ONTARIO COURT OF JUSTICE

HER MAJESTY THE QUEEN

v.

JOSEPH OTAVNIK

****

R E A S O N S F O R J U D G M E N T

BEFORE HIS HONOUR JUSTICE A. LACAVERA
On May 17, 2013, at TORONTO, Ontario

Courtroom 510

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APPEARANCES

S. Fericean, Ms.	Counsel for the Crown
J. Otavnik, Mr.	Self-represented
G. Tomlinson, Mr.	Amicus Curiae

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Lacavera, J. (Orally):

I propose to begin with some background.

Joseph Otavnik, the accused, is a private art collector. In his collection, he has paintings that he believes are original Norval Morriseau. Norval Morriseau is a Native Canadian artist of some note. The complainant, Ritchie Sinclair, claims to be an artist associated with Morriseau before his death in December of 2007.

The complainant had a website and began posting claims on the website that many Morrisseau originals were, in fact, worthless fakes. At least one of the Morrisseau paintings owned by the accused was included and called by the complainant a worthless fake. The conflict between the accused and the complainant began in October of 2008. Prior to that, they had little, if any, contact and were not really well known to each other.

The accused became quite upset over the allegations being made by the complainant and decided to sue the complainant in Small Claims Court. A copy of the judgment in that matter was delivered on the 25th of March of this year. It is Exhibit 14 in these proceedings.

It was admitted in evidence after the case was completed on a fresh evidence application brought by the accused. The argument was that the judgment reflected on the credibility of the complainant. While it may reflect on the reliability of the complainant's evidence as an art expert, I give it no weight on the issue of the complainant's credibility. It is an issue before me.

The dispute between the accused and the complainant escalated. The accused wanted the complainant to cease and desist making authenticity judgments with respect to Morrisseau works, and the complainant persisted in the belief he was protecting the legacy of Morrisseau by exposing fakes. The accused believed the complainant was wrongly devaluating -- devaluing his collection of Morrisseau art and damaging his property.

The dispute was escalated by an e-mail sent by the accused to the complainant seeking the address of the complainant. This e-mail was not filed and it is existence can only be inferred from the reference to it in a follow-up e-mail from the accused to the complainant. In this e-mail, which appears to have been sent some time in October 2008, the accused demanded a response from the complainant to provide his current address for legal service purposes. He then added that a failure to

respond will result in him offering a reward to someone who can locate the complainant's address.

He stated the following, which appears to be the root cause of the ongoing contact between the accused and the complainant, "You have called some of my Norval Morrisseau painting which are in my house fakes and I will not stand for it." He went on to add that in his view the complainant cannot paint worth a crap. "No one will buy your garage art. You can't paint you loser." The complainant responded on October the 18th, 2008, to tell the accused to save his reward money and just call Joe McLeod who delivered legal services -- who delivered legal service to the complainant last week.

The complainant went on,

> I'm sorry that you have been fooled, Joe. You and your brother have been fooled and now that you are heavily invested in the forged art work, you are between a rock and a hard place. Norval is a rock.

This is the context in which these charges arose. In this context, and the conduct of the accused that followed, the Crown alleges that the accused, between the 11th of October

of 2008 and the 18th of November of 2009, harassed the complainant causing him to reasonably fear for his safety, and the Crown further alleges that the accused assaulted the complainant on the 22nd of October, 2009. I note that this Information was sworn on the 16th of April, 2010. Needless to say, there are numerous details cited within the evidence. I have attempted to review some of these details in the following comments.

The complainant stated that, although no e-mails were produced, that the accused sent four or five e-mails mostly alleging that the complainant was not an artist. He did go on to say that he did not feel threatened by that because he knows that he is a good artist. He also stated that the accused sent one e-mail, "I'll see you Ritchie, but you won't see me coming." Then on the 22nd, the month or year was not mentioned, the accused stated in a series of e-mails, "Oh, I didn't know you were bum buddies with Morrisseau. Do your children know about this?" I hasten to add that the accused denies sending these e-mails and making these assertions, and I add that these e-mails were not produced. Mr. Sinclair, the complainant, said that he was really upset and it made him feel vulnerable to the possibility that the accused could spread this lie that would undermine his relationship with his sons.

