



# Ontario Court of Appeal Says No Tort of Harassment

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[Alex Lemoine](#)

In February 2017, the Ontario Superior Court of Justice in *Merrifield v. Canada (Attorney General)* recognized a standalone tort of harassment, opening new doors for lawsuits from aggrieved employees. Two years later, however, the Ontario Court of Appeal has overruled the lower court's decision and its recognition of the new tort.

## Background

Mr. Merrifield was an employee of the Royal Canadian Mounted Police ("RCMP"). The relationship became tense after Mr. Merrifield accused his superiors of unjustified and undeserved decision-making, including falsely accusing him of criminal conduct and launching an unsubstantiated investigation following his run for a political nomination. Mr. Merrifield also alleged that the RCMP failed to take steps to investigate his complaints of harassment. Mr. Merrifield commenced an action against the Crown on behalf of the RCMP claiming damages for the alleged harassment (among other things).

The trial judge found in favour of Mr. Merrifield on the facts, recognized the existence of an independent common law tort of harassment and awarded him \$140,000 in general and special damages, plus \$825,000 for the costs of the action. The Crown successfully appealed this decision.

## Appeal Decision

In coming to its decision, the Court of Appeal compared the case to the recently established tort of intrusion upon seclusion (see [here](#)), which was recognized largely because of the emerging acceptance of claims for breach of privacy. In contrast, the Court of Appeal found that:

1. The case law did not support the recognition of a tort of harassment;
2. There was no other basis to recognize a new tort of harassment. Unlike the tort of intrusion upon seclusion, the recognition of a tort of harassment was not the culmination of legal developments, was not supported by foreign judicial authority, and was not justified by a compelling policy rationale; and
3. There are existing legal remedies available to address conduct that is alleged to constitute harassment (for example, by seeking damages through the tort of intention infliction of mental stress or, in appropriate cases, remedies through Ontario's Human Rights Tribunal).

Based on the above, the Court of Appeal overturned the damages that were originally awarded to Mr. Merrifield and required him to pay costs to the Crown.

## Impact

Employers should not believe that they will be relieved from liability in the event of civil claims involving workplace harassment as a result of this decision. For example, depending on the seriousness of the conduct, an employee may be entitled to the following remedies in the event of workplace harassment:

1. damages for intentional infliction of mental suffering, if he or she can establish that he or she was subjected to conduct that was: (i) flagrant and outrageous; (ii) calculated to produce harm, and which (iii) results in visible and provable illness;
2. aggravated or punitive damages; or
3. redress under the Ontario *Human Rights Code* if the harassing conduct can be connected to a prohibited ground of discrimination.

In addition, employees can seek redress under the *Occupational Health and Safety Act* if an employer fails to meet their obligation to conduct a reasonable investigation in response to a complaint of workplace harassment. An employee may also be entitled to Workplace Safety and Insurance Board benefits for work related chronic mental stress injuries which may arise in circumstances of workplace harassment.

## Action

Employers should continue to be mindful of the importance of preventing, addressing and investigating bullying and harassment allegations.

Ultimately, while Ontario's highest court declined to recognize a tort of harassment in this case, employers should be aware that it left open the door to the development of a properly conceived tort of harassment that might apply in the appropriate context.

We will continue to watch to see if Mr. Merrifield will seek leave to appeal to the Supreme Court of Canada. Any future developments will be posted on this blog.

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