

# The Emerging Tort Of **Harrassment**

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*Bottom Line*  
RESEARCH AND COMMUNICATIONS

In recent years, courts have increasingly been asked to provide adjudication on circumstances involving various forms of harassing behaviour. In civil matters, this has given rise to case law considering how tort law might best respond to claims of that nature. One potential response that has received some judicial treatment is the development of a new tort of harassment.

Courts across Canada have so far taken a very cautious approach to developments in the law related to civil harassment claims. In most jurisdictions, the tort is not expressly recognized, and some decisions have expressed doubts about whether creation of a separate tort is appropriate.<sup>1</sup>

In Alberta however, lower court decisions have favoured adoption of a tort of harassment, and have provided some guidance on its contours. This development in Alberta has evolved out of cases dealing with the availability of civil restraining orders to prohibit harassing and vexatious conduct, and coincides with tentative consideration of other new, related torts in Alberta and elsewhere in Canada.

***"An applicant no longer needs to demonstrate an objective fear for their safety. Rather, it is sufficient to demonstrate a legitimate risk that the harassing intimidating, molesting or threatening behaviour will persist."***

### Civil Recourses for Harassing Behaviour in Alberta

One of the earlier Alberta decisions considering the ability of civil courts to provide redress for harassing behaviour, as separate from concerns for physical safety, is *Boychuk v Boychuk*, 2017 ABQB 428, 60 Alta LR (6th) 149. In that family law matter, the wife sought extension of a civil restraining order she had obtained against the husband. Veit J found that the wife had not fully informed the chambers judge of all relevant facts at the time of obtaining the original order and there was in fact no objective basis to justify the restraining order, which was consequently set aside. In the course of her reasons, however, Veit J opined on the court's power to provide protection from harassment. She concluded that judicial authority to grant restraining orders against unwanted behaviour did not derive only from statute and was not limited to circumstances of physical violence or fear for physical safety:

[37] [...] [A] superior court has inherent jurisdiction and is not limited to any statutory standard; it is entitled, and indeed expected, to administer equity, i.e. to do what is fair as between litigants. **The rights of citizens include**

**not only the right to live in safety but also the right to be free from vexatious or harassing conduct.** A citizen who has been plagued by harassing behaviour but told that the court cannot do anything to protect them from that behaviour would be further vexed upon learning that courts protect themselves from vexatious litigants by making orders restricting access of those litigants to judicial process; vexatious litigant orders do not depend on evidence that courts fear for the safety of the judges.

[38] Do citizens have the right to be free from vexatious conduct by another?

[39] **I have concluded that there is such a right.** The *Criminal Code* criminalizes certain types of harassment

[...]

[...]

[40] It is excessively rare for there to be criminal redress for conduct which cannot also be dealt with civilly. In my respectful view, **a person who repeatedly communicates with another after having been told that the communications are unwelcome is harassing the other person. That unwelcome communication should, and can, be stopped.** [Emphasis added]

Following *Boychuk*, the ability of civil courts to provide protection against behaviour that did not create a fear for physical safety, but was nonetheless harassing and vexatious, was recognized in other decisions. In *Muslim Counsel of Calgary v Mourra*, 2018 ABQB 118, [2018] AJ No 391, which concerned a dispute between a not-for-profit organization and one of its former members, Nixon J affirmed that threats of violence or fear for physical safety were no longer required in order for courts to issue a restraining order. A risk of harassing, intimidating, or molesting behaviour that was likely to continue was sufficient:

70 [...] **there is no longer a general requirement for an applicant to demonstrate an objective fear for their safety before a common law restraining order can be granted.** While older jurisprudence required that prerequisite, more recent jurisprudence has lowered the threshold: *Boychuk v Boychuk*, 2017 ABQB 428 at paras 50-52 [*Boychuk*]; see also *C (AT) v S (N)*, 2014 ABQB 132 at para 18.

