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# Social Media Threats: Examining the Canadian Criminal Law Response

Benjamin Perrin\*

## INTRODUCTION

The rapid proliferation of social media networks in the last decade has been truly remarkable. These virtual global communities have revolutionized a wide range of fields, including journalism, communications, marketing, politics, civic engagement and advocacy. This borderless digital common also presents a challenge for national criminal laws, which are only beginning to grapple with the impact and implications of this emerging technology. With so many Canadians on social media,<sup>1</sup> it is unsurprising that criminal activity is taking place on these networks.

As part of the Social Media Crime project, all reported Canadian judicial decisions related to criminal law and social media networks were identified and reviewed.<sup>2</sup> The most common categories of criminality recognized were: (1) sexual offences, (2) threats, and (3) criminal harassment.<sup>3</sup> This article examines

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<sup>1</sup> Shea Bennett, “59% use Facebook in Canada (LinkedIn: 30%, Twitter: 25%, Instagram: 16%)”, *Ad Week* (4 February 2015), online: < <http://www.adweek.com/socialtimes/canada-social-media-study/614360> > .

<sup>2</sup> See “The Social Media Crime Project”, Peter A. Allard School of Law, online: < <http://www.allard.ubc.ca/perrin/social-media-crime-project> > . Key word searches (in both English and French) were performed to identify all potentially relevant reported judicial decisions using Quicklaw’s “All Canadian Court Cases” database. This search (current to May 1, 2017) revealed 1,844 potentially relevant decisions related to Facebook (launched in 2004), 149 related to Twitter (launched in 2006) and 15 related to Snapchat (launched in 2011). These three social media networks were selected because they are commonly understood in everyday usage and in the social media literature to constitute social media networks, and because they are among the most commonly used by Canadians. The figures for the number of decisions above are totals of English and French reported decisions so there is some very minor duplication in them (e.g., a Supreme Court of Canada decision mentioning one of these social media platforms would be counted twice since they appear in both official languages, however there are very few of these). Many of these cases merely mentioned the applicable social media network in passing or in a non-substantive manner. However, those decisions dealing with social media networks in a material or substantive manner were identified and then categorized based on the type of offence or legal issue.

how Canadian criminal law is responding to threats on major social media networks.

Uttering threats, contrary to s. 264.1 of the *Criminal Code*,<sup>4</sup> is the second most prevalent police-reported violent criminal incident in Canada. In 2016, there were 60,448 police-reported incidents of uttering threats (167/100,000 people) while 16,823 people were charged with this offence.<sup>5</sup> Uttering threats accounted for 15.84% of all violent police-reported incidents.<sup>6</sup> Media reports and judicial decisions reveal that criminal threats are being made on social media networks.<sup>7</sup>

While recent international scholarship has explored threats on social media networks,<sup>8</sup> the Canadian legal literature has yet to examine how our criminal law

<sup>3</sup> For a summary of reported Canadian judicial decisions related to substantive criminal offences and social media networks, see Benjamin Perrin, *Social Media Crime: Annotated Criminal Code* (Ottawa: Canadian Bar Association Law for the Future Fund, 2017), online: < [http://www.allard.ubc.ca/sites/www.allard.ubc.ca/files/uploads/Perrin/social\\_media\\_crime\\_in\\_canada\\_-\\_annotated\\_criminal\\_code\\_-\\_perrin.pdf](http://www.allard.ubc.ca/sites/www.allard.ubc.ca/files/uploads/Perrin/social_media_crime_in_canada_-_annotated_criminal_code_-_perrin.pdf) > .

<sup>4</sup> R.S.C. 1985, c. C-46, s. 264.1 [*Criminal Code*].

<sup>5</sup> Statistics Canada, “Incident-based crime statistics, by detailed violations, annual”, CANSIM Table 252-0051 (modified July 24, 2017), online: < <http://www5.statcan.gc.ca/cansim/a26?lang=eng&id=2520051> > [Incident-based crime statistics].

<sup>6</sup> Incident-based crime statistics, *ibid* (calculation by author).

<sup>7</sup> See e.g., Sunny Dhillon, “Police Grapple with How to Handle Threats Online”, *The Globe and Mail* (17 August 2012), online: < <https://beta.theglobeandmail.com/news/british-columbia/police-grapple-with-how-to-handle-threats-online/article4487785/?ref=http://www.theglobeandmail.com&> > .

<sup>8</sup> For U.S. literature, see Melissa A. Whitehead, “MySpace, WhoseSpace? The Impact of Semi-Private Social Media on Threats and the First Amendment” (2013) 39:1 *New Eng J Crim & Civ Confinement* 193; P. Brooks Fuller, “Evaluating Intent in True Threat Cases: The Importance of Context in Analyzing Threatening Internet Messages” (2015) 37:1 *Hastings Comm & Ent LJ* 37; Adrienne Scheffey, “Defining Intent in 165 Characters of Less: A Call for Clarity in the Intent Standard of True Threats After *Virginia v. Black*” (2015) 69:3 *U Miami L Rev* 861; Mark Strasser, “Incitement, Threats, and Constitutional Guarantees: First Amendment Protections pre- and post-*Elonis*” (2015) 14:1 *U New Hampshire L Rev* 163; Michael Pierce, “Prosecuting Online Threats After *Elonis*” (2016) 110:4 *Nw U L Rev* 995-1006; Enrique Monagas & Carlos Monagas, “Prosecuting Threats in the Age of Social Media” (2016) 36:3 *N Ill U L Rev* 57; Lyrisa Barnett & Linda R. Norbut, “#IU: Considering the Context of Online Threats” (5 February 2018) *Cal L Rev*, forthcoming; University of Missouri School of Law Legal Studies Research Paper No. 2018-11, online: < <https://ssrn.com/abstract=3118659> > . For U.K. literature, see Paul David Mora & Ashley Savage, “*Chambers v DPP*: credible threat or a joke in bad taste?” (2012) 23:8 *Entertainment L Rev (UK)* 253; Nick Tall, “DPP interim guidelines on prosecuting cases involving communications sent via social media - a matter of common sense?” (2013) 24:3 *Entertainment L Rev* 88; Sara Mansoori & Eloise Le Santo, “Criminal law and social media” (2014) 158:41 *Solicitors Journal Supplement (Bar Focus)* 29; Lilian Edwards, “Section 127 of the Communications Act 2003: threat or menace?” *Computers & Law* (October/November 2012), online: < <https://www.scl.org/articles/2579-section-127-of-the-communications-act-2003-threat-or-menace> > . For other jurisdictions, see Expertise Centre on Cybercrime, “Case Note:

is responding to this phenomenon. This article begins to address this gap in the literature by identifying five key findings with respect to how Canadian criminal law is dealing with social media threats.

First, a major substantive issue in prosecuting social media threats is establishing mental fault. The general case law on the threats offence in s. 264.1(1) of the *Criminal Code* requires that the accused have intended to intimidate or be taken seriously. This high level of subjective *mens rea* has been difficult to establish in some reported cases, although a critical review of some of these judgments reveals legal and factual errors. Social media postings often lack the detailed context of physical-world interactions, making it more difficult to engage in the contextual analysis that is necessary to determine whether what is objectively read as a threat of bodily harm was subjectively intended to intimidate or be taken seriously. At the same time, regardless of the intention of the accused, the effect on the subject of the threat (and others who may be exposed to it) may be the same. This suggests that while the criminal law has a role to play in addressing threats made on social media networks, it cannot and should not be expected to be a complete answer to threats of violence online. Social media platforms have a leading role to play in addressing online threats. Their response to threats made on their platforms is an ongoing controversy that has generated significant debate among the public and social media users.

Second, threats on social media networks against women, minority groups and political leaders were observable in reported judicial decisions. This is consistent with the academic literature that has found sexism, racism and Islamophobia prevalent online. Victimology has shown that vulnerable and marginalized groups, such as women and minority groups, are disproportionately affected as victims of crime in the “off-line” world. It should come as no surprise for the situation to be replicated, and even potentially worse, in the online world. Indeed, the social media environment can be particularly hostile and amplify the exposure of these groups to threats of violence.

Third, social media threats were made in several reported decisions by people with mental health issues, which ranged from more to less serious. An even more prevalent similar observation is apparent in criminal harassment (i.e., stalking) charges involving social media networks. This suggests that more thought and

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Netherlands: LJN BW9843 - threats via Twitter” (2013) 10 *Digital Evidence & Electronic Signature L Rev* 218; Chung Nian Lam & Gareth Liu, “Singapore: criminal intimidation via Facebook messaging” (2016) 32:2 *Computer L & Security Rev* 379. For a discussion of threats and hate crimes on social media related to Muslims, see Imran Awan & Irene Zempi, “‘I will Blow your face off’—Virtual and Physical World Anti-Muslim Hate Crime” (2017) 57:2 *British J Criminology* 363 [Awan & Zempi, “I will Blow your face off”]; Imran Awan, “Islamophobia and Twitter: A Typology of Online Hate Against Muslims on Social Media” (2014) 6:2 *Policy and Internet* 133 [Awan, “Islamophobia and Twitter”]; Imran Awan, ed., *Islamophobia in Cyberspace: Hate Crimes Go Viral* (London: Routledge, 2016) [Awan, “Islamophobia in Cyberspace”].

research into how to address the intersection between mental health and social media crime is needed.

Fourth, it was surprising to find so few reported judicial decisions dealing with evidentiary issues related to social media threats, given that this communications technology is relatively new. This may be a testament to the success of general evidentiary rules and principles applicable to all forms of digital evidence. However, it bears mentioning that other types of social media crime, such as sexual offences and terrorism-related offences, generated more evidentiary decisions with respect to such evidence.

Fifth, while public debate about how to deal with abuse and vitriol on social media networks is frequently framed as a contest between freedom of expression and equality, Canadian jurisprudence has fairly categorically rejected the notion that threats of violence are entitled to protection as freedom of expression. As a result, freedom of expression has not been considered in any sustained fashion in the reported social media threats cases.

This article begins by discussing the legislative history, essential elements, and purpose of the threats offence in s. 264.1(1) of the *Criminal Code*.<sup>9</sup> It then analyzes major reported Canadian judicial decisions dealing with social media threats, based on the five themes identified above. Finally, this article concludes by highlighting the implications and limitations of this study, as well as areas for future research.

## BACKGROUND ON THE UTTERING THREATS OFFENCE

When the uttering threats offence was first enacted by Parliament in 1869, it was limited to written threats to kill or murder someone.<sup>10</sup> However, the legislative history of this offence reveals a steady expansion of the scope of the offence to its current form that encompasses: (1) not just threats of death, but also threats of bodily harm and threats against property and animals; and (2) threats communicated in any manner.<sup>11</sup> This enables the offence to apply to emerging communications technology (including social media networks), without the need for legislative amendment each time a new means of communication is created.

