

# Issue No. 41

## Evidence Admissibility and *Charter* Challenges to Criminal Harassment Legislation: An Analysis of Section 264(2)(b): *R. v. Davis*: 1999 M.J. No. 477

### Introduction

The criminal harassment provisions under section 264 of the *Criminal Code* came into force on August 1<sup>st</sup>, 1993, with the primary aim of protecting women in Canada from physical attacks and harassment.<sup>1</sup> In *R. v. Davis*, the Accused, a former intimate partner of the Complainant, was charged under section 264(2)(b) of the *Criminal Code*, which prohibits “repeatedly communicating with, either directly or indirectly, anyone known to the Complainant.”<sup>2</sup> In her decision, Justice Beard affirmed the language of the provision, stating the words “indirectly” and “anyone known” are not vague or overly broad, and therefore, the section does not infringe upon the Accused’s rights under sections 7, 2(b), and 2(d) of the *Charter*.<sup>3</sup> In other words, s.264(2)(b) is sufficiently clear and precise to inform individuals of the type of conduct it prohibits. Notably, Justice Beard affirmed that when the Accused’s expression amounts to criminal harassment, it will have a lower level of protection.<sup>4</sup> This is so since there is a laudable objective of the criminal harassment legislation that far outweighs the negative impact that it has on the freedom of expression.<sup>5</sup>



### Background

The Accused was charged with one count of criminal harassment under section 264 of the

*Criminal Code*, relating to events between January 1<sup>st</sup>, 1998, and November 18<sup>th</sup>, 1998.<sup>6</sup>

<sup>1</sup> Department of Justice Canada, News Release, "Amendments to the Criminal Code Respecting Family Violence, Child Abuse and Violence Against Women" (27 April, 1993).

<sup>2</sup> *R. v. Davis*, 1999 CanLII 14505 (MB KB).

<sup>3</sup> This legal bulletin will focus exclusively on the constitutional challenges under sections 7 and 2(b) of the *Canadian Charter of Rights and Freedoms*. At paras 115-117, Justice Beard clarified that in this case, the legislation does not prohibit contact or association by the Accused with anyone. Therefore, there is no violation of section 2(d) freedom of association. What it prohibits is a limited category of communication which meets certain criteria. She held that the issue falls squarely under the guarantee of freedom of expression in s. 2(b) and ought properly to be resolved there.

<sup>4</sup> *Supra* note 2 at para 130.

<sup>5</sup> *Ibid*.

<sup>6</sup> *Ibid* at paras 1, 27.

The Accused pleaded not guilty and challenged the constitutional validity of section 264 of the *Criminal Code*, alleging it violates his rights under s.7, 2(b), and 2(d) of the *Charter*.<sup>7</sup>

Justice Beard affirmed that the Accused's past conduct and the history of the relationship between the parties prior to January 1<sup>st</sup>, 1998 is relevant and admissible evidence in assessing whether the Accused's conduct underlying the present charge satisfies the elements of the offence of criminal harassment.<sup>8</sup> This includes events that occurred after the Accused and the Complainant's relationship ended in 1996 until January 1<sup>st</sup>, 1998, during which the Accused repeatedly engaged in unwanted direct and indirect communication with the Complainant and persons known to her, such as phone calls, letters, and flowers, despite the Complainant's clear and repeated statements that the relationship was over and to cease all contact.<sup>9</sup>

Further prior evidence showed that even after the Complainant changed her phone number to an unlisted one, the Accused continued to contact her, follow her, and harass her friends and family over a two-year period.<sup>10</sup> The Complainant reported the harassment to the police multiple times, resulting in the Accused being arrested on at least five occasions between May 1996 and April 1998.<sup>11</sup> The first four arrests led to probationary terms ranging

from one to three years, along with court-ordered counselling.<sup>12</sup> The Accused was arrested a fifth time in April 1998 for conduct that occurred in 1997, at which time, he pleaded guilty to criminal harassment, and in November 1998 was sentenced to one year incarceration.<sup>13</sup>

