MANITOBA LAW REFORM COMMISSION

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CHAPTER 1

INTRODUCTION

A. STALKING: THE NATURE AND EXTENT OF THE PROBLEM

The public has become increasingly familiar with the term "stalking" since it first entered our vocabulary in the 1980s. At that time, the word was used by the media to describe the conduct of obsessed fans who harassed and threatened various celebrities. Today, stalking refers to any type of harassing and intimidating conduct that causes a person to fear for his or her safety. The vast majority of people who are stalked are not in the public eye.

Stalking is not a single occurrence. It is a series of acts which must be examined together; it is a course of conduct. The methods employed by stalkers to harass a subject can involve a series of actions which are in themselves unlawful, such as making obscene telephone calls, using threatening language and committing acts of violence. On the other hand, stalkers frequently exhibit behaviour which is perfectly legal and socially acceptable in isolation. This apparently harmless conduct, such as following someone or sending gifts, can be intimidating if done persistently and against the will of another person. Taken together, and in the context of the relationship between the stalker and the subject, seemingly innocuous behaviour becomes wrongful and dangerous. Subjects of stalking suffer from emotional distress, anxiety and fear that seriously disrupt their day-to-day activities and their enjoyment of life. As a result of stalking, many subjects avoid public places and some lose their jobs and are eventually forced to move to a different city.

It is not possible to list exhaustively all the activities which fall within the scope of stalking. Common examples include: repeatedly following another person, repeated unwanted communication with another person, watching a person's home or workplace and threatening conduct. Typically, stalking commences with conduct that appears more annoying and irritating than dangerous. Then, the frequency and magnitude of the conduct escalates, which causes increasing fear, emotional distress and disruption to the subject's life. Ultimately, stalking may intensify to physical violence and homicide.

In 1993, Manitobans became acutely aware of the potentially tragic consequences of stalking when three innocent persons lost their lives. The first case involved Terri-Lyn Babb who was murdered in Winnipeg on January 21, 1993 by Ronald Bell, a former practical nurse. In 1990, Ms Babb was a patient at the hospital where Mr. Bell worked. Mr. Bell became infatuated with her and followed her over a period of several months, recorded her daily movements in his diary and took pictures of her. In March of 1991, Ms Babb made a police report about the harassment and a summons was issued to Mr. Bell. The matter was remanded over and over again until it was heard in May of 1992. In the interim, despite a peace bond agreement entered into by Mr. Bell in May 1991, the harassment continued. Ms Babb made additional complaints to the police that she feared for her safety because Mr. Bell continued to

follow her and was threatening her. Another summons was served on Mr. Bell but he did not show up for his hearing date. When all matters were finally heard in May 1992, Mr. Bell agreed not to contact Ms Babb for 12 months. In August 1992, Mr. Bell's application for a permit to carry a restricted weapon was approved and in November 1992 he registered a gun. Three months later, Mr. Bell walked up behind Ms Babb and shot her in the head while she waited for a bus. Mr. Bell eventually pleaded guilty to murder and, on May 30, 1994, was sentenced to life imprisonment with no parole for 18 years.

The second case involved the murder of Sherry and Maurice Paul by André Ducharme at their farmhouse outside of Winnipeg in 1993. Shortly thereafter, Mr. Ducharme killed himself. Maurice Paul and André Ducharme had grown up together. Mr. Ducharme became obsessed with Ms Paul and, when she rejected his advances, he warned "You're not going to live to see your next birthday, and I'm not going to live to see my next birthday." Mr. Ducharme was charged with uttering threats contrary to section 264.1 of the *Criminal Code* and was released from custody on condition that he not communicate with Ms Paul or come anywhere near her residence. Mr. Ducharme continued to talk of killing Ms Paul with others. When the news of Terri-Lyn Babb's murder was publicized, Ms Paul became extremely concerned over Mr. Ducharme's conduct and immediately instructed that the uttering charge, previously agreed to be dealt with on a non-judicial basis, proceed in the criminal courts. Six days later, Mr. Ducharme killed Sherry Paul and her husband.

The Babb and Paul cases are the two most tragic and publicized situations of stalking in Manitoba but they are not isolated events. Stalking is a growing problem across Canada. In 1995, 4,446 incidents of stalking were reported nationally.[1] However, Statistics Canada is of the opinion that the number of stalking-related incidents is closer to 10,000.[2] Approximately 40 people are charged with criminal harassment[3] in Winnipeg each year.[4]

A review of the legal decisions and the psychiatric literature involving stalking reveals that there is no monolithic concept of stalking and a single prototype of a stalker does not exist. Stalkers range from cold-blooded killers to lovesick teens and may exhibit a variety of psychological syndromes such as erotomania, schizophrenia, paranoia, manic depression, and obsessive-compulsive disorder.[5] Some have minor mental or emotional illnesses while others suffer from serious psychological syndromes or complete mental breakdown. Stalkers come

[1]Canada, Statistics Canada, Canadian Centre for Justice Statistics, *Canadian Crime Statistics 1995* (1996) 59.

[2]B. Holliday, "Police fail to keep track of stalking", *The Winnipeg Sun*, November 27, 1996, 5.

[3]The crime of criminal harassment prohibits virtually all forms of stalking and will be discussed in detail later in the Report.

[4]"38 charged in city last year for stalking", *Winnipeg Free Press*, April 19, 1996, A4.

[5]R.A. Lingg, "Stopping Stalkers: A Critical Examination of Anti-stalking Statutes" (1993), 67 St. John's L. Rev. 347 at 351, n. 25.

from all economic backgrounds and many have no previous criminal records.[6] Most commonly, men stalk women,[7] but men also stalk men, women stalk women, women stalk men and parents even stalk their own children. Although a stalker's obsession is usually with one person, the behaviour can also be directed at that person's family or friends. (Because the vast majority of stalkers are men and the vast majority of persons who are stalked are women, we will in this Report refer to stalkers as "he" and to their subjects as "she". We will also refer to persons who are being stalked as "subjects" rather than as "victims". This Report and the proposed Act which it recommends seek to empower persons who are stalked by providing them with a means of actively asserting their rights. The word "victim" tends to have a connotation of passivity not in keeping with this objective.)

According to the 1995 Statistics Canada data,[8] approximately one-third of the reported incidents of criminal harassment involved persons who were the spouse or ex-spouse of their stalker, while approximately 28% were acquaintances of their stalker, 15% were friends, 5% were business acquaintances and 3% were other family members**.** In 12% of cases, the stalker was a stranger. This category includes incidences of politicians and celebrities being stalked. Most incidents (approximately 67%) occurred at the subject's home while a significant number also took place on public streets, at schools, in parking lots, bars, restaurants, office buildings, hospitals and churches.[9]

At the outset, stalkers do not normally intend to harm their subjects. Initially, many wrongly believe that they are loved by or are in a serious relationship with their subjects or they are attempting to resurrect a relationship which has ended. However, when their subject does not respond as desired, the stalker becomes angry, which is typically when harassment becomes a serious concern. For some stalkers, rejection leads to a realization that they cannot have what they desire. The lowering of their self-esteem in turn leads to violence. It is because of their complex and often abnormal emotional make-up that stalkers are so persistent, unpredictable and potentially dangerous.[10]

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[6]C.O. Sloan, "Anti-stalking laws" (1994), 45 S. Carolina L. Rev. 383 at 385.

[7]In 1995, 75.7% of the reported incidents of stalking involved women being stalked by men: Canada, Statistics Canada, *supra* n. 1, at 60.

[8]Canada, Statistics Canada, *supra* n. 1, at 55.

[9]Canada, Statistics Canada, *supra* n. 1, at 50.

[10]K.L. Attinello, "Anti-Stalking Legislation: A Comparison of Traditional Remedies Available for Victims of Harassment Versus California Penal Code Section 646.9" (1993), 24 Pacific L.J. 1945 at 1950-52.

Clinical studies indicate that stalkers normally fall within one or more of four psychological categories: Former Intimate Stalkers, Delusional Erotomaniacs, Love Obsessionals and Sociopaths.[11]

The first category is the Former Intimate Stalkers or Simple Obsessionals. These individuals have had a prior relationship with the person being stalked and refuse to let go of a terminated relationship. They frequently have a history of abusive relationships and are often extremely emotionally dependent on their former lovers. They are unable to tolerate the thought of rejection. In some cases, these stalkers are so dependent on their former lovers that they would rather kill them than let them go and be forced to live without them. Former intimate stalkers also have a need to control their former lovers and often treat them as their personal possessions, using force to exert control or domination. They are a threat not only to the person being stalked, but also to anyone they perceive to be a significant obstacle to reunification. While the former intimate stalker is dangerous, he is the type of stalker most likely to respond to treatment if it is combined with stiff penalties for his anti-social conduct.

The second category of stalker is the Delusional Erotomaniac. A person who suffers from delusional erotomania believes that another person, usually of a higher status, is in love with him or her when, in fact, that person is not. Delusional erotomaniacs believe that the other person wishes to be pursued and often think they are destined to be with him or her. Delusional erotomaniacs interpret any small act as encouragement or as a communication of love. Although delusional, they do not suffer from visual or auditory hallucinations. Stalkers with this disorder usually attempt to establish an intimate romantic relationship with the objects of their desire. They may seek to accomplish this through letters, telephone calls, gifts and visits. Although there is no reciprocity of affection, delusional erotomaniacs continue in their efforts to establish the relationship. There is most often no intent to harm the other person or cause them any fear. Rather, these stalkers are simply attempting to establish a relationship with a person they believe is already in love with them.

Borderline Erotomaniacs or Love Obsessionals exhibit the same behaviour as the delusional erotomaniacs, but they are not delusional. They know the object of their obsession does not reciprocate their affection. Instead, they usually believe that he or she will love them if only given a chance. This causes them to embark on a relentless campaign to let the object of their obsession get to know them. Borderline erotomaniacs display alternate emotions of love and hate towards the individual upon whom they are fixated, but are less likely to make threats than the delusional erotomaniac.

The prognosis for treatment of both forms of erotomania is poor and individuals with these disorders will rarely seek help themselves. Therefore, some writers suggest that the only

[11]K.G. McAnaney, L.A. Curliss and C.E. Abeyta-Price, "From Imprudence to Crime: Anti-Stalking Laws" (1993), 68 Notre Dame L. Rev. 819 at 832-59; N. Diacovo, "California's Anti-stalking Statute: Deterrent or False Sense of Security?" (1995), 24 Southwestern U. L. Rev. 389 at 394-96. The following discussion of these categories borrows liberally from these articles.

solution is to deter these individuals' behaviour through strict law enforcement and severe sanctions.[12]

The final category of stalker is the Sociopath. Serial murderers and serial rapists fall into the category of sociopathic stalkers. These stalkers do not seek to establish a romantic relationship with their subjects. Instead, the sociopathic stalker compiles certain criteria for an "ideal victim" and then seeks them out. As is the case for erotomaniacs, the prospects are not good for their clinical rehabilitation.

There can be no doubt that stalking has a serious impact on the quality of life and safety of many people. No legal intervention will prevent all forms of stalking, but it is essential that the legal system does provide the greatest protection and remedies possible. This Report explores the current legal response to stalking, examines the experience of other jurisdictions and recommends reforms designed to provide enhanced protections and remedies for those who suffer fear, emotional distress and disruption of their lives as a result of stalking.

B. STALKING: PROTECTED INTERESTS AND A REMEDIAL FRAMEWORK

1. Protected Interests

We have surveyed the nature and impact of stalking conduct and have described the consequences it has on the lives of innocent people. Such conduct demands a strong legal response not only on the grounds of an intuitive sense of justice but also because the conduct infringes upon interests of the subjects of stalking which the legal system, to some extent, has always protected. The interests of the persons being stalked which are deserving of recognition and protection are personal security, emotional security, freedom of action and privacy. We will now describe each of these interests.

There is no more important role for the state than protection of its citizenry from physical violence. Although stalking may begin with acts innocent in themselves, the typical situation is one of conduct which becomes increasingly alarming and frightening until threats of violence and actual violence are likely. Stalking clearly impinges on the subject's interest in personal security and safety and the legal system must find a method to interrupt the escalation of dangerous conduct.

Stalking infringes on a person's interest in emotional or psychological security. Daily life has its own inevitable stresses but few would deny protection against unjustifiable conduct which threatens self-esteem, emotional security and mental health.

A consistent factor in stalking is the stalker's inability to accept the independent decision-making of the subject. There is a need or desire to control, coerce and intimidate her to act in

[12]Diacovo, *supra* n. 11, at 394-396.

a manner consistent with the stalker's interests and desires. Such conduct interferes with the interest of freedom of action and autonomous decision-making of the person being stalked.

Finally, stalking is a direct and gross violation of the subject's interest in privacy. Privacy includes the simple notion of being left alone, free of unwanted scrutiny, in our private lives. Stalking constantly invades the subject's privacy by following, watching, attending at the person's place of work or dwelling and by sending unwanted and inappropriate communications.

An infringement of any one of these interests is sufficient for legal intervention. In the collective, the strongest legal response is required.

2. Remedial Framework

No single remedy will solve the problem of stalking. What is needed is a basket of remedies aimed at different aspects of the problem. In this context, remedies may be grouped into four classes, according to their purpose: punitive remedies, protective remedies, preventive remedies and compensatory remedies.

Punitive remedies, such as fines or incarceration, impose a direct sanction on the stalker to punish him for the wrongful conduct. The defendant may also be deterred from future wrongdoing and a deterrent message is sent to the community. Punishment is normally within the purview of the federal Parliament and the criminal law.

Protective remedies take the form of judicial orders designed to restrain the activities of a stalker so as to protect the person being stalked. These include non-molestation and no-contact orders and other policies and procedures which seek to force the stalker to cease the behaviour which leads to wrongful conduct. Protective remedies also include orders seizing firearms and weapons from the stalker.

Preventive remedies are less common in the legal system. They seek to solve the underlying causes of the conduct. They might include court-ordered counselling, therapy or treatment or orders which reduce the stalker's ability or opportunities to continue his conduct.

Compensatory remedies provide recompense for the costs and expenses incurred as a consequence of the stalking and for the non-pecuniary losses such as fear, emotional trauma and suffering.

Only when the full scope of a subject's interests are protected by a complete range of remedies will the law have exhausted its power to deal with stalking. We seek in this Report to propose such a range of remedies.

CHAPTER 2

THE LAW RELATING TO STALKING IN MANITOBA

In this Chapter, we survey the law relating to stalking in Manitoba. We discuss both federal and provincial law. We begin with a description of the criminal law and the recent initiatives of the federal government to provide sanctions against stalkers. We then consider the scope of civil remedies available under tort law, including the role of the Criminal Injuries Compensation Board. This is followed by a survey of judicial protection orders which are available through the criminal and civil justice systems. We conclude by describing a miscellany of other legal principles and policies which seek to combat stalking.

A. CRIMINAL LAW

1. Introduction

The *Criminal Code* has always prohibited the more extreme conduct undertaken by stalkers. Until 1993, however, there was no crime that dealt directly with the generality of conduct defined as stalking. Prosecutors were forced to focus upon some aspect of the stalker's conduct and bring it within an existing provision of the *Criminal Code*, thereby not addressing the stalking as an independent phenomenon. Consequently, protection under the *Criminal Code* was incomplete and piecemeal. This changed when the federal government amended the *Criminal Code* to include the offence of criminal harassment.[1] This provision creates a general prohibition of stalking.

An understanding of the scope of protection provided by the *Criminal Code* can best be achieved by surveying the Code provisions in existence before 1993 which gave a limited protection from stalking and then describing the crime of criminal harassment.[2]

[1] *Criminal Code*, R.S.C. 1985, c. C-46, s. 264.

[2] An exhaustive discussion of the background, development and scope of the crime of criminal harassment is found in B.A. MacFarlane, "People Who Stalk People" (unpublished, 1995) (to be published in U.B.C. L. Rev.). See also M. Pilon, *"Anti-stalking" Laws: The United States and Canadian Experience* (Canada, Library of Parliament, Research Branch, Background Paper, 1993).

2. *Criminal Code* Provisions Existing Before 1993

Before the addition of the criminal harassment provision, there were a number of *Criminal Code* provisions which provided sanctions for some aspects of stalking conduct. Those provision included: intimidation, uttering threats, mischief, false messages, trespassing at night, sureties to keep the peace and criminal enforcement of civil orders, all of which are still criminal offences today. Brief reference will be made to each.

(a) Intimidation

The crime of intimidation is found in section 423 of the *Criminal Code*. That section makes it an offence to force a person to act or abstain from acting in a particular manner by means of violence, threats of violence, persistently following from place to place or besetting and watching a dwelling house, residence or workplace. Clearly, this covers some kinds of stalking conduct. However, reliance on this offence alone was problematic. First, it does not cover all kinds of stalking conduct. Secondly, the provision has been criticized as being unduly complicated and difficult to prove.[3] Thirdly, it provides only for summary conviction which carries a maximum $2,000 fine or six months imprisonment or both.[4] Fourth, the prosecution must show that the motive in doing the prescribed acts was to force the victim into a particular course of conduct. This may be difficult in some cases of stalking.

(b) Uttering threats

Section 264.1(1) of the *Criminal Code* declares that it is an offence in any manner to knowingly utter, convey or cause any person to receive a threat. This is a hybrid offence which means it can be prosecuted by way of indictment or summary conviction. A person found guilty where the Crown has chosen to proceed by indictment may be sentenced to a maximum of two years imprisonment. In order to come within the scope of the section, the accused must have made an overt threat. Consequently, more subtle forms of behaviour which may nevertheless cause fear for one's safety are not covered.

(c) False messages

Section 372(1) of the *Criminal Code* makes it an indictable offence for anyone, with intent to injure or alarm any person, to send any message which is known to be untrue. The maximum punishment is a term of imprisonment not exceeding two years. Section 372(2) prohibits indecent telephone calls and section 372(3) deals with the intent to harass by making

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[3]MacFarlane, *supra* n. 2, at 34.

[4]*Criminal Code*, R.S.C. 1985, c. C-46, s. 787(1).

repeated telephone calls. The latter two offences are punishable on summary conviction. Again, some stalking conduct may involve this kind of unlawful activity.

(d) Trespassing at night

Section 177 of the *Criminal Code* creates the offences of prowling and loitering. It is an offence to loiter or prowl at night on the property of another person near a dwelling house.[5] The essence of loitering is wandering without destination, while prowling involves some notion of evil.[6] Both these offences are punishable on summary conviction.

(e) Mischief

A stalker will sometimes damage the property of his subject as part of his stalking conduct. Under section 430 of the *Criminal Code*, it is an offence to wilfully destroy, damage or interfere with the property of another. The section has various penalty provisions depending on the nature of the property affected and the risk posed to human life. Included in the section is the wilful destruction or alteration of data, which would encompass some forms of stalking by computer.

(f) Sureties to keep the peace

Sureties to keep the peace or "peace bonds" have a long history in the common law.[7] Section 810 of the *Criminal Code* now deals with this matter. It allows any person who on reasonable grounds fears that he or she, or a member of his or her family, will be injured or his or her property will be damaged to lay an information before a justice.

A person seeking a peace bond can go to a Provincial Court office. If he or she can convince the magistrate that there is reason to fear for his or her safety, the defendant is served with a summons to appear before the justice or before the Provincial Court. If, at the hearing, the other person consents, a peace bond will be issued. If there is no consent, a date for trial will be decided upon. The trial is conducted under section 810(3) in accordance with Part XXVII of the *Criminal Code*. If the judge is satisfied that the fears are reasonably held, he or she may order that the defendant enter into a recognizance (peace bond) with or without sureties to keep the peace or be of good behaviour for any period not in excess of twelve months. The judge may also prescribe such conditions in the recognizance that seem desirable to secure the good conduct of the defendant. These conditions may include a prohibition from possessing firearms

[5]*Criminal Code*, R.S.C. 1985, c. C-46, s. 177.

[6]*R.* v. *Cloutier* (1991), 66 C.C.C. (3d) 149 (Que. C.A.).

[7]See MacFarlane, *supra* n. 2.

and the surrender of any firearms acquisition certificate that the accused may possess. Conditions may also be imposed requiring the defendant to keep a certain distance from the complainant or refrain from communicating with him or her. A refusal to enter into a recognizance may lead to a prison term not exceeding twelve months and a breach of an order is punishable by a term of imprisonment not exceeding two years.

This provision is obviously a useful one for those who are stalked. It provides legal protection without cost to the person seeking the order. It does not create an offence but rather attempts to prevent an offence from occurring. It is, therefore, a form of protective justice placing the accused on notice that his or her conduct is unacceptable and must change.[8] However, peace bonds can take a long time to obtain. Consultations revealed that it takes approximately two weeks to appear in court for a hearing for a peace bond in Manitoba. If the bond is not entered into by agreement, it may take weeks or even months for a trial to take place.[9] Therefore, peace bonds do not provide the immediate protection that many subjects of stalking require.

(g) *Criminal Code* enforcement of civil orders

Section 127(1) of the *Criminal Code* states that disobeying a lawful court order is an indictable offence punishable by a term of imprisonment not exceeding two years. The utility of this provision, however, is mitigated by the qualification that it only applies where there is no other express provision providing a penalty for the breach of the order.

(h) Summary

The above description of the Code provisions existing in 1993 illustrates the need for a more general provision dealing with stalking. As one writer commented:

> Our ability to control and deter stalking can be summarized in two words: spotty, and ineffective. Available legal mechanisms could scarcely keep up with classic stalking activities such as repeatedly following or telephoning someone. Although existing laws could deal with single incidents, they were not created to combat repeated threatening or harassing behaviour, a dominant characteristic of stalking. Moreover, existing law was hopelessly inadequate in dealing with the "new wave" of stalkers who harass by video, fax, voice-mail, E-mail or on the Internet. What was needed was a law that prohibited ongoing conduct which instilled fear on the part of the target victim.[10]

3. Criminal Harassment

[8]Further discussion of both criminal and civil non-communication and non-contact orders is found in Section D of this Chapter.

[9]D. Pedlar, *The Domestic Violence Review into the Administration of Justice in Manitoba* (Report submitted to the Minister of Justice, Manitoba, 1991) 74.

[10]MacFarlane, *supra* n. 2, at 26-27.

In 1993, the federal government responded to the inadequacies of the *Criminal Code* in respect of stalking by amending it to include the crime of Criminal Harassment. The offence is contained in section 264 and it is set out here in full:

> CRIMINAL HARASSMENT / Prohibited conduct / Punishment.
>
> 264. (1) No person shall, without lawful authority and knowing that another person is harassed or recklessly as to whether the other is harassed, engage in conduct referred to in subsection (2) that causes that other person reasonably, in all the circumstances, to fear for their safety or the safety of anyone known to them.
>
> (2) The conduct mentioned in subsection (1) consists of
>
> > (a) repeatedly following from place to place the other person or anyone known to them;
> >
> > (b) repeatedly communicating with, either directly or indirectly, the other person or anyone known to them;
> >
> > (c) besetting or watching the dwelling-house, or place where the other person, or anyone known to them, resides, works, carries on business or happens to be; or
> >
> > (d) engaging in threatening conduct directed at the other person or any member of their family.
>
> (3) Every person who contravenes this section is guilty of
>
> > (a) an indictable offence and is liable to imprisonment for a term not exceeding five years; or
> >
> > (b) an offence punishable on summary conviction.

A few comments on this section may be useful.[11]

(a) The section does not require the accused to have intended to cause a person to fear for her safety.[12] Some stalkers claim that their obsessive actions are motivated by love or a desire to protect another. Nevertheless, they usually know that they are harassing another person. Consequently, the provision is drafted to indicate that the accused is guilty if he knows that another person is harassed or is reckless as to that person being harassed. The term "reckless" means that the accused is a conscious risk taker who knows that there is a high likelihood that the conduct will cause the person to fear for her own safety or the safety of a

[11]For an exhaustive analysis of the ingredients of the offence of criminal harassment, see MacFarlane, *supra* n. 2, at 39-60. We have borrowed liberally from his analysis and insight.

[12]In spite of the clear words of s. 264, some judges continue to suggest that an intent to harass is an element of the offence: see *R.* v. *Lafreniere*, [1994] O.J. No. 437 (Prov. Div.); *R.* v. *MacLean*, [1994] O.J. No. 2296 (Prov. Div.); *R.* v. *Geller*, [1994] O.J. No. 2961 (Prov. Div.); *R.* v. *Greiff*, [1995] O.J. No. 2634 (Prov. Div.) and *R.* v. *Vrabie*, [1995] M.J. No. 247 (Prov. Ct.). A number of the statements were clearly *obiter dicta*. Other courts have made it clear that an intent to harass is not required: see *R.* v. *Porsnuk*, [1995] M.J. No. 519 (Prov. Ct.) and *R.* v. *Ryback*, [1996] B.C.J. No. 285 (C.A.).

person known to her.[13] It might be noted, however, that the provision does not extend to those who are merely negligent and ought to know the consequences of their behaviour.

(b) The section requires the accused to have engaged in the kinds of conduct described in section 264(2). It is not an open-ended provision prohibiting all forms of stalking. The scope of the offence is restricted by clauses (2)(a) to (2)(d) which describe specific categories of conduct. The accused may be found guilty only if one of the named acts is committed. For example, in one case the Court found that "yelling and screaming" at the complainant did not come within the wording of section 264(2) and so could not support a conviction.[14] There are four categories of specific conduct:

(i) repeatedly following from place to place the other person or anyone known to them.

These words are designed to distinguish an innocent and casual case of following from the case of stalking. The key word is "repeatedly" which clearly requires the following to take place again and again. This activity is one of the most common forms of stalking and this clause also covers the following of any person known to the subject. Such a situation can arise where the subject's children are being repeatedly followed by the stalker in an attempt by the stalker to harass the subject further.

(ii) repeatedly communicating with the other person or anyone known to them.

Again the word "repeatedly" is used, indicating that a single communication will be insufficient to establish guilt.[15] All means of communication are contemplated, including telephone, fax, e-mail, computer transmissions, signs, billboards and face-to-face oral statements and gestures. These words clearly cover a wide range of conduct typical of stalkers.

(iii) besetting or watching a dwelling place or place of work.

This is another category of conduct common in stalking situations.[16] Here the word "repeatedly" is omitted but it is likely that the words "besetting" and "watching" carry the connotation of some course of conduct over some significant period of time during which the watching or besetting takes place.[17]

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[13]See *R.* v. *Carter*, [1993] O.J. No. 3403 (Prov. Div.).

[14]*R.* v. *Geller*, *supra* n. 12.

[15]See *R.* v. *Campbell*, [1994] O.J. No. 2827 (Prov. Div.) (single invitation to complainant to ride in accused's automobile insufficient); *R.* v. *Johnston*, [1995] O.J. No. 3118 (Prov. Div.) (single communication insufficient). However, in *R.* v. *Ryback*, *supra* n. 12, in the context of the activities of the accused, three communications were deemed sufficient to come within the wording of s. 264(b).

[16]Discussion of the concept of "besetting" is found in *R.* v. *Vrabie*, *supra* n. 12, and watching and besetting was established in *R.* v. *Porsnuk*, *supra* n. 12.

[17]See MacFarlane, *supra* n. 2, at 55.

(iv) engaging in threatening conduct directed at the other person or any member of their family.

Threats are very much part of the stalker's stock-in-trade.[18] Threatening conduct includes statements or behaviour intended to harass the complainant or intended to coerce a complainant into some course of action or inaction to achieve the accused's purpose. Normally, threats must be such as to overcome the will of a person but depend more on the nature of the conduct than the emotional response elicited from the subject. In all cases, it is a question of fact in the circumstances as to whether conduct amounts to a threat. It may be noted that the threat must be made to a person "or any member of their family". This latter phrase is more restrictive than the words "anyone known to him" in the preceding subsections.

It is debatable whether a single threat will satisfy this category of conduct.[19] The better view would seem to be that more than one threat is required and some pattern of conduct must be established. In any event, it is unlikely that a prosecution would be brought for a single threat. The hallmark of the stalker is the undertaking of a persistent course of threatening and harassing conduct breeding fear to one's safety and security.

In the majority of serious stalking cases there will be conduct which falls into more than one category.[20] However, it is worth repeating that conduct falling into a single category will be sufficient to support a prosecution.

(c) The definition of criminal harassment includes the phrase "that causes that other person reasonably, in all the circumstances, to fear for their safety or the safety of anyone known to them". This part of section 264(1) focuses on the essential element of criminal harassment or stalking: the impact that such conduct has on another person (that is, the fear for their personal safety or that of someone known to them). Conduct within the prohibited categories in section 264(2)(a) to (d) will be insufficient to ground a prosecution unless it produces fear for safety.[21] The legislation establishes a subjective and an objective test. It must be shown that the subject did personally and subjectively fear for her safety and, objectively, the fear must be a

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[18]See *R.* v. *Khemhus (R.F.)* (1994), 54 B.C.A.C. 158; *R.* v. *Whittle (A.)* (1995), 133 Nfld. & P.E.I.R. 181 (Nfld. S.C.T.D.); *R.* v. *Ramparsad*, [1995] O.J. No. 3475 (Gen. Div.); *R.* v. *Sanghera*, [1994] B.C.J. No. 2803 (Prov. Ct.); *R.* v. *Karalapillai*, [1995] O.J. No. 2105 (Prov. Div.). Many other illustrations may have been cited. See also *R.* v. *Clemente* (1993), 86 C.C.C. (3d) 398 (Man. C.A.) on the meaning of threat in respect of s. 264(1)(a).

