COURT OF APPEAL FOR ONTARIO

CITATION: Merrifield v. Canada (Attorney General), 2019 ONCA 205
DATE: 20190315
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2019 ONCA 205 (CanLII)

Juriansz, Brown and Huscroft JJ.A.

BETWEEN

Peter Merrifield

Plaintiff (Respondent/
Appellant by way of cross-appeal)

and

The Attorney General of Canada, Inspector James Jagoe,
Superintendent Marc Proulx

Defendants (Appellants/
Respondents by way of cross-appeal)

Sean Gaudet and James Gorham, for the appellants

Laura Young, John Kingman Phillips and John-Otto Phillips, for the respondent

Heard: September 18-19, 2018

On appeal from the judgment of Justice Mary E. Vallee of the Superior Court of Justice, dated February 28, 2017, with reasons reported at 2017 ONSC 1333, 42 C.C.L.T. (4th) 4.

By the Court:

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[1] This appeal relates to claims of harassment and bullying by Royal Canadian Mounted Police (RCMP) managerial members of the respondent Peter Merrifield from 2005 to 2012. Merrifield was a junior RCMP Constable in 2005. He was promoted to Corporal in 2009 and Sergeant in 2014.

[2] The litigation has been protracted; Merrifield issued his notice of action in May 2007 and a 40-day trial was held over a period of 17 months, from November 2014 - April 2016. A lengthy decision was released in February 2017.

[3] The trial judge's decision reviewed in considerable detail more than seven years of strained relations between Merrifield and several of his superiors in the RCMP. In allowing the action, the trial judge recognized a new freestanding tort of harassment and found that many of the managerial decisions made in relation to Merrifield constituted harassment. In addition, she found the appellants liable for intentional infliction of mental suffering in relation to one set of interactions. The trial judge awarded Merrifield $100,000 in general damages, $41,000 in special damages, and $825,000 in costs of the action.

[4] We conclude that the trial judge erred by recognizing a tort of harassment, erred in applying the test for the intentional infliction of mental suffering, and made palpable and overriding errors in much of her fact-finding. The judgment must be set aside.

[5] The appeal is allowed for the reasons that follow. Merrifield's cross-appeal, seeking an increase in the damages awarded, is dismissed.

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BACKGROUND

[6] It is not necessary to review Merrifield's career in detail. A brief summary of the facts relevant to the litigation suffices.

[7] In February 2005, Merrifield was assigned to the RCMP's Threat Assessment Group (TAG), a unit responsible for providing protective services to federal politicians, including the Prime Minister. TAG duties also included monitoring criminal, extremist, and terrorist groups, and carrying out threat assessments.

[8] Merrifield's strained relations with RCMP management began in May 2005, when his superior officers learned that he had run for the nomination to be the Conservative Party's candidate in the upcoming federal election in the riding of Barrie without complying with the applicable RCMP regulations. It was decided that Merrifield was potentially in a conflict of interest position and should be removed from investigating a death threat made against Member of Parliament Belinda Stronach, who had recently left the Conservative Party caucus to join the Liberal Party caucus. Merrifield was transferred out of the TAG unit to another unit not responsible for protecting politicians.

[9] On July 9, 2005, Merrifield appeared on a radio show as a "terrorism consultant" and was interviewed about terrorist threats to Canada. After having learned that this was not the first time that Merrifield had spoken publicly about national security, Merrifield's line manager, Superintendent Marc Proulx, sent a memo to him on September 28, 2005, reminding him of his obligation to comply with applicable RCMP policies regarding media appearances.

[10] In October 2005, Merrifield was refused assignment to the Special Operations Centre (SOC), which had been constituted to respond to a terrorist threat against Toronto.

[11] In January 2006, Merrifield was transferred to Customs and Excise. He did not report for work but commenced sick leave. He did not report to his new post until July 2006. On January 5, 2006, Merrifield wrote to Proulx, accusing him of misconduct in his audit of Merrifield's corporate American Express card usage. The card had been cancelled by the RCMP in October 2005 due to nonpayment.

[12] On January 6, 2006, Proulx commenced a formal investigation pursuant to Part IV of the *Royal Canadian Mounted Police Act*, R.S.C., 1985, c. R-10 (*RCMP Act*), to establish whether Merrifield's use of his credit card had contravened the RCMP's Code of Conduct. The final report of the investigator concluded that Merrifield had contravened administrative policy by failing to pay the balance due on the card and had used the card for minor unauthorized purposes. A line officer

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issued a performance log directing Merrifield as to use of the credit card and expense policy.

[13] On June 27, 2007, Merrifield commenced this action against the Crown, on behalf of the RCMP, and individual RCMP members Inspector James Jagoe, Superintendent Marc Proulx, Assistant Commissioner Michel Seguin, Chief Superintendent Norman Mazzerolle, and Superintendent Martin Van Doren, seeking damages for the mental distress he suffered as a result of managerial bullying and harassment. He twice amended his statement of claim, most recently in April 2012, seeking further declaratory relief related to claims under ss. 2(b), 2(d) and 3 of the *Canadian Charter of Rights and Freedoms*. The action was discontinued as against Seguin, Mazzerolle and Van Doren by order of the trial judge on November 17, 2014.

