for Justice Statistics, catalogue no. 85-005-x at 2, online: http://www.statcan.gc.ca/pub/85-002-x/2011001/article/11530-eng.htm

[77] *Ibid* at 4.

[78] *Ibid* at 6–7.

Disturbingly, there have been news accounts of cyberbullied teens in Canada ending their lives in suicide.[79] One of the biggest distinguishing factors in determining whether malicious use of technology consists of criminal harassment in bullying-type cases will be whether the online conduct is merely annoying, or whether it causes the target to fear for his or her physical or psychological safety. In fact, recent research has shown that online harassment and bullying result in higher levels of trauma and stress for the victim than more traditional forms of stalking.[80] The psychological symptoms these victims experience may be more intense "due to the 24/7 nature of online communication, inability to escape to a safe place, and global access of the information."[81] The sense of humiliation they experience is often increased due to the public nature of the bullying or harassment. This type of harm was recently recognized by the Supreme Court of Canada in the civil case of *AB v Bragg Communications*, 2012 SCC 46.[82]

[79] Examples include: Amanda Todd, a 15-year old girl from Port Coquitlam B.C., whose suicide in October of 2012 was attributed to cyberbullying through the social networking site Facebook; Jamie Hubley, a 15-year old boy from Ottawa, ON, who killed himself in October of 2011 after complaining about bullying at school and on the Internet; Jenna Bowers, a 15-year old girl from Truro, N.S., commit suicide in January of 2011 after being harassed at school and bullied through a social networking site. See also: Michael Gorman, "Task force to hear from grieving mom: Murchison lost daughter to bullying" *The Chronicle Herald* (Halifax) (14 July 2011); and Pamela Cowan, "Family attributes suicide to bullying" *Leader Post* (Regina) (15 April 2011).

[80] PREVNet/SAMHSA Fact Sheets, "Physical Health Problems and Bullying": http://www.prevnet.ca/LinkClick.aspx?fileticket=5VWe%2f3H%2bbwI%3d&tabid=392 (accessed 7 May 2012); and see also Canada. Parliament. Senate. Standing Senate Committee on Human Right. *Proceedings*. (Issue No. 6, December 11, 2012).

[81] Elizabeth Carll, quoted in American Psychological Association, News Release, "Dealing with the Cyberworld's Dark Side" (6 August 2011), online: <http://www.apa.org/news/press/releases/2011/08/cyberworld.aspx> (accessed 1 September 2011).

[82] In this case the Court highlights the need to protect young victims from the inherent harms of cyberbullying as these cases are brought through the justice system. The case involved a 15 year old victim of Facebook cyberbullying who requested to proceed anonymously in her application for an order requiring disclosure of the perpetrators' identities. In the judgement, Justice Abella references the 2012 *Report of the Nova Scotia Task force on Bullying and Cyberbullying* noting that the girl's privacy interests are tied to the relentlessly intrusive humiliation of sexualized online bullying. The Court found that while evidence of a direct, harmful consequence to an individual applicant is relevant, courts may also conclude that there is objectively discernable harm. The ruling allowed the teenager to pursue the case using only her initials but did not impose a publication ban with respect to the non-identifying Facebook content. A.Wayne MacKay, *Respectful and Responsible Relationships: There's No App for That: The Report of the Nova Scotia Task Force on Bullying and Cyberbullying* (Feb.2012*),* online: http://cyberbullying.novascotia.ca/media/documents/Respectful%20and%20Responsible%20Relationships,%20There's%20no%20App%20for%20That%20-%20Report%20of%20the%20NS%20Task%20Force%20on%20Bullying%20and%20Cyberbullying.pdf (accessed 12 October 2012).

Part 2

Guidelines For Police: Investigating Criminal Harassment

The investigation of criminal harassment cases involves basic case development as well as the use of crime detection strategies. It may differ somewhat from investigation of other violent offences in that criminal harassment often involves conduct that, in isolation, appears innocent and harmless. As criminal harassment is often a progressive crime that wears down its victims over time, early, effective intervention can go a long way toward preventing more serious psychological harm and escalation of the harassment into violence or homicide. The objective of a police investigation in these cases is two-fold: to stop the harassment, as well as any other acts of violence, at an early stage; and to collect evidence to present a compelling case for prosecution. Since criminal harassment is a crime that may include a pattern of behaviour carried out against the victim over an extended period, an investigation can be time consuming and may involve numerous police reports.

Many targets of harassment say that one of the most frustrating aspects of being harassed is "not being taken seriously" by those whom they tell about the harassment. "Many stalking victims spend an inordinate amount of time attempting to convince others that they are being stalked and that they are in danger. Stalking victims need their experience and their response validated as normal reactions to a very abnormal situation. They also need the risk they face, and their requirement for protection, to be taken very seriously."[83]

Police practices and policies may vary from one jurisdiction to another. These guidelines should be considered in conjunction with other applicable policies (including provincial policies relating to spousal assault) and forms, as well as other remedial legislation (such as provincial civil legislation for victims of family or domestic violence). Keeping the victim informed and involved in the investigation is important in any offence, particularly in cases involving partner or spousal abuse.

The police guidelines in this handbook are based on strategies developed by the Vancouver Police Department's Criminal Harassment Unit. This unit has found that police intervention is most effective once the nature of the stalking case has been identified and a strategy has been developed to manage and, ideally, resolve the problem.

[83] Arnott, George, & Burkhart, *supra* note 35 at 101.

Investigators should be aware of **"false victimization syndrome"** involving cases where a complainant may falsely allege a case of criminal harassment. The motives for these complainants to falsify an allegation of stalking include: the need for an alibi or excuse for personal behaviour; the desire for reconciliation or a closer attachment to someone by placing that person in the role of rescuer; the need for revenge against someone who has rejected them or threatens their security; or to attract attention and sympathy.[84] Note that it should not be concluded that a victim is making false accusations without extremely thorough investigation: "all victim reports warrant careful, complete, and timely investigation characterized by professionalism and respect that will prevent any secondary victimization by the investigating process."[85]

2.1 Complainant Interview

This section of the Handbook, and many of the sections that follow, suggest methods of collecting evidence and types of evidence to collect. Courts in different jurisdictions may look for specific types of evidence, so it is important to be familiar with and use local precedents and inventories where they exist. Consulting with specialized police officers and units with expertise in the area of your investigation, for example criminal harassment, intimate partner violence, or child victims is highly recommended whenever possible.

- ❒ Interview the complainant thoroughly. Advise the complainant to be specific and accurate, and to neither minimize nor exaggerate. Police also must not minimize the situation. The possibility of stalking and the future risk of physical violence should be considered whenever a harassment-type offence is reported (such as harassing or obscene phone calls, following, or unusual incidents involving mischief or vandalism).

- ❒ Do not disregard the context in which the stalking behaviours are happening. "The whole story needs to be heard" from the perspective of the complainant's history with the suspect in order to properly assess the reasonableness of the complainant's fear in the circumstances.[86]

[84] K. Mohandie, C. Hatcher, D. Raymond (1998). In J. R. Meloy (Ed.), *The psychology of stalking: Clinical and Forensic Perspectives* (pp. 225-256). New York: Academic Press. The authors state that false victimization is relatively rare and accounts for about 2% of stalking cases in their experience. They caution that "The exploration of this issue should not in any way undermine the important advances made by modern law enforcement in responding to crime victims. Specifically, in the investigation of certain types of crime where women are the primary victims and men the primary offenders, such as rape, there have been problems overcoming a bias that such crime may have, in some way, been victim precipitated." at 227.

[85] *Ibid*.

[86] Family Service Regina, *Stalking and the Crime of Criminal Harassment* (Regina: Family Service Regina, no date).

- ❒ Be sensitive to the personal situation of victims and their state of mind, including the psychological and emotional distress that they are likely experiencing. They may require the assistance of a support person and/or interpreter. Keep in mind that due to the cumulative effect of repeated harassment and fear, targets may become hyper-sensitive and appear to be overreacting to individual incidents, if not considered in light of all that has occurred.[87]

- ❒ Inform the complainant that criminal harassment is a criminal offence. Emphasize the seriousness of the offence. Be clear with the complainant regarding the potential threat.

- ❒ Obtain a detailed chronology of all relevant incidents, including words uttered or gestures made by the suspect, and conversations and other communications with the suspect. Complainants usually need sufficient time, a calendar, and access to their own papers and documents to produce a clear chronology. Determine whether and how the victim has directly or indirectly, through family or friends, indicated to the suspect that any contact is unwelcome. Ascertain where and when the conduct occurred, as these factors can affect the victim's fear.

- ❒ Ascertain whether the incident(s) involved others or occurred in the presence of others (such as family, friends, co-workers or neighbours).

- ❒ Obtain background information on any previous relationship between the victim and the suspect (such as whether there have been any previous incidents of domestic violence; whether the victim has communicated to the suspect any interest in a reconciliation; or whether any friends or family have been pressuring the victim to reconcile with the accused or to not contact the police).

- ❒ Obtain information about the impact that the suspect's conduct has had on the complainant. One effective way to do this is to ask the complainant to describe a typical day before the criminal harassment began, and then to describe a typical day since the criminal harassment has begun.[88] Has the conduct caused the complainant to fear for his or her safety, or that of someone known to him or her? If so, how? Has the complainant taken any security or preventative measures, such as getting an unlisted telephone number, or changing his or her residential or work address? Has the complainant sought medical treatment or counselling?[89] (See the list of specific examples of types of impacts in 2.13 Police Report to Crown Counsel).

[87] For a more detailed discussion of survivor patterns of revealing family violence see: Linda C. Neilson, "Enhancing Safety: When Domestic Violence Cases are in Multiple Legal Systems (Criminal , Family, Child Protection). A Family Law, Domestic Violence Perspective." (30 June 2012), at pp. 17-20, online: http://www.learningtoendabuse.ca/sites/default/files/Enhancing_Safety.pdf.

[88] Rhonda Saunders, "Proving a Stalking Case", at <http: www.stalkingalert.com/lawenforcement.htm> (accessed 10 May 2012).

[89] Please note that though the answer to this question is potentially relevant to the investigation, asking this question risks impacting the complainant's privacy rights because it could prompt the defence to make an application for disclosure of related records.

- ❒ Where the complainant and suspect had a prior intimate relationship involving children, ask the complainant whether they are currently involved in a custody or access legal action. Determine what, if any, custody and access, or parenting order, terms and conditions apply.

- ❒ The interview with the complainant is an important source of information that will help police complete a thorough background check on the suspect. Note that this is merely in addition to a thorough police records check. Sometimes, the complainant may be able to provide details that may not appear in a police records check, such as information on the existence of a civil protection order. Ask the following questions, for example:
  - Is the suspect subject to any peace bonds; civil restraining orders; recognizance, bail or probation conditions; or weapons or firearms prohibition orders? If so, can the complainant provide a copy of the order(s) and/or the relevant details?
  - Does the suspect have any guns, or any access to other firearms or other weapons? Does the suspect have a weapons licence, registration certificate or authorization, or a similar document issued under the former *Criminal Code* provisions? Has the suspect ever had a licence, registration certificate or authorization for a firearm revoked?

- ❒ Be aware that certain victims in special circumstances may face additional difficulties inaccessing the criminal justice system. These vulnerable victims include the following:[90]
  - Immigrant victims may be unfamiliar with Canada's legal system, may be facing language or cultural barriers to communication, and may be experiencing economic instability or dependency on their stalker. In turn, the stalker may be using their native country's traditional mores or the threat of deportation to maintain control over the victim.
  - Intimate partners in an abusive same-sex relationship who have not yet self-identified to others may fear that that their sexual orientation may be disclosed, and may find it difficult to tell a police officer about the nature of their relationship with the perpetrator.
  - People with disabilities are often more vulnerable to their former intimate partners because prior dependency may have offered the stalker access to a wealth of information about the victim. In addition, the limited nature of specialized support services makes it easier for stalkers to trace the victim's daily routine and whereabouts.
  - Individuals suffering from mental illness may have trouble convincing the authorities that they are being stalked. This is particularly true in a scenario where the stalker is calm and articulate, while the victim may be confused or experiencing severe anxiety. In addition, the stalker may rely on the victim's mental illness to support the claim that the victim's fear is irrational or pretend to be concerned for the victim's well-being.

[90] Arnott, George & Burkhart, *supra* note 35 at 102–104.

- Individuals whose stalkers are technologically-savvy may be more vulnerable to having their online activity monitored, their electronic communications tampered with, personal information accessed, and/or physical location tracked. These victims should be especially alert to their stalkers seeming to have information that the victim has not shared with them, or having an uncanny ability to show up at the same location as the victim. It is important for these victims and their advocates to access information on safety planning concerning technology.[91]
- Male victims may experience increased difficulty in seeking protection from a stalker. For example, they may feel that their fears may not be taken seriously where the perpetrator is female. Also, in some communities, expressing a fear of this nature may be seen to be at odds with the traditional male role and could lead to ridicule or social rejection.[92]

2.2 Advice to the Complainant

❒ Remind complainants that the potential threat remains, even if they have reported the incident to police and/or obtained a restraining order. Advise them that they have a primary role to play in ensuring their own safety. Recognize that, although it is not fair, victims may be required to alter their lifestyle and usual routines, schedules, transportation routes and places regularly frequented. Emphasize the importance of self-care in order to avoid extreme stress and exhaustion, which may decrease their ability to stay alert or follow a safety plan.[93]

❒ Advise the complainant not to initiate contact with the suspect or agree to such contact.

❒ Advise complainants to tell the stalker to leave them alone only once and not to respond to the stalker's subsequent communications, regardless of whether they are threatening or polite. Victims should also avoid trying to bargain or reason with the stalker, as such actions may be perceived by the stalker as encouragement or a sign of weakness, and thus increase the potential risk of harm to the victims.[94]

❒ Advise the complainant to maintain a log of all contact (date, time, nature and summary of contact) with the suspect, including drive-bys and all unusual events, no matter how trivial they seem or whether they can be definitively attributed to the suspect. Advise the complainant that this includes keeping records of any indirect contact the suspect initiates by having the suspect's friends and relatives contact the complainant on the suspect's behalf.

[91] Office of the Chief Coroner. (2010) *Annual Report of the Domestic Violence Death Review Committee*. Toronto, ON, at p. 36. See for e.g., National Network to End Domestic Violence "Technology Safety Planning with Survivors", online: <http://nnedv.org/docs/SafetyNet/NNEDV_TechSafetyPlan_CanadaEnglish_BC_2011.pdf> (accessed 30 July 2012).

[92] For a further discussion of recent findings with regard to male victims, see Stephanie Ashton Wigman, "Male victims of former-intimate stalking: A selected review" (22 June 2009) International Journal of Men's Health.

[93] Arnott, George & Burkhart, *supra* note 35 at 111.

[94] *Ibid* at 108.

- ❒ Advise the complainant to retain for police all notes, gifts, telephone answering machine tapes and messages, e-mail and postings, and any other evidence related to the investigation. Ask the complainant not to handle or open any items received from the suspect, in order to prevent further distress and to avoid contaminating evidence that might be needed for purposes of forensic analysis.

- ❒ Advise the complainant to use available telephone services that may help police trace telephone calls. Such pay-per-use services may include "last call return" (which enables the victim to find out who called last by entering the appropriate tracing code immediately after every call and before any other call is received) and "name that number" (which enables the victim to obtain the name and locality associated with a given telephone number). The complainant should be advised to consider subscribing to other telephone services, including call screening and call display. Whether a victim should change his or her phone number or get an unlisted one can be controversial. For example, some victims would rather get the unwanted calls than change their number as they feel more secure being able to track and record phone calls, rather than just having the suspect show up unexpectedly on their doorstep. If this is the case, complainants may get some relief by getting a second number to share with only trusted individuals, and keeping the original one solely to record messages without having to answer it and risk having to speak to the suspect. Investigating officers should consult the telephone company for current services and tracing codes. Officers should also advise complainants as to the best type of answering machine or answering service to have for the purpose of recording and retaining messages for use as evidence.

- ❒ Advise the complainant to consult with someone who has been trained to advise victims on ways to use technology strategically to increase safety and privacy, and assist them in considering ways in which their technology use may make them vulnerable to the suspect. For example, they may want to consider changing cell phone numbers, and e-mail addresses, as well as removing their profiles and photographs from social networking sites such as Facebook, MySpace, and Twitter, as well as asking friends, family and other contacts not to reference them or post photos that include them on such sites. They may also want to consider: whether they use any GPS capable devices from which the suspect could use data to help stalk and locate them; how easily their cordless phones, baby monitors and cell phones can be monitored; whether the suspect may be hacking into or recording their computer use; and whether they have any passwords or pins that the suspect may know or be able to guess easily. Some police and victim services may be knowledgeable in this area, or be able to refer the victim to someone who is.[95] If you are not able to find anyone who can advise the victim on these issues, you may want to suggest they contact the American "Safety Net Project" at 1-800-799-7233 or http://nnedv.org/projects/safetynet.html.

[95] National Network to End Domestic Violence "Technology Safety Planning with Survivors", online: <http://nnedv.org/docs/SafetyNet/NNEDV_TechSafetyPlan_CanadaEnglish_BC_2011.pdf> (accessed 30 July 2012).

- ❒ Suggest that the complainant inform relatives, neighbours, friends, co-workers, employers, property managers and doormen of the ongoing harassment and, if possible, provide them with a photograph of the suspect. These people should alert the victim and/or police about any contact. This will enhance the complainant's safety and provide a larger pool of potential witnesses.

- ❒ Help the complainant contact victim services for support and assistance as soon as practicable after the complaint has been made. Early intervention by victim services enhances the victim's safety and increases the likelihood of cooperation with the criminal justice system. Victim service workers play a significant role in helping victims to identify risks and to develop and implement a personal safety plan for themselves and their children. Referrals should be made as soon as possible to allow the complainant to receive emotional support, appropriate referrals, information about the justice system and assistance in developing a safety plan.

- ❒ Provide the complainant with an occurrence report or incident number, and advise her or him to quote that number when making future complaints or inquiries. Provide the name of one officer who will be responsible for coordinating the investigation, even if other officers become involved.

- ❒ Advise the complainant of any decision to lay charges, of dates of significant proceedings, and of decisions made to detain or release the suspect from custody.

- ❒ Advise the complainant of other available types of protective relief such as civil protection orders, restraining orders and no-contact orders, available through family court orders, if applicable, and civil domestic/family violence legislation. (For more information see 2.11.3 Peace Bonds, Civil Protection Orders, and Civil Restraining Orders).

- ❒ Ensure that the complainant is provided with copies of conditions of release and sentencing and advise the complainant to carry a copy of any criminal or civil protection/restraining orders at all times.

2.3 Victim Welfare

Take appropriate action to increase the complainant's security, such as the following:

- ❒ Inform the complainant about the importance of security measures, such as making safety or contingency plans; carrying a fully charged cellular phone; installing better locks, improved lighting and a security system; getting a guard dog; and identifying safe places, including police stations, domestic violence shelters and busy public areas.

- ❒ Have a panic alarm installed, either privately or through local victim protection programs, where available.

- ❒ Flag the complainant's address on police databases (such as premise history on CAD systems).

- ❒ Ensure patrol officers are aware of the complainant and suspect, and are provided with the complainant's address details, suspect photo and vehicle information, and priority response.

- ❒ If the suspect does not have any firearms, apply for a preventative prohibition order under section 111 of the *Criminal Code*. If the suspect does have firearms, seize the firearms pursuant to section 117.04 of the *Criminal Code*.

- ❒ Relocate the complainant when the threat level is high or, in extreme cases, it may be advisable to explore the possibility of a secure identity change. Contact the Confidential Services for Victims of Abuse (CSVA) within the relevant jurisdiction or federally, through Service Canada, for more information.

- ❒ Address the special needs of complainants who face particular barriers. Cultural, communication, mobility, age and other barriers can increase the victim's risk.[96]

- ❒ Help complainants protect their children by identifying local services for children who may be affected by violence. Children's safety and emotional health are affected, whether or not they witness the threats or violence.

Note that stalker violence is usually affective, as opposed to predatory,[97] so complainants and officers need to be aware of dramatic moments, such as the termination of a relationship; the arrest of the suspect; court dates, particularly those when court orders are made and sentences are rendered; custody proceedings; and release or escape from custody.[98]

2.4 Collecting Evidence: Information to Investigate and Document

- ❒ Ask the complainant about, and query all relevant databases for, information on the suspect. Search under known aliases as well. Databases queried should include Canadian Police Information Centre (CPIC), Canadian Firearms Registration Online (CFRO),[99] Special Interest Police (SIP), Firearms Interest Police (FIP), local and provincial information systems, and available probation information sources (for summary conviction offence details not captured by the Criminal Name Index (CNI)/Level II). Where applicable, immigration and refugee authorities may have relevant information. In some cases, consider contacting prison institutions for further information on the conduct of the suspect, or relevant information relating to the complainant. These queries should include searches for criminal records, prior contact with police and contact with police in communities where the suspect may have previously lived. If the criminal record indicates similar

[96] *B.C. Protective Measures for Women's Safety: An Operational Framework for Justice System Intervenors*, 2004 [unpublished].
[97] B. Vitellio *et al.*, "Subtyping aggression in children and adolescents" (1990) 2 J Neuropsychiatry Clin Neurosci 189–192, defines "affective" as "impulsive, unplanned, overt, or uncontrolled," and "predatory" as "goal-oriented, planned, hidden, or controlled".
[98] It's important to keep in mind that stalkers, especially obsessional ones, often do not have extensive criminal histories. As such, "light" criminal records do not necessarily indicate that the stalker is not dangerous.
[99] Note that the Restricted Weapon Registration System (RWRS) is no longer available through CFRO. It is now available only through CFRS terminals, which chief firearms officers (CFOs) can search.

charges, determine the identity of the victims in those cases and the nature of their relationship with the accused.[100] These queries should cover the following:

- Nature, frequency, and specific details of threats and actual violence against the complainant or someone known to the complainant (note whether they are increasing in frequency and intensity);
- Prior threats against the complainant or someone known to the complainant;
- Actual pursuit or following of the complainant or someone known to the complainant;
- History of violence (including sexual assault) against the complainant or someone known to the complainant;
- Violations of civil restraining orders, peace bonds, recognizances, or bail or probation conditions;
- Information on the suspect's tendency toward emotional outbursts or rage;[101]
- Other incidents involving threats, violence or pursuit, including cruelty to animals;
- Homicidal or suicidal behaviour or threats;
- Major stress factors, such as loss of employment or termination of a relationship;
- Vandalism to the victim's property;
- Intense jealousy, including sexual jealousy;
- History of mental illness; and
- Substance abuse problems.

❒ In cases of former intimates involving children, include any history of involvement with child protection authorities.

❒ Determine possession of or interest in weapons or access to weapons (search CPIC, including CFRO and FIP, as outlined in Appendix A: Experts: Police Specialists). Determine the following, for example:

- Whether there are any weapons prohibition orders flowing from conviction or discharge, as a condition of bail or recognizance, or in preventative prohibition orders;
- The type of firearms documentation the person has (for example, does the suspect have restricted firearms, and how many firearms does the suspect have?); and
- Whether authorities have ever refused or revoked a licence, registration certificate or authorization (or Firearms Acquisition Certificate, permit or registration certificate under the former firearms provisions of the *Criminal Code*).

Any information discovered should be entered into the FIP database. This would include any conduct that gives rise to concerns about violence, including criminally harassing behaviour. If the information is not entered in FIP, then Chief Firearms Officers (CFO) will not be advised. They will not know whether to

[100] In other words, an assault conviction may not tell the whole story. The victim of an assault may have been a previous partner whom the accused stalked and assaulted; plea negotiations often result in pleas to less stigmatizing offences and a previous conviction may not convey the seriousness of the context of the offence.
[101] Including expressions of rage with strangers, such as road rage.

consider revoking existing licences and will not have this information when considering new applications. This type of information is crucial when CFOs are deciding whether to issue or revoke a licence.

2.5 Additional Investigative Techniques

Investigative techniques to gather corroborative evidence might include the following:

- ❒ Photograph any items vandalized, damaged or written on;
- ❒ Check for fingerprints on vandalized items or other objects sent to or left for the complainant;
- ❒ Obtain telephone and cellular[102] phone records of the complainant and suspect, which may provide evidence of calls. Because many service providers have limited retention periods for texting and phone records, it is prudent to obtain a production order for these records as soon as possible;
- ❒ Have the complainant acquire a telephone answering machine and retain recorded messages;
- ❒ Interview any potential witnesses, such as neighbours, family members, friends and co-workers;
- ❒ Research the suspect's whereabouts during the times of alleged acts to rebut or verify "alibi defences";
- ❒ In serious cases, consider surveillance, which may include static surveillance of the complainant's residence or other locations where harassment is occurring, mobile surveillance of the complainant at points of vulnerability (such as times when he or she is travelling between home and work) to gather evidence that the suspect is following the complainant, and surveillance of the suspect; and
- ❒ To support previous claims of intimate partner violence where injuries required medical treatment (for the complainant and/or children, if applicable), consider getting the complainant's consent for the release of his or her medical records. Also, try to secure any records relating to previous incidents of intimate partner violence, including those that were not reported to the police.

2.6 Collecting Technological Evidence

Investigators should not be intimidated by collecting evidence related to technology; everything they already know about investigation and law is still valid. However, it is important to not get overconfident with examining technological evidence. Computers should only be investigated by the appropriate experts. Data are extremely volatile and there is a great risk of accidentally erasing key data. For this

[102] Note that an expert may be able to give evidence as to where the cell phone was situated when a call was placed. A statement such as, "If you don't pick up your phone right now, I'm going to come in there," is much more threatening if it is made when the accused is out front in his car than when he is calling from further away.

reason, it is also important to act quickly to obtain volatile technological evidence, such as data on a computer and records at an Internet Service Provider (ISP), while the data is still available.

Several types of evidence can be used to prove that criminal harassment has occurred through the use of technology, for example: saved or printed screen captures of websites or e-mail correspondence from a complainant's computer; records from the ISP; and data or records from the suspect's computer or storage devices. Evidence may also be obtained from other devices, including cell phones, voice mail services, GPS instruments, and cameras. When the complainant consents to the viewing of cell phone information, such as text messages, it is possible to take note of the date, time and phone number from which the messages were sent, and the wording of the message. Sometimes this can be done by taking photographs of the phone's screen to capture an immediate record of the details and to corroborate the complainant in the event that the data cannot be retrieved from the phone at a later date, is lost by the time of the trial, or cannot be obtained from the service provider. Seizing the victim's evidence-containing electronic devices will help to preserve the evidence and will be useful for forensic examination.