Today, s. 264.1(1) of the *Criminal Code* sets out the uttering threats offence as follows:

264.1 (1) Every one commits an offence who, in any manner, knowingly utters, conveys or causes any person to receive a threat

(a) to cause death or bodily harm to any person;

<sup>9</sup> *Criminal Code*, *supra* note 5, s. 264.1(1).

<sup>10</sup> *The Offences Against the Person Act, 1869*, S.C. 1869, c. 20, s. 15.

<sup>11</sup> *Criminal Code*, S.C. 1953-54, c. 51, s. 316; *Criminal Law Amendment Act, 1985*, R.S.C. 1985, c. 27 (1st Supp.), ss. 38 & 53; *Criminal Law Amendment Act, 1994*, S.C. 1994, c. 44, s. 16.

- (b) to burn, destroy or damage real or personal property; or
- (c) to kill, poison or injure an animal or bird that is the property of any person.<sup>12</sup>

This article focuses on the first form of this offence, namely, threats to cause death or bodily harm to any person.<sup>13</sup> This is a hybrid offence, punishable by way of indictment by up to five years imprisonment, or as a summary conviction offence by up to 18 months imprisonment or a fine of up to \$5,000 for an individual or \$100,000 for an organization.<sup>14</sup>

The essential elements of the uttering threats offence in s. 264.1(1)(a) of the *Criminal Code* were consolidated and clarified by the Supreme Court of Canada in *R. v. McRae*.<sup>15</sup> The prohibited act (*actus reus*)<sup>16</sup> is that the accused, in any manner, uttered,<sup>17</sup> conveyed or caused any person to receive a threat to cause death or bodily harm<sup>18</sup> to any person. Whether the accused's conduct<sup>19</sup>

<sup>12</sup> *Criminal Code*, *supra* note 5, s. 264.1(1).

<sup>13</sup> For a threat on Facebook involving property, contrary to section 264.1(1)(b) of the *Criminal Code*, see *R. v. Saunders* (2013), 343 Nfld. P.E.I.R. 271, 1066 A.P.R. 271, [2013] N.J. No. 400 (Nfld. Prov. Ct.).

<sup>14</sup> *Criminal Code*, *supra* note 5, s. 264.1(2).

<sup>15</sup> *R. v. McRae*, 2013 SCC 68, 2013 CarswellQue 11603, 2013 CarswellQue 11604 (S.C.C.) [*McRae*].

<sup>16</sup> *Ibid*, at paras. 10-16.

<sup>17</sup> "Utters" is defined in *Black's Law Dictionary* as "[t]o say, express or publish": See *Black's Law Dictionary*, 10th ed., *sub verbo* "utters".

<sup>18</sup> "Bodily harm" is defined in s. 2 of the *Criminal Code*, *supra* note 5, as "any hurt or injury to a person that interferes with the health or comfort of the person and that is more than merely transient or trifling in nature". Bodily harm includes psychological harm: See *R. v. McCraw*, 1991 CarswellOnt 1024, 1991 CarswellOnt 113, [1991] 3 S.C.R. 72 (S.C.C.) at 81 [S.C.R.] [*McCraw*]. A threat of rape is considered a threat of bodily harm: *McCraw*, *ibid*, at paras. 28-33; see also *Non-Marine Underwriters, Lloyd's London v. Scalera*, 2000 SCC 24, 2000 CarswellBC 885, 2000 CarswellBC 886 (S.C.C.) at para. 120.

<sup>19</sup> While the Court used the term "words" in *McRae*, *supra* note 15 at paras. 10-11, which can mean written or spoken words, the offence is not limited to threats made through words. Indeed, the *Criminal Code*, *supra* note 5, s. 264.1(1)(a) refers to threats as being made "in any manner". A threat may be non-verbal, consisting of a gesture or symbol (e.g. an accused who, while being led out of court, points his hand to resemble a gun and pulls the "trigger" at a witness in the case.) The key is that the accused is communicating in any manner what a reasonable person would perceive to be a threat of death or bodily harm. A restrictive interpretation of s. 264.1(1)(a) of the *Criminal Code* that is limited to spoken words alone would be arbitrary, lead to absurd outcomes, be inconsistent with the purpose of the provision, and inconsistent with the legislative history of this provision which has progressively increased its ambit from its initial focus only on letters or writings to including threats made through numerous forms of communications to its current version which refers broadly to threats made "in any manner". Accordingly, referring to the accused's "conduct" rather than "words" is preferable since it encompasses threats made in any manner. The following are examples of cases involving non-verbal threats: *R. v. Moise*, 2017 QCCQ 598, 2017 CarswellQue 1149, EYB 2017-276276 (C.Q.) ("finger gun" gesture made at police officers, accompanied by "pow pow"

constituted a threat of death or bodily harm is a question of law determined on an objective standard: would a reasonable person fully aware of the circumstances have perceived them to be a threat of death or bodily harm?<sup>20</sup> In making this assessment, while testimony from people who witnessed or were the subject of the alleged threat may be considered in applying the reasonable person standard, they are not determinative. The plain and ordinary meaning of the words used is the starting point for analysis. Notably, it is unnecessary for the Crown to prove that the intended recipient of the threat was ever made aware of it or, if they were aware of it, that they were intimidated or took it seriously.<sup>21</sup> A threat may be against an individual or against an ascertainable group (e.g. police officers, a racial group, etc.).

With respect to mental fault (*mens rea*),<sup>22</sup> the accused must have intended the threat to intimidate *or* to be taken seriously.<sup>23</sup> It is unnecessary to prove that the accused intended the threat to be conveyed to the subject of the threat, or that the accused intended to carry out the threat. In making this subjective determination regarding the intent of the accused, inferences may be drawn from all of the circumstances, including the perceptions of any witnesses and the alleged victim.

### PURPOSE OF THE UTTERING THREATS OFFENCE

The Supreme Court of Canada has stated that the purpose of the uttering threats offence in s. 264.1(1)(a) of the *Criminal Code* is to protect against fear and intimidation. In *R. v. Clemente*,<sup>24</sup> Justice Cory stated that the purpose of the uttering threats offence is “to protect the exercise of freedom of choice by preventing intimidation. The section makes it a crime to issue threats without any further action being taken beyond the threat itself.”<sup>25</sup> Similarly, in *R. v.*

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sound, was a threat); *R. c. Bouchard*, 1994 CarswellQue 980, EYB 1994-55822 (C.A. Que.), leave to appeal to S.C.C. refused 189 N.R. 397 (note) (finding generally that words or gestures can qualify as threats); but see *R. v. Dumoulin*, 2000 CarswellOnt 3494, 38 C.R. (5th) 66 (Ont. S.C.J.) (finding that “utters” is limited to the spoken word and so, given that the Crown had particularized the charge as “uttering”, a gesture would not qualify as a threat).

<sup>20</sup> *McRae*, *supra* note 15 at para. 14 citing *R. v. Batista*, 2008 ONCA 804, 2008 CarswellOnt 7154, 62 C.R. (6th) 376 (C.A.) at para. 34 [*Batista*].

<sup>21</sup> See also *R. v. O'Brien*, 2013 SCC 2, 2013 CarswellMan 3, 2013 CarswellMan 4 (S.C.C.) at para. 13, per Fish J.

<sup>22</sup> *McRae*, *supra* note 15 at paras. 17-23.

<sup>23</sup> While s. 264.1(1)(a) of the *Criminal Code* uses the word “knowingly”, the Supreme Court of Canada has consistently interpreted this provision as requiring proof that the accused meant the threat to intimidate or be taken seriously. See *R. v. Clemente*, 1994 CarswellMan 152, 1994 CarswellMan 380, [1994] 2 S.C.R. 758 at 763, 95 Man. R. (2d) 161 (S.C.C.) [*Clemente*]; *McRae*, *supra* note 15 at para. 17.

<sup>24</sup> *Clemente*, *ibid.*

<sup>25</sup> *Clemente*, *ibid.*, at 761-762.

*McCraw*,<sup>26</sup> Justice Cory held that “[t]he aim and purpose of the offence [in s. 264.1 of the *Criminal Code*] is to protect against fear and intimidation. In enacting the section, Parliament was moving to protect personal freedom of choice and action, a matter of fundamental importance to members of a democratic society.”<sup>27</sup>

The Supreme Court of Canada has also recognized that threats of death or bodily harm are inherently violent.<sup>28</sup> Indeed, threats of death or bodily harm could foreseeably cause emotional distress and even psychological harm to the person against whom they are directed.

This articulation of the purpose of s. 264.1(1)(a) of the *Criminal Code* as recognized in the Supreme Court of Canada’s jurisprudence is compelling but incomplete, given that “[t]he Crown need not prove that the intended recipient of the threat was made aware of it, or if aware of it, that he or she was intimidated by it or took it seriously.”<sup>29</sup> In other words, how can the purpose of the uttering threats offence be limited to protecting the subject of the threat from fear and intimidation if they need not even be aware of it, intimidated by it, or take it seriously? The purpose of s. 264.1(1)(a) of the *Criminal Code* is arguably more expansive than has been explicitly recognized by the Supreme Court of Canada to date in at least two respects.

First, the uttering threats offence in s. 264.1(1)(a) of the *Criminal Code* functions as an incipient or inchoate offence. It is a preparatory crime that criminalizes conduct preceding the commission of more serious offences that are articulated in the threat itself (e.g. murder and assault).<sup>30</sup> Indeed, the Law Reform Commission has described threat-based offences as “preventive crimes” that exist for the purpose of giving police the power to intervene before a physical offence takes occurs.<sup>31</sup>

Second, an ancillary purpose of the threats offence in s. 264.1(1)(a) of the *Criminal Code* could be to suppress threats of death or bodily harm because of their potential negative effect on third parties and society. Such threats, if left unsanctioned, may help normalize violence, sow social unrest, undermine the rule of law, and disturb the peaceful enjoyment of life in a free and democratic

<sup>26</sup> *McCraw*, *supra* note 18.

<sup>27</sup> *Ibid*, at 82.

<sup>28</sup> *R. v. Steele*, 2014 SCC 61, 2014 CarswellMan 589, 2014 CarswellMan 590 (S.C.C.) at para. 47 [*Steele*].

<sup>29</sup> *McRae*, *supra* note 15 at para. 13.

<sup>30</sup> For a discussion of preparatory crime, see *R. v. Legare*, 2009 SCC 56, 2009 CarswellAlta 1958, 2009 CarswellAlta 1959 at paras. 25, 33 and 34. It is also noted that section 264.1 of the *Criminal Code* is the first offence to appear under the “Assault” heading in the *Criminal Code* and immediately before the offence of assault in section 265.

<sup>31</sup> Donald Stuart, “Working Paper on Homicide, Assault, and Threats (1st Draft)” (1979) Law Reform Commission of Canada (Ottawa: Law Reform Commission of Canada, 1979) at 66 (this language appears very similar to that used to describe inchoate offences) [1979 LRC Working Paper].



society.<sup>32</sup> However, such an ancillary purpose is an even greater step removed from physical violence actually being meted out. As discussed in the conclusion, the need to consider such a purpose to make sense of this offence is an indicator of just how broad it has become.