In the present case, the Crown argued that the Accused's conduct between January and November 1998 falls within s. 264(2)(b) of the *Criminal Code*, as he was "repeatedly communicating with, either directly or indirectly, the other person or anyone known to them."<sup>14</sup> The Crown submitted that, during this period and while in jail for related conduct, the Accused continued his pattern of harassment by directly and indirectly contacting individuals known to the Complainant.<sup>15</sup> Moreover, the Accused directly contacted the Complainant's friends and mother, indirectly emailed the Complainant's friend, and directly spoke with her family's pastor, vowing to make her listen to him no matter how long it took, if it was the last thing that he did.<sup>16</sup>

The Accused argued that he is not guilty of the offence of criminal harassment and challenged the constitutional validity of section 264 of the *Criminal Code*, arguing that it violated his rights under sections 7, 2(b), and 2(d) of the *Canadian Charter of Rights and Freedoms*.

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<sup>7</sup> *Ibid* at para 2.

<sup>8</sup> *Ibid* at paras 30-32, 36.

<sup>9</sup> *Ibid* at paras 3-9.

<sup>10</sup> *Ibid* at paras 5-9, 59.

<sup>11</sup> *Ibid* at paras 9, 12, 13, 16, 20, and 26.

<sup>12</sup> *Ibid* at paras 10, 16.

<sup>13</sup> *Ibid* at para 22, 24, 26.

<sup>14</sup> *Ibid* at para 40.

<sup>15</sup> *Ibid* at para 39.

<sup>16</sup> *Ibid* at paras 19, 21, 23, 25, 40, 60.

# The Court of Queen's Bench Decision

## Key Issues

The key issues in this case were:

- 1) Whether the charge of criminal harassment against the Accused was valid;
- 2) Whether s.264(2)(b) of the *Criminal Code* infringed upon the Accused's rights under s.7, s.2(b), and s.2(d) of the *Charter*.

Justice Beard concluded that the Crown had proved all of the elements of the offence of criminal harassment as set out in the indictment beyond a reasonable doubt and upheld the constitutionality of the *Criminal Code* provision, finding there was no *Charter* infringement.<sup>17</sup>

## Analysis

Section 264(1) and 264(2)(b) of the *Criminal Code* state:

264(1) Criminal Harassment- 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) Prohibited Conduct – The conduct mentioned in subsection (1) consists of (b) repeatedly communicating with, either directly or indirectly, the other person or anyone known to them.

## Criminal Harassment – Actus Reus

To prove criminal harassment, the Crown first had to show, beyond a reasonable doubt, that between January 1<sup>st</sup>, 1998, to November 18<sup>th</sup>, 1998, the Accused engaged in the conduct set out in s.264(2)(b) of the *Criminal Code*, specifically communication with anyone known to the Complainant.<sup>18</sup> Justice Beard found that this requirement was clearly met, as the Accused had repeatedly communicated through handwritten letters, telephone calls, emails, and

direct communications with persons known to the Complainant.<sup>19</sup>

While the Accused argued that directly communicating once to the family's pastor does not count as repeated contact, Justice Beard confirmed that "repeatedly communicating" does not require more than one contact with each individual with whom the Accused communicates.<sup>20</sup> Rather, the offence may be

<sup>17</sup> *Ibid* at para 78.

<sup>18</sup> *Ibid* at para 40.

<sup>19</sup> *Ibid* at paras 50-51.

<sup>20</sup> *Ibid* at para 45.

established even where there is only a single communication with each person, so long as the communications, when viewed collectively, are sufficient to be considered repeated contact in the circumstances.<sup>21</sup> Further, the law does not require absolute certainty about the exact words by the Accused to a person known to the Complainant since what matters is whether the overall facts prove the crime beyond a reasonable doubt.<sup>22</sup>

