



R. v. Elliott, 2016 ONCJ 35 (CanLII)

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CITATION: *R. v. Elliott*, 2016 ONCJ 35

ONTARIO COURT OF JUSTICE

B E T W E E N :

HER MAJESTY THE QUEEN

— AND —

Gregory Alan Elliott

Before Justice Brent Knazan

Reasons for Judgment released on January 22, 2016

Ms. Marnie Goldenberg counsel for the Crown

Mr. Christopher R. Murphy..... counsel for the defendant Gregory Alan Elliott

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BACKGROUND

Introduction

Gregory Elliott is charged with criminally harassing two women, Stephanie Guthrie and Heather Reilly, by repeatedly communicating with them knowing that they were harassed; and by the repeated communication causing them to reasonably, in all of the circumstances, fear for their safety. He is also charged with violating a bond binding him to keep the peace.

Mr. Elliott, a graphic artist, met Ms. Guthrie once and then exchanged emails with her about his offer to design a poster and a logo for free for her Women in Toronto Politics (WITOPoli) group, and he may have met her one other time.

Mr. Elliott and Ms. Reilly never met and never emailed each other.

The case against Mr. Elliott is criminal harassment by “tweeting”, or sending tweets. Tweets are messages that persons with Twitter accounts send to one another or to the world at large. Twitter is a social medium that people use to communicate succinctly with other people who have Twitter accounts.

Mr. Elliott sent some tweets directly to both women, but the prosecution does not rely on the direct tweets alone. Ms. Guthrie’s harassment and fear came from her perception that Mr. Elliott sent an incessant and obsessive amount of tweets, including those not sent directly to her but of which she would have been advised. Ms. Reilly became fearful when she inferred from one of his tweets that Mr. Elliott might be in the same physical place as her. The alleged communication by tweeting also includes tweets by Mr. Elliott about subjects, topics, ideas and events that Ms. Guthrie and Ms. Reilly were interested in and therefore might or probably would read.

[Section 264](#) of the *Criminal Code* is a detailed definition of a complicated charge with several constituent elements. One issue is whether Mr. Elliott’s tweets about topics and events that the complainants were likely to read amount to indirect communication with Ms. Guthrie and Ms. Reilly, as the section contemplates.

The prosecution must also prove that his tweets harassed them. If so, another issue is Mr. Elliott’s knowledge that they were harassed. The prosecution must also prove that the communication caused the complainants to fear for their safety, and finally that the fear was reasonable in all of the circumstances.

I begin with what Twitter is.

Twitter

One cannot understand this case without knowing about Twitter. The evidence about Twitter – what it is, how it works and how its users understand that it works – came from four sources: the evidence of Police Constable Dayler, who is qualified as an expert in Twitter; the evidence of Ms.

Guthrie, who works as a consultant and depends on Twitter for her work, and who tweets and reads others' tweets extensively; the evidence of Ms. Reilly, who had sent over 300,000 tweets at the time she testified; and the tweets of Mr. Elliott, who did not testify but expressed his views about Twitter in some tweets that he sent.

This judgment does not preface every reference to Twitter with the words "based on the evidence," but all the references to it come from these four parts of the evidence. There are gaps in the evidence about Twitter; there is no evidence of how Twitter works in any technical sense. However, I restrict myself entirely to the evidence. A case of criminal harassment over social media cannot turn on whether the judge happens to know or use social media, though I do take judicial notice of facts that need no proof. Twitter is pervasive; many famous persons tweet, and many newspaper articles and radio and television programs suggest obtaining more information on a topic by resorting to Twitter.

Twitter has its own language, and one cannot discuss the evidence without recourse to it. My definitions derive from explanations by three witnesses who were not always clear or consistent among themselves.

Twitter is a freely accessible online platform where people can engage in micro-blogging, sending short messages to individual followers or the general public.

A **tweet** is a message sent on Twitter, and is limited to 140 characters but can include links to other content on the internet.

To tweet is to send a message on Twitter. It can but need not be addressed to another user or person; one can send a tweet without addressing it. In this judgment I use "to tweet" or "tweeted" to describe such a general message on Twitter; if the tweet is to another person or persons, the terminology is "tweeted to".

A **Twitter account** enables the account holder to tweet and receive tweets. A Twitter account can be opened by submitting a valid email address and a name that can be either real or fake.

A **user's name** in Twitter is called a "**handle**". It takes the form of the "at sign" (@) followed by a name or initials, or just a word or words. It is also called a "username".

A **follower** is a person who signs up to read someone's tweets. The permission of the person followed is not required unless the account is private. To **follow** any other Twitter user, one need only click the word "follow" next to a handle on a box with a blue bird on the Twitter screen.

A tweet that starts with the intended recipient's handle will also be seen by those who follow either the sender or the receiver, according to P.C. Dayler.

A **mention** occurs when a handle is put after text of the tweet. The user whose handle is mentioned is advised (sometimes termed notified), and can access the tweet that mentioned them. It is not clear how they are advised and what they must do in order to see the tweet.

A **direct message**, seen as "DM" or "D" on the screen of the tweet, is a Twitter feature that allows the sender to communicate with just one user rather than to a public forum or stream.

A **locked** or **private account** is one that only those whom the account holder approves can follow.

To **favour** a tweet is to indicate a positive response to a received tweet.

To **unfollow**, by clicking on the "unfollow" button, is the reverse of "follow". According to P.C. Dayler, if you unfollow someone then you cease to receive their tweets, but you will still see tweets from others you follow that reference the person.

To **retweet**, seen as "RT" on the screen of the tweet, is to share a message with one's own followers without changing it. To **signal boost** is to widely diffuse a tweet by retweeting.

To **modify a tweet**, seen as "MT", is to fix grammatical or spelling errors but not change the content of a tweet. One can also modify a tweet by commenting on it or adding information.

Hashtag, the number sign (#) followed by text, usually identifies a topic. Anyone can create one; once it is created, anyone can follow the hashtag and receive all tweets that use it, from anyone, anywhere, regardless of who they are writing to. (It did not clearly emerge if this applies to direct messages.)

Twitter rules are rules published by Twitter. One must agree to them in order to obtain an account. They address what is allowed in modifying tweets and what Twitter considers to be abuse.

A **feed** or **newsfeed** enables a user to create specific feeds or lists that only give information that the user wants to follow, such as a type of tweet, or tweets from certain media outlets, or hashtags, according to P.C. Dayler. Ms. Reilly used feed to mean the activity on her account.

A **troll** is an individual or a group that constantly causes problems by making negative comments and engaging in online bullying. A **concern troll** is someone who pretends to be sympathetic about a topic or discussion while trolling.

Calling out is singling out someone for what they are doing or are, or directly confronting a user.

To **storify** is to create a record of tweets or other communications.

Avatar: an image chosen by an account holder that shows on every tweet they send. It can be a photograph or a cartoon, or the space for it can be left blank

Open account: one that isn't blocked. Anyone, even a person without a Twitter account, can see the tweets in an open account on the Twitter website.

To **tag** (defined by Ms. Guthrie) is to use someone's handle; she compared it to copying someone on an email.

To **subtweet** is to refer to another tweet in text without quoting or retweeting the original tweet.

Block: to set your account so that someone cannot send you tweets.

A **period (.) before a handle** was the subject of conflicting views. P.C. Dayler treated the period as any other character put before a handle. "Putting any character before [a handle that starts a tweet], whether it's a word, whether it's a period, whether it's anything like that ... [means] that message is viewable by only people necessarily who follow the creator of that content." So his view is that putting a period before a handle reduces diffusion of the tweet.

Ms. Guthrie and Ms. Reilly distinguished the period from other text.

Ms. Guthrie explained, according to the transcript, "If you start a tweet with a person's handle, only people [who] follow both you and that user can see the tweet. If you add a period in front ... everyone who follows you can see the tweet in their stream whether or not they follow the person you're tweeting at."

Ms. Reilly said, "The use of a period before a user name is so that people who don't follow Greg Elliott or don't follow myself [and]* Greg Elliott would see that I directed a statement at him. Without that period, the only person that would have seen that statement would be Greg_A_Elliott, as well as anybody who happened to follow both my account and that account. ... when you put the period though ... the entire world" can see it. She added, "There is no limitation to it being able to be viewed. Anyone who has a Twitter account, or anyone who ... would have logged on to @LadySnarksALot would have seen that in my public display."

* transcribed as "at"

FRAMEWORK

The Charges

Gregory Alan ELLIOTT, sometime between and including the 1st day of August in the year 2012 and the 20th day of November in the year 2012 in the City of Toronto, in the Toronto Region, knowing that Stephanie GUTHRIE is harassed, did repeatedly communicate directly or indirectly with Stephanie GUTHRIE thereby causing Stephanie GUTHRIE to reasonably, in all the circumstances, fear for her safety, contrary to the [Criminal Code](#)

and further that Gregory Alan ELLIOTT, sometime between and including the 1st day of August in the year 2012 and the 20th day of November in the year 2012 in the City of Toronto, in the Toronto Region, knowing that Heather REILLY is harassed, did repeatedly communicate directly or indirectly with Heather REILLY thereby causing Heather REILLY to reasonably, in all the circumstances, fear for her safety, contrary to the [Criminal Code](#)

and further that Gregory Alan ELLIOTT, sometime between and including the 1st day of August in the year 2012 and the 20th day of November in the year 2012 in the City of Toronto, in the Toronto Region did being at large on his recognizance bound under section 810 entered into before a Justice and being bound to comply with a condition of that recognizance directed by the said Justice, fail without lawful excuse to comply with that condition, to wit; Keep the peace and be of good behaviour, contrary to the [Criminal Code](#)

The Crime of Criminal Harassment

[Section 264](#) of the [Criminal Code](#) reads:

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

- (2) The conduct mentioned in subsection (1) consists of
 - (a) repeatedly following from place to place the other person or anyone known to them;
 - (b) repeatedly communicating with, either directly or indirectly, the other person or anyone known to them;
 - (c) besetting or watching the dwelling-house, or place where the other person, or anyone known to them, resides, works, carries on business or happens to be; or
 - (d) engaging in threatening conduct directed at the other person or any member of their family.
- (3) Every person who contravenes this section is guilty of
 - (a) an indictable offence and is liable to imprisonment for a term not exceeding ten years; or
 - (b) an offence punishable on summary conviction.
- (4) Where a person is convicted of an offence under this section, the court imposing the sentence on the person shall consider as an aggravating factor that, at the time the offence was committed, the person contravened
 - (a) the terms or conditions of an order made pursuant to section 161 or a recognizance entered into pursuant to section 810, 810.1 or 810.2; or
 - (b) the terms or conditions of any other order or recognizance made or entered into under the common law or a provision of this or any other Act of Parliament or of a province that is similar in effect to an order or recognizance referred to in paragraph (a).
- (5) Where the court is satisfied of the existence of an aggravating factor referred to in subsection (4), but decides not to give effect to it for sentencing purposes, the court shall give reasons for its decision.

The offence, as Parliament has defined it under [section 264](#), is complex. The application of subsection (2)(b) is even more complex in relation to Twitter, in which communication with individuals directly and indirectly overlaps with communication with everyone using the service, and communication with everyone else using the service becomes indirect communication with individuals. I will first outline what the prosecution must prove.

In *R. v. Kosikar*,^[1] Justice Goudge, following Justice Proulx in the Quebec Court of Appeal in *R. v. Lamontagne*,^[2] agreed with this description of the five elements of the offence that originated in a 1997 decision of the Alberta Court of Appeal in *R. v. Sillipp*:^[3]

- 1) It must be established that the accused has engaged in the conduct set out in [s. 264\(2\)](#) (a), (b), (c), or (d) of the [Criminal Code](#);
- 2) It must be established that the complainant was harassed;
- 3) It must be established that the accused who engaged in such conduct knew that the complainant was harassed or was reckless or wilfully blind as to whether the complainant was harassed;
- 4) It must be established that the conduct caused the complainant to fear for her safety or the safety of anyone known to her; and
- 5) It must be established that the complainant's fear was, in all of the circumstances, reasonable.

The description essentially rearranges the elements in the offence that emerge from the section. In *Lamontagne*,^[4] Justice Proulx rejoins the fourth and fifth elements as they are in the section, while adopting the *Sillipp* description, and organizes the *actus reus* into three elements, from which I take the following:

Actus Reus – the culpable behaviour and consequences

The three elements of the *actus reus* are:

- the act prohibited under subsection (1), in this case repeatedly communicating directly or indirectly under subsection (2)(b),
- the fact that the victim is harassed and
- the effect that this act provokes in the victim.

Harassment means causing someone to be tormented, troubled, worried continually or chronically plagued, bedevilled and badgered. It is not sufficient that the complainant be “vexed, disquieted or annoyed.” (*Kosikar*, paragraph 21)

Mens Rea – the mental element

With respect to the mental element of the offence, all of the appeal courts resort directly to subsection (1) – the defendant must know or be reckless as to whether the complainant is harassed – and add wilful blindness.

While addressing this mental element, the specific statutory state of mind, the authorities from three of the provinces (*Sillipp*, *Lamontagne* and *Kosikar*), were dealing with the prohibited behaviour in subsection (d), threatening. Only *R. v. Rybak*^[5] in the British Columbia Court of Appeal dealt with (b), repeatedly communicating. That case involved delivery of a package, a dinner invitation and a personal appearance at the complainant's house on Valentine's Day.

Those courts did not address the *mens rea* of communicating directly or indirectly. While in most cases the general intent required for committing that part of the *actus reus* will be self-evident, since the case involves Twitter I address the mental element in relation to the *actus reus* of repeatedly communicating. This is because some of the communication that is alleged to constitute the repeated communication is tweets using hashtags that could have been conveyed to the complainants or that they could have seen, but Mr. Elliott did not necessarily intend or know that.

The mental element that the charging section and the charge specify relates to the part of the *actus reus* that involves awareness of the complainant being harassed. Justice Proulx makes clear in *Lamontagne* that the complainant must be harassed in fact as a consequence of the prohibited act, and Justice Goudge in *Kosikar* accepts that the complainant must be in a state of being harassed as a consequence of the prohibited contact.

Further, judicial interpretation of the section establishes that the defendant must be responsible for the harassment that the complainant is experiencing. At paragraphs 15 and 16 of *Lamontagne*, Justice Proulx states as follows:[6]

Ce deuxième élément de l'actus reus, à savoir que la plaignante soit harcelée, ressort plus clairement de la version anglaise du texte qui exige la connaissance que la plaignante "is harassed", alors que la version française réfère à la connaissance que la plaignante "se sente harcelée". Dans l'arrêt *R. v. Rybak* (1996), 1996 CanLII 1833 (BC CA), 105 C.C.C. (3d) 240, la Cour d'appel de la Colombie-Britannique a aussi interprété l'art. 264 comme exigeant la preuve de la connaissance par l'accusé que la plaignante a été de fait harcelée, concluant que le premier juge n'avait pas erré "in finding that appellant knowingly or recklessly harassed the complainant". (*Rybak* as spelled in original)

D'ailleurs, quand dans la version française il est stipulé que la connaissance ou l'insouciance que la plaignante se sente harcelée cela implique que l'auteur, par son fait, a contribué au harcèlement de la plaignante puisqu'on pourrait difficilement lui imputer une connaissance d'un état dont il n'est pas responsable.

English version from 1998 CanLII 13048 (QC CA), 129 C.C.C.(3d)181:

The second element of the *actus reus*, that is the complainant was harassed, appears even more clear in the English version of the text which requires knowledge that the victim "is harassed", whereas the French version refers to knowledge that the complainant "feels harassed". In *R. v. Rybak* (1996), 1996 CanLII 1833 (BC CA), 105 C.C.C. (3d) 240, the British Columbia Court of Appeal also interpreted s. 264 as requiring proof of the accused's knowledge that the complainant was in fact harassed, concluding that the trial judge had not erred "in finding appellant knowingly or recklessly harassed the complainant".

Furthermore, when in the French version it is stipulated that there be *knowledge or recklessness that the complainant feels harassed*, that implies that the perpetrator, by his own act, contributed to the harassment of the complainant because one can hardly impute to him knowledge of a state of being which he is not the cause of. (Emphasis only in English translation)

I rely on the original as well as the translation because in my opinion it is arguable whether or not the apparently unofficial English version fully conveys Justice Proulx's "on pourrait difficilement lui imputer une connaissance d'un état dont il n'est pas responsable." Also, the translation has emphasis that does not appear in the online original.

Knowledge

Knowledge means actual knowledge; as the Ontario Court of Appeal stated in *R. v. Zundel*,^[7] the accused must know. A specific state of mind is specified in this section, which does not admit of anything less than knowledge, or recklessness as contemplated by the section and the form of charge in the *Criminal Code*. Don Stuart argues^[8] that *Zundel* is wrong and that the ruling is moot because the Supreme Court declared the section in question unconstitutional. But I hold, following the reasoning in *Zundel*, that knowledge requires that the accused actually knew. This also flows directly from the word without resort to authority: "knowing" requires that someone knows.

Kosikar includes wilful blindness, which is a narrow, specific state of mind. In *R. v. Brisco*, the Supreme Court said wilful blindness can "substitute for actual knowledge whenever knowledge is a component of the *mens rea*."^[9]

A court can properly find wilful blindness only where it can almost be said that the defendant actually knew. He suspected the fact; he realised its probability; but he refrained from obtaining the final confirmation because he wanted in the event to be able to deny knowledge.^[10]

The specific mental element of this offence has another feature: it requires knowledge of the mental or emotional state of another. A defendant's state of mind is always to be inferred, by either circumstantial evidence or their statements. Here, the specified intent has an unusual feature because it is a mental element of a crime that requires knowledge of another's mental or emotional state. To determine what the defendant knew, I must analyze what he must have inferred about the complainants' states of mind.

Recklessness

Recklessness means actual foresight of risk, according to Don Stuart, who cites *R. v. Sansregret* (1985). It has an element of the subjective. Courts have defined it in different ways but essential to all is an awareness of risk and a decision to act notwithstanding it. As Justice McIntyre said in *Sansregret*:^[11]

“It is found in the attitude of one who, aware that there is a danger that his conduct could bring about the results prohibited by the criminal law, nevertheless persists, despite the risk.”

Fear for Safety

The final requirement of this offence is that the complainant have a fear for her safety that is reasonable in all of the circumstances. The fear must be proven as a fact, though this is subjective to the complainant. The fear must be for her safety. The fear must be reasonable in all of the circumstances.

The word “reasonable” imports an objective evaluation of another person's – the complainant's – feeling, however real and genuine that feeling might be.^[12]

And the word “all” is as much a part of the section as every other word in it. Thus I must objectively evaluate the complainants' fears in view of all of the circumstances. In a charge of criminal harassment by means of Twitter, when there can be multiple tweets between the complainant and the defendant within a few minutes, and many tweets from others, some of which contribute to the circumstances, that can amount to a lot of circumstances to consider.

The Proof of the Tweets

The alleged repeated communication is communication using Twitter only. The complainants testified that they sent certain tweets, and that they saw and received certain tweets. However, both complainants tweet prolifically, and they could not remember all the tweets that they received or sent.

The proof of the tweets being sent, and their content, which the prosecution argues harassed the complainants and caused them to fear for their safety, is the whole of the case on the act of repeated communication. Ms. Reilly and Ms. Guthrie testified to other elements of the offence and confirmed that they had sent some tweets, which are relevant circumstances, and received and read some of the tweets. But without the tweets that Mr. Elliott sent, there is no proof of repeatedly communicating.

The prosecution seeks to prove the repeated communication by introducing an electronic record of the tweets into evidence. These records were obtained as follows. Detective Bangild, who has training in digital technology and using the internet as an investigative tool, received the complaints. He investigated using a computer program from the Sysomos company. To use this program requires a licence, which anyone can acquire, and the Toronto Police Service had acquired one. A person's public tweets are available to anyone on the public platform, as Twitter does not protect its users' tweets, so no search warrant was required.