Detailed instruction on how to locate and collect this type of evidence is beyond the scope of this publication.[103] It is important, however, to be mindful that because of the rapid growth of technology, and its use in society, specific laws, procedures, and court interpretation related to technological evidence are evolving at a faster pace than most of the other laws on criminal harassment. Consequently, it is critical to keep abreast of legal requirements for search warrants, production orders, data preservation requests and foreign cooperation requests when conducting investigations involving technological evidence. While police officers are the primary actors in obtaining this type of evidence, Crown attorneys are important advisors in determining the appropriate means of legally obtaining this evidence.

It is important to collect evidence that proves that the suspect was the one using the technological devices at the time of the offence, for example that places them at the keyboard or in possession of the cell phone at the relevant time, if possible. This might require evidence from others who live with the suspect and have access to his computer.

Once all technological evidence is collected, it is important to consider the need for forensic examination and analysis reports and testimony.

[103] Much of the overview information provided in this section, has been summarized from a presentation by Julie Roy, Alberta Justice Crown Prosecutor, titled "Cyber Stalking: Investigation and Prosecution" at the "In the Mind of a Stalker Workshop" hosted by ALERT (Alberta Law Enforcement Response Teams) and I-TRAC (Integrated Threat and Risk Assessment Centre)(Edmonton: 19 April 2012).

2.7 Physical Evidence

- ❒ ***Seize all physical evidence; do not leave this evidence with the complainant.*** Common sources of physical evidence include the following:
  - Taped phone messages (record all relevant voice mail messages);
  - Letters, notes, documents, photographs, diaries, and any other record or item made by the suspect regarding the complainant;
  - Relevant medical records;[104]
  - Documents containing the signature and handwriting or hand printing of the suspect;
  - Computer hard drives, portable digital storage devices (e.g. memory sticks), and cell phones containing, for example, e-mail and text messages and poems by the suspect that concern the complainant or were sent to the complainant; and
  - Hard copies of e-mail messages from the suspect to the complainant.

2.8 Search Warrants

- ❒ If necessary, seek advice from experts (listed at Appendix A: Experts: Police Specialists) to assess the type of stalking behaviour in question, in order to determine what collateral material might be included in the warrant, and whether to seek a public safety warrant under section 117.04 of the *Criminal Code* or a weapons search warrant under section 487.

- ❒ Where reasonable grounds exist, consider executing search warrants of the suspect's residence, vehicle and any recreational property to seek the following:
  - Photographs of the complainant;
  - Photographs, diagrams or drawings of the complainant's home or workplace;
  - Writings, logs or diaries kept by the suspect that describe stalking activities or thoughts or fantasies about the complainant or other victims, including information contained in computer files, storage devices, or other portable technology devices such as cell phones;[105]
  - Personal items belonging to the complainant;
  - Videotapes or audiotapes that might contain information concerning the stalking, such as surveillance footage;
  - Any collateral material—including books, journals, or other materials and electronic documentation or data—describing stalking techniques or containing subject matter dealing with stalking, harassment or violence;
  - Any equipment that appears to have been used to "stalk" the complainant, such as cameras, binoculars, video recorders, computer hard drives and digital storage devices;
  - Clothing worn by the suspect during the stalking episodes; and
  - Firearms, weapons, knives and ammunition belonging to the suspect.

[104] See the last bullet in Part 2.5 for elaboration.
[105] Also consider looking for materials in the suspect's handwriting for the purpose of handwriting analysis or comparison.

Note that firearms and weapons are treated separately under the *Criminal Code*, as shown by the following examples:

- **Section 117.02** authorizes a warrantless search for weapons, except in a dwelling house, where an offence has been committed and the grounds for obtaining a warrant exist but, because of exigent circumstances, it is not practicable to obtain the warrant.

- **Section 117.03** allows police to seize firearms and other items if they find someone in possession of such items without proper documentation.

- **Subsection 117.04(1)** enables police to apply to a justice for a warrant to search for and seize any weapon (including firearms), prohibited device, ammunition, prohibited ammunition or explosive substance, as well as any licences, registration certificates or authorizations held by or in the possession of the suspect, if there are reasonable grounds to believe that continued possession of weapons by the suspect poses a risk to public safety.

- **Subsection 117.04(2)** authorizes such a search and seizure without a warrant in exigent circumstances. If police do not find any documents relating to seized weapons, all such documents held by the suspect at that time are automatically revoked.

2.9 Expert Assistance

When dealing with cases involving criminal harassment or stalking, investigators may wish to seek the assistance of experts in this area, who may include forensic psychologists and psychiatrists, criminal police threat specialists, computer forensic specialists and firearms investigation specialists. Expert assistance can include help with the following:

- risk assessment (see also 2.10 Threat and Risk Assessments)
- risk management strategies
- acquisition of search warrants, public safety warrants,[106] production orders, or weapons prohibition orders
- interview strategies
- intervention strategies
- expert evidence[107]
- determination of characteristics and traits of an unidentified or unknown suspect (suspect profiling)

See Appendix A: Experts: Police Specialists for police agencies with expert personnel who provide additional guidance in criminal harassment cases, where required.

[106] Warrants under section 117.04 of the *Criminal Code* to search for and seize weapons to decrease risks to public safety.
[107] Such evidence can include expert interpretations of cell phone records.

2.10 Threat and Risk Assessments

The safety of the complainant is of paramount concern at all times and takes priority over "evidence-gathering" or "making a case." Each case must be treated seriously until evidence indicates otherwise. It is crucial to keep in mind that threat and risk assessments are contextual[108] and only relevant for a specific period. Factors should be updated and re-evaluated as needed for subsequent decision-making. Furthermore, although this process can help the parties make decisions, the absence of "identified risk markers" does not mean that violence will not occur.[109]

The appropriate level or type of intervention in a given case cannot be determined until a threat assessment or risk assessment has been made. While the terms are often used interchangeably, "threat assessment" refers to the process of assessing the risk of violence that the suspect poses to the complainant and assessing the potential impact of contemplated type of intervention on the complainant's safety. The term "risk assessment" refers more specifically to a developing body of research and tools aimed at improving the ability of various professionals in the criminal and civil (forensic) justice systems to evaluate "individuals to (a) characterize the risk that they will commit acts of violence and (b) develop interventions to manage or reduce that risk …".[110]

Threat assessment, which need not be "formal," should consider the typology of the stalker and the history or nature of the relationship between the suspect and the complainant. For example, it should consider all acts of violence, including threats, damage to property and harm to the complainant's pet. It is also important to watch for a sudden change in the frequency or severity of harassing behaviour; both an escalation and a sudden decrease in stalking activity may indicate a heightened risk of violence.[111] Assessment tools for one type of offence may not be applicable to another offence. Threat assessment should involve considering all available evidence, as well as all records of police action. It should take into account relevant research findings, such as the facts that the risk of physical harm to a victim fleeing domestic violence is highest during the first three months of separation, and that such violence often arises from long-term problems or a history of violence.[112]

[108] P.R. Kropp, S.D. Hart & D.R. Lyon, "Risk Assessment of Stalkers: Some Problems and Possible Solutions" (2002) 29:5 Criminal Justice Behavior 590 at 600.

[109] Ad Hoc Federal-Provincial-Territorial Working Group Reviewing Spousal Abuse Policies and Legislation, *Final Report: Spousal Abuse Policies and Legislation* (Ottawa: Department of Justice Canada, March 2003), online: <http://www.justice.gc.ca/eng/rp-pr/cj-jp/fv-vf/pol/spo_e-con_a.pdf> at 73: "The science of predicting domestic violence is in its infancy. Data on the reliability, validity and predictive accuracy of risk assessment tools are so scarce as to be 'practically non-existent.'" Data related to predicting criminal harassment violence are even scarcer.

[110] Kropp, Hart & Lyon, *supra* note 108 at 599.

[111] Arnott, George & Burkhart, *supra* note 35 at 97.

[112] For more information on risk assessment in relation to criminal harassment and stalking, including the relevance of typology to assessment and the process of constructing a menu of risk factors, see Kropp, Hart & Lyon, "Risk Assessment of Stalkers," *supra* note 108 at 590–616.

Several risk assessment and management tools are now being used across Canada. Justice Canada's 2009 report, *Inventory of Spousal Risk Assessment Tools Used in Canada*,[113] lists these tools, as well as investigative protocols and checklists used across the country.[114]

In choosing tools and protocols to use to assess and manage the risk of criminal harassment and related violence, remember that each tool has been developed to predict the likelihood of a certain outcome within a certain context. In fact, many of the tools used across Canada were developed specifically for use in cases of intimate partner violence. For example, the *Spousal Assault Risk Assessment Guide* (SARA) was designed to assess the risk of an individual being violent against a spouse. On the other hand, the *Danger Assessment* has two parts: the first is a tool to help raise the victim's awareness of the degree of risk he or she faces; and the second "presents a weighted scoring system to count yes/no responses of risk factors associated with intimate partner homicide."[115]

A few risk assessment and management tools were designed specifically for use in responding to stalking. In Canada, the Guidelines for Stalking Assessment and Management (SAM) were created to guide the professional judgment of law enforcement, criminal justice, security and mental health personnel in situations involving stalking.[116] The developers of the SARA and the Risk for Sexual Violence Protocol (RSVP) also created the SAM, which is used in cases where there is a known or suspected perpetrator with a history of stalking a single primary victim. The SAM focuses on three categories of factors: the nature of the stalking, the perpetrator risk factors and the victim vulnerability factors. Those using the SAM should have prior training or experience in working with stalking victims or perpetrators, as well as expert knowledge of the relevant literature.[117] The SAM User Manual suggests a number of ways to provide the recommended one to two days of training.

With such a variation in the approaches to risk assessment and the tools available,[118] professionals need to consider a number of factors when determining which tool to use in which circumstances, including the following:

- What type of information is available to the individuals doing the assessment?
- Are any specific professional qualifications required to use the tool under consideration?

[113] Allison Millar, *Inventory of Spousal Risk Assessment Tools Used in Canada* (Ottawa: Department of Justice Canada, 2009), online: <http://www.justice.gc.ca/eng/rp-pr/cj-jp/fv-vf/rr09_7/index.html> (accessed 21 June 2011).

[114] For more information on the predictive ability of commonly used risk assessment tools, see R.K. Hanson, L. Helmus & G. Bourgon, *The validity of risk assessments for intimate partner violence: A meta-analysis* (Ottawa: Public Safety Canada, 2007, user report no. 2007-07).

[115] Dangerassessment.org online information and training website, online: <http://www.dangerassessment.org/> (accessed 21 June 2011).

[116] Kropp, Hart, & Lyon, *supra* note 38 at v.

[117] *Ibid* at 6-8.

[118] For a comprehensive overview of the various approaches to risk assessment and management in cases of intimate partner violence, see P.R. Kropp, "Intimate partner violence risk assessment and management" (2008) 23:2 Violence and Victims, 202–220.

- For which population group is the tool effective? For instance, which gender of perpetrator does it apply to? Does it apply only to intimate or non-intimate relationships? Does it apply to specific cultural or ethnic groups? Which gender of victim does it apply to? Does it predict the risk of the type of outcome you are trying to assess and manage?

The RCMP; the Ontario Provincial Police (OPP), Behavioural Sciences and Analysis Section, Threat Assessment Unit; and the Sûreté du Québec (SQ) Behavioural Science Section; all have threat and risk evaluation specialists who can perform these types of assessments for the law enforcement community. In Alberta, the Integrated Threat and Risk Assessment Centre (I-TRAC) is a joint-forces multi-disciplined unit that provides law enforcement, child protection, prosecutors and corrections with threat assessment services and proactive approaches to reduce acts of intimate partner violence and intimate and non-intimate acts of stalking. I-TRAC services include assessing the level of risk an individual poses, providing case management strategies, training, safety planning, expert testimony and facilitating access to external agencies including mental health, and specialized law-enforcement and criminal justice units. All of these organizations have robust training programs for their specialists, who can assess violence potential in many types of cases, not just criminal harassment cases.

Once the threat or risk assessment has been completed, the investigation and case management strategy should be formulated and implemented. Options are listed below; they can be used individually or in combination, depending on the situation.

2.11 Level of Intervention

The level of intervention in cases of criminal harassment must always be carefully tailored to the individual perpetrators and complainants involved. Bear in mind that a victim's response will affect the level of risk. In a 2005 study, researchers looked at four risk assessment tools and at the accuracy of the victim's predictions that her partner or ex-partner would physically abuse or seriously harm her in the next year. They examined the correlations between recurrence of violence and protective measures that victims had taken.[119] It appears from the results that different protective measures have different effects on repeated perpetration, depending on whether the original offence was minor assault, severe assault or stalking. For example, some protective actions, such as going to a shelter or arresting the perpetrator at the time of the original offence, seemed to be most effective for all three offence types studied. However, other actions like getting a protection order appeared to be much more effective at preventing further victimization in situations when one has been assaulted as opposed to when one has been stalked. The researchers also examined other protective measures, including going to a place where the victim thought the perpetrator couldn't find her, no longer living with or being intimate with

[119] J. Roehl *et al.*, *Intimate Partner Violence Risk Assessment Validation Study: The RAVE Study Practitioner Study and Recommendations: Validation of Tools for Assessing Risk from Violent Intimate Partners* (May 2005, revised December 2005) [unpublished], online: <http://www.ncjrs.gov/pdffiles1/nij/grants/209732.pdf> (accessed 21 June 2011); and J. Campbell and A.D. Wolf, "Community Approaches to Intimate Partner Violence Risk Assessment: Challenges and Strategies," presented at "Reducing the Risk of Lethal Violence: Collaboration in Threat Assessment and Risk Management: From Theory to Practice" 8 February 2010, London, Ontario, online: <http://www.crvawc.ca/documents/Campbell%20risk%20assessment%20presentation.pdf> (accessed 21 June 2011).

the perpetrator, avoiding voluntary contact with the perpetrator and filing a criminal complaint.[120] What emerges from the research is the importance of fitting the response to the situation. There is no one solution for all instances of stalking or intimate partner violence.

2.11.1 No Intervention

In a small number of cases, it may be best to monitor the situation without taking action. This is particularly true for cases involving mentally disordered stalkers who may escalate their activity if the victim or police respond. While monitoring the situation, consider consulting criminal police threat assessment specialists, forensic psychiatrists, or other professionals who can provide insights and additional information.

2.11.2 Face-to-Face Deterrence

A meeting with police may affect the suspect's state of mind, as well as the complainant's safety. This level of intervention should be carried out only after considering all known facts and evidence, and at the appropriate stage of the investigation. Warning the alleged offender shows the complainant that the police are taking his or her complaint seriously, and informs the offender that the behaviour is inappropriate. It also gives the suspect an opportunity to explain his or her conduct at an early stage, so that police can make more informed case management decisions.

Many stalkers may be deterred by a face-to-face meeting with police in which the consequences of continuing the behaviour—that is, that criminal charges will be laid—are clearly set out. Any warning must be documented so that this information is accessible to future investigators, should the warning be ineffective. Warnings should be written whenever possible. However, it is crucial that the language used be carefully considered. A written warning is a constant reminder that establishes boundaries for the offender. It can also provide evidence of the exact wording used to warn the accused. Although the warning is not legally binding, it does serve as evidence, if the suspect continues the harassment, that the suspect knew that the complainant was harassed, or that the accused was reckless or wilfully blind to that fact. It is counterproductive to give multiple warnings to a suspect.

An interview can provide information about the suspect's thinking and behaviour patterns, and can yield admissions or corroboration. Any interview with the suspect should be conducted in accordance with the usual cautions and should also be documented. Experience has shown that the most common psychological defences of a stalker involve denial, minimization and projection of blame onto the complainant. Keeping this in mind can help investigators develop interrogation themes and establish a rapport with the suspect.

[120] Actual findings are not reported here, since they are not detailed or reliable enough to use in tailoring specific strategies to address criminal harassment.

2.11.3 Peace Bonds, Civil Protection Orders, and Civil Restraining Orders

This level of intervention should be considered when the complainant fears for his or her safety and the suspect poses a risk of injury or of an offence resulting in physical violence, or other conduct such as the infliction of severe psychological damage. There is often insufficient evidence to support a charge. Peace bonds and civil protection orders[121] are not substitutes for criminal charges. Charges should be laid where there is evidence to support them.[122]

An application for an order under section 810 of the *Criminal Code* should be considered where there is fear that the suspect will cause personal injury to an individual or the individual's spouse or child, or under section 810.2 where there is fear that the suspect will commit a "serious personal injury offence," which by definition also includes psychological damage. Peace bonds are also available under section 810.01 where the complainant is within a subsection 423.1(1) category, such as a justice system participant or journalist, and there is a fear for that person's safety; or under section 810.1 when the suspect's conduct involves prohibited sexual conduct against persons under age 16.

While sections 810 and 810.1 peace bond applications can be made by any individual before a provincial court judge, 810.01 and 810.2 applications may only proceed with the consent of the Attorney General of the jurisdiction where the application has been brought. While a section 810 peace bond has a maximum duration of 12 months, the other three peace bonds may be in effect for up to 24 months where the defendant has been previously convicted an offence related to the respective peace bond. These bonds can be renewed or varied by application to the court.

Section 810.2 has been particularly useful in cases where prior incidents of physical harm resulted in a sentence that is now finished, and the perpetrator has contacted the victim again. Where a violent or sexual offender under an active penitentiary sentence has been detained by Correctional Services of Canada until their Warrant Expiry Date because they are of high risk to commit a serious personal injury offence, the local police where the individual is planning to reside and/or the original charging police agency are advised of the offender's pending release into the community 90 days prior to release. This allows for a section 810.01, 810.1, or 810.2 peace bond application to be brought before the individual is released so that there are appropriate conditions imposed from the moment of release.

Civil protection orders may also be available to the complainant, either under legislation or through the common law. The superior courts have inherent jurisdiction to grant protective injunction orders to protect litigants during the litigation process. Restraining or no-contact orders are also available under

[121] That is, civil protection orders made under provincial and territorial legislation on domestic violence, or where applicable, under family law legislation.

[122] If domestic violence is an issue, applicable spousal abuse pro-charging policies in each jurisdiction require charges to be laid where there are reasonable grounds to believe that an offence has been committed; peace bonds and civil protection orders are not an appropriate alternative response where this test has been met. See Ad Hoc Federal-Provincial-Territorial Working Group, *Final Report, supra* note 109. The Working Group recommended retaining the current pro-charging policies for spousal abuse cases. The current test should continue to apply—in other words, a charge should be laid where there are reasonable grounds to believe that an offence has been committed and, in jurisdictions with Crown pre-charge approval (British Columbia, New Brunswick and Quebec), when it is in the public interest to lay a charge.

provincial or territorial law legislation if the victim is going through a separation or divorce. Nine provinces and territories have also passed civil domestic/family violence legislation: Saskatchewan, Prince Edward Island, Yukon, Manitoba, Alberta, Nova Scotia, Northwest Territories, Newfoundland and Labrador, and Nunavut.[123] Most provincial domestic violence legislation applies to cohabitants, family members or individuals who are living together in a family, spousal or intimate relationship, and to persons who are parents of children, regardless of their marital status or whether they have lived together. This legislation generally provides for two types of protective orders: a short-term emergency intervention or protection order, and a long-term victim assistance order, sometimes called a protection, prevention, or restraining order.[124] Many of these orders offer additional assistance to complainants that are not available through the criminal justice system, such as exclusive possession of the matrimonial home for a specified time period, orders directing a peace officer to accompany a specified person to the residence to safely collect personal belongings, and orders directing a peace officer to remove the alleged offender from the residence. It is helpful for the purposes of thorough protection planning, for officers to be aware of which civil protection orders are available in their jurisdiction, and who is available to assist complainants in obtaining these protections.[125] These protections can be particularly useful in situations where there is not enough evidence to lay a charge or obtain a criminal justice system protection order.

All section 810 peace bonds are tracked through CPIC, but civil restraining orders are not necessarily recorded there.[126] Civil restraining orders, peace bonds, and conditions of bail and probation are more effectively enforced if their terms are readily accessible to police agencies that are called to intervene in domestic disputes. The CFO in each jurisdiction has immediate access to court orders issued in family violence or stalking cases where an individual's right to possess a firearm is curtailed. Note that although subsection 810(3.1) (and 810.01(5), 810.1(3.03) and 810.2(5)) requires the justice to consider whether a firearms or weapons prohibition is desirable as a condition of the recognizance, it is important to specifically ask for one where appropriate and to provide the justice with any relevant information.

Advise the complainant to immediately report *any* breach of conditions of any court orders so that prompt action can be taken against the suspect. Be sure the victim understands that it is imperative to

[123] *Victims of Domestic Violence Act*, S.S. 1994, c.V-6.02; *Victims of Family Violence Act*, R.S.P.E.I. 1988, c.V-3.2; *Family Violence Prevention Act*, R.S.Y. 2002, c.84; *Domestic Violence and Stalking Prevention, Protection and Compensation Act*, C.C.S.M. 1998, c.93; *Protection Against Family Violence Act*, R.S.A. 2000, c.P-27; *Domestic Violence Intervention Act*, S.N.S. 2001, c.29; *Protection Against Family Violence Act*, S.N.W.T. 2003, c. 24; *Family Violence Protection Act*, S.N.L. 2005, c. F-3.1; *Family Abuse Intervention Act*, S.Nu. 2006, c.18. See also *Family Law Act*, R.S.O. 1990, c. C.12 (as amended C12).

[124] Nova Scotia's legislation only provides for the short-term emergency protection order. Manitoba's legislation allows a judge to issue a protection order if the respondent is stalking the subject, and their relationship need not have been intimate (section 6). Stalking is defined in almost exactly the same language as in section 264 (subsections 2(2) and (3)) of the *Criminal Code*. Nova Scotia includes the following in its definition of "domestic violence": "a series of acts that collectively causes the victim to fear for his or her safety, including the following, contacting, communicating with, observing or recording the person" (subsection 5(1)(e)). For more information on domestic violence legislation, see the Ad Hoc Federal-Provincial-Territorial Working Group, *Final Report, supra* note 109.

[125] These individuals will likely include family lawyers, victim service providers, and family law information centers.

[126] For example, British Columbia has a Protection Order Registry, which is a computer database of all criminal and civil protection orders issued by British Columbia courts. In Manitoba, all protection orders (the *ex parte* orders pronounced by provincial court judges) are registered on CPIC, if counsel or the party provides the court with the required information for registration. Police officers on Prince Edward Island register all Emergency Protection Orders on CPIC.

report all breaches in order to maintain offender accountability. Letting "little" breaches slide can entrench the offender in increasingly serious conduct. Also advise victims of the limitations of a peace bond and remind them of the continuing need to take precautionary measures.

2.11.4 Prohibition Against Possessing Weapons

Where appropriate, obtain a weapons prohibition order as a preventive measure.

If the suspect does not currently possess weapons and police want to prevent the suspect from obtaining them in the future, police can apply to a provincial court judge for an order under section 111 of the *Criminal Code* prohibiting the person from possessing weapons where they have reasonable grounds to believe that it is not in the interests of public safety for the person to possess weapons. This prohibition may last up to five years.

If the suspect possesses weapons and police have seized them, there will be a disposition hearing (provided the Return to a Justice was made immediately after the seizure[127] and the Application for Disposition[128] was made within 30 days of the seizure). At the hearing, the judge may impose a weapons prohibition order lasting up to five years.

Consider, as well, an application under section 117.011 of the *Criminal Code*. When people are prohibited from possessing weapons, this provision is designed to limit their access to weapons belonging to someone with whom they live or associate. Accordingly, even if the suspect is already prohibited by a court order from possessing weapons for up to five years, if the suspect lives with another person who is not prohibited from possessing weapons and who has several firearms, an application can be brought to a provincial court judge for an order against this other person to restrict the suspect's access to the firearms. While these orders must be minimally intrusive, they are still an important preventive measure that may require the other person to either enhance the storage security measures already in place or to store the firearms at another location for a period of time.

2.11.5 Arrest and Charges

Police lay charges in all provinces except British Columbia and Quebec, where the Crown does so. In New Brunswick, police lay charges after receiving advice from the Crown. (See also 4.3 Approval or Review of Charges)

A strong and consistent response to criminal harassment requires that all allegations of criminal harassment be taken seriously. If there are reasonable grounds to believe that the suspect has committed the offence of criminal harassment, arrest and charge(s) should likely result in all but the most exceptional circumstances (keeping in mind that different considerations apply in determining whether to make an arrest versus whether to lay charges). Arrest will often be necessary under subparagraph 495(2)(d)(iii) in order to prevent the continuation or repetition of the criminal

[127] Required under subsection 117.04(3).
[128] Required under section 117.05.

harassment, either by having the suspect enter into an undertaking to abide by certain conditions or by seeking to have the suspect detained in custody. (See also 2.12 Release From Custody and 4.4 Pre-Trial Release)

Where one or more of the incidents giving rise to the complaint of criminal harassment can be construed as a single criminal offence other than criminal harassment, consider laying both the separate charge and the inclusive count of criminal harassment. Examples of other criminal offences include the following:

- intimidation (section 423)
- uttering threats (section 264.1)
- wilful promotion of hatred (section 319(2))
- mischief (section 430)
- mischief in relation to data (section 430(1.1)
- forcible confinement (section 279)
- indecent or harassing telephone calls (section 372)
- defamatory libel (sections 298-301)
- trespassing at night (section 177)
- voyeurism (section 167)
- assault (sections 265 and 266)
- assault with a weapon or causing bodily harm (section 267)
- aggravated assault (section 268)
- sexual assault (sections 265 and 271)
- sexual assault with a weapon, threats to a third party, or causing bodily harm (section 272)
- aggravated sexual assault (section 273)
- causing death in the course of committing criminal harassment (is first degree murder under subsection 231(6))
- unauthorized use of a computer (section 342.1)
- identify theft (subsection 402.2(1))
- identity fraud (subsection 403(1)
- failure to comply with a condition of undertaking or recognizance (subsection 145(3))
- disobeying a court order (section 127)
- breach of recognizance (section 811)
- failure to comply with a probation order (section 733.1)

Consideration should also be given to laying charges related to serious incidents in the past.

Accused persons who have outstanding charges against them and (a) have contravened, or were about to contravene, their form of release[129] or (b) have committed an indictable offence after having been released in any of the manners described in subsection 524(8) should be arrested under section 524, as well as under the provisions related to the breaches. Being arrested under section 524 gives the accused notice that any previous forms of release may be cancelled. (See 4.5.5 Breach of Bail Conditions).