Second, the Crown must prove beyond a reasonable doubt that the Accused's conduct caused the Complainant to be harassed.<sup>23</sup> The term 'harass' is defined as being "tormented, troubled, worried continually and chronically, plagued, bedeviled and badgered."<sup>24</sup> Justice Beard found that the Complainant was continually and chronically harassed by the Accused, as evidenced by the steps she took to end contact, including refusing to return his countless voicemails, getting an unlisted phone number, calling the police at least nine times in 2.5 years, and seeing a psychologist.<sup>25</sup> Considering all of these factors, Justice Beard was satisfied beyond a reasonable doubt that the Complainant was harassed as a result of the continual and repetitive contact by the Accused.<sup>26</sup>

Third, the Court had to determine whether the Accused's conduct caused the Complainant

reasonably, in all of the circumstances, to fear for her safety or the safety of anyone known to her.<sup>27</sup> Fear in this case referred solely to the Complainant's own physical, psychological, or emotional safety.<sup>28</sup> The subjective element requires that the Complainant's fear for her psychological and emotional safety be caused by the Accused's conduct that forms the basis of the current charge.<sup>29</sup> Justice Beard found that the Complainant's fear was directly caused by the Accused's behaviour between January and November 1998, during which she grew increasingly frustrated and afraid, believing the harassment would not stop.<sup>30</sup> Also, the Accused's contact negatively impacted her life, leading her to install a security system and see a psychologist, reflecting the ongoing impact on her emotional and psychological well-being.<sup>31</sup> Justice Beard found that considering her testimony together with the history of their relationship, that she was satisfied that the Complainant was fearful for her psychological and emotional safety.<sup>32</sup> Notably, Justice Beard stated that the Complainant's engagement with a psychologist was in itself demonstrative of her fear for her mental health.<sup>33</sup>

The objective requirement requires that a reasonable person in the position of the Complainant would also be fearful.<sup>34</sup> Justice Beard was also satisfied beyond a reasonable

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<sup>21</sup> *Ibid* at para 46.

<sup>22</sup> *Ibid* at paras 47-48.

<sup>23</sup> *Ibid* at para 51.

<sup>24</sup> *Ibid* at para 52.

<sup>25</sup> *Ibid*.

<sup>26</sup> *Ibid* at para 52-53.

<sup>27</sup> *Ibid* at para 54.

<sup>28</sup> *Ibid*.

<sup>29</sup> *Ibid* at para 55.

<sup>30</sup> *Ibid* at paras 55-56.

<sup>31</sup> *Ibid* at para 56.

<sup>32</sup> *Ibid* at para 58.

<sup>33</sup> *Ibid*.

<sup>34</sup> *Ibid* at para 54.

doubt that it was reasonable for the Complainant, in the circumstances of this case as well as in the context of all of the events following their separation in 1996, to fear for her emotional and psychological safety.<sup>35</sup>

### *Criminal Harassment – Mens Rea (Intent)*

The Crown must establish that the Accused intended to engage in the conduct set out in s. 264(2)(b) and that the Accused knew that the Complainant would be harassed by his conduct or was wilfully blind or reckless as to whether the Complainant would be harassed.<sup>37</sup>

Justice Beard found that the Accused intended to communicate with persons known to the Complainant. Moreover, the letters were in his handwriting and sent directly to them, the telephone calls were made to their home numbers, and he made statements directly to the pastor.<sup>38</sup> The Accused also knew these people and that they were people known to the Complainant.<sup>39</sup>

Regarding the letters and emails, Justice Beard was satisfied beyond a reasonable doubt that the Accused knew that the Complainant would be harassed by his communication with her friends and family or was reckless as to whether she would be harassed. She found that even though the Accused stated in his letters and email messages that they were not meant for the Complainant, he knew that the recipients of

Lastly, Justice Beard found that there was no evidence that there was any lawful reason for the Accused to contact the Complainant.<sup>36</sup>

the letters would give the letters to the Complainant and/or authorities.<sup>40</sup> Justice Beard also states that even if she is wrong, the Accused was clearly reckless since he foresaw the risk that the letters would be given to the Complainant and that she would give them to the authorities, indicating that she did not want the contact and was harassed by it.<sup>41</sup> With this knowledge the Accused still chose to send the letters, and as a result he was at least reckless as to whether his conduct was harassing the Complainant.<sup>42</sup>

Regarding the communication with the pastor, Justice Beard was satisfied beyond a reasonable doubt that the Accused was at least reckless as to whether his communications with the pastor would cause further harassment to the Complainant.<sup>43</sup>

Therefore, for the above reasons, Justice Beard was satisfied that the Crown had proved all of the elements of the charge of criminal harassment as set out in the indictment beyond a reasonable doubt.<sup>44</sup>

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<sup>35</sup> *Ibid* at para 60.