I should note that the complainant was attributing other internet postings to the accused of which there is no evidence as to the author of the postings. This led to a Small Claims Court claim being commenced by the accused, Mr. Otavnik. Mr. Otavnik wanted to serve personally, as the rules require, the Small Claims claim. He did not have Mr. Sinclair's address for service. As will be seen later on, he believed that Mr. Sinclair's lawyer was Mr. Sinclair's representative, and this urged him to make contact with that lawyer so that he could effect service on the lawyer. Of course the situation is that the lawyer denied representing the complainant in the matter about to be commenced by Mr. Otavnik. While he did represent the complainant in other matters, he refused to accept service of the Small Claims claim. This led to the e-mails that I mentioned earlier where Mr. Otavnik was seeking the address of Mr. Sinclair for the purposes of service. Eventually, the address was obtained and this led to a personal service.

In circumstances, the complainant says, was a banging on his door that the complainant thought it was a process server, but the -- according to the complainant, the accused called ten minutes later identifying himself as the person who served the documents as Mr. Otavnik. The complainant complained of this

service because it was loud, according to the complainant, and aggressive.

The complainant said that Mr. Otavnik asked him to give him his website now and told him that "you don't want to pull your roommate into this". I should say at this point that Mr. Otavnik believed that Mr. Sinclair and his roommate were business partners and Mr. Otavnik believed he could not distinguish between the two of them as to who was posting what on the website and, so, he believed from early on that he would, if he saw fit, have an action against the roommate.

On January of 2009, there was a phone call from the complainant's lawyer who had received a letter warning him not to represent the complainant. Apparently, this letter indicated that the lawyer would be sued along with his wife for reasons that Mr. Otavnik believed he had, which I mention later on.

THE ACCUSED: Excuse me, Your Honour, can you indicate the decision now? I'm really stressed out here. I'm sorry.

THE COURT: I am sorry, what did you say?

THE ACCUSED: No, I said I -- I'm just really stressed out. If we could just hear the decision and then I can, you know -- sorry.

THE COURT: No, no, you -- I will not have any interruptions of this judgment.

THE ACCUSED: I'm sorry. I'm just stressed,

Your Honour.

THE COURT: The next time the complainant saw the accused was the 31st of March, 2009, in a Small Claims Court settlement conference setting. Here it was complained that the accused yelled at the complainant and called him a stupid idiot, asked him where his lawyer was, and the complainant's complaint was that he was embarrassed in front of other people.

The complainant gave what seems to be a conflicting statement that it was in April that he was asked why he wanted to persist, resulting in his roommate, Garth Cole, being brought into this and why he persisted when his lawyer, Zak Muscovitch, could be brought into this. I thought this was raised at another time, but in any event, it was noted from the complainant to be in April.

I note, as well, that there was an e-mail that is referred to as Exhibit 3 in these proceedings, and it is safe to conclude that Mr. Otavnik wrote a response to what he believed Mr. Sinclair had posted concerning Mr. Ugo Matulic. Now, these documents can be referred to, not for the truth of their content, but rather to suggest a state of mind of the author.

I should say that the posting was an anonymous one, but Matulic believed that it came from

the complainant. He has been referred to as "Stardreamer". He has been referred to as Ritchie "Stardreamer" Sinclair, and operator of the Morrisseau website. This posting referred to one Randy Potter who runs an auction house; Joseph McLeod, who has a gallery, or had a gallery; Joseph Otavnik; Ugo Matulic; and another person by the name of Michael Manese (ph.). The posting amounted to a threat. The -- if I may quote from it, it says, "Think about it Ugo. The meat grinder, if you're lucky." The -- Matulic reported this to the police apparently.

Now, in these proceedings, an e-mail was filed. It is dated April the 18th, 2009, and it comes from Mr. Otavnik apparently, but it was, it is fair to say, a response to Mr. Sinclair as Mr. Otavnik was certain that Sinclair posted the threatening e-mail. I should say, by way of background, that Sinclair and Matulic have what has been referred to as duelling websites, where they are constantly making various insinuations back and forth.

This e-mail, that apparently was from Mr. Otavnik, is a response to the e-mail I just mentioned, or the posting I just mentioned. It says the following,

I received the copy of your

anonymous e-mail which you sent to Ugo's blog on March the 28th. In that e-mail, you further defame me, threaten to put Ugo through the meat grinder, et cetera, and even named Mike M. We have been unable to verify that the comments -- we have been able to verify that the comments did indeed come from your IP address. The only question is whether or not you or Garth wrote it. I was not able to verify this information for the last settlement conference, but now I can. Mr. Sinclair, you keep digging a hole for yourself, and you might start to consider how you're going to save yourself.

The Crown asked me to interpret that as a threat. As matters progressed, the accused sued Mr. Sinclair's lawyer, Zak Muscovitch, and the roommate, Garth Cole, and Muscovitch's wife. This suit, according to the complainant, made him feel terrible. I might say that this suit began sometime in April of 2009.