Promptly advise the victim of the decision to lay charges and of the outcome of any judicial determination in relation to the charges.

2.12 Release from Custody

(See also 4.4 Pre-Trial Release)

Given the nature of criminally harassing conduct, when an officer in charge determines that it is appropriate to release the accused pursuant to section 499 or subsection 503(2.1) of the *Criminal Code*, such a release should normally be made subject to the suspect entering into a recognizance under paragraph 499(1)(b) or (c) or pursuant to an undertaking under subsection 503(2) prohibiting contact with, or proximity to, the complainant or other witnesses under subsection 499(2) or 503(2.1). If possible, the police should speak to the complainant before deciding whether to release the suspect; such a discussion will help the officer assess the risk to the complainant and determine which conditions might decrease that risk if the suspect is released. The following conditions should be considered:

- Abstaining from communicating, directly or indirectly, with the complainant or other specified person;
- Abstaining from going within 200, 500 or 1000 metres of any specified places, such as the complainant's residence and place of work, or from going within certain street boundaries set out on a map;
- Abstaining from consuming alcohol or other intoxicating substances or drugs, except in accordance with a medical prescription; and from going to establishments licensed to sell or serve alcohol;[130]

[129] See subsection 524(8) of the *Criminal Code* for applicable forms of release.
[130] This condition is only appropriate where there is evidence that such substances were involved in the offence or in the suspect's pattern of previous violent or sexually violent offending.

- Abstaining from possessing firearms, and surrendering any licence, registration certificate or authorization;[131]
- Reporting at specified times to a peace officer or other designated person;
- Maintaining a particular residence, notifying police/courts of any change of address, and obeying a curfew at that residence;
- Notifying police of employer's name and location and any employment changes; and
- Notifying police of make, model and license plate number of any vehicle the subject owns or has permission to drive.

Where the accused is released, forward the police file (herein after referred to as "*Police Report to Crown Counsel*") as soon as possible so that Crown counsel can address any application by the accused to change bail conditions before the first appearance.

Advise the complainant of the fact of the release and any release conditions.

2.13 Police Report to Crown Counsel

Forms used for the purpose of reporting to Crown Counsel must clearly address and document the key elements of the offence (see also 3.4 Key Elements). Practices vary among jurisdictions. Some jurisdictions have tailored a specific investigation report form for the collection of pertinent facts. Police agencies and prosecution services that work together should use an agreed-upon format or checklist of information that will provide Crown counsel with the information needed to deal with various stages of court proceedings, including the following details:

- ❒ Information on the prohibited conduct;
- ❒ Reasons why the victim reasonably fears for his or her physical, emotional or psychological safety (include all historical information that has contributed to the fear, such as details of previous incidents of domestic abuse);
- ❒ Details of changes the victim has made in response to the fear, such as whether the victim has:
  - moved to a new location or obtained a new phone number
  - recorded all telephone conversations and messages

[131] Paragraph 503(2.1)(e) dictates the undertakings available to the police upon the conditional release of an accused pursuant to subsection 503(2). This paragraph does not allow for as comprehensive a prohibition order as that which can be made by a justice under subsection 515(2). For more information relating to firearms prohibitions, forfeiture, amendment and revocation of authorizing documentation, and partial lifting of a prohibition order, see Part 4.4, "Pre-Trial Release." Note that the forfeiture provisions in section 115 of the *Criminal Code* do not apply either to police undertakings to abstain from firearms possession nor do they apply to judicial interim release orders made pursuant to section 515.

- told friends, family, co-workers or building security of the harassment, and given photos of the accused to these persons
- arranged escorts to his or her car and work site
- changed his or her work schedule or route to work
- stopped visiting places previously frequented
- taken a self-defence course
- installed a security system
- acquired a guard dog
- received counselling or other psychotherapy
- altered his or her behaviour in any other way;

❒ Evidence that the accused knew their actions harassed the victim or was reckless as to whether the victim was harassed, such as the fact that:
- the victim indicated to the accused his or her displeasure with the accused's conduct, either directly or indirectly
- someone else advised the accused of the victim's displeasure on the victim's behalf
- the suspect continued to engage in the conduct after such communication or after contact with the police
- the accused engaged in the conduct in contravention of an existing peace bond, civil restraining order, undertaking, recognizance, bail condition or probation condition;

❒ All available information necessary for a bail application hearing related to a detention order or to pre-trial release conditions, bearing in mind that in some jurisdictions, such as Alberta, the courts have specified the type of facts that the Crown is expected to be aware of and to speak to;[132]

❒ Any steps the accused has taken since the incident to address emotional, attitudinal or other problems;

❒ Information on factors related to those problems, such as:
- elements in the accused's life that tend to show either stability or instability (for example, place of residence, family support and job changes)
- whether the accused has any drug or alcohol problems, or a history of mental illness

[132] In ***Bleile***, 2000 ABQB 46, the Court stated that "in cases of spousal or intimate partner assault, the Crown cannot address bail without having certain vital background information in hand, in addition to the circumstances of the offence and the criminal record of the accused. That includes at a minimum, the following:

1. Whether there is a history of violence or abusive behavior, and, if so, details of the past abuse;
2. Whether the complainant fears further violence if the accused should be released and, if so, the basis for that fear;
3. The complainant's opinion as to the likelihood of the accused obeying terms of release, in particular no contact provisions; and
4. Whether the accused has any drug or alcohol problems, or a history of mental illness.

In response to this decision, the Alberta Ministry of Justice and Solicitor General developed the "Family Violence Investigation Report" ("FVIR"), which accompanies all reports dealing with domestic situations and consists of 19 questions that are pertinent to release, changing conditions, and ultimate resolution.

- whether the accused has ever attempted, or threatened to commit suicide
- stressors that may make the accused less able to control his or her impulses and thus may increase the risk to the victim
- the existence of suitable people in the accused's life who could act as effective sureties;

❒ Information that specifically addresses the risk to the victim if the accused is released, such as:
- details of the accused's criminal violence history, including whether the accused has a history of investigation, charges or convictions for violence and/or sex assaults
- list details of any history of violence or abusive behaviour in the parties' relationship or with a previous intimate partner
- indicate whether the accused has ever used or threatened to use weapons against the complainant, and whether the accused owns, has owned, or plans to purchase a firearm
- indicate whether the complainant believes the accused will disobey terms of release (e.g. no contact orders)
- indicate whether the complainant and accused have any children together, and if the complainant feels the accused presents a danger to the children. If the parties have separated, indicate with whom the children reside and whether they have contact with the other parent. If there are any other legal proceedings involving the children, such as custody and access or child protection, indicate the stage of these proceedings and any related orders or assessment that have been made
- indicate whether the complainant fears further violence if the accused is released from custody; and

❒ consideration should be given to recommending appropriate or necessary conditions that the Crown should seek at a pre-trial release hearing (see 4.4 Pre-Trial Release for a list of possible bail conditions).

2.14 Coding or Scoring Files for Incidents

Many police agencies collect statistical information on criminal harassment incidents. As of August 2005, the RCMP and other police services have been using the Uniform Crime Reporting (UCR) Scoring System. To search files prior to 2005, criminal harassment cases can be searched under the Operational Statistical Reporting System (OSR).

Under the UCR system, the scoring for criminal harassment is spelled out, however, the specific scoring and sub-scoring is 1625.0010.

Police agencies using the OSR system of coding or scoring files for incidents of criminal harassment should follow the OSR tables, as follows:
- code: AC41
- nature of event: criminal harassment or stalking crimes

2.15 The National Flagging System (NFS) for High-Risk Offenders

Officers who have been investigating an offender who they believe is at high risk of committing serious violent or sexually violent crimes should consider contacting their provincial or territorial NFS Coordinator in order to obtain information about the offender and/or to suggest the offender be added to the National Flagging System (NFS) for High-Risk Offenders. This system identifies the highest risk violent and sexually violent offenders nationally who are considered prime candidates for Dangerous and Long-term Offender applications. In addition, the system provides for a flag on CPIC, facilitating broad sharing of information about these offenders nationally among police and Crowns, regardless of which provincial or territorial jurisdiction made the identification. Each province and territory has a National Flagging System Coordinator who identifies individuals that should be flagged, and who coordinates the collection of information about the offenders. The coordinators also facilitate the transfer of this information to police and Crown prosecutors upon request.

When police conduct a criminal records check of a subject being investigated who is a "flagged offender", they will see a SIP entry indicating that the person has been flagged as a high-risk offender and see the contact information for the NFS Coordinator of the jurisdiction that requested the flag. The police can then contact the NFS Coordinator for information and, where appropriate, notify the Crown that he is a flagged offender.

The NFS alerts police to the fact that they are dealing with a high risk violent offender immediately upon the officer or member performing a CPIC check, and alerts Crowns to potential dangerousness. This assists in the proper handling of the individual from his or her encounter with police through to sentencing.

Part 3

The Law

3.1 Prohibition of Criminal Harassment

As outlined in 1.2 Legislative History of Criminal Harassment, the criminal harassment provisions have been in force since 1993. A significant factor in the swift enactment of section 264 was the increasing concern among criminal justice personnel that existing *Criminal Code* provisions did not adequately capture "stalking" conduct, which was gaining recognition as a significant form of violence against women.

The need for the criminal law to evolve and address new forms of criminal conduct such as criminal harassment was expressly recognized by Madame Justice L'Heureux-Dubé in ***Hinchey***, [1996] 3 SCR 1128:

> The notion of criminality, thus, is not a static one, but one which very much changes over time. As society changes, the conception of what types of conduct can properly be considered criminal evolves. There are a myriad of different activities which at one point in time were considered legal, but which we now consider criminal. The offence of criminal harassment is one obvious example. For many years, it was not recognized as criminal to persistently follow someone and cause them to fear for their safety, so long as no contact was made. Now, that has distinctly changed with the addition of s. 264 of the Code, which makes this conduct a crime.

3.2 *Criminal Code* Provisions

CRIMINAL HARASSMENT

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.

Prohibited conduct

(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.

Punishment

(3) Every person who contravenes this section is guilty of
  (a) an indictable offence and is liable to imprisonment for a term not exceeding ten years; or
  (b) an offence punishable on summary conviction.

Factors to be considered

(4) Where a person is convicted of an offence under this section, the court imposing the sentence on the person shall consider as an aggravating factor that, at the time the offence was committed, the person contravened
  (a) the terms or conditions of an order made pursuant to section 161 or a recognizance entered into pursuant to section 810, 810.1 or 810.2; or
  (b) the terms or conditions of any other order or recognizance made or entered into under the common law or a provision of this or any other Act of Parliament or of a province that is similar in effect to an order or recognizance referred to in paragraph (a).

Reasons

(5) Where the court is satisfied of the existence of an aggravating factor referred to in subsection (4), but decides not to give effect to it for sentencing purposes, the court shall give reasons for its decision.

MURDER IN COMMISSION OF OFFENCE

Criminal Harassment

231(6) Irrespective of whether a murder is planned and deliberate on the part of any person, murder is first degree murder when the death is caused by that person while committing or attempting to commit an offence under section 264 and the person committing that offence intended to cause the person murdered to fear for the safety of the person murdered or the safety of anyone known to the person murdered.

3.3 *Charter* Challenges

Charter challenges have argued unsuccessfully that section 264 is vague and overly broad and, therefore, void under subsection 2(b) (freedom of expression) and section 7 (life, liberty and security of the person). See ***Hau***, [1994] BCJ No 677 (Prov Ct) (QL) (see also ***Hau***, [1996] BCJ No 1047 (SC) (QL)), which upheld the constitutionality of the section but allowed an appeal and ordered a new trial). In ***Sillipp,*** 1997 ABCA 346, leave to appeal to SCC refused, [1998] SCCA No 3 (QL), Berger JA found that subsection 2(b) of the *Charter* was not engaged by paragraphs 264(2)(a) or (c) of the *Code*, and denied a section 7 argument that section 264 allows the morally innocent to be punished. At trial, Murray J found that the type of expression which may flow from behaviour as contemplated by section 264 was not protected by the *Charter*. In other words, when a person knowingly or recklessly engages in conduct specified in subsection 264(2), resulting in a reasonable apprehension of fear, there can be no exculpation by characterizing such conduct as a legitimate exercise of the freedoms guaranteed in section 2 of the *Charter*. In the event that he erred in his analysis, Justice Murray went on to justify any subsection 2(b) violations under section 1 by characterizing this form of "expression" as "attempts by persons to convey meanings of latent physical violence and direct psychological violence to other persons" (***Sillipp*** (1995), 99 CCC (3d) 394 at 413 (Alta QB), aff'd 1997 ABCA 346, leave to appeal to SCC refused, [1998] SCCA No 3 (QL)). In ***Doody***, [2000] QJ No 934 (CA) (QL), Michaud CJA dismissed an

application for leave to appeal, finding, among other things, that there was no merit to a constitutional challenge of paragraph 264(2)(c) of the *Code*.

In ***Davis*** (1999), 143 Man R (2d) 105 (QB), aff'd 2000 MBCA 42, the Court followed ***Sillipp*** with respect to the section 7 challenge on the vagueness of the *mens rea* component of the offence and found that the legislation does not violate rights of association under subsection 2(d) of the *Charter*. While accepting the Crown's concession that the communication component of the provision violates subsection 2(b), the Court found "that the laudable objective of the criminal harassment legislation far outweighs the negative impact that it has on freedom of expression." In ***Krushel*** (2000), 142 CCC (3d) 1 (Ont CA), leave to appeal to SCC refused, [2002] SCCA No 293 (QL) the Ontario Court of Appeal followed the Alberta Court of Appeal decision in ***Sillipp*** with respect to section 7 challenges for vagueness and insufficient *mens rea* requirements, and the ***Sillipp*** Queen's Bench decision in relation to the freedom of expression challenge. See also ***Cloutier***, [1995] Montreal No 500-01-005957 (Qc (Cr Div)).

The constitutionality of subsection 231(6) of the *Criminal Code*, relating to murder committed in the course of criminal harassment, has been challenged several times. In ***Linteau***, [2005] JQ No 16722 (CS) (QL), leave to appeal refused 2006 QCCA 1106, the accused argued that the minimal sentence of life imprisonment constitutes cruel and unusual punishment contrary to section 12 of the *Charter*. In dismissing the application, Beaulieu JCS emphasized the gravity of the crime of criminal harassment and stated that the objective of subsection 231(6) is to protect the life, liberty and security of women and other victims of such conduct.

Subsection 231(6) was also challenged in ***Ratelle-Marchand*****,** 2008 QCCS 1172,(QL) where the defendant argued that subsection 231(6) did not follow the principles of fundamental justice in depriving him of his liberty under section 7 of the *Charter*, and violated his right to be presumed innocent under subsection 11(d). Charbonneau JCS found that as with subsection 231(5), subsection 231(6) is a sentencing classification provision. Before applying subsection 231(6), the Court must be satisfied that murder was committed; therefore the provision in no way reduce the Crown's burden of proving of subjective foresight of death beyond a reasonable doubt."[133] Moreover, Charbonneau JCS reviewed the proportionality of the penalty in subsection 231(5):[134]

> Parliament's decision to treat more seriously murders that have been committed while the offender is exploiting a position of power through illegal domination of the victim accords with the principle that there must be a proportionality between a sentence and the moral blameworthiness of the offender and other considerations such as deterrence and societal condemnation of the acts of the offender.

Charbonneau JCS found that section 231 establishes a sentencing classification regime for a particular group of murderers who commit murder while perpetrating other offences of illegal domination of their

[133] ***Martineau***, [1990] 2 SCR 1 633, at para 9.
[134] ***Arkell***, [1990] 2 SCR 695, at para 11.

victims. The Court found that consistent with this regime, a rational link exists between the offences of criminal harassment and murder.

In responding to a *Charter* challenge, Crown counsel may also wish to review the legislative history of the criminal harassment provisions. That history is summarized in Appendix B—Legislative History of Section 264 of the Criminal Code.

3.4 Key Elements

The following key elements of the offence of criminal harassment must be established, as indicated in the Alberta Court of Appeal's summary of the elements of the offence in ***Sillipp***, 1997 ABCA 346, leave to appeal to SCC refused, [1998] SCCA No 3 (QL):

1. The accused engaged in **conduct** described in subsection 264(2);
2. The complainant was **harassed**;
3. The accused knew that the complainant was **harassed**, or he or she was **reckless or wilfully blind** as to whether the complainant was harassed;
4. The conduct caused the complainant to **fear for his or her safety**, or that of someone known to him or her; and
5. The complainant's **fear was reasonable** in all of the circumstances.

3.4.1 The Accused Engaged in Conduct Described in Subsection 264(2)

The accused must be shown to have engaged in any of the conduct prohibited in subsection 264(2).

Accused engaged in prohibited conduct via an agent or third party: In ***Ladbon***, [1995] BCJ No 3056 (Prov Ct) (QL), the accused, who was subject to a no-contact order, hired a private detective to follow his estranged wife, the victim. The Court found that the accused had engaged in the prohibited conduct through his agent, the private detective. See also ***Detich***, [1999] QJ No 25 (CA) (QL), where the offender's repeated attempts to communicate with the victim included such an attempt through a private detective.

Repeatedly Following From Place to Place: Paragraph 264(2)(a)

Meaning of "repeatedly": Referred to in paragraphs 264(2)(a) and 264(2)(b), "repeatedly" means more than once but not necessarily more than twice. In ***Ohenhen***(2005), 200 CCC (3d) 309 (ONCA), leave to appeal refused, [2006] SCCA No 119 (QL), the Ontario Court of Appeal changed the definition of the term, which used to be understood as more than once or twice. See also ***Saloio***, 2010 ONCJ 164, and

Vanin, 2006 SKPC 86. The repeated conduct must be viewed in its context to determine whether it is "repeated" (***Ryback*** (1996), 105 CCC (3d) 240 (BCCA), leave to appeal refused, [1996] SCCA No 135 (QL)).

Do not need distinct repeated time periods: In ***Belcher*** (1998), 50 OTC 189 (Gen Div), the Court determined that the repeated conduct does not have to occur on a number of occasions separated by time—the word "repeatedly" means "persistently". See also ***Thélémaque***, 2008 QCCQ 2308, in which it was found that criminal harassment can occur when the victim is a stranger and repeated communications and following take place on just one occasion over a half-hour period. The accused was convicted of criminally harassing a stranger on the subway; he sat beside her and took her hand, asking her if she had a pimp. He followed her off the subway and out of the station despite observing that she appeared agitated and scared of him.

When following takes place in public places: It appears more difficult to prove that the accused is following the complainant when the accused appears at the same random public location as the complainant. For example, in ***Weinstein***, [2007] OJ No 3012 (Sup Ct) (QL), the accused was acquitted of a criminal harassment charge under paragraph 264(2)(a). Even though on one occasion it was reasonable to infer that he was following the complainant, all of the other communications occurred in public places and did not involve locations where the accused should have expected to find the complainant, such as near her home or workplace. See also ***Potvin***, [2005] OJ No 4339 (Ct J) (QL), where the fact that the accused appeared to time his appearance at a public restaurant with the arrival of the complainant was not enough to conclude that repeated following had occurred.

Repeatedly Communicating: Paragraph 264(2)(b)

Meaning of "repeatedly": Referred to in paragraphs 264(2)(a) and 264(2)(b), "repeatedly" means more than once but not necessarily more than twice. In ***Ohenhen***(2005), 200 CCC (3d) 309 (ONCA), leave to appeal refused, [2006] SCCA No 119 (QL), the Ontario Court of Appeal changed the definition of the term, which used to be understood as more than once or twice. See also ***Saloio***, 2010 ONCJ 164, ***Vanin***, 2006 SKPC 86. In ***Di Pucchio***, 2007 ONCJ 643, two phone calls made after the complainant hung up the phone were found to constitute three distinct communications, as opposed to a single interrupted attempt.

Communicating with persons known to the victim: The courts will look to ascertain the real target of the accused's communications, which may appear to be directed at another person who was not harassed by the contact. In ***MRW***, [1999] BCJ No 2149 (SC) (QL), the accused was convicted of criminally harassing the victim by repeatedly communicating with persons known to the victim; the accused had been convicted approximately 16 years earlier of attempted murder of the victim and was allegedly attempting to re-establish contact with their two children. In ***Di Pucchio***, 2007 ONCJ 643, the Court found that even though the accused may have intended to speak with his daughter when he called his ex-wife's house, the communication was directed at his ex-wife, toward whom he had previously been physically violent and threatening. When she picked up the phone, the accused proceeded to speak with

the complainant, even though she had previously asked him not to contact her and unlisted her telephone number. He called back once after she told him not to call her house again and had a police officer call on his behalf as well.

Importance of the context in which the communication occurs: The trial judge must consider both "the content and the repetitious nature" of the communication, in the context in which it is made (***Scuby***, 2004 BCCA 28). The entire context of the communication must be taken into consideration, as "[t]he very nature of the offence of criminal harassment is that it consists of accumulation of what may appear in isolation as innocuous communications" (***Bell*****,** 2009 ONCJ 312). In ***Di Pucchio***, the complainant's fear was found to be reasonable "in light of the history of threatening, acrimony and abuse in this relationship", the repeated nature of communications, and the fact that the victim's telephone number was unlisted and had not been given to the accused.

Significance of requests to cease communication: Continuing to pursue contact after having been asked to stop is a relevant consideration in favour of conviction (***Sihota*** (2008) 79 WCB 2d 702 (ONSC)). See also ***Bell*****,** 2009 ONCJ 312, where only those communications made after the date on which the complainant told the accused to stop contacting her were found to constitute harassment.

Content of communications: Evidence of threats, violent behaviour or in-person contact on behalf of the accused is not required for a conviction under paragraph 264(2)(b) (***Liang***, 2004 NBCA 80, leave to appeal to SCC refused, [2004] SCCA No 520). In ***Bielicz***, [2008] OJ No 3633 (Sup Ct), repeated, emotional and aggressive phone calls were found to have clearly demonstrated intent to harass. See also ***Sihota*** (2008), 79 WCB 2d 702 (ONSC), where the Court found that fax and voice mail messages containing bizarre and frightening expressions (such as, "When are you going to stop drinking my blood?") sent to a company employee by a client were neither regular business communications nor a harmless joke.

Besetting or Watching: Paragraph 264(2)(c)

Since paragraph 264(2)(c) refers to besetting *or* watching, rather than besetting *and* watching, either action would satisfy the section (***Pastore***, 2005 ONCJ 332).

Meaning of "watching": "Watching" is to be given its ordinary dictionary meaning, such as "observing attentively, with the intention to control"[135] (***Gagné***, [2004] JQ no 11994 (CQ crim & pen) (QL)).

Meaning of "besetting": "Besetting" means "conduct by someone that causes another person to feel hemmed in or a person to feel surrounded, for a person to feel attacked on all sides." (***Smysniuk***, 2007 SKQB 453.) Driving by the complainant's home repeatedly qualified as "besetting" in view of the parties' complicated relationship. The meaning of "beset" includes "to trouble", "harass", "assail", "hem in or surround" (***Fujimori***, 2005 BCPC 110, citing ***Vrabie***, [1995] MJ No 247 (Prov Ct) (QL), which applied an ordinary dictionary meaning to "besetting" and held that besetting includes "to harass"—in other words, the conduct must be so blatant or vexatious as to constitute besetting). In ***Vrabie***, the Court took

[135] This is a translation of the definition of the verb "surveiller" given in the French decision at paras 20–22.

judicial notice of the fact that the incidents took place in an extremely public location in a small town. For example, one of the incidents was alleged to have taken place at a bakery that was across the street from the only post office in Flin Flon.

Complainant's knowledge of besetting: In ***Zorogole***, 2004 NSPC 16, the Nova Scotia Provincial Court held that in order to fall under paragraph 264(2)(c), the "persistent conduct, which need not be violent, must cause the other person to feel at risk of being in danger and, it must also result in the other person having a reasonable apprehension of violence." See also ***Diakow***, [1998] MJ No 234 (Prov Ct), which held that besetting required at least some knowledge or awareness on the part of the victim that she was the subject of the besetting.

Watching or besetting need not be repeated: Though the text of section 264 clearly requires communication and following to be repeated to constitute criminal harassment, there is no such requirement for watching and besetting under paragraph 264(2)(c), or threatening under paragraph 264(2)(d). Nevertheless, there has still been debate whether a single incident of watching or besetting can harass an individual. In ***Kosikar*** (1999), 138 CCC (3d) 217 (Ont CA), leave to appeal to SCC refused (2000), [1999] SCCA No 549 (QL), the Ontario Court of Appeal established that a single act of watching or besetting may be sufficient to convict depending on the overall context. Goudge JA wrote: "while being in a harassed state involves a sense of being subject to ongoing torment, a single incident in the right context can surely cause this feeling." It was followed in ***AA***, 2006 ONCJ 107, which held that even in the absence of prior contact, a single incident that carried a real risk of continuing torment to the complainant was sufficient for a conviction. See also ***Ohenhen*** (2005), 200 CCC (3d) 309 (ONCA), leave to appeal refused, [2006] SCCA No 119 (QL).

Fact of "watching" can be inferred from the content of communications: In ***Bielicz***, [2008] OJ No 3633 (Sup Ct) (QL), the defendant stated the complainant's current location, as well as details that made it clear that he had been spying on her new partner.

Non-criminal watching: The court may dismiss charges where the accused has a legitimate reason to watch the complainant, as in ***Wease***, [2008] OJ No 1938 (Sup Ct) (QL). In that case, the defendant, who was separated from the complainant, had been seen sitting outside her workplace in a parked car and taking pictures on several occasions, solely to gather evidence for ongoing family law proceedings (he was trying to prove that his wife was working full time). On the other hand, in ***Alverson,*** 2008 ONCJ 89, it was found that sitting outside the complainant's house in a parked car and staring constituted watching and besetting. Though the parties were in ongoing family law proceedings, the defendant not only did not have a legitimate reason to be sitting outside the house, but also, around the time of the incident, had been repeatedly following and threatening his son-in-law, who had custody of his granddaughter.

Odd or suspicious behaviour: Behaviour that constitutes watching or besetting within the meaning of paragraph 264(2)(c) must be distinguished from behaviour that is merely odd or suspicious. In ***Zorogole***, 2004 NSPC 16, the accused, who was a complete stranger to the complainant, was seen standing in front

of the complainant's house and watching the children play for about 15 minutes. He was wearing a camera over his shoulder. He also knocked on the door and said that he was trying to make friends. He did not make any threats, left after being asked to do so and never returned. Even though his behaviour could be seen as odd or suspicious, it was held that there was no reasonable indication of a risk of violence on his behalf.