<sup>36</sup> *Ibid* at para 61.

<sup>37</sup> *Ibid* at para 64.

<sup>38</sup> *Ibid* at paras 62-64.

<sup>39</sup> *Ibid* at para 63.

<sup>40</sup> *Ibid* at para 73.

<sup>41</sup> *Ibid*.

<sup>42</sup> *Ibid*.

<sup>43</sup> *Ibid* at paras 75-77.

<sup>44</sup> *Ibid* at para 78.

# The Charter Challenges

## Key Issues

The issues are whether:

- 1) The criminal harassment legislation, specifically, 264(2)(b), violates s.7 of the *Charter* since it is vague and overbroad;
- 2) The Crown having conceded that s.264(2)(b) violates s.2(b) of the *Charter*, whether it is a reasonable limit under s.1 of the *Charter*.<sup>45</sup>

Justice Beaud confirms that s.264(2)(b) does not violate s.7 of the *Charter* and although it does violate s.2 (b) of the *Charter*, it is saved under s.1 of the *Charter*.

## *Criminal Harassment and Section 7*

The Defence in this case argues that s.264(2)(b) violates s.7 of the *Charter* since its phrases “indirect” and “anyone known to them” are

vague or overly broad and, as such, are not in accordance with the principles of fundamental justice.<sup>46</sup>

## *Vagueness*

It is a principle of fundamental justice that laws must not be too vague.<sup>47</sup> The vagueness concern in this case centers on interpreting the degree of knowledge needed to fall within s. 264(2)(b) of the *Criminal Code*, specifically, what it means to “repeatedly communicate with, either directly or indirectly, the other person or anyone known to them,” as individuals may differ in how they define who is known to them.<sup>48</sup> Justice Beaud found that while familiarity may vary, the concept of someone being known is straightforward and easily determined in

context.<sup>49</sup> Moreover, she finds that the words “indirectly” and “anyone known to them” in s.264(2)(b) are not vague.<sup>50</sup> While a specific definition with mathematical precision is not required, and there is some room for interpretation by the court, it is not difficult to understand the boundaries of the communication at issue.<sup>51</sup> Therefore the defence did not establish on a balance of probabilities that s.264(2)(b) violated s.7 and the principle of fundamental justice that laws may not be too vague.<sup>52</sup>

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<sup>45</sup> *Ibid* at para 79.

<sup>46</sup> *Ibid* at para 80.

<sup>47</sup> *Ibid* at paras 82-87.

<sup>48</sup> *Ibid* at para 91.

<sup>49</sup> *Ibid*.

<sup>50</sup> *Ibid* at paras 83-87.

<sup>51</sup> *Ibid* at paras 90-93.

<sup>52</sup> *Ibid* at para 94.

## Overbreadth

Overbreadth analysis looks at the means chosen by the state in relation to its purpose.<sup>53</sup> The purpose of the criminal harassment legislation is to prevent stalking, that is, “activity whereby one person harasses another and thereby causes that person to fear for his or her physical, emotional or psychological safety by engaging in repetitive behaviour which, by itself, may not otherwise be criminal.”<sup>54</sup>

The Defence in this case argued that the legislation is overly broad “because (1) the group of people with whom the Accused is prohibited from communicating is too large and undefined and (2) because there is no limitation on the type of communication that is proscribed, so that innocent communication with others could be criminalized.”<sup>55</sup>