On May the 12th, 2009, there was a pre-trial where the complainant and Kinsman Robinson Gallery were co-defendants, but Kinsman Robinson settled out in April. The

complainant said that the accused was yelling at the judge and the complainant was shocked. He said that the accused tried to shove papers at him.

On the 14th of July, 2009, the complainant said the accused threw a binder at him. There was no binder as it turned out and the evidence discloses that, but it was a collection of a number of documents bound together by a staple of some sort. The accused denies throwing it at the complainant. The complainant says he threw it and it hit him. The complainant said that he felt that the accused had no respect for anybody. Again, the accused said all he did was serve a set of documents on the complainant.

Another incident on the 17th of August, 2009, again in the context of the civil suit, there was apparently an argument with the court reporter and the complainant said that that argument made him feel scared. He felt violated and he said that the accused had swinging moods. There was a reference made in the evidence by the complainant that he received an e-mail from a friend who said, "Look at this," and it was what I had previously referred to as the Ugo Matulic matter where Ritchie "Stardreamer" Sinclair was allegedly making threats towards Ugo Matulic. The complainant said that he is not

saying that the accused had any part that posting on the Net.

On October the 22nd, 2009, at Old City Hall, the accused was facing some matter, and the complainant, with no interest in the matter, came to watch the proceedings against Mr. Otavnik. He said that the accused noticed him there and made sexual gestures with his hand and mouth. The complainant had a camera, he said, for his protection. The accused complained to the police or security about the complainant attempting to take a picture at the court.

At that time, the complainant who was there, he said, as a spectator. He came out of the court and parked himself in front of the court and there, he says, the accused grabbed him by the neck -- grabbed him in a headlock for five seconds, and then ran off saying something about appeals. In summary, the complainant was asked how he felt and he said he could not sleep. He lost joy in his life and he was afraid for the people he knew.

I should say that in December of 2008, Mr. McLeod and others brought an injunction application to the Superior Court. At issue was the complainant's website where he was apparently alleging that the -- much of the Norval Morrisseau works were frauds. It was

even suggested that some in the Smithsonion, some in the Art Gallery of Canada in Ottawa, and some hanging in Parliament were fakes. As I understand the background, these allegations were depressing the Morrisseau art market, and this did not sit well with galleries who brought a lawsuit claiming an injunction to try and prevent the complainant from continuing to make these allegations. Mr. Otavnik, on the other hand, sought a remedy on his own in Small Claims Court.

I should note that the complainant, even after this so-called aggressive service of the Small Claims matter, was not fearful as can be demonstrated by the fact that he personally served the reply to the claim made by the accused. He served the accused by serving the document at his parents' house.

Some of the comments I am about to make, I have already touched on. I am going into them in a little more detail at this point. Dealing with the settlement conference where the accused apparently tried to serve more documents and said to the complainant, "You stupid idiot, where's your lawyer?" in response to a question asked by the complainant, "Have these been filed with the courts?" The complainant said he was shook up but not fearful. There were other people in the lobby.

The complainant knew that the objective of the accused was to have the complainant take down his website and cease and desist from making allegations of fakery and fraud on it. The complainant thought the accused was going to go after his friend, his lawyer, and his lawyer's wife. While the accused did sue his friend, business partner if you will, and a lawyer and the lawyer's wife, the accused believes he had grounds to do so. I might say that the complainant undertook to act for his roommate, Garth Cole, and thus demonstrated no particular fear of the accused.

I might say that the complainant considered the attempted service in court at a settlement conference, I believe it was in July, an intimidation. That was the first time he went to the police. It think this was on the 17th of July or the 14th of July, 2009. There were no injuries and this was the so-called 100-page binder assault by throwing documents as a method of effecting service. The complainant also complained of hassles over a piece of paper in court where the accused took a piece of paper from the complainant.

With respect to the attendance by the complainant on October 22, 2009, at the R. v. Otavnik matter, the complainant was there to watch, presumably, Otavnik face the music. He had a camera with him, but in my view, he was

demonstrating that he was not particularly concerned with his safety. That may be because of the surroundings, but one would have thought it is a bit provocative to bring a camera to the court, particularly where the evidence shows that sometime in some prior proceeding, attempts were made to take pictures and the complainant was warned about that in the court setting.

Now, the complainant also said this, that when he pulled out a camera, he said the police came to him and stated Mr. Otavnik had asked him to -- asked the officer, the complainant said that he believed Mr. Otavnik had asked the security to come and hassle him. He said he used the camera simply to protect himself.

