

Criminal Harassment

Criminal Code of Canada – Sections 264, 231(6) and 486.3(4)

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

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

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

SECTION 264

SUBSECTION (1) - Who

No person shall, *without lawful authority*

Subsection (1) begins, “No person shall, without lawful authority”. Who might have lawful authority to engage in some, or all, of the behaviours listed in subsection (2)? Well, law enforcement personnel would obviously have lawful authority to set up surveillance on a suspect or stalk individuals who have warrants out for their arrest, both of which look very much like criminal harassment. Picketers and protesters, providing they are peacefully doing so, are behaving lawfully when they plant themselves outside their target locations. This too may look very much like stalking. So there are situations where certain people, under certain circumstances or for specific purposes, may legally engage in what appear to be harassing behaviours. Case law has defined the term “lawful authority” very narrowly, restricting it to authority which emanates from the state by court order, by legislative approval or by some other executive power of the state.

And *knowing* that another person is harassed or *recklessly* as to whether another person is harassed

Continuing, it says, “and knowing that the other person is harassed or recklessly as to whether the other person is harassed.” Well established is that the law requires intention before an act is considered to be criminal. However, the required intent ascribed to any enactment can be something much less than premeditated and deliberate; it can be recklessness or wilful blindness. Noteworthy is the fact that recklessness is sufficient to establish fault or culpability in the case of criminal harassment. There need be no desire to harass – simply a situation where someone knows their behaviour is harassing, or is reckless, or indifferent, as to whether their behaviour is harassing to another person. Nor is there a requirement that the person doing the harassing knows that their behaviour is causing their target to be afraid or, for that matter, in any other way affected by their conduct. So the words “reckless” and “knowingly”, relate to harassment, not to fear.

***Engage* in conduct referred to in subsection (2)**

Continuing, subsection (1) goes on to say, “engage in conduct referred to in subsection (2).” Here, engage means going beyond merely planning and preparing to, but actually being involved in the actions or being involved in making the actions that are prohibited in subsection (2) happen.

That *causes* that other person

And, those prohibited actions must cause another person or persons - the target “or anyone known to the target” - “to fear for their safety.” “Causes” implies a direct link between the stalker’s actions and the fear experienced by the target or anyone known to the target. In other words, the activities that the stalker engages in, while not necessarily needing to be the only, or even the main, cause of the victim’s fear

or the fear of someone known to the victim, it must, to some degree, be a contributing cause.

Reasonably, in all circumstances, to fear

“Reasonably, in all circumstances” requires an examination of all the things known to the fearful person or persons, as well as all the events that have occurred. The intent is that the fear expressed by the victim, or someone known to the victim, be assessed against some objective criteria that is reflective of the values of the society that the law is meant to protect. One of the factors relevant to the reasonableness of a stated fear is the gender or socialization of the fearful person. Simply put, the fear expressed must be consistent with what most people, in a similar situation, would experience.

For their safety

The fear expressed must be “for their safety.” Here “safety” goes beyond just physical safety. This provision is designed to protect the emotional and psychological, as well as the physical, safety of targets and secondary targets. Safety means freedom from danger or risk. To restrict the definition of safety, in reference to harassing behaviour, to only the anticipation of physical harm would ignore that stalkers often engage in a campaign intended to destroy another’s psychological and emotional wellbeing with no intent to do them physical harm. In deciding this, the courts have recognized that criminal harassment is a crime of power and control. Power and control can be effectively exerted even if there is no threat to engage in personal violence. The control comes from instilling in another person the sense that they will never be free, that they will never be left alone, that the harasser will always be watching and waiting.

Or the safety of anyone known to them

Finally, criminal harassment can be committed either directly upon the principal target or indirectly upon the target’s loved ones or friends. The loved ones and friends of the primary target are described in this subsection as “anyone known to them.” The premise here is that primary targets may be “reached”, in a very significant, albeit non-physical way, and thereby harassed, through their friends and loved one. These are the secondary victims common in cases of criminal harassment.