[14] On January 5, 2012, Merrifield sent an email message to the RCMP Commissioner and several other senior members of the RCMP, asking why his harassment claim was not being settled. Receipt of the email message was acknowledged but his question went unanswered.

The trial judge's decision

[15] The trial judge found that the tort of harassment exists in Ontario. Her analysis concerning the existence of the tort is quite brief in the context of an otherwise lengthy decision – a mere 8 paragraphs of her 896-paragraph

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judgment. She set out four questions (as submitted by the plaintiff) that must be answered in order to establish entitlement to damages for harassment:

> 1. Was the conduct of the defendants toward Merrifield outrageous?
>
> 2. Did the defendants intend to cause emotional distress or did they have a reckless disregard for causing Merrifield to suffer from emotional distress?
>
> 3. Did Merrifield suffer from severe or extreme emotional distress?
>
> 4. Was the outrageous conduct of the defendants the actual and proximate cause of the emotional distress?

[16] The trial judge found that the elements of the tort were satisfied. She found, for example, that Merrifield's managers acted unreasonably in rejecting his explanation for failing to advise them he was running for the Conservative Party nomination in 2005. She found, further, that Merrifield's transfer out of the TAG unit was not *bona fide*, and the potential conflict of interest his managers apprehended was "remote at best" and a pretext for his transfer. She also found that Merrifield was "stood down" by the SOC because the manager at the SOC knew that he had been removed from TAG.

[17] The trial judge found that the appellants had a reckless disregard for whether their behaviour would cause Merrifield to suffer from emotional distress; that Merrifield suffered severe emotional distress; and that the appellants' outrageous conduct was the actual and proximate cause of his emotional distress.

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[18] The trial judge found, further, that Proulx's decision to order a Part IV investigation without first asking Merrifield for an explanation of apparent irregularities in the use of his American Express card was flagrant and outrageous conduct that he should have known would cause Merrifield harm. She considered that Proulx acted hypocritically in ordering the Part IV investigation, because he had himself engaged in discreditable conduct contemporaneously in attempting to procure the services of a prostitute. The trial judge was satisfied that Merrifield suffered from depression and post-traumatic stress disorder as a result of the RCMP actions, and she concluded that Merrifield had established the tort of intentional infliction of mental suffering (IIMS).

DISCUSSION

I. THE TORT OF HARASSMENT

[19] The decision under appeal is the first case in which a Canadian appellate court has been required to determine whether a common law tort of harassment exists. What is required in order for a new tort to be recognized or established? Neither party canvassed this issue, yet it is key to the resolution of this appeal. Accordingly, it is helpful to begin with a brief consideration of the nature of common law change, before considering whether a tort of harassment should be recognized at this time.

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The nature of common law change

[20] Common law change is evolutionary in nature: it proceeds slowly and incrementally rather than quickly and dramatically, as McLachlin J. explained in *Watkins v. Olafson*, [1989] 2 S.C.R. 750, at p. 760:

> Generally speaking, the judiciary is bound to apply the rules of law found in the legislation and in the precedents. Over time, the law in any given area may change; but the process of change is a slow and incremental one, based largely on the mechanism of extending an existing principle to new circumstances. While it may be that some judges are more activist than others, the courts have generally declined to introduce major and far-reaching changes in the rules hitherto accepted as governing the situation before them.

[21] As she went on to explain at pp. 760-761, courts may not be in the best position to address problems in the law; significant change may best be left to the legislature:

> There are sound reasons supporting this judicial reluctance to dramatically recast established rules of law. The court may not be in the best position to assess the deficiencies of the existing law, much less problems which may be associated with the changes it might make. The court has before it a single case; major changes in the law should be predicated on a wider view of how the rule will operate in the broad generality of cases. Moreover, the court may not be in a position to appreciate fully the economic and policy issues underlying the choice it is asked to make. Major changes to the law often involve devising subsidiary rules and procedures relevant to their implementation, a task which is better accomplished through consultation between courts and practitioners than by judicial

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> decree. Finally, and perhaps most importantly, there is the long-established principle that in a constitutional democracy it is the legislature, as the elected branch of government, which should assume the major responsibility for law reform.

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[22] These wise words of caution have been reiterated by the Supreme Court in a variety of contexts including *R. v. Salituro*, [1991] 3 S.C.R. 654, and *R. v. Mann*, 2004 SCC 52, [2004] 3 S.C.R. 59. The same idea is seen in English law: see e.g. *Launchbury v. Morgans*, [1972] UKHL 5, [1973] A.C. 127.

[23] Thus, when the Supreme Court created a duty of honest contractual performance in *Bhasin v. Hrynew*, 2014 SCC 71, [2014] 3 S.C.R. 494, it did so on the basis that good faith contractual performance *already existed* in Canadian common law as a general organizing principle that underpins and informs existing common law rules. Creation of the new common law duty was justified on the basis that it was an incremental step that followed from the implications of the general organizing principle, a step that responded to societal needs and vindicated the reasonable expectations of commercial parties without precipitating unintended effects.

Common law change in Ontario

[24] The importance of incremental development of the common law was discussed in *Jones v. Tsige*, 2012 ONCA 32, 108 O.R. (3d) 241, in which this court recognized the existence of a tort of intrusion upon seclusion.