[19]In *R.* v. *Johnston*, *supra* n. 15, at para. 29, the Court held that a single threat was not sufficient to constitute criminal harassment. However, in *R.* v. *Riossi*, [1997] O.J. No. 105 (Gen. Div.), the Court held that a single incident of a threatening conduct could amount to criminal harassment. This latter approach had been previously rejected in *R.* v. *Rawlings*,[1996] O.J. No. 4676 (Prov. Div.), where the Court concluded that the word "harass" in itself conveyed a meaning of repetitive behaviour or conduct.

[20]For example, *R.* v. *MacLean*, *supra* n. 12; *R.* v. *Karalapillai*, *supra* n. 18; *R.* v. *Ryback*, *supra* n. 12.

[21]The word "safety" has been interpreted to include both physical and psychological safety. See *R.* v. *Geller*, *supra* n. 12, and *R.* v. *Gowing*, [1994] O.J. No. 1696 at para. 9 (Prov. Div.), where Zuraw J. stated "safety includes more than freedom from physical harm. It includes a freedom from fear of the [sic] mental or emotional or psychological trauma." This view has been recently confirmed by the British Columbia Supreme Court in *R.* v. *Hau*, [1996] B.C.J. No. 1047 (S.C.).

reasonable one in all the circumstances.[22] Attention must be drawn to the importance of the words qualifying the fear as one which is reasonable "in all the circumstances". These words were added to the original formulation of the section in the Bill. Concern was expressed that the reasonableness of the fear might be assessed on a purely male and traditional perspective.[23] The added words point to the need to assess all the circumstances including the nature of the behaviour, the gender of the subject, the nature of any prior relationship, any imbalance of power in that relationship, the perceptions of the subject, given her life experience and situation, and the evidence of experts concerning the nature of stalking and the escalation in the seriousness of acts towards ultimate violence which is often a pattern among stalkers.[24] In essence, the court is to take a sensitive and compassionate approach to the issue of reasonableness. However, if, given this approach, the conclusion is that in the circumstances a reasonable person would perceive the conduct as merely a nuisance or an annoyance with no threat to safety, then no crime has been committed.[25]

(d) The definition of criminal harassment includes the phrase "without lawful authority". The accused is therefore not liable for conduct falling within section 264 if there is lawful authority for it. This element of the definition will operate as a defence and will arise only when all other elements of the crime have been satisfied. The words "lawful authority" would seem to require proof that the accused acted pursuant to some statutory or common law rule. According to one author, this defence will rarely arise other than in cases where it is alleged that a police officer criminally harassed another person.[26] In such a case, the question would be whether the police officer was enforcing the law or whether the police officer was on a personal vendetta beyond the boundaries of his or her lawful and authorized duties. Again, it will be a factual question based on all the surrounding circumstances.

(e) The section speaks of engaging in conduct when the accused knows or is reckless as to whether the other person is "harassed".[27] Harassment is not legislatively defined. Its dictionary meaning is to "trouble and annoy continually or repeatedly".[28] This term is not, however, pivotal, given the other requirements. Recall that the accused's conduct must fall

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[22]For a case where the subjective test was satisfied but not the objective test, see *R.* v. *Vrabie*, *supra* n. 12. *R.* v. *Ducey*, [1995] N.J. No. 315 (S.C.T.D.) speaks to the importance of the objective test.

[23]MacFarlane, *supra* n. 2, at 38, citing the Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-126, House of Commons, Issue No. 3, Thursday, May 27, 1993, published under the authority of the Speaker of the House of Commons by the Queen's Printer for Canada, at p. 26.

[24]MacFarlane, *supra* n. 2, at 43-44.

[25]For example, *R.* v. *Geller*, *supra* n. 12; *R.* v. *Browning* (1995), 42 C.R. (4th) 170 (Ont. Prov. Div.); *R.* v. *Johnston*, *supra* n. 15.

[26]MacFarlane, *supra* n. 2, at 50.

[27]For a discussion of the term harassment, see *R.* v. *Ryback*, *supra* n. 12, and *R.* v. *Sillipp* (1995), 99 C.C.C. (3d) 394 (Alta. Q.B.).

[28]*The Concise Oxford Dictionary of Current English* (8th ed., 1990) 537.

within one of the descriptive phrases in section 264(2)(a) to (d) and it must produce fear for the subject's safety. In those circumstances, harassment will almost inevitably have been established.

The great advantage of section 264 of the *Criminal Code* is that the section captures in broad language most of the conduct typical of stalkers and provides significant sanctions for this behaviour. The maximum sentence is a five year term of imprisonment. A survey of recent judgments indicates that, apart from some looseness of language in respect of the issue of intent to harass (some judges in *obiter* statements have suggested that an intent to harass is necessary), the section has been interpreted in furtherance of its original stated purposes. It also appears likely to withstand constitutional challenge.[29]

4. Further Amendments to the *Criminal Code*

On April 25, 1997, Bill C-27 received royal assent.[30] This amendment to the *Criminal Code* strengthened the provisions on criminal harassment. Section 231 of the *Criminal Code* was amended to allow for a conviction of first degree murder, even though the murder was neither planned nor deliberate, when death is caused while committing or attempting to commit criminal harassment and where the accused, while committing the offence, intended to cause the person murdered to fear for his or her own safety or the safety of any person known to the person murdered. Section 264 of the *Criminal Code* was amended to require that a court treat the breach of a restraining order at the time the offence was committed as an aggravating factor in sentencing for criminal harassment.

5. Criminal Harassment Prosecutions in Manitoba

Since 1993, there has been a fairly constant number of people charged with criminal harassment. In 1993, 35 people were charged. The number rose slightly in 1994 to 41 and then dipped to 38 in 1995. Of the 38 charged in 1995, 28 had previous criminal records and 19 of those persons had a previous record of violence. Most had a prior relationship with the complainant. Of those charged in 1995, 23 had a current or past relationship with the complainant, 6 were acquaintances of the complainant and 9 were strangers.[31]

6. Criticism

[29]*R.* v. *Hau*, *supra* n. 21, appeal allowed on other grounds [1996] B.C.J. No. 1047 (S.C.); *R.* v. *Sillipp*, *supra* n. 27.

[30]Bill C-27, *An Act to amend the Criminal Code (child prostitution, child sex tourism, criminal harassment and female genital mutilation)*, 2d Sess., 35th Parl., 1996-97; S.C. 1997, c. 16. The Act has not yet been proclaimed.

[31]"38 charged in city last year for stalking", *Winnipeg Free Press*, April 19, 1996, A4.

Some criticism of the federal government's responses to stalking continues to be heard. Concerns include prosecutors' willingness to accept plea bargains, the unwillingness of judges to impose jail terms on convicted stalkers and the lack of mandatory minimum sentences for criminal harassment. One commentator expressed her concerns in this way:

> [C]ritics of the existing legislation see an even more fundamental flaw and view the light sentences as a reflection of the way the judicial system views violence against women; often a bank robber gets a heavier sentence than a perpetuator of intimate violence. . . . Until society in any country accepts this domestic terrorism for what it really is, and until lawmakers can approach the dilemma through the eyes of a victim, adequate remedies will always be just out of reach.[32]

B. TORT LAW

1. Introduction

Tort law details the circumstances in which a person who suffers loss or injury may bring a private civil action for damages to compensate him or her for that loss. Tort law plays a complementary role to the criminal law. The primary focus of the criminal law is punishment. The primary focus of tort law is compensation for losses inflicted by the defendant.

Tort law does not, however, apply just to criminal conduct. It is broader than that. As a general proposition, tort law imposes liability on defendants to compensate loss where the defendant has been at fault. Fault includes intentional, reckless and negligent conduct. The emphasis on fault in modern tort law supports the view that compensation is not its sole goal or purpose. An award of damages against a wrongdoer may have a punitive or deterrent impact on the defendant and other members of society. It is also a vehicle by which a harmed person may establish some retribution and accountability in a civilized and public manner.

Tort law has obvious relevance to stalking. Stalking is a form of wrongdoing which often results in harm, losses and expenses. Such loss may include personal injury, psychological and emotional distress, depression, loss of income and a wide range of expenses from moving costs to counselling and therapy. It is essential to have a legal vehicle which allows the subject of stalking to recover monetary damages for such losses. However, tort law has proved inadequate to the task of providing a general remedy to the subjects of stalking. The primary reason is that tort law is an amalgam of a number of discrete torts, some dealing with particular kinds of loss, some dealing with particular kinds of conduct and some operative in particular circumstances. There is no tort of stalking. Consequently, lawyers must focus on particular aspects of the stalker's conduct and bring it within a conventional head of tortious liability, the primary purpose of which is not to provide a remedy for the subject of stalking. The situation in tort law is consequently similar to that of the criminal law before the introduction of the criminal harassment offence in 1993.

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[32]K.L. Walsh, "Safe and Sound at Last? Federalized Anti-stalking Legislation in the United States and Canada" (1996), 14 Dickinson J. Int. Law 373 at 401.

MacKay v. *Buelow* provides a useful illustration of the operation of tort law in this area. The plaintiff and defendant were divorced and had one young daughter who was in the custody of the plaintiff, her mother. The facts are contained in the passage below:

> . . . for a four month period beginning June, 1993 the defendant harassed and intimidated the plaintiff on numerous occasions by continuous telephone calls during the day and night, letters and notes left at her home, threats to kidnap the daughter Angela and remove her from the country, threats to the physical safety and well being of the plaintiff and Angela, throwing a cupboard door directly at the plaintiff and narrowly missing her, hanging a used condom on the wall in her home, stalking the plaintiff on several occasions by car and on foot, directly and indirectly threatening to kill her, videotaping her through her bathroom window from a tree, advising third parties of the existence of nude movies of her and continuously harassing her friends and professional advisors.[33]

As a consequence of this outrageous conduct, the plaintiff suffered depression, mental and emotional anguish, pain and suffering, loss of enjoyment of life, loss of self-esteem and self-worth, short-term memory loss, suicidal tendencies, loss of appetite and weight loss and had fears for her own and her daughter's safety. Counsel for the plaintiff argued in favour of liability on the basis of a number of traditional torts: assault, nuisance, breach of privacy, trespass to the person, and the intentional and negligent infliction of emotional distress (all of which are described below). The Court imposed liability on the basis of trespass to the person, breach of privacy and the intentional infliction of emotional distress and awarded $105,000 in damages.

MacKay v. *Buelow* is, however, one of the few Canadian tort cases providing a remedy for stalking. The result depended, in some part, on the outrageous and uncivilized conduct of the defendant. In this section, we survey the current state of Canadian tort law and examine its inadequacies and potential for providing a general remedy for stalking.

2. The Nominate Torts

There are a large number of torts which may provide a remedy for certain aspects of stalking. We survey the most relevant.

[33] *MacKay* v. *Buelow* (1995), 11 R.F.L. (4th) 403 at 405 (Ont. Gen. Div.).

(a) Assault

In tort law, assault has a narrow definition somewhat at odds with common parlance.[34] An assault is committed when a defendant intentionally causes another person to apprehend imminent unwelcome physical contact. The tort is actionable even though the plaintiff is not physically injured. Clearly, the behaviour of a stalker may include threats of violence and a civil remedy is available where the plaintiff's security has been threatened in this way. It should be noted, however, that the apprehension of violence must be reasonable and the violence threatened must be imminent. Threats of violence at some future time are not actionable as an assault. Conditional threats are actionable where a show of force is accompanied by a demand that the defendant has no right to impose on the plaintiff.[35]

The tort of assault is rarely instituted independently of other tortious wrongdoing. Damages are unlikely to be substantial and people may not realize that conduct which does not result in injury is actionable.[36] The expense of litigation is also a deterrent.

(b) Battery

The deliberate use of violence to cause injury to another person is a battery. The tort also extends to all intentional interference with another which is offensive to a reasonable sense of dignity.[37] Consequently, to push a person rudely, to cut a person's hair against his or her will, to spit upon a person and to pull on a person's clothing are considered batteries. The tort is therefore an important protection of an individual's personal integrity and dignity. Stalking may well escalate to physical interference and violence and then the tort of battery is available. There must, however, be some direct touching of the plaintiff. Insults, verbal abuse and threats, while emotionally damaging, do not amount to a battery.

(c) False imprisonment

A direct and intentional act which completely restrains another's freedom of movement is a false imprisonment. The restraint may be within physical boundaries or it may be imposed psychologically by an unwilling submission to threats or coercion. The restraint, however, must be complete. Mere obstruction of one's right of way is insufficient.[38] A stalker, by watching and

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[34]Assault is commonly taken to mean a deliberate physical injury. In tort law, such an act is a battery.

[35]*Read* v. *Coker* (1853), 13 C.B. 850, 138 E.R. 1437 (C.P.); *Police* v. *Greaves*, [1964] N.Z.L.R. 295 (C.A.).

[36]L.N. Klar, *Tort Law* (2nd ed., 1996) 40.

[37]J.G. Fleming, *The Law of Torts* (8th ed., 1992) 24.

[38]*Bird* v. *Jones* (1845), 7 Q.B. 742, 115 E.R. 668.

besetting a residence or apartment, may deliberately intimidate a person so as to prevent her from leaving a place of safety or security. Such an action may well amount to a false imprisonment. However, the need for a subject to avoid certain areas or places where a stalker may be is not likely to be a false imprisonment.

(d) Intentional infliction of nervous shock

One tort which has considerable potential to develop into a broad civil remedy against stalking is the tort of intentional infliction of nervous shock. This tort was developed by an English court in the case of *Wilkinson* v. *Downton*.[39] In that case, the defendant lied to the plaintiff, telling her that her husband had been involved in a serious accident. The Court held that the conduct was calculated to cause her serious harm and she recovered damages from the defendant.

However, the tort has been held within fairly narrow boundaries by a number of stringent requirements. The defendant must actually or constructively intend to cause nervous shock to the plaintiff. This will include not only conduct where the defendant desires that the plaintiff suffer shock but also includes conduct that a reasonable person would recognize as substantially certain to cause such loss. Secondly the action of the defendant must be such as to cause a serious emotional shock to the normal person. This has tended to restrict the tort to very serious or outrageous conduct. Thirdly, the plaintiff must suffer serious emotional harm which has manifested itself "by objective and substantially harmful physical or psychopathological consequences, such as actual illness."[40] Distress, anguish, fear and anxiety will not be sufficient. Clinical depression or post-trauma stress syndrome are likely to meet the threshold.

However, even given these strict requirements, the tort may provide a useful cause of action for the subjects of stalkers. The tort has recently been given new life in the area of sexual or emotional harassment in the workplace[41] and recently the English Court of Appeal[42] upheld a restraining order against a stalker in part because the defendant's conduct threatened to cause nervous shock to the subject. This tort does allow the totality of the stalker's conduct to be assessed and evaluated. Nevertheless, the essential components of the tort do create significant hurdles, the most significant of which is the need to prove psychiatric illness or physical consequences of the shock.

The American courts have broadened the scope of the tort by dispensing with the need to prove nervous shock as conventionally defined. Severe emotional distress is sufficient so long as it is proved that the defendant intentionally engaged in some conduct toward the plaintiff (a)

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[39]*Wilkinson* v. *Downton*, [1897] 2 Q.B. 57.

[40]Fleming, *supra* n. 37, at 34.

[41]*Boothman* v. *R.*, [1993] 3 F.C. 381 (T.D.) and *Clark* v. *Canada* (1994), 20 C.C.L.T. (2d) 241 (F.C.T.C.).

[42]*Khorasandjian* v. *Bush*, [1993] 3 All E.R. 669 (C.A.).

with the purpose of inflicting emotional distress or (b) where any reasonable person would have known that such would result and the defendant's actions are outrageous or intolerable in that they offend against the generally accepted standards of decency and morality.[43] This has permitted American courts to fashion a more effective remedy for the subjects of stalkers.[44]

(e) Trespass to land

Any intrusion on to the land in the possession of another is a trespass which may be remedied by an action for damages, by a prosecution under *The Petty Trespasses Act*[45] or by using reasonable force to evict a trespasser who refuses to leave the premises. The law provides strong protection of our privacy against physical intrusion into our homes and businesses. Stalking conduct may well include acts of trespass to land.

(f) Private nuisance

It is a private nuisance to act in a manner which causes an unreasonable interference with the plaintiff's enjoyment, comfort and use of land. The most common kind of nuisance committed by stalkers is the making of relentless and harassing telephone calls to the subject. This is outside the staple diet of private nuisances which are interferences by smoke, vibration, noise and smells. Nevertheless, the courts have extended the tort of private nuisance to nuisance by telephone calls. The leading case is *Motherwell* v. *Motherwell*[46] where the Alberta Court of Appeal issued an injunction and damages for telephone harassment. Initially, it was believed that the action in private nuisance was restricted to the possessor of land and that members of the family without a legal interest in land could not sue. Since *Motherwell* v. *Motherwell* however, it is clear that members of the family may bring an action based upon a licence (permission) to be in the family home.

(g) Watching and besetting

[43]*Restatement (Second) of Torts*, §46 (1965).

[44]*Samms* v. *Eccles*, 358 P. 2d 344 (Utah S.C. 1961).

[45]*The Petty Trespasses Act*, C.C.S.M. c. P50.

[46]*Motherwell* v. *Motherwell* (1976), 73 D.L.R. (3d) 62 (Alta. C.A.). See also *Stoakes* v. *Brydges*, [1958] Q.W.N. 9; *Alma* v. *Nakir*, [1966] 2 N.S.W.L.R. 396 (S.C.); *Khorasandjian* v. *Bush*, *supra* n. 42.

Watching and besetting is not discussed in the modern tort authorities. Its claim to recognition rests largely on an old English decision, *J. Lyons & Sons* v. *Wilkins*.[47] The case dealt with a labour dispute but a statement made in the case is of wider application and might be drawn on by a bold court to protect against stalking. The Court stated:

> . . . to watch or beset a man's house with a view to compel him to do or not to do what is lawful for him not to do or to do is wrongful and without lawful authority unless some reasonable justification for it is consistent with the evidence.[48]

Clearly such a tort has a close relationship with private nuisance.

(h) Malicious prosecution and abuse of process

A great deal of discretion is given to those who instigate prosecutions and litigation. There are, however, limits and a remedy may be available if a stalker seeks to harass another person with vexatious and baseless legal process. Malicious prosecution is available against a person who, with malice and without reasonable and probable cause, instigates a prosecution so long as the prosecution terminates in favour of the plaintiff.[49] The plaintiff may recover damages for loss of freedom, damaged reputation, mental suffering and economic losses.

The related tort of abuse of process operates in the field of civil litigation. It arises where the defendant makes use of the court process for an improper purpose if that is coupled with a definite act or overt threat in furtherance of that purpose.[50]

The court process is designed to serve the ends of justice, not to provide a vehicle for the unscrupulous to carry on harassment, stalking or a vendetta.

(i) Intimidation

Intimidation is generally considered a business tort concerned with economic losses. However, there would not seem to be any reason why it could not be used in a wider context. Two-party intimidation would be most relevant to the stalking situation. It arises when the defendant secures the submission of the plaintiff to his will by threats of unlawful acts. The plaintiff may recover damages for losses suffered from complying with the threats.[51]

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[47] *J. Lyons & Sons* v. *Wilkins*, [1899] 1 Ch. 255 (C.A.).

[48] *Id.*, at 267.

[49] *Roberts* v. *Buster's Auto Towing Service Ltd.*, [1977] 4 W.W.R. 428 (B.C.S.C.).

[50] *Teledata Communications Inc.* v. *Westburne Ind. Ent. Ltd.* (1990), 65 D.L.R. (4th) 636 (Ont. H.C.); *Poulos* v. *Matovic* (1989), 47 C.C.L.T. 207 (Ont. H.C.).

[51] Klar, *supra* n. 36, at 511-514.

(j) Defamation

It is not uncommon for a stalker to make untrue statements about his subject which tend to diminish the subject's reputation in the eyes of "right-thinking members of society".[52] Such statements are defamatory and may be remedied in damages. It must be kept in mind, however, that defamation protects reputation. Consequently, words of insult, obscenities and threats are not actionable as defamation. Moreover, defamatory words must be published to a third party. It is the publication which is actionable. A private defamatory communication between stalker and subject gives rise to no action in defamation.

(k) Privacy

The common law of torts failed to develop an independent tort of privacy. However, a number of provinces, including Manitoba, have a statutory tort of privacy. In Manitoba, *The Privacy Act*[53] declares that anyone who "substantially, unreasonably, and without claim of right, violates the privacy of another person, commits a tort against that other person."[54] This legislation seems particularly apt to protect the subjects of stalking. The essence of stalking is indeed a gross violation of the subject's privacy, the right to be left alone. Section 3 provides some examples of behaviour which may amount to a violation of privacy. Section 3(a) is particularly on point. It declares that privacy may be violated "by surveillance, auditory or visual, whether or not accomplished by trespass, of that person, his home or other place of residence, or of any vehicle, by any means including eavesdropping, watching, spying, besetting or following". The tort is also actionable without proof of damage.[55]

There has been very little litigation arising from *The Privacy Act* of Manitoba. However, there is one very pertinent decision, *Pateman* v. *Ross*.[56] The plaintiffs were a married couple. The male plaintiff had an intimate relationship with the defendant before he met his wife. The defendant had been unable to accept the termination of the relationship and had embarked on a course of harassing behaviour targeted at the plaintiffs and their families. Oliphant J. reviewed the evidence and concluded:

> As a result of the conduct of the defendant, the plaintiffs have been disturbed and embarrassed. The plaintiffs are concerned, as a result of the defendant's irrational behaviour, for their safety and that of their respective families. The plaintiffs fear that if the harassment of the defendant continues with the resulting violation of their privacy,

[52]*Sim* v. *Stretch*, [1936] 2 All E.R. 1237 at 1240 (H.L.).

[53]*The Privacy Act*, C.C.S.M. c. P125.

[54]*The Privacy Act*, C.C.S.M. c. P125, s. 2(1).

[55]*The Privacy Act*, C.C.S.M. c. P125, s. 2(2). See Chapter 9 for a discussion of actions without proof of damage.

[56]*Pateman* v. *Ross* (1988), 68 Man. R. (2d) 181 (Q.B.).

> irreparable harm will be done to the reputation of the male plaintiff and to the plaintiffs' marriage.[57]

The defendant claimed that she did not intend to harass the plaintiffs. Oliphant J. held that the Act did not require an intent to breach the plaintiffs' privacy. He had "no difficulty"[58] in concluding that the defendant had violated the privacy of the plaintiffs in breach of the Act. The Act provides for a number of remedies, the most relevant of which in this context are damages and an injunction. The judge found that damages would be an inadequate remedy and that the defendant would be unlikely to be able to pay the award. He issued an injunction forbidding the defendant from communicating with the plaintiffs in any way.

It is not clear why *The Privacy Act* has not been used more often in the case of stalking. It is possible that the legislation is not well known. It is also possible that lawyers do not perceive stalking as a privacy issue. Whatever the reason, *The Privacy Act* does appear to have been overlooked in the current debate on stalking.

(l) Harassment

Later in this Report, we will canvass recent developments in English tort law. There is some authority in England for a tort of harassment. In *Khorasandjian* v. *Bush*[59] and *Burris* v. *Azadani*,[60] the English Court of Appeal indicated that such a tort may exist. However, both cases dealt with the validity of interlocutory injunctions and the Court did not have an opportunity to spell out the scope and requirements of such a tort. Clearly, a strong tort of harassment would be very useful to the subjects of stalking, but Canadian authority is not very encouraging. While harassment would seem to be the basis of liability in *Rollinson* v. *R.*,[61] in *Allen* v. *C.F.P.L. Broadcasting Ltd*.[62] Leitch J. refused to recognize tortious liability for sexual harassment in the workplace, stating that the appropriate course of action is to pursue a remedy under human rights legislation.[63] It should be noted, however, that it may still be possible for a bold court to draw on the various strands of conventional tort principles and fashion a discrete tort of harassment.

3. Tort Remedies

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[57] *Id*., at 186.

[58] *Pateman* v. *Ross*, *supra* n. 56, at 188.

[59] *Khorasandjian* v. *Bush*, *supra* n. 42.

[60] *Burris* v. *Azadani*, [1995] 1 W.L.R. 1372 (C.A.).

[61] *Rollinson* v. *R.* (1994), 20 C.C.L.T. (2d) 92 (F.C.T.D.).

[62] *Allen* v. *C.F.P.L. Broadcasting Ltd.* (1995), 24 C.C.L.T. (2d) 297 (Ont. Gen. Div.).

[63] See also *Chapman* v. *3M Canada* (1995), 24 C.C.L.T. (2d) 304 (Ont. Gen. Div.).

In describing the nominate torts, we have made occasional reference to the remedies of damages and injunctions. Here we describe more fully the value of the remedies available in tort law.

(a) Damages

The normal remedy in a tort case is an award of damages. Damages may, however, serve different functions and to that end damages are classified as compensatory, aggravated and punitive. We will consider these in relation to the kind of losses suffered by the subjects of stalkers.

(i) compensatory damages

Compensatory damages are designed to place the injured person in the position she would have been in if the tort had not been committed. In essence, damages are to make good the loss caused by the wrongful act. Damages are assessed under three heads. First, there are future care costs for persons seriously and permanently injured who will need on-going health, home, vocational and social care. Secondly, damages are awarded for loss of earning capacity and for the loss of income as a result of injury or emotional suffering. Thirdly, an award is made for non-pecuniary losses such as pain, suffering and loss of enjoyment of life.

In stalking cases, losses will likely be non-pecuniary, arising from emotional shock or distress, and possibly will include some loss of income and financial expenses.

(ii) aggravated damages

Aggravated damages are also compensatory in nature but focus on the humiliation, distress, anxiety and wounded feelings of the plaintiff arising from the particularly wrongful nature of the defendant's behaviour or the defendant's state of mind. These damages are particularly appropriate in cases of stalking where physical injury is less likely than emotional distress and where injured feelings result from the evil intent of the wrongdoer and the character of his behaviour.

(iii) punitive damages

Punitive damages are quite distinct from compensatory and aggravated damages. Punitive damages are awarded to punish and deter the defendant and incidentally to deter others from similar conduct and to appease the plaintiff. The behaviour of the defendant must be sufficiently harsh, vindictive, reprehensible, outrageous or extreme to warrant such punishment. Again, these damages may be particularly appropriate in respect of stalking behaviour. As a

general principle, however, courts are reluctant to award punitive damages if the defendant has been convicted and punished under the criminal justice system.

(b) Injunction

While damages may be awarded for both past and future losses, they do not provide an assurance that the wrongful conduct will not continue. Consequently, it may be to the advantage of a plaintiff to seek a judicial order preventing a continuance of the wrongdoing. Such an order is known as a prohibitory injunction and may be particularly useful in the fight against stalking. In order to obtain a prohibitory injunction, the court must be satisfied that the plaintiff has a cause of action and that his or her legal rights have been violated. In addition, an injunction will not be given if damages are, in the circumstances, an adequate remedy. In the case of stalking, the fact that damages may not be recoverable from the defendant, that the wrongdoing may continue in spite of an award of damages and that the threatened harm is serious may influence the court in favour of the plaintiff.

Injunctions are awarded at the court's discretion. The court will weigh a variety of factors, including the appropriate balance between the competing interests of the plaintiff and the defendant, the extent of threatened harm, the character, actions and motives of the litigants and the efficacy of such an order. In the situation of stalking, judicial sympathy is likely to lie with the plaintiff. Injunctions are discussed further in Part D of this Chapter.

4. Conclusion

From this survey of tort law, it is apparent that many of the actions of stalkers amount to torts and that remedies are available. The protection is, however, fragmented, *ad hoc* and piecemeal. This is not surprising, given the range of stalking conduct and the different interests the conventional discrete torts protect. Stalking involves threats to the subject's safety (assault and intimidation), physical injury (battery), constraints on freedom (false imprisonment), emotional and psychological distress (intentional infliction of nervous shock), interference with enjoyment of premises (nuisance, watching and besetting), harassing litigation (malicious prosecution and abuse of process) and infringements of privacy (trespass to land and *The Privacy Act*).

No single tort captures the full extent or degree of a stalker's wrongdoing. Consequently, lawyers must improvise to secure an appropriate remedy for the loss suffered by the persons who are being stalked.

Once a tort is established, the courts have a sufficient array of remedies to provide appropriate compensation and protection of the plaintiff. Nevertheless, we do recognize the disadvantages of tort litigation. Actions must be brought in the Court of Queen's Bench and in

accordance with that Court's more complex procedural rules. Furthermore, tort litigation is notoriously slow, expensive and unpredictable.

C. CRIMINAL INJURIES COMPENSATION

Tort law has proved to be ineffective as a compensatory mechanism for criminal violence. In theory, tort liability may be established with reasonable ease against a criminal who injures another person. The appropriate tort is battery. However, in practice, it is unlikely that any compensation will be received. Often, it is difficult to identify or locate the perpetrator and, if judgment is awarded, it is unlikely that the damage award will be paid. In fact, victims of criminal violence rarely receive compensation under the tort system.

