



# What's New in HR Law

## Ontario Court of Appeal Confirms No Independent Tort of Harassment in Ontario

May 8, 2019

### Bottom Line

The Ontario Court of Appeal has confirmed that there is no independent “tort of harassment,” apart from existing legal remedies, such as the tort of intentional infliction of mental suffering.

### Facts: RCMP constable filed civil suit for bullying and harassment

The Plaintiff was a junior constable with the Royal Canadian Mounted Police (“RCMP”). In 2005, he was assigned to the RCMP’s Threat Assessment Group (“TAG”), a unit responsible for providing protective services to federal politicians.

Three months into this assignment, the constable’s superiors learned that he was campaigning for a nomination in a federal election. This was contrary to RCMP regulations, and after determining that the constable was potentially in a conflict of interest, the RCMP transferred him out of the TAG unit.

After being removed from the TAG unit, the constable engaged in a number of insubordinate acts, including breaching policies regarding media appearances, refusing assignments, and misusing his RCMP-issued credit card.

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In June 2007, the constable commenced a civil action against the federal government and individual members of the RCMP. He claimed damages for mental distress he had allegedly suffered as a result of bullying and harassment by RCMP management.

### **Ontario Superior Court of Justice: Independent tort of harassment exists**

The Ontario Superior Court of Justice allowed the constable's claim and awarded him damages (*Merrifield v. Canada (Attorney General)*, 2017 ONSC 1333).

In doing so, the trial judge recognized a new freestanding tort of harassment comprising the following elements:

1. Outrageous conduct of the defendants toward the plaintiff;
2. Intention of the defendants to cause emotional distress and/or reckless disregard of the defendants for causing the plaintiff to suffer emotional distress;
3. Severe or extreme emotional distress suffered by the plaintiff; and
4. An actual and proximate causal relationship between the defendants' outrageous conduct and the plaintiff's emotional distress.

Applying the above test, the trial judge found that the RCMP was liable in tort for harassment of the constable. In particular, the trial judge found that the constable's managers had acted unreasonably and recklessly in removing him from the TAG unit and that this conduct was the actual and proximate cause of the constable's emotional distress.

### **Ontario Court of Appeal: There is no independent tort of harassment**

In their appeal, the RCMP argued that an independent tort of harassment is not recognized in Ontario. The Ontario Court of Appeal agreed.

In reviewing the authorities cited by the trial judge, the Court of Appeal held that they did not confirm the existence of a tort of harassment or its elements. The Court also stated that there was no foreign judicial authority, academic authority, or compelling policy reason for recognizing a new tort—especially given that legal remedies, such as the tort of intentional infliction of mental suffering, already exist to redress harassing conduct.

The Court emphasized that significant legal change ought to be left to the legislature. Moreover, change to common law duties and torts should be incremental and only in response to existing societal needs.

There is not any indication yet as to whether any of the parties will seek leave to appeal the Ontario Court of Appeal's decision.

### **Check the Box**

This decision confirms that there is no independent tort of harassment; thus, employees may not currently bring civil actions for harassment in Ontario.

However, employers may still face harassment-related liability, both directly pursuant to human rights and occupational health and safety legislation, and, implicitly, under existing civil causes of action - such as the tort of intentional infliction of mental suffering.

This means that employers need to:

- maintain awareness of potential harassment in the workplace;
- respond appropriately to any harassment claim/complaint; and
- review their policies, training, and investigation procedures to ensure that they are taking appropriate and reasonable steps to protect against workplace harassment.

**Date:** March 15, 2019

**Forum:** Ontario Court of Appeal

**Citation:** [\*Merrifield v. Canada \(Attorney General\)\*, 2019 ONCA 205](#)

### Need more information?

Should you need more information, please contact [Danny Parker](#) at 519-435-6007, or your regular lawyer at the firm.



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