Along with a civilian proficient in computers, Det. Bangild had tried to access the tweets of the complainants and Mr. Elliott using the public platform. That is, they looked on Twitter's website, where anyone can go to read tweets (without a Sysomos licence). This approach limits the number

of tweets by period of time, and does not capture erased tweets. He decided that to investigate properly required looking at many more tweets than were visible on the public platform, so he resorted to the Sysomos software. P.C. Dayler explained that the Sysomos software does not save pictures or videos that were attached to the tweets, but only the text of the tweets.

Det. Bangild spoke to Ms. Guthrie and Ms. Reilly as well as another woman. He decided that for each complainant he would look for the “conversation between” the complainant and Mr. Elliott. He conducted this search by looking for every tweet that each complainant sent that contained Mr. Elliott’s handle, and every tweet that Mr. Elliott sent that contained either complainant’s handle.

He also searched for tweets that Mr. Elliott sent that contained certain hashtags. From the complainants’ evidence, I infer that the complainants reported to the police that Mr. Elliott was communicating with them by sending tweets using hashtags that, in the case of Ms. Guthrie, he knew that she had either created or followed, and in the case of Ms. Reilly, that he knew that she followed.

Det. Bangild also searched for the hashtag #fascistfeminists, which one of the complainants advised him that Mr. Elliott had either created or used. The complainants either did not disclose or Det. Bangild did not search the hashtag #GAEhole that someone had created in relation to Mr. Elliott.

When Det. Bangild printed out the results of his search, he produced tables of tweets. The first column contains a URL link to where the tweet can be found on the internet; there the tweet is shown with the sender’s handle. The second column states the date the tweet was sent. The third column contains the content of the tweet. The prosecution introduced these search results into evidence.

This format, in the case of the tweets searched by sender (a complainant or the defendant) that contains the other’s handle, gives the impression of an exchange when the tweets follow closely in time. Indeed Det. Bangild titled the documents “Conversation Between Stephanie Guthrie and Gregory Elliott” and “Conversations Between Reilly and Elliott.”

The tweets in this form do not appear as they would to someone tweeting or looking up tweets on the internet at Twitter’s site without using the Sysomos software. For one thing, the content of the tweets is sometimes garbled, as punctuation comes out as symbols in the Sysomos program. To see what the original viewers saw requires opening the full tweet. To this end, the prosecution introduced into evidence computer files on disks (DVDs) with the Sysomos software search results.

Clicking open a tweet in a file on a disk from which the tables were produced does show what the receiver of the tweet or a person looking for the tweet would see if they are connected to the internet. The screen displays much more information than the printed charts contain: the layout of the tweet, information about whether it was retweeted, received or favoured, links to attachments that accompanied the tweet and, importantly, other tweets that reply to or reference the tweet after it was sent in addition to showing some tweets in a person’s account that preceded or followed the tweet in question.

This method of proving the tweets raises evidentiary issues. They are

- the proof that Mr. Elliott sent the tweets that the prosecution attributes to him;
- which tweets are in evidence; and
- what use the Court can make of the tweets.

The proof that Mr. Elliott sent the tweets attributed to him

Mr. Elliott submits that as there is no evidence from Twitter or from an expert in Twitter or the Sysomos software able to vouch for the accuracy of the tweets attributed to him, the Crown has not proven that he sent the tweets, and therefore the DVD and the printouts allegedly containing the tweets contain hearsay evidence.

The contents of the tweets are not hearsay, and the Crown is not producing the tweets to prove the truth of their contents. Some tweets contain insulting allegations and descriptions of the complainants, some of the defendant. Many are unprovable in that the content consists of opinion. Indeed, this is one of Mr. Elliott's contentions.

This distinction between proof of contents and proof that something was said is fundamental. Justice Charron in *R. v. Khelawon* stated,[13]

At the outset, it is important to determine what is and what is not hearsay. ... The essential defining features of hearsay are therefore the following: (1) the fact that the statement is adduced to prove the truth of its contents"

The purpose for which the out-of-court statement is tendered matters in defining what constitutes hearsay because it is only when the evidence is tendered to prove the truth of its contents that the need to test its reliability arises.

While the disks and printouts are not hearsay with respect to the content of the tweets, because they do not purport to prove the truth of the content, they are hearsay insofar as proving that the tweet was sent by Mr. Elliott.

P.C. Dayler and Det. Bangild testified that the Sysomos software is reliable and that they have used it in the past to call up tweets that were sent and received. This is evidence, though not sufficient, that these tweets were sent from the accounts of the specified handles on the reported date and time, and the tweets said what was introduced into evidence.

But this evidence does not stand alone. In the middle of their Twitter exchanges, Mr. Elliott met Ms. Guthrie for dinner and exchanged emails with her. Tweets from the handle attributed to Mr. Elliott by the complainants refer directly to the dinner. This is evidence that the person who had dinner with Ms. Guthrie sent those tweets. And Ms. Guthrie identified Mr. Elliott in court as the person she had dinner with.

Once the handle is proven to be Mr. Elliott's, and one tweet from that handle shows up in the Sysomos search, that is sufficient to prove that he sent all the others that the search yields.

There is no evidence that anyone else had access to Mr. Elliott's handle or could access his account. As soon as one tweet on the disk with the Sysomos search results and in the printout is confirmed, it is not necessary to prove each and every one.

The hearsay complained of next is the information on the disk resulting from the Sysomos software that the sender sent the tweets on the time and date specified. A tweet from April 19 refers to the dinner the night before, as does an email from Ms. Guthrie. As both officers testified that they have used the Sysomos software in the past and that it reliably yields tweets that have been sent, I see no reason to question any of the other tweets with regard to dates. As the late great evidence scholar Ronald Delisle would point out, the location of the hands on a clock may be hearsay, but we accept a witness testifying to the time from having looked at them. I find that Mr. Elliott sent the tweets listed on the dates referred to in Exhibit 2, the disk and printout.

This leads to another of Mr. Elliott's arguments about the prosecution's evidence of the tweets: the possibility that they have been changed since they were sent. Indeed, the court must be vigilant when dealing with the internet that the material reported to be on it has not been altered. As Justice Trotter said about photographs on the internet in *R. v. Andalib-Goortani*,[14]

Materials taken from websites and offered as evidence in court must be approached with caution, especially in a case such as this where no one is prepared to step forward to say, "I took that photo and it has not been altered or changed in any way." Several U.S. cases warn about the possibility of tampering in this context.

Commenting on the same case, Professor David Tanovich also warns of changes in internet evidence.[15] Indeed, the prosecution's case not only relies on the tweets listed on the disk but on the judge being connected to the internet in order to view the exhibits!

Even if there is no concern about tampering with the tweets that were presented to the police as discussed in relation to photographs in *R. v. Andalib-Goortani*, it is possible that the evidence can change between the time that the defendant is charged and the different stages of the trial. The prosecution's reliance on evidence extracted from the internet led to two dramatic demonstrations of how the risk of a changing evidentiary foundation during the course of a trial can arise with internet evidence.

At one point during the testimony of Ms. Reilly, Crown counsel tried to open the link to one of the tweets on the disk and could not because Ms. Reilly had locked her account and made it private the day before she testified. Therefore the Crown, the police, the Court and the defendant could only see a screen that said, "Sorry: you're not authorized to see the status." Ms. Reilly unlocked her account and the trial continued.

The problem arose again after presentation of the evidence concluded. Defence counsel attempted to open the links of the tweets on the disk to the internet so that he could prepare his submissions, only to discover that Ms. Reilly had again locked her account. Crown counsel quite reasonably acknowledged the problem and took on the task of opening every tweet in the exhibits and printing them, so that the court had the tweet, at the time that Det. Bangild obtained it using the Sysomos software, opened as it would have appeared to the person receiving it. These tweets were then printed and entered as exhibits, the third version of Exhibit 2: the bound, blue-covered volumes.

No suggestion was made by the defence or the Crown that anyone altered the contents of the tweets between the tweet being sent and the Crown printing them. Thus the tweets were frozen and made permanent, at least as they appeared at the time that Crown counsel printed them. However, as some of the tweets include links to articles or other sites on the internet, the Court would still need to be connected to the internet to access the tweet in context, as described above – if the items linked to still existed, given P.C. Dayler's testimony that a Sysomos search does not capture attachments. But for the most part, printing the full tweets solved the problem of the evidence changing and access to the evidence depending on decisions taken by the account holder outside the trial.

However, the printed versions highlight another of Mr. Elliott's attacks on the manner in which the tweets became evidence: the selective nature of the relevant tweets resulting from Det. Bangild's search method.

Det. Bangild searched only tweets sent by the defendant with the complainants' handles, those sent by the complainants with the defendant's handle, plus certain tweets by the defendant using specified hashtags. He did not include any tweets sent by any of the three that did not use one of the other two handles or, in the case of Mr. Elliott, the chosen hashtags.

However, the printed tweets do show some tweets in the sender's account close in time to those on the disk – whether from the complainants, the defendant or others – that appear to form an exchange.

The defendant takes the position that only the tweets that the witnesses have "authenticated" (by which he means "confirmed receipt" or "confirmed sending") are evidence. As stated above, I do not agree with this, and the Crown has proven that the tweets on the disks were sent (but did not prove the truth of their contents).

On the other hand, the defendant argues that the proven tweets do not give the full picture of the Twitter action – i.e., do not provide "all the circumstances" as set out in the charge – and indeed tried to introduce tweets sent by others through cross-examination of the complainants. The Crown objected and I allowed the objections, as the witnesses could not know anything about them.

However, I agree with the defendant that I cannot fully understand all the circumstances within the meaning of [s. 264](#) with respect to the proven tweets without seeing the tweets that precede them on the printed-out page. When other tweets appear on the page of the printed tweets, which are in the end the exact product of the Sysomos search, they are then as much a part of the evidence as the original tweets. Their provenance and date are proven just as much as the main tweet that led to

the result that Det. Bangild obtained. There is no difference between them and the searched-for tweets, even if no witness has confirmed that they were sent.

It is not relevant whether the Crown and the defendant agreed that the only tweets in evidence are those authenticated in the ways that the parties have defined. If I cannot give meaning to the content of an introduced tweet without resort to other tweets that appear when the link is open, then the meaning of that tweet cannot be fully understood. The Crown relies on Mr. Elliott's tweets to show that he was repeatedly communicating, that what he was repeatedly communicating harassed the complainants and caused them to have a reasonable fear for their safety, and that he knew that they were harassed.

I agree with the defendant that the case falls if only the tweets that Det. Bangild searched are in evidence. The Crown will then have failed to prove the circumstances of the case necessary for the Court to assess whether the elements of the offence have been proven. The correct solution to this, now that the tweets have been brought up and printed and made exhibits, is to consider any relevant tweets that shed light on the tweets proffered as proof of the offence.

There is evidence that important tweets were not picked up by the Sysomos search and thus that this concern of the defence was not unfounded, which is one circumstance of this case. With two examples I will explain how they enter into evidence.

On August 12, Ms. Reilly retweeted a tweet from @tapesonthefloor: "RT @tapesonthefloor Given that my '#TOPoli strategies' involve #WiTOPoli being able to contribute unharassed, @greg_a_elliott, you're not actually that far off." The Sysomos search captured Ms. Reilly's retweet because she sent it and it contains Mr. Elliott's handle.

During deliberations, when I attempted to open the link to this tweet on Exhibit 2, the disk from the search, I could not open the tweet. I received the message:

Unable to open <http://twitter.com/LadySnarksalot/statuses/234757277016543233>.
Cannot locate the internet server or proxy server.

I do not know if this is because Ms. Reilly locked her account, as happened during the trial – thus the third dramatic incident in this trial – or because of another problem. In any event, that means Exhibit 2 is defective as a permanent exhibit and I must rely on Exhibit 2b, the tweets as printed in the blue volume.

In the expanded 2b is a tweet from @tapesonthefloor with Ms. Reilly's avatar cartoon below it and "1 Retweet".

Below that tweet is a tweet from Mr. Elliott: "@tapesonthefloor @rachelmack @amirightfolks You have accomplished nothing, and you will fall. Enjoy your AIDS, #TOPoli faggots." *[After delivering these reasons, I was advised that this tweet did not come from any Twitter account proven to be Mr. Elliott's. It follows that there is no evidentiary basis for stating that Mr. Elliott sent a homophobic tweet, used homophobic language or was homophobic, notwithstanding subsequent references to this tweet.]*

According to the search criteria this should have been captured in the search for tweets involving Ms. Guthrie because it contains her handle correctly spelled. But it is nowhere in Exhibit 2a (the table) nor in the expanded blue volume of 2A.

The second example arose in cross-examination. It is a tweet from Mr. Elliott to Ms. Guthrie: "@amirightfolks Sorry. But if you use that libel and hostile #GAEhole hashtag, I see it. Please stop harassing me pretending to be harassed." This tweet preceded one from Ms. Guthrie telling Mr. Elliott to stop contacting her, an important tweet in the case.

Crown counsel took the position in reply submissions that as the tweet is in Exhibit D, a lettered exhibit, it is not in evidence. But Ms. Guthrie agreed in cross-examination that she would have seen it because she replied to it. So the tweet is in evidence even if it is not in the exhibit. But it is not in the Sysomos chart 2a or the expanded tweets of 2a that I could see.

The Omission of Recklessness from the Charges

Although s. 264 prohibits certain conduct “knowing that another person is harassed or recklessly as to whether the other person is harassed”, both counts allege only “knowing” – that is, only that Mr. Elliott knew that Ms. Guthrie and Ms. Reilly were harassed.

Recklessness is a specific mental state that differs from knowledge as a form of *mens rea*. Only four charges in the *Criminal Code* make recklessness an element of the offence. Mr. Elliott was never arraigned on a charge alleging that he was reckless, and pleaded not guilty only to the counts as they now read.

At the conclusion of the evidence, both parties made submissions in writing. Both referred briefly to the mental element of recklessness as if it were charged when it was not.

When the trial continued with oral submissions on July 14, 2015 – 18 months after the trial began and more than 30 months after the charge was laid – I drew the omission to the attention of both counsel. At the conclusion of oral submissions when I adjourned the case for judgment, both parties agreed that I would determine the significance of the failure to allege recklessness.

After deliberations, I determined that Mr. Elliott could not be convicted on the basis of a mental element that was not alleged when he entered his plea. I further considered my obligation under s. 601(3) of the *Criminal Code* to amend the charge at any stage of the proceedings if it appeared that the indictment (in this summary conviction case, the information) fails to state or states defectively anything that is requisite or is in any way defective in substance.

I advised the parties of this on August 4, 2015. Mr. Elliott submitted that it was too late to amend the information, that he did not consent, and that his position was the proposed amendment could not be made without injustice being done. I then indicated that I was not inclined to amend the information on my own motion in the absence of consent, and did not do so.

Crown counsel then advised that she would consider her position and the next day applied to amend the information under s. 601 on the grounds that it defectively stated one form of the mental element requisite to constitute the offence. I subsequently heard more fulsome submissions on the operation, meaning and application of s. 601 of the *Criminal Code* to the circumstances of this case.

The relevant parts of s. 601 of the *Criminal Code* read:

601. (1) An objection to an indictment preferred under this Part or to a count in an indictment, for a defect apparent on its face, shall be taken by motion to quash the indictment or count before the accused enters a plea, and, after the accused has entered a plea, only by leave of the court before which the proceedings take place. The court before which an objection is taken under this section may, if it considers it necessary, order the indictment or count to be amended to cure the defect.

- (2) Subject to this section, a court may, on the trial of an indictment, amend the indictment or a count therein or a particular that is furnished under section 587, to make the indictment, count or particular conform to the evidence, where there is a variance between the evidence and
- (a) a count in the indictment as preferred; or
 - (b) a count in the indictment
 - (i) as amended, or
 - (ii) as it would have been if it had been amended in conformity with any particular that has been furnished pursuant to section 587.
- (3) Subject to this section, a court shall, at any stage of the proceedings, amend the indictment or a count therein as may be necessary where it appears
- (a) that the indictment has been preferred under a particular Act of Parliament instead of another Act of Parliament;
 - (b) that the indictment or a count thereof
 - (i) fails to state or states defectively anything that is requisite to constitute the offence,
 - (ii) does not negative an exception that should be negated,

- (iii) is in any way defective in substance,
 - and the matters to be alleged in the proposed amendment are disclosed by the evidence taken on the preliminary inquiry or on the trial; or
 - (c) that the indictment or a count thereof is in any way defective in form.
- (4) The court shall, in considering whether or not an amendment should be made to the indictment or a count in it, consider
 - (a) the matters disclosed by the evidence taken on the preliminary inquiry;
 - (b) the evidence taken on the trial, if any;
 - (c) the circumstances of the case;
 - (d) whether the accused has been misled or prejudiced in his defence by any variance, error or omission mentioned in subsection (2) or (3); and
 - (e) whether, having regard to the merits of the case, the proposed amendment can be made without injustice being done.
- (4.1) A variance between the indictment or a count therein and the evidence taken is not material with respect to
 - (a) the time when the offence is alleged to have been committed, if it is proved that the indictment was preferred within the prescribed period of limitation, if any; or
 - (b) the place where the subject-matter of the proceedings is alleged to have arisen, if it is proved that it arose within the territorial jurisdiction of the court.
- (5) Where, in the opinion of the court, the accused has been misled or prejudiced in his defence by a variance, error or omission in an indictment or a count therein, the court may, if it is of the opinion that the misleading or prejudice may be removed by an adjournment, adjourn the proceedings to a specified day or sittings of the court and may make such an order with respect to the payment of costs resulting from the necessity for amendment as it considers desirable.
- (6) The question whether an order to amend an indictment or a count thereof should be granted or refused is a question of law.
- (7) An order to amend an indictment or a count therein shall be endorsed on the indictment as part of the record and the proceedings shall continue as if the indictment or count had been originally preferred as amended.
- (8) A mistake in the heading of an indictment shall be corrected as soon as it is discovered but, whether corrected or not, is not material.
- (9) The authority of a court to amend indictments does not authorize the court to add to the overt acts stated in an indictment for high treason or treason or for an offence against any provision in sections 49, 50, 51 and 53.
- (10) In this section, "court" means a court, judge, justice or provincial court judge acting in summary conviction proceedings or in proceedings on indictment.
- (11) This section applies to all proceedings, including preliminary inquiries, with such modifications as the circumstances require.

Mr. Elliott opposed the application to amend on two grounds: that the section has no application because the prerequisites of [s. 601\(3\)](#) have not been met, and that consideration of the factors in [s. 601\(4\)](#) militate against allowing the amendment.

I begin with the first argument since if Mr. Elliott is correct that the section does not apply, that will end the matter. He relies on *R .v. McConnell*,^[16] in which the Crown sought an amendment that it did not need at the outset of the trial concerning the make of a car in a motor vehicle offence. The defence did not consent and the trial judge dismissed the application to amend. The Crown called no evidence.

Though the facts in *McConnell* are very different from this case, Justice Rosenberg made several statements that offer guidance in interpreting [s. 601\(3\)](#). As to whether there was a defect in the information's form, he stated: "The cases are remarkably unhelpful as to what constitutes a defect in

form or substance.” But he determined that however a defect in form or substance was defined, the information was not defective because it alleged offences known to law and complied with the sufficiency requirement of s. 581.

Here too, the counts are not deficient within the meaning of s. 581, and they disclose offences known to law. They are not defective in substance. The question remains whether they “fail to state or state defectively anything that is requisite to constitute the offence.”

In one sense they do not, for the same reasons that they are not defective in substance. They are perfectly good counts. Nor do they fail to state something that is requisite to constitute the offence: every element of the offence is present including the mental element. But the counts do state the mental element defectively. They entirely omit one way in which the requisite mental element of the offence could be committed if the section had been charged in full. Therefore I do not accept the argument that s. 601 is not even engaged. It is.