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[25] Far from being created from whole cloth, the intrusion upon seclusion tort was grounded in what Sharpe J.A. identified as an emerging acceptance of claims for breach of privacy. He carefully reviewed Ontario and Canadian case law, in which he discerned both supportive dicta and a refusal to reject the existence of the tort, and provincial legislation that established a right to privacy while not foreclosing common law development. He also considered academic scholarship, much of which supported the existence of a right to privacy. He drew upon American tort law, which recognizes a right to privacy, as well as the law of the United Kingdom, Australia, and New Zealand. He also noted societal change – in particular, technological developments that pose a threat to personal privacy – and the impetus for reform that it created. “[M]ost importantly,” he said, “we are presented in this case with facts that cry out for a remedy”: at para. 69.

[26] Ultimately, Sharpe J.A.’s conclusion was couched in terms of confirming the existence of the tort rather than simply creating it. As he put it, at para. 65:

> In my view, it is appropriate for this court to confirm the existence of a right of action for intrusion upon seclusion. Recognition of such a cause of action would amount to an incremental step that is consistent with the role of this court to develop the common law in a manner consistent with the changing needs of society.

Authority does not support the recognition of a tort of harassment

[27] The trial judge in this case relied on four trial-level decisions proffered by Merrifield as supporting the existence of the tort and establishing its elements:

Mainland Sawmills Ltd. et al v. IWA-Canada et al, 2006 BCSC 1195, 41 C.C.L.T. (3d) 52; *Savino v. Shelestowsky*, 2013 ONSC 4394, 4 C.C.L.T. (4th) 94; *McHale v. Ontario*, 2014 ONSC 5179; and *P.M. v. Evangelista*, 2015 ONSC 1419.

[28] She erred in doing so. Taken as a whole, these cases confirm neither the existence of the tort nor its elements.

[29] *Mainland Sawmills* is the key case in the analysis. It underlies all of the subsequent Ontario trial decisions – this, despite the fact that it is a British Columbia trial level authority in which the court did no more than *assume*, for purposes of dealing with an application seeking to have particular claims dismissed, that the tort exists. Far from confirming the existence of the tort, the application judge in *Mainland Sawmills* specifically concluded that the law is unclear.

[30] As for the elements of the tort, these too were assumed by the application judge in *Mainland Sawmills* based on the plaintiffs' submission – a submission that was based on American caselaw arising out of the tort of intentional infliction of emotional distress. In short, *Mainland Sawmills* is not authority for either the existence of the tort of harassment or the elements of such a tort.

[31] Nevertheless, *Mainland Sawmills* has been cited and relied on in several subsequent cases in Ontario in which the tort of harassment has been asserted.

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[32] In *Savino*, the motion judge does no more than find that although a tort of harassment is "not largely accepted, the door does not appear to be entirely closed on the possibility of this tort's existence": at para. 15. The court cites *Mainland Sawmills* as one of the few cases in which the elements of the tort are set out.

[33] *McHale* appears to assume the existence of the tort and cites two cases, *Lynch v. Westario Power Inc.*, [2009] O.J. No. 2927 (S.C.), and *Mainland Sawmills*, for the elements of the tort, only to conclude that the tort was not pleaded with sufficient particularity. *Lynch* specifically states that the existence of the tort of harassment is unclear and, like *McHale*, finds that the tort was not pleaded with sufficient particularity in accordance with *Mainland Sawmills* in any event.

[34] *P.M.* describes harassment as a "still-developing tort" and cites *Savino* and *Lynch* for the elements of the tort. *P.M.* is the only case cited by the respondent in which damages were awarded for harassment ($5,000), but the defendant in that case was the administrator of the estate of the tortfeasor and did not lead evidence.

[35] The trial judge concluded that the law of harassment has evolved since 2011, citing *McHale*, *P.M.*, and *John v. Cusack*, 2015 ONSC 5004, in support. The motion judge in *John* acknowledges that the existence of the tort is a "live

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legal issue", but assumes its existence for purposes of a summary judgment motion, ultimately dismissing the claim as frivolous and vexatious.

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[36] This is the extent of the authority cited in support of the existence of the tort. In sum, these cases assume rather than establish the existence of the tort. They are not authority for recognizing the existence of a tort of harassment in Ontario, still less for establishing either a new tort or its requisite elements.

There is no other basis to recognize a new tort

[37] Given that authority does not support the existence of a tort of harassment, should this court nevertheless recognize such a new tort?

[38] To pose the question in this way is to suggest that the recognition of new torts is, in essence, a matter of judicial discretion – that the court can create a new tort anytime it considers it appropriate to do so. But that is not how the common law works, nor is it the way the common law should work.

[39] At the outset, it is important to recognize that this is not a case like *Tsige*, which, as we have said, is best understood as a culmination of a number of related legal developments. As we have explained, current Canadian legal authority does not support the recognition of a tort of harassment.

[40] We were not provided with any foreign judicial authority that would support the recognition of a new tort. Nor were we provided with any academic authority

or compelling policy rationale for recognizing a new tort and its requisite elements.