Regarding (2), Justice Beard found that communication that is proscribed in s.264(2)(b) is limited since it requires that it must be communication with someone known to the Complainant that causes the Complainant to be harassed and to reasonably feel fearful and the Accused must know or be reckless that the communication is causing the Complainant to be harassed.<sup>56</sup>

Regarding (1), Justice Beard found that s.264(2)(b) must extend to contacts with people

known to the Complainant to effectively accomplish the goal of protecting people from harassment.<sup>57</sup> Having a more precise definition for “anyone known to them” to include only those persons identified as family and friends would be insufficient protection for the Complainant.<sup>58</sup> While one could achieve a more precise definition of the group included in the legislation by including only the Complainant and her or his family, that would not provide sufficient protection for the Complainant.<sup>59</sup> Indirect contacts through co-workers, friends, and acquaintances are just as harassing and disturbing as direct contacts with the Complainant or her family.<sup>60</sup> Unlike family relationships, these are not relationships that can be defined with precision.<sup>61</sup> Therefore, for the legislation to be effective, it must extend past direct contact with the Complainant and her family and include indirect contact with the Complainant and contact with other people.<sup>62</sup>

Therefore, Justice Beard finds that the limitation on these communications is “sufficiently clear so that the legislation is not overly broad, and the Accused will know what type of conduct is prohibited.”<sup>63</sup> As a result, Section 264(2)(b) is not overbroad and thus does not violate s.7 of the *Charter*.<sup>64</sup>

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<sup>53</sup> *R. v. Heywood* [1994] 3 SCR 761. *Ibid* at para 99.

<sup>54</sup> *Ibid* at para 100.

<sup>55</sup> *Ibid* at para 101.

<sup>56</sup> *Ibid*.

<sup>57</sup> *Ibid*.

<sup>58</sup> *Ibid* at para 103.

<sup>59</sup> *Ibid* at para 102.

<sup>60</sup> *Ibid* at para 104.

<sup>61</sup> *Ibid* at para 105.

<sup>62</sup> *Ibid* at para 104.

<sup>63</sup> *Ibid* at para 106.

<sup>64</sup> *Ibid* at para 107.

## Criminal Harassment and Section 2(B) Freedom of Expression

Justice Beard confirms that the legislation violates the Accused's freedom of expression under s.2(b) of the *Charter* and proceeds to do an analysis to see if s.264(2)(b) of the *Criminal Code* is saved under s.1 of the *Charter*.<sup>65</sup> Justice Beard states that s.264(1) and (2) meet the requirements of step one of the Oakes Test.<sup>66</sup> The objective of s.264 relates to concerns which are pressing and substantial in a free and democratic society.<sup>67</sup> For the second step, 2(i) there is a rational connection between the prohibited conduct and the objective of the Legislation.<sup>68</sup>

At the second step, 2(ii), the minimal impairment test addresses issues of vagueness and overbreadth.<sup>69</sup> The Defence argued that "to go so far as to criminalize communicating with anybody that may be known to the person who feels harassed, is to completely trample on an individual's rights to associate with other people as well as to express themselves."<sup>70</sup> The Defence added that "a good example of this would be in a small town where most everybody knows everyone else. This legislation would, in effect, prohibit someone from speaking to almost anybody in the town if the Complainant had sufficient reason to fear from that person."<sup>71</sup>

Justice Beard interpreted the Defence's argument to mean that s.264(2)(b) is too vague

and overly broad to the extent that it includes "indirect communications with the Complainant" and "communications with anyone known to the Complainant."<sup>72</sup> She also found the Defence's sweeping example unhelpful.<sup>73</sup> The legislation does not prohibit all communication, only that which harasses the Complainant and reasonably causes fear.<sup>74</sup> All of this is considered in the context of the past relationship between the parties and the past history of their relationship.

Notably, Justice Beard finds that this is a reasonable balance between the Accused's right to speak to people other than the Complainant and the rights of the Complainant not to be harassed.<sup>75</sup>

The same s.7 analysis of vagueness and overbreadth applies under the minimal impairment test under s.1 of the *Charter*, which Justice Beard found to not have been violated. Therefore, the measures chosen under s.264, including s.264(2)(b), impair as little as possible the Accused's right to freedom of expression.<sup>76</sup>

Finally, at step 2, 2(iii), there must be proportionality between the effects of the measures which limit the *Charter* right or freedom and the objective which has been identified as being of sufficient importance

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<sup>65</sup> *Ibid* at para 119.