Engaging in Threatening Conduct: Paragraph 264(2)(d)

Meaning of "threatening conduct": "Threatening conduct" is defined as "a tool of intimidation which is designed to instill a sense of fear in the recipient" (***McGraw***, [1991] 3 SCR 72; ***Lamontagne*** (1998), 129 CCC (3d) 181 (QCA); ***George,*** 2002 YKCA 2; ***Burns***, 2008 ONCA 6*;* ***Kohl***, 2009 ONCA 100; ***MacDuff***, 2011 BCSC 534).[136]

Objective standard in context: Whether the "tool of intimidation" was "designed to instill a sense of fear in the recipient" is to be determined from the perspective of a reasonable person in consideration of the context in which the alleged threats occurred. In other words, whether the impugned conduct was threatening is a question of fact to be determined from the perspective of a reasonable person in a similar context to the complainant (***McGraw,*** [1991] 3 SCR 72; ***Ryback*** (1996), 105 CCC (3d) 240 (BCCA), leave to appeal refused, [1996] SCCA No 135 (QL); ***Lamontagne*** (1998), 129 CCC (3d) 181 (QCA); and ***Burns*****,** 2008 ONCA 6).

In ***Burns*** at paragraph 2*,* the Ontario Court of Appeal set out the three criteria by which impugned threatening conduct is to be viewed:

I. "objectively,"
II. "with due consideration for the circumstances in which they took place, and"
III. "with regard to the effects those acts had on the recipient."

Consideration for the context in which conduct took place: A sinister comment followed by "just kidding" may not be viewed as a joke if the target has been threatened or otherwise harassed previously (***Noble***, 2009 MBQB 98, aff'd 2010 MBCA 60). In ***Burns*****,** 2008 ONCA 6, the accused was a police officer, dressed in full uniform when he wolf-whistled at and made vulgar comments to the complainant as she was walking down the street with her five-year-old daughter. The Court held that although the complainant justifiably felt scared and upset, the conduct did not rise to the level of "a tool of intimidation…designed to instill a sense of fear" and did not fall under paragraph 264(2)(d). Similarly, the obvious difference in size and strength between the defendant and the complainant can be taken into account when establishing the extent to which the conduct was threatening (***Kohl***, 2009 ONCA 100).

Mens rea*—No need to prove the accused *intended* the conduct to intimidate or cause fear: *Davis (AA) (1999), 44 WCB (2d) 222 (MBQB), affirmed 2000 MBCA 42, which the Manitoba Court of Appeal recently

[136] Most case law cites *George* for this definition of threat. This phrase first appeared in *McGraw* when Mr. Justice Cory was defining "threat" for the purpose of the offence of uttering threats under subsection 264.1 of the *Code*.

followed in ***Noble***, 2010 MBCA 60, states at paragraph 35: "*The mental element of the offence does not include a requirement that the accused foresee that his conduct will cause the complainant to be fearful*."[italics in original] ***Davis*** further clarifies that there are only two *mens rea* requirements for this offence: (1) the defendant must have intended to engage in the alleged prohibited conduct, and (2) the defendant must have known that his or her conduct would harass the complainant (or have been willfully blind or reckless as to whether the complainant would have been harassed). Although in ***Lukaniuk***, 2009 ONCJ 21, the Court's comments in *obiter*, in paragraph 17, might be taken to mean that the defendant must intend to intimidate or cause fear, the Court's acquittal of the defendant turned on its finding that the conduct did not cause fear in the complainant. The Court's comments regarding an intention to intimidate or cause fear relate to ***Clemente***, [1994] 2 SCR 758, which is based on the offence of uttering threats in section 264.1, not section 264. (See also 3.4.4 The Complainant Feared for Her or His Safety, or That of Someone Known to Her or Him)

Single act of threatening conduct sufficient: Paragraph 264(2)(d) is not ambiguous and can be given its ordinary meaning. A single act of threatening is sufficient and need not be repeated to satisfy paragraph 264(2)(d). ***Lamontagne*** (1998), 129 CCC (3d) 181 at 187 (Qc CA) accepted that a single incident ("You will see, tomorrow I will be out and you are going to regret it, God damn it") could be viewed by a reasonable person in the victim's situation as a threat or a "tool of intimidation which is designed to instill a sense of fear in the recipient." See also ***Kosikar*** (1999), 138 CCC (3d) 217 (Ont CA), leave to appeal to SCC refused, [1999] SCCA No 549 (QL), in which one letter by the offender to the victim that contained sexual innuendoes, considered together with the offender's past conduct toward the victim, constituted threatening conduct; ***Hawkins***, (2006)BCCA 498; ***George*** (2002), 162 CCC (3d) 337 (YCA); and ***Bertrand***, 2011 QCCA 1412.

Threatening conduct can be entirely non-verbal: In ***Kohl***, 2009 ONCA 100, leave to appeal to SCC refused, [2009] SCCA No. 130 (QL), the accused, who was a stranger to the victim, jumped out of the bushes, blocked a jogger's way and chased her down the street. It was held that even though the accused neither touched nor spoke to the victim, "[h]is conduct alone, without the spoken word, was more than sufficient to establish threatening conduct within the meaning of s. 264(2)(d)." Although it was an isolated incident of relatively short duration, the conduct was deemed to be "highly threatening and persistent."

Threatening conduct can also reach the target indirectly: In ***Sauvé***, [2007] OJ No 4928 (CA), leave to appeal refused, [2008] SCCA No 149 (QL), documents containing threats were filed in court with the knowledge that the complainant and the complainant's lawyer would see them. This was held to be prohibited conduct directed at the complainant. See also ***Coppola***, [2007] OJ No 1624 (Ct J) where the Court found that communicating false allegations of criminal conduct to the complainant's employer was an attempt to carry out the accused's earlier threat to cause her to lose her employment, and thus constituted threatening conduct.

3.4.2 The Complainant Was Harassed

Meaning of "harassed": Being harassed implies "being tormented, troubled, worried continually or chronically, being plagued, bedeviled and badgered."[137] See ***Sillipp*** (1995), 99 CCC (3d) 394 (Alta QB), aff'd 1997 ABCA 346, leave to appeal to SCC refused, [1998] SCCA No 3 (QL); followed in ***Ryback*** (1996), 105 CCC (3d) 241 at 248 (BCCA), leave to appeal refused, [1996] SCCA No. 135 (QL); ***Lamontagne*** (1998), 129 CCC (3d) 181 (Qc CA); and numerous other decisions. The terms are not cumulative. They do not replace but are individual synonyms for the word "harassed" in the *Criminal Code* (***Kordrostami,*** (2000) 143 CCC (3d) 488 (OCA)). For the conduct to constitute "harassment," it is not sufficient that the complainant was "vexed, disquieted or annoyed"[138] (***Sillipp***, 1997 ABCA 346). See also ***Yannonie***, 2009 ABQB at paragraph 33, in which the Court found that "the complainant was upset and vexed at the socially maladroit antics of the Accused" (frequent unwelcome visits to the mall kiosk where she worked, during which he made inappropriate remarks), which fell "somewhat short of establishing that the complainant was harassed."

The fact that the prohibited conduct harassed the complainant is established by the effect the conduct has on the complainant: In ***Thélémaque***, 2008 QCCQ 2308, the accused sat beside the complainant on a subway car, held her hand and started talking to her as if he knew her. He followed her when she got off the subway and walked away from him appearing scared. The Court stated that it was clear from her conduct and demeanour that she was harassed. The police who responded to her 911 call testified that she was crying, and had red eyes and a trembling voice, when they arrived. The accused acknowledged in his testimony that he could tell she was scared of him.

Abusive conduct during the course of a relationship can amount to harassment: In ***Chugh***, 2004 ONCJ 21, the accused was extremely controlling and abusive toward his wife. The Court found that his conduct was threatening and even though the wife was not afraid for her life, she reasonably feared that "some harm" would occur if she remained in the relationship. The Court "was satisfied that Ms. Chugh was 'tormented, troubled, worried continually or chronically, plagued, bedeviled and badgered'" and said that the accused was being wilfully blind if he was not aware of the impact that his demands, threats, insults and minor assaults had on his wife. See also ***Rosato***, [2007] OJ No 5481 (Sup Ct) (QL).

3.4.3 The Accused *Knew* That the Complainant Was Harassed or Was *Reckless* or *Wilfully Blind* as to Whether the Complainant Was Harassed

Mens rea*—Knew or was reckless or wilfully blind as to whether the complainant was harassed:** The Crown must prove that the accused intended to engage in the prohibited conduct knowing that the complainant was harassed, or being reckless or wilfully blind as to whether the complainant was harassed (Sillipp***,1997 ABCA 346).

[137] At para 38.
[138] At para 16.

Meaning of "reckless": In ***Frohlich***, [2010] ABQB 260, the Alberta Court of Queen's Bench relied on the definition of recklessness in the recent Supreme Court decision ***Briscoe***, 2010 SCC 13, which quotes ***Sansregret***, [1985] 1 SCR 570: "Recklessness involves knowledge of the danger or risk and persistence in the course of conduct bringing about a result prohibited by criminal law, that is the person is conscious of the risk and proceeds in the face of it."

Meaning of wilful blindness: ***Briscoe***, 2010 SCC 13, also distinguishes between recklessness and wilful blindness by describing wilful blindness as follows:

> Wilful blindness does not define the *mens rea* required for particular offences. Rather, it can substitute for actual knowledge whenever knowledge is a component of the *mens rea*. The doctrine of wilful blindness imputes knowledge to an accused whose suspicion is aroused to the point where she sees the need for further inquiries, but *deliberately chooses* not to make those inquiries.[139]

The Court emphasized the point that "wilful blindness" is equivalent to "knowledge" and quotes Glanville Williams on the following: "A court can properly find wilful blindness only where it can almost be said that the defendant actually knew. He suspected the fact; he realized its probability; but he refrained from obtaining the final confirmation because he wanted in the event to be able to deny knowledge … It requires in effect a finding that the defendant intended to cheat the administration of justice."[140] The Court further solidifies this concept by quoting Professor Don Stuart's characterization of "deliberate ignorance" as a more accurate label than "wilful blindness."

Direct evidence of the accused's state of mind is not required: Whether the accused has the required *mens rea* is a question of fact, to be determined based on the evidence presented. The trial judge may make a reasonable inference, based on the proven facts, that the accused was reckless as to whether the complainant was harassed (***Holmes***, 2008 ONCA 604).

Intent vs. motive: In ***Cromwell***, 2008 NSCA 60, where the accused stated that he was writing letters from prison to his ex-wife, contrary to court orders, because he believed the complainant was open to reconciliation, the Court stated: "The *mens rea* on a charge of criminal harassment contrary to section 264 of the *Criminal Code* is whether the accused knew, or was reckless, or wilfully blind as to whether the complainant was harassed. The mental element is the intention to engage in prohibited conduct with knowledge, or with recklessness, or with willful blindness that such conduct causes the victim to be harassed." The Court goes on to say that the motive of the accused is not relevant to the *mens rea* of this offence, thus even if the Court believed that the actions of the accused were based on an honest but mistaken belief that the complainant was open to reconciliation, the *mens rea* of the offence is satisfied if the accused intended to engage in the prohibited conduct and knew, or was reckless or willfully blind as to, whether his conduct was harassing the complainant. See also ***Krushel*** (2000), 142 CCC (3d) 1 (Ont CA).

[139] At para 21.

[140] Citing Glanville Williams, *Criminal Law: The General Part*, 2nd ed. (London: Stevens & Sons, 1961), at p 159 (cited in ***Sansregret***, at 586).

Prior discreditable conduct is admissible as going to whether the accused had requisite *mens rea* that the complainant was harassed: In ***Ryback*** (1996), 105 CCC (3d) 240 (BCCA), leave to appeal refused, [1996] SCCA No. 135 (QL), the Court held that evidence of prior conduct by the accused may be relevant to two elements of the charge of criminal harassment: whether the victim had a reasonable fear for her safety; and whether the defendant knew or was reckless as to whether his conduct harassed the victim. In *Kosikar* (1999), 138 CCC (3d) 217 (Ont CA), leave to appeal to SCC refused, [1999] SCCA No. 549 (QL), the Court dismissed an appeal against conviction under paragraph 264(2)(d) for a letter to the victim containing sexual innuendoes. The trial judge appropriately relied on the history of the offender's conduct toward the victim (which included a previous conviction for criminal harassment) as relevant to the offender's intention, and knowledge of or recklessness regarding, the harassment. See *Di Pucchio*, 2007 ONCJ 643, where although nothing said in any of the three phone calls the offender made to his ex-wife was threatening, and he did not necessarily intend to harass her, the Court found that "he was aware of the danger that [she] would be harassed". This was due to the abusive history of the parties' relationship and the fact that he recklessly persisted in attempting to communicate with the complainant, through an unlisted number that she had not shared with him, despite the fact that she stated she would call the police if he continued. (See also "Prior discreditable conduct is admissible as going to reasonableness of fear" in 3.4.5 The Complainant's Fear Was Reasonable in All of the Circumstances)

Evidence that the accused was asked to stop the contact/conduct as evidence of knowledge: The victim does not have to be forceful in rebuffing the defendant's attention (***Ryback*** (1996), 105 CCC (3d) 240 at para 41 (BCCA), leave to appeal refused, [1996] SCCA No 135 (QL)). See also ***Rehak*** (1998) 125 Man R (2d) 181 (QB), in which the complainant had indicated by her actions and gestures that she was displeased by the defendant's attention. In considering whether the defendant knew that the complainant was harassed by his conduct or was reckless as to whether she was harassed by his conduct, the Court stated that "[a] party need not be warned that his or her conduct is criminal before that conduct actually becomes criminal." If the accused's conduct persists after a police warning, he or she cannot be said to have been unaware that the complainant felt harassed. The warning can be viewed as an "objective indicator" of the complainant's fear (***Pennell*** (2007), 73 WCB (2d) 737 (Ont SCJ)). See also ***McLeod***, [2006] AJ No 644 (Prov Ct) (QL), where it was held that the accused should have known that his conduct was scaring his ex-fiancée after she called security, which resulted in his being banned from the mall.

The complainant's indication of feeling/being harassed may vary depending on personal characteristics of the victim, such as age: In ***Ratelle-Marchand***, 2007 QCCA 1854 at para 34, the Quebec Court of Appeal found that it was open for the trier of fact on a charge of first degree murder under subsection 231(6) of the *Code*[141] to find that the accused had knowingly or recklessly harassed his partner's two-and-a-half-year-old daughter, who had expressed in an age-appropriate way that she felt harassed, that she feared for her safety and that she feared the accused.

[141] This required that all the elements of section 264, including *mens rea*, be satisfied.

Mens rea* in an accused with mental illness:** In ***Rosato, [2007] OJ No 5481 (Sup Ct) (QL), after a determination of fitness to stand trial, the accused was convicted under paragraph 264(2)(d) of criminally harassing his wife by controlling every aspect of her life based on his paranoid delusions. He insisted she not have contact with friends and family and often performed bizarre rituals and said strange and frightening things. The court decided that "even if he didn't appreciate all the nuances of his conduct…the complainant's protestations [about his conduct] were known to the accused and he was aware of and knew his conduct harassed the complainant. He was also aware that there was a risk that his conduct harassed her, but went ahead anyway, not caring whether the conduct harassed [her] or not".[142]

Mens rea* in abusive controlling relationships:** In ***Chugh, 2004 ONCJ 21, the Court stated: "If Mr. Chugh honestly did not observe what his demands, threats, minor assaults, constant quarrelling and insulting his wife [were] doing to his wife and his marriage, then he was willfully blind to the situation."[143]

Mens rea* in harassing attempts to reconcile:** In ***Denkers (1994), 23 WCB (2d) 149, the Ontario Court of Appeal made the following statement, which is often relied upon in Canadian jurisprudence: "This victim, and others like her, are entitled to break off romantic relationships. When they do so they are entitled to live their lives normally and safely. They are entitled to live their lives free of harassment by and fear of their former lovers."[144] In ***Larivière***, 2009 QCCQ 3584, where the complainant abruptly put an end to a short dating relationship, the accused refused to accept the end of the relationship and phoned and emailed the complainant and came to her house. On the issue of *mens rea*, the Court stated: [TRANSLATION] "The accused claims that he only wanted the best for the complainant, to win her back and free her from the control of her former spouse. However, the Court finds that the accused knew that the complainant felt harassed by his behaviour and that he did not care."[145] See also ***Hyra***, 2007 MBCA 69; ***Scuby***, 20c04 BCCA 28; and ***Cromwell*,** 2008 NSCA 60.

Aggressive protests: In ***Bertrand***, 2007 QCCQ 6509, the accused was an animal rights activist who was found guilty of criminal harassment for engaging in threatening conduct by aggressively protesting at the offices of a research company that conducted tests on laboratory animals. The accused was disguised, yelled obscenities, knocked on windows, kicked doors, and used a loudspeaker and a megaphone to amplify the noise. The Court found that the accused was wilfully blind regarding whether the staff felt harassed by his conduct. The accused had tried more peaceful methods of protesting but found them to be ineffective "used more aggressive methods to ensure that their message was understood, regardless of whether people felt harassed."[146] The Court also stated that it believed that the accused wore masks to avoid being found guilty of a criminal offence.

[142] At para 84.
[143] At para 58.
[144] At para 15.
[145] At paras 24–25.
[146] At para 43 of the unofficial translation.

3.4.4 The Complainant Feared for Her or His Safety, or That of Someone Known to Her or Him

The targets of harassment must actually fear for their safety or that of someone known to them as a result of the conduct of the accused: See ***Sillipp***, 1997 ABCA 346; ***Josile*** (1998) WCB (2d) 249; and ***Hyra***, 2007 MBCA 69. For example, in *Fujimori*, 2005 BCPC 110, the Court found that obtaining a peace bond against the accused, making changes to her lifestyle and immediately retreating to her apartment upon finding the accused in her building supported an inference of fear on behalf of the complainant. See ***Hassan***, [2009] OJ No 1378 (SC) (QL), where the accused was acquitted on all counts of criminal harassment related to threats to distribute, and actual distribution of, intimate photographs of his former girlfriend, which he mailed to several people known to her. While the actions of the accused were characterized as "inappropriate and extremely nasty," it was not established that she "feared for her safety (psychological or physical) or that of anyone known to her."[147]

Fear for mental, psychological or emotional safety: Victims' fear for their safety or that of someone known to them is not restricted to fear of physical harm but, rather, includes fear for their mental, psychological or emotional safety. See ***Sillipp***, 1997 ABCA 346, leave to appeal to SCC refused, [1998] SCCA No 3 (QL); ***Ryback*** (1996), 105 CCC (3d) 240 (BCCA), leave to appeal refused [1996] SCCA No. 135; and ***Finnessey*** (2000), 47 WCB (2d) 326 (Ont CA). According to widely accepted dicta in ***Gowing*****,** [1994] OJ No 2743 leave to appeal to ONCA refused [1998] OJ No 90 , "it was the intention of the legislature that a victim's fear for his or her safety must include psychological and emotional security. To restrict it narrowly, to the risk of physical harm by assaultant behaviour would ignore the very real possibility of destroying a victim's psychological and emotional well-being by a campaign of deliberate harassment." However, fear for one's financial well-being is not sufficient. In ***Lincoln***, 2008 ONCJ 14, though the trial judge found that the complainant was threatened by her former fiancé's numerous threats that he would do everything in his power to get the engagement ring back, the offence of criminal harassment was not made out since the complainant did not specify that she felt her safety was threatened, as opposed to her financial well-being. See also ***Lukaniuk***, 2009 ONCJ 21.

Accused need not have knowledge of fear: It is not necessary that the Crown prove that the accused knew that the victim feared for her safety, only that the accused had the requisite *mens rea* that the complainant was harassed. See ***Ryback*** (1996), 105 CCC (3d) 240 (BCCA), leave to appeal refused, [1996] SCCA No. 135 (QL); and ***Pierce*** (1997), 34 WCB (2d) 437 (NSCA).

The complainant does not have to use the words "fear for safety": The victim's failure to testify as to his or her fear, or to use the word "fear", need not bar the court from drawing an inference based on the totality of the evidence. In ***Szostak***, 2012 ONCA 503, Rosenberg JA stated that fear can often reflect a state of uncertainty regarding what someone is capable of or intends to do. The Court of Appeal upheld Fairgrieve J's reasoning at trial that in the context of section 264, "fear for [one's] safety" included "a state of anxiety or apprehension concerning the risk of substantial psychological harm or emotional distress, in addition to danger of physical harm."

[147] At para 32.

Other actions of complainants that have been found not to negate a finding of fear include:

- Pretending to remain friends with the harasser in order to prevent the harassment from getting worse (***Haddad***, 2008 ONCJ 486);
- Staying in an abusive marriage, since even though the complainant was highly educated, she didn't realize the extent of her rights in Canada and came from a culture that she felt wouldn't be responsive to her fears for her safety in her marriage (***Chugh***, 2004 ONCJ 21);
- Following her ex-husband's car as he drove away after watching her house in the middle of the night, to confirm his identity (***Pastore***, 2005 ONCJ 332); and
- Having contact with the defendant after separating from him after a 20-year intimate relationship, and moving in to take care of him during an illness (***Saloio***, 2010 ONCJ 164).

In contrast, in ***JW***, 2010 ONCJ 194, the Court found that the continuous contact with the 18-year-old accused that was encouraged—and, at times, initiated—by the 15-year-old complainant cast doubt that she was harassed or that she feared for her safety.

Offence can be established where the victim fears for the safety of her or his child: In ***Colquhoun***, 2007 ONCJ 499, the accused was convicted of criminal harassment when the Court accepted that the complainant reasonably feared for her own safety or the safety of her daughter, after the accused angrily used a derogatory term in reference to the child. This occurred in the context of repeated harassment of the complainant after she had ended her relationship with the accused. See also ***Pennel***, (2007) 73 WCB 737 (Ont SCJ), where the Court found that the complainant reasonably feared for the safety of her daughter. The accused had been trying to re-establish a relationship with their daughter, whom he'd had no contact with for 10 years, after being convicted of sexually assaulting her when she was four.

Fear for the safety of non-family members: The "safety of anyone known to the complainant" is not restricted to immediate family members or people with whom the complainant has had an intimate relationship. In ***Cowan*** (2004), 61 WCB (2d) 646 (Ont SCJ), even though the complainant said she was not afraid for the safety of herself or her daughter, the Court found that her concern for her co-workers (and implied concern for the residents of the nursing home at which she worked) was evidence that could satisfy the fear for "the safety of anyone known to them" element of section 264 of the *Code*.

Not necessary for a harassed person to identify a particular person as the subject of the feared threat to safety: When a threat is not specifically directed at one particular person, threatening communications may be taken to be directed at a particular group of people generally (***Hawkins***, 2006 BCCA 498). In this case, the accused threatened several government employees over the telephone, regarding his driver's licence suspension, saying "there was an 85% chance he would kill government employees within a year."[148] He then argued that those employees who were not directly responsible for his file might not have felt personally threatened. The British Columbia Court of Appeal rejected this

[148] At para 7.

argument and held that "[it] would not be sensible to require a recipient to identify a particular individual as the subject of a threat stated in indiscriminate terms."[149]

3.4.5 The Complainant's Fear Was Reasonable in All of the Circumstances

The Crown must establish that the complainant's fear was reasonable, in all of the circumstances: See ***Lamontagne*** (1998), 129 CCC (3d) 181 (Que CA); and ***Krushel*** (2000), 142 CCC (3d) 1 (Ont CA). In ***Hyra***, 2007 MBCA 69, the key issue for the Manitoba Court of Appeal was whether the complainant's fear was objectively reasonable where the accused, who had been on one coffee date with the complainant, engaged in relentless and unwanted communication over a three-year period. In finding that the fear was reasonable, the Court described the conduct of the accused as "manifest[ing] unpredictability and an unwillingness or inability to exercise restraint or self-control, as shown by his disregard for police cautions and the charge." In ***Chaves***, [2007] OJ No 1551 (Ct J) (QL), the threatening conduct and the reasonableness of the complainant's fear, for his own safety and that of his family, could be implied from the context of the relationship between the target and the accused. The complainant was a police officer who was investigating charges against the accused, whom he knew to be a member of a motorcycle gang. Though the particular words of the accused might appear innocuous in and of themselves, the Court held that it "cannot disabuse itself of the context in which these remarks are being spoken and whether or not these words are to be taken as words of a sinister, intimidating, or threatening nature when it is apparent that by speaking those words in reference to his residence, that is the purpose for which Mr. Chaves has spoken those words…"[150]

Prior discreditable conduct is admissible as going to reasonableness of fear: See ***Ryback*** (1996), 105 CCC (3d) 240 (BCCA), leave to appeal refused, [1996] SCCA No 135 (QL); ***Hau***, [1996] BCJ No 1047 (SC); and ***Krushel*** (2000), 142 CCC (3d) 1 (Ont CA). In ***DD*** (2005), 203 CCC (3d) 6 (Ont CA), the Ontario Court of Appeal reviewed the leading cases on this issue and set out the probative purposes for which discreditable conduct occurring prior to the criminal harassment conduct is most frequently admitted. Those purposes are to provide context related to the following:

- the effect that the incident had on the complainant
- whether the accused knew that the conduct was harassing the complainant
- whether the complainant's fear for her or his safety was reasonable

The Court confirmed that the trial judge is required to weigh the probative value of the evidence against its prejudicial effect. The Court followed ***Ryback***'s dicta that while such evidence cannot "be used to establish any part of the *actus reus* of the charge, it is admissible to establish the mental elements required of both the accused and the complainant."[151] Thus, this evidence cannot be used to establish the propensity of the accused to do the alleged acts, but it can be used to provide context within which

[149] At para 23.
[150] *Ibid*.
[151] In other words, contextual information related to the elements in the three-part list above, as well as more context within which to determine the reasonableness of the complainant's fear. See ***DD*** at para 20.

to determine the mental states of the parties, as well as the reasonableness of the complainant's fear. This is a different issue than similar fact evidence. ***Hau*** also cites ***SB***, [1996] OJ No 1187 (QL) (Ct J (Gen Div)), which is frequently cited for its holding that in cases of intimate partner violence, evidence of pre-charge conduct is frequently admissible to provide narrative context or background to the charges before the court. Moreover, a minor incident of harassment directed at someone known to the complainant that took place a long time ago may be regarded as a relevant factor in the decision ***DD*** (2005), 203 CCC (3d) 6 (Ont CA)). See also "*Prior discreditable conduct is admissible as going to whether the accused has requisite mens rea that complainant was harassed*" in 3.4.3 The Accused Knew That the Complainant Was Harassed or Was Reckless or Wilfully Blind as to whether the Complainant Was Harassed.