[41] This is not a case whose facts cry out for the creation of a novel legal remedy, as in *Tsige*. That case concerned a highly significant intrusion into the plaintiff's personal information. The defendant, who was in a relationship with the plaintiff's former husband, used her workplace computer to gain access to the plaintiff's banking records and personal information over a period of several years – actions the court found to be deliberate, prolonged, and shocking. Discipline imposed on the defendant by her employer did not redress the wrong done to the plaintiff. In these circumstances, as Sharpe J.A. put it, "[T]he law of this province would be sadly deficient if we were required to send [the plaintiff] away without a legal remedy."

[42] That is not this case. In this case, there are legal remedies available to redress conduct that is alleged to constitute harassment. The tort of IIMS is one of these remedies, and it is discussed below.

[43] In summary, the case for recognizing the proposed tort of harassment has not been made. On the contrary, as we will explain, there are good reasons opposing the recognition of the proposed tort at this time.

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II. THE INTENTIONAL INFLICTION OF MENTAL SUFFERING (IIMS)

[44] The tort of IIMS is well established in Ontario and may be asserted as a basis for claiming damages for mental suffering in the employment context.

[45] In the leading case, *Prinzo v. Baycrest Centre for Geriatric Care*, (2002) 60 O.R. (3d) 474, at para. 48, this court held that the test for IIMS is met where the plaintiff establishes conduct that is (1) flagrant and outrageous, (2) calculated to produce harm, and which (3) results in visible and provable illness.

[46] A comparison of the elements of the proposed tort of harassment accepted by the trial judge and the elements of the existing tort of IIMS is instructive.

[47] Whereas IIMS requires flagrant and outrageous conduct, the proposed harassment tort would require only outrageous conduct. More significant, IIMS is an intentional tort, requiring an intention to cause the kind of harm that occurred or knowledge that it was almost certain to occur. This is a purely subjective test: *Boucher v. Wal-Mart Canada Corp.*, 2014 ONCA 419, 120 O.R. (3d) 481, at para. 43, whereas the proposed tort of harassment would require either intention or objectively-defined reckless disregard. Finally, IIMS requires conduct that is the proximate cause of a visible and provable illness, whereas causing severe or extreme emotional distress is sufficient for the proposed tort of harassment.

[48] Plainly, the elements of the tort of harassment recognized by the trial judge are similar to, but less onerous than, the elements of IIMS. Put another way, it is

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more difficult to establish the tort of IIMS than the proposed tort of harassment, not least because IIMS is an intentional tort, whereas harassment would operate as a negligence-based tort.

[49] Given the similarities between IIMS and the proposed tort of harassment, and the availability of IIMS in employment law contexts, what is the rationale for creating the new tort?

[50] Merrifield submits that the new tort must be created because there is an increased societal recognition that harassment is wrongful conduct. He notes that moral damages for mental distress can be awarded only at termination of employment, leaving a gap that the tort of harassment should fill. He asserts that the decision of the Supreme Court in *Saadati v. Moorhead*, 2017 SCC 28, [2017] 1 S.C.R. 543, supports the creation of the tort of harassment, and that the test the trial judge recognized for the tort is sufficiently stringent to limit the reach of the tort.

[51] We disagree.

[52] *Saadati* is concerned with proof of mental injury in the context of a known cause of action. Although it may make damages for mental injury more readily available in negligence actions, it does not require the recognition of a new tort. Moreover, this court has not allowed negligence to ground a claim for mental

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suffering in the employment context: *Piresferreira v. Ayotte*, 2010 ONCA 384, 319 D.L.R. (4th) 665.

[53] In summary, while we do not foreclose the development of a properly conceived tort of harassment that might apply in appropriate contexts, we conclude that Merrifield has presented no compelling reason to recognize a new tort of harassment in this case.

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Was IIMS established?

[54] The trial judge set out the test for IIMS outlined by this court in *Wal-Mart*. This requires a plaintiff to establish that the defendant's conduct:

> 1) was flagrant and outrageous;
>
> 2) was calculated to harm the plaintiff; and
>
> 3) caused the plaintiff to suffer a visible and provable illness.

[55] The trial judge found that Proulx's decision to order a Part IV investigation into Merrifield's travel credit card usage was both flagrant and outrageous because: a) he did not ask Merrifield for an explanation for his cash withdrawals, b) he did not reply to Merrifield's question about whether he had reason to believe the credit card was being used for non-RCMP purposes, c) he provided no particulars of the transactions that concerned him or a date range for which the investigation was to be conducted, and d) he alleged discreditable conduct contemporaneous to engaging in discreditable conduct himself, namely

attempting to procure a prostitute. She found that Proulx had a reckless disregard for causing Merrifield emotional distress, and that emotional distress was a consequence that was known to be substantially certain to follow from the decision to order the investigation. Finally, the trial judge found that Merrifield suffered from depression and post-traumatic stress disorder, based largely on his evidence and that of his family doctor that he was off work sick. Thus, she concluded that the tort of IIMS was established solely on the facts of the Part IV credit card investigation.

[56] This conclusion cannot stand. It flows from palpable and overriding errors in the trial judge's fact-finding and the incorrect application of the legal test.

[57] First, the trial judge suggests that Proulx was required to be satisfied that there was a breach of the RCMP Code of Conduct prior to ordering the investigation. This is incorrect. Proulx had the authority under s. 40(1) of the *RCMP Act* to order an investigation after having satisfied himself that Merrifield may have contravened RCMP policy on the use and payment of his RCMP credit card.