There is also no question that the information can be amended at this late stage in the trial, that is after the completion of submissions and adjournment for deliberations. Subsection 601(3) refers to “any stage of the proceedings”. And, that includes as late as an appeal, as in *R. v. Irwin*.^[17]

In *Irwin*, Justice Doherty was dealing with the power of the Court of Appeal to amend under s. 683. Justice Doherty had occasion to comment, though not directly, on amendments under s. 601(3) of the *Code*. He stated, at paragraph 18:

Elliot^[18] stands for the proposition that the court cannot substitute one charge for another under the guise of amending a defect in substance when the charge as initially laid was not defective in substance. *Elliot* does not address the question of the power to amend to make a charge conform to the evidence. That power of amendment is distinct from the other powers of amendment set out in s. 601 in that it is not premised on any defect in the language of the charge as initially laid, *but rather on a divergence between the charge as laid and the evidence as led*. (Italics and citation added.)

As Justice Rosenberg stressed in *McConnell* and as the section states, the matters to be alleged in the amendment must have been disclosed by the evidence under s. 601(3). If that prerequisite is met, I must again, following the word “shall” in s. 601(4), consider the five factors in the subsection. This means that despite the mandatory nature of the word “shall”, subsection (3) – which begins with “subject to this section, a court shall...” – is qualified. Thus, even if the prerequisites are met, a court is not required to amend the information but must still consider “whether or not an amendment should be made” after considering the factors in s. 601(4) (a) to (e) set out above.

In this case, Mr. Elliott concedes that he has not been misled or prejudiced in his defence within the meaning of s. 601(4)(d), but does argue that recklessness has not been disclosed by the evidence at trial under s. 601(3), which is the requirement for the amendment. He further argues that in the circumstances of the case referred to in s. 601(4)(c) and having regard to the merits of the case, making the amendment would cause an injustice within the meaning of s. 601(4)(e).

I begin with whether the matter to be alleged in the proposed amendment is disclosed by the evidence.

This proposed amendment and this case differ from the examples in which other courts have exercised the power regarding a fact such as a vehicle or a date that can easily be identified. This case involves a long trial in which the matter to be alleged is the specific *mens rea* of recklessness in a circumstantial case with regard to the accused’s state of mind.

Very recently, after the amendment issue arose here, Justice Caldwell of the Saskatchewan Court of Appeal thoroughly analyzed s. 603 of the *Criminal Code*. In *R. v. Koma* [2015] S.J. 420 he wrote: ^[19]

40 In the first two circumstances, by returning to the modern principle of statutory interpretation (Re *Rizzo*, para. 21), I conclude that, on their plain and ordinary meaning, the words used in ss. 601(3)(b)(i) and (iii) suggest the following: ...

"where it appears", i.e., it need only seem apparent to the court; ...

"and the matters to be alleged in the proposed amendment are disclosed by the evidence taken on the preliminary inquiry or on the trial", i.e., the offence alleged, when properly plead in the indictment or count, must be made out on the evidence taken on the preliminary inquiry or adduced at the trial of the accused.

Therefore, the prerequisite is only that the matters to be alleged in the proposed amendment seem apparent. Justice Caldwell's comment that the offence alleged must be made out on the evidence cannot mean that it must be proven because the section says "disclosed". And the evidence need not be specific because the section says "the matters" (the French "les choses"). Nothing could be broader.

Asked in submissions, Crown counsel did not specify any evidence referring to recklessness apart from the evidence as a whole. In written argument, she addressed knowledge and recklessness together. She submitted that Mr. Elliott knew that the complainants were harassed, or he was reckless or wilfully blind as to whether the complainants were harassed. She submitted that after he was aware that they had blocked him and wanted him to stop contacting them, he continued to send them a barrage of tweets or tweeted incessantly about them. She further submitted that his conduct prior to the period of alleged harassment was relevant to his *mens rea*.

The matter to be alleged is the whole case; there is no evidence of Mr. Elliott's state of mind apart from his communications to the complainants and theirs to him. Added to that is that those communications are in a modern social media with specific and complex language and methods. In other words, in order to determine the prerequisite of subsection (3)(b) – whether "the matters to be alleged in the proposed amendment are disclosed by the evidence taken" – I was required to review the whole case as if the amendment were accepted.

The application to amend, brought during deliberations, is not the place to decide whether this evidence establishes recklessness beyond a reasonable doubt. It need only be apparent that the recklessness alleged in the proposed amendment be disclosed by the evidence at trial. I find that it is apparent and that the requirements of s. 601(3)(b) are present.

I turn to s. 601(4). The circumstances of the case include Crown counsel's candid submission during the argument on this application that her primary position is and has always been that Mr. Elliott knew that the complainants were harassed. In view of this, I turn to the final day of the trial, July 14 (mentioned above), when oral submissions complemented the written submissions of the parties.

In written submissions, Crown counsel had combined knowledge and recklessness, relying on the complainants blocking Mr. Elliott and his barrage of tweets to argue that he was aware that both complainants wanted him to stop contacting him. Mr. Elliott addressed recklessly directly, arguing that the Crown had not proven that he was aware of any risk that the complainants were harassed.

Crown counsel, prior to the Court raising the issue of the counts making no reference to recklessness, in written reply took the position that Mr. Elliott was not reckless. This was corrected orally to read that he knew that the complainants were harassed but that if he did not know, he was reckless.

It was at that point that both counsel agreed to leave the issue of the count to the Court. No application for an amendment was brought and there was no request for an adjournment to consider such a step. The Crown's application for amendment followed the Court raising the matter during deliberations, as I have outlined.

Those are relevant circumstances under subsection 601(4)(c).

Subsection (a) has no application, and I have addressed the evidence on the trial when discussing s. 601(3)(b).

As regards s. 601(4)(d), Mr. Elliott concedes that he was not misled or prejudiced in any way by the omission of recklessness from the count; he cannot point to anything he would have done differently in the trial. Although I must consider all the factors in s. 601(4), judicial authority gives such pre-

eminence to this one so as to make it almost determinative. So in *R. v. Coté*, Chief Justice Lamer, as he then was, stated:[20]

Where a charge is reparable, you repair. To the extent that the evidence conforms with the correct charge and the appellants have not been misled or irreparably prejudiced by the variance between the evidence and the informations, the defect can and should be remedied.

In *Irwin*, *supra*, Justice Doherty held:[21]

In my view denying the power to amend to substitute a new charge where the substitution could not prejudice the accused ... would be an unwarranted windfall for the accused.

And at paragraph 52, Justice Doherty referred to prejudice being the litmus test against which all proposed amendments are judged.

Turning to s. 601(4)(e), “injustice” must mean something different from “prejudice” in subsection (d) on the principle of statutory interpretation that Parliament does not make the same point twice.[22]

As for the merits, this case is circumstantial with respect to state of mind, which may or may not result in proof of knowledge. If knowledge is not established beyond a reasonable doubt, Mr. Elliott must be acquitted unless the counts are amended to include recklessness, in which case the Crown may establish *mens rea*.

There is the possibility of a perception of injustice.

Also in *Irwin*, Justice Doherty cites Chief Justice Laskin in *R. v. Elliott* that “It is the responsibility of the Crown and not the court to settle the charge which will be brought against the accused.”[23]

Mr. Elliott could be found guilty on a charge that was amended only after the Court intervened after having adjourned for final deliberations. This, as Mr. Elliott argues, is late. The charge could have been laid without the defect, it could have been amended on arraignment or at the completion of the evidence, and this application could have been brought when I first inquired about the absence of recklessness at oral submissions on July 14, 2015.

An accused should face only one prosecutor, and a judge should never be seen to be aiding the prosecution’s case. To amend at this late stage could have an impact on the appearance of justice that is so crucial to every criminal proceeding, and that would cause an injustice.

However, it would be appearance only, because there is no prejudice. And the perceived injustice is not related to the merits of the case, but the manner in which the amendment came about. The [Criminal Code](#) specifically provides for that, and directs me to amend.

Had Mr. Elliott’s counsel pointed to one strategic decision or question on cross-examination, or one decision to call evidence that was different because recklessness was not alleged, I would not have allowed the amendment. But he did not because he could not; that is why there is no prejudice. So considering all the factors in s. 601(4), I amend the counts to add “or recklessly as to whether each complainant is harassed” after the word “harassed” and endorse the information according to s. 601(7).

FACTUAL BACKGROUND

@amirightfolks – Stephanie Guthrie

Mr. Elliott’s interactions with Ms. Guthrie

I begin with detailed reference to the communications only as needed to explain the background. Later, I will return to certain tweets that are alleged to be part of the criminal harassment.

The interaction with Ms. Guthrie has three broad phases: the initial meeting and cooling off, then things taking “a bad turn” (in her words), and finally a period of no contact followed by tweets that led Ms. Guthrie to the police.

Ms. Guthrie is a community activist and organizer. A main focus of her work and life is women’s interests, rights and safety. Twitter is an essential part of her life. She uses it to meet people who share her interests and contribute to the causes she works for and to obtain paying work for herself.

She or others who were active with her created several hashtags. The important ones in this case are:

- #WiTOpoli – Women in Toronto Politics
- #DEPUparty – set up to discuss “deputing” to city councillors
- #AOTID – created for an Academy of the Impossible event
- #TBTB – Take back the block

After she created the #WiTOpoli hashtag, Ms. Guthrie looked for a graphic designer for events that the WiTOpoli group was planning, particularly to design a logo and a poster. She tweeted the request and although that tweet is not in evidence, she believes that Mr. Elliott approached her through Twitter.

They met for dinner at a restaurant on April 18, 2012. The dinner was affable. From the conversation at dinner, having only Ms. Guthrie’s recollection, one possibility is that Mr. Elliott was interested in a friendship or more. He persisted in asking to drive her home after she declined.

There was some after-the-fact recolouring of this dinner by Ms. Guthrie, given what occurred later. She said she did not get a “great vibe” from Mr. Elliott, and his eyes made her feel “creeped out.” She felt uncomfortable as he repeatedly leaned across the table. She not only refused to accept a ride from him but would not accompany him to his car to look at a sample poster of his. So he went and got it.

In any event, the dinner was unremarkable. It was about what it was supposed to be about, and happened well before the tweets began that gave rise to the charges. I dwell on it to provide context for the subsequent email and Twitter exchanges. Asked about another possible meeting, Ms. Guthrie could not recall it but did not say it didn’t occur.

I also dwell on the aftermath of the dinner. This is not because their rapport was good at this time; good relations never preclude criminal harassment when things turn bad. It is because the email exchange provides information about how both Ms. Guthrie and Mr. Elliott write and express themselves, how Ms. Guthrie perceives and characterizes her own use of language, and how she absorbs and characterizes Mr. Elliott’s behaviour and language.

Between dinner and the next morning, Ms. Guthrie learned that someone else in her group knew a graphic designer who needed work and was eager to help. She emailed Mr. Elliott, thanking him for meeting her at dinner and telling him that she was in love with his poster work and ideas. She thanked him for some gift and wrote that she really enjoyed the conversation. She said that she really looked forward to working with him. She asked if he would do the poster after the other person did the logo. She signed off with “Best, Steph.”

Mr. Elliott replied later in the afternoon. He declined the suggestion that he do only the poster, saying that one person should do both the poster and the logo. He described his efforts that day to price the poster and asked her to let him know what her group decided, as if the issue were still open. He signed his email: “Love.”

Ms. Guthrie replied within three hours. She told Mr. Elliott that he was “too kind” and “awesome” and that his view that the same person should do both poster and logo made sense. She suggested a competition and asked for a week to decide. She signed with an “x” and an “o”, meaning a kiss and a hug respectively.

This did not meet with Mr. Elliott’s liking. He declined to compete with the other designer. He said that since he was offering his work for free, a competition was almost as bad as two designers

working on one poster.

Mr. Elliott wrote: “Competing also means I may put a lot of time into something that helps no one if it isn’t selected for ‘political’ reasons :-).” This last punctuation is common enough for me to take notice that it depicts a little face with a smile, a smiley face. He asked her to discuss his idea and concerns with her group and signed off with “Love.”

The next day, April 20, Ms. Guthrie answered that her group had decided to use the other artist. She was strongly complimentary to Mr. Elliott. She said she appreciated his time and offered to credit him for his creative contribution. She apologized that it didn’t work out for him, and thanked him for his “enthusiasm for and support of Women in #TOpoli”.

Mr. Elliott replied politely, saying, “Maybe next time,” and signed his email, “Love.”

There the exchange briefly concluded; it restarted three days later. It can be inferred that Mr. Elliott contacted Ms. Guthrie because she thanked him for firing things up again and said that she would like to work together if they could. She suggested an idea; he accepted. She said “awesome” and then he said “ok”, now signing “Greg.” Later that night she sent him some proposal, and their interchange ended peacefully and normally on April 24.

The emails were not the only communication. There was a continuous Twitter relationship of sorts, insofar as Twitter lends itself to being described in those terms, starting in February 2012.

Det. Bangild’s Sysomos search for tweets sent by Mr. Elliott and Ms. Guthrie show that from February until April both were using the other’s handles in tweets, either at the beginning of a tweet to direct it to the other, or as mentions that the other would also see. In some series of tweets a direct exchange between them can be identified – not of direct messaging but of one beginning a tweet with the other’s handle.

In one instance in February 2012, both Mr. Elliott and Ms. Guthrie tweeted putting the other’s handle at the beginning of the tweet. Mr. Elliott joined a discussion that was in progress and commented on the political significance of the use of a certain type of language, and Ms. Guthrie responded in a civil manner. Given Ms. Guthrie’s testimony that Mr. Elliott approached her by Twitter about doing a poster and Det. Bangild’s evidence that he searched for tweets from one to the other, I infer that the February exchange in 2012 was the beginning of their interaction. Mr. Elliott, a stranger, joined a conversation that he saw on Twitter and Ms. Guthrie engaged. The exchange was polite.

So was the email exchange from April 20 to April 24 that I have reviewed above. Ms. Guthrie testified that she was lying to him when she called him kind and awesome, but the exchange was civil.

On May 3, 2012, Mr. Elliott “fired things up again,” to use Ms. Guthrie’s words. Their exchange on Twitter is partly reflected in the tweets that are before the court – Ms. Guthrie agrees that there may have been direct messages that are not among the tweets that Det. Bangild discovered. Mr. Elliott had suggested ideas for Ms. Guthrie’s group’s meetings, and she had replied positively.

In the meantime, though, Ms. Guthrie had researched some of Mr. Elliott’s tweets. She concluded that opinions he had expressed showed that his philosophy was not compatible with her organization and that they could not use his skills.

Around that time, a news story was published in Toronto about a reporter who went to the Mayor’s house. A Twitter exchange between Ms. Guthrie and Mr. Elliott concerned Mr. Elliott using a word, either “sissy” or “pussy”, that suggested the reporter was a coward. The tweet is not in evidence, and Ms. Guthrie cannot remember the word, which she said offended her.

However, that episode ended civilly also. Ms. Guthrie testified that she thought Mr. Elliott a “creep” at their dinner in April 2012, that there was a seething anger to his emails about the artwork and that she knew from research that he had sexually harassed women, which was part of the reason she stopped him from doing the artwork. There is no apparent seething anger in Mr. Elliott’s emails, and Ms. Guthrie could not point to any in cross-examination.

She agreed in cross-examination that his email after the disagreement about Mr. Elliott's comments on the reporter and the mayor was pretty straightforward. She also agreed that when she testified to Mr. Elliott being a creep at the dinner and that one of the reasons for rejecting his offer to design the poster and logo was his treatment of women, she may have been looking back through the lens of what happened later. That frankness enhances her credibility.

Regarding the interactions until May 3, Ms. Guthrie testified that things really took a bad turn around the Bendilin Spurr incident in early July 2012, i.e., more than two months after the dinner.

Until May 3, there was no criminal harassment. The record to this date gives context for the later allegation – evidence of all the circumstances, should I need to determine the reasonableness of Ms. Guthrie's fear – but no harassment. The exchanges until then – debate about language in February, dinner in April and negotiations about artwork, the straightforward exchange as Ms. Guthrie rejected Mr. Elliott's offer to do artwork and falsely told him he was kind and awesome – is relevant to Mr. Elliott's knowledge, then and later. All the evidence demonstrates that he was working from the premise that their email and Twitter exchanges were appropriate.

From May 3 to July 6

During this period, Ms. Guthrie broke her ankle. Mr. Elliott discerned from a tweet, not to him, that she was immobilized. He asked her why. She expressed no dismay that he was following her tweets, but answered. He repeatedly offered to drive her or deliver alcohol, and she repeatedly declined. He also invited her to accompany him on a drive up north. She politely declined and referred to her boyfriend, and he stopped. Mr. Elliott was obviously interested in some sort of relationship with Ms. Guthrie. But Ms. Guthrie rebuffed him politely and appropriately despite the unsuccessful negotiations about the poster and the disagreement about the reporter and the mayor.

Ms. Guthrie testified that she was not being entirely honest in her courteous emails and tweets to Mr. Elliott. She testified that she feared him from the time she had dinner with him – as being “creeped out” is a kind of fear – but that she was wrestling with her feelings given that women are criticized when they express them.

The Bendilin Spurr affair

Mr. Spurr, a young man from Sault St. Marie, Ont., put a video game on the internet that permitted players to punch a prominent American feminist in the face. It was graphic in its violence. Ms. Guthrie tweeted about it on July 6 as follows: “So, I found the Twitter account of that fuck listed as creator of the ‘punch a woman in the face’ game. Should I sic the internet on him?”

Apparently her followers and others who read her tweet said she should. As she wrote later:[24]

Knowing full well the can of worms I was about to open, I'll admit my heart was in my throat as I tweeted,

“Hey bendilin, do you punch women in the face IRL, or just on the internet? (This guy made the Anita Sarkeesian Face-Punch game). Others, RT”

“IRL” means in real life.

I set out this tweet and its introduction both to develop the narrative and to demonstrate how Ms. Guthrie uses Twitter – what she sees as appropriate and within bounds.

Ms. Guthrie sent a tweet linking his local newspaper to a story about his work, and tweeted: “Sault Saint Marie employers, if you get a resume from @BendilinSpurr, he made a woman facepunching game...” She attached an article from the Huffington Post online site about the “sick” online game that invited users to beat up a virtual Anita Sarkeesian.

Everything happened rapidly at the moment that Ms. Guthrie says was the turning point. Mr. Elliott tweeted directly to Ms. Guthrie: “@amirightfolks He's got 11 followers. Why bring attention to the

guy? Media attention will only add to more ‘virtual face punching.’”

Mr. Elliott tweeted that it was revenge.

Ms. Guthrie replied, putting a period before Mr. Elliott’s handle: “@greg_a_Elliott Because I think the Sault Ste Marie community should be aware there is a monster in their midst.”

The exchange was becoming heated, but was a logical and fair debate.

Ms. Guthrie had enough of Mr. Elliott, the discussion and his views. She tweeted to him: “@greg_a_elliott If you think it’s revenge, you’re not paying attention. I’ve had it with you@rachelmack@emmamwoolley@sysrequest@metricjulie.” She then blocked him from sending tweets to her.

Mr. Elliott knew he was blocked because he tweeted: “@amirightfolks Next step may be to unblock me and refollow? I’m not the misogynist game creator you’re looking for, why punish me.” He then included the smiley face and the hashtag #love.

Just prior to the Bendilin Spurr dispute flaring up between Ms. Guthrie and Mr. Elliott, and a week after she had shut down Mr. Elliott’s advances by referring to her boyfriend, Ms. Guthrie and Mr. Elliott had exchanged tweets about Greece and panhandlers that involved putting the other’s handle first or in a list at the beginning of the tweet. Mr. Elliott, up to the flare-up, could not have known that Ms. Guthrie was harassed or wanted no contact with him. Quite the opposite.