<sup>1</sup> See for example *Merrifield v Canada (Attorney General)* (2019), 145 OR (3d) 494, 2019 ONCA 205, leave to appeal refused [2019] SCCA No 174, holding that the trial judge erred by recognizing a tort of harassment; *Ilic v British Columbia (Minister of Justice)*, 2023 BCSC 167, [2023] BCJ No 200, observing that "There is no recognized tort of harassment" (at para 196).



[...]

72 Given the lower threshold in the recent jurisprudence, an applicant for a permanent order need only demonstrate that there is a legitimate risk that the respondent's harassing, intimidating, molesting, or threatening behaviour will continue. To emphasize this point, **impugned behaviour need only be disruptive; it is not a requirement that it be violent:** [...]

73 [...] **we are in a new era. As stated above, the Courts are moving to a lower threshold in certain cases.**

74 With that context in mind, I further note that a superior court has the jurisdiction to grant injunctions to effect justice. **This jurisdiction exists even when there is no underlying threat of violence:** [...]. [Emphasis added]

The ability of courts to issue restraining orders to prevent harassment was also affirmed in *Sun v Huang*, 2021 ABQB 782, [2021] AJ No 1338, where Armstrong J reiterated the language from *Muslim Council* indicating that the applicable test no longer hinged on the applicant showing a fear for physical safety:

13 The test for a restraining order has evolved somewhat since the decision in P(R). An applicant **no longer needs to demonstrate an objective fear for their safety.** Rather, it is sufficient to demonstrate **a legitimate risk that the harassing intimidating, molesting or threatening behaviour will persist.** As the Court said in *Muslim Council of Calgary v Mourra*, 2018 ABQB 118 at para 72, “...**impugned behaviour need only be disruptive; it is not a requirement that it be violent.**...”. [Emphasis added]

In *Sun*, Armstrong J also considered the applicant's claim for tort damages related to the harassing behaviour, which had been framed under the tort of intentional infliction of mental suffering. Armstrong J found that in the absence of a provable mental injury resulting from the alleged conduct, tort damages were not available pursuant to that particular tort, which did not extend to behaviour causing annoyance or even alarm:

10 Mr. Sun claims damages for intentional infliction of emotional distress or, as the tort is more commonly known, intentional infliction of nervous shock. In the recent decision of *Dubé v RCMP*, 2021 ABQB 451, the elements of the tort were succinctly summarized at para 157:

The elements of the tort of intentional infliction of harm (also known as intentional infliction of nervous shock or mental suffering) are: (1) **flagrant or outrageous conduct;** (2) **calculated to produce harm;**






Ltd, 2008 SCC 27 at para 9, *Saadati v Moorhead*, 2017 SCC 28 at para 38.

11 Mr. Sun has not established the required elements of the tort. **While he was clearly annoyed, or may have even been alarmed, by Ms. Wang's correspondence and by his interactions with Ms. Wang and Mr. Huang, his evidence does not disclose any actual injury, mental or otherwise, attributable to the actions of Ms. Wang or Mr. Huang. In the absence of any injury, Mr. Sun's claim for intentional infliction of emotional distress must fail. [Emphasis added]**

The inadequacy of existing categories of tort law to address certain forms of unwanted conduct other than physical violence was acknowledged in *ES v Shillington*, 2021 ABQB 739, 34 Alta LR (7th) 324. The plaintiff in that case sought recognition of a new tort of public disclosure of private facts in response to the defendant's ongoing campaign of publishing private images of her on the internet. Inglis J found that the circumstances of the injury suffered by the plaintiff, which were "appalling and warrants a significant response from the court" (para 115), met the criteria set out in *Nevsun Resources Ltd v Araya*, 2020 SCC 5 at para 237, 443 DLR (4th) 183 for recognition of a new tort, and awarded general damages of \$80,000 and punitive damages of \$50,000, in addition to a restraining order. In determining that recognition of the new tort was appropriate, Inglis J noted the uneven development of new torts addressing related types of behaviour, including harassment, in jurisdictions across Canada (paras 36 et seq). A critical consideration in those cases, which Inglis J found was also present in the instant case, was the absence of any tort or other remedy that sufficiently addressed the harm:


63 The existence of a right of action for Public Disclosure of Private Facts is thus confirmed in Alberta. To do so recognizes these particular facts where a wrong exists for which there are no other adequate remedies. The tort reflects wrongdoing that the court should address. Finally, declaring the existence of this tort in Alberta is a determinate incremental change that identifies action that is appropriate for judicial adjudication.