SUBSECTION (2) – What

Repeatedly following from place to place or communicating with, directly or indirectly, the other person or anyone known to them

Subsection (2) lists a number of behaviours prohibited by law – these are behaviours commonly used by stalkers against their targets. These behaviours include repeatedly following from place to place, repeatedly communicating with, either directly or indirectly, besetting or watching, and engaging in threatening conduct. For the purpose of this section of the *Criminal Code*, repeatedly means

more than once when referring to following. When referring to communicating, repeatedly means many times over. In other words, a pattern of behaviour, consisting of a series of acts separated by time, rather than a single act, is required. In cases of criminal harassment, looking at the context in which the harassing acts occur is very important. Directly or indirectly means doing the stalking themselves, using other people, whether they know they are assisting the stalker or not, to do the stalking for them, directly stalking the primary target or indirectly stalking the primary target through stalking or causing fear in secondary targets. This subsection is very clear that, when it comes to following and communicating behaviours, not only is the conduct prohibited against the primary target, it is also prohibited against anyone known to the primary target.

Besetting or watching a dwelling-house or place where, the other person or anyone known to them, resides, works, carries on business or happens to be

Watching means the dictionary definition of watching. Besetting refers to watching behaviour that is done in such a blatant manner that it is harassing. The law does not require that watching and besetting be repeated; once is enough. Again, context is important. Besetting and watching includes the residence, workplace or place of business and anyplace the primary target, or anyone known to the primary target, may be. So again, not only the primary target is covered, but secondary targets are covered as well.

Engaging in threatening conduct directed at the other person or any member of their family

Finally, engaging in threatening behaviour, against the primary target or any member of the primary target's family, is prohibited. Recognizing that realistic fear can arise from a single incident, one incident of threatening conduct is sufficient to meet the standard required here. Again, the context must be considered. And to ensure that context is considered, because it provides that all important background essential to understanding criminal harassment, pre-charge "similar fact evidence" is admissible in cases of criminal harassment; in other words, the prohibited conduct as set out in section 264, subsection (2) of the *Criminal Code*.

SUBSECTION (3) - Indictable offence or offence punishable on summary conviction

Subsection (3) addresses punishment for those found guilty of criminal harassment. Because criminal harassment is a hybrid offence, offenders may be found guilty of an indictable offence and be liable to imprisonment for up to ten years, or punishable on summary conviction.

SUBSECTION (4) - Contravention of a protective court order - aggravating factor for sentencing

Subsection (4) states that, for the purposes of sentencing, criminal harassment in contravention of a protection order is an aggravating factor.

SUBSECTION (5) - Reason for not applying subsection (4)

Subsection (5) directs the Court to provide reasons for not doing so in those cases where the breach of a protection order is not considered an aggravating factor at the time of sentencing.

SECTION 231(6) – Murder first degree when caused while committing or attempting to commit an offence under section 264

Section 231(6) makes murder committed in the course of committing or attempting to commit criminal harassment, a first-degree murder offence, whether or not it was planned or deliberate. In other words, if you kill someone while stalking or trying to stalk them, you are as culpable as if you had planned to kill them.

SECTION 486.3(4) – Accused not to cross-examine witness

On application of the prosecutor or the victim, this amendment allows trial judges to appoint counsel to conduct the cross examination of criminal harassment victims in cases where the accused is self-represented, thus preventing the possibility of the harassment continuing in the courtroom.

References:

- Cornish, James L, Kelly A Murray and Peter I Collins. *The Criminal Lawyers' Guide to the Law of Criminal Harassment and Stalking*. Aurora, Ontario: Canada Law Book Inc., 1999.
- A Handbook for Police and Crown Prosecutors on Criminal Harassment*, Communications and Executive Services Branch, Canada Department of Justice, 2004.
- Watt, The Honourable Mr. Justice David, and The Honourable Madam Justice Michelle Fuerst. *The 2005 Annotated Tremeeear's Criminal Code*. Toronto, Ontario: Thomson Canada Limited, 2004.