[58] Second, Proulx's January 2006 mandate letter stated that Merrifield was "suspected of having contravened administrative policy". At its highest, the letter stated that Merrifield "may have engaged in disgraceful conduct". This was

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serious, but it was not equivalent to alleging the commission of criminal offences, as the trial judge stated.

[59] Third, the trial judge found that Proulx's initiation of the Part IV investigation was flagrant and outrageous because Proulx himself had engaged in disgraceful conduct at a time "contemporaneous" to initiating the investigation: that is, that he had been identified as attempting to procure a prostitute in a "John Sting" operation. This was plainly a legal error. The inference that Proulx's concerns with Merrifield's credit card misuse could not be *bona fide* because he had breached a wholly unrelated provision of the Code of Conduct *after* initiating the Part IV investigation is palpably wrong. There is simply no logical connection between the two. We accept the Crown's submission that the trial judge's reliance on this evidence vitiates her entire finding with respect to the Part IV investigation, and also calls into question her evaluation of the rest of Proulx's evidence. In our view, this piece of evidence was irrelevant. It was never pleaded and should not have been admitted.

[60] In sum, the IIMS argument failed at the first requirement and the trial judge erred in concluding otherwise. But the trial judge also erred in finding that the second and third elements of the tort were established. There was no evidence that Proulx's conduct was intended to cause harm or that he knew that harm was substantially certain to follow from his decision to order the Part IV investigation, and "emotional distress" was insufficient in any event. Finally, despite multiple

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findings of flagrant and outrageous conduct, the evidence did not establish the requisite causal connection.

[61] Our conclusions that the trial judge erred in recognizing the tort of harassment and in finding that the tort of IIMS was established in regard to the Part IV investigation are sufficient to allow the appeal. It is not necessary to address all of the additional arguments made by the appellants; however, given that most of the trial was focused on contested issues of fact, we consider it appropriate to address additional palpable and overriding errors the trial judge made in her analysis, as we explain below.

III. FACTUAL ERRORS

[62] The trial judge made numerous palpable and overriding errors in her fact-finding. These errors include ignoring relevant evidence, considering irrelevant matters, and making findings of fact that are clearly wrong. These errors preclude a conclusion that Merrifield was harassed – even assuming that a tort of harassment exists, with the elements accepted by the trial judge – as well as the trial judge's conclusion that the tort of IIMS was established in relation to the Part IV investigation or in any other context.

Merrifield's conduct and explanation for running for the Conservative Party nomination

[63] The event that initiated Merrifield's dispute with the RCMP was his standing for the Conservative Party nomination in the Barrie riding in 2005. The

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trial judge's findings concerning Merrifield's rationalization of his conduct and the RCMP's reaction are clearly unreasonable.

[64] In evaluating the factual record, the trial judge failed to keep in mind the requirements of the governing regulations: *Royal Canadian Mounted Police Regulations, 1988*, SOR/88-361. (These regulations were repealed in 2014, after all the events of this case.)

[65] Section 58.4 (1) of the regulations provided that a member who was a peace officer "may, only while on leave without pay granted for that purpose, (a) run for nomination, or stand as a candidate, in a federal, provincial or territorial election". Nothing in the RCMP Administrative Manual is inconsistent with the regulations.

[66] Merrifield was aware of the regulations in 2004. On February 3, 2004, he wrote an email to Sergeant Verrecchia – Advisor, Harassment, Human Rights, Conflicts of Issue, Central Region – seeking clarification of the regulations. His email indicates that he had considered the regulations closely, as he quoted and commented on several sections. He questioned whether the regulations applied if he were standing for nomination in an electoral district that did not exist as yet. Verrecchia replied stating unequivocally: "[T]he policy states you must be on LWOP [leave without pay] to run for nomination." She added that the leave would be without pay and that it applied, in the case of the nomination process,

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"beginning on the day on which the member enters the process and ending the day he withdraws or the process concludes." Verrecchia then provided Merrifield with a written memorandum dated February 11, 2004, indicating that the Professional Standards and Special Advisory (Legal) Unit of Internal Affairs had confirmed that "while running for nomination a member must be on LWOP". The memo reminded Merrifield that he had to submit his request for LWOP through proper channels and have it approved, and that it was his responsibility to identify and avoid situations of conflict.

[67] In 2004, Merrifield sought nominations in three ridings, but sought LWOP for only two of the three ridings. Subsequently, Merrifield ran as a candidate in the federal election while on LWOP and returned to his duties following his defeat.

[68] In 2005, Merrifield filed his papers seeking nomination in the Barrie riding some weeks before the nomination meeting was held on May 14, 2005. Merrifield revised his campaign literature from 2004 and had it reprinted. He had 300 pamphlets distributed. He had people working on his campaign, obtained a list of local party members, made audio recorded telephone calls, and had a campaign website. However, he did not advise the RCMP that he was running and did not request LWOP to run for the nomination.