The reasoning from *Shillington* was relied on in *Ford v Jivraj*, 2023 ABKB 92, [2023] AJ No 182, in which the defendant applied to set aside a restraining order issued against him, as a corollary to an action instituted by the plaintiff alleging defamation and seeking to prohibit the defendant from publishing any further comments about her. While the plaintiff did not specifically seek recognition of a tort



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of harassment, Graesser J opined that there was good justification for its existence, and considered that it could be relied upon as a basis for the restraining order granted in the case before him. After noting that “[t]he common law in Canada has been slow to recognize a tort of harassment” (para 255), Graesser J sought to extend the reasoning from *Shillington*:

263 In Alberta, Justice Inglis awarded damages against a defendant for claims including harassment in *ES v Shillington*, 2021 ABQB 739. I agree with her analysis and conclusions in that case and recognize that **this new tort now has a toe hold in Alberta. Her award did not depend entirely on harassment.**

264 I feel compelled to say that I am surprised by the pushback on the development of this potential tort. I fail to see what competing interests or rights need to triumph over an individual's privacy interests, as opposed to their being a reasonable balance.

[...]

271 **Harassment appears to me to be an obvious invasion of a person's privacy interests**, and to date has been subsumed (if at all) in the recognized tort of intentional infliction of mental suffering. That itself is a 20th Century tort.

272 The criminal law has recognized harassment as a criminal offence since 1993.

[...]

274 "Fearing for safety" in section 264 is not restricted to physical safety and has been interpreted to include psychological safety. "Injury" in section 372 is similarly not limited to physical injury and has been interpreted as including psychological and financial safety.

[...]

276 **I fail to see that if a deliberate course of harassment is a criminal offence why it is also not a civil wrong. In my view, it is time for the civil law to catch up to the Criminal law and recognize harassment as a tort.** [Emphasis added]

Most recently, the tort of harassment was expressly stated to be part of the law in Alberta in *Alberta Health Services v Johnston*, 2023 ABKB 209, [2023] AJ No 373. The defendant in that case was found to have engaged in an ongoing vitriolic campaign of defamatory remarks and threats made against AHS employees generally, and in particular the co-plaintiff Nunn, on his online talk show, in interviews with the press, and through other media. Feasby J awarded Ms Nunn \$400,000 in general damages, which included \$100,000 spe-



ment as follows. A defendant has committed the tort of harassment where he has:

1. engaged in repeated communications, threats, insults, stalking, or other harassing behaviour in person or through or other means;
2. that he knew or ought to have known was unwelcome;
3. which impugn the dignity of the plaintiff, would cause a reasonable person to fear for her safety or the safety of her loved ones, or could foreseeably cause emotional distress; and
4. caused harm.

Feasby J held that the essence of tortious harassment is “repeated and persistent behaviour” that “creates an oppressive atmosphere”. He set out a four-element test for determining whether a defendant has committed the tort of harassment:

98 **The fact that this Court regularly grants restraining orders to address harassment indicates that harassment is a justiciable issue. A recognition that the wrong that is being restrained in these cases is tortious harassment is an incremental change in the law.** The recognition of the tort of harassment, in turn, allows damages to be awarded in circumstances where the Court now can only issue restraining orders. Arming the Court to redress the problem of harassment by adding the power to award damages in appropriate cases is long overdue.