## TRENDS AND ISSUES IN SOCIAL MEDIA THREATS JURISPRUDENCE

Now that the legislative history, essential elements and purpose of the threats offence in s. 264.1(1)(a) of the *Criminal Code* have been set out, we can turn to an examination of the themes in the jurisprudence related to threats committed on social media networks.

### 1. Difficulties in Establishing Mental Fault for Social Media Threats

As discussed above, the Crown prosecutor must prove beyond a reasonable doubt that the accused intended to intimidate or be taken seriously in making what reasonable people would consider to be a threat of death or bodily harm. This is particularly challenging with respect to threats on social media networks, as courts are adjudicating in a relatively new environment, which is also constantly changing. The judicial understanding of social media networks is significant, since it affects how judges will consider all of the circumstances in evaluating evidence of an alleged social media threat. I begin by examining the first reported judicial decision where a criminal offence was allegedly committed on a social media network in Canada.

#### *R. v. Sather*

In *R. v. Sather*,<sup>33</sup> the Children's Aid Society ("CAS") took custody of the accused's newborn son ("Kyle"). A CAS employee was searching Facebook to find any references to the agency and found "frightening postings" on the accused's Facebook page. The accused was charged for making threats of death or bodily harm, contrary to s. 264.1(1)(a) of the *Criminal Code*.<sup>34</sup> The accused admitted that he made the Facebook postings. They refer to the accused in the third person, by his first name ("Dan"):

September 16, 2007 (10:53 a.m.)

"when I find out what nurse called CAS may god have murcey [sic] on my soul cause I'm going straight to hell with a 25 yr pit stop in prison"

October 23, 2007 (1:25 p.m.)

"Dan is gonna go suicidal bomb CAS"

November 5, 2007 (4:52 p.m.)

"Dan is sick of all the bull shit and in the midst of planning a tacticle [sic] strike to get kyle back and disappearing off the face of the earth."

<sup>32</sup> See *R. v. Khawaja*, 2012 SCC 69, 2012 CarswellOnt 15515, 2012 CarswellOnt 15516 at para. 70 [*Khawaja*].

<sup>33</sup> *R. v. Sather*, 2008 ONCJ 98, 2008 CarswellOnt 1286 (C.J.) [*Sather*].

<sup>34</sup> *Ibid.*, at paras. 1-4.

November 9, 2007 (9:56 a.m.)

“Dan is plan B is in full operation as of Nov. 23 first the man power was set up then the fire power is obtained now 2 weeks to find out where there keeping him.”

November 16, 2007 (10:25 a.m.)

“Dan is scared its almost time.”

November 20, 2007 (4:20 p.m.)

“Dan is I have no son think what u will I give up.”<sup>35</sup>

Justice R. Blouin of the Ontario Court of Justice readily concluded that these Facebook postings by the accused satisfied the *actus reus* of uttering threats, because, viewed objectively, they would have conveyed a threat of death or bodily harm to a reasonable person. However, Justice Blouin held that the Crown had not proven beyond a reasonable doubt that the accused had the requisite mental fault for the offence and, therefore, acquitted him of these charges.

Justice Blouin cited the Supreme Court of Canada’s decision in *R. v. Clemente*<sup>36</sup> as authority for the proposition that the mental fault element for uttering threats, contrary to s. 264.1(1)(a) of the *Criminal Code*, is that “the defendant must intend the words to instill fear or intimidate”.<sup>37</sup> However, this is an error of law and an incorrect description of what the Supreme Court of Canada decided in *Clemente*.

The very issue in *Clemente* was the mental fault element for the uttering threats offence in s. 264.1(1)(a) of the *Criminal Code*. In *Clemente*, the accused argued that the mental fault for this offence was that the accused intended to intimidate or instill fear, while the Crown argued that it is sufficient that the accused intended that the threat be taken seriously.<sup>38</sup> Justice Cory, writing for a unanimous Supreme Court of Canada, held that “[t]he requisite intent can be framed in either manner [. . .] The *mens rea* is that the words be spoken or written as a threat to cause death or serious bodily harm; that is, they were meant to intimidate or to be taken seriously.”<sup>39</sup> This was affirmed in a subsequent decision by the Court in *R. v. McRae* as follows:<sup>40</sup> “the fault element [for s. 264.1(1)(a) of the *Criminal Code*] is disjunctive: it can be established by showing either that the accused intended to intimidate *or* intended that the threats be taken seriously”.<sup>41</sup> However, as noted above, in *R. v. Sather* Justice Blouin incorrectly stated that *Clemente* “concludes that the defendant must intend the words to instill fear or intimidate”.<sup>42</sup> Justice Blouin’s legal error is repeated later in stating “[t]here are

<sup>35</sup> *Sather, ibid*, at para. 6.

<sup>36</sup> *Clemente, supra* note 23.

<sup>37</sup> *Sather, supra* note 33 at para. 8.

<sup>38</sup> *Clemente, supra* note 23 at 761.

<sup>39</sup> *Ibid*, at 761, 763.

<sup>40</sup> *McRae, supra* note 15.

<sup>41</sup> *McRae, ibid*, at para. 18 (emphasis in original).

many reasons why I conclude the postings were not meant to intimidate.”<sup>43</sup> Nowhere in Justice Blouin’s decision is there any mention or acknowledgement that the mental fault of uttering threats could be satisfied if the accused simply intended their threat of death or bodily harm to be taken seriously. Indeed, it appears as though Justice Blouin has mistakenly adopted the narrower articulation of the mental fault element for uttering threats that had been argued unsuccessfully by the appellant in *Clemente*.

This error of law could have been corrected on appellate review, but *R. v. Sather* was not appealed. Justice Blouin’s misstatement of the mental fault element for uttering threats, contrary to s. 264.1(1)(a) of the *Criminal Code*, should obviously not be followed and it also calls into question Justice Blouin’s subsequent conclusion that the Crown prosecutor in *R. v. Sather* had not proven the mental fault of the accused beyond a reasonable doubt. Unfortunately, Justice Blouin’s error has already been reproduced without correction in a law journal article.<sup>44</sup>

After incorrectly stating the law on the mental fault requirement for uttering threats under s. 264.1(1)(a) of the *Criminal Code*, Justice Blouin provides four reasons for concluding that the accused lacked the requisite *mens rea*:

Firstly, expert evidence was called to explain how people use Facebook. Jesse Hirsch testified that people who profile themselves embellish their character. They deliberately say provocative things to elicit a response from their Facebook “friends”. In a sense they construct an alternate persona.

Secondly, even without expert evidence to interpret them, it is clear that the postings were expressions of emotions directed towards people who might be sympathetic to Mr. Sather’s anger at losing his son. Only a fortuitous search by a CAS employee brought this to the attention of the authorities.

Thirdly, Mr. Sather had numerous direct contacts with CAS personnel and nurses at York Central Hospital and not one time did he do or say anything that might instil fear. Aside from being, to a minimal degree, agitated, in my view understandably he was polite and concerned. If his intent was to intimidate he had plenty of opportunity, yet did nothing. Fourthly, Mr. Sather testified that he posted these items to blow off steam as he had been taught in a prior anger management course. In different circumstances I might have found that explanation to be self-serving and convenient, but given all that I find from the above reasons, and observing Mr. Sather to testify in a straightforward manner about these matters, including a number of admissions that did not cast a

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<sup>42</sup> *Sather*, *supra* note 33 at para. 8.

<sup>43</sup> *Ibid*, at para. 9.

<sup>44</sup> Dan Grice and Bryan Schwartz, “Social Incrimination: How North American Courts are Embracing Social Network Evidence in Criminal and Civil Trials” (2012) 36:1 *Man LJ* 221, at 248 [Grice and Schwartz, “Social Incrimination”].

positive light on himself, including admitting he thought about killing someone, I conclude he was telling the truth and I accept his evidence.<sup>45</sup>

Each of these points merits unpacking. First, Justice Blouin does not justify the basis for Mr. Hirsh's<sup>46</sup> qualification as an expert in this decision. Mr. Hirsh's claims about how and why people use Facebook, particularly with respect to constructing an "alternate persona", are psychological or sociological in nature and are framed as broad generalizations. Yet an open source search reveals that Mr. Hirsh does not appear to be qualified in these fields. Instead he is described as "an artist, futurist, researcher and internet strategist" who holds a Masters degree from Ryerson University related to algorithms and predictive analytics.<sup>47</sup> It is, therefore, suspect whether he should have been qualified as an expert in this case to give evidence of this nature and whether the claims that he made, which were relied upon by Justice Blouin, are valid as expert evidence.<sup>48</sup>

The notion that most people use alternate personas online is part of early thinking on how people interacted in the beginning of the Internet era in the mid-1990s, which predated social media networks by a decade. This literature suggested that online identity is "de-centered and multiple"<sup>49</sup> and was based largely on online simulations, role-playing and fantasy. Certainly, some people portray themselves differently in their social media interactions than they may in their offline activities, or even create anonymous social media accounts. Yet contemporary literature on identity and social media has advanced significantly, suggesting that there is a meaningful link between a person's identity and their social media activities and persona.<sup>50</sup> It has also developed the concept of the "networked self", which recognizes the connection between online and off-line identity and conduct.<sup>51</sup> Understanding of the context of social media networks has, therefore, advanced significantly since the decision in *R. v. Sather*, which it

<sup>45</sup> *Sather*, *supra* note 33 at para. 9.

<sup>46</sup> While this expert's name is written as "Hirch" in *R. v. Sather* (*supra* note 33), this is a typo and it is actually spelled "Hirsh": Email correspondence between the author and Mr. Hirsh, 24 October 2017 (on file with author).

<sup>47</sup> National Speakers Bureau, "Jesse Hirsh: Futurist & Digital Strategist", online: < <https://www.nsb.com/speakers/jesse-hirsh/> >; see also Jesse Hirsh, online: < <http://jessehirsh.com/> > .

<sup>48</sup> See *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23, 2015 CarswellNS 313, 2015 CarswellNS 314 (S.C.C.) at paras. 22-24, adopting the reasons of Doherty JA in *R. v. Abbey*, 2009 ONCA 624, 2009 CarswellOnt 5008 (Ont. C.A.), leave to appeal to S.C.C. refused 2010 CarswellOnt 4827, 2010 CarswellOnt 4828; *R. v. Mohan*, 1994 CarswellOnt 1155, 1994 CarswellOnt 66, [1994] 2 S.C.R. 9 (S.C.C.) at 25 [S.C.R.].

<sup>49</sup> See e.g., Sherry Tuckle, *Life and the Screen: Identity in the Internet* (New York: Simon and Schuster, 1995).

<sup>50</sup> See Michal Kosinski et al., "Manifestations of user personality in website choice and behaviour on online social networks" (2014) 95:3 Mach Learn 357; José van Dijck, "'You have one identity': performing the self on Facebook and LinkedIn" (2013) 35:2 *Media, Culture & Society* 199.