As I said, the complainant had taken a picture, or tried to take pictures of the accused before on March the 31st, 2009, and the accused was, I think the evidence shows, was not threatening the complainant when the pictures were taken, and I have a note to look at page 147 somewhere in the mass of transcripts I have here. The complainant complained that he was concerned about what was going to happen to his friends, included that is Garth Cole and his lawyer who is apparently on a friendly basis with the complainant, and the lawyer's wife. The only suggestion I can see is that Mr. Otavnik said

that they were going to be sued. The complainant said this was simply a threat of something he did not understand.

I have already mentioned the incident where there was some yelling by Mr. Otavnik alleged by the accused in a dispute with the judge over the judge's knowledge of the law. Apparently, if that took place, the judge and Mr. Otavnik became friendly thereafter.

The complainant, over the attempted service in July of 2009 when the documents were thrown at him, considered this in court intimidation. He felt the accused was trying to break his resolve to stand up for the truth. The complainant, as I indicated, testified that he believes, because the accused was complaining to the security at Old City Hall in October over the complainant being there with a camera, that he testified, the complainant did, that the accused asked the police officer go and hassle him. The complainant admitted taking pictures of the accused on a prior court appearance, March 31st, 2009.

I should deal with, briefly, the testimony of Zak Muscovitch who was the lawyer acting for the complainant and his roommate, Garth Cole, in a civil action, requesting an interim injunction, requiring the complainant to take down a webpage he published called

morrisseau.com. The accused was not a party involved in that suit. Muscovitch testified that he got a call from a person, identified as the accused, asking him if he represented the complainant. "He called me a fucking asshole and hung up." This is because, the evidence discloses, Mr. Muscovitch would not indicate that he acted for Mr. Cole. The accused knew he did in the Supreme Court action, and he wanted Muscovitch to accept service of the Small Claims Court action. This is what led Muscovitch to, it is alleged, not represent the complainant in the Small Claims Court action.

Muscovitch complained later the accused sued him and his wife in Small Claims Court over Morrisseau's works of art. It is noted that that claim was settled. An issue arose in that matter over the costs of $100. Another lawyer representing Mr. Muscovitch told the accused to deal with him, not Muscovitch. The accused had paid the money that was ordered of $100 costs into court and he responded to the lawyer's suggestion that he deal with him with, "Eff you, lights out loser." Now, this lawyer sent that notation on to the complainant.

Muscovitch complained that he saw the accused be abusive towards the complainant with words like, "You're going to lose," and he saw the

accused infringe, as he put it, on people's space. There appeared to be a contradiction in Mr. Muscovitch's testimony when he indicated that the accused had told him what happened at Old City Hall. That, of course, was in October. He said it happened on another occasion and that when he learned that, he -- it caused him for -- to have concern, but he could not have learned that until October because that is when it took place. So, he is mistaken as to the timing of that knowledge.

Now, the Crown takes the position that the accused sued the complainant's lawyer simply to harass the complainant. The accused, on the other hand, gives reasons why he did that. He gave the following evidence. He said, referring to the lawyer,

> He knowingly misstated facts in an affidavit prepared by that lawyer wherein his client made certain assertions of fraud being perpetrated by the accused in regard to a tax shelter scheme.

The accused wrongly, it appears, attributed the assertion to the lawyer as he did not check out the facts being sworn to, and it was the accused's opinion that, if the lawyer is going to swear an affidavit, he should --

particularly one with those allegations in it, be somewhat -- or make some inquiries as to the facts being sworn to.

The facts being sworn to are contained in Exhibit 6, paragraphs 55 and 56. That is part of the affidavit being file in these proceedings, and I must say they contain serious allegations of fraud. The evidence seems to be that when told not to contact Muscovitch directly by the lawyer acting for Muscovitch, the accused did not contact Muscovitch directly thereafter. I note that the Small Claims Court case against the lawyer was settled. As I indicated earlier, the lawyer said that he did not act for the complainant in the Small Claims Court case because the accused called him a fucking asshole.

I have already dealt with why the accused was contacting the lawyer at all and this was over service of his claim. I note Mr. Muscovitch said he went, even though he was called a fucking asshole, to Small Claims Court and even though he was not representing the complainant. He went to Yonge and Sheppard for a couple of hours. He saw the accused at the trial of the accused versus Cole and the accused versus Muscovitch, and he and the complainant were there as an agent for Cole and he says that the accused was not very

pleasant towards the complainant.