To remedy this defect, the Legislature passed *The Criminal Injuries Compensation Act*.[64] The Act is administered by the Criminal Injuries Compensation Board and provides compensation on a no-fault basis to the victims of certain listed criminal offences. The criminal offences appear to have been selected on the basis of their likelihood to cause death or bodily injury. The compensation payable is limited to loss of income, expenses incurred as a consequence of the criminal violence and maintenance of a child born as a consequence of sexual assault. Compensation is not provided for non-pecuniary losses such as pain, suffering or distress.

The Act, however, provides no relief for the subjects of stalkers unless bodily injury is suffered by a listed crime, such as assault, aggravated assault and sexual assault. The victim of the offence of criminal harassment has no direct claim because that crime is not listed in the Act. This is unfortunate because the victim of criminal harassment may suffer the kind of losses recoverable under the Act. Such losses might include loss of income, expenses in seeking protection from the stalker or avoiding the stalker such as those arising from relocation and expenses for counselling and therapy. Coverage under the Act would provide a quick, efficient and inexpensive way to recover such expenses.

D. JUDICIAL ORDERS OF RESTRAINT AND PROTECTION

The primary focus of the criminal law is to punish the stalker. The primary focus of tort law is to compensate the subject of stalking. The principal need of the subject of stalking, however, is that the stalking end and that the subject be left alone. An important step to that end is the securing of a judicial order prohibiting the continuance of the wrongful conduct. In this section, we survey the availability of restraining orders and orders of protection under both criminal and civil process and describe the remedies available for breach of such an order.[65]

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[64]*The Criminal Injuries Compensation Act*, S.M. 1970, c. 56, C.C.S.M. c. C305.

[65]We have been assisted by Pedlar, *supra n. 9.*

1. Peace Bonds

Section 810 of the *Criminal Code* deals with the availability of orders of recognizance (peace bonds) with or without sureties. We described the process earlier and noted that conditions may be attached to the recognizance prohibiting the accused from communicating with the person seeking the order or requiring the defendant to keep a certain distance from her. The advantage of this course of action is that it imposes no significant financial burden on the person seeking the order. The disadvantage is that protection may be delayed. *The Domestic Violence Review into the Administration of Justice in Manitoba* noted that there may be a delay in the hearing of an application while the defendant is served with a summons and the hearing may be further delayed if the defendant refuses to sign a peace bond, necessitating the setting of a trial date which may be some months away.[66]

2. Judicial Interim Release

When a person is arrested and held in custody, he or she must be taken before a justice or judge to determine if he or she should be released with or without sureties or conditions until trial. This procedure is called judicial interim release (commonly referred to as "bail"). Under section 515 of the *Criminal Code*, a justice or judge is directed to release the person upon giving an undertaking without conditions unless the prosecution can show cause why some other order should be made. If cause is shown, the accused may be released on giving an undertaking with such conditions as the justice or judge directs. Among the conditions listed in section 515(4):

> (d) abstain from communicating with any witness or other person expressly named in the order, . . . except in accordance with the conditions specified in the order that the justice considers necessary;
>
> . . .
>
> (f) comply with such other reasonable conditions specified in the order as the justice considers desirable.

Furthermore, under sections 515(4.1) and 515(4.2), where a person is charged with an offence involving violence, threats of violence or criminal harassment, the justice or judge is required to consider the imposition of conditions prohibiting the possession of firearms and prohibiting contact or communication with a witness or anyone named in the order. There is therefore ample power for the courts to issue orders protecting the subjects of criminal harassment and other criminal acts under the process of interim judicial release. A great advantage of protective orders under this process is that it secures immediate protection for the subject and, furthermore, it is secured without the expense of any independent process that must be brought by her. It has, however, been pointed out in *The Domestic Violence Review into the Administration of Justice in Manitoba* that such conditions must be imposed at the outset and cannot be added later except with the consent of the accused.[67]

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[66]Pedlar, *supra* n. 9, at 74.

[67]Pedlar, *supra* n. 9, at 69.

The consequences of breach of conditions of judicial interim release are set out in section 524 of the *Criminal Code*. The accused can be arrested and a justice or judge must then cancel the original release and order that the accused be held in custody unless the accused can show why detention is not justified.

3. Probation Orders

Section 732.1 of the *Criminal Code* provides that, where a court sentences someone to probation, the court shall prescribe as part of the order that the offender must keep the peace and be of good behaviour. The court is empowered to make additional conditions listed in section 732.1(3) of the *Criminal Code*. The list includes conditions that the accused abstain from the consumption of alcohol or drugs and abstain from owning, possessing or carrying a weapon. Subsection 732.1(3)(h) provides that a probation order may require an accused to comply with such other reasonable conditions as the court considers desirable for protecting society and for facilitating the offender's successful reintegration into the community. This provides the court with an opportunity to impose no contact and non-communication restraints on a stalker and a prohibition on his attendance at various locations.

4. Conditional Discharge

Where a stalker is found guilty of criminal harassment or another criminal offence, a judge may conditionally discharge the accused on the conditions prescribed in a probation order.[68] The conditions may include protection and restraint orders in respect of the subject. If the accused breaches the probation order, he may be brought back to the court which can then enter a conviction and impose sentence.

[68] *Criminal Code*, R.S.C. 1985, c. C-46, s. 730.

5. Orders Under *The Family Maintenance Act*

Non-molestation and prohibition orders are available under *The Family Maintenance Act*[69] to protect spouses, including common law spouses as defined under the Act.[70] Under section 10(1)(c), the Court of Queen's Bench may make an order, subject to such terms and conditions as appear just, that "one spouse shall not enter upon any premises where the other spouse is living separate and apart." Section 10(1)(d) contains a broader power to order that "one spouse shall not molest, annoy or harass the other spouse or any child in the custody of the other spouse". The words of section 10(1)(d) are sufficiently general to cover most stalking behaviour between spouses and provide a useful avenue of protection. By virtue of section 14(2) of the Act, these orders are also available to applicants who have cohabited with the person against whom the order is sought. The legislation does not, however, extend beyond cohabitees and is, therefore, inapplicable to situations where the stalker and subject had some lesser relationship such as being boyfriend and girlfriend or where the stalker is a stranger or co-worker.

In 1992, *The Family Maintenance Act* was amended to introduce procedural changes in respect of a non-molestation order under section 10(1)(d).[71] The purpose of the changes was to expedite the issuance of such an order. By virtue of sections 46.1 to 46.5 of *The Family Maintenance Act* and the *Non-Molestation Orders Regulation*,[72] applications for an order under section 10(1)(d) may be brought before a designated magistrate (rather than before the Court of Queen's Bench or the Provincial Court) and an order may be made *ex parte* (without notice to the person against whom the order is sought). The amendment also provides that the order must be served as soon as is practicable.

The penalties for breach of an order under sections 10(1)(c) and (d) are found in section 50(1.1) of the Act. A person who breaches such an order is liable on summary conviction to a fine of not more than $1,000 or to imprisonment for not more than one year or both.[73] Because the Act has penalty provisions, the breach of an order cannot be prosecuted under section 127 of the *Criminal Code* (disobeying order of court); that section only applies where a punishment has not been expressly provided by law. *The Domestic Violence Review into the Administration*

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[69]*The Family Maintenance Act*, C.C.S.M. c. F20.

[70]*The Family Maintenance Act*, C.C.S.M. c. F20, s. 4(3), provides:

> The obligation under subsection (1) also exists where a man and a woman, not being married to each other, have cohabited continuously for a period of not less than five years in a relationship in which the applicant has been substantially dependent upon the other for support, if an application under this Act is made while they are cohabiting or within one year after they cease cohabiting and section 10 applies with the necessary changes to that application.

[71]*The Family Maintenance Amendment Act*, S.M. 1992, c. 47.

[72]*Non-Molestation Orders Regulation*, Man. Reg. 226/92.

[73]These penalties were increased by the 1992 amendment.

of Justice in Manitoba recommended that the penalty sections of the Act be deleted in respect of such orders to permit a prosecution for an indictable offence under section 127 of the *Criminal Code* (which has a maximum penalty of a term of imprisonment not exceeding two years).[74] The *Review* also recommended that the *Criminal Code* be amended to make all breaches of court orders, breaches of any undertaking or recognizances and breaches of probation orders indictable offences within the absolute jurisdiction of a Provincial Court judge.[75]

6. Prohibitory Injunctions

Prohibitory injunctions are court orders requiring the defendant to cease acting in a wrongful manner. The Court of Queen's Bench has a wide power to issue prohibitory injunctions and they may be useful in combatting stalking. It is important to note that the injunction is a remedy, the purpose of which is to redress a violation of the plaintiff's rights. An injunction cannot create new rights where none have existed before. Consequently, it is essential that the plaintiff issue a statement of claim seeking to establish a justiciable cause of action against the defendant.

That cause of action may arise from tort law, contract law, breach of fiduciary duty or on the basis of some other violation of the plaintiff's rights. The prohibitory injunction, like all equitable remedies, is most commonly issued where damages are an inadequate remedy and it is not available as of right. The court will exercise its discretion on the basis of all the surrounding factors and circumstances.

If necessary, the court can act quickly and, on notice of motion, issue an interlocutory injunction before trial. In cases of particular urgency, an injunction may be granted *ex parte* and, in some cases, an injunction may be issued even prior to an action being commenced. An *ex parte* interlocutory injunction will only be issued where the delay necessary to give notice might entail serious and irreparable injury to the plaintiff.

An injunction is a powerful remedy. If it is breached, a motion may be brought for a contempt order. If the defendant is found to be in contempt of court, the judge, under Rule 60.10(5) of the *Queen's Bench Rules*, may order the person in contempt:

> (a) be imprisoned for such period and on such terms as are just;
> (b) be imprisoned upon failure to comply with a term of the order;
> (c) pay a fine;
> (d) do or refrain from doing an act;
> (e) pay such costs as are just; and
> (f) comply with any other order that the judge considers necessary. . . .

[74]Pedlar, *supra* n. 9, at 76. This may have been persuasive in the 1992 amendments which preferred the approach of increasing the penalties for a breach of section 10(1)(c) and (d).

[75]Pedlar, *supra* n. 9, at 76.

E. OTHER MANITOBA LEGISLATION, REGULATIONS AND POLICY DIRECTIVES

There are a number of other laws and policies in place which are also pertinent to the protection from stalkers. We survey some of them.

1. *The Mental Health Act*

On occasion, the conduct of a stalker may be explained by the fact that he is suffering from a mental illness. If the stalker is unwilling to recognize this and seek appropriate health care, the provisions under *The Mental Health Act*[76] for admitting a person as an involuntary patient in a psychiatric facility may be initiated. Under the Act, the criteria for involuntary admission are that the patient is suffering a mental disorder as a result of which he or she is likely to cause serious harm to himself or herself or another or to suffer substantial mental or physical deterioration if not admitted to a psychiatric facility, that the patient is in need of continuing treatment that can only be provided in a psychiatric facility and that the person either refuses or does not have the capacity to consent to a voluntary admission.[77] Mental disorder is defined under the Act as a "substantial disorder of thought, mood, perception, orientation or memory that grossly impairs judgment, behaviour, capacity to recognize reality or ability to meet the ordinary demands of life . . . ."[78] Clearly, these criteria for involuntary admission are stringent and are unlikely to be satisfied in many stalking situations.

If the stalker is admitted as an involuntary patient, there are safeguards preventing an indefinite detention. A patient may not be detained for more than three months under a certificate of involuntary admission. Such a certificate may be renewed but an automatic review by the Review Board must take place after a third certificate is issued.[79] The patient also has a right to appeal the involuntary admission at any time.[80] If the Board of Review finds that the criteria for admission of an involuntary patient are not met, the patient must be treated as a voluntary patient.[81]

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[76]*The Mental Health Act*, C.C.S.M. c. M110.

[77]*The Mental Health Act*, C.C.S.M. c. M110, s. 16(1.1).

[78]*The Mental Health Act*, C.C.S.M. c. M110, s. 1.

[79]*The Mental Health Act*, C.C.S.M. c. M110, s. 26.3.

[80]*The Mental Health Act*, C.C.S.M. c. M110, s. 26.2(1).

[81]*The Mental Health Act*, C.C.S.M. c. M110, s. 26.2(3).

It should also be noted that an involuntary admission to a psychiatric facility does not necessarily give a right to treat the patient against his will. If a patient is mentally competent to make treatment decisions, those wishes must be respected.[82] Competency is determined by the attending physician who is directed to consider whether the patient understands the condition for which the treatment is proposed, the nature and purpose of the treatment, the risks and benefits of the treatment and consequences of not being treated. When the patient is incompetent, the Act contemplates substitute decision makers.

2. Policies Restricting Public Access to Government Data Bases and Information

In order to escape from harassment, the subject of a stalker may be forced to relocate within the province or beyond. Until recently, the stalker may have been able to obtain the subject's new address and other personal information through governmental data bases. The policy of the Manitoba government is now to restrict the availability of information relating to those who have been stalked or harassed. We survey some of those initiatives.

(a) Land Titles Office

Until recently, when a subject purchased another dwelling, the new address could be obtained by way of a computer search of registered owners' names at the Land Titles Office. However, in 1996, on the initiative of the Department of Justice, a policy was introduced to restrict access to the names of spouses and other parties who have peace bonds, restraining orders, orders of judicial interim release or probation orders in their favour.[83] The person protected by such an order may apply, free of charge, to the Land Titles Office to remove his or her name from the "personal names list" and place them on a "secure names list". The general public does not have access to that protected list. The name will remain on the protected list until December 31 of the year following the year in which the application was registered unless there is a renewal of the request. To enhance the protection provided, the Land Titles Office has also negotiated with the City of Winnipeg to ensure that a personal name search at its tax assessment department will not disclose the address of the protected person. As of May 1997, there were 14 names on the protected list. The procedure is simple. A standard application form must be completed and an affidavit must be sworn as to the existence of a protective order. The computer will then be programmed to protect that name. It may be noted that currently it is a prerequisite to name protection that there is a protective order in favour of the applicant.

[82] *The Mental Health Act*, C.C.S.M. c. M110, s. 24.

[83] Telephone conversation with Barry Effler, Deputy Registrar General and District Registrar, Manitoba Land Titles (May 21, 1997).

(b) *The Elections Act* and *The Local Authorities Election Act*

In 1995, *The Elections Act* and *The Local Authorities Election Act*[84] were amended to allow any voter, during an election period, to apply in writing to an election officer to have his or her name, address or other personal information omitted or obscured from the voters list in order to protect his or her personal security. The amendment also requires that appropriate steps be taken to ensure that the public is aware of this protection. This is another step a person may take to prevent further instances of stalking.

(c) Driver and Vehicle Licensing Division

Since 1991, the Driver and Vehicle Licensing Division has had policies in place to protect the privacy of those with driver's licences and the owners of motor vehicles. As a rule, a member of the general public is not able to access information through the Division. An exception is made in respect of members of the public who need to serve legal documents and, for that purpose, need the address of certain persons. The Division attempts to ensure the legitimacy of the applicant and copies the legal document to be served for its records. Information is also available to approximately 400 account holders who are mostly government offices or businesses which have a legitimate interest in securing information, such as motor vehicle dealers and law offices. The Division also has procedures in place for persons to apply for the status of "restricted access" which prevents all persons including account holders from securing information. The only exception is that information will be made available to law enforcement agencies. Restricted access status is given to all those who have a good reason for protection and the number of persons in that category number in the low hundreds. No person has recently been refused restricted access status.[85]

(d) Personal Property Registry

The Personal Property Registry is in the process of finding ways to restrict access to personal information relating to those who may be in danger from stalking. Currently, a search may be made by using the serial number of a motor vehicle and, if that motor vehicle is financed, the name, birth date and address of the debtor is available. There is as yet no policy in place restricting public access to the information normally available to the public from the Registry.

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[84]*The Elections Amendment, Local Authorities Election Amendment and Consequential Amendments Act*, S.M. 1995, c. 6, ss. 5 and 14.

[85]Telephone conversation with Ulysse A. Poirier, Supervisor of Vehicle Registration, Manitoba Department of Highways and Transportation (May 22, 1997). In a subsequent letter dated May 23, 1997, Mr. Poirier indicated that many others, such as law enforcement agencies and Autopac brokers, have access to driver and vehicle licensing records, although they are not entitled to disclose this information to the public. Therefore, despite the implementation of the restricted access procedures, personal information could nonetheless be obtained through an unauthorized disclosure by someone at one of these agencies. Although such activities would be highly unethical and in contravention of all privacy policies, it is possible.

In April 1997 the Government of Manitoba introduced amendments to *The Personal Property Security Act* allowing regulations to be made respecting the circumstances in which the address or other information about a debtor or secured party may be withheld from a search of the Registry.[86]

[86]Bill 24, *The Personal Property Security Amendment and Various Acts Amendment Act*, 3rd Sess., 36th Leg. Man., 1997.

CHAPTER 3

THE LAW IN OTHER CANADIAN PROVINCES

A. INTRODUCTION

Generally speaking, the law in other Canadian provinces is not dissimilar to that in Manitoba. Criminal law is, of course, uniform across the country and the tort law in Manitoba is largely reflected in other provinces. *The Privacy Act*[1] places Manitoba in a better position to provide a tort remedy for stalking than other jurisdictions. While most provinces have Criminal Injuries Compensation Boards or other schemes to compensate victims of crime, none give no-fault benefits to victims of criminal harassment. The availability of judicial orders is also similar across Canada. There are, however, recent and relevant developments in respect of orders in situations of domestic violence. We address some of these developments.

B. RECENT INITIATIVES ON DOMESTIC VIOLENCE IN CANADA

In recent years, there have been a number of studies[2] and some provincial legislative initiatives aimed at improving the legal protections for women against domestic violence. Of particular interest with respect to stalking are *The Victims of Domestic Violence Act* in Saskatchewan,[3] the *Victims of Family Violence Act* of Prince Edward Island[4] and the Alberta Bill which proposed a *Victims of Domestic Violence Act*.[5] The legislation is designed to provide speedy orders of protection and support for victims of domestic violence. To some extent, they are of a similar genre to the parts of Manitoba's *The Family Maintenance Act*[6] which empower courts to issue non-molestation orders.

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[1]*The Privacy Act*, C.C.S.M. c. P125.

[2]Law Reform Commission of Nova Scotia, *From Rhetoric to Reality: Ending Domestic Violence in Nova Scotia* (Report, 1995); Alberta Law Reform Institute, *Domestic Abuse: Toward an Effective Legal Response* (Report for Discussion #15, 1995).

[3]*The Victims of Domestic Violence Act*, S.S. 1994, c. V-6.02.

[4]*Victims of Family Violence Act*, S.P.E.I. 1996, c. 47.

[5]Bill 214, *Victims of Domestic Violence Act*, 4th Sess., 23rd Leg. Alta., 1996.

[6]*The Family Maintenance Act*, C.C.S.M. c. F20.

1. Saskatchewan

The Victims of Domestic Violence Act[7] of Saskatchewan provides for two kinds of orders: the Emergency Intervention Order and the Victim's Assistance Order. These orders are available to victims of domestic violence[8] who are cohabitants as defined by the Act. Included in this definition are persons who have resided together or who are residing together in a family, spousal or intimate relationship and persons who are parents of one or more children regardless of their marital status or whether they have lived together at any time.

Section 7 of the Act provides that the court may issue a Victim's Assistance Order once it has determined that there has been domestic violence. The Act gives the court the power to make a wide range of orders including provisions relating to the exclusive occupation of a residence, no contact and no communication orders, orders prohibiting the respondent from certain locations, provisions requiring the respondent to pay compensation for monetary losses suffered by the victim, recommendations that the respondent receive counselling or therapy and many others. Applications may be made by the victim or someone on his or her behalf and provisions are made for private hearings, confidentiality and orders banning publication of reports of the hearing. A Victim's Assistance Order may give possession or occupation of property to the victim but it does not affect title or ownership to the property and a landlord may not evict the victim from leased premises solely because his or her name is not on the lease.

Section 3 of the Act provides that, when domestic violence has occurred, a designated justice of the peace may issue an Emergency Intervention Order if the seriousness or urgency of the situation makes an immediate order of protection necessary without notice to the alleged abuser. The order may even be issued over the telephone. The order, which is enforceable by the police, may include provisions granting exclusive occupation of the premises to the victim, directing a peace officer to remove the respondent from the premises, prohibiting communication and contact with the victim, directing a peace officer to supervise the removal of personal belongings from the residence and any other terms deemed necessary to protect the victim.

The order is not effective unless the respondent receives notice of it. Under the Act, the *ex parte* order is subject to review by a judge of the Court of Queen's Bench within three days. If the order is not confirmed, a re-hearing will take place where the onus is on the respondent to show why the order should not be confirmed. The onus of proof for all determinations is on the balance of probabilities.

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[7] *The Victims of Domestic Violence Act*, S.S. 1994, c. V-6.02.

[8] Domestic violence is defined in section 2 as:

> (i) any intentional or reckless act or omission that causes bodily harm or damage to property;
> (ii) any act or threatened act that causes a reasonable fear of bodily harm or damage to property;
> (iii) forced confinement; or
> (iv) sexual abuse

The provisions relating to the Emergency Intervention Order have been referred to as creating a model of "adult protection and emergency intervention"[9] which places a premium on speedy efficient procedures.

The legislation has no punishment provision. Consequently, a person in breach of an order would be subject to the inherent contempt powers of the court or would be liable for prosecution under section 127 of the *Criminal Code* which provides a maximum sentence of two years imprisonment.

2. Prince Edward Island

Prince Edward Island has enacted the *Victims of Family Violence Act*[10] which is almost identical to the Saskatchewan legislation, with two significant differences. The first is that the Prince Edward Island Act defines family relationship as a relationship between a man and a woman who have been married or have co-habited or are members of the same family. This is narrower in scope than the definition of cohabitants under the Saskatchewan Act. Second, the Prince Edward Island Act provides that a respondent who encourages or solicits another person to do an act which, if done by the respondent would constitute family violence against the victim, is deemed to have done that act personally. There is no such provision in the Saskatchewan Act.

3. Alberta

In 1996, a private member's Bill entitled the *Victims of Domestic Violence Act*[11] was introduced by Alice Hanson of the opposition Liberal Party. The Bill was supported in principle by the government but it died at the Committee stage. The Bill is not identical to the Saskatchewan legislation, but is very similar. The significant differences between the two are outlined below. It seems likely that the Bill will be revived in some form at the next session of the Legislature.

As amended at Committee, the Bill provided for an expanded definition of cohabitant which includes children over the age of 16 who normally reside in the same residence as the victim. The definition of domestic violence was extended to include emotional and financial abuse. However, the main difference between the Bill and the Saskatchewan legislation is the creation of an offence for making a false and malicious application for a protection order, punishable by a fine of up to $10,000 and/or one year in prison.

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[9]Law Reform Commission of Nova Scotia, *supra* n. 2, at 63.

[10]*Victims of Family Violence Act*, S.P.E.I. 1996, c. 47.

[11]Bill 214, *Victims of Domestic Violence Act*, 4th Sess., 23rd Leg. Alta., 1996.

The proposed Alberta legislation was based in part on the Alberta Law Reform Institute's Report for Discussion, *Domestic Abuse: Toward an Effective Legal Response.*[12] The Institute is in the process of finalizing its position on this issue and there are indications that the final report may be somewhat different than the Report for Discussion.

C. CONCLUSION

These initiatives on domestic violence are not directly applicable to stalking. Their primary focus is on violence in the home when the parties are living together. Stalking normally occurs after the relationship has terminated. Furthermore, stalking may be committed where the stalker and victim have never lived together and when the stalker is a stranger to the victim. Nevertheless, to the extent that this legislation gives broad powers to issue protective orders quickly, cheaply and with a minimum of procedural difficulty, it provides a model which may be utilized in the legal response to stalking.

[12]Alberta Law Reform Institute, *supra* n. 2.

CHAPTER 4

THE LAW IN JURISDICTIONS OUTSIDE CANADA

A. ENGLAND

Stalking, and the protection from it, are very topical issues in England. Recently, a legal commentator has noted that "[i]t seems that every newspaper reader in this country, and therefore probably every adult, appears to be asking the question 'Is there a law against stalking?'".[1] As that quote indicates, the approach of the English legal system is reflective of that in Canada. The English legal system has stretched conventional legal principles and remedies to their limit only to find that the protection against stalkers remains inadequate and incomplete. In recent years, as in Canada, a number of initiatives in both the criminal law and civil law have extended the protection of the law, but that protection has failed to address the problem adequately. Here, we describe the more noteworthy developments in English law.

1. Criminal Law

English criminal law has not proved to be very effective in respect of stalking. The common law offence of "behaviour likely to cause a breach of the peace" has proved to be particularly ineffective[2] and, although much publicity was given to the recent conviction of Anthony Burstow for the offence of "causing psychological grievous bodily harm"[3] in respect of a particularly abhorrent course of conduct, the conviction was secured by a guilty plea. The common law has, however, been supplemented by a variety of penal legislation which enhances the law's protection.

Section 43(1)(a) of the *Telecommunications Act 1984*[4] makes it an offence to send a grossly offensive or indecent, obscene or menacing message by means of a public telecommunication system. Section 43(1)(b) prohibits persistently sending false messages by the public communication system with the intent to cause annoyance, inconvenience or needless

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[1]T. Lawson-Cruttenden, "Is there a law against stalking?" (1996), 146 N.L.J. 418. This article has proved most useful in describing recent developments in the English law of stalking.

[2]*Id.*

[3]B. Frost and F. Gibb, "Stalker jailed for causing grievous bodily harm", *The Times*, March 5, 1996. See also the editorial comment in the same edition.

[4]*Telecommunications Act 1984* (U.K.), 1984, c. 12.

anxiety. Clearly, this covers some aspects of stalking behaviour. The legislation is, however, weakened by the fact that it provides for a penalty of a fine only.

The *Malicious Communications Act 1988*[5] also addresses some aspects of stalking behaviour. Under the Act, it is an offence to send a letter or other article which conveys an indecent or grossly offensive message, a threat, information which is false and known or believed to be false by the sender, or any other article of an indecent or grossly offensive nature when the intent of the sender is to cause distress or anxiety to the recipient or to any other person that the sender intends that its content or nature be communicated. Subsection 1(2) sets out defences in respect of the sending of threats. No offence is committed where the threat was used to reinforce a demand which the sender believed he or she had reasonable grounds for making and the sender believed that the use of the threat was a proper means of reinforcing the demand. Again, the penalty is a fine only.

However, the legislative reform which had the greatest general application to the broad range of stalking conduct was section 154 of the *Criminal Justice and Public Order Act 1994*[6] which introduced a new section 4A into the *Public Order Act 1986*.[7] The Act introduced the offence of intentional harassment, alarm and distress. As the name suggests, the offence requires an intent to cause a person harassment, alarm and distress and the accused must use threatening, abusive or insulting words or behaviour, disorderly behaviour, or display any wording, sign or other visible representation which is threatening, abusive or insulting. Finally, the actions of the accused must cause the victim harassment, alarm or distress. It is a defence to show that the defendant's conduct was reasonable.[8] The penalty includes a fine and a term of imprisonment not exceeding six months. This provision bears some similarity to the Canadian crime of criminal harassment. The English provision differs in two important respects. The English legislation requires an intention to cause harassment, alarm or distress which may prove difficult in some cases of stalking. It will be remembered that the Canadian offence stresses knowledge or recklessness that the victim is being harassed. Secondly, the English offence does not require fear for one's safety and, in this respect, it is broader than the Canadian language.

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[5]*Malicious Communications Act 1988* (U.K.), 1988, c. 27.

[6]*Criminal Justice and Public Order Act 1994* (U.K.), 1994, c. 33.

[7]*Public Order Act 1986* (U.K.), 1986, c. 64.

[8] See also the following subsections of section 4A:

> (2) An offence under this section may be committed in a public or a private place, except that no offence is committed where the words or behaviour are used, or the writing, sign or other visible representation is displayed, by a person inside a dwelling and the person who is harassed, alarmed or distressed is also inside that or another dwelling.
>
> (3) It is a defence for the accused to prove -
> (a) that he was inside a dwelling and had no reason to believe that the words or behaviour used, or the writing, sign or other visible representation displayed, would be heard or seen by a person outside that or any other dwelling . . . .

The most recent development in English criminal law is the *Protection from Harassment Bill* which is discussed in detail below.

2. Tort Law

As in Canada, English tort law has provided some protection in respect of certain categories of stalking conduct by way of the conventional torts of assault, nuisance, intention to inflict nervous shock and the like. These torts have been stretched to provide a remedy in damages or by way of injunction but the protection is incomplete and inadequate. There has, however, been considerable interest and discussion in England of the recognition of a tort of harassment which would embrace much of conventional stalking conduct. The interest has been generated by two recent Court of Appeal decisions relating to stalking. The focus of both was the availability of injunctive relief.