And on the day that she said that she had had it with him, there was a spirited discussion about the strategy used against Bendilin Spurr. Ms. Guthrie tweeted in response to someone who had tweeted to her and Mr. Elliott, “I don’t want him destroyed”; to others including Mr. Elliott, “I want his hatred on the Internet to impact his real-life experience.”

From the blocking to the start of the period the information covers – July 7 to 31

The time period that follows is what Ms. Guthrie herself describes as when relations between her and Mr. Elliott took a bad turn.

Mr. Elliott continued to participate in the Bendilin Spurr debate. Comments by others involved ranged from opposing Mr. Elliott’s views to questioning them. Crown counsel submits that between July 15 and August 11, he sent 23 tweets either to Ms. Guthrie or tagging her without distinguishing between the two: nine of them began with her handle, and as she had blocked Mr. Elliott, it can’t be known how many of the 23 she saw.

This period overlaps the beginning of that covered in the offence period, which begins on August 1. I will divide it in two: from July 7 to July 31, and then August 1 onwards.

From July 7 to July 29, Mr. Elliott tweeted 45 times including Ms. Guthrie’s handle. He did know that she had blocked him. To understand his tweeting anything that included Ms. Guthrie’s handle requires looking at the tweets that Mr. Elliott was receiving.

On July 7, someone new joined the discussion that Mr. Elliott was having with Ms. Guthrie and others, before she said that she had had enough. This tweeter, J. whose handle was @velocipietonne, had tweeted to Mr. Elliott, “who the fuck are you” and mentioned Ms. Guthrie (@amirightfolks) as well as someone else, @emmamwoolley. Mr. Elliott replied by saying: “who the fuck am I? not as hateful and angry as you. You waste energy hating. There’s a better way.”

Mr. Elliott’s tweet is noteworthy for several reasons. The main reason is that Mr. Elliott was answering someone who had attacked him, aggressively and with vulgarity, and who had also tweeted to @amirightfolks, with what is ostensibly a reasonable attempt to bring the conversation back to civil debate. Furthermore, his tweet included the two names that @velocipietonne had included as well as another, @metricjulie. He was communicating indirectly with Ms. Guthrie but I infer that it was in passing and in the context of a fast, multi-directional dispute. At one point that day, he tweeted: “Do what you think is right..thanks for letting me point out what I think is wrong.”

The debate continued on July 7. The other tweeters – apparently women by their pictures, avatars or references in their handles such as “sister” – disagreed with Mr. Elliott, but they were debating with him.

For example, someone named “Sister Aloysius” tweeted him and Ms. Guthrie saying of Bendilin Spurr: “He’s obviously a big boy and can handle dishing it out.” Mr. Elliott asked if the others in the conversation – but with Ms. Guthrie’s handle first – would be happy if Bendilin Spurr removed his face-punch game. Ms. Guthrie wrote in reference to Mr. Elliott to @rachelmack, a friend of hers also engaged in the discussion: “Don’t bother. This guy is an MRA who disguises his feelings about women with a cloak of ‘care’ for their freedom.”

“Sister Aloysius” was still engaging Mr. Elliott and told him, with Ms. Guthrie’s and the others’ handles added, to “put down the MRA crap now” if he wanted to earn her respect. “MRA” means Men’s Rights Activist, Ms. Guthrie testified.

Mr. Elliott was calling the others’ approach to Mr. Spurr’s hateful face-punch game revenge. @rachelmack was saying that it wasn’t, that it was just desserts. Another person, again tweeting to everyone in on the debate by adding their handles, said that he or she did not want Mr. Spurr destroyed. Ms. Guthrie said that she didn’t want that either but wanted his hatred to “impact on his real-life experience.”

But Mr. Elliott did not let it go. He asked, in succinct Twitter language, what if Mr. Spurr killed himself because of the orchestrated attack by the women in the discussion? Some said that would be Mr. Spurr’s own agency; one said that he was far too pleased with himself to be a suicide risk.

It was then that Ms. Guthrie told Mr. Elliott that she had had enough of him, and blocked him.

However heated, it was a discussion. The Crown does not characterize it as harassment and neither does Ms. Guthrie, who agreed that as of July 28 she was not afraid of Mr. Elliott. She did testify that the harassment was cumulative and that later these events entered into the cumulative effect.

Crown counsel relies in part on the volume of Mr. Elliott’s tweets, citing the 23 tweets between July 15 and August 15 to demonstrate repeated communication and harassment. But these dates appear to me to be arbitrary, as does the starting point of August 1 in the information. Nothing particular happened on August 1, and it appears to be a cautious starting point that the police used. Up to that date, Ms. Guthrie had blocked Mr. Elliott but she did not fear him.

On July 15 tweets were exchanged as Mr. Elliott continued to argue with Ms. Guthrie’s friends, including @popeshakey. A man came into the exchange reporting that Mr. Elliott had stalked him on Twitter and attacked everything he tweeted, and Mr. Elliott replied that the accusation was nonsense. A woman joined in, and Mr. Elliott was frankly sexist and sexually offensive with her. The tweets continued to be about Bendilin Spurr. Mr. Elliott tweeted, perhaps sarcastically: “If you’re done with him on twitter...Perhaps a visit? I’m thinking a road trip maybe.” Another tweeter to Mr. Elliott, Mr. Spurr and Ms. Guthrie as well as @rachelmack, reasonably suggested: “I’d go down for a public, moderated debate. Think he’d participate?”

Ms. Guthrie then tweeted, without a hint of disdain, rancour or sarcasm that I can determine, to the person who started the conversation and Mr. Elliott: “@CarolineG82@greg_a_elliott@rachelmack Working on another idea. This problem is much bigger than Bendilin, who I don’t think will get it.”

So Ms. Guthrie tweeted to Mr. Elliott eight days after she blocked his tweets.

She did dislike Mr. Elliott, as made clear on July 28 when she attended a function in her honour, “Steph Guthrie Appreciation Day”. At the event, she agreed, it is possible that she said that she was planning to “teach Mr. Elliott a lesson.”

I find that Ms. Guthrie was an honest witness. She felt harassed and went to the police and put herself in their hands. She did not give them all the information about her interactions with Mr. Elliott, but as she said, she was not asked to. I do not accept Mr. Elliott’s submission that she lied to this Court. Whether or not it could have been proven that she said those words at Steph Guthrie

Appreciation Day, she admitted that she may have said them. I find as a fact that she did, and that that is an important fact in understanding what happened.

Her admission that she was not afraid of Mr. Elliott until the end of July further enhances her credibility, as does her testimony mentioned earlier that she was probably looking back at April through the lens of what occurred later. She saw the issues, followed defence counsel's thoughts and questions, and may have been vague at points – but in the end respected her affirmation.

Before reaching the period covered by the information, I will deal with an event related to the function honouring Ms. Guthrie. On July 28, Mr. Elliott used the #shesrightfolks, that others, not Ms. Guthrie, had created for that event. She apparently saw six tweets that Mr. Elliott sent using the hashtag. She was not following Mr. Elliott and had blocked him, but her friends who were following him were telling her what he was up to.

One of the July 28 tweets was a retweet by Mr. Elliott defending himself from a tweet by Ms. Guthrie that he was a concern troll of #feminism: “To him women’s liberation is exclusively sexual not really freeing.” Mr. Elliott tweeted: “Bullshit”. Since Ms. Guthrie had sent the tweet and included the hashtag #feminism plus the accusation that Mr. Elliott trolled on the hashtag, logic and her intelligence lead me to conclude that she knew he would read it: she was again, as on July 15, communicating with him while blocking him. As she testified in relation to Mr. Elliott but in a different scenario, using hashtags of those who have blocked you is a “great way” to cause them to see your tweets. Thus I conclude she was communicating with, commenting on and also attacking Mr. Elliott while claiming to have had it with him on July 7.

The “great way” for him to communicate with someone who had blocked him – by using a hashtag that the blocker uses or that he knew the blocker checked – was part of Ms. Guthrie’s theory of how Mr. Elliott was communicating with her and harassing her using hashtags.

Ms. Guthrie interpreted some of Mr. Elliott’s July tweets as him using the hashtag #shesrightfolks to follow discussions on the party thrown for her. For her part, she worked to teach him a lesson, participating in an ongoing debate about siccing the internet on Bendilin Spurr. She tweeted about him without using his handle: “Should’ve heard the ‘Ughhhhhh’ in the room upon mention of the name ‘Greg Elliott’ #shesrightfolks”.

As the period charged in the information approached, Ms. Guthrie and Mr. Elliott had been engaged, benignly from February to April by Twitter, unhappily – though only when looking back through the lens of what happened later – in April at dinner and by email, contentiously but consensually through June, and very unhappily for Ms. Guthrie from July 7 when she blocked him.

August 1 to September 12

Within the period set out in the information are three discrete periods: August 1 to September 9, September 9 to 12, and starting November 5 just prior to the arrest. Between these dates there was relative calm, as there were no tweets between Mr. Elliott and Ms. Guthrie that the Sysomos search captured.

On August 3, the *Toronto Star* published an article about Ms. Guthrie. Mr. Elliott tweeted about it and added, “#Hate is hate” with a smiley face.

The article was about Ms. Guthrie’s campaign against Bendilin Spurr. In a tweet, Mr. Elliott accused Ms. Guthrie of “media-whoring”, as the full tweet in Exhibit 2A demonstrates. Indeed, Mr. Elliott’s August 3 tweet employed one of the ways in which the Crown alleges that the non-direct tweets amount to communicating with and harassing Ms. Guthrie: he mentions her. “@coreymintz the #TOSTar hack promotes his friend @amirightfolks as she ‘media-whores’ in the name of ‘misogyny’ thestar.com/living/article...#topoli”.

Around August 12, Ms Guthrie testified, things became serious regarding Mr. Elliott, and she began to be fearful of him. But between the July 28 celebration of her and August 3, he hadn’t done anything except tweet about the article, and she was not afraid when July ended.

Then Ms. Guthrie renewed the Twitter discussion about Mr. Elliott. Consistent with her intention to teach him a lesson, according to her testimony, she began to inform more people about what she considered his mistreatment of women.

Ms. Guthrie, though in her perception not sexually harassed herself, retweeted six tweets that included Mr. Elliott's handle. Others, she had learned, had confronted him about his unwanted sexual tweets to them.

She testified that she wanted him to know that his behaviour was unacceptable, so she retweeted the tweets from other women. She knew that he would read them as they had his handle.

Mr. Elliott meanwhile continued to tweet, using #TOpoli at the beginning of some of his tweets. The Sysomos program that Det. Bangild used searched all of Mr. Elliott's tweets in which Ms. Guthrie's handle appears. This includes as recipient, someone mentioned or appearing in a retweet or a reply to someone who has tweeted to or mentioned Ms. Guthrie.

During this period, Ms. Guthrie does not allege any sexual harassment or threats to her or any specific harassing language, but relies on the volume of Mr. Elliott's tweets to her, that mention her, or that use hashtags she follows or created.

After July 15 Mr. Elliott tweeted to Ms. Guthrie only once – in the sense of beginning the tweet with her handle – on August 15. Ms. Guthrie testified that she did not see this tweet.

The use of the hashtags in this discussion and Ms. Guthrie's handle is the indirect communication on which the Crown relies. The tweets show that Mr. Elliott was continuing to debate the Spurr affair, as well as responding to tweets from individuals about his behaviour with women and his dispute with Ms. Guthrie.

I will review some of the tweets as representative, but in general, his tweets explain his perspective, respond to tweets about him and advance his views, however offensive or wrong they may be. He names @amirightfolks as attacking his followers, and talks about his dinner with Ms. Guthrie and the poster, and @amirightfolks's tweets about it. His language is vulgar and sometimes obscene, and once inexplicably homophobic, though this tweet was not captured in the Sysomos search, as explained above. Several tweets said he was the target of a calling out, was harassed himself and that his behaviour was misrepresented.

Whether his behaviour was misrepresented or not is debatable, as he was arguing with others and they with him. But there is a basis for his belief that he was the target of a calling out and a campaign to discredit his reputation.

Unknown to him in early August, Ms. Guthrie had met with 15 others, including Ms. Reilly and those with the handles @rachelmack and @popeshakey, to find a way to make Mr. Elliott's behaviour stop.

Known to Mr. Elliott was that many people on Twitter were confronting him about his behaviour. Reading the tweets that precede his tweets, only for the context of his, sheds light on his use of Ms. Guthrie's handle during the time specified in the count regarding Ms. Guthrie.

Here is another representative example. On August 12, before Ms. Guthrie retweeted six tweets that contained Mr. Elliott's handle, somebody named @canadiancynic tweeted to his or her followers in the Twitter world: "Apparently, one @greg_a_elliott, Toronto artist with four sons, is totally creeping out women on Twitter. I'm sure his sons are proud of him."

Since the text mentioned his handle, Mr. Elliott would have been notified. According to the tweet as expanded when opened on the internet, he would also have seen Ms. Guthrie's avatar beside the retweets and favourites count at the bottom of it, and would have seen her retweeting it.

But Mr. Elliott tweeted to @canadiancynic, not to Ms. Guthrie: "And so the attacks begin? Bring in my family too? I've been documenting all of this organized harassment, lawyer contacted."

This generated another tweet at Mr. Elliott from @jkosuch: “Honestly, @greg_a_elliott: Knock it off. You’re not doing yourself any favours. Stop acting like a misogynist and stop harassing women.”

Mr. Elliott would have been able to see Ms. Guthrie’s photo beside the retweets and favourites of this tweet.

Mr. Elliott did not testify, as is his right, but the prosecution brought his voice into the case by introducing his tweets; it had to, because that is also his alleged crime. These tweets are evidence that I must consider when deciding what he was doing, what he intended and what he knew.

In a tweet on August 15, Mr. Elliott asked: “Does @amirightfolks believe THIS? ‘When someone’s tweeting offends people, it’s an indication they need discipline and training.’ #TOPoli”.

Ms. Guthrie replied with tweets, though not to Mr. Elliott, saying that she was taken out of context. She also tweeted, but not to Mr. Elliott, and obviously referring to their exchanges over the summer, that he was offering rides for wrong reasons. He must have seen this, because he included it in a tweet in which he told his followers that 20 women whom he had helped thought she was crazy.

Ms. Guthrie sent other tweets about Mr. Elliott, but not to him.

One more example demonstrates the context of Mr. Elliott mentioning Ms. Guthrie in a tweet. I choose it because it is directly about her and has vulgar language, so it could be seen, standing alone and as listed in the tweets produced by the Sysomos search, as harassing.

Ms. Guthrie tweeted: “That GAE calls me ungrateful for not accepting rides from a strange man speaks to how little he understands of rape culture.” Another person, @mkronline, who must have followed Ms. Guthrie or somehow seen her tweet, tweeted: “What does GAE mean? Google has failed me.”

Ms. Guthrie answered: “Toronto man Gregory A Elliott, sexually harassing women on the internet since lord only knows when.”

Yet another tweeter, @True_Tory, tweeted to Ms. Guthrie and @mkronline: “Funny thing is, he’s dating my mom and is INCREDIBLY nice to her. A sweetheart, really. #GettingCreepy”.

Ms. Guthrie answered, cautiously: “I’m not sure if I should take that seriously.” And then (ironically), “It IS the internet after all.”

@True_Tory, from his name (Joe Tory) apparently a male, answered: “He makes me call him StepDaddy, but other than that it’s good. Really. #Help”.

It appears that True_Tory may have been teasing and taunting Mr. Elliott. But Mr. Elliott seemed to know True_Tory, and tweeted: “So. Now you RT my interaction w/women? You know that I know this woman? What is @amirightfolks fucking problem? Stop it. #TOPoli.”

Mr. Elliott’s tweet appears in the table that Det. Bangild produced, standing alone, that is, without reference to the tweet that preceded it.

Not only was Mr. Elliott facing the reference to his sons, someone had posted a parody account of Mr. Elliott with a similar handle. Ms. Guthrie had been tweeting with her friends and laughing at Mr. Elliott. As she did not mention him, this exchange with her friends does not appear on the printout from the Sysomos search for August 9. But she agreed in her testimony that she tweeted all her followers, laughing at the parody account of someone she described as “her least favourite creep on Twitter.”

In some tweets, Mr. Elliott referred back to how he met Ms. Guthrie, when he offered to design a poster for her group. He referred to the attack on Bendilin Spurr and how he disagreed with it. He used the hashtag #fascistfeminists. He referred to having offered a truce in this tweet: “Hey, @amirightfolks and @popeshakey...offering #peace in regard to the #FascistFeminists vs. #MisogynistGreg ‘war’. Meet to discuss? Yes?”.

Mr. Elliott used #TOpoli to call those he perceived as attacking him “losers who attack in a cowardly pack”. He also tweeted: “Offered @amirightfolks a ‘anytime ride’ when she had a cast on her leg and the nut-job thought I wanted sex? Fuck. #illegitimate#misogyny.” He also used #WiTOpoli in August and September.

On September 9, Ms. Guthrie, who while not ceasing to tweet about Mr. Elliott, had not tweeted to him since sending the retweets, tweeted him to defend herself. Putting a period before his name so that it would go to all his followers, according to her, she wrote: “.@greg_a_elliott,I blocked you a month ago; stopped tweeting re: yr serial harassment weeks ago. Stop contacting me.” Attached to her tweet is a screen shot with the hashtag #GAEhole. Ms. Guthrie was responding to Mr. Elliott’s tweet, which the Sysomos search did not capture, telling her to stop harassing him. She tweeted: “... I was copied on a response to his tweet. Lawyer friend advised I publicly state my desire not to be contacted.”

Then, in a tweet that may respond to a September 5 tweet in which Mr. Elliott used #FascistFeminists and said “You ‘bullies’ create #gaehole ... lie”. Ms. Guthrie replied: “.@greg_a_elliott I don’t use the #GAEhole tag(except here) but it’s not libel. I’ve asked you: stop contacting me and smearing my work. Stop.” Mr. Elliott had tweeted throughout August and September using #FascistFeminists and #WiTOpoli.

The six November tweets

After Ms. Guthrie wrote telling him to stop on September 9, Mr. Elliott did not tweet using her handle until November 9. On November 5, the day before the United States presidential election, he tweeted: “#Massachusetts sounds like a perfectly acceptable synonym for #motorboating a very large breasted woman. #amirightfolks? #obama #romney.” This tweet is incomprehensible to me without context, but there was no evidence of any, and Ms. Guthrie testified that she never saw the tweet. It did not have her handle, but the hashtag of her username.

Four days later, he tweeted, apparently responding to someone: “@dreahouston@kiwiner Right... @amirightfolks isn’t ‘whipping up outrage’ she’s fighting anti-opression with oppression. Bullshit. #topoli”

On November 12, he sent three tweets. One was to @elleinad, who had initially engaged him in a calm exchange about his treatment of women. It read: “@elleinad.. You met me in person. I dare you to claim that I was anything but a respectful gentleman. @amirightfolks fantasized the opposite.”

Then he tweeted to no one in particular: “You’re a victim of your misunderstanding. You Need us. @liverr I’m sorry it happened to you...@rachelmack@amlrightfolks@LadySnarksalot”.

Mr. Elliott had previously tweeted flirtatiously with @liverr, who then falsely stated that she was 13. This led some of Ms. Guthrie’s group to retweet that he was sexual with underage girls.

On November 12, he tweeted to @elleinad again: “@elleinad.. Originally offered to help@amirightfolks w/ @witopoli but then learned she and her crowd #Bully people and call it ‘calling out’”.

Finally, on November 13 he sent a tweet to @justinsb: “You are wrong on all counts. go listen to @amirightfolks play her shit music in crappy bars with your loser faux-feminist friends.”