<sup>51</sup> See Zizi Papacharissi, "Conclusion: A Networked Self" in Zizi Papacharissi, ed., *A*

bears reminding, was the first such reported decision on social media crime by a Canadian criminal court. Given the myriad concerns about the expert evidence in *R. v. Sather*, the “alternate persona” generalization should not be followed.<sup>52</sup>

Regardless of the validity of the expert evidence in *R. v. Sather*, it is not at all clear that an individual who was making threatening social media postings using an “alternate persona” would, for that reason alone, have any less intention to intimidate or be taken seriously. The opposite could be more plausible, namely, that by adopting an alternate persona someone may be less reticent to make threatening statements on a social media network than in face-to-face interactions due to their social inhibitions and fear of the consequences of making such a statement. Such a situation could suggest that it is more likely they intended to intimidate or be taken seriously by choosing social media networks as their communications medium for making the alleged threat.

Second, Justice Blouin characterizes the accused’s impugned Facebook postings as “expressions of emotions towards people who might be sympathetic”<sup>53</sup> to the accused and that only a “fortuitous search” brought it to the attention of the authorities. However, it is readily apparent from the facts in this case that the accused’s impugned Facebook postings were publicly accessible and not part of a private profile (because they were found by a CAS employee doing a search of Facebook). They were not merely available for viewing by people who were “sympathetic” to the accused (i.e., his “friends”). Even if they were, this does not prevent a finding that the accused meant them to be taken seriously as opposed to intimidate. It is, thus, here that the legal error identified above becomes material since Justice Blouin did not consider whether the accused’s threatening posts were intended to be taken seriously. Furthermore, the fact that a CAS employee identified the threats through a search is also immaterial to whether the accused intended them to be taken seriously. It is not necessary for an uttering threats conviction for the threat to be communicated to the subject.<sup>54</sup> However, when the subject of the alleged threats found out about them, they were concerned enough to report it to police, which is circumstantial evidence that may be considered in determining whether the accused intended the threat to intimidate or be taken seriously.<sup>55</sup>

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*Networked Self: Identity, Community, and Culture on Social Media Sites* (New York: Routledge, 2010) at 304-318.

<sup>52</sup> The expert testimony in *R. v. Sather*, *supra* note 33 at para. 9, concerning an “alternate persona”, was distinguished on the facts in *R. v. Hayes*, 2017 SKPC 8, 2017 CarswellSask 53 (Sask. Prov. Ct.) at para. 41 [*Hayes*]. Unfortunately, the problematic expert evidence in *R. v. Sather* has been relied upon in the scholarly literature. After citing it, Grice and Schwartz make the following conclusion: “Even if an individual’s posts are genuine and serious, courts should be cautious when it comes to understanding the context of videos, photographs, posts, and messages”: Grice and Schwartz, “Social Incrimination”, *supra* note 44 at para. 73.

<sup>53</sup> *Sather*, *supra* note 33 at para. 9.

<sup>54</sup> *McRae*, *supra* note 15 at para. 15.

Third, Justice Blouin contrasts the accused's threatening Facebook postings with the accused's interactions with CAS in person, stating that in the latter the accused was "polite and concerned" and, reasoning that "[i]f his intent was to intimidate he had plenty of opportunity, yet did nothing."<sup>56</sup> Again, we see the taint of legal error and the concept of an "alternate persona" significantly affecting the analysis by Justice Blouin. Someone could very well intend their threat be taken seriously by those to whom it was communicated on a social media network, while keeping their intention or purposes hidden from the subject of the threat. Alternatively, people may be more apt to make threats with an intention to intimidate or be taken seriously when they are made on social media networks as opposed to in face-to-face interactions owing to a fear of consequences from such a physical interaction.

Finally, Justice Blouin accepted the testimony of the accused that his threatening Facebook postings were "to blow off steam as he had been taught in a prior anger management course".<sup>57</sup> To begin with, it strains credulity that any legitimate anger management course would ever condone what the accused did in this case in making what Justice Blouin recognized were objective threats of death or bodily harm. Regardless, the accused was, by his admission, angry at losing his son. In acting on his anger, he made repeated and increasingly ominous threats of death or bodily harm which included a timeline that was taken seriously enough by police that they arrested the accused on the day that he stated in his Facebook postings would be the day that he was "full operation" with the "man power" and "fire power".<sup>58</sup> It is notable that he was not charged in relation to just one comment on his Facebook page, but a series of threatening comments that built on each other. This makes it less likely that these can be characterized as devoid of any intention to be taken seriously or intimidate.

In sum, the decision in *R. v. Sather* is bad law that should not be followed. It is based on a patent legal error with respect to the mental fault requirement for uttering threats, contrary to s. 264.1(1)(a) of the *Criminal Code*, which taints the factual analysis throughout. Justice Blouin's decision also relied on problematic and outdated evidence regarding alternate personas, so courts should not follow it.

#### *R. v. Lee*

In *R. v. Lee*,<sup>59</sup> the accused came to the attention of the York University Security and Toronto Police Service for Facebook postings including images of swastikas, a reference to the Virginia Tech massacre (where 32 people were killed by a gunman), and anti-Semitic statements. A detective with the Toronto Police

<sup>55</sup> See *McRae, ibid*, at para. 10.

<sup>56</sup> *Sather, supra* note 33 at para. 9.

<sup>57</sup> *Sather, ibid*.

<sup>58</sup> *Ibid*, at para. 6.

<sup>59</sup> *R. v. Lee*, 2010 ONCJ 291, 2010 CarswellOnt 5223 (Ont. C.J.) [*Lee*].

Service cautioned the accused about the postings, but no charges were laid at that time.<sup>60</sup> Just over a month later, on November 10, 2009, the accused made the following posting on his own Facebook page and was charged with uttering threats in relation to it:

I'm wearing black and I'm riding black this time around . . . I'm really sorry however you never thought this day would come, and didn't want it to be this way . . . I never knew why you would frame me nor put me on the cross for a few dollars . . . but I don't care, if you are a priest, judge, cop, lawyer, commoner, or teacher . . . I 'm bringing death with me this time around.<sup>61</sup>

Puzzlingly, the Crown submitted that this alleged threat was made against the accused's 273 Facebook "friends". Yet the plain language of this Facebook posting is not directed against, or limited to, such persons. Rather, it is an alleged threat of death against anyone. The accused wrote: "I don't care, if you are a priest, judge, cop, lawyer, commoner, or teacher . . . I 'm bringing death with me". In other words, it was an indiscriminate threat, which is a common aspect of mass shootings and sufficiently captured by the language of s. 264.1(1)(a), which refers to threats causing death or bodily harm to "any person". Despite this flaw in the Crown's framing of the charges, it did not affect the outcome of the case. The prosecution failed for other reasons. Justice K. Wright of the Ontario Court of Justice was not convinced beyond a reasonable doubt that the accused's posting was intended as a threat to intimidate or be taken seriously.

Unfortunately, Justice Wright's description of how Facebook works is inaccurate, both as it existed at the time, and presently. This factual error led to a flawed analysis of the accused's mental fault, as well as a problematic statement about the seriousness of statements made on Facebook that should not be followed. Justice Wright wrote:

This case is unique because the alleged threat comes in the form of a posting that was made by Mr. Lee on his Facebook page. It is noteworthy that this was a posting on Mr. Lee's Facebook page as opposed to a message he posted on someone else's Facebook page. At the time it was made, 273 people had access to Mr. Lee's Facebook. These authorized individuals are commonly known as "friends" in the Facebook environment. The Crown alleges that all those individual or "friends" that would have had access to Mr. Lee's Facebook were the subject of the threat. *It is noteworthy that in order for any of his friends to read the posting they would have had to access Mr. Lee's Facebook page.* There is no way for Mr. Lee to confirm that a friend has read his message unless they write a reply comment or tell him directly that they have done so. If Mr. Lee meant the message to be taken seriously, it seems to me he would want to ensure that his target audience would have received it. The Facebook format I have reviewed, of which Mr.

<sup>60</sup> *Ibid*, at para. 6.

<sup>61</sup> *Ibid*, at para. 7.

Lee was well aware, diminishes the seriousness that can be attached to the words written by Mr. Lee on this occasion.<sup>62</sup>

The impugned Facebook posting in *R. v. Lee* was made on November 10, 2009, yet Facebook’s “News Feed” feature had already been launched over three years prior, in September 2006. Facebook’s News Feed provides users with a constant stream of updates of the Facebook activities, including postings, of their friends.<sup>63</sup> Consequently, Justice Wright was incorrect in stating that in order for the accused’s posting to be read, his friends necessarily had to access the accused’s Facebook page directly.<sup>64</sup> Instead, when the accused made his posting on Facebook, in addition to it appearing on his own Facebook profile, it would have been broadcast to any number of his friends on their News Feed, depending on algorithms that Facebook uses.<sup>65</sup>

Consequently, Justice Wright’s finding that “[i]f Mr. Lee meant the message to be taken seriously, it seems to me he would want to ensure that his target audience would have received it”<sup>66</sup> is problematic due to an inaccurate and overly restrictive understanding of how Facebook postings are disseminated. Likewise, Justice Wright’s conclusion that “[t]he Facebook format [. . .] diminishes the seriousness that can be attached to the words written by Mr. Lee on this occasion”<sup>67</sup> is based on a fundamental error in understanding how this social media platform functions, and should not be followed by other courts. It is troubling that this statement has already been extracted as part of the ratio of the decision and reproduced in a law review article without the authors noting that the underlying factual basis for it is wrong.<sup>68</sup>

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<sup>62</sup> *Lee, ibid* at para. 9 (emphasis added).

<sup>63</sup> See Samantha Murphy, “The Evolution of Facebook News Feed” (12 March 2013), *Mashable*, online: <<http://mashable.com/2013/03/12/facebook-news-feed-evolution/#jArk2yx3FPq2>> ;

Facebook, “How News Feed Works”, online: <<https://www.facebook.com/help/327131014036297/>> .

<sup>64</sup> Justice Wright is correct, however, in stating that there is no way for the accused to know that someone has viewed his Facebook posting unless they interact with it in some way that is captured by Facebook (e.g. by posting a comment replying to the posting or liking it): see Facebook, “Can I Tell Who’s Looking at My Profile”, online: <<https://www.facebook.com/help/210896588933875>> [Facebook, “Who’s Looking”].

<sup>65</sup> These algorithms continue to evolve. The way that Facebook currently explains it in rather opaque terms is as follows: “The stories that show in your News Feed are influenced by your connections and activity on Facebook. This helps you to see more stories that interest you from friends you interact with the most. The number of comments and likes a post receives and what kind of story it is (ex: photo, video, status update) can also make it more likely to appear in your News Feed.” Facebook, “Who’s Looking”, *ibid*.

<sup>66</sup> *Lee, supra* note 59 at para. 9.

<sup>67</sup> *Ibid*.

<sup>68</sup> Grice and Schwartz, “Social Incrimination”, *supra* note 44 at para. 72.