The first case is *Khorasandjian* v. *Bush*.[9] The male defendant was a friend of the female plaintiff but they had never cohabited. When their relationship ended, the defendant stalked and harassed the plaintiff. The plaintiff was not able to seek a non-molestation order under section 1 of the *Domestic Violence and Matrimonial Proceedings Act 1986* because she was never married to nor had she ever cohabited with the defendant. A trial judge issued an interlocutory prohibitory injunction restraining the defendant from "using violence to, harassing, pestering or communicating with the plaintiff in any way". The defendant appealed the order on the grounds that an injunction could issue only to protect the plaintiff's rights and under tort law there was no right to be free from harassment, pestering and communication. In essence, there was no known tort of harassment. Consequently, the issue for the Court was whether or not the plaintiff had a substantive cause of action against the defendant upon which to support the injunction. The Court upheld the injunction. The persistent telephone calls amounted to the tort of nuisance and the defendant's campaign of persecution would satisfy the tort of intentional infliction of nervous shock but for the fact that the plaintiff had not suffered an actual illness. The Court does, however, have jurisdiction to issue a *quia timet* injunction before damage is caused and the Court held that the risk of psychological illness was so significant as to warrant the interlocutory injunction. The case has understandably given rise to a debate over whether the Court of Appeal recognized a new tort of harassment drawing on principles of nuisance and intentional infliction of nervous shock or whether the Court supported the injunction by a liberal interpretation of two conventional heads of tortious liability.

The second decision is *Burris* v. *Azadani*.[10] The female plaintiff was harassed and stalked by the male defendant. An interlocutory prohibitory injunction was issued. One of the terms of the order was that the defendant was prohibited from entering or remaining within 250 yards of the plaintiff's home. The defendant cycled along the road in front of her home in

[9]*Khorasandjian* v. *Bush*, [1993] 3 All E.R. 669 (C.A.).

[10]*Burris* v. *Azadani*, [1995] 1 W.L.R. 1372 (C.A.).

contravention of the order and was subsequently sentenced to a brief term of imprisonment in respect of the breach. The sentence was appealed on the grounds that, in cycling on a public road, the defendant committed no breach of the plaintiff's rights and, since she had no cause of action against him, he could not be restrained in this way. The Court of Appeal upheld the order. In doing so, two important matters were addressed. First, the Court of Appeal added weight to the argument that there is a tort of harassment. Bingham M.R. stated that "Nor . . . can the view be upheld that there is no tort of harassment."[11] Secondly, the Court appeared willing to uphold an injunction even where the defendant's conduct (cycling on a public road) would not in itself be tortious. Bingham M.R. stated:

> Ordinarily, the victim will be adequately protected by an injunction which restrains the tort which has been or is likely to be committed . . . . But it may be clear on the facts that if the defendant approaches the vicinity of the plaintiff's home he will succumb to the temptation to enter it, or to abuse or harass the plaintiff; or that he may loiter outside the house, watching and besetting it, in a manner which might be highly stressful and disturbing to a plaintiff. In such a situation the court may properly judge that in the plaintiff's interest -- and also, but indirectly, the defendant's -- a wider measure of restraint is called for.[12]

The Court of Appeal is clearly stretching the law to provide protection of the plaintiff. The Court is using the injunction to protect the plaintiff's legitimate interests as balanced against the defendant's interest in freedom of action.

These two cases do provide some support for an embryonic tort of harassment and indicate that the English Court of Appeal is willing to extend tort law to provide a more complete remedy against such conduct. What remains unclear is the scope, requirements and defences to such a tort. No court has as yet undertaken an analysis of these aspects of a tort of harassment.

3. Family Law (Non-molestation Orders)

Courts in England have significant powers to make non-molestation or protective orders in domestic disputes. Under the *Domestic Proceedings and Magistrates' Courts Act 1978*,[13] a married person may make application to a magistrate's court where his or her spouse has used or threatened violence against the applicant or a child of the family and a court order is necessary for the protection of the applicant or child. The court may order that the respondent not use or threaten violence against the applicant or child.

Furthermore, the respondent may be excluded from the matrimonial home if there has been violence against a spouse or a child, threats against a spouse and a child and violence against another or breach of an existing order if the applicant or child is in danger of being

[11] *Id.*, at 1378.

[12] *Burris* v. *Azadani*, *supra* n. 10, at 1380-1381.

[13] *Domestic Proceedings and Magistrates' Courts Act 1978* (U.K.), 1978, c. 22.

physically injured. It has been noted[14] that the House of Lords has held that the criteria applicable to an ouster order are found in the *Matrimonial Homes Act 1983*[15] and that such orders are to be just and reasonable having regard to the conduct of the spouses. It may be noted that the applicant must be married to the respondent. Broader powers are found in the *Domestic Violence and Matrimonial Proceedings Act 1976*.[16] Under that Act, application can be made by a spouse or a man or woman who are living with each other in the same household as husband and wife to a County Court for an injunction against molestation of the applicant or any child living with the applicant even though no other proceedings are pending before the court. This power is similar to that under *The Family Maintenance Act*[17] of Manitoba. The common form of the restraining order is that the respondent must restrain from "assaulting, molesting, annoying or otherwise interfering with the applicant or any child living with the applicant."

Injunctions may also be available in divorce and other matrimonial proceedings or where the plaintiff's rights are interfered with or threatened.

In 1992, the English Law Commission issued its Report on *Family Law: Domestic Violence and Occupation of the Family Home*.[18] It made, *inter alia*, a number of recommendations relating to the availability and scope of non-molestation orders. The recommendations included that the courts should continue to have power to grant protection against all forms of molestation including violence; there should be no statutory definition of molestation; the Court should have the power to grant a non-molestation order where this is just and reasonable having regard to all circumstances including the need to secure the health, safety and well being of the applicant or a relevant child; and that non-molestation orders should be capable of being made for any specified period or until further order.

The most interesting recommendation significantly widens the relationships in which non-molestation orders may be given:

> . . . [A] non-molestation order should be capable of being made between people who are associated with one another in any of the following ways:
>
> (i) they are or have been married to each other;
> (ii) they are cohabitants or former cohabitants;
> (iii) they live or have lived in the same household, otherwise than merely by reason of one of them being the other's employee, tenant, lodger or boarder;

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[14]E. Schollenberg and B. Gibbons, "Domestic Violence Protection Orders: A Comparative Review" (1992), 10 Can. J. of Fam. Law 191 at 202- 203.

[15]*Matrimonial Homes Act 1983* (U.K.), 1983, c. 19.

[16]*Domestic Violence and Matrimonial Proceedings Act 1976* (U.K.), 1976, c. 50.

[17]*The Family Maintenance Act*, C.C.S.M. c. F20.

[18]The Law Commission (Eng.), *Family Law: Domestic Violence and Occupation of the Family Home* (Report #207, 1992) 19-27.

(iv) they are within a defined group of close relatives;
(v) they have at any time agreed to marry each other (whether or not that agreement has been terminated);
(vi) they have or have had a sexual relationship with each other (whether or not including sexual intercourse);
(vii) they are the parents of a child or, in relation to any child, are persons who have or have had parental responsibility for that child (whether or not at the same time);
(viii) they are parties to the same family proceedings.[19]

The Law Commission, however, rejected the approach of some Australian states which recommended the removal of all relational restrictions, throwing the jurisdiction open to all interested parties.

These recommendations were adopted in the *Family Law Act 1996*.[20] Section 42 of that Act provides that a person associated with the respondent may make an application for a non-molestation order even if no other family proceedings have been instituted. A non-molestation order means an order containing a provision prohibiting the respondent from molesting another person who is associated with the respondent or a provision prohibiting the respondent from molesting a relevant child. In deciding whether to make a non-molestation order, the court shall have regard to all the circumstances including the need to secure the health, safety and well being of the applicant or child. A non-molestation order may refer to specific acts of molestation, to molestation in general, or both. Such an order may be made for a specific period of time or until further order.

Section 45 provides that non-molestation orders are available *ex parte* where the court considers that it is just and convenient to do so. In making an *ex parte* order, the court shall consider any significant harm that may result if the order is not granted immediately, whether the applicant is likely to be deterred from pursuing an application if an order is not granted immediately, and whether there is reason to believe that the respondent is aware of the proceedings but is deliberately evading service and prejudice will result from delay.

If an order is made *ex parte*, section 45(3) provides that a respondent must be given an opportunity to make representations relating to the order at a full hearing as soon as it is just and convenient. The Act also provides for the attachment of a power of arrest to one or more provisions of the order.

[19] *Id.*, at 26-27.

[20] *Family Law Act 1996* (U.K.), 1996, c. 27.

4. The *Protection from Harassment Act 1997*

The *Protection from Harassment Act 1997* received royal assent in the United Kingdom on March 21, 1997.[21] The Act addresses stalking conduct using both the civil and criminal justice system. It creates two separate criminal offences and a statutory tort.

(a) Offence 1 - high level criminal offence

The Act criminalizes the use of words or behaviour, on more than one occasion, which causes a person to fear that violence will be used against him or her where this is either intentional or occurs in circumstances where a reasonable person would have realized that this would be the effect. This offence carries a maximum prison sentence of five years and an unlimited fine. The Act provides a defence to those persons engaging in this conduct if it is done for the purpose of preventing or detecting crime, carried out under lawful authority or was reasonable in the particular circumstances.

(b) Offence 2 - low level criminal offence

The Act also criminalizes the use of words or behaviour, on more than one occasion, which causes a person to be harassed, alarmed, or distressed where this is either intentional or occurs in circumstances where a reasonable person would have realized that this would be the effect. This offence carries a maximum prison sentence of six months and/or a fine of £5000. The Act provides a defence to those persons engaging in this conduct if it is done for the purpose of preventing or detecting crime, carried out under lawful authority or was reasonable for the protection of himself, herself or another or for the protection of his, her or another's property.

(c) The statutory tort of harassment

The Act also creates a statutory tort of harassment in exactly the same terms as the low-level criminal offence. A person who is harassed may bring civil proceedings against the stalker and may be awarded damages for any anxiety caused by the harassment and any financial loss resulting from the harassment. A harassed person may also seek a civil injunction preventing the stalker from harassing the subject. Breach of such an order would be a criminal offence which would carry a maximum prison sentence of five years and an unlimited fine. The Act does not provide for any *ex parte* civil relief and requires a subject of stalking to utilize the costly, slow and complicated civil courts to obtain protective relief by way of an injunction.

[21] *Protection from Harassment Act 1997* (U.K.), 1997, c. 40.
The full text of the Act is available at: http://www.hmso.gov.uk/acts/acts1997/1997040.htm.

B. UNITED STATES OF AMERICA

1. Criminal Law

The most significant development in the United States has been the passage of legislation making stalking a criminal offence. The first state to respond to the concerns about stalking was California. The legislation was passed in 1990. It was prompted by five murders during the previous year where the victims had been followed, harassed or threatened.[22] Now, every state of the Union and the District of Columbia have an anti-stalking law.[23] There is, however, no consistency from one state to another and the degree of protection depends to some extent on the location of the victim.

Some of the inconsistency is indicated in the following passage from a recent analysis of the legislation.

> Some states require the existence of both a "credible threat" and the additional appearance that the stalker intends to and has the actual ability to carry out that threat. Other states specify a course of conduct in which the stalker "knowingly, purposefully, and repeatedly" engages in a series of actions directed toward a specific person, and which serve no legitimate purpose and "alarms, annoys, and causes a reasonable person to suffer fear and emotional distress."
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> For example, California criminalizes "repeated following or harassing that would cause, and actually does cause, a reasonable person to suffer substantial emotional distress." Illinois on the other hand, criminalizes activity involving "at least two separate occasions of following or placing under surveillance another person," and includes no requirement of fear on the victim's part whatsoever. Maryland criminalizes "the approach or pursuit of another," whereas Vermont's statute outlaws "following or lying in wait or harassing," and specifically includes acts which are "verbal, written, threats, vandalism, or unconsented to physical contact." Finally, Pennsylvania criminalizes "acts done without proper authority."
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> Because of this lack of uniformity in defining the crime, some behavior that would have properly been categorized as stalking in one state may have been deemed completely innocent in another. In many cases, this ambiguity actually allowed offenders to "slip through the cracks" of justice, by permitting the judicial system to vindicate only the rights of those stalking victims who fell prey to behavior criminalized in that particular state.[24]

This state legislation has been complemented by federal legislation. When Congress passed the *Violent Crime Control and Law Enforcement Act of 1994*,[25] Title IV of that legislation created Violence Against Women provisions.[26] These provisions make it a federal crime to cross a state line "with the intent to injure, harass or intimidate that person's spouse or intimate

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[22]M. Pilon, *"Anti-stalking" Laws: The United States and Canadian Experience* (Canada, Library of Parliament, Research Branch, Background Paper, 1993).

[23]K.L. Walsh, "Safe and Sound at Last? Federalized Anti-stalking Legislation in the United States and Canada" (1996), 14 Dickinson J. Int. Law 373 at 374.

[24]*Id.*, at 386.

[25]*Violent Crime Control and Law Enforcement Act of 1994*, Pub. L. No. 103-322, 1994 U.S.C.C.A.N. (108 Stat.) 1796.

[26]*Violent Crime Control and Law Enforcement Act of 1994*, Pub. L. No. 103-322, 1994 U.S.C.C.A.N. (108 Stat.) 1796 at 1902-55.

partner" or to cause a spouse or intimate partner to cross a state line by "force, coercion, duress or fraud" which then results in bodily injury to that person. The legislation also makes it a crime to cross a state line "intending to violate any portion of a protection order that involves credible threats of violence, repeated harassment or bodily injury."[27]

These American developments were clearly influential and instructive in the development of the Canadian criminal harassment legislation.

2. Civil Anti-stalking Legislation

A number of states, including California, Wyoming and Michigan have enacted civil laws to complement their criminal legislation designed to combat stalking. The Wyoming statute[28] provides that a person who is the victim of stalking as defined by criminal statute may maintain a civil action against an individual who engages in a course of conduct that is prohibited under criminal statute. She may seek damages incurred as a result of that conduct. She may also be awarded exemplary damages, reasonable attorney's fees and costs of the action. There is no requirement that the individual has been charged or convicted under criminal statute.

The California Civil Code[29] creates a tort of stalking using a definition virtually identical to the crime of stalking. A person who commits the tort is liable to the victim for general damages, special damages and punitive damages. The court may also grant equitable relief, including an injunction.

In Michigan, a victim of stalking may petition the court for a restraining order to prohibit stalking behaviours.[30] The order must be specific as to the particular activities to be restrained, but may include (though not limited to):

- following or appearing within the sight of the victim;
- approaching or confronting the victim in a public place or on private property;
- appearing at the victim's home, work, or school;
- entering onto or remaining on property owned, leased, or occupied by the victim;
- contacting the victim by telephone, mail or electronic mail; and
- placing an object on or delivering an object to property owned, leased or occupied by the victim.

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[27]See Walsh, *supra* n. 23.

[28]*Civil Liability for Stalking* 1993, s. 1-1-26. The full text of the section is available at http://www.nvc.org/hdir/stlkwy.htm.

[29]*California Civil Code*, s. 1708.7. The full text of the section is available at http://www.nvc.org/hdir/stlkca.htm.

[30]J.C. Wickens, "Michigan's New Anti-stalking Laws: Good Intentions Gone Awry" (1994), 1 Detroit Coll. L. Rev. 157 at 188-189.

Violation of a valid anti-stalking restraining order is punishable by immediate arrest and the criminal contempt powers of the court. If found guilty of criminal contempt, the stalker may be sentenced to up to 90 days in jail and/or fined up to $500.00. An individual who violates an anti-stalking order may also be prosecuted and convicted of aggravated stalking for the same violation.

A victim of stalking in Michigan may also sue the stalker for actual costs incurred as a result of stalking (for example, property damage, lost wages and medical/therapy costs), exemplary damages, court costs and reasonable attorney fees.[31] A lawsuit may be brought regardless of whether or not the stalker has been charged or convicted in a criminal case.

3. Tort Law

American tort law deals with stalking in much the same way as Canadian law. Existing heads of tortious liability have been applied in respect of pertinent conduct of the stalker to impose liability. There has not, however, been any development of a discrete tort of stalking. Consequently, assault, breach of privacy, nuisance and many other conventional torts have played a role in providing compensatory redress to subjects of stalking.

In one area, however, American law is better positioned to provide protection. American courts have developed the rule in *Wilkinson* v. *Downton* dealing with the intentional infliction of nervous shock beyond its conventional parameters. In Canada, the tort is restricted by the requirement that the plaintiff suffer nervous shock of a kind which produces physical manifestations and symptoms of a recognized psychiatric illness. Mere emotional distress is insufficient to ground a cause of action.

The American courts have dispensed with this requirement and have regarded "severe emotional distress" as sufficient in certain circumstances. Liability may be imposed where the defendant intentionally engages in some conduct towards the plaintiff (a) with the purpose of inflicting emotional distress or (b) where any reasonable person would know that such would result and his actions are of such a nature as to be considered outrageous and intolerable in that they offend against the generally accepted standards of decency and morality.[32] This principle would clearly cover a great deal of conduct associated with stalking.

American law has also developed a tort of privacy which in most states provides a protection similar to *The Privacy Act* of Manitoba.

4. Family Law (Civil Protection Orders)

[31] *Id.*, at 188-189.

[32] *Restatement (Second) of Torts*, §46 (1965).

In all states of the United States, civil protection orders are available in respect of domestic abuse. These are orders which are similar in form and process to those available under *The Family Maintenance Act* of Manitoba. We note that not all situations of stalking would come within these kinds of procedures but they may be applicable to some. The Law Reform Commission of Nova Scotia recently summarized the American position in their Report on domestic violence. They wrote:

> Most define "eligible" victims as "family and household members". Some include common law, dating or other intimate relationships. One state also protects high risk adults with disabilities. All codes permit the survivor to apply for the orders and in many states to apply on behalf of children. Most codes do not require that the person have vacated the home or have proceeded with a divorce but some do. Most codes prohibit abusive conduct which is domestic and violates criminal law. Some expressly state the nature of the behaviour and include a range of actions including, in some cases, emotional distress such as creating a disturbance at the petitioner's place of employment and other stalking behaviours. In two-thirds of states the application process is expedited with special forms and clerical assistance provided and in many cases they can be obtained *ex parte* and on the same day as the petition. Some codes provide for confidentiality of information or do not require information regarding the petitioner's name and address. Translation is also provided in some states. In some cases, there is a filing fee and in others there is no fee for this order. Most of the codes require that the pleadings, process and order be filed on the defendant and some codes also require that these be filed with the law enforcement office. Most orders prohibit the defendant from future acts of violence (49/51 States), grant exclusive possession of the home to the survivors (50/51 states) and award temporary custody to the non-abusive parent. In half of the states, orders may be made for attorney fees or costs. One code (Washington) also authorizes the court to order electronic monitoring of the defendant. The length or duration of the order varies from state to state running between one and three years and in most cases, the orders can be extended. These codes can be enforced through arrest in 19 states and in 23 states there can be a warrantless arrest if breach is suspected. Some codes require imprisonment for the breach while others require a violent act before there can be imprisonment. The sentences are usually for 6 months to one year with fines of approximately $1,000. The problem of double jeopardy is explicitly addressed by state codes since there is concern that if the defendant is found guilty under the code, he can be charged under another code for the same activity. Some of the main forms of relief provided in the state codes include the following:
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> - restraining order;
> - exclusive use of a residence or eviction of a perpetrator from the victim's house;
> - custody or visitation authorized;
> - payment of child or spousal support;
> - attorney fees or costs;
> - ophthalmology compensation; and
> - non-contact provision.[33]

C. AUSTRALIA

The New South Wales *Crimes Act*[34] criminalizes both "stalking" and "intimidation" with the intention of causing another person to fear personal injury and provides that the punishment

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[33]Law Reform Commission of Nova Scotia, *From Rhetoric to Reality: Ending Domestic Violence in Nova Scotia* (Report, 1995) 53-54.

[34]*Crimes Act 1900* (N.S.W.), s. 562.
The full text of the Act is available at http://www.austlii.edu.au/au/legis/nsw/consol_act/ca190082/.

for such acts is a term of imprisonment for up to 5 years, a fine or both. Intimidation is defined as conduct amounting to harassment or molestation, the making of repeated telephone calls or any conduct that causes a reasonable apprehension of injury, violence or damage to their property. The Act defines stalking as following a person or approaching a person's place of residence, business or work or any place that a person frequents for the purposes of any social or leisure activity. According to the Act, causing a person to fear personal injury includes causing the person to fear personal injury to another person with whom he or she has a domestic relationship. The Act specifically states that a person intends to cause fear of personal injury if he or she knows that the conduct is likely to cause fear in the other person. The prosecution in Australia is not required to prove that the person alleged to have been stalked or intimidated actually feared personal injury; it is enough that the stalker knew his actions would likely result in such fear.

D. NEW ZEALAND

The New Zealand *Domestic Violence Act*[35] provides increased protection for subjects of domestic violence by recognizing that apparently trivial acts may form part of a pattern that constitutes violence and allowing those in a domestic relationship with the abuser to apply for civil protection orders. Section 3 defines domestic violence as physical, sexual or psychological abuse (which includes intimidation, harassment and threats of abuse). Section 4 defines a domestic relationship broadly, including family members, persons who ordinarily share a household and persons with a close personal relationship. A subject of domestic violence may seek a protection order prohibiting the respondent from contacting or communicating with her. The order may contain provisions preventing the respondent from following or watching the subject and may require the respondent to surrender all firearms. These orders are available *ex parte* in circumstances where delay would risk the subject's safety or cause the subject undue hardship.

On August 20, 1996 the New Zealand Minister of Justice, Hon D.A.M. Graham, introduced the *Harassment and Criminal Associations Bill*.[36] The Bill is made up of a package of measures which targets both stalking and gang-related activities.

Parts I to IV of the Bill provide greater protection for subjects of on-going and persistent harassment. The Bill creates an offence punishable by imprisonment for a maximum of two years for harassing another person so that person fears for his or her safety or the safety of a member of his or her family. It allows civil restraining orders to be obtained in order to stop persistent harassment. Breach of the civil order will be an offence punishable by six months imprisonment or, where the offender has two previous convictions for breach within a three year period, a maximum of two years imprisonment. Police are empowered to approach a suspected

[35]*Domestic Violence Act*, 1995, No. 86 (N.Z.).

[36]The full text of the Bill is available at http://www.executive.govt.nz/93-96/minister/graham/dgn2008.htm.

harasser and require his name and address. It is an offence, which can result in arrest without warrant, to refuse.

CHAPTER 5

THE NEED FOR REFORM

Stalking is a serious problem in Manitoba, especially for women. As discussed in Chapter 1, stalkers can have a devastating effect on the lives of those who are stalked, subjecting them to harassment and fear in their homes, at work and in public places for months or even years. Those who are stalked often feel that they have lost control of their lives and in many cases are helpless to do anything to remedy the situation. The law has clearly recognized the interests infringed by stalking conduct. But, other than in criminal law, there has been no direct discrete legal reform to deal with the general problem. The dominant characteristic of the legal response to stalking is that the protection is uneven, uncertain and unpredictable. The result is that far too often subjects of stalking are still left unprotected and uncompensated.

We identify the inadequacies of the existing law by returning to the four classes of remedies needed to protect the range of interests invaded by stalking that we discussed in Chapter 1: punitive, protective, preventive and compensatory.

Punishment is usually achieved through the criminal law, which falls within the exclusive jurisdiction of the federal Parliament. The most notable development has been the creation of the offence of criminal harassment. Although periodic fine-tuning of the legislation and of prosecutorial policy is expected, the criminal law may now provide a sufficient response to stalking.

The primary vehicle for compensatory remedies is tort law and we have noted how individual torts that protect one or other of the subject's interests may be utilized to impose liability in respect of some aspect of the stalker's conduct. Tort law has not developed a discrete and independent head of tortious liability dealing with stalking as a unique phenomenon. While the remedies available in tort law are generous, there are other disadvantages. Tort litigation is slow, unpredictable, complex and expensive -- a daunting combination for many subjects of stalking. It may be noted, however, that tort law, when successfully applied against stalkers, may have some significant punitive effect: persons who are found liable for torts related to stalking cannot rely on liability insurance to pay the judgment and must pay it from their own resources.

The criminal injuries compensation system offers compensation on a no-fault basis; however it does not extend to the victims of criminal harassment.

As previously discussed, a wide range of protective orders is currently available to subjects of stalking. These include peace bonds, orders on judicial interim release, probation orders, non-molestation orders under *The Family Maintenance Act* and prohibitory injunctions. Again, however, the protection is uneven and incomplete. Some of the protective orders, such as injunctions, involve the more complex procedures of the Court of Queen's Bench. Some are

available only if the parties have lived together. Although policies now in place in respect of drivers' licensing and the land transfer system do have some protective effect, in general the law does not provide a mechanism for securing broad and effective protective orders on the basis of stalking as an independent form of conduct.

The law is least effective in the realm of preventive remedies. In extreme cases, involuntary admission to a psychiatric facility for mental health care is possible, but there has been no significant progress towards legally recommended or ordered therapy or counselling. There is certainly room for the development of more proactive approaches to resolving basic causal factors producing the stalking behaviour.

We are persuaded that the law can deliver a better response to the serious problem of stalking. What is needed to combat stalking is a simple, quick and inexpensive means of obtaining protective legal remedies. These remedies should include no-contact orders, restraining orders and orders that remove firearms from the possession of the alleged stalker. These orders should be available without notice to the alleged stalker because the foremost concern ought to be the availability of immediate protection for persons being stalked. Moreover, a hearing where the alleged stalker will not be present encourages subjects of stalking to seek protection and denies stalkers another opportunity to confront and intimidate the persons they stalk.

Experts agree that perhaps the most effective means of preventing stalking is early intervention. If the courts are properly engaged in a stalking situation before it escalates into violence, many of the tragedies resulting from stalking can be avoided. Once a person feels fear as a result of the alleged stalker's harassing conduct, she ought to be able to seek protection from the court. A subject of stalking should be able, in appropriate circumstances, to obtain orders immediately, putting an alleged stalker on notice that his conduct is unwelcome, that it is causing the subject to feel fear and that there is a court order requiring him to cease the offensive activity. Many individuals accused of engaging in stalking conduct will likely stop their questionable activities at this early stage. Such a process will not only halt many instances of stalking, but will also serve to identify those stalkers who are most dangerous. Early on in the course of conduct, such a process would recognize those persons who will continue to harass in violation of a court order to cease such conduct and despite being made aware that their behaviour is unwelcome. Once these individuals are identified, subjects could obtain from the court the further relief needed. Other orders which ought to be available to prevent stalking include provisions requiring the stalker to receive counselling at his own expense and provisions requiring the stalker to relinquish to the court personal property used in furtherance of stalking the subject.

It should be open to the court to find the stalker in contempt of court for violating its express order to cease the stalking behaviour. On a conviction for contempt, the court should be able to fine a stalker or sentence him to a period of incarceration.

The law should clarify the right of the person being stalked to compensation. There should be a relatively quick method for obtaining an order requiring the stalker to pay compensation for monetary losses suffered as a result of stalking. Recoverable losses should include loss of income, costs of counselling, moving and accommodation expenses, costs of security measures and legal expenses. There should also be a means by which a subject can sue a stalker for all losses resulting from their conduct. General damages, aggravated damages and punitive damages ought to be recoverable in this manner. Finally, there should be a means by which a person injured as a result of stalking can receive some compensation through the no-fault criminal injuries compensation system.

Consultations by the Commission revealed that many persons being stalked are not interested in punishing their stalker. Some are concerned that punishment will further anger the stalker, making matters worse, while others receive financial support from their stalker and therefore do not want him incarcerated. Most simply desire that the stalking come to an end. The Commission has concluded that the best way to achieve this objective is through a provincial statute under which subjects of stalking can obtain civil orders designed to protect them, prevent further incidents of stalking and compensate them for their losses. A significant advantage of such a provincial statute is that civil orders are easier to obtain than a criminal conviction because of the reduced standard of proof and relatively simple procedures. In many criminal harassment cases, the subject and the stalker are the only witnesses to the events. In such cases, securing a criminal conviction is difficult, especially because the conduct associated with stalking -- the act of following someone, calling them, or sending them gifts -- is often indistinguishable from perfectly legal conduct. With the availability of civil remedies, a subject will be able to secure protection in many situations where the evidence would not be sufficient to meet the criminal burden of proof.

Another important advantage of a provincial anti-stalking scheme is flexibility. Stalking encompasses a large number of activities carried out by persons who range from complete strangers to co-workers to spouses. Because there are so many different varieties of stalking situations, effective anti-stalking legislation must allow for a process and remedies which can be tailored to address individual situations, something the criminal law is not designed to do.

Finally, the creation of a provincial scheme would empower the subject of stalking by providing a means of actively asserting her rights and "fighting back", rather than having to rely on the police and the Crown for protection. The creation of a civil remedy would prompt more people to report incidents of stalking and to use the justice system in a proactive manner.

We have prepared draft legislation, *The Stalking Protection, Prevention and Compensation and Consequential Amendments Act*, which we recommend for enactment[1]. The draft Act provides for swift and simple protective measures, compensation for stalking and orders aimed at preventing the continuation of the conduct. The draft legislation is set out in Appendix A of this Report and is discussed in greater detail in the following Chapters.