Evidence that the accused has previous charges, non-contact orders, and/or convictions against the same complainant indicates that the accused knew the conduct was unwelcome and the complainant likely had an increased level of fear that the accused did not cease after justice system involvement: See ***Hau***, [1996] BCJ No 1047 (SC) (QL); and ***Kosikar*** (1999), 138 CCC (3d) 217 (Ont CA). See also ***Palermo***, [2006] OJ No 3191 (Sup Ct) (QL), where the accused called the complainant and said "You can't win with me," and then laughed and hung up after he was acquitted of several charges involving the same complainant, including criminal harassment after the relationship had ended. While such a comment may not appear threatening on its face, the Court found that the conduct was threatening. The fact that the accused had been acquitted of the previous conduct was equivalent to a finding of innocence on the previous charges, but the trial judge was still permitted to admit the evidence of the acquittal as being relevant to the current charges since that "verdict did not eliminate the relevance of the complainant's belief that she was being harassed [prior to the period covered by the current charges]" and that the accused called her after the acquittal and taunted her, suggesting that there was nothing she could do to stop him. This was relevant to assessing whether his conduct was threatening and the reasonableness of her fear with respect to the conduct currently before the Court. See also ***Cromwell***, 2008 NSCA 60, where the complainant's fear, caused by a series of letters written by her common-law spouse while he was in prison and subject to a no-contact order, was found to be reasonable in the context of his previous conviction for assault, criminal harassment and breach of no-contact orders against the same complainant, as well as his continuous references to his wish to resume the relationship and for her to stay faithful to him.

Fear of what the accused might be capable of: In ***Szostak*****,** 2012 ONCA 503, even though the complainant demonstrated concern for the well-being of the accused, her former common-law spouse, and was sympathetic to his unfortunate circumstances, her fear of him was reasonable, since he had assaulted her in the past, had unpredictable behaviour, and continued to harass her with multiple insulting and sometimes threatening voice messages. In ***Birsely***, 2009 ONCJ 458, the accused was found guilty of criminal harassment even though he had never threatened the celebrity complainant. The cumulative effect of his actions of persistently contacting the television personality, whom he'd never met, as well as her friends and family, and expressing his love and desire to marry her, despite

numerous requests to stop, caused the victim to fear for her safety. On the other hand, in ***Wolfe***, 2008 BCPC 119, the complainant's stated fear of her ex-husband, allegedly caused by his repeated offensive and aggressive phone calls, was found to be unreasonable in the absence of any actual threat by the accused to do anything, other than go to court.

The "reasonable person" standard must take into account all of the victim's circumstances in order to effectively protect the most vulnerable members of society: See ***Gauthier***, [2005] JQ no 5751 (CS)(QL). In this case, the complainants were children and the accused could not rely on the reasoning that an adult would not be fearful of his behaviour. However, the Court found that even though the children's fear was reasonable, the accused had not engaged in any prohibited conduct. In determining the reasonableness of the victims' fear, the court must take all circumstances into account. As per Greco J at paragraph 23, in ***Lafreniere*** (1994), 22 WCB (2d) 519 (Ont Ct J (Prov Div))(QL), and applied in ***Hertz***, [1995] 27 WCB (2d) 321 (Alta Prov. Ct.) this context can include:

> ...the gender of the victim and the story and circumstances surrounding the relationship which existed or which had existed, if any, between the accused and the victim. As per ***Lavallee***, it is legitimate to take gender into account due to the differences which recognizably exist between the size, the strength, and the socialization of women when compared to their male counterparts.

See also ***Kordrostami***, 143 CCC (3d) 488 (CA), where in affirming the trial court's finding of reasonableness of the complainant's fear, the Ontario Court of Appeal considered personal characteristics of the complainant, such as her young age.

3.4.6 Without Lawful Authority

The Crown must establish that the accused did not have lawful authority to engage in the harassing conduct: In ***Vandoodewaard*** (2009), 86 WCB (2d) 90 (Ont Sup Ct), Durno J upheld the trial judge's finding that "lawful authority should not be limited to more official types of authority such as police authority or government sanctioned authority. The common law could also provide sufficient authority."[152] He further referred to the Ontario Specimen Jury Instructions, which provide that "to have lawful authority to do something means that the law specifically allows a person to do what the accused did in the circumstances in which he or she did it."

A legal right to see one's child does not in and of itself constitute lawful authority in the sense of section 264: In ***BD***, 2006 ONCJ 249, it was not a lawful contact where the accused, who had a substantial history of violence and psychological abuse against the complainant, repeatedly contacted her, in contravention of a court order, to pressure her to bring their daughter to visit him in jail. There were other lawful means available for him to exercise his right to contact his daughter, and the Court made an inference that he "intended, as was his pattern, to overwhelm [the complainant's] refusal to submit to his demands." In ***Wolfe***, 2008 BCPC 119, the accused was acquitted of criminally harassing his estranged wife by making repeated obnoxious and offensive phone calls, sometimes making explicit sexual

[152] At para 75.

references. Although the calls bothered and upset the complainant, the Court found that they were not threatening and the accused was communicating for the legal purpose of abiding by the separation agreement with regard to their children.

Harassing elements can be found in communications otherwise made for a legitimate purpose: In ***Vandoodewaard*** (2009), 86 WCB (2d) 90 (Ont Sup Ct), it was held that, despite the fact that the appellant had a legitimate interest in having the complainant return his property, the Court could not turn a blind eye to the "constant repetition of the vitriolic and generally threatening comments in his communication to the complainant." See also ***Lincoln***, 2008 ONCJ 14, where the Court found that the accused might have had a legal claim to the return of an engagement ring, though "he had no lawful authority to repeatedly leave offensive and threatening messages for [his former girlfriend]." See also ***Milani***, 2007 ONCJ 394, where the Court emphasized that even if communications have a legitimate purpose, such as discussing ongoing matrimonial issues between ex-spouses who have children together, it may still be necessary to look at the content of the communications to ascertain their true purpose. In this case, the Court found that the true purpose of the accused's threatening phone calls was to pressure the complainant to "see things his way" in their matrimonial disputes. On the other hand, in ***Moyse***, 2010 MBPC 21, it was decided that the accused's repeated communications had the legitimate purpose of persuading the complainant to return his property to him; her failure to do so was found to be inconsistent with her alleged fear of the accused.

3.5 Murder Committed in the Course of Criminal Harassment

Subsection 231(6) of the *Criminal Code*, which came into effect in 1997,[153] makes murder committed in the course of criminally harassing the victim a first degree murder offence, irrespective of whether it was planned and deliberate. (See 3.2 Criminal Code Provisions for the full text of this subsection). ***Bradley,*** 2003 PESCTD 30, motion for appeal dismissed, 2007 PESCAD 23, is the first reported case of a successful prosecution under subsection 231(6), although the trial judge also found that the murder was otherwise first degree because it had been planned and deliberate.

Elements of criminal harassment murder: The Crown must prove that the accused caused the death of the deceased while the accused was committing or attempting to commit criminal harassment of the deceased as per section 264 of the *Criminal Code*. In addition to proving the elements of the offence of criminal harassment (see 3.4 Key Elements), to prove that murder was first degree under subsection 231(6), the Crown must also prove the additional element, that the accused subjectively intended to cause the person murdered to fear for her or his safety, or the safety of anyone known to the person murdered (***Bradley,*** 2003 PESCTD 30; ***Morehouse***, 2008 ABCA 225; and ***Desjardins***, 2010 QCCA 2).

[153] Bill C-27, *An Act to amend the Criminal Code (child prostitution, child sex tourism, criminal harassment and female genital mutilation)*, proclaimed into force on May 26, 1997. See SC 1997, c. 16, s. 3.

The offences of murder and criminal harassment need not occur simultaneously, but the two must make up one continuous sequence of events forming a single transaction: See ***Tran***, 2005 ABQB 852. See also ***Alaoui,*** 2009 QCCA 149, leave to appeal to SCC refused, [2009] SCCA No. 126 (QL), where the perpetrator, who had previously harassed his estranged wife, had no contact with her for four months prior to her murder. The interruption between the conduct that would constitute criminal harassment and the murder was held to have been sufficiently lengthy to bar the application of subsection 231(6).

Difference between subsections 231(5) and (6): The first reported reference to subsection 231(6) was in ***Russell***, 2001 SCR 53, where the Court noted the distinction between subsections 231(5) and 231(6). In order for subsection 231(6) to apply, the murder victim must be the same person who was being criminally harassed. (See also ***Tran***, 2005 ABQB 852.) In contrast, the constructive murder provisions in subsection 231(5) do not contain this limitation and did apply in ***Russell***, where the murder victim was not the same person who was unlawfully detained. In ***Penney***, [2004] OJ No 5914 (Sup Ct) (QL), the court quoted ***Harbottle***, [1993] 3 SCR 306, in order to clarify another difference between subsection 231(6) and subsection 231(5). The difference lies in two factors: i) the underlying offence; and ii) the additional mental element required by subsection 231(6), which provides that in engaging in a criminally harassing conduct, the accused intended to cause the victim to fear for his or her own or another's safety.

The constitutionality of subsection 231(6) was challenged and upheld in ***Linteau***, [2005] JQ no 16722 (CS) and ***Ratelle-Marchand,*** [2008] JQ no 3949 (CS)(QL). (See 3.3 Charter Challenges, for details.)

3.6 Case Law Dealing with Cyberstalking and Online Harassment

The use of technology to stalk and harass has been a growing concern in Canada over the last few years. Not only does it present unique investigatory and evidentiary challenges to police officers and prosecutors, but it also exposes and subjects victims to new types of harms. To date in Canada, because section 264 of the *Criminal Code* is not restricted to a specific method of communication, it has not been necessary to update it for it to apply to emerging technologies. It remains that so long as the user of the technology has knowledge that his or her conduct is harassing another person, and that person has a reasonable fear for his or her safety, the elements of the offence of criminal harassment will likely be satisfied.

As fact situations involving the use of new technologies to stalk and criminally harass began entering the courts, reported decisions did not reflect any challenges or reluctance in applying the established jurisprudence to these fact situations. In other words, the elements of the offence remain the same, and no new legal tests have appeared. The ways in which these cases do appear to differ, though, is in the kind of evidence that is presented to the court (see, for example, ***Labrentz,*** 2010 ABPC 11) and in the recognition that is being given to the unique ways in which this type of harassment affects victims. This impact on victims has been noted both in reference to the reasonableness of the victim's fear and at sentencing.

The courts have recognized that victims of cyberstalking may be more vulnerable than other victims, as they are less capable of escaping or hiding from the offender. ***Wenc***, 2009 ABPC 126; aff'd 2009 ABCA 328, for example, involved two men who entered into an intimate relationship after meeting online. Shortly after the complainant terminated the relationship, the accused began harassing him through repeated phone calls and voice mail messages, as well as numerous email and fax messages. The accused used false identities and third-party computers, making the process of tracing the source of the harassment difficult and lengthy. In addition, the accused spread false online rumours that the complainant was spreading HIV, sent nude photographs of him to their friends and assumed the identity of the complainant in chat rooms, causing strangers to come to the victim's residence expecting sexual encounters. The trial court stated: "Courts have noted that the intimidation caused by the harassment is a real form of harm, and unlike with more conventional modes of harassment, the victim of cyber-stalking is less able to escape or hide from their tormentor."[154] See also ***Fader***, 2009 BCPC 61, in which the accused was found guilty of criminal harassment for conduct that included sending sexually explicit pictures and videos of the complainant to the complainant's new boyfriend, threatening to send nude pictures of her to numerous people who knew her, and posting pictures of her and her contact information on an adult dating website, which resulted in people contacting her.

In ***Barnes***, [2006] AJ No 965 (Prov Ct)(QL), aff'd 2006 ABCA 295, the accused used his computer skills to obtain details of the complainant's personal life, steal her identity and electronically distribute her photographs. He continued to do so despite a no-contact order, even while living overseas, where he fled after warrants for his arrest were issued. The complainant described his relentless campaign of harassment as a systematic attempt to destroy her life. Cioni J stated that "cyber stalking can cause harm to people in their essential lives [and] is close to and a form of identity theft."[155]

In ***Cholin***, 2010 BCPC 417, the accused had first become fixated on the complainant in 2004 when she was a 12 year old actress, and he was 33 years old. Two years later, when she was a regular cast member in a television drama, she belonged to a social networking site whose security measures were still in development. The accused indicated in his profile on the same site that he was friends with many of the same people as the complainant and then initiated contact with her. She initially replied, but then blocked him from her site once his messages became odd and disturbing. The accused persisted in trying to contact her through various means, including sending overtly threatening sexual messages through her friends. The Court found that the conduct had a life-changing and serious effect on the victim and her family, and that the accused had little appreciation for the impact of his conduct. In sentencing the offender to 18 months incarceration, in addition to the 5 months spent in pre-trial detention, the Court imposed a 3 year probation order, which included a prohibition from accessing the Internet and not being in possession of any electronic device with capacity to access to the Internet.

[154] 2009 ABPC 126, at para 36.
[155] At para 1.

Part 4

Guidelines For Crown Prosecutors

The Department of Justice Canada's 1996 research report, *A Review of Section 264 (Criminal Harassment) of the Criminal Code of Canada*, reviewed the implementation of the 1993 criminal harassment provisions in six cities (Vancouver, Edmonton, Winnipeg, Toronto, Montreal and Halifax). The report identified a number of barriers to effective implementation and made several recommendations to enhance the effectiveness of the existing provisions. The following guidelines were developed to address these findings and recommendations, as well as to reflect consultations with Crown prosecutors and the developing case law to date.

Crown practices and policies vary from one jurisdiction to another, including in the use of victim witness assistance programs, for example. *These guidelines should be considered in conjunction with other applicable legislation and policies, including provincial policies relating to spousal assault and to diversion/alternative dispute resolution.* A primary objective in criminal harassment cases should be to keep the victim safe, informed and involved.

4.1 Process Considerations

- ❒ Where possible, make the same Crown counsel (and any Victim Witness Assistant) responsible for carrying a criminal harassment case from start to finish.
- ❒ Document all actions in each criminal harassment case on a case record sheet. This task includes identifying all actions taken and reasons for Crown decisions.
- ❒ Ensure sufficient time for case preparation.
- ❒ Seek early hearing dates and oppose unreasonable adjournment requests. Although not all delays are avoidable, "delays" can affect different victims differently: they may increase stress for some people and decrease stress for others. Note that it is always important to assess and re-assess the ongoing safety of the victim, and the adequacy of any no-contact conditions and other measures, during these intervening periods.

- ❒ In all domestic violence occurrences, consider whether there is any evidence of criminal harassment. If there is a reasonable likelihood of conviction and it would be in the public interest to proceed, consider laying charges[156] where such evidence exists.

- ❒ In criminal harassment cases where the accused is self-represented, the Crown can apply under subsection 486.3(4) for an order appointing counsel to cross-examine the victim. This reform reflects the serious nature of criminal harassment, including its impact on the safety and well-being of victims, by preventing the victim from having to endure further harassment by a self-represented accused. In these cases, counsel must be appointed unless doing so would interfere with the proper administration of justice.

- ❒ Make testimonial aids (screens, closed circuit television and support persons) available to facilitate the testimony of vulnerable victims and witnesses, such as victims (and their children) of spousal abuse, sexual assault and criminal harassment. For adult victims and witnesses, the aids are available, on application under section 486 of the *Criminal Code*, where it can be demonstrated that because of the surrounding circumstances (including the nature of the offence and any relationship between the victim/witness and the accused), they would be unable to provide a full and candid account without the testimonial aid. Under section 486.2, in cases where children or witnesses who may have difficulty giving testimony by reason of physical or mental disability are testifying, testimonial aids are to be made available to the child once a request has been made.

- ❒ For witnesses under age 18 or with a disability, consider the use of video recorded statements in evidence under section 715.1 of the *Criminal Code*. For witnesses outside the jurisdiction, consider an application, under sections 714.1 through 714.8, for the witness to testify by audio or audio/video technology.

- ❒ Ensure that the victim is given an opportunity to prepare a victim impact statement to file with the court as soon as possible. (For more information see 4.10 Victim Impact Statements)

4.2 Victim Interview

- ❒ Involve the victim throughout the process. For example, consult with the victim and provide the victim with timely information, particularly with respect to the release of the accused on bail and to the results of the trial and sentencing.

- ❒ Where possible, interview the victim before the date of the accused's first court appearance.

[156] Please note that throughout this Part of this Handbook, in jurisdictions where it is the police that lay charges, wording that directs the reader to "consider laying charges" for the Crown would consist of considering whether to advise the police of the existence of evidence that might support the laying of a particular charge.

- ❒ Prepare the victim to testify in court. Be sensitive to the victim's personal situation and state of mind, including the psychological and emotional distress he or she is likely experiencing. The victim may require the assistance of a support person and/or an interpreter. If the victim has not yet been referred to victim services, help the person contact victim services for support and assistance as soon as practicable.

- ❒ Crown counsel should ensure that the following critical information is documented in the file:
  - A description of all incidents of prohibited conduct in which the accused is alleged to have engaged;
  - Details of any words uttered or gestures made by the accused during the conduct;
  - The nature of the location and the time of day when the conduct occurred (these factors can affect the victim's fear);
  - Whether the incidents involved others or occurred in the presence of others, such as family, friends, co-workers and neighbours;
  - Whether the victim communicated—either indirectly through an intermediary, or directly—his or her displeasure with the accused's conduct (in other words, whether there is any direct evidence that the accused had actual knowledge of the harassing nature of the conduct, or was reckless as to the effect of the conduct on the victim);
  - Whether the victim has been required to alter his or her lifestyle or actions because of the accused's conduct (one effective way to do this is to have the victim describe their typical day before the stalking began, and the describe their typical day since the criminal harassment has begun);[157]
  - The history of any prior relationship between the victim and the accused, particularly details of past incidents of abusive or violent behaviour toward the victim, and criminal convictions for violence against the victim; and
  - The physical stature and gender of the victim and the accused.

4.3 Approval or Review of Charges

Police lay charges in all provinces with the exception of British Columbia and Quebec, where the decision to lay charges is made by the Crown. In New Brunswick, the decision to lay charges is made by police after receiving advice from the Crown. (See also 2.11.5 Arrest and Charges)

[157] Rhonda Saunders, *supra* note 88.

When deciding whether to lay charges, consider the following:

- ❒ Is there independent evidence supporting the charges?

- ❒ Consider laying both the separate charge and the inclusive count of criminal harassment, where one or more of the incidents giving rise to the complaint of criminal harassment can be construed as a single criminal offence. For example, where appropriate, consider also laying one or more of the following charges:
  - intimidation (section 423)
  - uttering threats (section 264.1)
  - wilful promotion of hatred (subsection 319(2))
  - mischief (section 430)
  - mischief in relation to data (subsection 430(1.1))
  - forcible confinement (section 279)
  - indecent or harassing telephone calls (section 372)
  - defamatory libel (sections 298–301)
  - trespassing at night (section 177)
  - voyeurism (section 162)
  - assault (sections 265 and 266); assault with a weapon or causing bodily harm (section 267)
  - aggravated assault (section 268)
  - sexual assault (sections 265 and 271)
  - sexual assault with a weapon, threats to a third party or causing bodily harm (section 272)
  - aggravated sexual assault (section 273)
  - causing death in the course of committing criminal harassment (first degree murder) (subsection 231(6))
  - unauthorized use of a computer (section 342.1)
  - identity theft (subsection 402.2(1))
  - identity fraud (subsection 403(1))
  - failure to comply with a condition of undertaking or recognizance (subsection 145(3))
  - disobeying a court order (section 127))
  - breach of recognizance (section 811))
  - failure to comply with probation order (section 733.1)

- ❒ Consider laying counts relating to serious incidents in the past.

- ❒ Consider seeking a peace bond order under sections 810,[158] 810.01, 810.1, or 810.2 of the *Criminal Code* where there is insufficient evidence to support charges. However, peace bonds are not normally an alternative to criminal charges where there is sufficient evidence to support charges. (See also 2.11.3 Peace Bonds, Civil Protection Orders, and Civil Restraining Orders).

In cases involving domestic violence, decisions to stay or withdraw charges should only be made after due consideration of all relevant facts, such as the history of violence between the accused and the victim, and whether the accused is influencing the victim's willingness to testify. While all victims want the harassment to stop, a complex array of factors may result in their reluctance to cooperate with the prosecution. Some of these factors particular to situations involving former intimates include the following: fear of the offender, perceived powerlessness, low self-esteem, social and economic dependency, lack of confidence in the justice system's ability to protect them, fear of authority and fear of child apprehension. The impact of these factors may be compounded by other experiences for Aboriginal women, women who are living in poverty, refugee or immigrant women, or women with disabilities. "Victim reluctance is considered by experts to constitute a significant risk factor warranting more, rather than less, criminal justice intervention."[159] Victim services play a central coordinating role in the provision of information and support to victims.

Diversion or alternative measures are generally not appropriate in criminal harassment cases, particularly in cases involving intimates. In jurisdictions where alternative processes are available, such processes should only be used where proper safeguards are in place. Alternative measures may be appropriate where all of the following circumstances are in place:

i. The referral to the alternative justice process is made *post-charge on Crown approval*;

ii. Trained and qualified personnel, using validated risk assessment tools, determine that the case is not high-risk (in other words, if after a consideration of a variety of factors, including any history of violence, threats of serious violence, prior breaches of protective court orders, the use or presence of weapons, employment problems, substance abuse and suicide threats, the offender is assessed to be at low risk of re-offending and therefore of low risk of harm to the victim's safety, as well as that of her children and other dependents, both throughout and after the process);

iii. The alternative justice process offers the same or greater measure of protection of the victim's safety as does the traditional criminal justice process;

[158] Note ***Klein***, 2011 SKQB 94, where the trial court's section 810 order banishing the appellant from the entire city of Regina was reduced to banishment from a more defined area of the city. In this case, the accused had been harassing the complainant for 35 years, which had resulted in psychological distress and distress-related medical issues for the complainant and had just been released from custody in relation to this harassment. Though he had not committed another offence since his release, he was observed by the complainant's family waiting around in locations that she frequented. The complainant continued to live in fear of the appellant.

[159] Victim Services Division, BC Ministry of Public Safety and Solicitor General, January 2004.

iv. The victim is fully informed of the proposed alternative justice process and her wishes are taken into consideration. In addition, victim consent is required and victim support must be provided where the victim will be asked to participate in the alternative justice process;

v. The offender fully accepts responsibility for his action;

vi. The alternative justice process is part of a program approved by the Attorney General for the purpose of providing alternative justice responses to spousal abuse and is overseen by the Attorney General or the court;

vii. The alternative justice process is transparent (that is, it maintains formal records of the actions taken by those engaged in the process) and it is undertaken in a timely and reasonable manner;

viii. The alternative justice process has the capacity to deal with spousal abuse cases and is delivered and supervised by persons possessing the requisite skill, training and capacity, including the ability to recognize and address any power imbalances, as well as cultural differences; and

ix. The possibility of criminal conviction and sentence remains if the process fails.[160]

❒ Inform the victim, police and victim services of any decision to reduce, withdraw or stay charges.

❒ Ensure that disclosure procedures are set up so that any information that would reveal a new address, phone number, location, or workplace of the victim or others involved is not disclosed.

4.4 Pre-Trial Release

(See also 2.12 Release From Custody)

4.4.1 Where the Accused Is Not in Custody

❒ Where the accused is not in custody when charges are approved, Crown counsel should seek a warrant for the arrest of the accused where there is need to seek the detention of the accused or to ensure that the protective conditions of release are imposed. On the issuance of the warrant, Crown counsel may oppose any endorsement of the warrant authorizing the release of the accused pursuant to section 507.

❒ Where the accused has been released by police, Crown counsel may consider seeking a warrant for the arrest of the accused under section 512, if it is necessary to protect the public interest.

[160] See Ad Hoc-Federal-Provincial-Territorial Working Group, *Final Report, supra* note 109 at 32–33. The majority of the Working Group members recommended against the use of alternative justice processes in spousal abuse cases, except in the circumstances listed above.

❒ Where the accused has been released by a justice or police on conditions, Crown counsel should consider the sufficiency of those conditions and possible variation or review of them.

4.4.2 Evidence at Bail Application Hearing

Before the show-cause hearing, Crown counsel should consider consulting with the police and/or the victim regarding any information missing from the file, as well as any new developments or concerns regarding risk factors. Note that in some jurisdictions, such as Alberta, the courts may have specific minimum requirements regarding which information is vital in the Crown's submissions at a bail application hearing. In ***Bleile***, 2000 ABQB 46, Martin J identified the following essential information to be included in the Crown submissions:

1. Whether there is a history of violence or abusive behaviour, and, if so, details of the past abuse;
2. Whether the complainant fears further violence if the accused should be released and, if so, the basis for that fear;
3. The complainant's opinion as to the likelihood of the accused obeying terms of release, in particular to no contact provisions; and
4. Whether the accused has any drug or alcohol problems, or a history of mental illness.[161]

In preparing bail submissions, see also information suggested to be included in 2.13 Police Report to Crown Counsel**.** When necessary to obtain complete information, the Crown should request an adjournment of the proceedings under subsection 516(1) of the *Code*.

At a bail application hearing, Crown counsel should do the following:

❒ Oppose pre-trial release where:
- Accused poses a danger to the safety of the victim or a witness; or
- Accused has breached a previous or existing no-contact order or condition (see ***Baggs***, [2008] NJ No 95 (SC (TD)) (QL)).

❒ Present evidence of the history of the harassment, as well as of any past incident of abuse or criminal conviction.

❒ Advise the Court of any indicators of high risk as reflected in the circumstances of the allegations, the relationship between the accused and the victim, and the background of the accused. Where possible, a risk assessment should be completed before an accused applies for judicial interim release. See, for example, ***Skinner*** (2009), Nfld & PEIR 70 (Prov Ct), where bail was denied due to the accused's long-term obsession with the complainant and his multiple breaches of court orders. A psychological assessment of the accused showed he had a history of sexual deviancy. This, in connection with his prior obsessive behaviour, was found to indicate a high risk of reoffending.

[161] At para 11.

- ❒ Present evidence of prior breaches of no-contact orders or conditions. Consider calling the charging police officer as a witness.

- ❒ Present evidence of the victim's concerns for his or her personal safety if the accused is released on bail.