Tweets with the hashtags Ms. Guthrie uses

The prosecution tendered lists of tweets in which Mr. Elliott used hashtags that Ms. Guthrie (or Ms. Reilly) followed or might see. They are:

#4thwave
#16days
#AOTID

#DEPUParty
 #FascistFeminists
 #TBTB
 #WiTOPoli

All but #FascistFeminists are hashtags that Ms. Guthrie either created or were associated with events or organizations that she was active in.

Mr. Elliott used #4thwave four times in April, and it plays no role in this case.

He used #16days three times on November 20, the day before he was charged. In one tweet he wrote: "Harassment online is criminal harassment. But you better be damn sure it's harassment, and, it is directed towards you." In one he tweeted: "And women w/unshaved legs are bitches? #sexism. @colleen_rowetil no shave November ends and guys no longer look like rapists #16days." In one he wrote to @soapboxingGeek: "I'll check your TL over the past year and Storify out any context. That's how #misandrists do it isn't it? #16days#bullying."

Mr. Elliott also used the hashtag #TBTB. In one tweet he wrote: "I have learned that #TOpoli #FascistFeminists are using my avi, libelling me, and are attempting to get me kicked off Twitter. Bullies #TBTB". I take "avi" to mean "avatar".

Ms. Guthrie testified about this tweet that "Greg" created the #fascistfeminists hashtag to refer specifically to her and to the other complainants in the case, who at the time that she testified were Ms. Reilly and @rachelmack. In her opinion, Mr. Elliott felt that people were spreading lies about him, saying that he was "creepy" and claiming that he was making uninvited sexual advances to women on Twitter. She testified that none of it was lies, that it was all substantiated and that the evidence was public. This is a concise, fair characterization of the dispute that Ms. Guthrie was involved in and that led to this case.

In two of these tweets, Mr. Elliott was putting forth his own defence even before he was charged; not in the context of criminal charges against him but to express his opinion on the use of Twitter and freedom of expression generally. On November 15 he tweeted: "To create a hashtag like #AOTID and then suggest that you own and control the conversation is evidence you don't understand Twitter's true value."

Mr. Elliott's tweets using #AOTID are important to the prosecution's case because he sent them on November 15 and 16, in part prompting Ms. Guthrie to go to the police. He sent 11 tweets using #AOTID, though none to Ms. Guthrie. #AOTID, Ms. Reilly testified, was set up to promote an online discussion.

In one tweet using #AOTID, Mr. Elliott quoted a tweet by someone named @danspeerin about how quickly Marshall McLuhan comes up in Twitter discussions – which had nothing to do with Ms. Guthrie. His use of #AOTID appears in quotation marks.

He then sent two tweets on November 15 using #AOTID that expressed his view of hashtags and Twitter: one as set out above, and the other saying "Calling out a troll' is usually just 'asking everyone you know to gang up on someone offering an opinion different than yours' #AOTID #dumb." Ms. Reilly testified that the #AOTID discussion was about trolling.

These tweets were not random or irrational.

A discussion ensued with someone named @CromartyHeather. In it, @CromartyHeather and Mr. Elliott obviously referred to Ms. Guthrie, though neither named her nor used her handle. This exchange, which is pointed and acerbic, does not show up in the Sysomos search of #AOTID, but does when Mr. Elliott's tweets are expanded.

Mr. Elliott tweeted: "@CromartyHeather When idiots who call everyone #trolls and creeps start a discussion about it, I'm going to comment– nothing to do with her."

@CromartyHeather challenged him about using Ms. Guthrie's handle: "@greg_a_elliott Oh so you randomly typed those letters in, and didn't do it to try and get her attention?" and told him that his

tweet did not make sense.

Mr. Elliott told her that he was still waiting for an apology from Ms. Guthrie and the others who bullied him when he pointed out their “calling out” attack on others. He also wrote, obviously referring to Ms. Guthrie: “She doesn’t own a hashtag. Twitter’s public. What kind of control freaks are you? Censoring Twitter? Go to Facebook”.

As Ms. Guthrie surmised, and Crown counsel agreed, the conversation between @CromartyHeather and Mr. Elliott began with @CromartyHeather tweeting: “Apparently there’s a troll in the #AOTID feed. Ha ha ha, least self-aware dude ever.”

Mr. Elliott’s tweets with @CromartyHeather harken back to having dinner with Ms. Guthrie, not imagining her as a “sexual option”, and to her imagining that he thought otherwise, her making inaccurate statements about people based on her own “crazy” fears and needs. @CromartyHeather told him that he brought her up in every conversation.

As far as I can determine, because Twitter conversations are sometimes too concise for anyone not involved to follow, when Mr. Elliott then wrote “You wish” and quoted @CromartyHeather, she replied that that didn’t make sense. Mr. Elliott tweeted “like the #AOTID contributor who makes inaccurate statements about people based on her own crazy fears and needs.”

Ms. Guthrie interprets this tweet as showing his intention to communicate with her after she told him in September that she did not want to hear from him.

@LadySnarksAlot – Heather Reilly

Mr. Elliott and Ms. Reilly never met. Ms. Reilly, whose handle is @LadySnarksAlot, knows Ms. Guthrie. She could not honestly recall her first interaction with Mr. Elliott, though it may have been through #TOpoli. This hashtag, which means “Toronto politics”, has been around a long time, as Ms. Guthrie testified.

Ms. Reilly was also associated with #WiTOpoli. She could not recall if she ever saw Mr. Elliott’s handle associated with that hashtag, or comments made by him in relation to it, before the alleged harassment.

Ms. Reilly’s interaction with Mr. Elliott appeared to begin, according to the tweets that Detective Bangild obtained through the Sysomos software, in April 2012. They started to exchange tweets and argue about the incident between the mayor and the reporter referred to above.

In Ms. Reilly’s case, the issue of the meaning and proper use of hashtags in Twitter arose early, directly and explosively. After three tweets by Mr. Elliott about the incident with the mayor, Ms. Reilly sent a retweet (RT) to @popeshakey, a friend of hers, and to Mr. Elliott. The retweet said: “There really is no need for discussion. ‘Don’t rape us. Don’t attack us. Don’t harass us.’ Why does that require discussion?”

In the summer of 2012 she saved a copy of a photo that Mr. Elliott had uploaded and emailed it to other individuals who, according to her, had been harassed in a similar manner to her own experience.

Three times during the summer – on July 18 and 30 and August 9 – Mr. Elliott tweeted using the #TOpoli hashtag. One tweet was about the Dufferin bus service, one was about tomatoes, and one was about the smell of garbage trucks. After the last one, Ms. Reilly tweeted: “@greg_a_elliott Please do me a favour & not reply to my posts. You don’t follow me- were you creeping the #TOpoli tag to find my tweet?”

Mr. Elliott expressed disbelief in a tweet: “@LadySnarksalot ‘Creeping’ the #TOpoli thread? What are you? Fucking nuts? You hashtag #Topoli you leave your tweets open to comment. #Duh”.

Ms. Reilly retweeted that tweet, which meant that everyone who followed her or #TOpoli could see it. Then she pointed out a flaw in his logic, telling him that he had retweeted randomly about her

tomato plants with no #TOpoli hashtag. Both read the other's tweets closely. She ended by asking him to please ignore her feed. And she thanked him by writing "Thx".

Mr. Elliott was not so polite. He tweeted: "Know what? This is Twitter, your request offends my sensibilities. Seriously, you say something #TOpoli stupid, I'm replying."

Ms. Reilly also retweeted that tweet by Mr. Elliott, further expanding the dispute between them to all of her followers. Then she tweeted Mr. Elliott with a period in front of his handle, with the result, according to her evidence – which is different from P.C. Dayler's and Ms. Guthrie's, though it is possible that she misspoke – that people who followed neither of them would see it. She did this to create a public record and to notify her followers that she was making a statement that he should stop reading her feed: "Please leave me alone. I have nothing to engage you on, even of [sic] I've now 'offended your sensibilities'. Thank you."

Mr. Elliott replied with a tweet that put a period in front of @LadySnarksAlot so that, again based on Ms. Reilly's evidence, people who followed neither of them would see that he had directed a statement to her: ".@Ladysnarksalot How'd you feel if I was so delusional to ask you to not retweet me? You want 'control' use your email, not Twitter. #Topoli".

Ms. Reilly, still on August 9, emphasized that she did not want Mr. Elliott replying to her tweets. She put a period before his handle and wrote: ".@greg_a_elliott Please stop replying to me. I have nothing more to say to you as I've now 'offended your sensibilities'. Thank you."

During August the dispute escalated, as Mr. Elliott defended an open right to reply on Twitter and read others' tweets. Twitter could have had a more eloquent defender, as some who joined in pointed out to him about his tone. At one point he tweeted "Snark, How fat IS your ass? #TOPOLI." Ms. Reilly, though not the first to use vulgar language, had by then retweeted a comment by someone named @criticalbritt, who told Mr. Elliott of a wish that "you'd disappear up your own arse you supercilious fart golem". This is the register of language sometimes used by both those arguing for an open Twitter and those wanting to prevent further attacks on women.

Also on August 9, Mr. Elliott tweeted to Ms. Reilly: "@ladysnarksalot ignoring you is easy. I'm just not that 'into' you. As I said, you comment on #TOpoli your comments are open to comment."

Two hours later, Det. Bangild's Sysomos search found, Mr. Elliott sent two tweets to someone whose handle was @whyteappleby:

@whyteappleby.@ladysnarksalot Agreed...methinks the Snarky Lady doth profess too much...If you don't understand Twitter...leave#TOpoli

and

@whyteappleby My tone is fine til control-freaks like .@ladysnarksalot try to change the rules of Twitter. "Creeping" the #TOpoli hashtag?

Once again the expanded printed exhibit 2B shows the context of Mr. Elliott's tweets and gives much more information. I have considered these tweets, not for their truth but as being sent.

The expanded exhibit 2B that relates to Ms. Reilly shows that @whyteappleby, a stranger as far as I can determine, entered into a Twitter conversation with both Ms. Reilly and Mr. Elliott, as a mediator. @whyteappleby tweeted a suggestion (with some ambiguity because of the grammar or perhaps Twitter brevity): "@LadySnarksalot@greg_a_elliott Can we not call following a popular hashtag 'creeping'? That literally the purpose of Twitter."

Mr. Elliott's tweet about leaving Twitter was a response to this. Then @whyteappleby tweeted to both, "Well, to be fair, methinks your tone sucks too."

Mr. Elliott replied about his tone in the tweet above. Det. Bangild picked this up, as set out above, as it was from Mr. Elliott and contained Ms. Reilly's handle.

In an exchange with Ms. Reilly, @whtyeappleby advised that the comment about the tone sucking was not about Ms. Reilly. Ms. Reilly replied, "Thanks, I wasn't sure why he went nasty."

In short, this was a Twitter conversation among three people, not Mr. Elliott gratuitously using Ms. Reilly's handle. It was a conversation about an issue near the heart of this case: the purpose of Twitter and whether following a hashtag can be considered "creeping".

On August 12 Ms. Reilly retweeted others' tweets that criticized Mr. Elliott and told him to stop acting like a misogynist and harassing women. The same day, Mr. Elliott tweeted to Ms. Reilly: "Hey@LadySnarksalot Why 'favourite' my tweet when you say you want NO interaction with me? Make up your mind. #Topoli#TOMedia".

Ms. Reilly in cross-examination conceded that that was a fair comment. In examination-in-chief, she explained that Mr. Elliott's use of #TOPoli meant that anyone reading tweets related to #TOPoli would see his comment even though it was not relevant to #TOPoli.

Also on August 12, Ms. Reilly retweeted tweets from men whom she perceived as supporting her because they were telling Mr. Elliott to stop engaging her and stop harassing women on Twitter. She was able to choose from among a variety of tweets to retweet, as Mr. Elliott had critics on Twitter. One of Mr. Elliott's tweets in reply was the explicitly homophobic one that I have mentioned.

On August 24 and 25, Ms. Reilly retweeted or modified seven tweets criticizing Mr. Elliott.

Then on the 28th, Mr. Elliott quoted Ms. Reilly's comment on a tweet by someone who supported him: "she appears to be an ally of Greg Elliott's...I'd wager she's probably one to ignore" but preceded that with "Snark. How fat IS your ass?" The original tweet is not in evidence, because if Ms. Reilly wrote to another person separate from an exchange with Mr. Elliott, it would not appear in the evidence.

On the same day, Ms. Reilly tweeted with a period before Mr. Elliott's handle so that not only his followers but the "whole world" would see it, according to her evidence: ". @greg_a_elliott Just couldn't ignore me, huh? Leave me the fuck alone." However, the space between the period and his handle, perhaps a typographical error, may mean that it did not have this effect.

According to the printout of the Sysomos search, Mr. Elliott did not contact Ms. Reilly from August 14 to 28. His one tweet on the 28th purporting to quote her, after saying "Snark. How fat IS your ass", was three days after she had sent the seven retweets and modifications with such messages as "I wish you'd disappear up your own arse you supercilious fart golem", "He's apparently a multiple-times harasser/creepo on twitter" and "Don't like @greg_a_elliott misogynistic rants so use them against him. Stencil his harassing tweets next to his own art Attribute Accordingly."

On August 29 and 30, after Ms. Reilly tweeted him to leave her "the fuck alone," Mr. Elliott tweeted: "Heather's fat ass gets fatter". He used #TOPoli and then quoted Ms. Reilly tweeting someone else: "@SophieAnneB join those who've blocked #GAEhole . It's much nicer after blocking."

Then, the Sysomos search showed, he mentioned Ms. Reilly's handle in the exchange with @elleinad that I have reviewed in relation to Ms. Guthrie. @elleinad, who apparently had dinner with Mr. Elliott and whom he crudely propositioned and apologized to, consistently tried to reason with him on Twitter and criticized him for attacking people's physical appearance on Twitter.

He also tweeted Ms. Reilly twice on August 30 and once on September 1. One tweet was civil and appears to be a continuing Twitter discussion with others about calling out and trolling. The other two were nasty and insulting, one that used #TOPoli calling Ms. Reilly "a hateful bitch" who "enjoys ganging up on people who don't deserve it" and saying that "her ass is still fat". In another tweet directed at no one in particular, he called Ms. Reilly, Ms. Guthrie and two others "self-righteous Twitter bullies" and used #Twitter, i.e., a hashtag to discuss Twitter itself. Ms. Reilly did not recall seeing this latter tweet; she testified that she would probably personally not see it.

For the next two months, the Twitter world received almost nothing from Mr. Elliott with Ms. Reilly's handle, according to the Sysomos search, which revealed just two tweets. But 17 times in September, Ms. Reilly either retweeted about Mr. Elliott or tweeted with his handle at the beginning

preceded by a period. In some of these she defended herself against Mr. Elliott, who had tweeted that she had stalked a Hollywood movie star at the Toronto Film Festival by referring to his body. His tweet is attached to her tweet, but it does not mention her handle. Ms. Reilly called it a subtweet, which refers to someone without using their handle.

In several tweets, Ms. Reilly yet again made clear that she wanted Mr. Elliott to leave her alone on Twitter. Ms. Reilly was what she called signal boosting at this time. If people who followed her also wanted to chime in and tell him to knock it off, that was fine with her. She also said in one tweet that she had not used the tag #GAEhole for six days. She testified that she had used it sometimes, though not often.

Mr. Elliott's one reply to Ms. Reilly's retweets, on September 13, was: "Nothing better to do? #obsession #sad @VeronikaSwartz @rachelmack @nataliezed @la_panique @ladysnarksalot The parody? I find it hilarious."

Someone, not Ms. Reilly or Ms. Guthrie, had created a parody account with a handle similar to Mr. Elliott's.

Ms. Reilly replied with three retweets about Mr. Elliott. Two of them criticized him for using #TBTB. All of them had his handle with a period before them, with her intention that at least all of his followers would see them. One read: ".@greg_elliott_ Stop using this hashtag to spew your self-aggrandizing, misogynistic bullshit. #tbtb".

An incident on September 10 led Ms. Reilly to be concerned for herself in the real world, as opposed to the Twitter world. Ms. Reilly and her friends were meeting in a place called the Cadillac Lounge, and some of them tweeted that they were there. Ms. Reilly recalls Mr. Elliott tweeting to the effect of "a whole lot of ugly at the Cadillac Lounge." It is not clear how she heard about this, but it was through a tweet of which she could not "recall the verbiage".

Ms. Reilly did not find this tweet was physically insulting, just insulting, and thought Mr. Elliott might be present at the Cadillac Lounge. Though she had blocked him, she somehow came to know of his tweet. Although he could have known from her or her friends' tweets that they were at the Cadillac Lounge, she concluded that the individual who was harassing her on Twitter, as she referred to Mr. Elliott, was potentially in the same location as she, and that that was "concerning".

When Crown counsel asked her what she meant by it being concerning, she replied that it was because she had no idea what his potential future intent could be if he had chosen to escalate the harassment from online to in-person. She felt uncomfortable and looked around the restaurant to see if he was there, using a photo she had of Mr. Elliott and his four sons that had been posted. Ms. Reilly had printed this photo for self-protection, to be aware of what Mr. Elliott looked like. She said she also removed her own picture from her Twitter signature and replaced it with a cartoon, but cross-examination demonstrated that that had nothing to do with Mr. Elliott or the Cadillac Lounge.

But after she determined that Mr. Elliott was not at the Cadillac Lounge, she testified, she still felt tense because he appeared to be fixated on reading her Twitter feed.

On September 11, Ms. Reilly complained to Twitter that Mr. Elliott was tweeting her or reading her feed even though she had blocked him. Referencing some of Mr. Elliott's vulgar and hurtful tweets, she wrote that she was "part of a ladies group that meets Mondays, and he is 'tweet eavesdropping/stalking' this group, which also leads many of us to be concerned for our safety in real life, as this has now begun to feel like a real life threat."

Twitter replied that Mr. Elliott had not broken any Twitter rules and referred her to her local police department. She went in November.

In court, Ms. Reilly testified that the implication that he was physically present at the Cadillac Lounge, which turned out to be inaccurate, gave her "the impression that he was stalking me though my tweets, and could potentially be at any location I was, and I felt that that could eventually lead to a threat against my personal safety. This appeared to escalate from name calling through to potential...this could be physical harm to me."

It was after the Cadillac Lounge incident that communication between Mr. Elliott and Ms. Reilly – or at least tweets from either that use the other’s handle – stopped for two months.

During September Ms. Reilly took screen captures of any tweets that Mr. Elliott wrote in reference to her or her tweets. She tweeted to him –“is this some kind of a threat?” but in her testimony she was not sure what Mr. Elliott’s intent was and was not even sure of what her tweet was.

November 2012, just before the charge

At some point after September 13, Mr. Elliott had an exchange with someone with the handle @liverr, who falsely told him that she was 13 when she was over 18. Briefly, tweets appeared about Mr. Elliott propositioning a child. Then a flurry of tweets occurred on November 12.

Mr. Elliott tweeted the handle of Ms. Reilly and seven others, saying they “...can go fuck themselves. #topoli#FascistFeminists”. He tweeted: “#FascistFeminist cuts/pastes my timeline out of order” and quotes Ms. Reilly tweeting “first he propositions a 13 year old”, and added #TOpoli.

Ms. Reilly retweeted two tweets referring to Mr. Elliott and the 13-year-old – who was not 13. Then she sent what she referred to as a unique tweet: “Hey @Greg_a_elliott - no one is trying to warp the twisted shit you write. You do enough damage with your own tweets #creepy #lame”.

Finally, one conversation that Det. Bangild captured did not involve Ms. Reilly initially except that Mr. Elliott included her handle, or as she put it, tagged her into the conversation. He tweeted: “@larschristens10 @valerieburns613 Sorry Lars, @ladysnarksalot is a fat, angry pig who creates lies and rumours about me”.

He then tweeted to Ms. Reilly: “@LadySnarksalot Snarky, seems @larschristens10 is under the impression you have ‘facts about me’ that you should share w/ others. @valerieburns613”. Ms. Reilly then retweeted four tweets, including on November 15, in which others forcefully criticized and insulted Mr. Elliott.