[1]The Act is based on Saskatchewan's *The Victims of Domestic Violence Act*, S.S. 1994, c. V-6.02.

RECOMMENDATION

Legislation such as The Stalking Protection, Prevention and Compensation and Consequential Amendments Act, set out in Appendix A of this Report, should be enacted to provide Manitobans with simple, effective and flexible protection from and compensation for stalking.

CHAPTER 6

THE ACT: STALKING DEFINED

A. INTRODUCTION

In this and subsequent chapters, we will explore in detail the remedies we are proposing for persons who are being stalked. These remedies are embodied in draft legislation entitled *The Stalking Protection, Prevention and Compensation and Consequential Amendments Act*, which is contained in Appendix A of this Report. The Act contains comprehensive remedies aimed at protecting individuals who are being stalked, preventing the continuation of that unacceptable behaviour and providing for compensation. A full discussion of these remedies appears along with the relevant portions of the draft Act.

In this Chapter, we consider the definition of stalking. The following Chapters will in turn deal with protection orders, prevention orders, compensation and various other matters under the proposed Act.

B. STALKING AND CRIMINAL HARASSMENT

The definition of stalking is obviously crucial to the success of our proposed scheme. The Commission sought a definition of stalking sufficiently wide to draw within it the full range of unacceptable conduct without impinging on legitimate activity. This is difficult when the character of the conduct depends on the surrounding circumstances. Care was taken to ensure that the definition conveys the notion that stalking is not a single incident, but a course of conduct. One can be the subject of stalking even when no identifiable instance of stalking is taking place at a given moment. Subjects of stalking live in constant fear due to the ongoing behaviour of their stalker. Even when the stalker is not actively following or trying to communicate with the subject, she still lives in fear and therefore is still being stalked.

As noted earlier, the behaviour commonly known as stalking has been criminalized by section 264 of the *Criminal Code* as criminal harassment. We have decided that, for the purposes of our proposed civil remedies, the definition of stalking should follow the definition of criminal harassment as much as possible. By using essentially the same definition as the *Criminal Code*, the proposed Act adopts a meaning for stalking which has been tested in the courts and has the benefit of judicial interpretation. This also allows the jurisprudence which develops in one area of the law to be applied to the other. Moreover, the similarity in the definitions ensures that those who are convicted of criminal harassment would also be liable for

the tort of stalking and subject to the orders under the Act. This reduces the risk of inconsistent verdicts between civil and criminal cases which would send mixed messages to the public.

The definition of stalking in the proposed Act establishes the element of reasonable fear as the dividing line between lawful conduct which is merely annoying and harassing conduct which can be the subject of legal remedies. No one should have to endure a course of behaviour which causes a person reasonably to fear for her safety or the safety of someone known to her. Such behaviour clearly interferes with legitimate protected interests and is outside the bounds of acceptable conduct.

> **Meaning of stalking**
> **2(1)** Stalking occurs where a person, without lawful authority and knowing that another person is harassed or recklessly as to whether the other person is harassed, engages in conduct on more than one occasion that causes that other person reasonably, in all the circumstances, to fear for their safety or the safety of anyone known to them.

C. ELEMENTS OF STALKING

The definition of stalking can be divided into seven separate elements all of which must be proven in order to obtain relief under the Act.

1. "Without lawful authority"

As noted earlier, we are concerned that legitimate activities should not fall afoul of our proposed legislation. For example, police officers may follow suspected criminals or watch their residences; in doing so, they may even cause those persons or their families reasonably to feel fear. However, so long as the police are acting within the scope of their authority, they ought not to be considered to be stalking. Accordingly, we have specified that a person is stalking only if his actions are "without lawful authority".

We recognize that there may be other circumstances in which one person may legitimately follow, watch or attempt to communicate repeatedly with others. For example, reporters or private investigators might do so in the course of their work. Although the exception for persons acting with lawful authority would likely not apply to such cases, it must be remembered that such conduct is caught by our proposed Act only if it causes fear. Accordingly, no problem should arise for persons carrying on such activities in a responsible manner.

2. "Another person is harassed"

Usually, it is a particular individual who is stalked by another individual. Clearly, this is the focus of the proposed Act. However, by using the word "person" in the Act, the Commission recognizes that it is possible for a corporation (which is regarded by the law as a "person") either to stalk an individual or be the subject of stalking. One can imagine a situation where an individual stalks a corporation by waiting outside its head office, following its officers and threatening its employees. For example, in *R.* v. *Karalapillai*,[1] an accused was charged with criminal harassment for making telephone calls to an institution combatting racism. On each occasion, the accused made various threats to the employees at the institution, made very racist remarks about the Holocaust and, in some instances, threatened to kill the employees if his demands for money were not met. In such cases, even if no individual is stalked (suppose that no one is subjected to more than one incident), the cumulative behaviour of the stalker can amount to a stalking of a corporation. Because the law distinguishes between "individuals" (human beings) and the broader "persons" (which includes entities having a legal existence such as corporations) we have used the term "person", rather than "individual" to describe those covered by the Act.

As in the *Criminal Code*, our proposed Act does not define the word "harass". Cases which have considered the term in the context of criminal harassment have resorted to the ordinary or dictionary definition of the word. The word "harass" has been held to mean "'engaging in a course of vexatious comment or conduct that is known or ought reasonably to be known to be unwelcome.'"[2] It includes troubling someone by frequent attacks, and subjecting them to constant molesting or persecution.[3] In another context, courts have defined "harassment" as meaning to "vex, trouble or annoy, continually or chronically . . . ."[4] The criminal cases have also concluded that "harassment" requires conduct which occurs on more than one occasion because the word "harass" imports a sense of ongoing or repeated conduct.[5] A single act, even if it puts another in fear for her safety, does not constitute harassment.[6]

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[1]*R.*. v. *Karalapillai*, [1995] O.J. No. 2105 (Prov. Div.).

[2]*R.* v. *Geller*, [1994] O.J. No. 2961 at para. 11 (Prov. Div.).

[3]*R.* v. *Johnston*, [1995] O.J. No. 3118 at para. 28 (Prov. Div.) .

[4]*R.* v. *Ens*, [1980] 1 W.W.R. 639 at 644 (Sask. Dist. Ct.). This was a case dealing with the meaning of the word "harassment" in the Saskatchewan *Collection Agents Act*, 1968. This same dictionary definition was applied to "harassment" under the *Canadian Human Rights Act* in *Hum* v. *R.C.M.P.* (1987), 8 C.H.R.R. D/3748 at D/3760 (Can. Human Rights Trib.). A substantially similar definition was also applied to "harassment" under the *Ontario Human Rights Code* in *Re Toronto Hydro Electric System and C.U.P.E., Local 1* (1988), 2 L.A.C. (4th) 169 at 194 (grievance).

[5]*R.* v. *Johnston*, *supra* n. 3, at para. 28; *R.* v. *Geller*, *supra* n. 2, at para. 12.

[6]*R.* v. *Johnston*, *supra* n. 3, at para. 29. However, in *R.* v. *Riossi*, [1997] O.J. No. 105 (Gen. Div.), the Court held that one single incident of a threatening conduct could amount to criminal harassment. This approach was not followed in *R.* v. *Rawlings* (1997), 33 W.C.B. (2d) 275 (Ont. Prov. Div.), where the Court concluded that the word "harass" in itself conveyed a meaning of repetitive behaviour or conduct.

3. "Knowing that another person is harassed or recklessly as to whether the other person is harassed"

In order to determine whether a respondent has stalked the subject, the court will have to determine what was in the mind of the stalker while he was engaging in the conduct under consideration. In criminal law, the mental element of an offence is called the *mens rea* and there can be different standards of this element. For example, there could be a requirement that the alleged stalker desires or intends that the subject be harassed and feel fear. This is usually expressed in legislation with words such as "intentionally" and "wilfully". In our view, this would set too high a standard and would not cover many instances of stalking (such as the stalker who believes that he loves the subject and only wishes to win her heart through a relentless campaign). Instead, it should suffice that the respondent knows that the subject is being harassed as a result of his behaviour, even if this result is not his intention. This is expressed through the concept of "knowing that another person is harassed".

The Act also uses the lower mental standard of "recklessly". In criminal law, the word "recklessly" means that the accused is a conscious risk-taker who knows that there is a danger that the conduct will bring about the prohibited result but nevertheless persists despite the risk.[7] The cases considering criminal harassment have concluded that "recklessly", in the context of stalking behaviour, means the stalker knows that his attentions are unwanted but continues in his conduct.[8] Therefore, in order to come within the definition of stalking, a respondent need not desire that the subject is harassed so long as he knows that is the result or that such a result is possible.

It is important to note that the words "knowing" and "recklessly" in the proposed Act refer to the harassment of the subject and not to the fear for her safety. It is not necessary that the respondent knows or is reckless as to the fact that his conduct is causing the subject to fear for her safety or the safety of another; it is enough that the respondent knows that his conduct is harassing the subject or is reckless as to that fact.[9]

4. "On more than one occasion"

The phrase "on more than one occasion" does not appear in the definition of criminal harassment but, as mentioned previously, the courts have held that the word "harass" itself requires conduct that is repeated or ongoing. We have included this phrase for clarity and to assist those who are seeking the Act's protection or who are administering it to understand the Act's requirements.

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[7] *Sansregret* v. *The Queen* (1985), 18 C.C.C. (3d) 223 at 233 (S.C.C.).

[8] *R.* v. *Hau*, [1996] B.C.J. No. 1047 at para. 53 (S.C.).

[9] *R.* v. *Stanfield,* [1995] O.J. No. 1510 (Gen. Div.).

5. "That causes that other person reasonably, in all the circumstances, to fear"

This requirement is identical to the one found in the definition of criminal harassment. This element of the definition separates conduct which is merely annoying from that which is unlawful. The crucial element which gives rise to civil liability is fear.

There is both a subjective and objective element to the requirement of fear and both must be satisfied in order for stalking to occur. In order to meet the subjective requirement, the person must actually feel fear. For the objective requirement, the subject's fear must be "reasonable in all the circumstances". This allows the court to consider an alleged stalker's actions in their full context and would permit the examination of any prior relationship with the subject of the stalking, any imbalance of power in that relationship and any other factors which might explain why the subject is fearful for her safety. According to *R.* v. *MacIntyre*,[10] in the context of criminal harassment, the phrase mandates that the totality of the conduct and relationship between the accused and the complainant must be considered.

We recognize that certain persons may not be able to satisfy the subjective requirement that they actually feel fear. This may be the case for some mentally disabled persons or young children: they may feel no fear in a particular situation even though most people would. This was in fact the case in *R.* v. *Johnston*,[11] where the accused approached a 14 year-old girl with whom he was not acquainted, asked if she had financial problems and asked for her telephone number. The Court found that the actions of the accused would cause reasonable concern for any parent, and that the police were reasonably concerned about the behaviour, but went on to conclude that it was only the fear of the girl herself that was relevant under the *Criminal Code*. Since the two communications did not appear to cause the girl to fear for her safety, no criminal harassment had taken place.

In our view, the remedies in our proposed Act should be available where a young person or a person lacking mental competence does not feel fear if a reasonable person would feel fear in those circumstances (of course, a guardian or other such person would have to act on their behalf to obtain the remedies). For these reasons, we have included a provision which deems that such persons have the necessary state of mind.

> **Deemed fear**
> **2(3)** Where, but for mental incompetence or minority, a person would reasonably, in all the circumstances, fear for their safety or the safety of anyone known to them due to conduct described in subsection (1), the person shall be conclusively deemed to have such fear for the purposes of subsection (1).

[10] *R.* v. *MacIntyre*, [1996] N.S.J. No. 537 (S.C.).

[11] *R.* v. *Johnston*, *supra* n. 3.

In order to determine whether a subject's fear is reasonable in all the circumstances, it may be necessary for the court to consider stalking conduct which took place before the coming into force of the Act. According to *R.* v. *Hau*,[12] in criminal harassment cases, evidence of prior contact between the accused and the complainant is relevant to whether her fear is reasonable and whether the accused was reckless in his harassment. Therefore, while such conduct cannot form the substance of a charge, it is admissible in a prosecution for conduct that occurred after criminal harassment became a crime. The Commission is of the view that this will also be the case with the proposed Act, so that evidence of stalking which occurred before the Act comes into force will be admissible in a hearing based on conduct which occurred after the Act comes into effect.

6. "Fear for their safety"

There clearly is no requirement that a subject be injured physically or mentally in order for stalking to take place so long as the subject fears for her safety or the safety of someone known to her. Many cases have interpreted the word "safety" in the context of criminal harassment. The courts have held that the word "safety" means more than freedom from physical harm and includes freedom from the fear of mental, emotional or psychological trauma.[13]

7. "Or the safety of anyone known to them"

A stalker may target a subject's family or friends as a means of harassing the subject. For example, a stalker may repeatedly follow and threaten an ex-wife's new partner or her child. Our proposed Act recognizes this by defining stalking to include situations where the subject fears for the safety of "anyone known to them".

D. EXAMPLES OF STALKING

The *Criminal Code* set out four types of conduct which are stated to constitute criminal harassment:

> 264 (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;

[12] *R.* v. *Hau*, *supra* n. 8.

[13] In *R.* v. *Gowing*, [1994] O.J. No. 2743 (Gen. Div.), the Court held that it was the intention of Parliament that a victim's fear for her safety include psychological and emotional security for the purposes of s. 264(1) of *Criminal Code*. See also *R.* v. *Theysen*, [1996] A.J. No. 788 at para. 37 (Prov. Ct.); *R.* v. *Hau*, *supra* n. 8.

(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.

A conviction can be obtained under section 264(1) of the Code only if the accused has engaged in one of the listed forms of conduct. In other words, the *Criminal Code* does not outlaw every sort of conduct which one might imagine as constituting stalking. It outlaws only those forms of stalking listed in subsection 264(2).

Our proposed Act takes a somewhat broader approach.[14]

Examples of stalking
2(2) The conduct mentioned in subsection (1) includes

(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.

While subsection 264(2)(a) to (d) of the *Criminal Code* and subsection 2(2)(a) to (d) of the proposed Act contain identical lists of stalking behaviour, the list in the *Criminal Code* is exhaustive, while the list in our proposed Act is not. While stalking, as we propose to define it, includes all instances of criminal harassment, it is wider in scope and may include harassing conduct not listed in subsection 2(2). For example, suppose an ex-husband named Peter learns that his former wife, Nancy, is spending time with a man named Joe. Now suppose Peter threatens Joe on two separate occasions, each time saying something to the effect that Joe will end up dead unless he stays away from Nancy. Nancy is afraid for Joe's safety but Joe himself is not. In this case, there is no criminal harassment vis-a-vis Joe because he does not fear for his safety. Nancy cannot claim she is being criminally harassed because the threatening conduct is not directed at a member of her family (which is required by subsection 264(2)(d) of the *Criminal Code*) and the conduct arguably does not fall within the scope of subsection 264(2)(a) to (c). However, because the examples in the proposed Act are a non-exhaustive list of stalking behaviour, Nancy may be considered a subject and would be entitled to the Act's remedies; she clearly falls within the scope of section 2(1) of the Act in that she feels fear for the safety of someone known to her.

[14]This is the only significant way in which we have diverged from the *Criminal Code*'s definition of criminal harassment.

CHAPTER 7

THE ACT: PROTECTION ORDERS

In most cases, the needs of subjects of stalking are best met by a remedy which can be obtained quickly, easily and inexpensively, and which is aimed at ending the stalking behaviour. The protection order is designed to be that remedy.

A. REQUIREMENTS TO OBTAIN AN ORDER

Protection orders are designed to provide a person being stalked with immediate protection. Since a stalker's motivation is the obsessive exercise of abusive power and control, effective protection of the subject and resolution of the problem require the severance of any ongoing contact with the stalker. Protection orders are therefore available from a designated justice of the peace without notice to the alleged stalker, upon proof of three criteria.

> **Protection order without notice**
> **3(1)** A protection order shall be granted without notice by a designated justice of the peace where he or she determines, on a balance of probabilities, that
>
> (a) the subject is being stalked by the respondent;
>
> (b) due to the stalking, the subject reasonably, in all the circumstances, fears at the time of the application for his or her safety or the safety of anyone known to the subject; and
>
> (c) the subject has an honest belief that the respondent will continue to stalk him or her.

The three requirements for obtaining a protection order are not particularly onerous or difficult for the applicant to demonstrate. Each is discussed in turn.

1. "The subject is being stalked by the respondent"

In order to obtain a protection order, the subject will have to demonstrate to a justice, on the balance of probabilities, that she is in fact being stalked by the respondent. This means she

will have to meet all of the elements of stalking outlined in Chapter 6. Because stalking is an ongoing course of conduct, that is, a series of incidents, the subject will not have to demonstrate that a specific incident of stalking is occurring at the time of the application. For example, she will not have to show that she was followed to the courthouse or that the respondent is outside her house while she is making the application by telephone. Past incidents of stalking will satisfy the requirement of section 3(1)(a) so long as they can be seen as part of a continuing pattern.

2. "Fears at the time of the application"

The subject will also have to demonstrate on the balance of probabilities that, due to the stalking, she reasonably, in all the circumstances, fears, at the time of the application, for her safety or the safety of anyone known to her. This immediate fear is the justification for granting the order without notice to the respondent. If, due to the respondent's conduct, the applicant reasonably feels fear, the situation is urgent and the subject ought to be entitled to protective relief immediately.

Where an application is made on behalf of a person who is very young or mentally incompetent, section 2(3) of the Act will conclusively deem such persons to feel fear if, but for their minority or mental incompetence, they would reasonably, in all the circumstances, fear for their safety or the safety of anyone known to them.

3. "The subject has an honest belief that the respondent will continue to stalk him or her"

Finally, the subject must demonstrate on the balance of probabilities that she honestly believes the stalking will continue in the future.[1] Again, where an application is made on behalf of a person who is very young or mentally incompetent, the Act deems such persons to have an honest belief that the stalking will continue if, but for their minority or mental incompetence, they would have that belief.

> **Deemed belief**
> **3(2)** Where, but for mental incompetence or minority, a person would reasonably, in all the circumstances, have an honest belief that the respondent will continue to stalk him or her, the person shall be conclusively deemed to have such an honest belief for the purposes of subsection (1).

B. REMEDIES

[1]If there is reason to believe that the stalking has ended, a protection order should not be granted. However, it is difficult to imagine many cases in which stalking behaviour in the recent past does not justify an honest belief that the stalking will continue (perhaps the stalker has been permanently incapacitated in an accident).

Because protection orders are meant to provide immediate relief and are available without notice to the alleged stalker, the relief which is available is limited to provisions aimed at stopping the threat to the subject's safety.

> **Types of provisions**
> **3(4)** A protection order may contain any or all of the following provisions, subject to such terms and conditions as the designated justice of the peace considers appropriate:
>
> (a) a provision prohibiting the respondent from stalking the subject;

This is a blanket provision designed to prohibit all future incidents of stalking of the subject by the respondent. Since many stalkers are both determined and clever, this provision will prevent a stalker from complying with an order by simply changing the method of stalking. If, for example, a stalker repeatedly followed the subject and an order was made preventing the respondent from coming within 100 metres of the subject, he could then start phoning or mailing the subject without breaching the order. If, however, the initial order contained a provision prohibiting the respondent from stalking the subject, the telephone calls would be a violation of the order and the respondent would be subject to the remedies discussed in Chapter 10. Due to the definition of stalking, this provision would also prohibit the respondent from engaging in stalking conduct directed at someone else if the intent was to harass the subject and it in fact caused the subject reasonable fear for that person's safety.

> (b) a provision prohibiting the respondent from communicating with or contacting the subject or any other specified person or both;

This provision prohibits the respondent from communicating with the respondent in any way, whether by telephone, mail, note, sign, fax, computer or in person. It also prohibits communication with any other specified person, which is defined in the Act as follows:

> **"specified person"** means a person who is identified by name or by membership in an identified class;

This allows the court to prevent the respondent from communicating with the subject's co-workers, classmates, relatives and the like without having to identify each person by name.

> (c) a provision prohibiting the respondent from attending at or near or entering any specified place that is attended regularly by the subject or any other specified person or both, including the residence, property, business, school or place of employment of the subject or any other specified person or both;

Again the section applies to the subject or any specified person. The inclusion of the phrase "at or near" prevents a respondent from complying with an order by waiting for the subject just outside of her place of business or across the street from her house.

(d) a provision directing the respondent to relinquish to a peace officer until further order any weapon, ammunition and explosive substance in the control, ownership or possession of the respondent, together with any firearms acquisition certificate, registration certificate in respect of a restricted weapon, or permit to carry or transport a restricted weapon that has been issued to the respondent;

Seized weapons
3(5) Where the designated justice of the peace makes an order under clause (4)(d) to seize personal property, the property shall be dealt with as prescribed by regulation.

The designated justice of the peace is given the power to order the removal of weapons from the possession of the alleged stalker in order to lessen the danger posed by him. In the case of firearms, any firearms acquisition certificate or permit respecting restricted weapons must also be given up.

(e) any other provision that the designated justice of the peace considers necessary to provide for the immediate protection of the subject.

This provision recognizes that stalking can take many forms. It is designed to ensure flexibility and to allow the designated justice of the peace to tailor individual remedies to address the subject's need for immediate protection. One example of the kind of order that might be granted under this section is one preventing the respondent from enlisting the help of another person to harass the subject.

C. PROCEDURE

1. Application to a Designated Justice of the Peace

As we have noted above, protection orders will be available from designated justices of the peace.[2] We have chosen justices of the peace to be the first point of contact for applicants, rather than judges of the Court of Queen's Bench, for two reasons. First, the process will be more accessible if justices of the peace are used, as there are a significant number of such officers located throughout the Province, while there are fewer judges of the Court of Queen's Bench, in fewer locations. Second, the greater informality of appearing before a justice of the peace means the process is more conducive to providing assistance to subjects of stalking. The use of justices of the peace will also tend to make the entire process quicker and less expensive. For the most part, appearances before the Court of Queen's Bench require formal documents and the presence of counsel.

[2]Section 43 of *The Provincial Court Act*, C.C.S.M., c. C275, grants justices of the peace jurisdiction to hear, try and determine cases under any Act of the Legislature which provides that a justice of the peace may hear, try and determine matters that arise under that Act.

While it is important that protection orders be available quickly, easily and inexpensively, it is also essential that the process operate fairly to both applicant and respondent. Accordingly, the proposed Act calls for all protection orders granted by a designated justice of the peace to be reviewed promptly by a judge of the Court of Queen's Bench. This review is discussed later in this Chapter.

The Chief Judge will designate as many justices of the peace as he or she thinks appropriate to have the authority to make protection orders. In doing so, she will no doubt consider the need for an adequate number of justices to be available throughout the Province as well as the need for those justices to have appropriate training respecting the problem of stalking and the intended operation of the proposed Act.

> "**protection order**" means an order made under section 3;
>
> "**designated justice of the peace**" means a justice of the peace who has been designated under section 15;
>
> **Designation of JP**
> **15** The Chief Judge of the Provincial Court of Manitoba may designate a justice of the peace to hear and determine an application for a protection order under this Act.

A subject may appear in person before a designated justice of the peace to apply for a protection order. The application may also be made on behalf of a subject by a peace officer or by a lawyer; those applications may be made in person or by telecommunication. For all of the methods of application, the evidence presented to the designated justice of the peace must be sworn or affirmed.

> **Evidence under oath**
> **3(3)** Every witness in an application for a protection order must give evidence under oath or affirmation.
>
> **Who may apply**
> **4(1)** An application for a protection order may be made by a subject or, with the subject's consent, by a lawyer or peace officer.
>
> **How to apply**
> **4(2)** An application for a protection order may be made

(a) in person by a subject;

(b) by telecommunication or in person by a lawyer or peace officer acting on behalf of a subject.

Where a subject applies for a protection order before a designated justice of the peace in person,[3] she may bring along witnesses and any evidence to assist in her application. The justice will then listen to the evidence of the subject and any witnesses. The evidence will be given under oath or affirmation. The justice will take detailed notes of the evidence for the file. He or she will then decide whether to grant the order, deny the order or adjourn the matter in order for the subject to obtain additional evidence. If an order is granted, the justice must also determine the terms of the order.

The process envisioned by the Commission is simple and a subject should not require any assistance. If, however, a subject prefers not to appear in person or is unable to do so because she lives in a remote location or is afraid to leave her residence, an application may be made on the subject's behalf. Because the subject's representative must possess a sworn statement by the subject (and by any witnesses), the Commission is of the view that only peace officers and lawyers should be able to act on behalf of applicants.

In order to accommodate emergencies and to recognize that not every location can have a designated justice of the peace, lawyers and peace officers should be able to apply by way of telecommunication and to transmit all supporting sworn evidence in that way.

"telecommunication" includes communication by telephone, fax or electronic mail.

The Commission anticipates that there will be at least one designated justice of the peace on call at all times to receive applications for protection orders by telecommunication which, in most cases, means by telephone. An application by telecommunication can be made by a subject at any time of the day or night, but must be done with the assistance of a lawyer or peace officer. To allow individuals to call a designated justice of the peace and obtain an order over the telephone directly would open the process to abuse. The justice would have no way of knowing if the person was who they claimed to be and could not properly obtain sworn evidence. Requiring a subject to enlist the assistance of a lawyer or peace officer when making an application by telephone ensures that the subject gives sworn evidence and discourages prank or frivolous applications. This requirement should not inhibit the application process since almost everyone in the Province can get access to a peace officer without great difficulty. Applications cannot be made by a peace officer or lawyer without the consent of the subject.

Before an application is made by telecommunication, the subject must make a sworn written statement outlining the facts upon which the application is based. The lawyer or peace

[3]We anticipate that there will be at least one designated justice of the peace available for each judicial district during normal working hours for applications made in person. Extended hours might be considered in larger centres.

officer then makes the application to a justice. Whether the application is granted or not, the lawyer or peace officer must immediately transmit the sworn statement to the designated justice of the peace. In most cases, the statement will be sent by fax; it might however be mailed electronically or sent by conventional mail. If the justice is satisfied that the subject is being stalked, reasonably fears for her safety or the safety of someone known to her and honestly believes the stalking will continue, the justice must grant a protection order immediately. The justice must not wait for the original sworn statement from the subject to arrive.

> **Subject's statement**
> **4(3)** Where an application is not made in person by a subject, the lawyer or peace officer acting on behalf of the subject
>
> (a) must possess at the time of the application a written document sworn or affirmed by the subject and by any witness that states the facts upon which the application is based; and
>
> (b) must immediately transmit that document in the prescribed manner to the designated justice of the peace.
>
> **Order need not wait**
> **4(4)** In an application by telecommunication, a designated justice of the peace shall decide whether to make a protection order based on the information provided by the lawyer or peace officer, without waiting for reception of the document described in subsection (3).

We anticipate that the protection order form will contain four parts.[4] The first is the original copy of the order, to be completed by the justice of the peace. The second is a copy of the order to be served on the respondent. The third is a copy to be provided to the subject. The fourth is a copy to be used by the peace officer for proof of service after Part 2 of the order has been served on the respondent. Where a protection order is granted in person, Part 1 of the order is placed on the file, Parts 2 and 4 are given to a peace officer for personal service on the respondent and Part 3 is given to the subject.

Where a protection order is granted on an application by telecommunication with the assistance of a peace officer, the justice of the peace completes Part 1 of the order and directs the peace officer to complete Parts 2, 3 and 4 of his or her copy of the form with the same information and provisions that are contained in the justice's copy, noting on it the name of the issuing justice and the time it was issued. These parts of the order are deemed to be of the same force and effect as Part 1 of the order for the purpose of enforcement. The justice then instructs the peace officer to serve Part 2 of the order on the respondent as soon as possible and provide the subject with Part 3 of the order.

[4]This procedure is based on *The Victims of Domestic Violence Regulations*, Sask. Reg. c. V-6.02, Reg. 1.

Where a protection order is granted on an application by telecommunication with the assistance of a lawyer, the justice of the peace completes all four parts of the order and arranges for service of Parts 2 and 3 on the subject and the respondent.

The respondent is not bound by the order until he has notice of its provisions.

> **Enforcement of order**
> **4(5)** Where a designated justice of the peace makes a protection order based on an application by telecommunication, the designated justice of the peace shall immediately communicate its provisions to a peace officer so that a written order in the prescribed manner shall be produced for the purposes of enforcement.
>
> **Same effect**
> **4(6)** A protection order based on an application by telecommunication has the same effect as a protection order based on an application made in person.
>
> **Notice of order**
> **5(1)** A respondent is not bound by any provision in a protection order until he or she has notice of that provision.
>
> **Service**
> **5(2)** Service of a protection order on a respondent is to be made in the form and manner prescribed in the regulations.

2. Review by Court of Queen's Bench

Immediately upon granting a protection order, the justice must forward the order and all supporting documentation, including his or her notes, to the Court of Queen's Bench at the nearest judicial centre. Where the order was granted by telecommunication, the justice must wait for the sworn statement by the subject before forwarding the file to the court.[5]

Within three days after receiving the order and supporting documentation (or as soon as possible afterwards), a judge of the Court of Queen's Bench must review the order in chambers (that is, in his or her office). No witnesses are to be present and no new material may be filed.