I note there is an e-mail floating around in these proceedings dated the 6th of January, 2010, and that e-mail is, of course, outside the dates alleged in the Information.

Now, in these circumstances, it is fair to say that the accused believed that the lawsuit that he brought was a battle -- a battle to be hard fought. He believed that he was protecting his property and the property value, and he believed that a lawsuit allows for, not only proof of the allegations made in the suit, but an attack on the other side in terms of their personality. He believed that the defendant was making false claims and he believed that that called into question the defendant's integrity and personality.

He believed that the defendant was personally, for whatever motives, devaluing and attacking the property that the accused and his family had. He believed that these attacks on his property were unfair without any basis. He believed that he and his family were being falsely accused of fraud. He believed that the complainant had no expertise whatsoever to give opinions on the authenticity of Norval Morrisseau works of art. There is no doubt that the accused can properly sue to protect his property.

THE ACCUSED: Excuse me, I didn't hear that, im -- improperly?

THE COURT: Can properly sue to protect his property.

The issue here is, is conduct of the Small Claims Court action in which the accused represented himself and the complainant represented himself amounted to criminal harassment. In my view, it did not. Even if I accept much of the assertions of the complainant, a reasonable doubt has been raised by the testimony of the accused. I find that his motive for the lawsuits against the complainant were, as I said, to protect his property, not to harass. I believe his motive to sue the roommate, and the lawyer and his wife were justified and not an attempt at intimidation and harassment.

There is no doubt that the accused conducted these proceedings in less than a civil manner. He was more aggressive than what is required in a civil lawsuit. Although I have referred and looked at the evidence of James White, Randy Potter, and Joseph McLeod, it basically -- their evidence lends to the theory of the accused that the complainant was improperly alleging forgeries and fraud.

The Crown Attorney has submitted that the accused's conduct was and amounted to criminal

harassment. The Crown assumes that what the complainant says were contained in e-mails that were not made Exhibits in these proceedings was as relayed by the complainant. These e-mails apparently were long gone if they existed at all, and the complainant's memory of their wording of those was distant in time and difficult to rely on, in terms of the complainant's memory.

The Crown acknowledges, properly so, I think, that Mr. Otavnik is entitled to sue whomever he pleases in Small Claims Court, but I think she is correct in asserting that he is not entitled to use litigation as a shield from prosecution for threatening conduct. There is no doubt that there are limits. The question is, were the limits tested or surpassed in this case.

Terms like intimidation, threats and harassment can be used to describe varying degrees of conduct. Lawyers in lawsuits often send threatening, intimidating correspondence. Tactics, in some cases in civil matters, get fairly heated. This circumstance, unfortunately, had the added factor that the plaintiff and the defendant in the civil suit represented themselves, calling for contact between them and their contact was taking place in a very disputed area, the accused with respect to his art and his property, and

the devaluation of it, he believed, by the complainant, and the complainant who believed he was protecting the Morrisseau legacy.

I note, although it does not have a great bearing on my decision in this matter, that there was a civil suit brought for harassment. That was dismissed by a Small Claims Court.

Mr. Tomlinson represented Mr. Otavnik during the course of this proceeding as *amicus curiae*. He cross-examined the complainant and he did, it is fair to say, offer assistance and guidance to the accused and his attendance was very much appreciated by this Court.

Mr. Tomlinson made what I considered to be a very strong argument with respect to element five in the five elements of proof of a charge such as this. It deals with the issue of the fear felt by the complainant must be objectively reasonable in the circumstances, and Mr. Tomlinson argued that the alleged fear was not proven to be objectively reasonable in the circumstances and an essential element was not proven beyond an reasonable doubt.

Now, he points to the credibility of the complainant's assertion that he subjectively felt fear when he said that the complainant went with a camera on the 22nd of October, 2009, where he had no interest to observe the

accused, as I said earlier, to face the charges at Old City Hall in the City of Toronto, and Mr. Tomlinson asked rhetorically if the complainant felt fear, why is he going to the court where he knows the accused will be and he knows that the accused is facing charges. He knows that the decision day is the 22nd of October, 2009, and he sat in on those proceedings.

Now, it is fair to say that Mr. Otavnik went through the evidence in detail, and it is fair to say that he pointed out places where no documents were produced and he denied the assertions made by the complainant. He refers for example, to the four or five e-mails that the accused said were sent. He said they are not in evidence and they should not be relied upon. It is merely the complainant's word and he denies sending those e-mails and denies being the author of such statements as, "Oh, I didn't know you were bum buddies with Morrisseau." He says, "I did not say that. I argued that that's what I said in the witness stand under oath," and there is no e-mail as corroboration of what was alleged he said.