Ms. Reilly went to the police on November 21, after Ms. Guthrie did. She went after she saw the police press release that followed Ms. Guthrie’s complaint, which she later retweeted to others. To that point Ms. Reilly had been keeping an eye on her tweets and his account. She did not see anything that made her think that any implied threat was going to escalate or get worse, she testified.

As for harassment, she did not feel that Mr. Elliott was picking on her *per se*, but did not appreciate randomly being dragged into Twitter fights for no reason. She did not like him making derogatory remarks about her with #TOpoli, so that everyone else reading #TOpoli could see them.

ANALYSIS

Has the Crown Proven Every Element of the Offence?

As set out earlier, the Crown must prove five elements of the offence in relation to each charge: repeated communication, that the complainant was harassed, that Mr. Elliott knew she was harassed, that the communication caused her to be fearful for her safety, and that the fear was reasonable in all the circumstances. The prosecution must prove each element beyond a reasonable doubt.

While it may be convenient to list the elements separately, they intertwine and interact in section 264 and the charge. The repeated communication explicitly must cause the fear, and implicitly must be the reason that the person is harassed, by either the nature or the frequency of the communication.

The defendant's knowledge that the person is harassed is also related to the communication. As Justice Proulx stated in *R. v. Lamontagne, supra*, one can hardly be expected to know about harassment that they have not caused ("dont il n'est pas responsable"). And Justice Berger said in *Sillipp*,

That which is prohibited is a person engaging in subsection (2) conduct with knowledge (recklessness or wilful blindness) that such conduct is causing the complainant to be harassed. The *mens rea* of the offence is the intention to engage in the prohibited conduct with the knowledge that the complainant is thereby harassed.[25]

So the knowledge that the other person is harassed presumes a knowledge that the other person is harassed by the sender's communication.

I propose to deal with the elements of the offence separately for Ms. Guthrie and Ms. Reilly because the facts are different, their relationships with Mr. Elliott were different, and so were the contents of his communications.

But since the issues regarding Twitter are generally applicable, I will first discuss communication on Twitter, freedom of expression and hashtags.

Communication on Twitter

Twitter is a public forum; Ms. Guthrie compared it to a public square. You can communicate privately on it, and people do, but it is difficult. If you simply tweet, anyone who follows you can read it and anyone who doesn't follow you can read it on the internet so long as they have a twitter account and yours is not private. If you address the tweet to someone by putting their handle first in the tweet, not only they will see it but those who follow their feed can see it as a tweet that they receive. If you mention someone's handle in the text, then they will be notified even if the tweet is to someone else.

You can't talk about anyone using their handle without them seeing your tweet (unless they have blocked you). Only if you and your correspondent direct message each other can you have a private conversation over Twitter, by addressing tweets to each other and not mentioning any hashtags or other handles. Furthermore, it is internet communication: a permanent written record of the conversation may be created, as the Sysomos software produced in this case. In another context, that of the state recording a private communication without consent, the Supreme Court of Canada has recognized a conceptual difference between a conversation that is recorded and one that is not regarding expectation of privacy.[26]

Everything militates against using Twitter as private communication and in favour of using it as a public forum, which is how Twitter self-defines and what it is. Tweets go to anyone who wants to read you by any method. Referring to other's handles spreads the tweet. Putting a period before the recipient's handle permits either everyone or at least the recipient's followers to read it (on this point the evidence is not clear). Mentioning anyone else by their handle sends it to them. If anyone who receives it retweets it, then it may spread in the same way among the retweeter's followers and then their followers. Pyramid and chain-letter metaphors come to mind; this is the very signal boosting that Ms. Reilly explained and that the complainants and Mr. Elliott engaged in.

Freedom of expression

Freedom of expression as a long-enshrined part of Canadian life and law preceded it being enshrined in s. 2(b) of the [Charter of Rights and Freedoms](#). Sharpe and Roach succinctly summarize the scope of freedom of expression in their book *The Charter of Rights and Freedoms*: [27]

Artists and writers often push the limits of conventional values. Scholars question "sacred cows" and accepted wisdom. Freedom of expression represents society's commitment to tolerate the annoyance of being confronted by unacceptable views. As stated by the Ontario Court of Appeal in an early [Charter](#) case "[T]he constitutional guarantee extends not only to that which is pleasing but also to that which to many may be aesthetically distasteful or morally offensive: it is indeed often

true that “one man’s vulgarity is another man’s lyric”. More recently, the Supreme Court of Canada emphasized that freedom of expression must include the “right to express outrageous and ridiculous opinions” and that as “[p]ublic controversy can be a rough trade...the law needs to accommodate its requirements.”

Hashtags

Apart from general tweets using handles, there is the use of hashtags. Rather than tweeting to someone in particular, one can communicate with people self-chosen by their interests: the topics, conversations or ideas they follow. Thus, Twitter users can read and learn about anything that they want that has a hashtag, or start their own hashtag.

Twitter is a powerful medium and gives an individual the potential to communicate with many people as if that individual had access to the mass media. As such, the individual has certain responsibilities, and must act within the law, as Mr. Elliott is charged with failing to do. However, the individual also enjoys a constitutional right to freedom of expression.

The litigation in this case does not directly concern the proper use of Twitter or its potential to benefit or harm society. But in order to determine the narrow issue of whether Mr. Elliott committed an offence in relation to Ms. Guthrie and Ms. Reilly, I have to determine how a hashtag should be viewed. The prosecution and complainants rely on all Mr. Elliott’s tweets, including those that used hashtags that Ms. Guthrie and Ms. Reilly used. Mr. Elliott’s use of #AOTID prompted Ms. Guthrie to go to the police. In addition to the qualified evidentiary basis that I have previously explained, I have the principle of freedom of expression and its limits on which to draw.

Twitter not only expands access to readers to those who do not have access to the mass media, it is an alternative to the mass media. It has the potential to develop so that more and different points of view can be promoted, including those that are not reflected in traditional media. Since tweets can include links, I can conclude, just from the evidence, that Twitter can spread well-considered articles as well as the tweeter’s opinion. Any limitation on its use that is not necessary to prevent criminality will limit this potential. It will not be consistent with the freedom of expression that is essential to a free and democratic society.

Once someone creates a hashtag, anyone can use it. Everyone has to be able to use it freely; anything less will limit the operation of Twitter in a way that is not consistent with freedom of expression.

On the other hand, someone may want to participate in a discussion anchored by a hashtag but not want to communicate with a particular person. Of many possible reasons for this, one may be that the person to be excluded does not want to hear from the other or has even told the other to stop contacting them. To interpret using a hashtag that you know another person also has used, may use, is using for an event, or even created (by using it first) as communicating indirectly with that person would prevent legitimate use of the hashtag. No one could use the hashtag without checking that anyone who did not want to hear from them was not using or following it, or might use or follow it.

The complainants’ position, and that of the Crown, is that the repeated communication alleged of Mr. Elliott consists of tweeting using handles, mentions and hashtags. The hashtag branch of the argument raises the general issue of whether communication by Twitter using a hashtag can accurately be called communicating with a person at all, never mind directly or indirectly.

If a person includes a hashtag in a tweet only for the purpose of communicating to someone who they know reads the hashtag, then this position is correct. However, given the nature of Twitter and hashtags, in order to prove that the intention of using the hashtag is to communicate with a particular follower of it, one would have to reasonably exclude any legitimate intention to refer to it or to communicate with anyone else who might be following it.

The essence of Twitter and hashtags, as the limited evidence in this case demonstrates, is to facilitate communication between people with like interests who voluntarily choose to follow certain topics or people and see what is being said about and by them. If you can’t use hashtags –

whatever hashtags you want and no matter who created them – then you can't use the platform to its potential.

Even with respect to tweeting in general, using Twitter while being protected from seeing another person's tweets or having them see and comment on yours is unworkable. You can limit seeing another person's tweets by blocking them, by not opening another person's feed and by asking your friends not to retweet tweets from people you have blocked. And you can avoid reading their replies by not writing to them. But if you tweet with hashtags and follow hashtags, you are going to see every tweet that contains those hashtags, and anyone who wants can follow them. A blocker can choose to avoid seeing tweets with hashtags they follow from someone they have blocked, but they lose the benefit of the hashtag discussion by that choice.

In this case, Mr. Elliott repeatedly used the AOTID hashtag just before Ms. Guthrie went to the police. Crown counsel in her submissions relies on the contents of Mr. Elliott's tweets to show that he was referring to Ms. Guthrie. @CromartyHeather tweeted to him "And yet you keep bringing her up. In every convo. Ones she's not at all involved in. you stalk her event's hashtag." Then "She doesn't talk about you because she doesn't like you. YOU, however, can't stop thinking about her. Telling."

Mr. Elliott's reply is his defence, at least on the hashtag issue. "She doesn't own a hashtag. Twitter's public. What kind of elitist control freaks are you? Censoring Twitter? Go to Facebook".

Crown counsel submits that Mr. Elliott was referring to Ms. Guthrie and that he was aware of Ms. Guthrie's connection to #AOTID. In this, Crown counsel is correct. There can be no doubt that Mr. Elliott was referring to Ms. Guthrie and that he was aware of Ms. Guthrie's connection to #AOTID.

On November 15, Mr. Elliott's tweet about creating a hashtag said suggesting you own it shows that you do not understand Twitter's true value. Ms. Guthrie testified that it was public information that #AOTID was associated with an event that she organized. She did not say that she invented it, but that she or someone in her group did.

It is difficult to situate a hashtag in Twitter. Neither party to this trial argued by analogy, and I can find no exact one. But courts must attempt to apply existing concepts to changing technology or develop new ones to deal with it. For example in *R. v. Vu*,^[28] the Supreme Court of Canada had to decide whether for the purpose of search warrant law, a computer was like a drawer or cupboard in a place covered by a warrant to search the place, or was a separate place itself.

In one sense, creating a hashtag for an event on Twitter is similar to announcing a public meeting. Being public, it is not subject to restriction by the organizers as a private meeting would be; the only restriction is that those attending obey the law. But one's very attendance at a public meeting cannot be deemed a violation of the law that is then used to bar entry. Similarly, the only restriction on tweeting a hashtag created for a specific event is that the Twitter account holder not break the law.

The potential diffusion of ideas that a hashtag holds could also be analogized to a billboard or an orator with a loudspeaker at a street corner. They can spread their ideas broadly and someone specific may hear them if they pass by. If the renter of the billboard or the orator knew that a specific person would have to pass by to go to work, and erected the billboard or delivered the speech for that reason, the general communication could be intended communication with a specific person. This is how Ms. Guthrie viewed Mr. Elliott's use of #AOTID: as tweeting with a hashtag that was meant for her and likely to reach her.

Tweets that use hashtags that anyone may or may not read or see, if they are for the purpose of communicating legally, should not be included as the communications referred to in [subsection 264\(2\)\(b\)](#) because that presumes that tweeting a hashtag carries with it the intention that a particular person see it. And that is the communication contemplated by [s. 264\(2\)\(b\)](#).

As I have noted, none of the appeal court cases have dealt with [s. 264\(2\)\(b\)](#) except *Rybak*, and in that case the communication and intention to communicate was obvious from the visits and the deliveries.

However, if it can be proven that a person used a hashtag with the intention that someone who followed or had to follow it would read it, that would come within the meaning of communication in [s. 264\(2\)\(b\)](#). It would lose its distinction and become like any other communication.

ANALYSIS: Stephanie Guthrie

I return to the elements of the offence as they apply to the circumstances of this case.

Repeated communication

Every time that Mr. Elliott started a tweet with Ms. Guthrie's handle or mentioned Ms. Guthrie, he communicated with her directly. When he tweeted mentioning her handle, he knew that it might be brought to her attention. Even after she blocked him, his perception that she was part of a group proves he knew tweets with her handle would reach her.

I therefore find the repeated communication that the section requires.

Was Ms. Guthrie harassed?

I accept that Ms. Guthrie was sincerely harassed within the meaning of the [Criminal Code](#) as interpreted in *Lamontagne* and *Kosikar* above. She was certainly vexed, disquieted and annoyed, but *Kosikar* holds that this is not enough. Using other synonyms in the Court of Appeal's resort to the dictionary in *Kosikar*, she was not tormented or chronically plagued. She did feel troubled, bedevilled or badgered. But harassment has an identifiable meaning without resort to the dictionary, and that is how Ms. Guthrie felt.

The fact of her harassment came from different beliefs and positions that she held and the large volume of tweets that Mr. Elliott sent to her or about her. It came from her view that Mr. Elliott could not use Twitter in the way that he did. It came from her understanding that every tweet from Mr. Elliott that mentioned her was meant for her – even if it was a retweet of someone else's tweet that had mentioned her. It came from her perception that she could tweet on topics without being exposed to what she viewed as his spurious, invalid tweets about the same topic – even if the topic was him, his online behaviour alleged or factual, his opinion on subjects she discussed, or insults to him.

As for the hashtags, Ms. Guthrie's view was that when he used one associated with her – even when exercising the freedom of discussion that hashtags permit – he was intending to communicate with her, and that contributed to the fact of her harassment. But she was harassed.

Did Mr. Elliott know that Ms. Guthrie was harassed?

Knowledge is a state of mind. An accused's state of mind can be proven by direct evidence, if for example he states it and is believed. This is not the case here. There is no statement or confession by Mr. Elliott that he knew that Ms. Guthrie was harassed. To the contrary, his only direct statement about harassment that was admissible was denial: "you had better make sure it is harassment and make sure that it is directed at you."

Therefore, the prosecution must prove Mr. Elliott's knowledge by circumstantial evidence. In this it is no different from any other circumstantial case relating to an essential element of the offence. Establishing beyond a reasonable doubt that the element is proven and the accused is guilty requires not only evidence from which guilt can be inferred but evidence that excludes every reasonable inference consistent with innocence.

An additional feature of the knowledge requirement in criminal harassment is that this knowledge, the state of mind of the accused, relates to the state of mind of another: the complainant, and whether she is harassed.

There is no doubt that Ms. Guthrie was harassed and that Mr. Elliott must know that now, after her complaint and her testimony.

But even now, what has harassed her is only the volume of tweets. There is no allegation of sexual harassment or threats, as Ms. Guthrie and Crown counsel acknowledge. Certainly anyone sending one tweet of that nature would know that the receiver would be harassed, Crown counsel would have drawn my attention to it, and likely Ms. Guthrie would have mentioned it. But Ms. Guthrie took pains to emphasize the volume. I have reviewed all tweets in the Sysomos printout, including the hashtag-based tweets, searching for such a tweet. Mr. Elliott called Ms. Guthrie a “nut-job” and once a “bitch” when he said he would have wished her well about her music that night except that she had been such a “bitch lately”. No tweets in themselves provide the basis for inferring knowledge.

There is no direct communication to Mr. Elliott that Ms. Guthrie is harassed.

She blocked him on July 7 but did not tell him, though he must have known because he referred to it. Only in September when she unblocked him did she tell him that she had blocked him.

Ms. Guthrie assumed that he was going offline, by which she meant out of Twitter and into her public tweets. She did not consider that he was receiving her tweets from people who followed her or were not blocked, in the same way as she learned about Mr. Elliott’s tweets from her friends after she had blocked him. In any event, going off Twitter and reading public tweets was one way to get around blocking, as she described. Blocking does not work to stop the blocked person from having access to your open account. It only works to prevent you from seeing their tweets.

And I do not accept that blocking someone or telling them that you blocked them a month ago communicates that you are harassed. Ms. Guthrie was not harassed on July 7, yet she blocked him. There can be many reasons for not wanting to read someone’s tweets. In this case, as I will discuss, it was in part because Ms. Guthrie thought what Mr. Elliott had to say was worthless nonsense. This may be understandable, but is not equivalent to advising someone that you are harassed.

Ms. Guthrie’s next possible direct communication to Mr. Elliott that she was harassed was her tweet of September 9th in which she said she had blocked him a month ago and stated: “stopped tweeting re: yr serial harassment weeks ago”.

Ms. Guthrie’s retweets in August were about Mr. Elliott allegedly harassing others and sexually harassing and “creeping” women. She was not talking about herself and testified to that effect. This is not a statement that she was serially harassed.

The volume of tweets, to Ms. Guthrie, demonstrated Mr. Elliott’s obsession with her and her work. She did not specify which among many tweets harassed her, saying it was no one particular tweet. She did testify that the #AOTID tweet early in November was the catalyst (mistranscribed “ethicist”) for going to the police.

Included in the volume indicating obsessiveness to her are all the tweets the Sysomos program found; those to her handle, those mentioning her handle, those retweeting tweets that contained her handle, those with hashtags she followed and those using #fascistfeminists. The accumulation without distinction is what caused her to be harassed.

I will now address whether Mr. Elliott knew that Ms. Guthrie was harassed by these tweets.

Until July 28, she was not afraid, nor was she harassed.

After July 28, the two were operating on the entirely different premises I have referred to. Ms. Guthrie’s was that Mr. Elliott had nothing worth saying about anything and that his opinions were spurious and not worth reading or responding to. This included his view, opposite to hers, that he did not harass women.

Ms. Guthrie asked in testimony, “What did it matter that he had a valid point? Who cares?” I interpret this evidence, with the help of her explanation, as meaning that even if he had a valid point

it did not permit him to stalk and harass her. In that sense, she is correct: you are not permitted to repeatedly communicate a valid point to someone when you know that they are harassed if it would cause them to reasonably fear for their safety in all of the circumstances.

But in another sense, important to the determination of this charge, Ms. Guthrie is not correct. If he had a valid point, he was entitled to use the hashtags that she had created and mention her, as he would not know that she was harassed by his expressing views in opposition to hers or her friends'. This is particularly the case regarding any issue about which Ms. Guthrie had herself engaged.

It goes further. He did not have to have a valid opinion in her view or even an opinion that was not spurious in her view. He could, in the tradition of Canadian freedom of expression that I discussed above, have a controversial or even offensive opinion. He could use extreme, hyperbolic, provocative language such as "fascist feminists." He could be, and unfortunately was, homophobic and insulting.

Mr. Elliott's view, as emerges from the content of his proven tweets, is that he could write what he wanted. His view conforms to the Twitter rules and the Canadian value of freedom of expression. If that was his state of mind, then he would not know that Ms. Guthrie was harassed by his doing what was lawful and what the platform they were both using permitted. What was lawful remained lawful; it does not amount to a crime unless the person communicating knows that the other person is harassed.

From Mr. Elliott's side, the whole exchange in relation to Ms. Guthrie was about what people talk about, whether he would do the poster, whether he could drive her around when she was injured or bring her alcohol, whether it was a good idea to campaign against Bendilin Spurr and notify Mr. Spurr's employer, whether he "creeped her out" at dinner, whether he was a misogynist, whether the charges of harassing women online were fair, whether he was trying to proposition an underage girl or an adult woman, and even at the end whether he was harassing her and her friends or he was being harassed under the guise of being accused of harassment.

He was accused of being sexist, misogynist and tweeting inappropriately, but he denied all the accusations.

Ms. Guthrie's opinion of Mr. Elliott's tweets is relevant to the crucial issue of whether Mr. Elliott knew that she was harassed.

For instance, she commented on this tweet: "Blaming the majority of normal #men for #rape is wrong. Rapists are not normal men. They're crazy. Why not blame the mentally ill? #TBTB".

Ms. Guthrie testified that she had no idea why the validity of this tweet's point was relevant to the trial, but in any case it was "garbage". She knew lots of normal men who have raped and women who had been raped by men whom counsel would call normal. She said she had no idea what defence counsel was talking about when he suggested that Mr. Elliott's tweet made a pretty good point, and she concluded with "Who cares?"