[5]There is nothing in the Act which prescribes the consequences for not transmitting the sworn statement to the justice of the peace. The Commission was of the view that any consequence which jeopardized the safety of the subject (such as revoking the order) ought not to be considered. If lawyers fail to transmit the document, the Commission believes that this is a matter more appropriately dealt with by way of professional discipline.

The purpose of the review is to determine whether there was sufficient evidence before the designated justice of the peace to support the granting of the protection order. If the judge is so satisfied, he or she will confirm the protection order and it then becomes an order of the Court of Queen's Bench. Notice of the confirmation is to be served by the court on the respondent and the subject.

> **Notice of confirmation**
> **7(2)** The court shall cause notice of confirmation. . . of a protection order under section 6 to be given to the subject and respondent in the form and manner prescribed in the regulations.

If, however, upon reviewing the file, the judge is not satisfied that there was sufficient evidence before the justice to support the granting of the order, the judge must direct a rehearing of the matter. The ordering of a rehearing does not affect the protection order; the order remains in effect until the hearing.

If the judge orders a rehearing, notice is given to the respondent and the subject. A date for the rehearing is set as soon as is possible. The subject may attend the rehearing but is not required to do so. The subject may be represented by an agent or may act on her own behalf. If a properly served respondent does not attend, the order may be varied or confirmed in his absence. The rehearing is not considered to be an appeal of the decision of the justice of the peace; rather, it is a new hearing at which the judge must decide whether a protection order should be granted based on the facts available at the time of the rehearing.

The rehearing judge must have regard to all the evidence which was before the justice of the peace, along with any new evidence the respondent or the subject would like the court to consider. This evidence may be in the form of sworn testimony or documentary evidence. Both parties will be able to call witnesses and conduct examinations and cross-examinations of those witnesses. Where one or both of the parties are not represented, the judge will normally assist in obtaining the evidence from witnesses.

However, it is important to note that there is a presumption that the protection order granted by the justice of the peace is valid. Therefore, the burden of proof at the rehearing rests with the respondent who must demonstrate, on the balance of probabilities, why the order should not be confirmed.

At the conclusion of the rehearing, the judge has three options. He or she may confirm the protection order; it then becomes an order of the Court of Queen's Bench. The judge may terminate the order. Finally, the judge may vary the order in accordance with any of the provisions available under section 3 of the Act. In other words, the judge can make any order that the justice of the peace could have made at the time of the original application. If a subject wishes to obtain the additional remedies available under section 10 at the rehearing (these are referred to as the prevention remedies and are discussed in the next Chapter), she must make a concurrent application for a prevention order under that section to be heard at the same time as

the rehearing. Such an application is only available on notice to the respondent in accordance with the *Queen's Bench Rules*. Given the nature of these additional remedies, it is appropriate that they be available only with notice to the respondent. It is up to the parties and the rehearing judge to decide whether to hear the application for a prevention order at the same time as the rehearing or to deal with the prevention order application at a later date.

"court" means the Court of Queen's Bench;

Documentation to Queen's Bench
6(1) A designated justice of the peace who makes a protection order shall forward in the prescribed manner a copy of the order and all supporting documentation, including his or her notes, to the court at its nearest judicial centre, immediately upon making the protection order or, where the order is based on an application by telecommunication, immediately upon receipt of the document described in subsection 4(3).

Review of order by court
6(2) Within three working days of receipt of the protection order and all supporting documentation by the court or, if a judge is not available within that period, as soon as one can be made available, a judge shall

(a) review the order in his or her chambers; and

(b) confirm the order where the judge is satisfied that there was evidence before the designated justice of the peace to support the granting of the order.

Rehearing
6(3) Where, on reviewing the protection order, the judge is not satisfied that there was evidence before the designated justice of the peace to support the granting of the order, the judge shall direct a rehearing of the matter.

Procedure for rehearing
6(4) Where a judge directs that a matter be reheard, the local registrar shall set a rehearing date as soon as possible before the court and shall give notice of the rehearing, in the form and manner prescribed in the regulations, to the respondent and the subject.

Attendance of subject
6(5) A subject is entitled, but not required, to attend a rehearing and may fully participate in the rehearing personally or by an agent.

Protection order is not stayed
6(6) Notwithstanding any other provision in this Act, a protection order continues in effect and is not stayed by a direction for a rehearing under this section.

Nature of rehearing
6(7) Subject to subsection (8), a court which holds a rehearing shall deal with the matter as on an original hearing before a designated justice of the peace and may confirm, terminate or vary the protection order in accordance with any provision available under section 3.

Evidence
6(8) The evidence that was before the designated justice of the peace shall be considered as evidence at the rehearing.

Onus on respondent
6(9) At a rehearing, the onus is on the respondent to demonstrate, on a balance of probabilities, why the order should not be confirmed.

Absent respondent
6(10) Where the respondent fails to attend the rehearing, the protection order may be confirmed or varied in the respondent's absence.

3. Variation Orders

Notice of the decision of the rehearing judge is to be served by the Court of Queen's Bench on the subject and respondent As mentioned previously, a protection order which is confirmed or varied by the rehearing judge becomes an order of the Queen's Bench. This is also true of a protection order that is confirmed by a judge in chambers who has reviewed the file of the justice of the peace under section 6(2)(b) of the Act. A protection order remains in effect until varied or revoked by a subsequent order of the court. This is because a provision that the order will expire after a period of time unless renewed by the person being stalked would place the onus on the wrong person and would not be in the interests of persons who are being stalked. An aggrieved respondent can, at any time after the order is adopted by the Court of Queen's Bench, bring an application to have the order revoked.

The Commission recognizes that many applications for protection orders will be done with haste and without the assistance of a lawyer. It is therefore important that a subject be able to come back to the court if her original application does not provide her with all the protection she requires. A subject may need modifications to existing provisions of an order and may also wish to obtain relief which was not available from the justice of the peace without having to reinitiate proceedings from the beginning.[6] Because the *Queen's Bench Rules* only allow for variation or amendments of Queen's Bench orders in exceptional circumstances,[7] we have

[6]The Commission hopes that the same judge who confirmed or varied the initial protection order will hear variation applications.

[7]*Queen's Bench Rules*, Rule 59.06(1)(a) allows for amendments of orders in cases where there has been "an error arising from an accidental slip or omission". Rule 59.06(1)(b) allows amendments for "any particular on which the court did not adjudicate". Rule 59.06(2)(a) allows a variation of an order where there has been a fraud or where facts arise or are discovered after the order was made. Rule 59.06(2)(d) allows a variation when the relief sought is different than that originally awarded. While these Rules may be broad enough to encompass many situations where variation is sought, we believe that, for the sake of clarity and certainty, it would be helpful to place the power to seek variation by way of application in the Act.

included specific provisions allowing for variation applications at any time with notice to the other party. A variation application under section 8(1) can include the following:

- a request for prevention orders available under section 10 of the Act;
- a request to change, add or delete a provision already contained in the order;
- a request to extend or decrease the period of time for which any provision of the order is to remain in force;
- a request to terminate any provision of the order; or
- a request to revoke the entire order.

Effect of confirmation
7(1) For all purposes, including appeal or variation, a protection order that is confirmed or varied by a judge under section 6 is deemed to be an order of the court.

Notice of confirmation
7(2) The court shall cause notice of confirmation, termination or variation of a protection order under section 6 to be given to the subject and respondent in the form and manner prescribed in the regulations.

Subsequent variation
8(1) After a protection order has been confirmed or varied under section 6, the court, on application by the subject or respondent named in that order, may from time to time

(a) order any provision available under section 10;

(b) change, add or delete provisions contained in the order;

(c) extend or decrease the period for which any provision is to remain in force;

(d) terminate any provision in the order; or

(e) revoke the order.

Finally, any provision in a protection order is subject to and is varied by any subsequent order made under any other statute of the Province of Manitoba or any federal Act. This section is meant to address the possibility of protection orders granted under the Act conflicting with subsequent family law orders. This may occur, for example, where the stalker and the subject have children together and custody and access are in question. In such a case, the later orders take precedence over orders granted under the Act.

Priority of other subsequent orders
8(2) Any provision in a protection order is subject to and is varied by any subsequent order made under any other Act or any Act of the Parliament of Canada.

CHAPTER 8

THE ACT: PREVENTION ORDERS

A. INTRODUCTION

The Commission expects that the protection order will be the most commonly used remedy under the proposed *Stalking Protection, Prevention and Compensation Act*. Such orders respond to the need for immediate protection of persons being stalked. However, the Commission also recognizes that there may be cases where subjects of stalking do not feel imminent danger. As well, some persons being stalked may desire more extensive remedies than those available by way of protection order. The prevention order is designed to meet these needs.

Applications for prevention orders are to be made in accordance with the *Queen's Bench Rules*. The applicant or, more commonly, her lawyer must arrange for service of the application on the respondent. The hearing itself may be conducted in any manner the court sees fit. Witnesses may be called or the evidence may be presented by way of affidavit. As with other civil remedies, the subject need only demonstrate, on the balance of probabilities, that stalking has occurred.[1]

B. REMEDIES

1. Protection Order Remedies by Way of a Prevention Order

The relief available under a prevention order includes all the relief available by way of protection order plus several additional remedies designed to prevent further stalking and to compensate the subject.

Unlike an application for a protection order, in order to obtain a prevention order, the subject need not show that she feels fear at the time of the application or that she has an honest belief that the stalking will continue. However, in practice it is unlikely a court will make any prevention orders which duplicate those available by way of protection order, clauses (a) to (d), unless the subject can prove that there is a likelihood that the stalking will continue.

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[1]The burden of proof for both protection orders and prevention orders is on a balance of probabilities (rather than the criminal standard of beyond a reasonable doubt). It will be recalled that this standard of proof was expressly stated in section 3(1) in regard to protection orders. Although we realize that this is the standard of proof which would apply even if it were not specified (since it is a civil, not criminal, proceeding), we thought it useful to specify the standard since it will generally be applied by justices of the peace who are not lawyers. Since prevention orders will be obtained from judges, we did not think it necessary to restate the civil burden of proof.

"prevention order" means an order made under section 10;

Prevention order
10(1) Where, on application, the court determines that stalking has occurred by the respondent, or on variation of a protection order under section 8, the court may make a prevention order containing any or all of the following provisions, subject to such terms and conditions as the court considers appropriate:

(a) a provision prohibiting the respondent from stalking the subject;

(b) a provision prohibiting the respondent from communicating with or contacting the subject or any other specified person or both;

(c) a provision prohibiting the respondent from attending at or near or entering any specified place that is attended regularly by the subject or any other specified person or both, including the residence, property, business, school or place of employment of the subject or any other specified person or both;

(d) a provision directing the respondent to relinquish to a peace officer until further order of the court any weapon, ammunition and explosive substance in the control, ownership or possession of the respondent, together with any firearms acquisition certificate, registration certificate in respect of a restricted weapon, or permit to carry or transport a restricted weapon that has been issued to the respondent;

As noted, clauses (a) through (d) are identical to the remedies available in protection orders. The balance of the remedies are only available by way of prevention order.

2. Specific Damages

A subject may seek compensation for specific damages caused by stalking. General damages for pain and suffering cannot be granted in a prevention order but can be recovered in an action for the statutory tort of stalking (this is discussed in the next Chapter). The amount of damages must be established by the subject and can include any income lost as a result of the stalking, the cost of obtaining counselling and the cost of changing residences or adding security.

(e) a provision requiring the respondent to pay compensation to the subject for any monetary losses suffered by the subject as a result of the stalking, including loss of income, out-of-pocket losses for injuries sustained, cost of counselling or therapy, moving and accommodation expenses, cost of any security measure that is reasonably necessary for protection,

legal expenses and cost of any application under this Act;

3. Property Remedies

Since many subjects are stalked by persons with whom they have had a personal or intimate involvement, the stalker may be in possession of personal property belonging to the subject. The stalker may use the fact that he possesses these items to stalk the subject further. For example, he may call the subject and arrange for meetings with her under the guise of returning the items. The stalker may also threaten to destroy the items unless the subject agrees to meet with him. Some stalkers also use items belonging to the subject, such as keys, identification documents, address books or diaries, to assist them in their stalking activity. In order to prevent this type of harassment, the Act permits a court to order the respondent not to damage, convert, or otherwise deal with the subject's property or to deliver up the property to the subject.

(f) a provision prohibiting the respondent from taking, converting, damaging or otherwise dealing with any property in which the subject may have an interest;

(g) a provision ordering the respondent to deliver up possession to the subject of any personal property in which the subject may have an interest;

Sometimes the property in question is owned by both the subject and the stalker (generally where the parties lived together at one time). Although the court should be able to require the stalker to turn over such jointly owned property, it is not our intention that such an order affect the ownership of that property. That should properly be the subject of other proceedings. This remedy aims only at returning the property to the subject (co-owned with the stalker or not) which has or could be used as a means to harass the subject further.

Effect on property interests
11 A prevention order does not in any manner affect the title to or an ownership interest in any real or personal property jointly held by the parties or solely held by one of the parties.

4. Orders to Obtain Counselling

The Commission recognizes that the behaviour of some stalkers results from serious psychological conditions and that, in those cases, they could benefit from treatment and counselling. In certain cases, the stalker's emotional illness is such that even the threat of legal sanction will not be sufficient to deter the stalker and only therapy will bring the conduct to an end.[2] Since stalkers rarely seek help themselves, [3] the proposed Act provides courts with the discretion to order the stalker to obtain counselling at the stalker's own expense, where appropriate.

> (h) a provision ordering the respondent to obtain counselling or therapy at the respondent's expense or otherwise;

5. Orders to Secure Compliance

Since the focus of the Act is protection and prevention, all options should be open to the court in its efforts to ensure compliance with its orders. Therefore, the court may require the respondent to post a bond to secure compliance with the terms of the prevention order. It may also require the respondent to report to the court or a person designated by the court to monitor the respondent's compliance with the order.

> (i) a provision requiring the respondent to post any bond that the court considers appropriate for securing the respondent's compliance with the terms of the order;
>
> (j) a provision requiring the respondent to report as specified to the court or an officer thereof or any other person designated by the court for the purpose of monitoring any provision of a prevention order;

6. Seizure of Items Used to Assist in Stalking

Many stalkers use a variety of aids in the course of their stalking. For example, a stalker may employ binoculars, telescopes, listening devices, video cameras and other equipment in his pursuit of the subject. Accordingly, the court is empowered to order the temporary seizure of such items in order to protect the subject and to encourage compliance by the respondent with other provisions in the order. Where the court finds that a stalker has used an automobile to

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[2]The literature on stalking treatment concludes that most stalkers are more likely to respond to treatment if it is combined with stiff penalties for their anti-social conduct. See N. Diacovo, "California's Anti-stalking Statute: Deterrent or False Sense of Security?" (1995), 24 Southwestern U. L. Rev. 389 at 394-96.

[3]K.G. McAnaney, L.A. Curliss and C.E. Abeyta-Price, "From Imprudence to Crime: Anti-Stalking Laws" (1993), 68 Notre Dame L. Rev. 819 at 835.

watch or follow the respondent, the court may order the car temporarily seized and may suspend the respondent's driver's licence.

> (k) a provision seizing until further order of the court any personal property of the respondent used in furtherance of stalking the subject;
>
> (l) notwithstanding any Act of the Legislature, a provision cancelling or suspending until further order of the court any licence issued to the respondent under *The Highway Traffic Act*, where the respondent drives a motor vehicle in furtherance of stalking the subject;

7. Other Orders

The prevention order provides for a wide variety of remedies to prevent stalking and protect the subject. However, particular situations may require that additional remedies be fashioned in order to provide the subject with the needed relief. The court should be able to tailor relief to the individual needs of the parties. One example of the kind of order which might be granted under this section is one preventing the respondent from enlisting the help of another person to harass the subject.

> (m) any other provision that the court considers appropriate.

C. VARIATION ORDERS

In contrast to applications for protection orders, prevention orders for the most part will be made with the assistance of counsel and the hearings will be conducted with notice to the respondent so there will be adequate time for the applicant to properly prepare. Therefore, in the interest of finality, the Commission believes that the ordinary *Queen's Bench Rules* should apply to variations of prevention orders.[4] An applicant who seeks additional orders and who is not permitted to seek a variation under the *Queen's Bench Rules* will have to bring a fresh application. A respondent who wishes to contest a prevention order and who cannot seek a variation under the *Queen's Bench Rules* will still be able to appeal the decision of the judge to the Manitoba Court of Appeal. Appeals of protection orders and prevention orders are discussed in Chapter 10.

CHAPTER 9

[4]*Queen's Bench Rules*, Rule 59.06(1)(a) allows for amendments of orders in cases where there has been "an error arising from an accidental slip or omission". Rule 59.06(1)(b) allows amendments for "any particular on which the court did not adjudicate". Rule 59.06(2)(a) allows a variation of an order where there has been a fraud or where facts arise or are discovered after the order was made. Rule 59.06(2)(d) allows a variation when the relief sought is different than that originally awarded.

THE ACT: COMPENSATION

A. THE TORT OF STALKING

The main purpose of our proposed legislation is to allow for quick action to protect the subject from stalking and to provide innovative remedies to prevent continuation of the conduct. However, there is also a place for more traditional legal remedies. The subject should be able to sue the stalker as she could for any other legal wrong. As we noted earlier in this Report, this is difficult because the law does not recognize stalking as a tort in and of itself. In our view, it should. Accordingly, our proposed Act makes stalking a tort, thus permitting the subject to recover all the relief available in civil actions including injunctions and damage awards. This is the only method by which a subject can receive complete compensation for all forms of damages which may result from stalking, including loss of future income and compensation for pain and suffering.[5] A plaintiff may also obtain aggravated or punitive damages in a tort action. The proposed Act creates a tort using the definition of stalking found in section 2 of the Act.

> **Liability of stalker**
> **16(1)** A person who stalks another person commits a tort against that person.

Some torts, such as negligence, require the plaintiff to suffer injury in order to sue successfully. Other torts however, such as assault and battery, allow plaintiffs to obtain legal redress even when they have suffered no injury; for these torts, any offensive contact or even mere emotional disturbance is a sufficient basis for an action. The reason for this distinction is that these torts are designed to protect individual rights to live free from fear and unwanted physical interference. They permit legal redress in the absence of physical injury in order to punish those who engage in such behaviour, to minimize attempts at retaliation and to prevent escalation to violent behaviour that does cause physical injury. These same policy objectives apply to the tort of stalking and the Act therefore provides that the tort of stalking is actionable without proof of damage.

> **Action without proof of damage**
> **16(2)** An action may be brought under subsection (1) without proof of damage.

B. CRIMINAL INJURIES COMPENSATION

As we noted in Chapter 2, *The Criminal Injuries Compensation Act*[6] provides no relief for the victims of stalkers unless bodily injury is suffered as a result of a listed crime, such as

[5] As noted in Chapter 8, specific damages can be obtained as part of a prevention order.

[6] *The Criminal Injuries Compensation Act*, C.C.S.M. c. C305.

assault, aggravated assault or sexual assault. The victim of the offence of criminal harassment has no direct claim because that crime is not listed in the Act. We are of the view that *The Criminal Injuries Compensation Act* should be amended to provide compensation to the victims of criminal harassment. If this were the case, a subject of stalking would be entitled, on a no-fault basis, to compensation for some of her losses arising from the stalking. Coverage under the Act would provide a quick, efficient and inexpensive way for a subject to obtain financial relief.

Consequential amendment, C.C.S.M. c. C305
20(1) ***The Criminal Injuries Compensation Act*** *is amended by this section.*

20(2) *Schedule 1 is amended by adding the following in sequential order under the columns entitled Section of Criminal Code and Description of Offence, respectively:*

264	criminal harassment

CHAPTER 10

THE ACT: ADDITIONAL PROVISIONS

In this Chapter, we consider a number of additional provisions which are dealt with in our proposed *Stalking Protection, Prevention and Compensation Act*.

A. CONFIDENTIALITY OF THE SUBJECT

The experience of engaging the legal system in order to find relief from stalking should not exacerbate the stress and fear already felt by the subject and certainly should not place her in greater risk of harm. Consideration should be given to protecting the subject's identity.

Normally, court proceedings are open to the public. The court may exclude the public where there is a possibility of serious harm or injustice to a person. In such a case, disclosure of what transpires in the closed hearing is not a contempt of the court unless to do so is expressly prohibited by the court.[1] The Commission is of the view that stronger protection is warranted for the privacy of subjects of stalking.

Under the proposed Act, the subject's address is to be kept confidential when she makes any application for orders. The subject may also request that the court make an order prohibiting the publication of any information likely to identify any party or witness to proceedings under the Act. The Court may grant such an order where it believes that publication of identifying information would have an adverse effect on, or cause hardship to, the subject or would otherwise not be in her best interests.

> **Confidentiality**
> **12(1)** The registrar of the court and a designated justice of the peace shall keep a subject's address confidential.
>
> **Prohibition of identifying information**
> **12(2)** On the request of the subject, the court may make an order prohibiting any person from publishing or broadcasting in a media report the name of any person who is a party or witness in proceedings relating to a protection order or a prevention order or any information likely to identify any such person if the court believes that such publication or broadcasting would have an adverse effect on or cause hardship to the subject or would otherwise not be in the best interests of the subject.

[1] *The Court of Queen's Bench Act*, C.C.S.M. c. C280, s. 76.

B. IDENTIFICATION OF THE STALKER

The Commission is mindful of the fact that in some circumstances the subject will not know the name of the stalker. She may be able to describe a person who is following her, but be unable to ascertain who he is or where he lives. In such a case, the subject will be able to seek the assistance of the police in identifying the respondent so that she can obtain an order under the Act.

> **Identification assistance**
> **17** Where a peace officer believes on reasonable grounds that a person is being stalked and can identify the person who is suspected of stalking, the peace officer may, upon the request of the person being stalked, disclose the suspected person's name to the person being stalked for the purpose of facilitating access to a remedy under this Act.

C. THE RIGHTS OF THE RESPONDENT

While the primary objective of the proposed Act is protection for persons who are being stalked, it is also respectful of the rights of person who are alleged to be stalking. Because protection orders are available without notice, it is possible that false allegations may be made and that an order may be granted against a respondent who has not in fact engaged in stalking. A respondent who has been served with a groundless protection order must nonetheless comply with the order; he must wait until the matter is reviewed by a judge of the Court of Queen's Bench before he can make application to have the order revoked. However, since the review will take place within a very short period of time and compliance only involves not contacting or following the subject or, in some cases the surrender of firearms, the Commission believes that adherence to the order is not an onerous burden. If the protection order is confirmed by the judge reviewing the file, the respondent may immediately make an application to have the order revoked. If the reviewing judge orders a rehearing, the respondent may appear at the rehearing to request that the order be revoked. In either situation, the Commission believes that a respondent served with a protection order will have an opportunity to challenge its validity within one or two weeks of receiving the order, at the most, and, in many instances, within days.

The Commission does recognize that the reputation of an innocent respondent may be damaged if it becomes known that he is subject to a protection order. To permit the publication of a protection order before the respondent has had a reasonable opportunity to challenge it would be unjust. Therefore, the Act provides for an automatic publication ban on any information that might identify any party to the proceedings. The ban is in effect until the respondent has had a reasonable opportunity to challenge the validity of the protection order. The publication ban is lifted in the following three situations:

1) The protection order has been confirmed by a judge of the Court of Queen's Bench in chambers after reviewing the order of the justice. Thirty days have passed from the

time the respondent received notice of the confirmation and, in that time, no application to vary or revoke the order has been made by the respondent.[2] In this case, the respondent has been given a reasonable opportunity to challenge the order and has not done so. Therefore it can be assumed that he accepts the order and does not wish to challenge it; the publication ban is accordingly lifted at the end of the 30 day period.

2) The protection order has been confirmed by a judge of the Court of Queen's Bench in chambers after reviewing the order of the justice. Within 30 days after the confirmation, the respondent has brought an application to vary or revoke the order. The ban will end once there has been a determination of that application since, at the hearing of the respondent's application, he will have had an opportunity to challenge the order's validity.

3) The protection order has not been confirmed by the reviewing judge. A rehearing has been ordered. The publication ban ends once the court has heard the matter and made a determination since, at the rehearing, the respondent will have been given an opportunity to challenge the validity of the order.

Any person who violates the publication ban is subject to strict penalties which are provided for in the Act.[3]

> **Ban on identifying information**
> **9(1)** No person shall publish or broadcast in a media report the name of any person who is a party or witness in proceedings relating to a protection order or any information likely to identify any such person, until the later of:
>
> (a) thirty days after service upon the respondent of the protection order confirmed under subsection 6(2) by a judge in chambers;
>
> (b) the hearing and determination by the court of any rehearing under section 6; or

[2]It is essential that the person effecting service on the respondent be obliged to file an affidavit of service with the court immediately, in order to ensure that the media can determine the point at which they will no longer be in breach of the publication ban.

[3]The publication ban is modelled after the law which prevents the disclosure of any information likely to identify any person involved in child protection or adoption proceedings, *The Child and Family Services Act,* C.C.S.M. c. C80, s. 75(2):

> **Reporting not to identify persons involved**
> **75(2)** No press, radio or television report of a proceeding under Parts III and V shall disclose the name of any person involved in the proceedings as a party or a witness or disclose any information likely to identify any such person.

The penalties in the proposed Act are identical to the ones found in *The Child and Family Services Act,* C.C.S.M. c. C80, ss.75(3) and (4).

(c) the hearing and determination by the court of any application brought under section 8 by a respondent within thirty days after a protection order is confirmed under subsection 6(2) by a judge in chambers.

Offence and penalty
9(2) Every person who contravenes subsection (1) is guilty of an offence punishable on summary conviction and is liable, if an individual, to a fine of $5,000 or imprisonment for 2 years or both and, if a corporation, to a fine of $50,000.

Offence by corporate officers
9(3) Where a corporation is guilty of an offence under this section, any officer, director or agent of the corporation who directed, authorized, participated in, or acquiesced in, the commission of the offence, is party to and is also guilty of the offence and is liable to the penalties set out in subsection (2).

D. CUSTODY AND ACCESS ORDERS

In many stalking situations, the subject and the stalker have lived together as spouses or as common law partners. If they have had children together, custody and access orders may be in effect between the stalker and the subject. Such orders may not be compatible with no-contact or restraining orders granted under the proposed Act.

In order to ensure that there is no conflict between orders granted under the Act and family court orders, the Act requires all applicants for protection or prevention orders to disclose to the designated justice of the peace or the court the details of any custody or access order which governs both the subject and the respondent. Where such an order exists, the justice or judge granting an order under the Act may make an order specifying the logistics of any access granted, so as to ensure the protection of the subject. For example, suppose the respondent has, by order of the Court of Queen's Bench, access on weekends to a child in the custody of the subject. The justice of the peace or judge granting an order under the Act for no-contact and non-communication with the subject may require the respondent and the subject to make arrangements for picking up and dropping off the child through a third party. The judge or justice might also order that the child be picked up from a location other than the subject's residence. In short, the court may provide the subject with protection in a manner which does not conflict with existing family court orders. However, the Act does not permit the court to make new custody or access orders or to modify the substance of existing ones; such variations would continue to be available in the usual way.

Existing order of custody or access
13(1) In an application for a protection order or a prevention order, the subject must disclose to the designated justice of the peace or the court, as the case may be, the details of any order of custody or access to which both the subject and respondent are parties.

Logistics of access
13(2) Where both the subject and respondent are parties to an existing order relating to custody and access under an Act of the Legislature or under the *Divorce Act*, the designated justice of the peace or the court, as the case may be, may make an order specifying the logistics of any access granted to one party to a child in the custody of the other party to ensure that the protection of the subject is not compromised by the exercise of such access.

E. NON-COMPLIANCE WITH COURT ORDERS

Unfortunately, there will always be some respondents who choose to ignore a protection or prevention order which has been obtained against them. For these orders to be effective, respondents must understand that serious consequences exist for non-compliance.

However, it must also be understood that our proposed Act is not a penal statute. Its purpose is to provide protection, prevention and compensation for the subjects of stalking, not to punish the stalker. Punishment is the role of the criminal law, which is within the exclusive jurisdiction of the federal government.

Nonetheless, the fact that our proposed statute does not set out any penalties does not mean that non-compliance with a protection order or a prevention order is without consequences. The law provides that, where a statute is silent as to the consequences of non-compliance with court orders made pursuant to the Act, three remedies automatically apply: civil contempt of court, criminal contempt of court and section 127(1) of the *Criminal Code*. We discuss each of these three below.

1. Civil Contempt

A subject may utilize the civil contempt powers of the Court of Queen's Bench to address breaches of orders granted under the Act.[4] The primary objective of contempt proceedings in a civil matter is to enforce performance of a court order, which is consistent with our proposed Act's focus on protection and prevention, rather than punishment.

Where a person against whom a protection order or prevention order has been made breaches the order, the subject may apply to the court for a finding of civil contempt. In order to obtain the finding, the subject would have to prove beyond a reasonable doubt[5] the following:

1) that a clear and unambiguous term of an order was in effect;
2) that the defendant had proper notice of the order;

[4]This can be done by way of motion pursuant to *Queen's Bench Rules*, R. 60.05 and 60.10.