<sup>66</sup> *Ibid* at para 123.

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

<sup>68</sup> *Ibid* at para 124.

<sup>69</sup> *Ibid* at para 125.

<sup>70</sup> *Ibid* at para 122.

<sup>71</sup> *Ibid* at para 127.

<sup>72</sup> *Ibid* at para 125.

<sup>73</sup> *Ibid* at para 128.

<sup>74</sup> *Ibid*.

<sup>75</sup> *Ibid*.

<sup>76</sup> *Ibid* at para 129.



under the first criterion.<sup>77</sup> Justice Beard found that expression which is found to constitute criminal harassment would have a lower level of protection like hate propaganda and defamatory libel.<sup>78</sup> Therefore the laudable objective of the criminal harassment legislation far outweighs the negative impact that it has on freedom of expression.<sup>79</sup>

Therefore, Justice Beard finds that s.264(1) and (2)(b) is a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society and is thereby saved by s.1.<sup>80</sup> In 2000, the Manitoba Court of Appeal dismissed the appeal.<sup>81</sup>

## Takeaways

Although almost 30 years old, this case gives rise to five major takeaways. First, the Accused's arguments that s.264(2)(b) of the *Criminal Code* effectively prohibited him from communicating with his own friends and family who were also known to the Complainant was found to be incorrect. For any communication with any third party to be prohibited, a communication with his friends and family would have to be one which could cause the Complainant to fear for her safety.<sup>82</sup> Clearly a letter to them about weather conditions or employment would not qualify as an offence.<sup>83</sup> It is the Accused's "repeated attempts to have friends, his or hers, pass on a message to the Complainant about his continuing desire to see her or to let it be known that he has not given up on pursuing her which reasonably causes the Complainant to fear for her safety."<sup>84</sup>

Second, Justice Beard confirmed that repeated direct or indirect communication, including with individuals known to the Complainant, can amount to criminal harassment, even if each individual is only contacted once. In this case, although the Accused only spoke to the pastor once, Justice Beard held that this still contributed to a repetitive course of conduct when viewed in the broader context. Thus, even isolated contacts, if part of an ongoing effort to reach or disturb the Complainant through third parties, can satisfy the actus reus of the offence. Third, Justice Beard did not rule on whether sending an email to a person the Accused mistakenly believes was known to the Complainant constitutes criminal harassment under section 264.<sup>85</sup> However, Justice Beard did

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<sup>77</sup> *Ibid* at para 130.

<sup>78</sup> *Ibid*.

<sup>79</sup> *Ibid*.

<sup>80</sup> *Ibid* at para 131.

<sup>81</sup> *R. v. Davis*, 2000 MBCA 42.

<sup>82</sup> *Ibid* at para 8.

<sup>83</sup> *Ibid*.

<sup>84</sup> *Ibid*.

<sup>85</sup> *Supra* note 2 at para 43.

contend that these communications are still relevant and admissible evidence in relation to the other elements of the offence, similar to using conduct prior to the charges, if the court is satisfied that the Accused sent the communications.<sup>86</sup>

Fourth, s.264(2)(b) and its terms “*indirectly*” and “*anyone known to the Complainant*” are not vague or overly broad. Justice Beard found that they can be reasonably understood and applied

within context, meaning the law is neither vague nor overbroad.

Lastly, Justice Beard affirmed that when the Accused’s expression amounts to criminal harassment, it will have a lower level of protection under the *Charter*.<sup>87</sup> This is because there is a laudable objective of the criminal harassment legislation that far outweighs the negative impact that it has on freedom of expression.

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<sup>86</sup> *Ibid* at para 44.

<sup>87</sup> *Ibid* at para 130.

<sup>88</sup> *Ibid*.