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[69] Shortly before the nomination meeting on May 14, Merrifield was asked if he had any ambition to run in another election. According to Assistant Sergeant Crane, Merrifield stated: “None whatsoever. It was too expensive.” Merrifield testified that he told Crane and Jagoe that he would not be running in an election “anytime soon”. This, after informing those present at a dinner that he had received a call from the Richmond Hill riding of the Conservative Party offering him the candidacy in that riding.

[70] A few days following the nomination meeting, Crane and Jagoe learned that Merrifield had been running for the Conservative Party nomination in Barrie at the time of the conversation detailed above. They thought that Merrifield had not been forthright with them. When they confronted him with the fact he had run for nomination without disclosing it or obtaining proper leave, Merrifield explained the difference between running for nomination and running in a public election "at least twice”, and stated that he was running as a protest. The trial judge thought it unreasonable of Crane, Jagoe, and Proulx not to accept Merrifield’s explanation. At para. 749 of her decision, she states:

> A logical explanation of the difference between a nomination meeting [and] an election fell on deaf ears. Surely, these two higher ranking officers [Crane and Jagoe] who had management responsibilities were capable of understanding the difference. I find that they chose not to understand it.

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[71] At para. 752 of her decision, the trial judge states that Proulx "did not know the difference between a nomination meeting and an election. To him it was all the same thing."

[72] Given the regulations, it made no difference whether Merrifield had been running for nomination or for election. He was required to be on leave during the entire period he was running for nomination. He should have sought and obtained LWOP before he stood for nomination, as Verrecchia had advised him in writing in 2004.

[73] The trial judge was clearly wrong in finding that Crane, Jagoe, and Proulx were unreasonable in not accepting Merrifield's reliance on the irrelevant distinction between an election and a nomination. Merrifield's responses to direct questions led them to believe he had no current political ambitions at a time when he was actively involved in the political process. That, his failure to advise his line supervisor and request LWOP, and his subsequent self-serving rationalization for his conduct gave his superior officers good reason to conclude that he could not be trusted to be forthright with them. They could reasonably believe that a forthright colleague would have disclosed that he was running for nomination at the very time he was asked questions exploring his political ambitions. Crane and Jagoe could reasonably view Merrifield's response to the question about whether he had ambition to run for election – "none whatsoever"

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– as a half-truth at best. At trial, Crane still believed that Merrifield had lied to him – that he had said one thing and done another.

[74] The trial judge supports Merrifield's rationalizations by pointing to several irrelevant considerations.

[75] The trial judge rejected the RCMP's argument at trial that Merrifield ran to win the nomination and accepted Merrifield's testimony that he stood for nomination only to have the status to speak at the nomination meeting and as a strategy to divert votes from the leading candidate. She accepted that Merrifield had not sold any (para. 688) (or many (para. 747)) memberships and did not have the required support to win the nomination.

[76] These irrelevant considerations do not excuse Merrifield for contravening the regulations. They do not change the facts that Merrifield stood for nomination; that he did not apply for leave; that he did not advise the RCMP before he ran; and that he did not disclose the fact he was running when asked directly about his political ambitions.

[77] The trial judge also excused Merrifield's conduct by observing that the nomination was a "private" event open only to party members, and that there was no "wide-spread public knowledge" of Merrifield's involvement. Again, this was irrelevant. The regulations requiring leave expressly applied to the nomination process without regard to the nature of that process. It was a legal error to

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consider that the "private" nature of a nomination process excused Merrifield's non-compliance with the regulations.

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[78] The trial judge minimized the significance of Merrifield's candidacy for the nomination throughout her decision. The fact is that he ran as a candidate for the nomination. He completed the nomination papers and distributed campaign material and flyers to party members. It was irrelevant what his intentions were in doing so – irrelevant whether he intended to win or could have done so.

[79] The trial judge accepted Merrifield's testimony that he did not believe he needed LWOP "based on his conversation with Sgt. Boos and his understanding of how the earlier LWOPs were re-categorized". Indeed, there had been confusion about how his previous leaves without pay to run for nominations and election should be coded. But Sgt. Boos said nothing that could reasonably be construed to lead Merrifield to believe that he did not need LWOP, however it was coded. Even accepting that Merrifield believed his LWOP could be coded "personal needs" LWOP or "special leave without pay", the fact remains that he still had to arrange leave and advise the RCMP that he was running for nomination.

[80] The trial judge did not disagree with Merrifield's position at trial that he needed leave only for the day of the nomination meeting. But that position is plainly a self-serving reading of the regulation. Verrecchia had clearly advised

Merrifield otherwise in writing in February 2004. Merrifield should have arranged leave from the date he filed his candidacy papers with the riding until he was no longer a candidate for nomination. During this period he was sending out his campaign flyers, had an active website, and was soliciting support for his nomination. Had Merrifield complied with the regulations, Crane, Jagoe, and Proulx would not have been surprised to learn that he had run.

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[81] In summary, the trial judge's analysis of Merrifield's rationalization of his conduct and the RCMP's reaction to it is clearly unreasonable. Merrifield's RCMP superiors had good reason to regard him as a colleague who could not be trusted to be completely forthright with them – a matter of importance in any position, but especially so in the context of Merrifield's employment in the RCMP.