Much in this exchange is relevant to this case. Mr. Elliott was using the #TBTB hashtag that Ms. Guthrie created for "take back the block", to make streets safe for women. She said she was harassed by Mr. Elliott using it among all the other communications, and the prosecution cites it as one of his many indirect communications.

The language of Mr. Elliott's tweet is neutral and benign. The content is far-reaching, invoking complex concepts of nothing less than right and wrong, blame, the reasons men rape women, mental illness, what is normal and the criminal responsibility of the mentally ill. Some would say it is presumptuous to attempt this in no more than 140 characters; epigrams and maxims have their place in great writing but also their limit. Not all of us are writers such as La Rochefoucauld or Oscar Wilde. Others would and are allowed to say that tweeting about such topics advances understanding.

I agree with Crown counsel that you cannot use hashtags and ostensible rational comment as a pretence for harassing someone who you know is following the hashtag and does not want to hear

from you.

However, Ms. Guthrie's positions on the irrelevance of Mr. Elliott's views to her allegation about his use of #TBTB, with respect and recognizing that she genuinely holds it and is entitled to, are not obvious or common, even if they could be shown to be correct in a way that I am unable to perceive. Her view does not distinguish between valid debate and the right to express wrong views on the one hand, and harassment by repeated tweeting on the other. It presumes ownership by the creator of a hashtag, or at least control of who participates in discussion using the hashtag.

The proper use of Twitter is complicated, as it is developing. One view is Mr. Elliott's as expressed in tweets such as, "You don't know the value of twitter. If you want a private conversation use email," and tweets expressing the importance of allowing others to tweet even if you think their opinions have no validity and are garbage. Ms. Guthrie's view is the opposite. Though she testified that Mr. Elliott had a right to give his opinion, she took the position that she could demand that she be excluded from receiving it, which is her right – but also that he had to comply and cooperate, which is not her right.

Given Ms. Guthrie's view, Mr. Elliott would have had to know it in order to know that she was harassed. Knowledge, as discussed above, is really knowing. But that he knew that he was harassing her is not the only reasonable inference, based on the evidence that at the time, he was observing her constant involvement with him: participating in the mocking of him, unblocking to communicate with him, telling others he was a men's rights activist harassing women online, saying his name and celebrating the "Ugh" at the mention of his name at the meeting.

This very context and history, which the prosecution relies on to show that Ms. Guthrie was harassed, raises doubt as to whether Mr. Elliott knew she was harassed. This is quite apart from the campaigns against Mr. Elliott that were hatched at the summer meeting, and the Twitter discussions among Ms. Guthrie and her followers about his alleged harassment of women.

In order to prove circumstantially that Mr. Elliott knew that Ms. Guthrie was harassed, Crown counsel relies on specific tweets.

For instance on August 12, in what Ms. Guthrie describes as the big blowout, Ms. Guthrie retweeted six tweets that others had written about Mr. Elliott and containing his handle. Ms. Guthrie describes this day as when she became fearful of Mr. Elliott. She testified that she retweeted those tweets, given his ongoing monitoring of her feed and despite the fact that she had blocked him, to tell Mr. Elliott to stop sexually harassing women. Ms. Guthrie wanted Mr. Elliott to know that these others did not think his behaviour was acceptable. And Mr. Elliott was still blocked by Ms. Guthrie.

These retweets by Ms. Guthrie are not evidence that Mr. Elliott knew that she was harassed. By her own testimony she was engaging with him; she wanted him to know something. And she was communicating what others thought, which was not about herself but about other women being harassed. And, of course, she was doing this on Twitter. She had blocked Mr. Elliott and believed this stopped him from following her, but she knew that blocking does not work because you can go out of Twitter and see tweets from a person with an open account. And she knew he would see these tweets anyway because she had included his handle, which meant he would be notified of them.

At the most, these tweets would send a mixed message as to Ms. Guthrie's state of mind with respect to the only issue I am here concerned with: did Mr. Elliott know that she was harassed? She was fully participating in a campaign to educate him about his harassment of women.

Mr. Elliott tweeted often after August 12, and many of his tweets contained Ms. Guthrie's handle or quoted excerpts of her previous tweets. I have already concluded that they had the effect of harassing her. But the reason that neither Ms. Guthrie nor Crown counsel rely on any threatening or sexually inappropriate comments in the tweets is because there are none.

An example is the August 22 tweet in which he stated that Ms. Guthrie had labelled him "creepy." The prosecution argues that he still continued to barrage her with tweets, implying that he did it despite knowing that she thought he was creepy. But the full tweet, to someone named

@Robsonian, is: "Offered to help @WiTOpoli...crazy@amirightfolks labelled me 'creepy'. Gladly let it go. Watched them attack others...Defended."

This tweet does not show that Mr. Elliott knew that Ms. Guthrie was harassed by the content of his tweets or the repeated communication. It refers right back to the dinner and the poster negotiations, and is a description and defence of what he perceived he had been doing.

As in other instances that I described in the facts above, his use of Ms. Guthrie's handle was as a proper noun in his argument to @Robsonian. He was giving his side of the story and Ms. Guthrie happened to play a major role. He did know that she might receive it.

This is an innocent tweet, but is included in the totality of tweets that Ms. Guthrie testified harassed her and made her fearful. It does not support an inference that Mr. Elliott was repeatedly tweeting knowing that she was harassed. Similarly, each tweet in this totality is presented as an attempt to communicate with Ms. Guthrie without reference to any other possible legitimate use of either her handle or the hashtag.

Ms. Guthrie's view is that if he was using her handle or a hashtag that she created or was associated with, then he was attempting to communicate with her. This made her feel stalked and harassed. Ms. Reilly agreed with this analysis in reference to Ms. Guthrie. So did a tweeter named @CromartyHeather, a stranger to these proceedings but whose exchange with Mr. Elliott could stand as a summary of the case concerning Ms. Guthrie. @CromartyHeather tweeted: "Apparently there's a troll in the #AOTID feed. Ha ha ha, least self-aware dude ever." Mr. Elliott engaged with @CromartyHeather and referred to his dinner with Ms. Guthrie. He said, unconvincingly in my opinion, given his later offers of rides that he concedes could be perceived as flirtatious, that "not one thought of her as a sexual option ever entered my mind. She imagines otherwise."

@CromartyHeather replied to Mr. Elliott in a tweet that encapsulates the accusation against him regarding Ms. Guthrie: "And yet you keep bringing her up. In every convo. Ones she's not at all involved in. You stalk her event's hashtag." Then "She doesn't talk about you because she doesn't like you. YOU, however, can't stop thinking about her. Telling."

Mr. Elliott's reply sums up the defence: "She doesn't own a hashtag. Twitter's public. What kind of elitist control freaks are you? Censoring Twitter? Go to Facebook".

Not only Ms. Guthrie, Ms. Reilly and @CromartyHeather characterized his using Ms. Guthrie's handle and the hashtags she followed as harassment. The police took this view in designing the Sysomos search and it's also the position of Crown counsel in submissions. In respect of Mr. Elliott's reply about "Twitter is public," counsel submits: "It is clear that Mr. Elliott was referring to Ms. Guthrie and that he was aware of Ms. Guthrie's connection to the #AOTID."

I agree with Crown counsel that the exchange with @CromartyHeather and Mr. Elliott's reply make this clear. He even refers to "the #AOTID contributor who makes inaccurate statements about people based on her own crazy fears or needs." But this does not address what Mr. Elliott was doing. He was openly commenting on the #AOTID event about trolling, openly giving his side of the dispute with Ms. Guthrie, and openly stating his views on how Twitter should be used.

Each aspect of his tweeting is legitimate. To repeat, tweeting on a topic and exercising freedom of expression, arguing facts about his history with Ms. Guthrie (possibly falsely regarding his having no sexual interest), exercising and expressing his opinion on the proper use of the medium that everyone was using, is permitted.

To argue this tweet as a sample of criminal harassment does not advance the proposition that Mr. Elliott knew Ms. Guthrie was harassed; it raises doubt as to whether he knew or not. It comes back to the two understandably different ways that Mr. Elliott and Ms. Guthrie viewed the whole affair.

His volume of tweets harassed her because of her view that she could control people's non-threatening, non-sexual use of her handle and hashtags that she used beyond not reading their tweets and taking the ineffectual step of blocking. He cannot be imputed with knowledge that Ms.

Guthrie was harassed by his tweeting. Mr. Elliott was not responsible for that view, which is at least arguably incompatible with Twitter.

There is more evidence about his knowledge that she was harassed. After September 9, he stopped tweeting her until the November tweets with her handle and #AOTID. He did use other hashtags.

This significant behaviour stop can give rise to at least two reasonable inferences. One is that he stopped even using her handle because he knew that he had harassed her. The other inference is that there would be no reason for him to believe he was harassing her because he did as she asked and stopped contacting her.

His six November tweets were all to others, and they continued to argue his position about his dispute with Ms. Guthrie. Even the last, on November 13, when he told @justinsb to “go listen to @amirightfolks play her shit music in crappy bars with your loser faux-feminist friends” is part of a bitter exchange with @justinsb.

His conversation with @CromartyHeather, as usual, contains no threats, sexual harassment or language that would in itself be harassing. It refers to Ms. Guthrie though not by name or handle.

Ms. Guthrie saw some of these tweets, though not the whole exchange. She had re-blocked Mr. Elliott after she unblocked him to send her September 9 tweet. She testified that in her opinion he used the hashtag to go around the block she had placed on him.

She was entitled to conclude and think that. But her conclusion is based on the notion that an event hashtag could be restricted. It can't be. Mr. Elliott was entitled to joust with @CromartyHeather about her telling him that he was obsessed with Ms. Guthrie. His use of #AOTID does not add in any way to the circumstantial case proving what he knew about Ms. Guthrie's state of mind on November 15.

In summary, there is no direct evidence of Mr. Elliott's knowledge of Ms. Guthrie's harassment. Blocking does not convey harassment; it does not work and can be done for many reasons. No one conveyed to Mr. Elliott that he was harassing Ms. Guthrie; she was leading or at the least playing a major role in calling him out for allegedly harassing women online.

As for the circumstantial evidence of his knowledge, he received or saw tweets alleging that he harassed women, saying that his name attracted an expression of “Ugh” at a meeting, and that used #GAEhole, which was obviously intended to be obscene. He was also the subject of a parody account and was called a Men's Rights Activist and a serial harasser of women for a long time. Ms. Guthrie was not responsible for all this, but was involved in everything but #GAEhole.

His tweets, though obscene and homophobic in at least two instances, never threatened or were sexual. He exercised his right to tweet and to use public hashtags. And the volume of tweets that harassed Ms. Guthrie included permissible comment by Mr. Elliott and tweets using hashtags that Ms. Guthrie helped create and followed.

To return to Justice Proulx, “one can hardly impute to him knowledge of a state of being which he is not the cause of.” (“on pourrait difficilement lui imputer une connaissance d'un état dont il n'est pas responsable.”)

Given his correct view that he was allowed to do this and her continued efforts to call him out for his behaviour, I cannot infer that when he tweeted he knew that she was harassed by anything he was responsible for. The circumstantial evidence of his knowledge does not prove that he knew she was harassed beyond a reasonable doubt, because it does not exclude reasonable inferences consistent with innocence.

Recklessness

As there is no proof beyond a reasonable doubt that Mr. Elliott knew that Ms. Guthrie was harassed, I turn to recklessness. This is an entirely different mental state than knowledge. It requires only

awareness of the risk and then persistent conduct despite the risk.

It is less onerous for the prosecution to establish. But it still requires Mr. Elliott to be aware that something he is responsible for is harassing a person, as in my analysis of actual knowledge. To adapt what Justice Berger said in *Sillipp*, that which is prohibited is Mr. Elliott repeatedly communicating, reckless as to whether or not his conduct is causing Ms. Guthrie to be harassed.

Awareness of the risk is still a state of mind to be inferred from the evidence.

The accusations that Mr. Elliott harassed women online were, quite simply, nearly unanimous from those he was fending off and attacking, whom he grouped as #FascistFeminists. He did not have to accept their accusations and most certainly did not. Ms. Guthrie never said that he was harassing her in so many words, as I found in discussing knowledge. And he vehemently denied that he had ever sexually harassed her and defied her to provide an example.

But as for harassment from his communication with her using her handle, he was aware that she did not want to hear from him. He exercised his right to keep referring to her. But he had to be aware that there was a risk that he was harassing her.

Also, he persisted in sending indirect communications. I do not include his use of hashtags, given my findings that they should not be treated as direct or indirect communication absent proof of intention to use them for that purpose. But he was confident in his knowledge of what amounts to harassment, as he made clear in his comment using #16days: "you better be damn sure it's harassment, and, it is directed towards you."

I am not talking about criminal harassment in all of its elements but the word in its ordinary meaning, the part of the *actus reus* to which knowledge and recklessness must attach. There was an overwhelming risk that Ms. Guthrie was harassed by his tweets that mentioned her handle or referred to her. It does not matter for the purpose of assessing recklessness whether she was wrong about her right to stop others from sending tweets that might reach her or that a court might ultimately find that she was wrong and he was right. He was aware of the risk and he took it.

Recklessness has been established and there is no need to consider wilful blindness. I therefore turn to Ms. Guthrie's fear for her safety.

Fear for her safety

Ms. Guthrie testified that she felt harassed from when her dispute with Mr. Elliott turned serious in August. She said that the tweets between August and November in which he used a hashtag that she had created showed a lack of respect for her boundaries and that he was contacting her when she had explicitly requested that he not. His knowledge of the neighbourhood in which she lived and of the increasingly sort of "nonsensical, paranoid, conspiracy theoriesque" nature of his tweets about her and her friends made her feel "very much that there was a potential for danger".

I have already found Ms. Guthrie to be credible. Fear for her safety is subjective to her. This element of the offence is proven beyond a reasonable doubt.

Reasonable in all of the circumstances

The complainant's fear for her safety must be reasonable in all of the circumstances.

While Ms. Guthrie's genuinely held fear for her safety is subjective to her, this element of the offence requires an objective assessment of her fear. Justice Berger wrote in *Sillipp*,^[29] "It is trite law that 'reasonableness' imports an objective standard that is measured by the reasonable person test."

This does not mean that the subjective grounds for Ms. Guthrie's fear for her safety do not enter into the determination. It is just that they are subject to an assessment of reasonableness in all of the circumstances. Ms. Guthrie, during testimony, expressed her concern that the case had become

focused on her behaviour rather than Mr. Elliott's. But this final branch of the charge requires an assessment of the reasonableness of her fear.

That Ms. Guthrie is a woman is relevant. Crown counsel submits that "a reasonable person, especially, a woman, would find Mr. Elliott's tweets and behaviour concerning and scary." Women are vulnerable to violence and harassment by men, and Ms. Guthrie advocates for understanding and change. I must judge the reasonableness of Ms. Guthrie's fear in all the circumstances and on the evidence.

Being a man, I govern myself by now Chief Justice McLachlin's and Justice L'Heureux-Dubé's concurring minority opinion in *R. v R.D.S.*,^[30] particularly where they quote Judge Benjamin Cardozo at paragraph 34:

There is in each of us a stream of tendency, whether you choose to call it philosophy or not, which gives coherence and direction to thought and action. Judges cannot escape that current any more than other mortals. All their lives, forces which they do not recognize and cannot name, have been tugging at them – inherited instincts, traditional beliefs, acquired convictions; and the resultant is an outlook on life, a conception of social needs.... In this mental background every problem finds its setting. We may try to see things as objectively as we please. None the less, we can never see them with any eyes except our own.

And at paragraphs 41 and 42:

41 It is axiomatic that all cases litigated before judges are, to a greater or lesser degree, complex. There is more to a case than who did what to whom, and the questions of fact and law to be determined in any given case do not arise in a vacuum. Rather, they are the consequence of numerous factors, influenced by the innumerable forces which impact on them in a particular context. Judges, acting as finders of fact, must inquire into those forces. In short, they must be aware of the context in which the alleged crime occurred.

42 Judicial inquiry into the factual, social and psychological context within which litigation arises is not unusual. Rather, a conscious, contextual inquiry has become an accepted step towards judicial impartiality. In that regard, Professor Jennifer Nedelsky's "Embodied Diversity and the Challenges to Law" (1997), 42 McGill L.J. 91, at p. 107, offers the following comment:

- What makes it possible for us to genuinely judge, to move beyond our private idiosyncracies and preferences, is our capacity to achieve an "enlargement of mind". We do this by taking different perspectives into account. This is the path out of the blindness of our subjective private conditions. The more views we are able to take into account, the less likely we are to be locked into one perspective It is the capacity for "enlargement of mind" that makes autonomous, impartial judgment possible.

The circumstances

I return to some of the circumstances that I reviewed in discussing Mr. Elliott's knowledge that Ms. Guthrie was harassed. Mr. Elliott never physically hurt Ms. Guthrie. He never threatened her. He never sexually harassed her. After their dinner, except for a possible meeting that she cannot remember, his interaction with her was only by whatever device he tweeted from.

What caused Ms. Guthrie's fear was the volume of tweets, and her perception that he was obsessed and fixated on her and her work. The volume of tweets on which Crown counsel relies includes tweets before July 7. The context of these tweets is an important circumstance to consider in considering whether she reasonably feared Mr. Elliott because of the volume of his tweets, to her, about her and using hashtags she created or used. And as her objection to these tweets is intertwined in her mind with the fact that she blocked him, the reason that she blocked him is also one of all of the circumstances. It demands detailed review.

Ms. Guthrie's defence of American feminist Anita Sarkeesian was admirable. The face-punch game is very violent; pictures of it are in evidence. But her action on behalf of women and Ms. Sarkeesian was controversial in her own view. She knew full well the can of worms that she was about to open, as she put it, and said her heart was in her throat. She also used the word "sic" in her tweet asking

whether to engage the internet public about the creator of the game. This metaphor has no meaning apart from a violent one, like freeing a dog to bite. She made her argument to the game's creator, Mr. Spurr, with rhetorical force: "Do you punch women in the face IRL, or just on the internet?"

In short, her approach was a matter open to fair debate. Mr. Elliott called it revenge. She told him that if he thought it was revenge he was not listening, and that she was through with him.

Unknown to him she had investigated Mr. Elliott using the internet and learned of his alleged harassment of women. That was part of the reason for not using his work earlier, which she did not disclose to him.

His tweeting after being blocked because he used the word "revenge" is not behaviour that could lead someone to reasonably fear for their safety – particularly when Ms. Guthrie was tweeting to others that he was a men's rights (MRA) guy who disguises his feelings about women with a cloak of "care," and that he was a "concern troll" of feminism.

In any event, there was no fear or harassment until the end of July. I agree with Crown counsel that behaviour before the period charged in the information is relevant to harassment and fear. But I disagree that anything up to August 1 provided any objective reason for Ms. Guthrie to fear for her safety. The record shows a civil or mutually acceptable relationship until July 7 and then Mr. Elliott tweeting his point of view.

Any circumstances that make her fear reasonable therefore must be found during the period charged. Ms. Guthrie testified that she became fearful of him when things became serious around August 12. That is the day that Ms. Guthrie tweeted the six retweets of others telling Mr. Elliott to stop harassing women, to stop being a misogynist, to stop "creeping out" women.

The Sysomos search found 43 tweets from Mr. Elliott between Ms. Guthrie's six retweets on August 12 and her unblocking him on September 9 to tell him to stop contacting her. Only one began with Ms. Guthrie's handle, as the subject of a sentence saying that she admitted that she had a brand.

During this time, on August 15, Ms. Guthrie had tweeted to a person who had enquired about "GAE" that he was a Toronto man "sexually harassing women on the internet since lord only knows when" and "that GAE calls me ungrateful for not accepting rides from a stranger speaks to how little he understands of rape culture."

On August 23 he tweeted: "Hey, @amirightfolks and @popeshakey...offering #peace in regard to the #FascistFeminists vs. #MisogynistGreg 'war'. Meet to discuss? Yes?".