The mere fact that an alleged threat was made on a social media network does not make it automatically more or less serious. There are arguments that cut both ways. On one hand, using social media's emblematic function to broadcast the threat to a large number of people or to the public at large may suggest the accused intended to intimidate or be taken seriously. On the other hand, many individuals appear to post their life almost as a stream of consciousness, providing a narration or curated record of their lives. This diary-like use of social media suggests that they did not intend their postings to be taken particularly seriously. Indeed, in *R. v. Lee*, Justice Wright analyzed the accused's pattern of Facebook activity in order to determine whether the accused had the requisite mental fault. Justice Wright specifically highlighted that the accused "had a habit of reporting almost hourly what he was doing" and that these were "littered with biblical references and his political opinions".<sup>69</sup> As a result of these competing explanations for the relevance of the social media context, caution must be exercised in making the fact-specific determinations required in these cases.

The accused in *R. v. Lee* testified that the Facebook posting that was the subject of the death threats charge was not a threat at all. Instead, he testified that he was making reference to his experience working for the coroner during the H1N1 outbreak transporting dead bodies. He testified he wrote about wearing black because that was the color of the uniform that he wore while doing so. The judge assumed the reference to "riding black" referred to the color of the vehicle he drove. In cross-examination, the accused was able to refer to a specific biblical passage alluded to in the post. The judge found the accused frequently made biblical references related to death on his Facebook page.<sup>70</sup> Justice Wright recognized "[a]bsent this explanation, it is easy to see how this posting could have been interpreted as a threat. [ . . . ] The context of threat combined with Mr. Lee's explanation as to when and why he wrote the message has left me in a state of reasonable doubt."<sup>71</sup>

Despite Justice Wright's errors with respect to how Facebook actually operates (*i.e.*, a lack of knowledge of the News Feed function), there is nevertheless a sound basis for an acquittal in this case given the accused's explanation and the trial judge's findings in this regard. This case demonstrates how difficult it will be to know in any given situation whether what objectively appears to be a threat of death or bodily harm satisfying the *actus reus* of the offence in s. 264.1(1)(a) of the *Criminal Code* is, in fact, criminal, owing to the complexities of investigating and then proving subjective mental fault.

It is reasonable to conclude, however, setting aside the factual errors in *R. v. Lee* concerning how Facebook actually operates, that *had the accused not testified* and provided his explanation of the impugned Facebook posting that he could have been properly convicted. This is because inferences could reasonably

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<sup>69</sup> *Lee*, *supra* note 59 at para. 11.

<sup>70</sup> *Lee*, *ibid*, at paras. 16-20.

<sup>71</sup> *Ibid*, at paras. 21, 23.

be drawn from the evidence that he intended the alleged threat to intimidate or be taken seriously. For example: the plain-language of the posting; the other postings of the accused which included images of swastikas and anti-Semitic comments; a reference to the mass shooting at Virginia Tech; and the reference to wearing black, which it could be argued was an allusion to the notorious black trench coats worn by Eric Harris and Dylan Klebold who were the shooters at Columbine High School on April 20, 1999.<sup>72</sup>

*R. c. Joad*

In *R. c. Joad*,<sup>73</sup> the accused appealed his convictions for uttering threats, contrary to s. 264.1(1)(a) of the *Criminal Code*, and counseling the commission of an indictable offence (murder), contrary to s. 464 of the *Criminal Code*. The accused, who was born in Syria, made a Facebook posting that said: “We must start by killing Assad’s media reporters”<sup>74</sup> (referring to Syrian President Bashar al-Assad).

The Quebec Court of Appeal allowed the appeal and ordered a new trial, finding that the trial judge’s very brief oral decision on these serious charges did not meet the minimum requirement for providing reasons. The trial judge failed to refer at all to the accused’s testimony, including the explanation given by the accused for his impugned Facebook comments: namely, that his intention was that pro-Assad journalists should only be killed after lawful trials in Syria, which retains the death penalty. The accused denied wanting to encourage anyone to do anything illegal. The appellate court rejected the Crown’s submission that this explanation went to motive and not to intention, instead finding that the accused’s explanation provided context to interpret the accused’s impugned Facebook postings.

Notably, the accused deleted the impugned comments once he realized that they were leading to confusion. Great care must be exercised in considering evidence that the accused deleted impugned social media postings that allegedly constitute an offence. The principle of contemporaneity requires that the mental fault of the accused be considered at the time they committed the *actus reus* of the offence. While post-offence conduct of many varieties may be circumstantial evidence of intention, in uttering threats cases the ultimate determination must always be whether the accused intended their threat to be taken seriously or intimidate at the time that they made the alleged threat.

In uttering threats cases, evidence that the accused deleted their impugned social media postings could cut either way, based on the particular circumstances of the case. For example, imagine that the accused saw that their comments were being interpreted differently than they intended, and they deleted them because

<sup>72</sup> Jefferson County Sheriff, “The Trench Coat Mafia & Associates”, *CNN*, online: <<http://edition.cnn.com/SPECIALS/2000/columbine.cd/Pages/MAFIA-TEXT.htm>> (accessed 23 February 2018).

<sup>73</sup> *R. c. Joad*, 2016 QCCA 1940, 2016 CarswellQue 11502 (C.A.) [*Joad*].

<sup>74</sup> *Ibid*, at Annex (unofficial English translation).

they never intended their comments to be taken that way. On the other hand, imagine a situation where the accused deleted their impugned postings only after the postings began to be commented on, or shared on a given social media network, since the accused became fearful that the notoriety of their postings would bring them to the attention of authorities. In other words, the postings were deleted to attempt to destroy evidence of the offence, i.e., a threat they intended to intimidate or be taken seriously, but then got “cold feet” about. Another possibility is that someone may delete a social media threat out of remorse or regret. While that may affect sentencing, it would not affect their criminal liability.

*R. v. Le Seilleur*

Despite the aforementioned difficulties, there are cases where courts have found the accused had the mental fault for an uttering threats conviction related to social media conduct. For example, in *R. v. Le Seilleur*,<sup>75</sup> the accused was a 19-year-old student and Pauline Marois was then Premier of Quebec. The accused read an online CTV news article entitled “Pauline Marois ready to call an election”. The accused shared the article through her Twitter account (she had over 100 followers), and made the following comment: “Good get the bitch out of there before I bomb her”.<sup>76</sup> The accused was charged, *inter alia*, with uttering threats contrary to s. 264.1(1)(a) of the *Criminal Code*. There was no dispute that the accused’s Twitter comment constituted a threat, given “the clear and unambiguous words written by the accused and the context in which they were uttered and conveyed”.<sup>77</sup>

The only issue was whether the accused had the requisite mental fault for uttering threats under s. 264.1(1)(a) of the *Criminal Code*. The accused testified at trial that she wrote the comment “without thinking about it clearly” and “had no intention of anything”.<sup>78</sup> She stated that she posted the tweet in a moment of anger after a comment made by the Premier, and admitted during cross-examination that she was frustrated about various things the Premier was doing.<sup>79</sup>

Justice Yvan Poulin held that the accused in *R. v. Le Seilleur* had the requisite *mens rea* for uttering threats and convicted her of the offence, finding:

Although she claims that she wrote the post “without thinking clearly” and “without meaning what was written”, it is clear from the evidence that it came from an operating mind that was angry and frustrated. Her frustration was unmistakably vocalized in a serious threatening and

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<sup>75</sup> *R. v. Le Seilleur*, 2014 QCCQ 12216, 2014 CarswellQue 13487, 2015EXP-309 (C.Q.) [*Le Seilleur*].

<sup>76</sup> *Le Seilleur*, *ibid*, at para. 2.

<sup>77</sup> *Ibid*, at para. 9.

<sup>78</sup> *Ibid*, at para. 3.

<sup>79</sup> *Ibid*, at paras. 3-4.

intimidating manner. Although it might have been written in a “split second”, it was still a conscious act which was clearly intimidating and threatening. [ . . . ] the Court is convinced beyond a reasonable doubt that at the precise moment the message was posted, the accused — who was angry and frustrated at the Prime Minister — had the requisite intention to be taken seriously.<sup>80</sup>

Justice Poulin’s finding that the accused had the intention to be taken seriously is based on her admission that, at the time she made the impugned Facebook posting, she was “angry and frustrated” at then Premier Marois. The inference being drawn here is that someone acting out of anger and frustration intends to be taken seriously. While this same inference could have been drawn, but was not, in *R. v. Sather*, this inference was made in *R. v. Hayes*, discussed next, revealing an inconsistency in how such evidence is assessed.

#### *R. v. Hayes*

In *R. v. Hayes*,<sup>81</sup> Justice R. Green of the Saskatchewan Provincial Court found the accused guilty of uttering threats, contrary to s. 264.1 of the *Criminal Code*, for two Facebook postings that he made threatening Prime Minister Justin Trudeau.<sup>82</sup>

In two separate statements to police after making each of these Facebook postings, the accused made incriminating statements. Justice Green found that the accused “was politically opposed to the Prime Minister, angry about decisions taken by the Prime Minister’s government and frustrated by the perceived effects these decisions had on his own financial situation”.<sup>83</sup> Justice Green noted that nothing in what the accused said suggested that he had made the Facebook postings in jest.<sup>84</sup> Justice Green had no hesitation in concluding that a reasonable person would find that the accused’s impugned Facebook postings constituted a threat against the Prime Minister.

With respect to mental fault, the defence argued that the accused was frustrated and attempting “to rally others to political action — that he did not intend to utter a threat, but only to express an opinion”.<sup>85</sup> Justice Green rejected this argument, finding that the accused intended both to be taken seriously and to intimidate in making the threats, based both on the language of the postings themselves and several incriminating statements made by the accused to police.<sup>86</sup> Justice Green also distinguished the decision in *R. v. Sather* (discussed above):

<sup>80</sup> *Le Seelleur, ibid*, at paras. 10, 13 (emphasis in original removed).

<sup>81</sup> *Hayes, supra* note 52.

<sup>82</sup> *Hayes, ibid*, at paras. 3-4.

<sup>83</sup> *Ibid*, at para. 37.

<sup>84</sup> *Ibid*, at para. 36.

<sup>85</sup> *Ibid*, at para. 38.

<sup>86</sup> *Hayes, ibid*, at para. 39.