He rightly argued that there should be no reference to the Matulic blog, because the Crown agreed that she was not relying in the Matulic blog, and that is all about the meat grinder, and so on. He said that there were

opportunities to call witnesses to substantiate what the complainant was saying took place in court, that there apparently were other witnesses standing around in the court area, but no other witnesses were called, only the complainant, and he complained, and I think rightly so, that the response of 'digging a hole and save yourself' comments were responses to the Matulic blog and really the Matulic blog is not an issue, or should not be in this case.

Even though the document has been filed, and I refer to it, I did not refer to it for the truth of its contents, but I referred to it to give an indication that if the complainant was the author, it certainly demonstrates a state of mind.

Mr. Otavnik rightly pointed out to the comment by the complainant that he did not expect the accused to be there as a demonstration of his lack of credibility because he was only there to see the accused's case. He says the complainant was not fearful at all and the complainant followed the accused to court. He took me through his reasons given in evidence why he sued Garth Cole. He believed that Cole and the complainant were partners and each contributed to the website.

He said that his motivation was he wanted the

complainant to simply stop hurting the market with respect to the Morrisseau works of art and he said,

> People in the art world wanted the complainant and Matulic to stop because they were people who owned the artwork, and these people in the art world were stuck between -- in the middle, between Mr. Ritchie Sinclair and Mr. Ugo Matulic,

who were apparently exchanging comments on the Internet. He pointed me to the fact that he did not threaten any judge, nor did he shove papers on the complainant. He, in fact, denied throwing any papers at the complainant. He denied making suggestions as to the sexual orientation of the complainant, and he denies vehemently that even if he had, he would not bring the complainant's sons into the issues he suffered and litigated with the complainant.

I looked at the law with respect to this matter and I was guided by R. v. Wisniewska found at 2011, O.J. No. 5026, where Justice Durno, beginning at paragraph 28, reviewed the law with respect to criminal harassment after citing the section of the Criminal Code being s.264(1) that we are dealing with -- (1) and (2) that we are dealing with. At paragraphs

29 to 39, which I need not repeat here, the law is reviewed.

Mr. Tomlinson asked me, and I have already indicated his submissions in that regard, to pay particular attention to paragraph 37, and he reinforced his submission, with respect to what was said by Justice Durno at paragraph 37, by saying that the complainant demonstrated no fear either subjectively or objectively because he had no worries about attending on October the 22nd, 2009.

Just looking briefly at paragraph 37, Justice Durno had this to say,

> Parliament has provided for the overly sensitive or unreasonable complainant in the final element, whether the fear for their safety or the safety of others was reasonable in all the circumstances. The objective component requires an assessment of how the reasonable person would have felt in similar circumstances.

He cites a case and he goes on,

> Making that determination requires a consideration of all the circumstances, including but not

> limited to, the history and circumstances surrounding the relationship between the parties, the age, sex and race of the complainant, whether there were explicit directions to the accused to leave the complainant alone, and the duration of the harassment.

At paragraph 38, he begins, and I will not read the whole paragraph,

> What is required in each case is a fact specific determination of whether the fear was reasonable. There is no requirement the Crown establish threats of violence or actual violence. To import that requirement would ignore psychological safety and the objectives of the legislation.

Mr. Otavnik was asked, at page 50, volume 3, the following question, "More specifically, did you intend to threaten?" and the accused said,

> Oh, God, no, just stop. I mean what's -- what's -- why bother? I mean him -- him and Ugo have these duelling blogs I mean for like going on for like four or five years at

> least, one saying this is fake and that's fake. It's like, you know, people in the art world want both of these, both Ritchie and Ugo to disappear. I mean it just -- it's just terrible and people like me who own the artwork, we're stuck in the middle.

At page 54, Mr. Otavnik made his view clear. He said in response to this question, "And the question that I have for you is was that claim commenced against Mr. Cole an animus that you had against Mr. Sinclair?" His answer,

> Absolutely not, no. I mean I sue anybody who claimed my stuff was fake. I mean this is not personal at all. I mean, you know, when I met Ritchie in 2004, he's an okay guy. I don't know why he did what he does. I mean in 2008, he all of a sudden starts calling Norval's works fakes, and I have nothing against the guy. I really don't. It's nothing personal. It's just me -- me. My family owns artwork. We have, you know, uhh, we don't sell artwork, we own artwork, and I just can't have people calling my artwork fake. You know I'll sue anybody who calls it fake.