- ❒ Emphasize that the victim's rights must also be considered. Paragraph 515(10)(b) of the *Criminal Code* makes it clear that bail decisions must take the safety of the victim into account. ***Mills***, [1999] 3 SCR 668, can be cited, if necessary, as standing for the proposition that the court must also consider the victim's *Charter* rights, in addition to those of the accused, in making its decisions.

- ❒ Present any evidence that the accused possesses firearms, weapons, or a related licence, registration, certificate or authorization.

- ❒ Where the accused is ordered detained in custody, seek a direction from the justice that the accused abstain from communicating, directly or indirectly, with the victim, witness or any other person named in the order (subsection 515(12)). Crown counsel should also request such an order for an accused who has been remanded into custody before the commencement or completion of his or her judicial interim release hearing (subsection 516(2)). If any such direction or order is made, follow procedure in your jurisdiction to ensure that remand facilities and police provost personnel are made aware of the order at the earliest opportunity.

4.5 Conditions for Release

4.5.1 Mandatory Considerations

When the accused is released on bail, the court shall consider whether it is desirable, in the interests of the safety and security of any person, particularly a victim or witness, to include conditions prohibiting the accused from doing the following:

- Possessing any firearm, cross-bow, prohibited weapon, restricted weapon, prohibited device, ammunition, prohibited ammunition, explosive substance or all such things (the condition should also address the method and time of surrendering any of these items) (subsection 515(4.1));[162]
- Communicating, directly or indirectly, with the victim, a witness or any other person expressly named in the order (subsection 515(4.2)); and

[162] Under subsection 515(4.1), this condition is mandatory for the offence of criminal harassment, unless the justice decides that it is not necessary.

- Going to any place within 200, 500 or 1,000 metres of any specified places, such as the victim's residence and place of employment (or any other place that the victim is normally known to frequent),[163] or within defined street boundaries, which can be set out on a map for clarity (subsection 515(4.2)).[164]

What to do about the children when there's a no-contact order between the parents

Where the victim and offender have children together, courts often consider how an order prohibiting communication between the parents will impact the children, and whether the offender should also be prohibited from having contact and/or communication with the children. The following are examples of some such orders that have been made: ***Alberts*** (2000), 147 BCAC 90 2000 BCCA 628: no contact with [name(s) of child(ren)] "except as may be ordered in child custody or access proceedings subsequent to the coming into force of this probation order by a court of competent jurisdiction"; and ***Dhillion***, 2007 BCPC 92, where the Court imposed a similar condition for the accused not to contact children "except through legal counsel or pursuant to child custody…or access proceedings…". However, many factors come into play in determining the best wording for each fact situation. As in the examples above, the criminal courts will often defer to the family court, to determine what will be in the best interest of a particular child. Other authorities to whom the court can defer decisions surrounding contact with the children are child protection authorities and child psychologists. For this reason, it will be helpful if the police or Crown have information from the victim or their civil lawyers about what other legal proceedings the family is involved in—such as family or child protection proceedings—and what other court orders members of the family might be subject to. Where there is to be any contact between the accused and their child, it is important that the Crown propose that the order be precise about how the contact will be arranged—for example, through a third party, or by e-mail, text messages or voice mail on a specific phone number. This type of specificity will leave an evidence trail of the nature of communication that is occurring. (For discussion of protection orders concerning children from a family law perspective see Linda C. Neilson, "Enhancing Safety: When Domestic Violence Cases are in Multiple Legal Systems (Criminal , Family, Child Protection). A Family Law, Domestic Violence Perspective." (June 30, 2012), at pp. 73-72. Available online at: http://www.learningtoendabuse.ca/sites/default/files/Enhancing_Safety.pdf

[163] This could include for example the YMCA during family swim times, or the local hockey arena on Saturday morning for hockey practice.

[164] Caution should be used to ensure that no-contact or radius clauses do not reveal a new address, phone number, location or workplace of the victims or others involved. Where available, an electronic monitoring bracelet or GPS monitor and conditions related to such a device should also be considered where such a device is desirable to monitor the accused's location.

4.5.2 Firearms/Weapons Prohibition

(See also 2.11.4 Prohibition Against Possessing Weapons)

Where the conditions of judicial interim release include a weapons prohibition, the following points apply.

- The justice must specify what is to be done with the weapons the accused already possesses, as well as how weapons-related documents are to be surrendered (subsection 515(4.11)).
- Note that section 115, which provides that, where there is a weapons prohibition order, the weapons in the possession of the accused are forfeited unless the prohibition order states otherwise, specifies that it does not apply to judicial interim release orders under section 515.
- Section 116, which provides that when someone is prohibited from possessing weapons, any documents relating to those weapons are revoked or amended when the prohibition order commences, pursuant to subsection 116(2), applies only "in respect of the period during which the order is in force," when the prohibition order is made under section 515.
- Section 113 allows for the partial lifting of a prohibition order where the person establishes that he or she requires a firearm or restricted weapon for sustenance hunting or employment purposes.
- If the justice does not impose a weapons prohibition as a condition of release, the justice must give reasons for this decision (subsection 515(4.12)).
- Where a court makes, varies or revokes a firearms prohibition order, the court must notify the Chief Firearms Officer without delay (section 89 of the *Firearms Act*).

4.5.3 Additional Conditions

When it is in the interests of the safety and security of any person, particularly a victim of or a witness to the offence or a justice system participant, a justice may impose other reasonable conditions. Crown counsel should consider seeking other conditions necessary to reflect the specific needs of the victim and accused, including the following:

- Abstain from the consumption of alcohol or other intoxicating substances or drugs, except in accordance with a medical prescription;[165]
- Report at specified times to a peace officer or other designated person;

[165] This condition is only appropriate where there is evidence that such substances were involved in the offence.

- Notify a peace officer or other designated person of any change in his or her address, employment or occupation. Consider requiring or seeking the condition that the accused is not to move without receiving prior permission of the court. This gives the court some control over where the accused might move. Sometimes, an accused notifies the designated person that he or she has moved to an address that is close to the complainant's residence or place of work, but not so close that the accused is breaching another condition. When the accused is required to come to court to change an address, the police or the Crown can check the proposed address against those frequented by the complainant to ensure some element of safety and peace of mind for the victim;
- Abstain from driving a motor vehicle (where one has been used in committing of the offence of criminal harassment);
- Obey a curfew requiring the accused to be home between specified hours, unless he or she obtains written permission from a designated person to be out (where the criminal harassment occurred during the night);
- Responsible sureties must come forward to closely supervise the accused. This condition is often the most significant factor the Crown considers when deciding whether to consent to release or oppose bail. However, it is very important to thoroughly assess the suitability and capabilities of proposed sureties. Such an assessment should normally include a criminal record check of the proposed surety, an inquiry into what knowledge the surety has of the accused (including criminal history), an inquiry into whether the surety fully appreciates the responsibilities of a surety, and general information about the surety, including his or her availability to supervise the accused;[166] and
- If the alleged harassment involved the use of a computer or other electronic device, consider a request for a condition limiting or prohibiting the possession or use of such a device. (See discussion of conditions prohibiting or limiting use of technology at 4.8.5 Probation Conditions).

❒ Where the accused is also bound by a civil court order, every effort should be made to provide the justice with the text of the civil order. To the extent that the civil order imposes different conditions from those imposed at the bail application hearing, ask the justice to advise the accused to obey the conditions of the criminal order, and the aspects of the civil order that are not contradicted by the criminal order.

❒ In cases involving former intimates with children, consider whether the exercise of the accused's rights to child access may conflict with a no-contact order with the victim. Recommend that, in the event of any such conflict, the accused shall forgo exercising his or her access rights.

[166] For more detailed suggestions, see D. Garth Burrow, *Bail Hearings* (Scarborough, Ontario: Carswell, 1996).

4.5.4 Follow-Up With Police, Victim Services and Complainant

❒ Have a system in place so that the police, victim services, and the complainant are advised of the date of the bail hearing and the outcome of the hearing, including any conditions imposed as part of the pre-trial release or detention. Systems should be put in place so that police will ensure any information relating to release conditions, including weapons prohibitions, is input into CPIC as soon as possible.

4.5.5 Breach of Bail Conditions

Given the nature of the threat to criminal harassment victims, pre-trial release is typically opposed where the accused breaches a previous or existing no-contact order or condition, or where new allegations suggest that the accused poses a danger to the safety of the victim, witnesses or other members of the public.[167]

❒ Where the accused breaches bail conditions, consider the following:

- Having the accused arrested pursuant to paragraph 524(1)(a) of the *Code*;[168]
- Charging the accused under subsection 145(3) or 145(5.1) and possibly charging the accused with a new count under section 264; and
- Bringing an application pursuant to subsection 524(8)[169] to have all previous releases cancelled (see preconditions of that subsection), and either opposing release on any new subsection 145(3) or 145(5.1) charges, or tailoring the conditions to address the new offences as well.

This approach is advantageous because when the justice finds that the conditions in paragraphs 524(8)(a) or (b) are met, the justice must cancel all existing forms of release. The onus is then on the accused to show cause why detention is not justified, in relation to both the new charges and the old charges (for which previous forms of release have been cancelled). The application to cancel previous forms of release is usually made during the judicial interim release hearing. If the accused is subsequently released, it will be under one form of release (in other words, one set of conditions) for all charges for which the existing forms of release were cancelled. If the accused is detained, it will be for all outstanding charges. Where subsection 524(8) applies, the laying of new charges will bring the accused's entire course of conduct before the bail court.

Note that where subsection 524(8) does not apply, subsection 515(6) may still place the onus on the accused to show why his or her detention in custody is not justified.

[167] In these situations, a bail review hearing under section 521 of the *Code* might also be appropriate.
[168] See Part 2.10.5, "Arrest and Charges."
[169] Note that where the previous form of release was made under subsection 522(3) (in relation to section 469 offences), subsection 524(4) applies.

4.6 Election: Summary Conviction or Indictment Considerations

Issues to consider in determining whether to proceed by way of summary conviction or indictment include the following:

- Is the offence date more than six months old? If so, you cannot proceed summarily unless both the Crown and defendant agree to do so.[170] Given the repetitive nature of criminal harassment conduct, there are times when some of the repeated acts may have occurred more than six months ago. In ***Barton***, 2010 ONSC 3562, Hockin J held that even though only one of the acts of repeated communication had occurred within the limitation period set out in section 786(2) of the *Code*, the court could look to the totality of the evidence causing the complainant to fear for her safety, including the conduct that occurred outside of the statutory limitation period. Note that the courts have frowned on the prosecution electing to proceed by indictment, when it is clear that if the six month limitation period had not expired, the prosecution would have proceeded summarily (see ***Quinn***, [1989] JQ no 1632 (Que CA) (QL); and ***Bridgeman***, [2004] JQ no 2319 (Que CA) (QL)).

- Does the case require a quick response and solution by the criminal justice system?

- Do the nature and seriousness of the conduct in question warrant a strong response by the criminal justice system?

- Given the facts of this case, and the suspect's criminal record, is a penalty in excess of six months' imprisonment likely?

- Would a preliminary hearing and possible trial by judge and jury impose a greater burden on the victim?

- Will the election have any implication on plea negotiations?

- If the six month limitation period has expired, can the delay be attributed to the Crown, and if so, was it possible for the Crown to have completed the investigation and laid charges within six months of the date of the offence, given the nature of the offence and evidence to be investigated?

4.7 Case Preparation

- Determine whether the Information is accurate and complete—in other words, whether it reflects all of the necessary elements of a charge under section 264—or whether it needs to be amended. The Information and charges should also be reviewed to determine whether all of the charges arising from the evidence gathered by police have been laid.

[170] See subsection 786(2) of the *Criminal Code*.

- ❒ Contact the victim as soon as practicable to advise him or her of responsibility for the case. (In some jurisdictions, the Crown's office may make this initial contact through the victim witness assistance program.) Be sensitive to the victim's personal situation: some victims may prefer or need to be interviewed well before the preliminary hearing or trial date; others may prefer or need to be interviewed closer to the preliminary hearing or trial date. Take notes of all meetings with the victim and record the following on the Crown case record sheet: the date of the meetings, the persons present, the issues discussed, and the recommendations or decisions made.

- ❒ Advise the victim that all information provided to the Crown is subject to Crown disclosure obligations.

- ❒ Where appropriate, seek the assistance of experts, such as police threat specialists and forensic psychiatrists. See, for example, ***McCartney***, 2005 BCPC 493, where, due to a psychological assessment indicating that the accused was schizophrenic and suffered from delusions, he was found not criminally responsible for a section 264 charge stemming from his harassing phone calls made to a politician and to RCMP officers, on account of a mental disorder.

- ❒ Where evidence of the accused's prior conduct or history will be led to address the reasonableness of the victim's fear, ensure that all of this evidence is available and properly documented.

- ❒ Where the accused is self-represented, bring a motion well in advance to appoint counsel for the purposes of cross-examining the victim of the criminal harassment (subsection 486.3(4)), or any children or other vulnerable witnesses (subsections 486.3(1) and (2)). Specifically, subsection 486.3(4) requires the trial judge to appoint counsel for a self-represented accused to cross-examine the victim, thus preventing any continuation of the harassment that might occur if the accused is permitted to personally cross-examine the victim.

4.8 Sentencing

In reviewing cases for sentencing purposes, Crown counsel should remember that a number of specific sentencing provisions apply to criminal harassment sentencing decisions. Specifically, the commission of an offence of criminal harassment in the face of a protective court order is an aggravating factor for sentencing purposes (subsections 264(4) and (5)). As well, effective July 23, 2002, the maximum sentence for criminal harassment was increased from 5 to 10 years, when proceeding on indictment, making it possible to argue that criminal harassment fits the criteria of a "serious personal injury offence" for the purpose of peace bonds under section 810.2 of the *Code*. Evidence that the offender, in committing the offence, abused his or her spouse or child is an aggravating factor for sentencing purposes (paragraph 718.2(a)(ii)). Moreover, evidence that the offence was motivated by bias, prejudice or hate on the listed or analogous grounds is also an aggravating factor for sentencing purposes (paragraph 718.2(a)(i)). Recent reforms to the conditional sentencing regime restrict the applicability of

conditional sentences for criminal harassment convictions (see 4.8.4 Conditional Sentences). Consideration may also be given to bringing a dangerous or long-term offender application.

4.8.1 Relevant Factors

The length of sentences in criminal harassment cases appears to have been increasing since section 264 was enacted in 1993. Just as there is a wide range of types and severity of criminal harassment, there is a wide range in the sentences that are being imposed for this offence. The 1994 decision of the Ontario Court of Appeal in ***Denkers*** (1994), 23 WCB (2d) 149, has been cited frequently, given the overwhelming number of criminal harassment cases that occur as a result of the inability of the accused to accept the termination of an intimate partnership:

> This victim, and others like her, are entitled to break off romantic relationships. When they do so they are entitled to live their lives normally and safely. They are entitled to live their lives free of harassment by and fear of their former lovers. The law must do what it can to protect persons in those circumstances...[171]

The Prince Edward Island Court of Appeal's 1995 decision in ***Wall*** also continues to guide sentencing courts dealing with criminal harassment convictions:

> The fact an offender shows any propensity toward this kind of conduct, regardless of his unblemished past, is cause for great concern and for a very careful and judicious approach to sentencing. Factors such as the absence of a prior criminal record and expressions of remorse, which must necessarily be considered on sentencing, should not be given undue weight in the sentencing of this offence.[172]

Wall was followed in ***Bates*** (2000), 146 CCC (3d) 321 (Ont CA), one of the leading cases in the country on sentencing in cases involving spousal violence and those involving criminal harassment. In this decision, Moldaver and Feldman JA noted the egregious nature of cases involving spousal abuse:

> Crimes involving abuse in domestic relationships are particularly heinous because they are not isolated events in the life of the victim. Rather, the victim is often subjected not only to continuing abuse, both physical and emotional, but also experiences perpetual fear of the offender.[173]

[171] At para 15.
[172] ***Wall*** (1995), 136 Nfld & PEIR 200, at para 9.
[173] At para 30.

On the need for strong sentences in cases of criminal harassment, the Court quoted the clear intent of legislators to "strongly denounce criminal harassment in Canadian society"[174] and went on to say:

> The number of recent cases continuing to reach this court emphasizes the extent of the problem of criminal harassment and the need for sentencing courts to respond to this type of offence in the most forceful and effective terms, sending the message of denunciation and general deterrence to the community, and specific deterrence to individual offenders.[175]

And more recently in ***Cooper***, 2009 BCCA 208, at the other end of the country, the British Columbia Court of Appeal affirmed the trial court's following ruling on the importance of denunciation in cases like this:

> It is important that in a small community such as this, where violence, spousal abuse and interference with witnesses are serious and difficult problems, that the Court should express its repugnance at the offences committed by Mr. Cooper. To the extent it is possible, Mr. Cooper and others who might be tempted to conduct themselves similarly should appreciate that a fixed term of imprisonment will be the likely result.[176]

Factors to consider at sentencing include the following:

- whether the offence was calculated and planned
- the magnitude and impact of the crime
- the use of violence
- the use of a weapon
- the offender's previous criminal record, including offences relating to the victim, and breaches of restraining and no-contact orders
- the history and context of the offender's relationship with the victim
- aggravating or mitigating factors
- pre-sentencing, medical or psychological reports, including any risk assessment related to the victim in particular and the public in general
- the offender's insight into the crime, and any feelings of remorse
- punishment, deterrence and rehabilitation
- the victim impact statement or other victim impact information
- guilty plea
- time spent in pre-trial custody
- firearms prohibitions
- conditional sentence conditions

[174] Bates at para 39 quotes the preamble to the 1997 amendments to section 264. Bill C-27, *An Act to amend the Criminal Code (child prostitution, child sex tourism, criminal harassment and female genital mutilation)*, proclaimed in force May 26, 1997. See S.C. 1997, c. 16.

[175] At para 42.

[176] At para 22.

- probation conditions
- family support
- the ability to abide by court orders
- the prolonged duration of conduct
- the impact of a criminal record on employment

4.8.2 Custodial Sentences

The chart that follows provides further insight into factors that courts take into consideration in making sentencing decisions for the offence of criminal harassment. The cases are presented in chronological order and provide trend information and guidelines in sentencing in this area. This chart only contains some of the cases in which custodial sentences were ordered, and is not an exhaustive listing of all the dispositions that have been made. For information on cases in which other types of sentencing orders were made, see the various sections after the chart.

❒ See also ***Brownlee***, 2006 BCPC 395, where the court emphasized that relentless and repeated conduct, such as demonstrated by the accused, can be extremely dangerous and is known to often end in tragedy. The accused called his pregnant ex-girlfriend, who had ended the relationship, over 20 times a day, followed her to home and work, watched and beset her at her house, and threatened to take her baby away.

Key Case Characteristics	Case Name	Sentence	Profile of Accused	Nature of the Harassment	Aggravating Factors	Mitigating Factors
Prior convictions relating to victim ***Breach of court orders*** ***Former common-law partner***	***Edwards*** [2009] OJ No 4764 (Sup Ct) (QL)	**S. 264:** 4 years' custody and 3 years' probation (reduced to 16 months after credit for pre-trial custody). **Ss. 264.1:** 1 year concurrent. **Other:** s.109 weapons prohibition; ss. 487.051(3) DNA order. **Suggested range:** 2½ to 4 years' custody for serial harassers.	Male, 61 years old, 11-year period of harassment began after termination of a 24-year common-law relationship with the complainant. **Prior criminal record:** 14 convictions, all post-separation, relating to threatening or harassing, and breaches of recognizance and probation orders.	Two phone messages at the complainant's workplace, containing threats of violence and death threats against the complainant and her bosses. **Victim impact statement:** The complainant has lived in a state of perpetual fear and apprehension for past 10 years.	- Harassment of the same complainant. - Domestic nature of the relationship. - **Ineffectiveness of previous and increasingly harsher sentences**.	- Guilty plea with no trial required. - History of alcohol abuse. - No criminal record before the age of 50 (when the harassment began).

Key Case Characteristics	Case Name	Sentence	Profile of Accused	Nature of the Harassment	Aggravating Factors	Mitigating Factors
Use of technology ***Former same-sex intimate partner*** ***Impact on victim*** ***Endangerment through involvement of third parties*** ***Disrupting complainant's work***	***Wenc*** 2009 ABPC 126; 2009 ABCA 328	**S. 264:** 90 days' custody, served intermittently (the ABCA found that "the **appropriate sentence in this case is 12 months' Imprisonment**").[177] **Suggested range:** 9 to 24 months' custody for harassment of this duration and sophistication. "…**victim of cyber-stalking is less able to escape or hide from their tormentor …[d]eterrence and denunciation are the primarily applicable sentencing principles in these …cases."(ABPC)**	Male, 37 years old, harassed his same-sex former intimate partner for 2 years after the break-up. The couple originally met online. **Prior criminal record:** No.	The harassment took the form of hundreds of e-mails, false Internet postings and phone calls sent following their break-up. It continued for over 1½ years. Phone calls interfered with the complainant's business by jamming the voice mail system. The accused also impersonated the complainant in chat rooms and caused strangers to arrive at the complainant's residence with expectation of sexual encounters. The victim did much of the initial investigation linking the accused to the anonymous harassment.	- Planned and deliberate, and inventive. - The persistent, unrelenting nature of the harassment (over 1½ years). - Caused extreme fear and humiliation. - Showed extreme insensitivity and cruelty. - Minimized involvement, blamed the victim, and showed little insight into his conduct. - The accused and the complainant had had an intimate relationship.[178] - Danger posed to the victim with involvement of third parties.	- Guilty plea (though the effect was diminished by the fact that the plea was 3 years after the arrest and after the preliminary inquiry started). -No prior record (though the effect was diminished since the offence occurred over a long time period).

[177] However, the Court didn't alter the sentence in this case, since the defendant had already had "piecemeal" restrictions on his liberty for which it would be challenging to determine appropriate credit.

Key Case Characteristics	Case Name	Sentence	Profile of Accused	Nature of the Harassment	Aggravating Factors	Mitigating Factors
No prior criminal record ***Harassment during intimate relationship*** ***Violence***	***Said*** [2009] OJ No 1243 (Sup Ct)	**S. 264:** 3 months' custody **Global sentence:** 8 months' custody (includes 264, 266, and 2 x 264.1.) **Other:** 2 years' probation order (including Partner Assault Response program); s. 109 weapons prohibition; ss. 487.051(3) DNA order.	Male, harassment began several months into an 11-month relationship with the complainant. **Prior criminal record:** No.	The accused was possessive of the complainant. He would strike her in the face during sexual relations and loiter at her place of work. On one occasion, he threatened to kill her and harm her child.	- The harassment occurred over a long period of time. - Assault occurred during sexual intimacy. - There was a long-lasting effect on the victim. - Threats of death and bodily harm were terrifying.	- No prior criminal record. - Pleaded guilty. - Showed remorse.
Short duration of harassing behaviour	***Rubletz*** 2009 ABCA 191	**S. 264:** 3 months' custody plus 3 years' probation (i.e., time served between sentencing and successful appeal of 2-year custodial sentence at trial).	Male. **Prior criminal record:** Extensive record, including a prior s. 264 charge involving the same complainant.	24 unanswered phone calls within a 2-hour period. No threatening or abusive voice mail messages. The Crown conceded the sentencing judge had **"mischaracterized the seriousness of the communication"**.	- Not addressed in the reported decision.	- Not addressed in the reported decision.

[178] This factor applied even though the accused and the victim were not spouses or common-law partners, as specified in subsection 718.2(a)(ii). The Court pointed to two other Alberta Court of Appeal decisions in which subsection 718.2(a)(ii) had been applied in other cases of intimate relationships, after the relationships had ended: ***Lee***, 2004 ABCA 46; and ***Evans*** (1997), 196 AR 207 (CA).

Key Case Characteristics	Case Name	Sentence	Profile of Accused	Nature of the Harassment	Aggravating Factors	Mitigating Factors
Harassment of employees' professional regulating body **Prior charges of criminal harassment** **Mental health issues** **Breach of court order**	***Bédard*** 2009 QCCS 2278	**S. 264:** 54 months' custody (reduced to 28 months after two-for-one credit for 13 months' pre-trial custody). **Other:** s. 487.051(3) DNA order.	Male. Harassed employees of the Engineering Order of Quebec. **Prior criminal record:** Three prior s. 264 convictions. The accused was on probation at the time of this offence.	The accused terrorized the staff with frequent and aggressive phone calls, which prompted the complainants to install an alarm button at reception. The accused was aggressive and disruptive at trial and at times had to be removed from the courtroom and observe the proceedings on closed-circuit television from another room in the courthouse. The accused was unstable and dangerous when not taking psychiatric medication.	- Prior criminal record for s. 264 offences. - Breaching court order at the time of this offence.	- None.

Key Case Characteristics	Case Name	Sentence	Profile of Accused	Nature of the Harassment	Aggravating Factors	Mitigating Factors
Victim a stranger ***Single incident***	***Kohl*** 2009 ONCA 100, varied, 2009 ONCA 254, leave to appeal to SCC refused, [2009] SCCA No 130 (QL)	**S. 264:** 2 years' custody (ONCA originally imposed a 3-year probation condition as well, but in a subsequent judgment, the Court struck the probation order since it was illegal, as the accused was serving 5 years' custody at the time) (originally 3 years' custody at trial level).	33-year-old male. Stranger to the complainant. **Prior criminal record:** Significant; included robbery, assault and sexual assault.	Accused jumped out of the bushes while the complainant was jogging, blocking her way, and then chased her down the street. Although it was an isolated incident of a relatively short duration, the conduct was deemed to be "highly threatening and persistent."	- Not addressed in the appellate decision.	- Not addressed in the appellate decision.

Key Case Characteristics	Case Name	Sentence	Profile of Accused	Nature of the Harassment	Aggravating Factors	Mitigating Factors
Former common-law partner ***Ongoing intimate partner abuse*** ***Use of a weapon***	***Shears*** [2008] OJ No 4897 (Sup Ct) (QL)	**S. 264*:*** 2 years' custody. **Global sentence:** 5½ years' custody (shortened to 3 years after two-for-one credit for time served) for criminal harassment, assault causing bodily harm, uttering threats to cause bodily harm, pointing a firearm, possession of a restricted weapon and breach of a court order. *The Court stated that **the sentence had to "reflect the society's revulsion of [the accused's] conduct towards a vulnerable victim, a conduct that was not the result of one incident but of several incidents."**	Male. 5-year common-law relationship with the complainant. The accused also has a young child with the complainant. **Prior criminal record:** Lengthy criminal record dating back to his youth, including assaults against former common-law partner.	The couple had separated and, during an argument, the accused pointed a rifle at the complainant's head. The rifle went off and injured her leg. Subsequently, the accused harassed the complainant to prevent her from reporting the shooting to the police.	- An escalating pattern of threats and violence to prevent the complainant from reporting the shooting. - An extreme case of abuse of a common-law partner. - Use of a weapon while under a weapons prohibition. -Extensive criminal record, including a previous domestic assault on a different common-law partner, and breach of conditions of past sentences.	- A period of good behaviour for the 3 years previous to this incident. - No prior weapons offences.