Merrifield's potential conflict of interest

[82] A second significant error was the trial judge's finding that Merrifield's potential conflict of interest was "remote at best" and that the RCMP's concern about it was not "*bona fide*". In arriving at this conclusion, the trial judge failed to consider all of the evidence. In particular, she failed to consider the evidence that Merrifield himself had perceived the potential for a conflict, and she failed to consider the evidence of Verrecchia, despite having summarized it earlier in her reasons.

[83] At para. 149, the trial judge mentioned in passing that Merrifield declined to perform an Order in Council check on Belinda Stronach "because he was friends with her." This is neither a complete nor accurate account of Merrifield's testimony. Merrifield described his personal relationship with Stronach "as acquaintances". Significantly, he said that "I felt…that me conducting an order in council check for her would be a conflict of interest, so I declined to do it" (emphasis added). When asked to explain why he thought it would be a conflict of interest, he responded: "It would be a conflict of interest, because if there was something omitted or something erroneously reported, that personal relationship could be seen as a conflict of interest, whether through concealment or advantage. So it would be best not to conduct that order in council check." He further expressed his view that the conflict did not arise from his political affiliation but from his personal relationship with Stronach. What Merrifield described as a personal relationship was an artifact of his political activities. He said Stronach had been "very helpful and supportive throughout the 2004 campaign year for me." He added that he had sat with her on the Conservative caucus for the Greater Toronto Area.

[84] Further, the trial judge noted that when Merrifield was assigned to investigate a death threat against Stronach, "he contacted Ms. Stronach directly on that day to ask her if she was comfortable with his doing the investigation." In his testimony, he described this contact with Ms. Stronach as having "taken steps

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to avoid [a] conflict of interest and ensure that the person who was [the] subject of the threats was comfortable with the investigation" (emphasis added).

[85] This testimony may not establish that Merrifield thought he was in a conflict of interest position, but it does show that he perceived the possibility of a conflict.

[86] The trial judge did not refer to Merrifield's decision not to perform the Order in Council check, or to his asking Stronach if he should recuse himself from investigating the death threat, when she concluded at para. 754 that "the potential for a perceived conflict of interest was remote at best". The evidence that Merrifield shared the RCMP's perception of a possible conflict of interest undermines her finding that the perception was "remote at best".

[87] The trial judge's finding that the RCMP's perceived conflict was not *bona fide* lacks evidentiary support. The RCMP management was aware that Merrifield had asked Stronach if he should recuse himself from the investigation and was concerned about the appearance of their relationship as a potential conflict. As Jagoe explained in his testimony, if Merrifield were not removed from the death threat investigation, "it would appear that Ms. Stronach was deciding who was doing the investigation and this could be viewed as a conflict". This was a reasonable consideration.

[88] In summarizing the evidence, the trial judge recounted that Proulx checked with Verrecchia on May 24, 2005, asking "whether he was wrong to think that

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there was a conflict.” The trial judge reviewed Verrecchia’s testimony beginning at para. 168. Verrecchia said that Proulx sought her guidance about the conflict of interest policy and whether Merrifield had contravened it. Among other things, she told Proulx that Merrifield’s investigation of Stronach’s death threat was a conflict as he was partisan and his objectivity might be questioned. The RCMP had to be objective, especially with respect to political investigations. According to the trial judge, at para. 170, Verrecchia’s view was that:

> [O]bjectively, it was an apparent conflict for Mr. Merrifield and the RCMP. If something had happened, Mr. Merrifield’s integrity could be questioned and the Force’s objectivity could be questioned as well. His involvement in the Stronach investigation created both perceived and apparent conflicts.

[89] Verrecchia also stated her concerns about the campaign literature Merrifield had distributed while he was not on LWOP and still working for the RCMP. He was speaking against some of the laws of the day, for example the gun registry, which was a law of Canada that had to be enforced by the RCMP. Verrecchia said: “While working as an RCMP officer, he should not have taken a public stance against the government and its existing laws. He had an obligation to enforce the laws and remain objective.” Significantly, the trial judge noted that Verrecchia had advised Proulx that “Mr. Merrifield was proceeding contrary to the advice that she had given him in 2004.”

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[90] Verrecchia also pointed out that section 12.12 F of the RCMP Conflict of Interest Policy states that "once a member returns from LWOP, the officer is to determine a suitable assignment taking into account political opinions expressed, political impact that may result from the posting and investigations with political overtones being conducted by the proposed unit." She stated that she had advised Proulx that Merrifield should not be doing any political investigations as it was a conflict.

[91] The fact that Proulx consulted and followed the advice of internal resources at the RCMP before forming a firm opinion that Merrifield posed a potential conflict of interest, and before transferring him out of TAG, demonstrates that the trial judge's finding that his action was not *bona fide* was clearly wrong. On no understanding could his conduct be said to be outrageous.

[92] A more minor matter is that Verrecchia's explanations show that the trial judge was also clearly wrong in stating, at para. 752, that "Mr. Merrifield's political views were irrelevant." His political views would have been less problematic if he had followed the regulations and been on LWOP, but as an active RCMP officer he had expressed political views in opposition to the laws of Canada that he was required to enforce, and in these circumstances it was not unreasonable to be concerned about a conflict of interest.