I, however, am satisfied that the *Sather* case can be distinguished from that of Mr. Hayes, as no evidence was presented at the trial, either by Mr. Hayes or by an expert on his behalf, to suggest what he intended in making the posts or how he used Facebook or that he had a false persona on Facebook. Nor was there any evidence of any ongoing dialogue between Mr. Hayes and the Prime Minister. While his comments may have been directed on the Internet to a group which included people who shared his political views and frustration, nevertheless it is clear to me that the best evidence of Mr. Hayes' intent in making these posts is that contained in his two statements he gave to the RCMP, which I have referred to above.<sup>87</sup>

The evidence on intention is even stronger in *R. v. Hayes* than in *R. v. Le Seelleur*, owing to the many incriminating statements made by Hayes to the police. However, for both of these accused, their threats were similar in two ways: they were both manifestations of anger and frustration with politicians, and there was no intention to act on the threats. This highlights the fact that an intention to act on a threat is not required for the uttering threats offence to be committed.<sup>88</sup>

## 2. Social Media Threats Made Against Women, Minority Groups, and Politicians

Women, minority groups and politicians were three groups that were readily observed as targets of social media threats in reported judicial decisions. Indeed, international research into social media crime suggests that the prevalence of sexism, racism and Islamophobia online disproportionately affects women and minority groups.<sup>89</sup>

### *Social media threats against women*

There are numerous reported judicial decisions involving social media threats against women.<sup>90</sup> In all but one of these cases, the accused was male.<sup>91</sup> Social media threats included sexist language and sexualized violence.

The language used by the accused in making a threat against then Quebec Premier Pauline Marois in *R. v. Le Seelleur* was infused with sexism, referring to

<sup>87</sup> *Ibid*, at para. 41.

<sup>88</sup> See *ibid* at paras. 14-17, 23, 25, 37, 39, 41; *Le Seelleur*, *supra* note 75 at paras. 10, 13.

<sup>89</sup> See Michael Salter, *Crime, Justice and Social Media* (New York: Routledge, 2017); Michael Salter, "Justice and Revenge in Online Counter-Publics: Emerging Responses to Sexual Violence in the Age of Social Media" (2013) 9:3 *Crime Media Culture* 225; Kevin J. Gin et al., "Racialized Aggressions and Social Media on Campus" (2017) 58(2) *J of College Student Dev* 159-174; Awan and Zempi, "I will Blow your face off", *supra* note 8; Awan, "Islamophobia and Twitter", *supra* note 8; Awan, "Islamophobia in Cyberspace", *supra* note 8.

<sup>90</sup> *R. v. D. (D.)*, 2013 ONCJ 134, 2013 CarswellOnt 3034 (Ont. C.J.) [*D.D.*]; *R. v. Hirsch*, 2017 SKCA 14, 2017 CarswellSask 77 (Sask. C.A.) [*Hirsch*]; *Le Seelleur*, *supra* note 75.

<sup>91</sup> In *Le Seelleur*, *ibid*, the accused was a 19-year-old female student.

the former Premier as a “bitch”.<sup>92</sup> In *R. v. Hayes*,<sup>93</sup> the accused made a Facebook posting for which he was not charged in relation to Alberta Premier Rachel Notley, referring to both her and Prime Minister Justin Trudeau as “scab, mofo’s, bloodsucking politicians”.<sup>94</sup> These decisions are explored further below under the sub-heading of social media threats against politicians.

There are three other notable reported judicial decisions to date dealing with uttering threats against women. The first two involve threats against females by male accused in a relationship context, while the third was a threat made by a man against all women.

*R. v. D. (D.)*

In *R. v. D. (D.)*,<sup>95</sup> the male accused (who was under 18 years of age at the time) and the 16-year-old female complainant met at a school band performance. Several days after they met, the accused and the complainant had a conversation on Facebook where the accused made disturbing statements involving graphic sexualized violence that he told the complainant he wanted to do to her.<sup>96</sup> In response to these comments, the complainant protested that he could not do any of those things to her and that she would not allow a man to harm her. She said that she was “scared that he’d act out and cut me and rape me”.<sup>97</sup>

In searching the accused’s backpack incidental to arrest, the police found a note with large block letters saying “KILLER RAPE DEATH” with a handwritten note stating, *inter alia*, “I can only get pleasure, sexual pleasure, if the female is undergoing extreme pain, being raped, abused, tortured, or simply crying.” The note then described, in detail, specific acts of extreme sexual violence and sadism.<sup>98</sup>

Defence counsel submitted that the accused was not uttering threats in his Facebook conversation with the complainant but was simply conveying his fantasies or desires, but not his intentions.<sup>99</sup> The accused did not testify or call any evidence.

Justice J.A. De Filippis of the Ontario Court of Justice found that the accused’s statements to the complainant in the Facebook conversation were meant to be taken seriously. When the accused described his violent desires, the complainant told him to calm down and he responded by saying “I don’t care if u want it to happen or not“. After considering all of the circumstances, in finding

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<sup>92</sup> *Le Seilleur, ibid*, at para. 2.

<sup>93</sup> *Hayes, supra* note 52.

<sup>94</sup> *Ibid*, at para. 5.

<sup>95</sup> *D.D., supra* note 90.

<sup>96</sup> *Ibid*, at para. 3.

<sup>97</sup> *Ibid*, at para. 4.

<sup>98</sup> *Ibid*, at para. 5.

<sup>99</sup> *D.D., ibid*, at para. 7.

the accused guilty of uttering threats contrary to s. 264.1(1)(a) of the *Criminal Code*, Justice De Filippis concluded by stating:

The Facebook conversation reflects his need to cause bodily harm as a source of sexual gratification. He described the violent nature of the acts contemplated and sought the complainant's submission to his desire. He also said he did not care if she consented. I have no doubt these words were meant to be taken seriously and that they intimidated the complainant. Indeed, I am confident he derived pleasure from the threats themselves.<sup>100</sup>

*R. v. Hirsch*

In *R. v. Hirsch*,<sup>101</sup> the accused unsuccessfully appealed his conviction for uttering threats to cause bodily harm to the complainant, his former girlfriend, contrary to s. 264.1(1)(a) of the *Criminal Code*. The complainant testified that the accused had been emotionally and physically abusive during their eight-year relationship and that was her reason for ending it. However, she continued to see him occasionally, including daily during the week or so before the accused posted a message on his Facebook account saying that he was going to choke her and shoot her with a shotgun. The message also included a nude image of the complainant.<sup>102</sup> In addition to reporting this message and the image to police, the complainant reported it to Facebook who replied later that the postings had been taken down. However, it was unclear whether Facebook or the accused actually removed the postings.

*R. v. Hunt*

In the Quebec case of *R. v. Hunt*,<sup>103</sup> the self-represented accused was charged with uttering a threat to cause death or bodily harm on Facebook against all women, contrary to s. 264.1(1)(a) of the *Criminal Code*. A woman had called 911 after "surfing on the Internet" and reading a message on Facebook that frightened her. The message looked like a suicide note and general threat against women, referring to the December 6, 1989 killing of 14 women at the École Polytechnique de Montréal by Marc Lépine, before he died by suicide.<sup>104</sup> The reported decision in this case relates to various *Canadian Charter of Rights and Freedoms* motions brought by the accused, all of which were dismissed by the court.

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<sup>100</sup> *Ibid*, at para. 21.

<sup>101</sup> *Hirsch*, *supra* note 90.

<sup>102</sup> It should be noted that pursuant to the *Protecting Canadians from Online Crime Act*, S.C. 2014, c. 31 (assented to 19 December 2014), the publication of intimate images without consent is now an offence under s. 162.1 of the *Criminal Code*, *supra*, note 4.

<sup>103</sup> *R. v. Hunt*, 2012 QCCQ 4688, 2012 CarswellQue 6365, 2012EXP-2784, EYB 2012-208072 (C.Q.) [*Hunt*].

<sup>104</sup> *Hunt*, *ibid*, at para. 6, note 1.

*Social media threats against minority groups**R. c. Rioux*

In *R. c. Rioux*,<sup>105</sup> the accused was charged with uttering threats of death or bodily harm to Muslims, contrary to s. 264.1(1)(a) of the *Criminal Code*, and public incitement of hatred, contrary to s. 319(1) of the *Criminal Code*, in relation to comments that he made on TVA's Facebook page as part of a discussion forum. The discussion was related to a TVA Facebook posting entitled "Two Montreal imams unequivocally condemn the murders of the two Canadian soldiers". Comments then followed from members of the public on the TVA Facebook page.

The accused wrote the following on the TVA Facebook page as part of this discussion: "I can't wait to get my hunting licence so that I can stick their fucking heads on my truck hood!!!!"<sup>106</sup> Other people then replied to the accused's posting stating he had made a death threat. He responded to them, stating, *inter alia*, "We're going to exterminate your sub-race. :) [ . . . ] Damn I can't wait to get my licence!"<sup>107</sup>

The accused gave a brief statement to police saying he was "just fooling around" and when he saw the comments on his comment, he "panicked".<sup>108</sup> Justice Roy of the Court of Québec rejected the accused's explanation, finding instead that, "[f]ar from showing a sense of panic, his statements are made with hostility and persistence".<sup>109</sup> While Justice Roy convicted the accused of public incitement of hatred, contrary to s. 319(1) of the *Criminal Code*, the accused was acquitted of uttering threats, contrary to s. 264.1(1)(a) of the *Criminal Code*. Justice Roy found that there was "no evidence" of either the *actus reus* or *mens rea* for uttering threats, finding as follows:

There is a fundamental difference between making comments that are hateful in nature and encourage the sharing of this negative feeling, and making statements that constitute a threat.

The image used by the accused of resorting to decapitation and dismembering the victim as though he were a trophy is an example of this difference.

The comment reflects a feeling of hatred without, however, constituting an actual threat, given the manner in which the idea is expressed, such as, for example, the reservation about obtaining a licence.

<sup>105</sup> *R. c. Rioux*, 2016 QCCQ 6762, 2016 CarswellQue 6792, 2016 CarswellQue 13004, 2016EXP-2527, EYB 2016-268197 (C.Q.) [*Rioux*].

<sup>106</sup> *Rioux*, *ibid.*, at para. 10.

<sup>107</sup> *Ibid.*, at paras. 11-12.

<sup>108</sup> *Ibid.*, at para. 13.

<sup>109</sup> *Ibid.*, at para. 46.



It must nevertheless be admitted that the comment about exterminating the sub-race is closer to the wrongful act in question, although it does not fundamentally change the scope of the discourse.

A well-informed, reasonable person should consider all the comments which, in the Court's view, are more closely associated with hate speech than with making actual threats.

As for intent, the Court cannot conclude beyond a reasonable doubt that the accused sought to intimidate or arouse fear.

His comments tend to insinuate and persistently share a perception characterized by detestation, but they do not reflect a wish to sow fear and intimidate.

Consequently, the accused is acquitted of this offence.<sup>110</sup>

There are numerous problems with this reasoning that make the acquittal in this case suspect. To begin with, the entire framework of Justice Roy's analysis presumes public incitement of hatred and uttering threats are mutually exclusive offences.<sup>111</sup> While there are fundamental differences between these offences,<sup>112</sup> they certainly do not preclude the conduct of an accused constituting both public incitement of hatred and uttering threats. As the Supreme Court of Canada held in its seminal uttering threats case of *R. v. McRae*, "the words do not have to be directed towards a specific person; a threat against an ascertained group of people is sufficient".<sup>113</sup>

Rather than directly applying the law of uttering threats, Justice Roy employs this problematic and undefined notion of "fundamental difference"<sup>114</sup>

between these two offences in considering whether the accused is guilty of uttering threats. Having already found the accused guilty of public incitement of hatred, Justice Roy's conclusion is that the facts of this case are "more closely

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<sup>110</sup> *Rioux, ibid*, at paras. 64-71.