Then he mentioned her in a tweet to someone else saying he had offered a truce. Next he sent the tweet about offering Ms. Guthrie a ride when she had a cast and saying that the "nut-job" thought he wanted sex. Then he tweeted someone with a request to ask her if she had one example of his "sexually harassing her".

Another tweet was a defence insisting that he was a gentleman. He called Ms. Guthrie a drama queen and retweeted her calling him a textbook creep that she looked in the eye.

Ms. Guthrie's fear came from the volume of his tweets, including those using only hashtags. She could not say that she saw all of them, but I accept that she saw a lot. But whether she reasonably feared for her safety requires me to inquire into her reasoning.

Ms. Guthrie was operating on several premises that she made clear and I have discussed: Mr. Elliott's views were spurious and garbage and of no value; the contents of his tweets were irrelevant; if she didn't want to hear from him and blocked him, then he should not use her handle and risk her seeing what he had written.

In these circumstances, these premises were not reasonable. If she was fearful solely because of the volume of tweets to her, mentioning her or using a hashtag that she created or followed, then the reason that Mr. Elliott was tweeting and what he was saying is relevant to the reasonableness of the fear.

I have discussed this in dealing with whether Mr. Elliott knew that Ms. Guthrie was harassed. The main premise that I find unreasonable is her perception that she could tweet about topics but not be exposed to his tweets (however spurious and invalid) about the same topic – even if the topic was him.

All of Mr. Elliott's tweets at issue were responses to the attacks on him that I have listed, or a return to the original dinner and the Bendilin Spurr dispute. I say "all" his tweets because Crown counsel does not rely on the content of any one tweet to suggest harassment. His not letting go of a topic is stubborn and may be considered childish, but it does not provide a basis for a recipient of his tweets to fear danger, especially if the recipient is herself still making negative comments about the sender.

Another premise of Ms. Guthrie's is that Mr. Elliott was not allowed to tweet using hashtags that she created, was closely associated with or followed. But he was. She held a view of hashtags and Twitter that is she is entitled to but, according to this evidence, is not reasonable. The effect of P.C. Dayler's evidence on this point is that a hashtag is open to the world.

Another important circumstance is what occurred after Ms. Guthrie unblocked Mr. Elliott and told him to stop contacting her. Leaving aside his hashtag tweets, he did so until November 5.

I have reviewed his six November tweets and the exchange that @CromartyHeather commenced using #AOTID. Ms. Guthrie testified that made her afraid. Her basis was that he seemed obsessed and fixated; i.e., she was afraid by the very fact that he tweeted.

It is reasonable that fear can arise just from the fact of someone continuing to contact someone after being asked to stop. That behaviour could reasonably signify that the person who continued the contact was capable of anything since they ignored the request. Findings of reasonable fear are made on just that basis; I have done so myself in criminal harassment trials.

But in this case, Ms. Guthrie's unreasonable premise that Mr. Elliott was irrational and had nothing valid to say meant that she never put his tweets into any context. The very fact of his tweeting any hashtag she followed or any tweet about her or with her handle harassed her.

She would not even allow for the possibility that he had any reason apart from the obsession with her that she perceived to tweet about her. Given that she had a leadership role in the campaign to denounce him, that is not reasonable.

I do not restrict this consideration to physical safety, as s. 264 can include psychological safety. Though Crown counsel argued that as a basis of Ms. Guthrie's fear, I did not interpret her fear of danger to mean that. She particularly cited his knowing the neighbourhood in which she lived, and there is no evidence that she feared for her psychological safety. But that fear must also be reasonable.

At this point I have already determined that Ms. Guthrie was harassed by the repeated communication. Had there been anything in the tweets of a violent or sexual nature or that indicated the irrationality that Ms. Guthrie perceived, that could support a fear of danger on the basis that he would be capable of anything. But as I have discussed in relation to knowledge, I have reviewed all of the tweets – despite Crown counsel and Ms. Guthrie not relying on any one tweet – and found no such tweet. The element that the fear be reasonable in all of the circumstances has not been established beyond a reasonable doubt.

The charge is dismissed.

ANALYSIS: Heather Reilly

Repeated communication

Mr. Elliott communicated directly with Ms. Reilly during the period set out in the information, August 1 to November 20. He used her handle when he expressed disbelief about her request to stop following her feed, called her “fucking nuts”, and told her that “This is Twitter” and that her request that he stop replying to her posts offended his “sensibilities”. He used her handle again when he replied to her retweets by asking how she would feel if he was so delusional as to ask her not to retweet him. Just those two communications amount to repeated communications.

He also communicated with Ms. Reilly indirectly during the period, by mentioning her. I discount any of the tweets in which Mr. Elliott used a hashtag such as #TOpoli for the reasons given above in discussing hashtags, but such tweets form almost no part of Ms. Reilly’s complaint against Mr. Elliott.

But he mentioned her or directly tweeted her in both September and November. She did not recall seeing all the tweets that mentioned her – but again, communicating twice is enough.

I therefore find the repeated communication that the section requires.

Was Ms. Reilly harassed?

For Ms. Reilly it was the content of the tweets that harassed her and caused her to fear for her safety.

Ms. Reilly was frustrated by Mr. Elliott’s continuing to respond to what she had written. She was frustrated that Twitter’s blocking function was inadequate. She defined his replying or referencing her tweets as contacting her, and that included his commenting on her tweets to #TOpoli. Although I do not agree that commenting on someone’s comments on an open hashtag discussion is contacting the person, her subjective view was that she did not want to have any contact with him.

But the way that he contacted her was harassment.

On August 28, two weeks after their exchange about the proper use of Twitter and her offending his sensibilities, he sent a tweet starting as Snark and quoted her, and used her handle in the text. He wrote. “Snark. How fat IS your ass?” Two days later he tweeted to her: “@LadySnarksalot And your ass is still fat. And you’re still a hateful ‘bitch’ who enjoys ganging up on people”.

This latter tweet combined a valid comment (about ganging up) with a gratuitous reference to a woman’s body. And he added vitriol by including “hateful ‘bitch’”.

When Ms. Reilly testified that she retweeted negative comments about him, because she was glad to see other individuals were seeing that his behaviour was harassing, she was talking about him harassing her, not harassing others.

Harassment is a subjective state of mind of the victim, and I find that Ms. Reilly was harassed by Mr. Elliott’s tweets that did ultimately reach her.

Did Mr. Elliott know that Ms. Reilly was harassed?

There was no background history of emails, Twitter exchanges or personal meetings with Ms. Reilly. As soon as Mr. Elliott tweeted about Toronto garbage pickup trucks and tomato plants, Ms. Reilly told him to stop following her feed, and their argument about controlling Twitter began. Ms. Reilly tried, initially, to cut off the exchange quickly. She told him on August 9, just 12 days after he had first tweeted about her using #TOpoli, to please stop replying to her and that she had nothing more to say to him.

Then tweets from others that Ms. Reilly retweeted told Mr. Elliott to stop what he was doing. He responded enough that I can infer that he read them. Otherwise, as I have reviewed, Mr. Elliott was silent between August 14 and 28, and sent only one tweet on the 28th. That day, Ms. Reilly replied to Mr. Elliott: “Just couldn’t ignore me, huh? Leave me the fuck alone.” Again she told him to stop.

Here the same issue arises as with Ms. Guthrie, but I reach a different conclusion. Mr. Elliott generally used Twitter to say whatever he wanted and to argue about what Twitter was for. His direct and indirect tweets to Ms. Reilly are in response to something, either that she had tweeted or retweeted, or that others had tweeted about what he had said. But he peppered his tweets with mean, crass and insulting comments that were not necessary to the argument that he was making. And she repeatedly told him that she did not want to hear from him, either directly or by retweeting others telling him to stop. She tweeted explicitly: "please leave me alone."

In the midst of this negativity, Mr. Elliott asked on August 12 why Ms. Reilly favoured one of his tweets when she wanted nothing to do with him. This is the tweet that Ms. Reilly conceded was fair comment. But it preceded her August 28th tweet telling him to leave her "the fuck alone".

And in both September and November Ms. Reilly signal boosted, retweeting tweets in which she and others told Mr. Elliott to leave her alone.

There is no direct evidence that Mr. Elliott knew that Ms. Reilly was harassed. He never said as much in a tweet. Ms. Reilly was herself attacking Mr. Elliott, by using #GAEhole, retweeting the false allegations about his creeping on 13-year-olds, and encouraging others to deface his artwork in her retweets of August 24 and 25.

On the circumstantial proof of what he knew, I can rely on all Mr. Elliott's tweets in inferring his knowledge. He is smart and does not miss much. He responds to almost everything about himself. When someone has told you to "leave me the fuck alone" and you persist in calling them "a hateful 'bitch'" and say they "have a fat ass", you know that you have harassed them by your language even if you are engaging in a legitimate argument at the same time.

The language itself is harassing. He may not have agreed with her views about Twitter and her right to ask him to stop tweeting or reading her feed. But insulting her body and calling her a hateful bitch, even if the "bitch" is in quotation marks, amounts to harassing. It has nothing to do with comment or argument.

In the words of Justice Proulx in *Lamontagne*, he was responsible for her being harassed and so knowledge can be imputed to him.

It is not necessary to deal with wilful blindness or recklessness. This element of the offence is established beyond a reasonable doubt in relation to Ms. Reilly.

Fear for her safety

For the prosecution to prove the charge, it is not sufficient that it be proven that Mr. Elliott repeatedly communicated directly or indirectly and that he knew she was harassed, as she was. The repeated communication must cause Ms. Reilly to fear for her safety.

Relying on how Ms. Reilly answered in court when Crown counsel adduced the evidence of fear, I find that this element has not been proven beyond a reasonable doubt. This is an example of the advantage to the trial judge of seeing and hearing the witnesses as opposed to reading a transcript. At the outset of her examination, Ms. Reilly told Crown counsel that she went to the police after a press release indicated that Mr. Elliott had been charged. She went to provide to the police the information that she had provided to Twitter around September 25.

When Crown counsel asked her how she felt towards Mr. Elliott when she went to the police, she replied that she felt "somewhat frustrated" because her repeated requests to be left alone had been ignored and she faced continued harassment. She did not mention any fear.

The information that Ms. Reilly provided to Twitter about her fear was about the September 10 incident at the Cadillac Lounge.

Crown counsel questioned Ms. Reilly about what concerned her about the Cadillac Lounge incident. She could not lead Ms. Reilly. If Ms. Reilly did not say something about fear, there would have been no evidence of this element and a possible dismissal. Defence counsel in his submissions

suggested that Crown counsel almost pulled the word out of Ms. Reilly. I find that Crown counsel did nothing improper and her examination was flawless, but I agree with that characterization.

Ms. Reilly testified honestly. She was authentic and did not try to present herself as anything other than who she was. She and Ms. Guthrie may have been reluctant and not forthcoming about what occurred at the meeting about what to do about Mr. Elliott, but Ms. Reilly, like Ms. Guthrie, respected her affirmation. She was not trying to answer in order to convict Mr. Elliott, whom she dislikes intensely.

Ms. Reilly did not testify in any persuasive manner that she feared for her safety. At one point, she changed her avatar from a picture of her to a cartoon. There is no evidence that doing that changed the appearance of her tweets retroactively. And since no tweet appears with any avatar other than her @LadySnarksAlot cartoon, I cannot determine precisely when she did this, and Ms. Reilly did not say. She did not testify that she did this because she was afraid, but said it was because she received advice to do it.

She testified that she was “concerned” at the Cadillac Lounge. When Crown counsel asked Ms. Reilly what she meant by being concerned, she answered that “it was concerning because it ...I had no idea what his potential future intent could be if he would have chosen to escalate any of the harassment from being online to being in person.”

There are so many hypotheticals and conditionals in this honest answer that it leaves me with doubt about whether she was afraid for her safety.

In cross-examination, Ms. Reilly testified that she could not remember how Mr. Elliott’s tweet that there was “a whole lot of ugly at the Cadillac Lounge” came to her attention while she was at the lounge. She said it took her two minutes to satisfy herself that he was not physically there. But she felt “that the offline potential stalking of my location or other people’s locations could increase and I was concerned for my safety.”

Once again her answer has “potential” and “could increase”. She agreed that the potential stalking did not occur, but stated that she wasn’t psychic and wasn’t able to ensure that that wouldn’t happen.

The whole of Ms. Reilly’s concern for her safety reduces to two minutes in the Cadillac bar. Armed with a photograph, she was responding to a tweet from someone she had blocked, but could not remember how the tweet was brought to her attention. She did not think that the tweet referred to her physically, and in fact it did not. No other tweet indicated that Mr. Elliott knew or cared where she was.

I find, based on her testimony, that this is the fear that she was expressing to Twitter in her email complaint of September 11, 2012, when she wrote: “Additionally I am part of a ladies group that meets Mondays, and he is ‘tweet eavesdropping/stalking’ this group, which also leads many of us to be concerned for our safety in real life, as this has now begun to feel like a real life threat.”

This comment was based on the tweet from Mr. Elliott regarding the Cadillac Lounge meeting. After the Cadillac Lounge incident and her complaint to Twitter, Ms. Reilly continued to engage with Mr. Elliott. She retweeted tweets that mocked him about being afraid to walk the streets after dark, about people trying to help him but his ego “fucking it up” and telling him to stop using #TBTB to spew his “self-aggrandizing, misogynistic bullshit”. She retweeted tweets accusing him of “working on” teenage girls, of not updating his profile because he was afraid it would hurt his “mack”, of “creeping” on 13-year-olds. One, not a retweet, referred to the “twisted shit” that he wrote. All this occurred before the police became involved with Ms. Guthrie.

As Ms. Guthrie testified, there is no such thing as a perfect victim. But Ms. Reilly’s retweeting of forceful, insulting, unconfirmed and ultimately inaccurate attacks suggesting pedophilia – combined with her tentative, hypothetical concerns that he could possibly move from online to offline harassment, and her knowledge that he never came to the Cadillac Lounge and never again referred to her whereabouts – raises doubt in my mind to whether she was afraid of Mr. Elliott.

There is no suggestion of fear in her communication. Fear can be of psychological harm, as Crown counsel submits, but that is not the fear that Ms. Reilly was expressing to Twitter or in her testimony.

Reasonable doubt is a high standard. As Justice Cory stated in *R. v. Lifchus*, “a jury which concludes only that the accused is probably guilty must acquit.”^[31] This directive applies to every element of this charge, including that Mr. Elliott’s repeated communications caused Ms. Reilly to fear for her safety.

Even if I had found that the two minutes of concern at the Cadillac Lounge amounted to fear for her safety, I would not find it to be reasonable in all of the circumstances. Ms. Reilly wrote to Twitter that Mr. Elliott stalked her and eavesdropped on Twitter. She also tweeted to him on September 11, right after the Cadillac Lounge incident: “Making this request again publicly-stop reading my feed and alluding to it with your tweets.”

Her fear that he might have been at the Cadillac Lounge and that he could escalate to offline and real-life harassment (though she had no idea what he would do) is based on her view that there is privacy in Twitter and that one account holder can dictate what another account holder tweets. But on the whole of this evidence, relating to both her and Ms. Guthrie, Twitter is not private, by definition and in its essence.

On this evidentiary record, asking a person to stop reading one’s feed from a freely chosen open account is not reasonable. Nor is it reasonable to ask someone to stop alluding to one’s tweets. To subscribe to Twitter and keep your account open is to waive your right to privacy in your tweets. Arranging a meeting or social event using tweets other than direct messages is like inviting strangers into your home or onto your phone line while you talk to your friends. Blocking only goes so far, as long as you choose to remain open.

I am not satisfied beyond a reasonable doubt that Mr. Elliott’s repeated communications caused Ms. Reilly to fear for her safety. But had I been so satisfied in relation to the Cadillac Lounge incident, I would not be satisfied beyond a reasonable doubt that such fear, based as it was on an expectation that non-direct tweets are private, was reasonable in all of the circumstances.

The charge relating to Ms. Reilly is also dismissed.

CONCLUSION

The charges are dismissed.

There is evidence of Mr. Elliott not keeping the peace in the general sense of swearing and using sexual and sexist language inappropriately. But Crown counsel fairly stated at the outset that the alleged breach of his peace bond was the commission of the other two offences. Since he is not guilty of those, the charge of failing to comply with his peace bond is also dismissed.

Brent Knazan
Ontario Court of Justice
January 22, 2016

- [1] *R. v. Kosikar* 1999 CanLII 3775 (ON CA), 138 C.C.C.(3d) 217
- [2] *R. v. Lamontagne* [1998] J.Q. no 2545; version in English 1998 CanLII 13048 (QC CA), 129 C.C.C.(3d) 181
- [3] *R. v. Sillipp* 1997 ABCA 346 (CanLII), 120 C.C.C.(3d) 384
- [4] *Lamontagne, supra*, (English) at p.186
- [5] *R. v. Rybak* 1996 CanLII 1833 (BC CA), 47 C.R. (4th) 108
- [6] *Lamontagne, supra* J.Q. no 2545
- [7] *R. v. Zundel* 1987 CanLII 121 (ON CA), 56 C.R. (3d) 1
- [8] Don Stuart, *Canadian Criminal Law*. Carswell (Toronto 2011), p.245
- [9] *R. v. Brisco* 2010 SCC 13 (CanLII), [2010] 1 S.C.R. 411 paragraph 21
- [10] *Ibid.*, Glanville Williams quoted in paragraph 23
- [11] Stuart, *supra*, at p.247, citing *R. v. Sansregret* 1985 CanLII 79 (SCC), [1985] 1 S.C.R. 570, at paragraph 16
- [12] *Sillipp, supra*, paragraph 26
- [13] *R. v. Khelawon* 2006 SCC 57 (CanLII), [2006] 2 S.C.R. 787, paragraphs 35-36
- [14] *R. v. Andalib-Goortani* [2014] O.J. No. 4499
- [15] “*R. v. Andalib-Goortani: Authentication & the Internet*”, David M. Tanovich, 13 C.R. (7th) 140.
The parties did not address the applicability of ss.31.1 and following of the *Canada Evidence Act* that Prof. Tanovich discusses.
- [16] *R. v. McConnell* 2005 CanLII 13781 (ON CA), 75 O.R. (3d) 388
- [17] *R. v. Irwin* (1998) 1998 CanLII 2957 (ON CA), 123 C.C.C. (3d) 316
- [18] *R. v. Elliot* (1970), 1969 CanLII 373 (ON CA), 3 C.C.C. 233 (Ont. C.A.)
- [19] *R. v. Koma* [2015] S.J. 420
- [20] *R. v. Côté* 1996 CanLII 170 (SCC), [1996] 3 S.C.R. 139
- [21] *Irwin, supra*, paragraph 54
- [22] Ruth Sullivan, *Statutory Interpretation*, 2nd ed. (Toronto 2007), p.167
- [23] *R. v. Elliott* 1977 CanLII 209 (SCC), [1978] 2 S.C.R. 393, at p.424
- [24] Ms. Guthrie wrote this on the Storify.com website, which enables creation of narratives using emails, photos, tweets, links and other elements.
- [25] *Sillipp, supra*, paragraph 32
- [26] *R. v. Duarte* 1990 CanLII 150 (SCC), [1990] 1 S.C.R. 30, paragraph 30
- [27] Robert Sharpe and Kent Roach, *The Charter of Rights and Freedoms*, Irwin Law (Toronto 2009), Chapter 9
- [28] *R. v. Vu*, 2013 SCC 60 (CanLII), [2013] 3 S.C.R. 657
- [29] *Sillipp, supra*, paragraph 26
- [30] *R. v. R.D.S.* 1997 CanLII 324 (SCC), [1997] 3 S.C.R. 484
- [31] *R. v. Lifchus* 1997 CanLII 319 (SCC), [1997] 3 S.C.R. 320, paragraph 36