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[93] The trial judge considered it significant that no conflict was apprehended when Merrifield, after running in the election in 2004, worked in the Integrated National Security Enforcement Team (INSET) and was assigned to TAG, a sub-unit of INSET, in February 2005. Verrecchia explained in her testimony that this was not a concern as his LWOP status had separated him from the RCMP during the campaign and election period. As well, Proulx, who became Merrifield's line officer at TAG in February 2005, was unaware of Merrifield's previous political activities and unfamiliar with the policies that applied to RCMP members engaging in political activities. That is why he consulted Verrecchia.

[94] In her analysis section, the trial judge made only passing reference to Verrecchia. At para. 753, she said that Proulx "consulted Sgt. Verrecchia who believed that there could be a problem with perceived conflict." The trial judge then went on to state that Proulx also consulted the RCMP Policy Branch. The trial judge pointed out that the Policy Branch took a long time to respond and that, when it did, its reply was not responsive to the issue. She then found that "if there was a significant concern that Mr. Merrifield's attendance at the Barrie nomination meeting had compromised his ability to work in national security, the Policy Branch would have provided Supt. Proulx with direction in a timely manner."

[95] As the Crown points out, there are two problems with this.

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[96] First, the issue was not whether Merrifield's political activities compromised his ability to work in national security; it was whether his political activities compromised his ability to protect politicians. Second, the trial judge was wrong to ascribe bad faith to Proulx, who was not responsible for the delay of the Policy Branch and was acting on the best information and advice he had been given. It is illogical for the trial judge to conclude that, because the Policy Branch took longer to answer Proulx's inquiries than she considered reasonable, Proulx's concerns were not *bona fide*.

[97] Setting aside the trial judge's finding that Proulx's concern over a potential conflict of interest was not *bona fide* sweeps away additional findings. For example, it sweeps away the finding that Merrifield's transfer out of TAG constituted an "other type" of discipline that was "unjustified and punitive".

Merrifield's January 5, 2012 email correspondence

[98] On January 5, 2012, Merrifield sent a lengthy email to a number of senior members of the RCMP, including the Commissioner, Deputy Commissioner, and Assistant Commissioner, lamenting that the RCMP had taken no steps to settle his case and that the Department of Justice did not have "the best interest of the RCMP at heart." In the email he made a serious allegation of misconduct by Proulx.

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[99] The trial judge evidently regarded the email as significant and set it out in full at para. 557 of her reasons. She said that in the email Merrifield "was taking extraordinary steps to contact upper management with the hope of resolving his concerns." She found that Merrifield received no response to the email and that "the RCMP's conduct in ignoring this email went beyond all standards of what is right or decent. I find that it was one of the actual and proximate causes of Mr. Merrifield's severe emotional distress."

[100] The trial judge's analysis is clearly erroneous. Merrifield and the RCMP were opposing parties in litigation. The proper avenue for communication between the parties was through counsel. In effect, Merrifield was complaining that the RCMP was defending the action rather than settling it. His request should have been communicated through his counsel. The RCMP response, if any, likewise should have been through counsel.

[101] In any event, the trial judge was mistaken in saying the RCMP did not respond to the email. The Assistant Commissioner emailed Merrifield on January 6, 2012, the day after his email was received, informing him that the RCMP was continuing its discussions with Department of Justice counsel "regarding the most appropriate manner to proceed with this civil action against us that is currently before the courts." He added that the RCMP had not abandoned efforts towards trying to reach a resolution and anticipated "additional discussions with you <u>and your counsel</u> in this regard" (emphasis added).

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[102] In the circumstances, this was an entirely appropriate response.

Proulx's failure to "set the record straight"

[103] It was patently wrong for the trial judge to find it outrageous for Proulx not to have "set the record straight" with Van Doren by telling him after the SOC incident that his concerns with Merrifield had been addressed, and that Merrifield had been "cleared" of wrongdoing. As we have explained above, the perception that Merrifield could not be trusted to be completely forthright could reasonably be held. The fact that Proulx's September 28, 2005 letter to Merrifield warned rather than disciplined him did not give rise to an obligation on Proulx to inform anyone that Merrifield had been "cleared".

[104] In our view, this matter illustrates the readiness with which the trial judge identified wrongdoing on the part of the RCMP managers and found them to have acted outrageously. We note that the trial judge found that many of the other things the RCMP did or did not do were elements of conduct she considered outrageous. We are not to be taken to agree with those other findings, but for purposes of this decision it is not necessary or fruitful to go through all of them here.

CONCLUSION

[105] In summary, the trial judge erred in concluding that the tort of harassment exists in Ontario and we are not persuaded that the tort should be recognized.

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The trial judge also erred in concluding that the tort of IIMS was made out based on Proulx's initiation of a Code of Conduct investigation. No other facts found by the trial judge met the test for IIMS.

[106] For these reasons, the appeal is allowed. The cross-appeal is dismissed.

[107] The appellants are entitled to costs of the appeal, the cross-appeal, and the trial. The appellants may make brief submissions on costs, not exceeding 10 pages, to the Registrar of this court within 10 days of this decision. The respondent will have 10 days from service of those written submissions to serve and file his submissions, which shall not exceed 10 pages.

Released: March 15, 2019 ("D.B.")

"R.G. Juriansz J.A."
"David Brown J.A."
"Grant Huscroft J.A."

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