Key Case Characteristics	Case Name	Sentence	Profile of Accused	Nature of the Harassment	Aggravating Factors	Mitigating Factors
Prior marriage ***Disrupting complainant's work***	***Malakapour*** 2008 BCCA 326	**S. 264:** 30 months' custody (shortened to 2 years after two-for-one credit for 6 months of pre-trial custody).	Male, 52 years old, began harassing his wife after she left their marriage. **Prior criminal record:** One breach of court order.	The harassment took place over 15 months and consisted of thousands of phone calls, many of which disrupted the complainant's work; watching and besetting of the complainant; and death threats if she would not come back to the marriage. The harassment continued despite arrest and a peace bond.	- Not specified in the appellate decision.	- Not specified in the appellate decision.

Key Case Characteristics	Case Name	Sentence	Profile of Accused	Nature of the Harassment	Aggravating Factors	Mitigating Factors
Continued harassment in custody ***Former common-law partner***	***Cromwell*** 2008 NSCA 60	**S. 264:** 36 months' on appeal (26 months after 10-month credit for time in remand). (Originally 4 years' custody at trial level). * The trial judge relied on the sentence in *O'Connor*, which was subsequently reduced by the Ontario Court of Appeal.	Male. He had a common-law relationship with the complainant and was the father of three children with the complainant. **Prior criminal record:** Extensive record, including for previously harassing the complainant.	While in custody for conviction for harassing his wife and subjected to no-contact court orders, the accused continued to contact the complainant via a series of letters. The first letter attempted to reconcile; the others were harassing and controlling.	- Not specified in the appellate decision.	- Not specified in the appellate decision.

Key Case Characteristics	Case Name	Sentence	Profile of Accused	Nature of the Harassment	Aggravating Factors	Mitigating Factors
Former intimate partner ***Repeated offences against victim*** ***Violence*** ***Family support for perpetrator***	***Feick*** [2008] 77 WCB (2d) 719 (Ont. Sup Ct)	**S. 264:** 1 year's custody. **Global sentence:** 4 years' custody (reduced by 3 months' credit for pre-trial custody) for 2 counts of break and enter, sexual assault, repeated telephone calls under ss. 372(3), and criminal harassment. *The Court noted that this case called for **denunciation and deterrence, while rehabilitation was a secondary consideration.**	60-year-old male had an intimate relationship with the complainant while he was in a common-law relationship with another woman. **Prior criminal record:** Some prior convictions, including one prior assault of his common-law spouse.	After the complainant ended their intimate relationship, the accused engaged in threats and assaults, breaking into the complainant's residence to sexually assault her on three occasions. This harassment and abuse continued over a 3-year period. He also followed her and embarrassed her in public places, including at her business.	- The accused's refusal to accept end of relationship. - The prior criminal record contained convictions for violence and breach of court orders. - The repeated nature of the harassment and the prolonged length of time over which it occurred. - **s. 718.2(a)(ii) did not apply,** since their relationship was not a domestic one and each had other spouses while they were romantically involved.	- Good behaviour in the period between the charge and the time of sentencing. - Family support available. - Drug or alcohol abuse was not a factor. - Self-employed for 25 years.

Key Case Characteristics	Case Name	Sentence	Profile of Accused	Nature of the Harassment	Aggravating Factors	Mitigating Factors
Protection of the public ***Mental health issue*** ***Harassment of a Children's Aid Society caseworker***	***Richard*** 2008 ONCJ 343	**S. 264:** 18 months' custody and 3 years' probation. **Note:** Extensive probation conditions were also imposed to ensure the safety of the complainant upon the accused's release, with the non-contact and non-association portions to begin immediately. **Other:** s.109 weapons prohibition for life; and ss. 487.051(3) DNA order. ***The need to protect the complainant and to denounce the accused's behaviour was also taken into account.**	Male. Began harassing a Children's Aid Society caseworker and, incidentally, her family, out of anger at her involvement with his children. **Prior criminal record:** A variety of property, narcotics and assault charges.	The accused made repeated phone calls to the home of the caseworker using coarse language and implicitly threatening the safety of the employee and her family. **The pre-sentencing report** revealed obsessive beliefs about the Children's Aid Society and an inability to move away from his fixation.	- Prior criminal record.	- A 15-year gap in the criminal record immediately prior to this incident.

Key Case Characteristics	Case Name	Sentence	Profile of Accused	Nature of the Harassment	Aggravating Factors	Mitigating Factors
Continued harassment in custody ***Former common-law partner***	***Hudgin*** 2008 ABPC 87	**S. 264:** Three charges: 6 months' custody concurrent on each of the first two charges and 1 month's custody consecutive for harassment from custody. **Global sentence:** 7 months (also had two more concurrent 6-month sentences for uttering death threats, and break and enter and theft).	Male, 28 years old. He had a common-law relationship with the victim. The harassment began upon breakdown of the relationship.	The accused refused to accept the end of the common-law relationship. The harassment took place during a three-month period. It began as persistent letter writing, phone calls, and visits to the complainant's home and workplace, then escalated into death threats. The accused broke into her home and damaged her property. The accused turned himself into the police but continued to call the complainant from jail, despite a s. 515(12) prohibition.	- The victim could not feel safe in her home because the accused had invaded it. - The accused was persistent in harassing her after he was charged and in custody.	- Turned himself into police. - Guilty plea. - Minimal prior criminal record. - The young age of accused.

Key Case Characteristics	Case Name	Sentence	Profile of Accused	Nature of the Harassment	Aggravating Factors	Mitigating Factors
Extensive criminal record ***Former intimate partner*** ***Breach of court order*** ***Protection of the public*** ***Victim impact statement***	***O'Connor*** 2008 ONCA 206 rev'g [2006] OJ No 3017 (Ct J)(QL); leave to appeal to SCC refused, [2008] SCCA No 279 (QL)	**S. 264**: 3½ years' custody on appeal (30 months plus 414 days of time served). (Originally 6 years' custody at the trial level.) **Global sentence:** 4½ years for criminal harassment, assault and breach of probation. ***The Court cautioned that this case does not establish a 3½-year "outer limit" in sentencing serial harassers.** ***The Court felt there was a need to protect the public and to denounce the conduct of the accused.**	Male, in a relationship with the female complainant. **Prior criminal record**: 8 convictions for violence and 47 convictions against the administration of justice.	The charge stemmed from an incident where the accused followed and intimidated the complainant and her young son.	- The accused's prior criminal record showed a history of preying on vulnerable women. - He was breaching a court order at the time of this offence. - He prevented the complainant from getting help. - The victim impact statement described very negative effects on the complainant.	- None of any significance.

Key Case Characteristics	Case Name	Sentence	Profile of Accused	Nature of the Harassment	Aggravating Factors	Mitigating Factors
Former intimate partner ***Victim impact statement*** ***Mental health issue*** ***Use of technology*** ***Breach of court order***	***Cedros*** 2007 ONCJ 556	**S. 264:** 150 days' custody on one count, and 60 days' custody consecutive on the other. **Global sentence:** 275 days' custody and 3 years' probation for two counts of criminal harassment, and three counts of uttering threats and breaching bail conditions. **Other:** A mandatory 10-year weapons prohibition under s. 109.	25-year-old male with no prior criminal record. He had a former dating relationship with the complainant. He sought psychiatric help throughout the period of harassment.	The accused called her house up to 23 times a day; called her vulgar names; uttered numerous death threats directed at the victim, her family and her boyfriend; and threatened to rape her mother. The accused also sent threatening e-mails and texts. He hacked into a website of a professional organization of which she was a member and altered her first name to "Slutolana" and changed her password to "who_owns_you".	- Duration and intensity of the illegal acts. -Breach of bail conditions. - Threat to rape the complainant's mother. - **The victim impact statements attested to a "drastically diminished sense of safety", loss of trust in people and deep humiliation experienced by the family**.	- Guilty plea. - Remorse.

Key Case Characteristics	Case Name	Sentence	Profile of Accused	Nature of the Harassment	Aggravating Factors	Mitigating Factors
Post-marriage break-up ***Extensive criminal record*** ***Victim impact statement***	***Brake*** [2007] NJ No 359 (Prov Ct) (QL)	**S. 264:** 1 years' custody and 3 years' probation. ***The Court noted that a shorter sentence would not adequately serve the objectives of denunciation, deterrence and retribution, which are of particular importance in cases involving domestic violence.**	Male. He harassed his wife after their separation. **Prior criminal record:** Extensive, including threatening the same complainant.	The accused called the complainant over 100 times and left messages with a threatening undertone. The calls continued after the complainant changed her number. **Victim impact statement** sets out the torment she experienced.	- None specifically labelled as aggravating factors.	- Guilty plea.

Key Case Characteristics	Case Name	Sentence	Profile of Accused	Nature of the Harassment	Aggravating Factors	Mitigating Factors
Multiple stranger victims ***No prior criminal record*** ***Victim impact statements***	***Leasak*** 2007 ABCA 38; aff'g [2006] AJ No 431 (QB) (QL)	**S. 264:** 7 years' custody for nine counts under s. 264.	The accused was a 39-year-old male with no previous relationship with his 32 female victims. **Prior criminal record:** No.	There were 283 separate incidents over an 11-year period (with some individual complainants being harassed for 8 years). Activities included following the victims, making obscene calls, looking up the victims' skirts, and placing pornographic graffiti on the victims' vehicles or mailboxes.	- Planned and deliberate. - Post-offence, contacted five victims while prohibited from doing so. - Significant mental impact on the victims. - Duration of the offences.	- No prior criminal record (carries little weight when offences took place over 11 years). - Guilty plea. - Family support. - Steady employment history. - Willingness to undergo treatment. - Cooperation with the police.
Breach of court orders ***3 separate former intimate partners*** ***Aboriginal offender***	**Stuart** 2006 ABCA 168, aff'g [2005] AJ No 1409 (QB) (QL)	**S. 264:** 3 years' custody (1 year consecutive for each of three counts). **Global sentence:** 45 months for three counts under s. 264 and two counts of breach (peace bond and undertaking).	Male of Aboriginal descent. He was in a common-law relationship with two of the victims and lived with the third for several months. Evidence of prior abuse of all three complainants. **Prior criminal record:** Two prior assault charges.	The accused made repeated "manipulative, demeaning, belittling and obscene" phone calls to three complainants over a 3-year period.	- Record of intimate partner abuse. - Committing the offences while on release. - Absence of remorse.	- None mentioned.

Key Case Characteristics	Case Name	Sentence	Profile of Accused	Nature of the Harassment	Aggravating Factors	Mitigating Factors
Stranger to victim ***Extensive criminal record*** ***Breach of court order***	***Ohenhen*** (2005) 200 CCC (3d) 309 (ONCA); leave to appeal refused, [2006] SCCA No 119 (QL)	**S. 264:** 3 years' custody (reduced to 18 months after two-for-one credit for 9 months of pre-trial custody) and 2 years' probation. On appeal, the sentence was found to be appropriate.	Male. No prior relationship to the victim. Met the victim at the Canadian National Exhibition and phone calls began shortly after. Section 264 charge stemmed from conduct while on probation for the uttering threats conviction. **Prior criminal record:** Long history of criminal behaviour, including assault with weapons and prior conviction for uttering threats against this same complainant.	The accused placed a series of harassing phone calls, which started as amicable but turned abusive, threatening and derogatory. Following conviction for uttering threats against the same complainant, the accused also sent letters to her.	- Prior criminal record. - Prior charge for uttering threats against the same complainant.	- None mentioned.

Key Case Characteristics	Case Name	Sentence	Profile of Accused	Nature of the Harassment	Aggravating Factors	Mitigating Factors
Racially motivated ***Neighbour complainants***	***Lankin*** 2005 BCPC 1	**S. 264:** 60 days' custody (reduced to 32 days after credit for pre-trial custody) and 2 years' probation.	19-year-old male with a history of drug and alcohol abuse. He has limited reading and writing skills, and a Grade 9 education. **Prior criminal record:** No.	The accused harassed his neighbours, who were of Chinese descent, by leaving notes on their property containing racial slurs and by leaving dirty clothes on their porch. His behaviour was attributed to a belief that employers were hiring minorities to save money.	- Motivated by bias, prejudice or hate based on race. - Planning of offences, damage to property. - Multiple incidents involved.	- Offender's young age. - No criminal record. - Expressed remorse. - No further offences while on bail.

Key Case Characteristics	Case Name	Sentence	Profile of Accused	Nature of the Harassment	Aggravating Factors	Mitigating Factors
Breach of court orders ***Post-intimate relationship break-up***	***Hudson*** [2004] NWTJ No 44 (Terr Ct) (QL)	**Global on two counts under s. 264 and two breaches:** 9 months' custody and 1 years' probation. (2 months' custody on the first s. 264 count and 1 month on the related breach of undertaking; and 5 months on the second s. 264 count, and 1 month on the related breach of probation—all consecutive.)	Male with a prior intimate relationship with the complainant. **Prior criminal record:** On probation for a suspended sentence for harassing the same complainant.	The harassment began when the complainant ended their relationship. While on probation, the accused showed up in her bedroom, emotionally blackmailing her and threatening suicide if she had another boyfriend. Upon arrest, he phoned her from jail.	- Breach of probation order.	- None mentioned.

Key Case Characteristics	Case Name	Sentence	Profile of Accused	Nature of the Harassment	Aggravating Factors	Mitigating Factors
Prior marriage ***Prior criminal record*** ***Breaches of court order*** ***Absence of violence***	***Finnessey*** (2000), 135 OAC 396 (CA); leave to appeal to SCC refused, [2000] SCCA No 565 (QL) **** This case precedes the 2002 increase to s. 264's maximum penalty***	**S. 264:** 2 years' and 8 months' custody, consecutive to other charges, on appeal (reduced to 2 years and 4 months after credit for pre-trial custody). (Originally, 18 months' custody, concurrent with other charges, at the trial level). **Global sentencing:** 4 years' custody (on appeal) for s. 264 charges, breaking and entering, damage to a police vehicle, and threatening a police officer. *****The Court held that a **lack of violence is not a mitigating factor in a charge of harassment.**	29-year-old male. Separated from his wife, the complainant. Evidence that he suffered abuse as a child. **Prior criminal record:** 36 prior convictions, including prior assault and break and enter charges, and a history of violating parole conditions.	The accused broke into his ex-wife's home and terrorized her for several hours, threatening to kill her and her family. Over the next 15 months, the accused harassed the complainant. He phoned her hundreds of times, broke into her home, evaded arrest, and taunted her and the police.	- Extensive criminal record, including breaches of court orders. - Violation of parole and escaping from custody. - A prior s. 264 conviction involving the same complainant.	- Not applicable.

Key Case Characteristics	Case Name	Sentence	Profile of Accused	Nature of the Harassment	Aggravating Factors	Mitigating Factors
Deterrence and denunciation of domestic violence ***Former intimate partner*** ***Breach of court orders***	***Bates*** (2000), 146 CCC (3d) 321 (Ont CA) **** This case precedes the 2002 increase to s. 264's maximum penalty***	**<u>Global sentencing</u>:** 30 months' custody on appeal for 11 charges, including one count of criminal harassment, one count of uttering a death threat, three counts of assault, and six breaches of judicial interim release orders. (Originally 14 months' custody and three years' probation at the trial level.) ***The Court emphasized the need for denunciation and general deterrence to the community, and specific deterrence to individual offenders.**	Male. He had an intimate relationship with the complainant. He was married to a different woman during and after the affair and afterward. He had a history of depression. **Prior criminal record:** Two prior convictions for driving offences.	The harassment began when the complainant broke off their relationship after he assaulted her. The accused continually contacted and threatened her. At one point, the complainant's father found the accused waiting in the complainant's home when she was out.	- Escalating pattern of harassment over 3 months, including an assault. - Predatory following. - Harassing the complainant's friends. - Ineffectiveness of three prior court orders. - Final threat of homicide and suicide with a realistic-looking weapon.	- Guilty plea on some counts, (though the Court noted that the complainant still had to testify at trial).

4.8.3 Dangerous and Long-Term Offender Applications

- In appropriate cases, consideration may be given to bringing a dangerous or long-term offender application, given that a conviction of criminal harassment can qualify as a "serious personal injury offence", which is the prerequisite for a dangerous offender or long-term offender application.[179] On July 2nd, 2008, significant reforms to the dangerous and long-term offender provisions came-into-force, designed to respond to the Supreme Court of Canada decision in ***Johnson*****,** 2003 SCC 46. The Court in that decision held that for the provision to be constitutional, a sentencing court could not imprison the offender indeterminately if the offender could be successfully managed under a lesser sentence, such as a long-term offender supervision order. The 2008 amendments changed the procedure so that where an offender meets the dangerous offender criteria, the court shall designate the individual as a dangerous offender, and then impose the appropriate sentence, either an indeterminate sentence, a determinate sentence with a long-term offender supervision order or a regular sentence. In a major reform to the provisions, if an individual designated as a dangerous offender but sentenced to a long-term supervision order eventually breaches a condition of the order once released into the community, the individual is sentenced as an existing dangerous offender. If the court is satisfied that the risk the offender poses to public safety cannot be successfully managed in the community, an indeterminate sentence may be imposed.
- For an example of a case in which an offender who had been convicted of criminal harassment was found to be a dangerous offender, and an indeterminate term of imprisonment was imposed, see ***May*** (2007) 78 WCB (2d) 372 (Ont Sup Ct) (QL), where the accused, who had assaulted his girlfriend, broke into her house and continuously called her. His previous criminal record included stalking and threatening to kidnap two former girlfriends after they had ended the relationship. Following one episode, weapons—including an axe and a loaded rifle—were found in his vehicle, which was parked outside the girlfriend's house. His violent behaviour escalated with alcohol consumption. The accused was diagnosed as a psychopath and a pathological liar, unlikely to be able to follow through with rehabilitation. He presented a high risk of violence in a future domestic relationship. The victim impact statements were very similar and attested to the profound life-changing fear that the accused instilled in the victims.
- In other cases, a long-term offender designation was found to be more appropriate. See ***Desjarlais***, 2008 ABQB 365, where the Crown sought a dangerous offender designation, but the accused was instead designated as a long-term offender and received a global sentence of 10 years imprisonment followed by 10 years of community supervision. The predicate offence was a conviction for aggravated assault, criminal harassment and kidnapping of a woman with whom the accused had previously lived. The accused's criminal record comprised more than 60 offences; however, only 7 of those were considered violent offences. Even though the predicate offence was violent and there was a substantial risk of reoffending, there was no pattern of

[179] Bill C-15A, *An Act to amend the Criminal Code and to amend other Acts*, proclaimed into force on July 23, 2002, increased the maximum penalty to 10 years such that it could meet the criteria for a "serious personal injury offence" in section 752.

violence against a particular type of victim, no lasting physical injuries were inflicted, and there were sufficiently long intervals of time between previous offences.

- In ***Elizee*** (2007) 72 WCB (2d) 777(Ont Sup Ct), the accused was declared a long-term offender, and given a sentence of 5 years' imprisonment followed by a 10-year community supervision order, even though he fit the profile of a dangerous offender, since the Court found there was a reasonable possibility that the risk could be managed in the community. The accused was convicted of criminal harassment, assault causing bodily harm, unlawful confinement, attempted extortion and possession of prohibited weapons. He had been simultaneously involved in several intimate relationships with vulnerable young women, on whom he inflicted serious domestic violence.
- Where a Crown brings a dangerous offender application but the court finds the criteria for such a designation is not met, the court may instead impose a long-term offender sentence without further application of the Crown.
- When an application for a dangerous or long-term offender designation is not successful, consideration should be made to submitting information about the offender to the National Flagging System ("NFS") High-Risk Offenders (see 2.15 The National Flagging System (NFS) for High-Risk Offenders).

4.8.4 Conditional Sentences

Not available when proceeding by indictment

Conditional sentences are available for a conviction of criminal harassment, when the Crown has proceeded summarily. A conditional sentence has not been available for a conviction of criminal harassment, where the Crown proceeds by indictment, since December 1, 2007. As of November 20, 2012, amendments to the conditional sentencing regime under section 742.1(f) the *Criminal Code*, state that conditional sentences are not be available for the offence of criminal harassment under section 264 when prosecuted by way of indictment.[180] Between December 2007 and November 20, 2012, subsection 742.1 stated that a person convicted of a "serious personal injury offence" as defined in section 752, a terrorism offence or a criminal organization offence prosecuted by way of indictment (the maximum term of imprisonment being 10 years or more) was not eligible for a conditional sentence. The definition of a "serious personal injury offence" includes conduct likely to inflict severe psychological damage upon the victim, which captures the offence of criminal harassment, and removed the possibility of a conditional sentence where it was prosecuted by way of indictment.

When proceeding on summary conviction

A conditional sentence may nevertheless be an appropriate disposition in a criminal harassment case, where the Crown elects to proceed summarily.

[180] Bill C-10, *Safe Streets and Communities Act*, Royal Assent Received on March 13, 2012, section 742.1 proclaimed into force on November 20, 2012. SC 2012, c. 1.

The Supreme Court of Canada stated clearly in ***Proulx***, [2000] 1 SCR 61, that there should be no judicial presumption for or against the use of conditional sentences for any category of offence. The existing pre-requisites, in section 742.1 of the *Code*, for the use of a conditional sentence were then as follows: that the offence not provide for a minimum penalty; that the sentence be less than two years; that the offender not be a danger to the community; and that the sentence be consistent with the purpose and principles of sentencing, including denunciation, deterrence and incapacitation. The Court also emphasized that conditional sentences should include both punitive and rehabilitative objectives, and that conditions such as house arrest or curfew should be the norm. ***Bailey*** (1998), 124 CCC (3d) 512 at para 17 (Nfld CA), considered the types of conditions that may be imposed as part of a conditional sentence and stated that Parliament's intention in enacting the conditional sentencing provisions would be best "served by conditions which may limit the liberty of the subject but allow him or her to serve the sentence in the community."

The factors that have frequently led courts to reject imposing a conditional sentence for a criminal harassment conviction, where a sentence of less than two years is appropriate, include the following: a significant risk of reoffending; victim safety; and the fact that a conditional sentence would not provide the specific and general deterrence warranted by the gravity of the conduct in question.

Conditional sentences granted

In ***Colquhoun***, 2007 ONCJ 499, the accused repeatedly contacted his former partner and damaged her car after she refused to take him back following a break-up that he initiated. Aggravating factors included persisting with harassing communications despite warnings from the police and a complete lack of remorse. The Court stated that the sentence would have been served in jail had it not been for mitigating factors, which included the accused's "impeccable" background, exemplary family members, favourable references from a past employer and payment of restitution in the amount of $1,000, as well as the fact that the accused had undergone counselling and had been given a good prognosis. A 60-day conditional sentence was imposed, followed by 18 months on probation.

In ***DIDB***, 2006 QCCA 460, the accused began harassing the complainant after the latter ended their three-year romantic relationship. The Court described the appellant's conduct as extremely possessive and stated that its repetitive nature, along with the "diverse means by which he brought it about", was consistent with the concept of criminal harassment. The accused telephoned the complainant relentlessly and left numerous messages at her home and work, frequently visited her without warning, followed her on the street, hovered around outside her apartment and filmed her at work. He also sent nude photographs of the complainant to her workplace and threatened to show a video of their sexual activity to her parents, friends and colleagues. At trial, the accused was convicted of criminal harassment, mischief, sexual assault, extortion and assault, and sentenced to 18 months in prison. After acquitting the accused of sexual assault and mischief, the Quebec Court of Appeal substituted a 12-month conditional sentence, allocated for 12 months on one count of criminal harassment (with 6 months for extortion and 1 month for assault to be served concurrently). The accused was ordered to

remain at his residence for the first 6 months and a curfew was imposed for the remaining 6 months. The sentence was followed by a two-year probation period.

Conditional sentences denied

In ***Cooper***, 2009 BCCA 208, a joint submission asking for a conditional sentence of 15 to 18 months was denied in view of the offender's possessive and violent conduct following a marriage breakdown. The Court found that the offender was unlikely to abide by a conditional sentence, given his history of previous breaches of probation and recognizance orders and it was, therefore, reasonable for the joint submission to be set aside at trial. In ***Hudgin***, 2008 ABPC 87, a conditional sentence was held to be inappropriate in part due to the fact that the accused trivialized the offences and refused to take any responsibility. He was also at a moderate to high risk of reoffending and needed psychiatric counselling.

In ***Kelly*** (2004), 233 Nfld & PEIR 108 (Prov Ct), the Court denied a conditional sentence, which was being sought to protect his employment. The accused repeatedly called, threatened and followed the complainant after she had ended their 24-year marriage. He pleaded guilty to all the charges, consisting of criminal harassment, three counts of breach of a recognizance order and uttering death threats. The accused was 51 years old with no previous criminal record and was responsible for the support of one minor child and two adult children. The Court held that imposing a conditional sentence "would be tantamount to the Court saying to the accused: even though you have ignored the Court's order on three separate occasions, you will now be released on another Court order."A 60-day intermittent sentence served on weekends, followed by two years of probation, was found to be more appropriate.

Compulsory conditions of conditional sentence order (subsection 742.3(1))

- ❒ Keep the peace and be of good behaviour.
- ❒ Appear before the court when required to do so by the court.
- ❒ Report to a supervisor
  - within two working days, or such longer period as the court directs, after the conditional sentence order is made; and
  - thereafter, when required by the supervisor and in the manner directed by the supervisor.
- ❒ Remain within the jurisdiction of the court unless written permission to go outside that jurisdiction is obtained from the court or the supervisor.
- ❒ Notify the court or the supervisor in advance of any change of name or address, and promptly notify the court or supervisor of any change of employment or occupation.

Optional conditions of conditional sentence order (subsection 742.3(2))

❒ Abstain from
- the consumption of alcohol or other intoxicating substances; or
- the consumption of drugs except in accordance with a medical prescription.

❒ Abstain from owning, possessing or carrying a weapon.

❒ Provide for the support or care of dependants.

❒ Perform up to 240 hours of community service over a period not exceeding 18 months.