<sup>111</sup> *Ibid*, at para. 64.

<sup>112</sup> For example, in terms of *actus reus*, *Criminal Code* s. 319(1), public incitement of hatred, requires that the accused's statements be made in a public place, but uttering threats can take place anywhere so long as the threat is communicated to any person. Additionally, public incitement of hatred is limited to identifiable groups whereas uttering threats can be in relation to either an individual or group of people (including identifiable groups). Further, public incitement of hatred requires that the accused's statements are "likely to lead to a breach of the peace" whereas there is no such requirement for uttering threats where the target of the threat does not even need to be aware of the threat or, if they are aware, fear or be intimidated by it.

<sup>113</sup> *McRae, supra* note 15 at para. 13, citing with approval *R. c. Rémy-Mercier*, 1993 CarswellQue 230, 1993 CarswellQue 2096, 82 C.C.C. (3d) 176 (C.A. Que.) at 185 [S.C.R.], leave to appeal refused [1993] 4 S.C.R. vii (note) (S.C.C.) (threat against "police officers" generally); *R. v. Upson*, 2001 NSCA 89, 2001 CarswellNS 177, 194 N.S.R. (2d) 87 (C.A.) at para. 31 (threat against "members of the black race" generally).

<sup>114</sup> A better translation may be "fundamental distinction" but does not affect the analysis of these reasons.

associated with hate speech than with making actual threats.”<sup>115</sup> This is not appropriate legal reasoning at the stage of determining criminal liability. It is not a question of which of the two charged offences better fits the conduct of the accused at this stage. A trial judge in these circumstances must consider each offence independently and determine whether the Crown has proven the essential elements beyond a reasonable doubt. It is only if there are findings of guilt for multiple offences in relation to the same conduct that an issue may arise as to whether it is appropriate to enter convictions for each offence or apply the rule in *R. v. Kienapple*.<sup>116</sup>

In considering the accused’s comments posted on the TVA Facebook page, Justice Roy effectively evaluates each comment of the accused in isolation, rather than in their entire context, which is problematic and inconsistent with *R. v. McRae*.<sup>117</sup> The accused goes so far as to say “[w]e’re going to exterminate your sub-race”, yet Justice Roy does not consider that a reasonable person in these circumstances would find that this constituted a threat, finding only that it comes close to being one. A more obvious objective threat in relation to a minority group is difficult to conceive. In *R. v. McRae*, the Supreme Court of Canada also stated that “witness opinions are relevant to the application of the reasonable person standard; however, they are not determinative”.<sup>118</sup> In *R. c. Rioux*, the accused’s comments on the TVA Facebook page drew immediate reaction from witnesses to them, who explicitly identified them as death threats and advised the accused that he would be sent to jail.<sup>119</sup> Justice Roy erred in failing to consider this evidence.

With respect to mental fault, while Justice Roy correctly identified the relevant legal standard from *R. v. McCrae* as intent either to intimidate or be taken seriously,<sup>120</sup> this standard was not actually applied in the analysis. Instead, Justice Roy only expressly considered whether the accused’s comments reflected “a wish to sow fear and intimidate”.<sup>121</sup> Justice Roy did not examine whether the accused intended his comments to be taken seriously.

<sup>115</sup> *Rioux*, *supra* note 105 at para. 68.

<sup>116</sup> *R. v. Kienapple*, 1974 CarswellOnt 238F, 1974 CarswellOnt 8, [1975] 1 S.C.R. 729, 44 D.L.R. (3d) 351. There are conflicting authorities on whether *Kienapple* applies to cases where criminal harassment and uttering threats both result in a guilty verdict. Such cases where *Kienapple* was not applied include: *R. v. N.K.*, 2017 ONSC 3988, 2017 CarswellOnt 10399 (S.C.J.) (somewhat separate incidents); *R. v. Dixon*, 2016 ONSC 4993, 2016 CarswellOnt 12601 (S.C.J.) (with separate factual situations, *Kienapple* does not apply); *R. v. Strickland*, 2004 CarswellNfld 434, [2004] N.J. No. 368 (N.L. Prov. Ct.) (finding generally that harassment and uttering threats have distinct elements and *Kienapple* does not apply). See *contra*, *R. v. Francis*, 2017 ONCJ 313, 2017 CarswellOnt 7361 (C.J.), *R. v. Hawkins*, 2006 BCCA 498, 2006 CarswellBC 2989 (C.A.); *R. v. Heaney*, 2013 BCCA 177, 2013 CarswellBC 974 (C.A.); *R. v. Noble*, 2010 MBCA 60, 2010 CarswellMan 255 (C.A.).

<sup>117</sup> *McRae*, *supra* note 15 at para. 16.

<sup>118</sup> *Ibid*, at para. 15.

<sup>119</sup> *Rioux*, *supra* note 105 at paras. 11-12.

<sup>120</sup> *Ibid*, at para. 62.

The myriad problems and legal errors with the reasoning in *R. c. Rioux* means that it should not be followed and its conclusions are suspect. Had the case been appealed, and a new trial ordered, the result could have been different.

#### *R. v. Lee*

In *R. v. Lee*,<sup>122</sup> the accused was not charged with a threat in relation to a minority group. However, he first came to the attention of police because, *inter alia*, he had posted images of swastikas and anti-Semitic comments.<sup>123</sup> The accused openly admitted his “disdain” for the Jewish community.<sup>124</sup>

#### *R. v. Hayes*

In the course of making a Facebook posting, for which he was convicted of uttering threats against Prime Minister Justin Trudeau, the accused in *R. v. Hayes*<sup>125</sup> made derogatory comments against Muslims, which he accused the Prime Minister of being: “[t]his asshole is a Muslim who stands against everything western culture in Canada has built and fought for for over a hundred years.”<sup>126</sup>

#### *Social media threats against politicians*

Politicians are the final group of victims of social media threats that were observed in reported judicial decisions, and many more similar cases appear in media reporting. In *R. v. Hayes*,<sup>127</sup> the accused was convicted of uttering threats, contrary to s. 264.1(1)(a) of the *Criminal Code*, against Prime Minister Justin for two Facebook postings. The accused had also made a posting for which he was not charged in relation to Alberta Premier Rachel Notley.<sup>128</sup> As noted above, then Quebec Premier Pauline Marois was the subject of the threat in *R. v. Le Seilleur* for which the accused was convicted.<sup>129</sup>

### **3. Social Media Threats are Being Made by People with Mental Health Challenges**

There are a number of reported judicial decisions involving social media threats made or allegedly made by people with mental health challenges. This raises questions about what the appropriate preventative responses to social media crime and the use of punitive measures are when dealing with an accused

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<sup>121</sup> *Ibid*, at para. 70.

<sup>122</sup> *Lee*, *supra* note 59.

<sup>123</sup> *Lee*, *ibid*, at para. 6.

<sup>124</sup> *Ibid*, at para. 11.

<sup>125</sup> *Hayes*, *supra* note 52.

<sup>126</sup> *Ibid*, para. 3.

<sup>127</sup> *Ibid*.

<sup>128</sup> *Ibid*, para. 5.

<sup>129</sup> *Le Seilleur*, *supra* note 75.

who faces mental health challenges, but nevertheless falls short of being found not criminally responsible on account of mental disorder.

In *R. v. Hunt*,<sup>130</sup> the self-represented accused had been diagnosed with schizophrenia and had previously been found not criminally responsible on account of mental disorder for falsely telling the police that he had killed a woman.<sup>131</sup>

In *R. v. Boissoneau*,<sup>132</sup> the accused communicated via Twitter with Islamic extremists and supporters of ISIS, going as far as writing, “[g]ive me Canadian addresses. I will ensure something happens.”<sup>133</sup> He pled guilty to uttering threats, contrary to s. 264.1(1)(a) of the *Criminal Code*, for making this statement but appealed his sentenced of one year imprisonment. Justice H.M. Pierce of the Ontario Superior Court of Justice reduced the sentence to six months’ imprisonment, given the accused’s circumstances. The accused was an Aboriginal man who suffered a brain injury, was diagnosed with Fetal Alcohol Spectrum Disorder, and was raised by his father who had been exposed to a residential school. Justice Pierce also noted that he had few followers on Twitter, that he did not actually intend to engage in terrorist activity, and that the offence was essentially a nuisance to law enforcement.

In *R. v. D. (D.)*,<sup>134</sup> the accused had previously cut himself and spent four months in a psychiatric facility.<sup>135</sup> In *R. v. Lee*,<sup>136</sup> the accused, though acquitted, was described by the trial judge as “clearly a troubled individual”.<sup>137</sup>

#### 4. Issues with Social Media Content as Evidence

In most reported judicial decisions concerning threats allegedly committed on social media networks, there is no discussion of any evidentiary issues. The accused in these cases typically admitted that they made the statements, which were admitted as evidence. One exception is the decision in *R. v. Hirsch*<sup>138</sup> where the accused appealed his conviction for uttering threats against his former girlfriend on Facebook, arguing, *inter alia*, that the trial judge erred in admitting and relying on screenshots of the accused’s Facebook page. The Saskatchewan Court of Appeal rejected the accused’s submission, holding that the screenshots were sufficiently authenticated, consistent with s. 33.1 of the *Canada Evidence Act*,<sup>139</sup> stating that the requirement is not onerous, such that, “to authenticate an

<sup>130</sup> *Hirsch*, *supra* note 90.

<sup>131</sup> *Ibid*, at paras. 15-16.

<sup>132</sup> *R. v. Boissoneau*, 2016 ONSC 820, 2016 CarswellOnt 2644 (S.C.J.) [*Boissoneau*].

<sup>133</sup> *Ibid*, at para. 13.

<sup>134</sup> *D.D.*, *supra* note 90.

<sup>135</sup> *Ibid*, at para. 2.

<sup>136</sup> *Lee*, *supra* note 59.

<sup>137</sup> *Ibid*, at para. 23.

<sup>138</sup> *Hirsch*, *supra* note 90.

<sup>139</sup> *Canada Evidence Act*, R.S.C. 1985, c. C-5.

electronic document, counsel could present it to a witness for identification and, presumably, the witness would articulate some basis for authenticating it as what it purported to be”.<sup>140</sup>

As to the integrity of the screenshots of the accused’s Facebook postings in *R. v. Hirsch*, although they had been provided by a friend of the complainant to her and then to the police, the Saskatchewan Court of Appeal found that the trial judge adequately addressed the issue of integrity by identifying pieces of evidence that led to the conclusion that it would be speculative to conclude that anyone but the accused had authored the messages or that they had been altered.<sup>141</sup> The appellate court held that:

... the screen captures are the best evidence available to the Crown to adduce Mr. Hirsch’s Facebook page itself into evidence. Indeed, given the fluidity and impermanence of postings on a Facebook page, a screen capture may be one of the few ways of establishing what was actually posted on a Facebook page at any point in time.<sup>142</sup>

## 5. Rejection of Freedom of Expression Claims in Relation to Social Media Threats

Section 2(b) of the *Canadian Charter of Rights and Freedoms* provides constitutional protection for freedom of expression as a fundamental freedom:

2. Everyone has the following fundamental freedoms:

.....