I note that at page 54 and 55, he explained why he sued Muscovitch, but I will not go through the transcript now.

In the final analysis, I find the Crown has not proven beyond a reasonable doubt the complainant was in a state of being harassed in the sense of feeling tormented, troubled, worried, continually or chronically plagued, bedeviled and badgered. As I indicated, this is evident from the fact the complainant persisted in his assertions that the accused's artwork was fake throughout this whole period. He represented his roommate in the Small Claims Court and he took pictures of the accused during the courses of the proceedings, and for no reason that I can find in the evidence, he went to see the accused face charges at Old City Hall in October of 2009 with a camera, even though he had been previously warned by court security not to take pictures in court.

When viewed objectively, the conduct complained of was not reasonably capable of causing the complainant to fear for his safety, or the safety of his roommate, Garth Cole, or the safety of his lawyer, Muscovitch, and Muscovitch's wife. Further, I find that the conduct complained of was not threatening within the meaning of s.264(2)(d). Even though it could be characterized as

aggravating, annoying, provoking, ungentlemanly, disrespectful, even belligerent.

This was a dispute between two individuals, each representing different opinions as to the authenticity of works of art. The accused felt he was protecting his property, that is to say, the value of his art collection from false assertions of fakery and fraud. The complainant, on the other hand, throughout thought he was protecting the reputation of the artist he admired, Norval Morrisseau. He thought he was protecting his reputation against a marketplace saturated with fraudulent forgeries of Morrisseau's art.

In my opinion, the conduct of the accused in this case, in all of the circumstances in which it took place, has not been proven beyond a reasonable doubt to have fallen within s.264 and what it was enacted to prevent. The accused will be found not guilty of the offence of criminal harassment.

The accused has also been charged with the offence of assault. It is alleged that on the 22nd day of October, 2009, the accused assaulted the complainant by holding the complainant in a headlock for five seconds. Apart from the issues of shoving of documents towards the complainant by the accused, this

is the first allegation of any physical contact by the accused.

I am satisfied on the evidence that the contact alleged could have taken place, however, the evidence of the accused, and in this regard I must consider R. v. W.D., has in my view raised a reasonable doubt. The benefit of that reasonable doubt must be given to the accused. Accordingly, he will be found not guilty of the offence of fraud (sic).

I referred to -- as a footnote, I referred to a civil claim. On March the 22nd, 2011, a claim of harassment by the complainant against the accused was dismissed. In that case, Lynch v. Westario Power Inc., 2009, CarswellOnt 4057 was cited. The dismissal was on the basis the complainant did not establish on the balance of probabilities that he suffered severe or extreme emotional distress and possibly a visible, proven illness. As I indicated, although this judgment was brought to my attention, I do not consider it a factor that affected my deliberations and my conclusion in this matter.

Madam Clerk, do you have the Exhibits, or do I have them? You have them. Here is the rest of them to put in there.

CLERK OF THE COURT: Thank you.

THE COURT: This book of authorities can be

given back to Mr. Tomlinson. This document -- I think the argument of the Crown was made an Exhibit.

MS. FERICEAN: Your Honour, I didn't ask for my submissions to be made an Exhibit, but I'm not sure if they were actually made an Exhibit.

THE COURT: I have it written at the top my copy, Exhibit 15...

MS. FERICEAN: Oh.

THE COURT: ...in the trial. So I do not know whether there is another copy there or not. So...

MS. FERICEAN: I only have up to Exhibit....

THE COURT: ...unfortunately, I have to confess, I have marked this up, but...

MS. FERICEAN: I have my one copy, thank you.

THE COURT: ...I have marked up the Exhibit basically and I wrote some other notes on the front of it, but there it is. It should be made -- it is an Exhibit and it should be made part of the...

MS. FERICEAN: Thank you, Your Honour.

THE COURT: ...part of the documentation.

EXHIBIT 15: Crown's submissions - produced and marked.

THE COURT: Now, let us see what else I have here. This is mine. What -- what do you think this is?

CLERK OF THE COURT: This I have as Exhibit 14.

MS. FERICEAN: I believe -- I believe Your Honour's ruling was that the first...

THE COURT: Yes.

MS. FERICEAN: ...part of that tab 1 was an Exhibit, but the rest was not...

THE COURT: Correct.

MS. FERICEAN: ...supposed to be made an Exhibit.

CLERK OF THE COURT: Pages 1 to 38...

THE COURT: Correct.

CLERK OF THE COURT: ...I have marked as Exhibit 14.

THE COURT: Correct, that is it.

MS. FERICEAN: All right. So....