❒ Attend a treatment program approved by the province:
- For example, completion of an intensive sexual offender treatment program: See ***PLA***, 2003 ABPC 179, where the accused was given a conditional sentence of two years less a day, and three years' probation. The accused had repeatedly watched and driven by two female 13-year-old complainants as they each walked home from school. When the police seized his van, they found duct tape, gloves, a balaclava, and a case containing film, condoms and rubber gloves. The accused had one previous conviction for attempted rape and was a suitable candidate for community supervision, but without counselling, he had a moderate risk of re-offending.

❒ Comply with such other reasonable conditions as the court considers desirable, subject to any regulations made under subsection 738(2), for securing the good conduct of the offender and for preventing a repetition by the offender of the same offence or the commission of other offences. Some conditions that have been imposed as "other reasonable conditions" are as follows:

- No contact or communication with the victim: Almost all conditional sentences for criminal harassment convictions include a condition prohibiting the offender from contacting or communicating with the victim, either directly or indirectly. Where the offender and victim have children together, see text box: What to do about the children when there's a no-contact order between the parents for considerations to take into account.

- House arrest: In ***Perrier*** (1999), 177 Nfld & PEIR 225, at para 30 (Nfld SC (TD)), the Court imposed a condition requiring the accused to stay in his home, with a list of exceptions specifying when he could leave. For example, these exceptions allowed him to receive medical and dental treatment, attend meetings with legal counsel, and pursue employment or education. See also, ***DIDB***, 2006 QCCA 460, where the accused was ordered to remain at his residence for the first six months and a curfew was imposed for the remaining six months. The sentence was followed by a two-year probation period.

- No operation of a motor vehicle unless a named person is a passenger in the vehicle: See the remarks at sentencing for ***Gerein***, (April 7, 1999), Vancouver C39753-01-DD (BC (Prov Ct)); finding of guilt reported at [1999] BCJ No 1218 (Prov. Ct.) (QL).

- No possession of a camera while in a motor vehicle: See the remarks at sentencing for ***Gerein***, (April 7, 1999), Vancouver C39753-01-DD (BC (Prov Ct)); finding of guilt reported at [1999] BCJ No 1218 (Prov Ct) (QL).

- No operation of a motor vehicle unless the accused has previously provided his supervisor with the following information in writing: year, make, model, colour, vehicle identification number, name of registered owner and licence number. See ***PLA***, 2003 ABPC 179 (facts outlined above).

- Requirement to report any romantic relationship or sexually intimate relationship to the conditional sentence supervisor: See ***Carvalho***, [2002] BCJ no 2819 (Prov Ct)(QL).

4.8.5 Probation Conditions

Mandatory conditions (subsection 732.1(2))

❒ Keep the peace and be of good behaviour: See ***Solomon*** (2007), 74 WCB (2d) 262 (Ont Sup Ct), where the accused appealed the length of his probation order, which required him to keep the peace for two years. The accused had been convicted of criminal harassment after he had driven his truck to within 10 to 15 feet of the complainants' home and began yelling threatening obscenities. The Court dismissed the appeal, since a requirement to keep the peace for two years toward the complainants cannot be seen as an onerous sentence.

❒ Appear before the court when required to do so by the court.

❒ Notify the court or the probation officer in advance of any change of name or address, and promptly notify the court or the probation officer of any change of employment or occupation.

Optional conditions (subsection 732.1(3))

❒ Do not contact or communicate with the victim, either directly or indirectly. Note that where the complainant and accused have children together, the court may need to consider how a non-communication order prohibiting communication between the parents will impact on the ability of either of the parents to have contact with the children, while addressing the safety needs of the complainant. For considerations that should be taken into account with these types of conditions, see Text box: What to do about the children when there's a no-contact order between the parents.

- ❒ Refrain absolutely from being present at, or within a specified distance of, the victim's place of employment and place of residence (as well as those of any other named persons, such as family, friends or other intimates).

- ❒ Refrain absolutely from being present at other designated locations: In ***Sayyeau***, [1995] OJ No 2558 (Prov Div) (QL), the offender was prohibited from being present within the city of Cornwall on Sundays, as well as at certain other locations (malls, restaurants and parks on specified days, or at specified times), to allow the victim the freedom to walk about without any fear of further molestation. See also ***Bailey*** (1998), 124 CCC (3d) 512 (Nfld CA), where the Newfoundland Court of Appeal upheld a condition that prohibited the offender from participating in a regatta for the term of his conditional sentence; this condition gave the victim true freedom of choice to continue participating in the event. The Court of Appeal did, however, strike out a condition that prohibited the offender from coaching young females, as the evidence did not support the conclusion that he had demonstrated a pattern of harassing women attending the regatta.

- ❒ Be under the supervision of the probation officer and report to the probation officer forthwith and thereafter at such times and places as the probation officer shall direct.

- ❒ Make efforts to seek and maintain employment or education, as approved by the probation officer (***Gares***, 2007 ABPC 60). See also ***Lankin***, 2005 BCPC 1.

- ❒ During the term of probation, undergo whatever assessment, counselling and treatment the probation officer or any other professional deems necessary, in light of the offender's conduct that gave rise to the charge, or in light of any other concern:[181] Treatment programs that address spousal abuse may be imposed; see ***Prakash***, 2009 ONCJ 197 (QL), where the Court imposed the condition to complete the Partner Assault Response (PAR) program and any other counselling the conditional sentence supervisor recommended.

[181] Note that there may be limitations on what can be ordered under these types of conditions. See, for example, ***Rogers*** (1990), 61 CCC (3d) 481 (BCCA); and ***RMC***, 2002 ABPC 115.

- ❒ Abstain from consuming alcohol or other intoxicating substances or drugs, except in accordance with a medical prescription: See ***Brake***, [2007] NJ No 359 (Prov Ct) (QL), where the offender was prohibited from the use, possession or consumption of alcohol due to the fact that many of his crimes were committed while he was under the influence of alcohol. Attending treatment or counselling programs to address substance abuse may be imposed as a term of probation (***O'Connell***, [2005] OJ No 4783 (Ct J) (QL)). However, note ***Shoker***, 2006 SCC 44, where the Court held that a condition to provide bodily samples for testing to ensure compliance with a condition to abstain from drugs and alcohol was not authorized by the *Criminal Code*. In response to this decision of the Supreme Court of Canada, Bill C-30, which restores the authority for a court to impose a drug and alcohol prohibition as a condition of probation, was passed by Parliament and given Royal Assent on March 23, 2011, but had not yet come into force at the time this *Handbook* was published.

- ❒ Reside in a designated mental health institution as a condition of the probation order: See ***Rosato***, [2007] OJ No 5481 (Sup Ct) (QL), where the accused was compelled to reside in a psychiatric hospital for a period of three years.

- ❒ Probation conditions prohibiting or limiting Internet access may be appropriate when a computer was used to commit the crime. In ***RWG***, (2007)] BCPC 441, where the offender was a troubled young man with an extensive criminal record who harassed and threatened a teenage girl whom he met on an Internet social networking site, the Court imposed such a condition prohibiting access to any Internet sites or services that allow for social interaction. See also ***Cholin***, 2010 BCPC 417. These are in contrast to ***Wenc***, 2009 ABPC 126, varied 2009 ABCA 328, where the Court chose not to limit access to a computer despite prolonged and serious online harassment, including the use of false identities and third-party computers.

Prohibiting or restricting computer access for child sexual exploitation cases

Another area where probation conditions prohibiting or restricting access to computers or the Internet is in sentencing for Internet child exploitation (child pornography or luring cases). In the child exploitation context, there does not seem to be any dispute that probation conditions dealing with access to computers are appropriate since the offences were committed through use of a computer. In fact, effective August 9, 2012, section 161 of the *Code* has been amended to require a judge to consider prohibiting suspected or convicted child sex offenders from having any unsupervised use of the Internet or other digital network.[182] This issue is complicated by the fact that computers are becoming ubiquitous in modern society and the courts have begun to carve out special protections and rules for the investigation or search of computers and the data they contain. In some cases, a complete *prohibition* of computer use has been seen by the courts as problematic, so instead conditions *restricting* computer use and allowing for monitoring of compliance through conditions permitting the police to search the residence of the offender or requiring the installation of computer monitoring software have been used. (See for example ***Kwok*** (2007), 72 WCB (2d) 533 457 (Ont Sup Ct)). However, many courts deciding child exploitation cases prefer to ban the possession or use of computers by the offender in their home due to the perceived unconstitutionality of enforcing or monitoring compliance with conditions restricting computer use. The conditions monitoring compliance tend to rely on random search clauses aimed at gathering evidence for enforcement purposes, which are being found to be unconstitutional as per ***Shoker***, 2006 SCC 44. See for example ***Smith*****,** [2008] OJ No 4558 (Sup Ct)(QL), in which, though the Crown was prepared to allow computer and Internet use in the home if it was monitored and subject to random searches, the Court preferred to prohibit all use of computers, outside of the workplace, to the unconstitutionality of such monitoring; and ***Unruh***, 2012 SKPC 51, in which the Court held it was unconstitutional to order such monitoring, even where the accused was prepared to consent to it. In ***Yau***, 2011 ONSC 1009, the Court was not prepared to order any conditions banning the use of computers, other than that in paragraph 161(1)(c), prohibiting the use of computers for the purpose of communicating with persons under the age of 16.[183] ***Unruh*** further illustrates that in order for such conditions to be appropriately authorized as reasonable conditions for the protection of society and facilitating the offender's reintegration into the community, under paragraph 732.1(3)(h), the conditions must not contain broader restrictions than are necessary to protect society, within the context of the offence for which the sentence is being imposed, nor making it too difficult for the offender to successfully reintegrate into society, especially given the need for using technology in the workplace.

[182] SC 2012, c. 1, s. 16.

[183] The reluctance of some Canadian courts to restrict the use of Internet accessing devices is consistent with the views of some courts in the United States. The US Supreme Court in *Ontario v Quon*, 130 US 2619 (2010), a case dealing with privacy of text messages on workplace cellphones, stated that certain forms of communication may be "essential means or necessary instruments for self-expression, even self-identification". In other US courts, complete bans on computer use have been found to be unreasonable or overbroad since they interfere with the goal of rehabilitation, as computers and the Internet are considered to be modern necessities. On appeal, courts tend to remand these conditions back to the sentencing courts for narrowing and clarity (see for e.g. *United States v White*, 244 F3d 1199 (10th Cir 2001), and *US v Russell*, 600 F3d 631 (DC Cir 2010)).

4.8.6 Breach of Probation

- ❒ Consider charging the offender with any breach of probation conditions (section 733.1) or alleging any breach of conditional sentence conditions (section 742.6). See, for example, ***Boyd***, [2008] OJ No 4434 (Ct J) (QL), where the Court sentenced the offender to a global jail term of 13 months and four days', plus three years' probation for threatening death, harassing phone calls, and four counts of breaching probation (no contact and keep the peace provisions). The Court imposed 3 months' concurrent custody on one of the breach of probation charges, and 3 months' consecutive on the other since the offender's criminal record already contained a number of breach charges. See also ***Hudson***, [2004] NWTJ No 44 (Terr Ct) (QL), where the Court imposed a sentence of 11 months for two charges under section 264, 1 month for a breach of probation and 1 month for a breach of undertaking.

4.8.7 Fine

- ❒ The imposition of a monetary penalty, in combination with probation, and restitution may be appropriate. See ***Wall*** (1995), 136 Nfld & PEIR 200 (PEISC (CA)). In this case, the Court imposed a $1,000 fine, a restitution order and three years' probation.

4.8.8 Restitution

- ❒ Under section 738, the court may order restitution to the victim for ascertainable costs arising from the commission of the offence. See, for example, ***Siemans*** (1999), 136 CCC (3d) 353 (Man CA).

4.9 Ancillary Sentencing Orders

4.9.1 Firearms/Weapons Related Orders

(a) Firearms/Weapons Prohibition

- ❒ Where the offender is convicted, or discharged under section 730 of the *Criminal Code*, of criminal harassment, subsection 109(1) of the *Criminal Code* provides for a mandatory prohibition order, in addition to any other punishment that may be imposed (or any other condition prescribed in the discharge).

  - First offence: The court must prohibit the offender from possessing any firearms, other than a prohibited or restricted firearm, and any cross-bow, restricted weapon ammunition and explosive substance for at least 10 years after the offender's release from prison (or ten years after the date of the conviction or discharge where no imprisonment is imposed); and the court must prohibit the offender from possessing any prohibited firearm, restricted firearm, prohibited weapon, prohibited device and prohibited ammunition for life.

- Second or subsequent offence: The court must prohibit the offender from possessing any firearm, cross-bow, restricted weapon, ammunition and explosive substance for life. Note that various provincial appellate courts have held that, under subsection 727(1), the mandatory 10-year prohibition order is not available unless the Crown proves that the accused was notified that the Crown would be seeking greater punishment due to earlier convictions. See ***Jobb*** (1988), 43 CCC (3d) 476 (Sask CA); ***Ellis*** (2001), 143 OAC 43 (CA); and ***Caplin***, [2001] JQ no 5941 (Qc CA)(QL).

❒ It is still possible to obtain a firearms prohibition order where there has not been a conviction for criminal harassment, or another offence requiring a prohibition order under section 110. A peace officer or firearms officer may also apply to a provincial court judge for a firearms prohibition order under section 111 where he or she "believes on reasonable grounds that it is not desirable in the interests of the safety of the person against whom the order is sought or any other person that the person against whom the order is sought should possess any such thing".

❒ Section 113 allows for the partial lifting of a prohibition order where the person establishes, on a balance of probabilities, that he or she requires a firearm or restricted weapon for sustenance hunting or because the prohibition order would deprive the offender of the only viable employment available to him or her.

❒ For an example of a lifetime weapons prohibition in an extreme case of spousal abuse, see ***Shears***, [2008] O.J. No. 4897 (Sup Ct) (QL). In this case, the accused had a history of perpetrating intimate partner abuse and was also under the restriction of a 10-year weapons prohibition during the offence for which he was being sentenced, where he threatened his common-law partner by holding a gun to her head.

(b) Requirement to surrender

❒ Section 114 provides that the authority making the prohibition order may require that the person against whom the order is made to surrender "(a) any thing the possession of which is prohibited by that order that is in the possession of the person on the commencement of the order, and (b) every authorization, licence and registration certificate relating to any thing the possession of which is prohibited by the order that is held by the person on the commencement of the order".

(c) Forfeiture

❒ Section 115 provides that weapons in the possession of a person who has been prohibited from possessing weapons are forfeited unless the prohibition order states otherwise.

(d) Authorization Revoked or Amended

- Section 116 provides that any documents relating to weapons that a person is prohibited from possessing are revoked or amended when the prohibition order commences.

(e) Offence of possession of prohibited item contrary to order

- When the individual continues to possess the prohibited items, contrary to the prohibition order, commits an offence under section 117.01, which carries a maximum penalty of ten years imprisonment on indictment.

(f) Chief Firearms Officer

- Where a court makes, varies or revokes a firearms prohibition order, the court must notify the Chief Firearms Officer without delay (section 89 of the *Firearms Act*).

4.9.2 Victim Surcharge

- A victim surcharge will be imposed in every case unless the offender satisfies the court that payment of the surcharge would cause undue hardship to the offender and his or her dependants. See ***Rowe*** (1994), 126 Nfld & PEIR 301 (Nfld SC (TD)).

- Case law has confirmed that a victim surcharge is appropriate in cases of criminal harassment, since it is the type of offence that can cause long-term harm to the victims, who often find themselves in need of various assistance programs (***DWH***, [2005] BCSC 24768, aff'd ***Hawkins***, 2007 BCCA 487). In this case, the accused was ordered to pay $300 in relation to the criminal harassment charge and $100 pertaining to the charge of uttering threats.

- The court may exempt the offender from payment of the victim surcharge where the offender satisfies the court that, prior to incarceration, the offender did not have stable employment for many years (***Shears***, [2008] OJ No 4897 (Sup Ct) (QL)). The court may also waive the victim surcharge where the offender is unemployed (***RWG***, 2007 BCPC 411) or impecunious (***Brake***, [2007] NJ No 359 (Prov. Ct.) (QL) and ***Strickland***, [2004] NJ No 368 (Prov Ct)(QL)). See also ***Richard***, 2008 ONCJ 343, in which no victim surcharge was imposed in view of the offender's incarceration and the fact that he had previously lived on a disability pension.

Note that on April 24, 2012, Bill C-37, *Increasing Offenders' Accountability for Victims Act*, was introduced. This Bill would amend the *Criminal Code* by doubling the victim surcharge that offenders must pay, and ensuring that the surcharge is automatically applied in all cases. The proposed amendments would make the victim surcharge mandatory for all offenders, repealing the current provisions that allow offenders who can demonstrate undue hardship to be exempted from paying the surcharge.

4.9.3 DNA Orders

The Crown should consider making an application for a DNA order upon sentencing. Criminal harassment is a secondary designated offence under section 487.04 of the *Criminal Code.* Therefore, a DNA collection order may be granted if the judge is satisfied that it is in the best interests of justice to do so. The burden of proof is on the Crown to convince the court to make the order. In deciding whether to grant the order, the courts are required to consider the following factors:

- the criminal record of the person or young person
- the nature of the offence and the circumstances surrounding its commission
- the impact such an order would have on the person's or young person's privacy and security of the person

4.10 Victim Impact Statements

- The *Criminal Code* requires the court to consider statements that victims have submitted to the court, in accordance with subsection 722(2), for the purpose of determining the sentence to be imposed on offender. Victim impact statements may be prepared for submission at the sentencing hearing. These statements provide an opportunity to describe the harm done to, or loss suffered by, the victim as a result of the commission of the crime.

- Victim impact statement programs exist in some provinces to help victims complete their statements. Practices regarding when and how the statement is gathered vary among jurisdictions.

- Section 722 of the *Criminal Code* directs the victim to file her or his statement with the court. The court provides a copy of the statement to the offender, or their lawyer, and the prosecutor after a determination of guilt. Having the victim provide a copy of the victim impact statement directly to the court, rather than to the police or prosecutor, prevents a situation in which the prosecutor would be obligated to disclose the statement to the defence prior to a finding of guilt. If this were to occur, it might provide the defence with additional information on which to cross-examine the victim.

- Judges are required to inquire whether the victim has been informed of the opportunity to prepare a statement and may adjourn the proceedings to permit the victim to prepare a statement. Upon request, the victim shall be permitted to read the statement.

- In ***Gares***, 2007 ABPC 60, evidence of lasting psychological damage presented in the victim impact statement was considered an aggravating factor. The accused was sentenced to serve 13 months in prison, having spent 5 months in pre-trial custody. See also ***Cedros***, 2007 ONCJ 556, where the Victim Impact Statement attested to a "drastically diminished sense of safety", loss of trust in people and deep humiliation experienced by the family of the complainant. In this case, the accused had repeatedly called the complainant and her family, and made serious threats of violence against the family members.

Appendix A

Experts: Police Specialists

1. Behavioural Analysts and Specialists in Criminal Harassment

Police agencies with expert personnel who might provide guidance for criminal harassment cases in their jurisdictions include the following.

Domestic Violence Unit
Family Service Regina
2020 Halifax Street
Regina, Saskatchewan
S4P 1T7
Phone: (306) 757-6675
E-mail: info@familyserviceregina.com

Integrated Threat and Risk Assessment Centre (I-TRAC)
Alberta Law Enforcement Response Teams (ALERT)
ALERT West Campus
18807 Stony Plain Road
Edmonton, Alberta
T5S 0C1
Phone: (780) 509-3415
Fax: (780) 495-0041

Ontario Provincial Police
Criminal Behaviour Analysis Unit
Threat Assessment
777 Memorial Avenue
Orillia, Ontario
L3V 7V3
Phone: (705) 329-6150

Royal Canadian Mounted Police
Behavioural Sciences Branch
1426 St Joseph Blvd
Ottawa, Ontario
K1A 0R2
Phone: (613) 998-3491

Toronto Police Service
Intelligence Division
Phone: (416) 808-3500

Toronto Police Service
Behavioural Assessment Section
Sex Crimes Unit
Phone: (416) 808-7458
E-mail: bas@torontopolice.on.ca

Durham Regional Police Service
Threat Assessment Unit
605 Rossland Road East, Box 911,
Whitby, Ontario
L1N 0B8
Phone: (905) 579-1520 ext. 5638
Toll free phone: 1-888-579-1520 ext. 5638
E-mail: threatassessment@drps.ca

Peel Regional Police
Threat Assessment Unit
7750 Hurontario Street
Brampton, Ontario
L6V 3W6
Phone: (905) 453-3311 ext.7760

York Regional Police
Threat Assessment Unit
17250 Yonge Street
Newmarket, Ontario
L3Y 4W5
Phone : (905) 830-0303 ext. 7849
Fax: (905) 751-1313

Sûreté du Québec
Division de l'analyse du comportement
1701, rue Parthenais, local 1.82
Montréal, Québec
H2K 3S7
Tél. : (514) 598-4079
Courriel : dac@surete.qc.ca

Vancouver Police Department
General Investigation Section
3585 Graveley Street
Vancouver, BC V5K-5J5
Phone: (604) 717-3201

Please inform Justice Canada of additional police agencies with expert personnel that should be added to the list above.

2. Firearms Investigation Specialist

Firearms Investigative & Enforcement Services Directorate
1450 Meyerside Drive, Suite 415
Mississauga, Ontario L5T 2N5
Phone: (905) 795-5205
Fax: (905) 795-5224
E-mail: nwest@rcmp-grc.gc.ca
Police Assistance 24/7: 1-866-920-0553

Appendix B

Legislative History of Section 264 of the *Criminal Code*

Introduction of the Offence of Criminal Harassment into the Criminal Code

House of Commons

First Reading of Bill C-126 (An Act to amend the Criminal Code and the Young Offenders Act)—April 27, 1993

Second Reading—May 6, 1993 (see Hansard, *House of Commons Debates*, at 19015– 19019 for the Minister of Justice's Second Reading Speech)

Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-126—Issue No. 1 (May 11 and 25, 1993); Issue No. 2 (May 26, 1993); Issue No. 3 (May 27, 1993); Issue No. 4 (June 1, 1993); Issue No. 5 (June 2, 1993); and Issue No. 6 (June 2, 1993)

Report of Legislative Committee—June 3, 1993

Third Reading—June 10, 1993

Senate

First Reading—June 14, 1993

Second Reading—June 17, 1993

Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs—Issue No. 50, First Proceedings (June 21, 1993); and Issue No. 51, Second and Final Proceedings (June 22, 1993)

Report of Committee—June 22, 1993

Third Reading—June 23, 1993

Royal Assent received on June 23, 1993, and proclaimed into force on August 1, 1993.

See S.C. 1993, c. C-45.

See also Nicholas Bala, "*Criminal Code* Amendments to Increase Protection to Children and Women: Bills C-126 and C-128" (1993) 21 C.R. (4th) 365.

1997 Amendments—Bill C-27—murder in the course of criminal harassment

The 1993 criminal harassment provisions were amended by Bill C-27, *An Act to amend the Criminal Code (child prostitution, child sex tourism, criminal harassment and female genital mutilation)*, to make murder committed in the course of criminally harassing the victim a first degree murder offence, irrespective of whether it was planned and deliberate; and to make the commission of an offence of criminal harassment in the face of a protective court order an aggravating factor for sentencing purposes.

House of Commons

First Reading of Bill C-27 (An Act to amend the Criminal Code (child prostitution, child sex tourism, criminal harassment and female genital mutilation))—April 18, 1996

Second Reading—June 10, 1996

Minutes of Proceedings and Evidence of the Standing Committee on Justice and Legal Affairs—Issue No. 4 (October 1, 1996); and Issue No. 6 (November 1, 5, 7, 19, 21, 26, 27, and 28, and December 3 and 4, 1996)

Report of Committee (Sessional Paper No. 8510-352-63)—December 5, 1996

Debated at report stage—April 7 and 8, 1997

Third Reading—April 14, 1997

Senate

First Reading—April 15, 1997

Second Reading—April 15 and 16, 1997

Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs—Issue No. 59, First and Final Proceedings (April 17, 1997)

Report of Committee—April 17, 1997

Third Reading—April 21, 1997

Royal Assent received on April 25, 1997, and proclaimed into force on May 26, 1997. See S.C. 1997, c.16.

The criminal harassment provisions were further amended by Bill C-15A, *An Act to amend the Criminal Code and to amend other Acts*, which doubled the maximum sentence for criminal harassment from 5 to 10 years' imprisonment when proceeding on indictment.[184]

House of Commons

First Reading of Bill C-15A, then named Bill C-15, (*An Act to amend the Criminal Code and to amend other Acts*)—March 14, 2001 (see Hansard, *House of Commons Debates*, at 1646 for the Minister of Justice's First Reading Speech)

Second Reading—May 3 and 7, and September 20 and 26, 2001 (see Hansard, *House of Commons Debates,* at 3581 for the Minister of Justice's Second Reading Speech)

Minutes of Proceeding and Evidence of the Standing Committee on Justice and Human Rights—Issues No. 21 and 22 (October 2, 2001); Issue No. 23 (October 3, 2001); and Issue No. 24 (October 4, 2001)

Bill divided into C-15A and C-15B—October 3, 2001

Report of the Committee—October 5, 2001 (Sessional Paper No. 8510-371-74); concurred in October 18, 2001

Third Reading—October 18, 2001 (see Hansard, *House of Commons Debates*, at 6312 for the Minister of Justice's Third Reading Speech)

Senate

First Reading—October 23, 2001

Second Reading—November 6, 2001

Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs—Issue No. 20, First Proceedings (December 5, 2001); Issue No. 21, Second Proceedings (December 6, 2001); Issue No. 22, Third Proceedings (December 12, 2001); and Issue No. 24, Fourth and Final Proceedings (February 7, 2002)

[184] This amendment was originally introduced in the House of Commons on June 8, 2000, in Bill C-36, *An Act to amend the Criminal Code (criminal harassment, home invasions, applications for ministerial review -- miscarriages of justice, and criminal procedure) and to amend other Acts*. Bill C-36 died on the Order Paper with the prorogation of Parliament on October 22, 2000. It was reintroduced as part of Bill C-15 on March 14, 2001, which, in turn, was subsequently split into Bill C-15 A (which included the criminal harassment amendment) and Bill C-15B.

Report of the Committee—February 19, 2002; debated and adopted February 20, 2002

Third Reading—February 21, and March 5, 12, 13, 14 and 19, 2002

Royal Assent received on June 4, 2002, and proclaimed into force on July 23, 2002. See S.C. 2002, c.13.