[5]The standard of proof is beyond a reasonable doubt because a finding that civil contempt has been committed can result in imprisonment. See *Sunnyside Shopping Plaza Ltd.* v. *Sunnyside Transmission Ltd.* (1981), 46 N.S.R. (2d) 156 (S.C.).

3) that the defendant breached the terms of the order; and
4) that the defendant did the violating act intentionally.[6]

It is not necessary for the defendant to have intended to disobey an order of the court or intended to interfere with the administration of justice. The defendant is of course allowed to present witnesses on his behalf by oral evidence.

Since compliance is the end to be obtained, in most cases a fine is the appropriate remedy. However, where disobedience of an order of the court has been wilful and flagrant, incarceration is not an unusual remedy. Where a finding of contempt is made, the judge may also order that the respondent pay costs to the subject and may make additional orders to ensure compliance with the Act.

2. Criminal Contempt

Conduct which would amount to a civil contempt may also be the basis of a criminal contempt where the wrong is deliberately repeated in an attempt to defy the court's authority openly or where some other element of public defiance is introduced.[7] In such a case, the conduct tends to depreciate the authority of the court and the administration of justice and therefore criminal contempt proceedings are appropriate. Flagrant public breaches of orders under our proposed Act might well attract this remedy.

[6] *In re Bramblevale Ltd.*, [1970] Ch. 128 (C.A.); *Re Sheppard* (1976), 67 D.L.R. (3d) 592 (Ont. C.A.), aff'g (1975), 62 D.L.R. (3d) 35 (Ont. H.C.).

[7] *Regina (City)* v. *Cunningham*, [1994] 7 W.W.R. 457 at 462 (Sask. Q.B.); *Everywoman's Health Centre Society (1988)* v. *Bridges* (1990), 54 B.C.L.R. (2d) 273 at 293 (C.A.). Section 9 of the *Criminal Code* provides that a court, judge, justice, or provincial court judge continues to have the authority to impose punishment for contempt of court. This preserves the inherent jurisdiction of the Court of Queen's Bench to protect its processes through either summary proceedings or trial by direct indictment. The Provincial Courts have no jurisdiction to hear contempt proceedings for failure to obey the orders of the Court of Queen's Bench: see *R.* v. *Vermette*, [1987] 1 S.C.R. 577.

The following elements are needed to prove a criminal contempt:

> To establish criminal contempt the Crown must prove that the accused defied or disobeyed a court order in a public way (the actus reus), with intent, knowledge or recklessness as to the fact that the public disobedience will tend to depreciate the authority of the court (the mens rea). The Crown must prove these elements beyond a reasonable doubt . . . [T]he necessary mens rea may be inferred from the circumstances. An open and public defiance of a court order will tend to depreciate the authority of the court. Therefore when it is clear the accused must have known his or her act of defiance will be public, it may be inferred that he or she was at least reckless as to whether the authority of the court would be brought into contempt.[8]

The most accepted procedure for dealing with criminal contempt is by summary proceedings. Proceedings may be commenced by the Attorney General, any party to the proceedings (including the subject) or any interested party (such as a witness).[9] Proceedings may be brought by petition, application or motion made to the Court of Queen's Bench. There is no prescribed procedure for summary contempt proceedings, which adds to the flexibility of the scheme. A person alleged to be in criminal contempt is entitled to all the safeguards of natural justice but is not entitled to trial by jury.[10] A conviction requires that the offence be proven beyond a reasonable doubt.

3. Section 127(1) of the *Criminal Code*

In addition to being an act of contempt, disobeying an order of a court (where, as in the case of our proposed Act, no punishment is provided) is also an indictable offence under section 127 of the *Criminal Code*, with a maximum sentence of two years in jail:

> DISOBEYING ORDER OF COURT / Attorney General of Canada may act.
>
> 127(1) Every one who, without lawful excuse, disobeys a lawful order made by a court of justice or by a person or body of persons authorized by any Act to make or give the order, other than an order for the payment of money, is, unless a punishment or other mode of proceeding is expressly provided by law, guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.

The section applies to breaches of civil orders[11] and its operation is not precluded by the availability of civil contempt proceedings.[12] The operation of this section of the *Criminal Code*

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[8] *U.N.A.* v. *Alberta (Attorney General)*, [1992] 3 W.W.R. 481 at 493-494 (S.C.C.).

[9] *R.* v. *Bannerman* (1979), 17 B.C.L.R. 238 (S.C.).

[10] *R.* v. *Froese* (1980), 23 B.C.L.R. 181 (C.A.).

[11] *R.* v. *Clement*, [1981] 2 S.C.R. 468.

[12] In *R.* v. *Clement*, *id.*, the Supreme Court of Canada held that the power of the Queen's Bench to find a person in contempt, both by statute and by the common law, does not amount to "a punishment or other mode of proceeding . . . expressly provided for by law", because there is no provision for an express penalty.

will allow the police to arrest a stalker who is not acting in accordance with a court order made under the proposed Act.

F. APPEALS

Either the respondent or the subject may appeal a protection order or a prevention order granted by a judge of the Court of Queen's Bench, but only with leave from the Court of Appeal. Such an appeal can be on questions of law only.[13]

> **Appeal**
> **14** With leave of a judge of the Court of Appeal, an appeal from a protection order or prevention order may be made to the Court of Appeal on a question of law.

Like appeals in other civil actions, both questions of fact and questions of law may be the subject of an appeal in an action founded on the statutory tort of stalking.

G. RIGHTS NOT DIMINISHED

The rights of action and remedies made available under the proposed Act are in addition to any rights and remedies available to the subject, whether by statute or under the common law.

> **Other rights not diminished**
> **18(1)** Subject to subsection (2), any right of action or remedy under this Act is in addition to and does not diminish any other right of action or remedy available otherwise than under this Act.

Of course, where a subject has received damages in a proceeding under the Act, any court determining an issue arising out of the same stalking conduct in another proceeding must consider those damages already awarded.

[13] The identical limitation on appeals is found in Saskatchewan's *The Victims of Domestic Violence Act*, S.S. 1994, c. V-6.02, s. 12.

Damages to be regarded
18(2) When assessing damages in any other proceeding arising out of the same stalking behaviour, a court shall have regard to any damages awarded in a proceeding under this Act.

H. REGULATIONS

As with most legislation, certain procedural details must be provided for in regulations. The Act therefore authorizes the drafting of these regulations.

Regulations
19 The Lieutenant Governor in Council may make regulations:

(a) prescribing the procedures to be followed for applications, hearings and rehearings under this Act;

(b) prescribing the manner in which a lawyer or peace officer is to transmit to the designated justice of the peace the statement of a subject or witness given under subsection 4(3);

(c) prescribing the form and manner by which a designated justice of the peace or a peace officer acting at the direction of a designated justice of the peace shall under subsection 4(5) prepare a written protection order for the purposes of enforcement;

(d) prescribing the manner in which a designated justice of the peace is to forward a copy of a protection order and all supporting documentation to the court;

(e) prescribing the form and manner of providing any notice or service required to be provided under this Act, including prescribing substitutional service and a rebuttable presumption of service;

(f) prescribing the manner in which and at whose expense seized property under clauses 3(4)(d), 10(1)(d) and 10(1)(k) is to be impounded, the maximum time period for which that seized property may remain impounded and, in default of a further order within that time period ordering return of the property to its owner, the manner in which the seized property shall be sold or otherwise disposed of;

(g) respecting any matter or thing that the Lieutenant Governor in Council considers necessary or advisable to carry out the intent and purpose of this Act.

It will be recalled that the Court of Queen's Bench is empowered to order the seizure of firearms or personal property used to carry out stalking. Regulations will be required to govern the storage and, where appropriate, return of such property.

Seized property

10(2) Where the court makes an order under clauses (1)(d) or (1)(k) to seize personal property, the property shall be dealt with as prescribed by regulation.

CHAPTER 11

STALKING AND DOMESTIC VIOLENCE

We have on a number of occasions in this Report made reference to domestic violence. Usually, this has been because recent developments in the legal response to domestic violence, particularly in other jurisdictions, have provided inspiration for our proposals for a legal response to stalking. Recent legislation in Saskatchewan[1] and Prince Edward Island [2] has featured the creation of comprehensive, effective judicial orders which can be obtained quickly, easily and without great expense. We have borrowed from these initiatives in order to provide useful and meaningful remedies for subjects of stalking.

Our focus in this Report has been on stalking. We set out to find ways in which the civil law can supplement the protection offered by the criminal law to subjects of stalking and we believe we have succeeded in attaining this objective. However, our work on stalking has made us well aware that there is a need for similar work to be done with respect to domestic violence in Manitoba. Our research has shown us that, just as the law is capable of a stronger, more effective response to stalking, so is it capable of a stronger, more effective response to domestic violence. It was the Commission's intention to follow up its project on stalking with a similar project on domestic violence. Unfortunately, this will now not be possible.

Nonetheless, we believe that it is important to recognize that, although our proposed *Stalking Protection, Prevention and Compensation Act* is designed to address stalking, it may still have a role to play in combatting domestic violence. In some cases, violence by one spouse against another will fall within the definition of stalking. Domestic violence typically takes place on more than one occasion and clearly causes fear for safety. Section 2(2)(d) of our proposed Act provides that stalking includes "engaging in threatening conduct directed at the other person or any member of their family". In short, a person who is the subject of domestic violence will often also be considered to be a subject of stalking under our proposed Act and will often be able to avail herself of its remedies.

The criminal case of *R.* v. *Sanghera*[3] is instructive. In that case, the accused and the complainant were living together as husband and wife. The accused threatened, pushed, shoved, punched, kicked and beat the complainant. As a result, the accused was charged with

[1]*The Victims of Domestic Violence Act*, S.S. 1994, c. V-6.02.

[2]*Victims of Family Violence Act*, S.P.E.I. 1996, c. 47.

[3]*R.* v. *Sanghera*, [1994] B.C.J. No. 2803 (Prov. Ct.).

criminal harassment; that is, he was charged under the provision of the *Criminal Code* which outlaws stalking behaviour. The accused attempted to argue that he could not be charged under that provision because it does not apply to people living together in a domestic relationship. That argument was rejected by the Court which held that no such exception exists. The accused was convicted because the Court concluded that his threatening conduct fell squarely within the definition of criminal harassment.

> Threatening conduct can harass and create as much fear when the parties are living together as when they are living apart . . . . A person can as easily be harassed by someone who repeatedly follows, repeatedly communicates with, or besets or watches her or him whether the two are co-habiting or not.[4]

Because the definition of stalking in our proposed Act is virtually identical to the definition of criminal harassment in the *Criminal Code*, Mr. Sanghera's conduct would equally be considered to be stalking for the purposes of obtaining orders and remedies available under our Act.

The ability to obtain relief under *The Stalking Protection, Prevention and Compensation Act* will be of great assistance to many subjects of domestic violence. However, it must be recognized that the proposed Act was designed to address stalking, not domestic violence, and so it does not contain some of the remedies which are needed to address the problem of domestic violence properly (such as orders for exclusive occupancy of the family residence or orders for the removal of the respondent from the residence). Further work will be required to develop a scheme similar to our proposed Act, but with the specific needs of subjects of domestic violence in mind.

[4] *Id.* at para. 45.

CHAPTER 12

CONCLUSION

Stalking is a serious problem in Manitoba and elsewhere. It has a devastating impact on the lives of those who are stalked, subjecting them to harassment and fear in their homes, at work and in public places for months or even years. Although recent amendments to the *Criminal Code* have been an important advance, the traditional legal responses to stalking continue to leave many subjects of stalking unprotected and uncompensated.

No single remedy can adequately fill this gap in the law. What is needed is a non-traditional scheme which can protect the full scope of a subject's interests. *The Stalking Protection, Prevention and Compensation Act* which we propose in the Report provides subjects of stalking with a variety of effective and meaningful remedies which they can utilize to address their individual situation. This comprehensive and flexible approach allows the Act to serve many functions in the battle against stalking:

- the Act will serve to draw the public's attention to the serious problem of stalking;
- the Act will alert some individuals that their conduct is unlawful and subject to powerful remedies, thereby deterring many from stalking;
- the Act will allow subjects of stalking to seek relief from the courts early on in a stalking situation, putting an end to many instances of stalking before they escalate into violence;
- the Act will provide subjects of stalking with immediate protection from stalkers, tailored to meet their individual needs, without high cost and without complicated court proceedings;
- the Act will provide subjects of stalking with the ability to obtain orders aimed at preventing the continuation of the stalking;
- the Act will provide subjects of stalking with the ability to obtain compensation for their losses;
- proceedings under the Act will provide corroborating evidence for any criminal harassment charges that may be concurrently or subsequently filed, improving the chances that a stalker will be criminally convicted.

Finally, the Act as a whole will empower subjects of stalking by providing them with a means of actively asserting their rights, prompting more people to report incidents of stalking and to use the justice system in a proactive manner.

Although the Act will be an effective tool to combat stalking, we recognize that it is not a panacea and that more must be done. Other strategies that must be pursued in the battle against stalking include developments in counselling and rehabilitating stalkers, assistance programs for subjects of stalking and education of police officers, lawyers and judges. The success of the Act itself depends on the extent to which these other measures are adopted and the extent to which the legal system recognizes stalking as a serious problem in Manitoba. As stalking is a relatively new phenomenon and is entirely novel as a discrete area of the civil justice system, those individuals who will play a part in the administration of the Act must learn more about stalking. Their training should emphasize that incidents of stalking cannot be viewed as single events, but must be seen as part of a course of conduct which causes severe emotional injury and which can quickly escalate to violence. Emphasis should be placed on the very real danger that lurks behind behaviour that may seem innocuous if examined in isolation.

Legislation alone cannot solve the problem of stalking. However, we believe that the legislation we propose in this Report is an important advance in the fight against this serious problem.

This is a Report pursuant to section 15 of *The Law Reform Commission Act*, C.C.S.M. c. L95, signed this 28th day of May 1997.

Clifford H.C. Edwards, President

John C. Irvine, Commissioner

Gerald O Jewers, Commissioner

Eleanor R. Dawson, Commissioner

Pearl K. McGonigal, Commissioner

APPENDIX A

THE STALKING PROTECTION, PREVENTION AND COMPENSATION AND CONSEQUENTIAL AMENDMENTS ACT

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of Manitoba, enacts as follows:

INTERPRETATION

Definitions

1 In this Act,

"court" means the Court of Queen's Bench;

"designated justice of the peace" means a justice of the peace who has been designated under section 15;

"protection order" means an order made under section 3;

"prevention order" means an order made under section 10;

"respondent" means a person against whom a protection order or prevention order is sought or made under this Act;

"specified person" means a person who is identified by name or by membership in an identified class;

"subject" means a person who is being stalked;

"telecommunication" includes communication by telephone, fax or electronic mail.

Meaning of stalking

2(1) Stalking occurs where a person, without lawful authority and knowing that another person is harassed or recklessly as to whether the other person is harassed, engages in conduct on more than one occasion that causes that other person reasonably, in all the circumstances, to fear for their safety or the safety of anyone known to them.

Examples of stalking

2(2) The conduct mentioned in subsection (1) includes

(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.

Deemed fear
2(3) Where, but for mental incompetence or minority, a person would reasonably, in all the circumstances, fear for their safety or the safety of anyone known to them due to conduct described in subsection (1), the person shall be conclusively deemed to have such fear for the purposes of subsection (1).

PROTECTION FROM STALKING

Protection Order
by Designated Justice of the Peace

Protection order without notice
3(1) A protection order shall be granted without notice by a designated justice of the peace where he or she determines, on a balance of probabilities, that

(a) the subject is being stalked by the respondent;

(b) due to the stalking, the subject reasonably, in all the circumstances, fears at the time of the application for his or her safety or the safety of anyone known to the subject; and

(c) the subject has an honest belief that the respondent will continue to stalk him or her.

Deemed belief
3(2) Where, but for mental incompetence or minority, a person would reasonably, in all the circumstances, have an honest belief that the respondent will continue to stalk him or her, the person shall be conclusively deemed to have such an honest belief for the purposes of subsection (1).

Evidence under oath
3(3) Every witness in an application for a protection order must give evidence under oath or affirmation.

Types of provisions
3(4) A protection order may contain any or all of the following provisions, subject to such terms and conditions as the designated justice of the peace considers appropriate:

(a) a provision prohibiting the respondent from stalking the subject;

(b) a provision prohibiting the respondent from communicating with or contacting the subject or any other specified person or both;

(c) a provision prohibiting the respondent from attending at or near or entering any specified place that is attended regularly by the subject or any other specified person or both, including the residence, property, business, school or place of employment of the subject or any other specified person or both;

(d) a provision directing the respondent to relinquish to a peace officer until further order any weapon, ammunition and explosive substance in the control, ownership or possession of the respondent, together with any firearms acquisition certificate, registration certificate in respect of a restricted weapon, or permit to carry or transport a restricted weapon that has been issued to the respondent;

(e) any other provision that the designated justice of the peace considers necessary to provide for the immediate protection of the subject.

Seized weapons
3(5) Where the designated justice of the peace makes an order under clause (4)(d) to seize personal property, the property shall be dealt with as prescribed by regulation.

Who may apply
4(1) An application for a protection order may be made by a subject or, with the subject's consent, by a lawyer or peace officer.

How to apply
4(2) An application for a protection order may be made

(a) in person by a subject;

(b) by telecommunication or in person by a lawyer or peace officer acting on behalf of a subject.

Subject's statement

4(3) Where an application is not made in person by a subject, the lawyer or peace officer acting on behalf of the subject

(a) must possess at the time of application a written document sworn or affirmed by the subject and by any witness that states the facts upon which the application is based; and

(b) must immediately transmit that document in the prescribed manner to the designated justice of the peace.

Order need not wait
4(4) In an application by telecommunication, a designated justice of the peace shall decide whether to make a protection order based on the information provided by the lawyer or peace officer, without waiting for reception of the document described in subsection (3).

Enforcement of order
4(5) Where a designated justice of the peace makes a protection order based on an application by telecommunication, the designated justice of the peace shall immediately communicate its provisions to a peace officer so that a written order in the prescribed manner shall be produced for the purposes of enforcement.

Same effect
4(6) A protection order based on an application by telecommunication has the same effect as a protection order based on an application made in person.

Notice of order
5(1) A respondent is not bound by any provision in a protection order until he or she has notice of that provision.

Service
5(2) Service of a protection order on a respondent is to be made in the form and manner prescribed in the regulations.

Documentation to Queen's Bench
6(1) A designated justice of the peace who makes a protection order shall forward in the prescribed manner a copy of the order and all supporting documentation, including his or her notes, to the court at its nearest judicial centre, immediately upon making the protection order or, where the order is based on an application by telecommunication, immediately upon receipt of the document described in subsection 4(3).

Review of order by court
6(2) Within three working days of receipt of the protection order and all supporting documentation by the court or, if a judge is not available within that period, as soon as one can be made available, a judge shall

(a) review the order in his or her chambers; and

(b) confirm the order where the judge is satisfied that there was evidence before the designated justice of the peace to support the granting of the order.

Rehearing
6(3) Where, on reviewing the protection order, the judge is not satisfied that there was evidence before the designated justice of the peace to support the granting of the order, the judge shall direct a rehearing of the matter.

Procedure for rehearing
6(4) Where a judge directs that a matter be reheard, the local registrar shall set a rehearing date as soon as possible before the court and shall give notice of the rehearing, in the form and manner prescribed in the regulations, to the respondent and the subject.

Attendance of subject
6(5) A subject is entitled, but not required, to attend a rehearing and may fully participate in the rehearing personally or by an agent.

Protection order is not stayed
6(6) Notwithstanding any other provision in this Act, a protection order continues in effect and is not stayed by a direction for a rehearing under this section.

Nature of rehearing
6(7) Subject to subsection (8), a court which holds a rehearing shall deal with the matter as on an original hearing before a designated justice of the peace and may confirm, terminate or vary the protection order in accordance with any provision available under section 3.

Evidence
6(8) The evidence that was before the designated justice of the peace shall be considered as evidence at the rehearing.

Onus on respondent
6(9) At a rehearing, the onus is on the respondent to demonstrate, on a balance of probabilities, why the order should not be confirmed.

Absent respondent
6(10) Where the respondent fails to attend the rehearing, the protection order may be confirmed or varied in the respondent's absence.

Effect of confirmation
7(1) For all purposes, including appeal or variation, a protection order that is confirmed or varied by a judge under section 6 is deemed to be an order of the court.

Notice of confirmation
7(2) The court shall cause notice of confirmation, termination or variation of a protection order under section 6 to be given to the subject and respondent in the form and manner prescribed in the regulations.

Subsequent variation
8(1) After a protection order has been confirmed or varied under section 6, the court, on application by the subject or respondent named in that order, may from time to time

(a) order any provision available under section 10;

(b) change, add or delete provisions contained in the order;

(c) extend or decrease the period for which any provision is to remain in force;

(d) terminate any provision in the order; or

(e) revoke the order.

Priority of other subsequent orders
8(2) Any provision in a protection order is subject to and is varied by any subsequent order made under any other Act or any Act of the Parliament of Canada.

Ban on identifying information
9(1) No person shall publish or broadcast in a media report the name of any person who is a party or witness in proceedings relating to a protection order or any information likely to identify any such person, until the later of:

(a) thirty days after service upon the respondent of the protection order confirmed under subsection 6(2) by a judge in chambers;

(b) the hearing and determination by the court of any rehearing under section 6; or

(c) the hearing and determination by the court of any application brought under section 8 by a respondent within thirty days after a protection order is confirmed under subsection 6(2) by a judge in chambers.

Offence and penalty
9(2) Every person who contravenes subsection (1) is guilty of an offence punishable on summary conviction and is liable, if an individual, to a fine of $5,000 or imprisonment for 2 years or both and, if a corporation, to a fine of $50,000.

Offence by corporate officers

9(3) Where a corporation is guilty of an offence under this section, any officer, director or agent of the corporation who directed, authorized, participated in, or acquiesced in, the commission of the offence, is party to and is also guilty of the offence and is liable to the penalties set out in subsection (2).

Prevention Order
by Queen's Bench

Prevention order

10(1) Where, on application, the court determines that stalking has occurred by the respondent, or on variation of a protection order under section 8, the court may make a prevention order containing any or all of the following provisions, subject to such terms and conditions as the court considers appropriate:

(a) a provision prohibiting the respondent from stalking the subject;

(b) a provision prohibiting the respondent from communicating with or contacting the subject or any other specified person or both;

(c) a provision prohibiting the respondent from attending at or near or entering any specified place that is attended regularly by the subject or any other specified person or both, including the residence, property, business, school or place of employment of the subject or any other specified person or both;

(d) a provision directing the respondent to relinquish to a peace officer until further order of the court any weapon, ammunition and explosive substance in the control, ownership or possession of the respondent, together with any firearms acquisition certificate, registration certificate in respect of a restricted weapon, or permit to carry or transport a restricted weapon that has been issued to the respondent;

(e) a provision requiring the respondent to pay compensation to the subject for any monetary losses suffered by the subject as a result of the stalking, including loss of income, out-of-pocket losses for injuries sustained, cost of counselling or therapy, moving and accommodation expenses, cost of any security measure that is reasonably necessary for protection, legal expenses and cost of any application under this Act;

(f) a provision prohibiting the respondent from taking, converting, damaging or otherwise dealing with any property in which the subject may have an interest;

(g) a provision ordering the respondent to deliver up possession to the subject of any personal property in which the subject may have an interest;

(h) a provision ordering the respondent to obtain counselling or therapy at the respondent's expense or otherwise;

(i) a provision requiring the respondent to post any bond that the court considers appropriate for securing the respondent's compliance with the terms of the order;

(j) a provision requiring the respondent to report as specified to the court or an officer thereof or any other person designated by the court for the purpose of monitoring any provision of a prevention order;

(k) a provision seizing until further order of the court any personal property of the respondent used in furtherance of stalking the subject;

(l) notwithstanding any Act of the Legislature, a provision cancelling or suspending until further order of the court any licence issued to the respondent under *The Highway Traffic Act*, where the respondent drives a motor vehicle in furtherance of stalking the subject;

(m) any other provision that the court considers appropriate.

Seized property
10(2) Where the court makes an order under clauses (1)(d) or (1)(k) to seize personal property, the property shall be dealt with as prescribed by regulation.

Effect on property interests
11 A prevention order does not in any manner affect the title to or an ownership interest in any real or personal property jointly held by the parties or solely held by one of the parties.

General Provisions
Concerning Protection Orders
and Prevention Orders

Confidentiality
12(1) The registrar of the court and a designated justice of the peace shall keep a subject's address confidential.

Prohibition of identifying information
12(2) On the request of the subject, the court may make an order prohibiting any person from publishing or broadcasting in a media report the name of any person who is a party or witness in proceedings relating to a protection order or a prevention order or any information likely to identify any such person if the court believes that such publication or broadcasting would have an adverse effect on or cause hardship to the subject or would otherwise not be in the best interests of the subject.

Existing order of custody or access
13(1) In an application for a protection order or a prevention order, the subject must disclose to the designated justice of the peace or the court, as the case may be, the details of any order of custody or access to which both the subject and respondent are parties.

Logistics of access
13(2) Where both the subject and respondent are parties to an existing order relating to custody and access under an Act of the Legislature or under the *Divorce Act*, the designated justice of the peace or the court, as the case may be, may make an order specifying the logistics of any access granted to one party to a child in the custody of the other party to ensure that the protection of the subject is not compromised by the exercise of such access.

Appeal
14 With leave of a judge of the Court of Appeal, an appeal from a protection order or prevention order may be made to the Court of Appeal on a question of law.

Designation of JP
15 The Chief Judge of the Provincial Court of Manitoba may designate a justice of the peace to hear and determine an application for a protection order under this Act.

COMPENSATION FOR STALKING

Liability of stalker
16(1) A person who stalks another person commits a tort against that person.

Action without proof of damage
16(2) An action may be brought under subsection (1) without proof of damage.

GENERAL PROVISIONS

Identification assistance
17 Where a peace officer believes on reasonable grounds that a person is being stalked and can identify the person who is suspected of stalking, the peace officer may, upon the request of the person being stalked, disclose the suspected person's name to the person being stalked for the purpose of facilitating access to a remedy under this Act.

Other rights not diminished
18(1) Subject to subsection (2), any right of action or remedy under this Act is in addition to and does not diminish any other right of action or remedy available otherwise than under this Act.

Damages to be regarded
18(2) When assessing damages in any other proceeding arising out of the same stalking behaviour, a court shall have regard to any damages awarded in a proceeding under this Act.

Regulations
19 The Lieutenant Governor in Council may make regulations:

(a) prescribing the procedures to be followed for applications, hearings and rehearings under this Act;

(b) prescribing the manner in which a lawyer or peace officer is to transmit to the designated justice of the peace the statement of a subject or witness given under subsection 4(3);

(c) prescribing the form and manner by which a designated justice of the peace or a peace officer acting at the direction of a designated justice of the peace shall under subsection 4(5) prepare a written protection order for the purposes of enforcement;

(d) prescribing the manner in which a designated justice of the peace is to forward a copy of a protection order and all supporting documentation to the court;

(e) prescribing the form and manner of providing any notice or service required to be provided under this Act, including prescribing substitutional service and a rebuttable presumption of service;

(f) prescribing the manner in which and at whose expense seized property under clauses 3(4)(d), 10(1)(d) and 10(1)(k) is to be impounded, the maximum time period for which that seized property may remain impounded and, in default of a further order within that time period ordering return of the property to its owner, the manner in which the seized property shall be sold or otherwise disposed of;

(g) respecting any matter or thing that the Lieutenant Governor in Council considers necessary or advisable to carry out the intent and purpose of this Act.

Consequential amendment, C.C.S.M. c. C305

20(1) ***The Criminal Injuries Compensation Act*** *is amended by this section.*

20(2) *Schedule 1 is amended by adding the following in sequential order under the columns entitled Section of Criminal Code and Description of Offence, respectively:*

264	criminal harassment

C.C.S.M. reference

21 This Act may be cited as *The Stalking Protection, Prevention and Compensation Act* and referred to as chapter S--- of the *Continuing Consolidation of the Statutes of Manitoba*.

Coming into force

22 This Act comes into force on the day it receives royal assent.

REPORT ON STALKING

EXECUTIVE SUMMARY

EXECUTIVE SUMMARY

Stalking is a serious problem in Manitoba, especially for women. Stalkers can have a devastating effect on the lives of those who are stalked, subjecting them to harassment and fear in their homes, at work and in public places for months or even years.

The Manitoba Law Reform Commission's Report on *Stalking* recommends that legislation should be enacted to provide Manitobans with simple, effective and flexible protection from stalkers. The Commission has prepared draft legislation, *The Stalking Protection, Prevention and Compensation and Consequential Amendments Act*, set out in Appendix A of the Report, which it recommends for enactment. The proposed Act will also serve to prevent many instances of stalking and will provide a means by which subjects of stalking can receive compensation (in this Report, people who are stalked are referred to as subjects of stalking).