(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

Historically, based on the broad interpretation that the Supreme Court of Canada has given this fundamental freedom, it was considered that s. 264.1 of the *Criminal Code* infringed freedom of expression as guaranteed by s. 2(b) of the Charter, but was nevertheless saved by s. 1 of the Charter.<sup>143</sup> However, in a contemporary judgment, the Supreme Court of Canada clarified that threats of violence are excluded from protection under s. 2(b) of the *Charter* entirely.<sup>144</sup> As Chief Justice McLachlin wrote for a unanimous Court in *R. v. Khawaja*:<sup>145</sup>

This Court’s jurisprudence supports the proposition that the exclusion of violence from the s. 2(b) guarantee of free expression extends to threats of violence. [ . . . ] It makes little sense to exclude acts of violence

<sup>140</sup> *Hirsch*, *supra* note 90 at para. 18.

<sup>141</sup> *Hirsch*, *ibid*, at paras. 22-29.

<sup>142</sup> *Ibid*, at para 24. See *R. v. Hamdan*, 2017 BCSC 676, 2017 CarswellBC 1375 (S.C.).

<sup>143</sup> *R. v. Clemente*, 1993 CarswellMan 154, [1994] 2 W.W.R. 153, 92 Man. R. (2d) 51 (Man. C.A.), *affd* 1994 CarswellMan 152, 1994 CarswellMan 380 (S.C.C.), *supra* note 23; see also *Batista*, *supra* note 20.

<sup>144</sup> *Steele*, *supra* note 28 at para. 49; *Khawaja*, *supra* note 32 at para. 70.

<sup>145</sup> *Khawaja*, *ibid*.

from the ambit of s. 2(b), but to confer protection on threats of violence. Neither are worthy of protection. Threats of violence, like violence, undermine the rule of law. [ . . . ] They undermine the very values and social conditions that are necessary for the continued existence of freedom of expression [ . . . ] Threats of violence fall outside the s. 2(b) guarantee of free expression.<sup>146</sup>

Given this position, it is not surprising that a reported judicial decision dealing with an alleged social media threat rejected a claim that s. 264.1 of the *Criminal Code* infringes s. 2(b) of the Charter. However, there has been no reported case to date that has been fully argued in this context with the benefit of counsel. *R. v. Khawaja* would appear to preclude such a claim.

In *R. v. Hunt*,<sup>147</sup> the self-represented accused, who was charged with uttering a threat to cause death or bodily harm on Facebook against all women, brought various Charter motions, including that what he wrote was protected by s. 2(b) of the Charter and, therefore, the evidence of what he wrote could not be used against him. Justice of the Court of Quebec Richard Marleau dismissed the motion, stating that while s. 2(b) of the Charter generally protects freedom of expression, it is subject to limitation under s. 1 of the Charter, of which the uttering threats offence is one example.<sup>148</sup> While the reasoning in *R. v. Hunt* on this issue is not particularly detailed and does not cite any authority, the outcome is correct.

## CONCLUSION

The uttering threats offence in s. 264.1 of the *Criminal Code* was enacted well before any notion of the Internet or social media networks. Given that the genesis of this legacy offence is hundreds of years old at common law, it is remarkable that it has been able to function at all in this new virtual environment.

The difficulties of establishing mental fault in social media threats cases is by far the most challenging aspect for the prosecution in reported judicial decisions. However, part of the problem is a major legal error in the earliest social media threats decision in *R. v. Sather* with respect to the legal test for mental fault under s. 264.1(1)(a) of the *Criminal Code* as well as reliance on “expert” evidence that may not have been properly admitted and, at any rate, is based on outmoded conceptions of online identity. This decision is bad law and should not be followed. A similar legal error was made in *R. c. Rioux*, which was compounded by failing to consider evidence of the reaction of witnesses to the alleged threat, and effectively treating the uttering threats offence in s. 264.1(1)(a) of the *Criminal Code* and public incitement of hatred offence in s. 391(1) of the *Criminal Code* as mutually exclusive at the stage of determining criminal liability. Even

<sup>146</sup> *Ibid*, at para. 70.

<sup>147</sup> *Hunt*, *supra* note 103.

<sup>148</sup> *Hunt*, *ibid*, at paras. 19-26.

when the correct legal standard was employed, mental fault analysis in social media threats cases has sometimes been flawed due to factual errors resulting in a misunderstanding of the basic aspects of social media networks, such as Facebook's News Feed in *R. v. Lee*.<sup>149</sup>

As discussed above, international literature has found that threats against women and minority groups are prevalent on social media networks. It is troubling to see cases where threats are made involving sexualized violence against women, such as the horrific threats in *R. v. D. (D.)*,<sup>150</sup> and the combination of so-called "revenge porn" and threats against women in *R. v. Hirsch*.<sup>151</sup> It is difficult to understand a valid legal basis for acquittals in cases such as *R. c. Rioux*,<sup>152</sup> where the accused was charged with uttering threats of death or bodily harm to Muslims in such explicit terms.

An interesting issue identified in this study was that several of these cases involved threats made by people with mental health challenges, including a person with schizophrenia,<sup>153</sup> a person with a brain injury and FASD,<sup>154</sup> a person who had cut themselves and been admitted to a psychiatric facility for several months,<sup>155</sup> and another person who was described as "clearly a troubled individual".<sup>156</sup> My research is also investigating criminal harassment offences involving social media networks and there are numerous cases where people with mental health challenges have been charged with criminal harassment and found not criminally responsible on account of mental disorder. Further research is needed into the relationship between social media crime and mental health.

It was surprising that not many evidentiary issues were raised or decided in reported judicial decisions involving social media threats, particularly given the nature of this new technology. However, there are numerous cases related to other offences that this research study has uncovered that make this an important topic warranting further study.<sup>157</sup>

Finally, this article has also found that there has been very little consideration of freedom of expression under s. 2(b) of the Charter in social media threats cases. Freedom of expression features prominently in public debates around social media networks and the controversy around efforts to

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<sup>149</sup> *McRae*, *supra* note 15.

<sup>150</sup> *D.D.*, *supra* note 90.

<sup>151</sup> *Hirsch*, *supra* note 90.

<sup>152</sup> *Rioux*, *supra* note 105.

<sup>153</sup> *Hunt*, *supra* note 103.

<sup>154</sup> *Boissoneau*, *supra* note 133.

<sup>155</sup> *D.D.*, *supra* note 90.

<sup>156</sup> *Lee*, *supra* note 59 at para. 23.

<sup>157</sup> For some discussion of evidentiary issues related to social media, see Brock Jones, "The Court 'Likes' Your Post: Assessing Social Media Evidence in Criminal Proceedings", (2015) 62 Crim LQ 372-383; David Orr, "Evidence in the Age of Social Networking", (2016) Provincial Judges J 32.

regulate or address their context by social media network providers. However, owing to the Supreme Court of Canada's decision in *R. v. Khawaja*,<sup>158</sup> such claims in respect of threats of death or bodily harm will likely be unsuccessful since that decision clarifies that threats of violence do not warrant s. 2(b) Charter protection. There remains scope for arguments that a given posting, while objectively appearing to be a threat to a reasonable person, was made in jest or as political satire and, thus, is not criminal in nature.

This article has explored and critiqued the current state of Canadian criminal law on threats made on social media networks. While it has revealed some insights into the issues and trends related to social media threats, it is based on reported judicial decisions and as such, only provides part of the picture. Further research is needed into social media crime in Canada given the large proportion of Canadians who are active in these global digital communities. Conducting qualitative and quantitative research into threats committed on social media networks (and other offences such as sexual offences, criminal harassment and terrorism-related offences) would be a valuable exercise to examine some of the preliminary issues and themes identified in this article, such as threats made against women and visible minorities, and threats made by people with mental health challenges.

Another issue for further research is whether the uttering threats offence in s. 264.1(1) of the *Criminal Code* as it is currently framed is appropriate for routine enforcement on social media networks. The breadth of the uttering threats offence has steadily expanded since its original statutory enactment, hastened along by both judicial interpretation and Parliamentary reform. It is very much an inchoate crime, particularly given that the subject of the threat does not even need to be aware that it is made, threats of psychological harm are sufficient, and the accused does not have to have any intention or ability to actually follow through on the threat. Applying such a broad and expansive offence in the virtual world of social media networks, where there can be massive distance between the accused and the subject of a threat can lead to concerns about over-criminalization. While the *actus reus* of this offence is quite broad, it is reigned in to a large degree by the *mens rea* requirement that the accused must intend the threat to intimidate or be taken seriously. As discussed with respect to the purpose of the offence, an ancillary purpose of the offence appears to be the suppression of threats of death or bodily harm because of their potential negative effect on third parties and society. Yet that is an even further step removed from the harm threatened to be caused.

Given the broad scope of the offence in s. 264.1(1) of the *Criminal Code* and the extensive virtual terrain covered by social media networks, police and prosecutorial discretion play a major role in selecting and prioritizing which social media threats will actually be pursued in practice. In that context, it is not surprising that criminal charges for threats against political leaders made on

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<sup>158</sup> *Khawaja*, *supra* note 32.



social media networks are becoming more common. While they may not be more prevalent, they are more likely to be identified through pro-active enforcement and taken more seriously as part of a precautionary security strategy. This also raises concerns about access to justice for victims through the equal protection of the law. As in many areas of policing, the response to social media threats against typical users appears to be *ad hoc* and complaint driven.

Additional research is needed to examine how police and Crown prosecutors are dealing with social media threats since most criminal incidents reported to the authorities do not result in charges. It would be valuable to understand the reasons behind decisions to investigate or charge, and whether there is any consistency in making such determinations. It is notable that foreign jurisdictions, such as the UK Crown Prosecution Service, have published guidelines on prosecuting cases involving communications sent via social media.<sup>159</sup> Such transparency would be laudable in Canada, particularly given how broadly the offence is framed and how widespread such threats appear to be on social media networks.

Canada is a digital nation that is very active on social media networks. With a better understanding of these issues, law reform, and the policy options of both government and social media platforms, should be developed to enhance the response to crime on social media networks. While these technologies promise many benefits, there is a darker side to social media networks. As our understanding of the risks deepens, so too must our response become more sophisticated.

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<sup>159</sup> U.K. Crown Prosecution Service, “Guidelines on prosecuting cases involving communications sent via social media”, online: < [http://www.cps.gov.uk/legal/a\\_to\\_c/communications\\_sent\\_via\\_social\\_media/](http://www.cps.gov.uk/legal/a_to_c/communications_sent_via_social_media/) > .