THE COURT: So, do you have, uhh....

CLERK OF THE COURT: I have a copy here.

THE COURT: Do you know what Exhibit number that is?

CLERK OF THE COURT: Pages 1 to 38 is Exhibit 14.

THE COURT: All right. So that has already been done?

CLERK OF THE COURT: I believe so.

THE COURT: So, I can take this back and have the clerk then deal with it. All these transcripts are here. I have this. I have that. Mr. Otavnik, I have no jurisdiction whatsoever to say what I am about to say...

THE ACCUSED: Mmm hmm.

THE COURT: ...but I hope that this is the end of the matter.

THE ACCUSED: Well, okay.

THE COURT: All right.

MS. FERICEAN: I wonder if -- obviously, Your Honour's found that the conduct of Mr. Otavnik to not amount to criminal harassment but, given your findings with regards to his actions being belligerent and provocative and so forth, would Your Honour consider directing Mr. Otavnik to enter into a common law peace bond?

THE COURT: I gave it some thought, Ms. Fericean. I think I would have to ask him if he wants to show cause. I think it would prolong this procedure and I am a little concerned about restricting him should there be a need to have some kind of future contact in some court case. I am hoping that there is going to be no more court cases. There has been enough court cases.

MS. FERICEAN: I can indicate, Your Honour, that in anticipation of a conviction, I had Mr. Sinclair prepare a victim impact statement for the purposes of a sentencing hearing, and I'm advised by Mr. Sinclair, obviously I have not had an opportunity to confirm this, that Mr. Otavnik has sent some similar documents to Mr. Sinclair's current employer or the -- his new gallery that he's associated with, and Mr. Sinclair is concerned that Mr. Otavnik is essentially seeking to continue his behaviour of trying to distance him from any gallery that might sell his work.

THE ACCUSED: I -- I find this outrageous, Your Honour. Go ahead, go ahead. Let her finish.

MS. FERICEAN: That's all I have to say. That's -- that's the only information I have right now.

THE COURT: Mr. Tomlinson or Mr. Otavnik, do you want to say something?

THE ACCUSED: First of all, I just want to publicly thank Mr. Tomlinson for his great work to get us *amicus* with a somewhat difficult client in me.

As far as -- as far as the Crown's -- this peace bond stuff, forget it. I mean, uhh, there is going to be significant litigation in the civil courts. This is not my forte, criminal court, obviously, but civil is and any such peace bond will be, uhh, vigorously opposed by -- by me, and any -- today or any day in the future. I've been found not guilty and, uhh, that is -- this case never should have been brought. There never was a case and that is my position. I'm sorry you had to hear it. I'm sorry toward -- sometimes my conduct towards you, which I apologize for. Umm, thank you very much.

THE COURT: Thank you.

THE ACCUSED: That's all, sir.

THE COURT: We have to understand that lawsuits are heated matters and that exchanges need to be conducted with civility and this is

a subject matter that is being brought up constantly by the Law Society with respect to members of the Bar. So, members of the Bar have to behave civilly and cordially to each other. They can fight all they want, but you do it in a pleasant way. There is no need for animosity.

Now, I understand and I have given my reasons. Try to -- try to consider what I have said and you can -- the Crown does not -- does not say you cannot sue. The Crown acknowledges you can sue all you want, but you have to be careful in the way you conduct the case. So, we will all have a nice long weekend now and that is it.

MR. TOMLINSON: I apologize, Your Honour. If I may just raise one point that I noted. In your Reasons for Judgment, just dealing with the not guilty verdict with respect to count 2, I believe Mr. Otavnik may have pointed this out and brought to my attention, you may have misspoken in using the word "fraud" as opposed to "assault" with respect to count 2. I believe that you may -- meant to say assault as that....

THE COURT: If I said fraud, I made a mistake and I misspoke, and I should have said obviously what the Information says. It is a count of fraud -- of assault.

MR. TOMLINSON: Of assault, that's correct.

THE ACCUSED: Thank you.

MR. TOMLINSON: I thank Your Honour. I thank my friend.

THE COURT: All right, thank you.

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FORM 2

Certificate of Transcript

Evidence Act, subsection 5 (2)

I, Barbara Bynoe,
(Please print name of authorized person(s))

certify that this document is a true and accurate transcript of the recording of

R. v. Otavnik in the Ontario Court of Justice,
(Case Name) (Name of Court)

held at 444 Yonge Street, Toronto taken from Recording No.
(Court address)

4817-510-20130517-141129.

August 27, 2013
(Date)

B. Bynoe
(Signature of authorized person(s))