THE CURRENT LAW

Criminal Law

Until 1993, there was no offence which specifically outlawed stalking. Prosecutors were forced to focus upon some aspect of the stalker's conduct and bring it within an existing provision of the *Criminal Code*, thereby not addressing stalking as an independent phenomenon. Consequently, protection under the *Criminal Code* was incomplete and piecemeal. This changed in 1993 when the federal government amended the *Criminal Code* to include the offence of criminal harassment. This provision creates a general prohibition of stalking. However, even with this amendment, the criminal law does not directly provide protection while the stalking is occurring, prevent its continuation or provide compensation for the subject's losses.

Tort Law

Tort law details the circumstances in which a person who suffers loss or injury may bring a private civil action for damages to compensate him or her for that loss. Like the criminal law before 1993, tort law has proved inadequate to the task of providing a general remedy to the subjects of stalking because there is no discrete tort of stalking. Subjects of stalking must attempt to bring particular aspects of the stalker's conduct within the scope of an existing tort.

Criminal Injuries Compensation

The Criminal Injuries Compensation Act provides some compensation to the victims of certain listed criminal offences. The Act, however, provides no relief for the subjects of stalking

unless bodily injury is suffered as a result of a listed crime, such as assault. The subject of the offence of criminal harassment has no direct claim because that crime is not listed in the Act.

Judicial Orders of Restraint

Currently, subjects of stalking may, in certain situations, obtain restraining orders and orders of protection from the courts. Peace bonds are available to persons who fear they will be injured or their property will be damaged, but these may take weeks or even months to obtain. Other protection orders such as orders available on judicial interim release or probation orders are only available after a stalker has been charged with a criminal offence. *Family Maintenance Act* orders allow subjects of stalking to seek no-contact orders, but only if they have cohabited with their stalker. That Act does not apply to situations where the stalker and subject had some lesser relationship, such as being boyfriend and girlfriend, or where the stalker is a stranger or co-worker. Prohibitory injunctions are also a means by which subjects of stalking can obtain protection, but these are difficult to obtain, costly and can involve long delays.

THE NEED FOR REFORM

The dominant characteristic of the legal response to stalking is that the protection is uneven, uncertain and unpredictable. The result is that far too often subjects of stalking are left unprotected and uncompensated.

Because the concept of stalking covers so many different situations, no single remedy will solve the problem. What is needed is a basket of remedies aimed at different aspects of the problem. Only when the full scope of a person's interests are protected by a full range of remedies will the law have exhausted its power to deal with stalking.

The Commission has concluded that the best way to achieve this objective is through a provincial statute under which subjects of stalking can obtain civil orders designed to protect them, prevent further incidents of stalking and compensate them for their losses. A provincial statute offers a number of advantages: it can supplement the criminal law and fill the gaps which now exist in the non-criminal law; it can create remedies which are available quickly, easily, with few formalities and with a standard of proof lower than that required by the criminal law; it can address the needs of those who do not wish to punish their stalker, but simply wish the stalking to end; and it can recognize the need for flexibility and allow for a process and remedies that can be tailored to address individual situations, something the criminal law is not designed to do. Finally, the creation of a provincial scheme would empower the subject of stalking by providing a means of actively asserting her rights and "fighting back". The creation of a civil remedy would prompt more women to report incidents of stalking and to use the justice system in a proactive manner.

THE PROPOSED ACT

The Commission recommends that provincial legislation should be enacted to combat stalking. The Act which the Commission proposes is entitled *The Stalking Protection, Prevention and Compensation and Consequential Amendments Act.*

Stalking Defined

The definition of stalking in the proposed Act is sufficiently wide to draw within it the full range of unacceptable conduct without impinging on legitimate activity. It follows the definition of criminal harassment as much as possible, thereby adopting a meaning for stalking which has been tested in the courts and has the benefit of judicial interpretation.

Stalking occurs where a person, knowing that another person is harassed or recklessly as to whether the other person is harassed, engages in conduct that causes that other person reasonably, in all the circumstances, to fear for their safety or the safety of anyone known to them. The element of reasonable fear is the dividing line between lawful conduct which is merely annoying and harassing conduct which can be the subject of legal remedies.

"Recklessly" in the context of stalking behaviour means that the stalker knows that his attentions are unwanted but continues in his conduct. Therefore, in order to come within the definition of stalking, a respondent (the alleged stalker) need not desire that the subject is harassed so long as he knows that is the result or that such a result is possible.

There is both a subjective and objective element to the requirement of fear and both must be satisfied in order for stalking to occur. In order to meet the subjective requirement, the person must actually feel fear. For the objective requirement, the subject's fear must be "reasonable in all the circumstances". This allows the court to consider an alleged stalker's actions in their full context and permits the examination of any prior relationship with the subject of the stalking, any imbalance of power in that relationship and any other factors which might explain why the subject is fearful for her safety.

The Act lists examples of stalking, such as repeatedly following another person, repeatedly communicating with another person, watching a person's house or place of business or engaging in threatening conduct directed at another person. The listed examples of stalking are not exhaustive and other conduct may come within the definition of stalking.

Protection Orders

Protection orders are designed to provide a person being stalked with immediate protection. They are available from a designated justice of the peace without notice to the alleged stalker, upon proof of three criteria: the subject is being stalked, she fears for her safety at the time of the application and she has an honest belief that the respondent (the alleged stalker) will continue to stalk her.

Because protection orders are meant to provide immediate relief and are available without notice to the alleged stalker, the relief which is available is limited to provisions aimed at stopping the threat to the subject's safety. They include provisions prohibiting the respondent from stalking the subject, from communicating with the subject or from attending at or near any specified place that is attended regularly by the subject, provisions directing the respondent to relinquish firearms and any other provisions necessary to provide for the immediate protection of the subject.

The Commission recommends that justices of the peace be the first point of contact for applicants, rather than judges of the Court of Queen's Bench, because there are a significant number of such officers located throughout the Province, while there are fewer judges of the Court of Queen's Bench, in fewer locations. There is greater informality when appearing before a justice of the peace and the process is quicker and less expensive, making their use more conducive to providing assistance to subjects of stalking.

A subject may appear in person before a designated justice of the peace to apply for a protection order. The application may also be made on behalf of a subject by a peace officer or by a lawyer; those applications may be made in person or by telephone.

Protection orders given by justices of the peace are promptly reviewed by a judge of the Court of Queen's Bench who may confirm the order or decide that the matter be reheard. The ordering of a rehearing does not affect the protection order; the order remains in effect until the hearing.

If a matter is reheard, the subject and the stalker will both have an opportunity to make their case at the rehearing, after which the judge has three options. He or she may confirm the protection order, terminate the order or vary the terms of the order. Once an order is confirmed at a rehearing, either a subject or a respondent may apply to a judge to have the order varied, expanded, restricted or terminated.

Prevention Orders

Prevention orders are designed to address situations where the subject's needs are less urgent. The relief available under a prevention order includes all the relief available by way of protection order plus several additional remedies designed to prevent further stalking and to compensate the subject. Applications for prevention orders are to be made in accordance with the *Queen's Bench Rules.* The respondent is given notice and a hearing is held before a judge of the Court of Queen's Bench. The hearing may be conducted in any manner the court sees fit. Witnesses may be called or the evidence may be presented by way of affidavit.

A prevention order can award compensation for specific damages caused by stalking, such as income lost as a result of the stalking, the cost of obtaining counselling and the cost of changing residences or adding security. It can also include provisions that the respondent return

the subject's property, that the respondent obtain counselling at his own expense, that the respondent post a bond to ensure his compliance with the prevention order and that the respondent surrender to the court any property he is using to assist him in his stalking activities (which may include his driver's licence).

Compensation

The proposed Act also creates a tort of stalking, thereby permitting the subject to recover all the relief available in civil actions, including damage awards and injunctions. Suing a stalker in the tort of stalking allows a subject to receive damages for loss of future income, damages for pain and suffering, aggravated damages and punitive damages.

The proposed Act also amends *The Criminal Injuries Compensation Act* to provide compensation for injuries resulting from criminal harassment. This would allow subjects of stalking to receive compensation for some of their losses arising from the stalking. Coverage under this Act would provide a quick, efficient and inexpensive way for a subject to obtain some financial relief.

Miscellaneous Matters

In order to protect the identity of the subject, the proposed Act requires that the subject's address be kept confidential when she makes any application for orders. The subject may also request that the court make an order prohibiting the publication of any information likely to identify any party or witness to proceedings under the Act.

The proposed Act provides that, in circumstances where the subject does not know the name of the stalker, she may seek the assistance of the police in identifying the respondent so that she can obtain an order under the Act.

While the primary objective of the proposed Act is protection for persons who are being stalked, it is also respectful of the rights of persons who are alleged to be stalking. The Commission recognizes that the reputation of an innocent respondent may be damaged if it becomes known that a protection order has been obtained against him. Therefore, the Act provides for an automatic temporary publication ban on any information which might identify any party to the proceedings. The ban is in effect until the respondent has had a reasonable opportunity to challenge the validity of the protection order. Any person who violates the publication ban is subject to strict penalties.

Non-compliance with Court Orders

The proposed statute does not contain any penalties for non-compliance with its orders. However, this does not mean that non-compliance is without consequences. Where a statute is silent as to the consequences of non-compliance with court orders made pursuant to the Act, three remedies automatically apply: civil contempt of court, criminal contempt of court and section 127(1) of the *Criminal Code*. These remedies offer a subject of stalking and the court flexibility in dealing with a persistent stalker and allow for punishment in the form of significant fines and incarceration.

STALKING AND DOMESTIC VIOLENCE

While the proposed Act is designed to address stalking, it may also have a role to play in combatting domestic violence. In many cases, violence by one spouse against another will fall within the definition of stalking. A person who is the subject of domestic violence will often also be considered to be a subject of stalking under the proposed Act and will often be able to avail herself of its remedies. However, it must be recognized that the proposed Act was designed to address stalking, not domestic violence, and so it does not contain some of the remedies that are needed to address the problem of domestic violence properly. The Commission had intended to undertake such a project, but now will be unable to do so.

CONCLUSION

The Stalking Protection, Prevention and Compensation Act provides subjects of stalking with a variety of remedies and procedures which they can utilize to address their individual situation and which will be available quickly, easily and without expense. Although the Act will be an effective tool to combat stalking, it is not a panacea and the Commission recognizes that more must be done. For example, developments in the rehabilitation and counselling of stalkers, assistance programs for subjects of stalking and education of members of the justice system are also needed.

Legislation alone cannot solve the problem of stalking. However, the legislation proposed in this Report is an important advance in the fight against this serious problem.

SOMMAIRE DU RAPPORT SUR

LE HARCÈLEMENT AVEC MENACES

SOMMAIRE

Au Manitoba, le harcèlement avec menaces constitue un problème grave, particulièrement pour les femmes. La conduite des personnes qui harcèlent ou poursuivent leur victime avec malice et de façon répétée peut avoir un effet dévastateur sur la vie de cette dernière, qui se voit ainsi condamnée à vivre dans la crainte et la tension, à la maison, au travail ou dans des lieux publics, et ce, pendant des mois, voire des années.

Dans son rapport intitulé *Stalking*, la Commission de réforme du droit du Manitoba recommande l'adoption d'une loi qui donnerait à la population manitobaine un moyen simple, efficace et souple de se protéger contre le harcèlement avec menaces. À cette fin, la Commission a rédigé l'avant-projet de loi intitulé *Loi sur la protection, la prévention et l'indemnisation en matière de harcèlement avec menaces et modifications corrélatives*, reproduit à l'annexe A du rapport. Une fois adoptée, cette loi servira à prévenir de nombreux incidents de harcèlement avec menaces et constituera pour les victimes un moyen grâce auquel elles pourront recevoir une indemnisation.

L'ÉTAT ACTUEL DU DROIT

Droit pénal

Jusqu'en 1993, le *Code criminel* ne contenait aucune disposition criminalisant le harcèlement avec menaces. Les procureurs de la Couronne étaient alors contraints de centrer leur poursuite sur un aspect particulier de la conduite du harceleur qui constituait déjà une infraction selon les dispositions existantes du *Code criminel*, ce qui les empêchait d'aborder le harcèlement avec menaces comme un phénomène en soi. Par conséquent, le *Code criminel* n'offrait qu'une protection incomplète et fragmentaire aux victimes de harcèlement. La situation a changé en 1993 lorsque le gouvernement fédéral a modifié le *Code criminel* de façon à créer l'infraction de harcèlement criminel. Selon cette nouvelle disposition, toute forme de harcèlement criminel est interdite. Pourtant, en dépit de cette modification, le droit criminel n'offre pas de protection alors que le harcèlement est en cours, il n'empêche pas qu'il se poursuive et ne prévoit pas d'indemnisation en faveur de la victime.

Droit de la responsabilité civile délictuelle

Le droit de la responsabilité civile délictuelle prévoit en détail dans quelles circonstances une personne qui subit des pertes ou des lésions corporelles peut intenter une action civile en dommages-intérêts. Comme le droit criminel avant 1993, le droit de la responsabilité civile délictuelle n'offre pas un recours d'ensemble efficace permettant de dédommager les victimes de harcèlement avec menaces, car ce comportement ne constitue pas un délit. Les victimes de harcèlement doivent donc centrer leur poursuite sur un aspect particulier de la conduite du harceleur qui revêt déjà un aspect délictuel selon le droit en vigueur.

L'indemnisation des victimes d'actes criminels

La *Loi sur l'indemnisation des victimes d'actes criminels* prévoit l'indemnisation des victimes à l'égard de certaines infractions qui y sont énumérées. Elle n'accorde toutefois aucune indemnisation aux victimes de harcèlement criminel, à moins que celles-ci n'aient subi des lésions corporelles à la suite d'une infraction indiquée dans la Loi, telle que les voies de fait. La victime de harcèlement criminel ne dispose d'aucun recours direct, parce que ce crime ne fait pas partie de la liste d'infractions contenue dans la Loi.

Ordonnances restrictives

À l'heure actuelle, les victimes de harcèlement avec menaces peuvent, dans certaines situations, obtenir auprès des tribunaux des ordonnances restrictives et des ordonnances de protection. Les personnes qui craignent subir des blessures ou que leurs biens ne soient endommagés peuvent déposer une demande en justice en vue d'obtenir une ordonnance contraignant le harceleur à prendre l'engagement de ne pas troubler l'ordre public. Toutefois, il faut souvent attendre des semaines, voire des mois, avant qu'une telle ordonnance ne soit rendue. Pour que les tribunaux puissent imposer dans d'autres ordonnances, telles que les ordonnances de libération provisoire ou les ordonnances de probation, des conditions protégeant les victimes, il faut que l'auteur du harcèlement ait commis une infraction criminelle. Selon la *Loi sur l'obligation alimentaire*, les victimes de harcèlement peuvent obtenir une ordonnance de non-communication, mais seulement si elles ont cohabité avec l'auteur du harcèlement. La Loi ne s'applique pas aux situations où le harceleur et la victime ne sont pas mariés ou ne vivent pas en union de fait, si, par exemple, ils font seulement se fréquenter ou entretenir des relations amoureuses, ou si le harceleur est un collègue de travail ou un étranger. Enfin, les ordonnances d'injonction constituent un autre moyen par lequel les victimes de harcèlement avec menaces peuvent obtenir protection, mais ces ordonnances sont difficiles et coûteuses à obtenir, et peuvent occasionner de longs délais.

NÉCESSITÉ DE RÉFORME

Les solutions qu'offre le régime juridique en matière de harcèlement avec menaces se caractérisent principalement par le fait que la protection en découlant est inégale, incertaine et imprévisible. Il en résulte donc que les victimes de harcèlement avec menaces sont beaucoup trop souvent laissées à elles-mêmes, sans protection et sans indemnisation.

En raison du fait que la notion de harcèlement avec menaces s'applique à un grande diversité de situations, il n'existe pas de solution unique au problème. Il est plutôt nécessaire de mettre sur pied une gamme de recours permettant d'attaquer divers aspects du problème. La justice n'aura mis en oeuvre tous les moyens possibles de lutte contre le harcèlement avec menaces qu'à partir du moment où l'ensemble des intérêts de la personne seront protégés par un train complet de mesures.

La Commission en est arrivée à la conclusion que le meilleur moyen d'atteindre ces objectifs était l'adoption d'une loi provinciale en vertu de laquelle les victimes de harcèlement avec menaces pourraient obtenir, au civil, des ordonnances qui leur permettraient à la fois d'obtenir protection, d'éviter que d'autres incidents ne se produisent et de recevoir une indemnisation pour les pertes qu'elles ont subies.

Le fait de procéder par voie de loi provinciale offre de nombreux avantages : une telle loi complète le droit pénal et comble les lacunes qui existent actuellement en matière de droit à caractère non pénal; elle peut contribuer à la création de recours qu'il est possible d'exercer rapidement, facilement, et avec un minimum de formalités, recours qui sont assortis d'une norme de preuve moins élevée qu'en droit criminel; elle peut répondre aux besoins des victimes qui ne cherchent pas à faire punir l'auteur du harcèlement, mais qui souhaitent simplement que le harcèlement cesse. La Loi serait élaborée de façon à offrir la flexibilité voulue et à instaurer une procédure et des mesures de redressement visant à répondre aux besoins suscités par la situation propre à chaque victime, ce qui ne relève pas des objectifs que vise le droit pénal. Enfin, l'instauration d'un régime provincial donnerait à la victime des moyens concrets qui lui permettraient de faire respecter ses droits et de se défendre contre le harceleur. La création d'un recours civil encouragerait les femmes à porter davantage plainte pour harcèlement avec menaces et à se servir de manière proactive du système juridique.

L'AVANT-PROJET DE LOI

La Commission recommande l'adoption d'une loi provinciale afin de faire échec au harcèlement avec menaces. La Loi qu'elle propose s'intitule la *Loi sur la protection, la prévention et l'indemnisation en matière de harcèlement avec menaces et modifications corrélatives*.

Définition du harcèlement avec menaces

Dans la nouvelle loi, la définition du harcèlement avec menaces est suffisamment large pour englober toute la gamme des actes inacceptables, sans toutefois empêcher les activités légitimes. Elle correspond de près à la définition de harcèlement criminel, ce qui permet de bénéficier de l'éclairage apporté par la jurisprudence quant au sens de cette expression.

L'expression « harcèlement avec menaces » s'entend du fait pour une personne qui, sachant qu'une autre personne se sent harcelée ou sans se soucier de ce qu'elle se sente harcelée, agit de sorte à lui faire raisonnablement craindre, compte tenu du contexte, pour sa sécurité ou celle d'une de ses connaissances. L'élément de crainte raisonnable sert à établir la ligne de démarcation entre un acte importun mais tout de même licite et le harcèlement avec menaces qui peut donner lieu à des recours en justice.

Par l'expression « sans se soucier de ce que la personne se sente harcelée », on entend que le harceleur sait que sa conduite est gênante, mais qu'il continue néanmoins de harceler la personne. Par conséquent, pour commettre le délit civil de harcèlement avec menaces, il ne

s'agit pas tant que l'auteur de l'acte reproché désire harceler la victime, mais qu'il sache que sa conduite constitue du harcèlement ou qu'elle puisse être interprétée comme tel.

Pour prouver la commission de harcèlement avec menaces, il faut démontrer, en ce qui a trait à l'exigence concernant la crainte, qu'il existe à la fois un élément subjectif et un élément objectif. Sur le plan subjectif, le comportement doit faire naître une crainte réelle chez la victime. Sur le plan objectif, la crainte de celle-ci doit être « raisonnable compte tenu du contexte ». Ces éléments permettent au tribunal de considérer l'ensemble du contexte propre aux actions de l'auteur prétendu du harcèlement et de tenir compte de tout facteur pouvant expliquer pourquoi la victime craint pour sa sécurité, notamment toute relation qui aurait pu au préalable exister entre le harceleur et la victime, et tout déséquilibre de pouvoir entre les deux personnes en cause.

La Loi énumère certains exemples de harcèlement avec menaces, tels que le fait de suivre une personne de façon répétée, de communiquer de façon répétée avec cette personne, de cerner ou surveiller le lieu où la personne réside ou exerce ses activités ou, encore, de se comporter d'une manière menaçante à l'égard de cette personne. La liste précédente n'est pas exhaustive et d'autres actes peuvent constituer du harcèlement avec menaces au sens de la définition contenue dans la Loi.

Ordonnances de protection

Les ordonnances de protection ont pour but de garantir une protection immédiate à la victime de harcèlement avec menaces. La victime peut obtenir un tel type d'ordonnance auprès d'un juge de paix, sans que l'auteur prétendu du harcèlement en ait reçu notification au préalable, si elle peut prouver qu'elle répond aux trois critères suivants : elle fait l'objet de harcèlement avec menaces; elle craint pour sa sécurité au moment où elle dépose sa demande et elle croit honnêtement que l'auteur du harcèlement continuera de la harceler.

Puisque les ordonnances de protection ont pour objet de fournir une protection immédiate et qu'il est possible de les obtenir sans notification préalable du contrevenant, les mesures de redressement pouvant être accordées se limitent à celles qui visent à éliminer la menace que le harceleur pose à la sécurité immédiate de la victime. Parmi ces mesures, on retrouve entre autres l'interdiction au contrevenant de harceler la victime, l'interdiction de communiquer avec elle ou de se trouver dans les lieux ou à proximité de lieux que fréquente habituellement la victime et, enfin, l'obligation pour le contrevenant de remettre ses armes à feu à la police.

La Commission recommande que les victimes de harcèlement avec menaces adressent en premier lieu leur demande à un juge de paix, plutôt qu'à un juge de la Cour du Banc de la Reine, parce que le nombre de juges de paix est plus élevé dans l'ensemble de la province que celui des juges de la Cour du Banc de la Reine et qu'ils sont présents dans un plus grand nombre d'endroits. Le fait que l'instance se déroule devant un juge de paix implique un degré moindre de formalité et rend la procédure à la fois plus expéditive et moins coûteuse. Le recours à ces auxiliaires de la justice permet donc de mieux venir en aide aux victimes de harcèlement.

La victime de harcèlement avec menaces peut comparaître en personne pour demander à un juge de paix désigné de rendre une ordonnance de protection. Cette demande peut être également présentée au nom de la victime, par un agent de la paix ou par un avocat à qui la victime aura demandé de le faire. Ces demandes peuvent se faire en personne ou par téléphone.

Les ordonnances de protection rendues par un juge de paix font dans un court délai l'objet d'un contrôle par un juge de la Cour du Banc de la Reine qui pourra confirmer l'ordonnance ou décider que l'affaire doit être entendue de nouveau. Si le juge de la Cour du Banc de la Reine ordonne la tenue d'une nouvelle audience, l'ordonnance de protection rendue par le juge de paix demeure en vigueur jusqu'à la nouvelle audience.

Si une nouvelle audience a lieu, la victime et l'auteur prétendu du harcèlement auront tous les deux l'occasion d'y exposer leurs prétentions. À l'issue de l'audience, le juge pourra ou bien confirmer l'ordonnance de protection, l'annuler, ou en modifier les modalités. En cas de confirmation dans le cadre d'une nouvelle audience, la victime et l'auteur du harcèlement peuvent par la suite demander au tribunal de modifier ou d'annuler l'ordonnance ou encore d'en élargir ou d'en limiter la portée.

Ordonnances de prévention

Ces ordonnances sont utilisées dans les cas où les besoins de la victime en matière de protection sont moins urgents que dans les cas précédents. Les mesures de redressement pouvant être accordées au moyen des ordonnances de prévention comprennent, en plus de celles pouvant être obtenues dans le cadre d'ordonnances de protection, plusieurs autres mesures visant à empêcher d'autres manifestations de harcèlement avec menaces et à indemniser la victime. Les demandes se font en conformité avec les règles de procédure de la Cour du Banc de la Reine. L'auteur prétendu de harcèlement reçoit notification de la demande et l'audience se déroule devant un juge de la Cour du Banc de la Reine. L'audience peut se dérouler de toute manière que la Cour estime appropriée. La preuve peut être présentée sous forme de témoignages de vive voix ou encore par affidavit.

Dans une ordonnance de prévention, le tribunal peut ordonner que la victime reçoive une indemnisation pour des dommages-intérêts particuliers découlant du harcèlement, tels qu'une perte de revenus, les frais engagés pour recevoir des services de counselling, pour déménager ou renforcer la sécurité de sa maison. L'ordonnance peut également contraindre le harceleur à restituer les biens de la victime, à obtenir des services de counselling à ses propres frais, à remettre au tribunal tout bien qu'il utilise dans ses activités de harcèlement (y compris son permis de conduire), ou à déposer un cautionnement visant à garantir qu'il se conformera à l'ordonnance.

Indemnisation

L'avant-projet de loi fait du harcèlement avec menaces un délit et donne ainsi la possibilité à la victime d'obtenir toutes les mesures de redressement possibles dans le cadre d'une poursuite civile, y compris des dommages-intérêts et des injonctions. L'éventail des dommages-intérêts que la victime peut se voir accorder dans le cadre d'une poursuite civile pour harcèlement avec menaces comprend les dommages-intérêts pour la perte de revenus éventuels, les dommages-intérêts pour souffrances et douleurs, les dommages-intérêts supplémentaires et les dommages-intérêts punitifs.

L'avant-projet de loi modifierait la *Loi sur l'indemnisation des victimes d'actes criminels* de sorte à prévoir l'indemnisation des victimes pour des blessures qui découleraient du harcèlement avec menaces. Ainsi, les victimes de harcèlement criminel seraient au moins indemnisées pour certaines des pertes qu'elles ont subies. Le niveau de protection obtenu grâce à la nouvelle loi permettrait à la victime d'obtenir une certaine indemnisation financière, et ce, d'une manière à la fois rapide, efficace et peu coûteuse.

Questions diverses

En vue de protéger l'identité de la victime, l'avant-projet de loi exigerait que son adresse ne soit pas divulguée au moment de la demande d'ordonnance. Il lui serait également possible de demander au tribunal de rendre une ordonnance interdisant la publication de tout renseignement permettant d'identifier une partie ou un témoin dans le cadre d'une poursuite engagées en vertu de la Loi. Dans les cas où elle ne connaît pas l'identité de l'auteur du harcèlement, la victime peut, afin d'être en mesure d'obtenir une ordonnance, s'adresser à la police pour obtenir son aide en vue de trouver l'identité du harceleur.

Même s'il a pour but premier d'assurer la protection des victimes de harcèlement avec menaces, l'avant-projet de loi respecte également ceux de l'auteur prétendu du harcèlement. La Commission reconnaît que la réputation d'une personne innocente peut être ternie si le public apprend que l'on a rendu contre elle une ordonnance de protection. Par conséquent, l'avant-projet de loi prévoit l'application automatique d'une ordonnance de non-publication temporaire visant tout renseignement qui permettrait d'identifier une partie à la poursuite. Cette ordonnance demeurerait en vigueur jusqu'à ce que l'auteur prétendu de harcèlement ait eu l'occasion raisonnable de contester la validité de l'ordonnance de protection. Toute personne qui enfreint cette ordonnance de non-publication encourt des pénalités sévères.

Non-respect des ordonnances du tribunal

La violation des ordonnances rendues sous le régime de l'avant-projet de loi ferait l'objet de sanctions, bien que celui-ci n'en prévoie pas expressément. Trois recours sont possibles dans le cas d'une loi ne comportant pas de dispositions expresses à ce sujet : un recours civil pour outrage au tribunal, un recours pénal pour outrage au tribunal et le recours prévu au paragraphe 127(1) du *Code criminel*. Ces recours donnent à la victime et au tribunal saisi de la cause une gamme de sanctions suffisamment large pour contrer un harceleur persistant, notamment au moyen de fortes amendes ou de peines d'emprisonnement sévères.

HARCÈLEMENT AVEC MENACES ET VIOLENCE CONJUGALE

Même si l'avant-projet de loi a pour but de lutter contre le harcèlement avec menaces, il peut également jouer un rôle dans la diminution des cas de violence conjugale. Il arrive souvent que la violence conjugale donne lieu à des comportements qui correspondent à du harcèlement avec menaces au sens de l'avant-projet de loi. Ainsi, la victime de violence conjugale pourrait bénéficier des mesures de redressement accordées en vertu de l'avant-projet de loi. Cependant, il faut reconnaître que, puisque l'avant-projet de loi vise le harcèlement avec menaces et non pas la violence conjugale, il ne prévoit pas certaines des mesures conçues en vue de réduire la violence conjugale en soi. La Commission entendait se pencher sur cette question, mais ne sera pas en mesure de le faire.

CONCLUSION

La *Loi sur la protection, la prévention et l'indemnisation en matière de harcèlement avec menaces* met à la disposition des victimes de harcèlement criminel toute une gamme de mesures de redressement et de procédures propres à les aider à résoudre leur problème rapidement, facilement et sans engager de dépenses importantes. Même si la Loi constituera un outil efficace pour lutter contre le harcèlement, on ne saurait la considérer comme une panacée et la Commission est consciente, à cet égard, qu'il reste encore un long chemin à parcourir notamment dans les domaines suivants : la réhabilitation des auteurs de harcèlement, le counselling qui leur est offert, les programmes d'aide aux victimes et la sensibilisation à la question des intervenants en matière d'administration de la justice.

Les textes législatifs à eux seuls ne suffisent pas à résoudre le problème du harcèlement avec menaces. Toutefois, l'avant-projet de loi annexé au rapport représente un progrès marqué dans la lutte contre ce problème épineux.