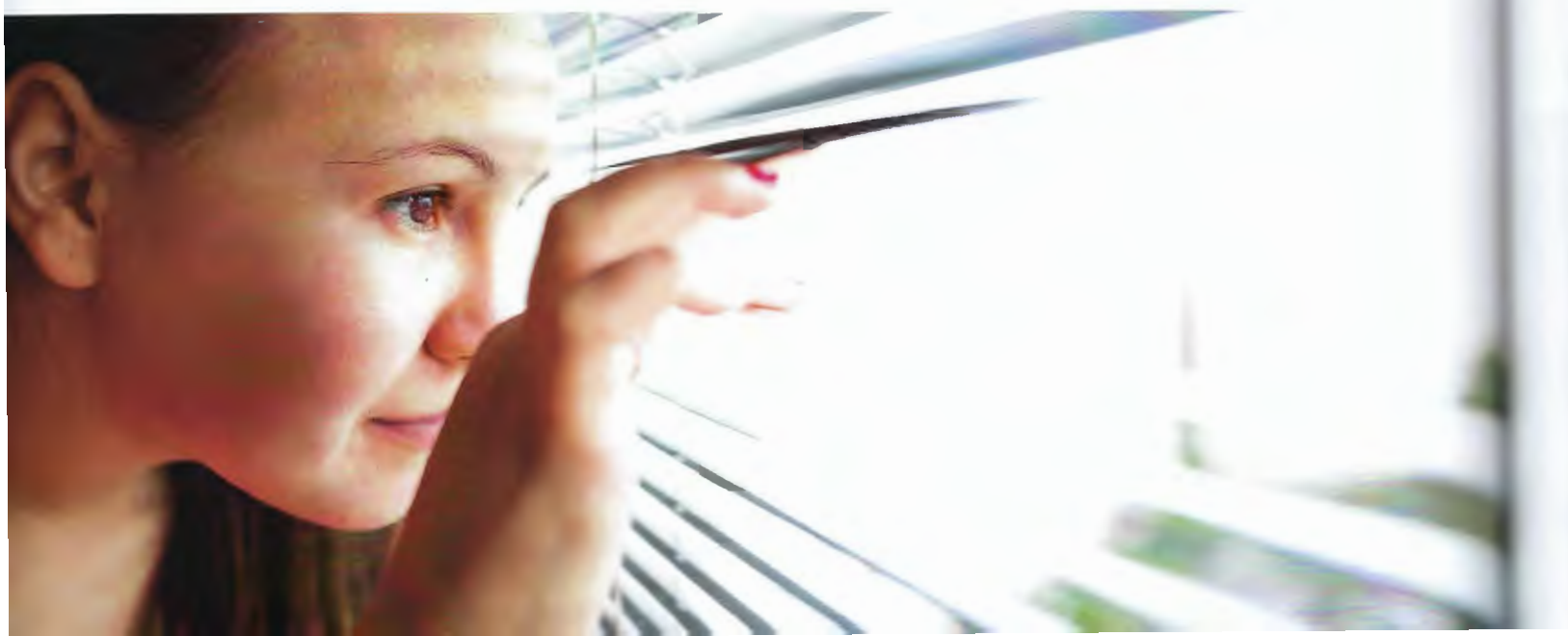
[...]

106 My view, based on the offence of criminal harassment, is that the **essence of harassment is repeated or persistent behaviour**. A single encounter where threats and insults are made or where other offensive behaviour takes place may be actionable on other grounds but it is not harassment. **Harassment occurs when the behaviour is recurring and creates an oppressive atmosphere. Any definition of harassment must specify that the behaviour is repeated.**

107 Based on the foregoing, I define the tort of harass-

108 Recognizing the tort of harassment in the terms described above **provides a doctrinal foundation for and structure to what Alberta courts have already been doing for many years in the context of restraining orders**. Taking this step does not create indeterminate liability nor does it open floodgates; to the contrary, it defines the tort of harassment in a measured way that will guide courts in the future. [Emphasis added]

Outside Alberta, some decisions have also supported the development of a tort of harassment, including internet harassment. For example, a restraining order was granted in *Stancer Gossin Rose LLP v Atas*, 2021 ONSC 670, [2021] OJ No 384, where the defendant had engaged in a prolonged campaign of online attacks designed to cause emotional and psychological harm to a large number of persons against whom she had grievances. Although damages were initially claimed, these were later withdrawn since the defendant was in bankruptcy proceedings.. Corbett J held that recognizing a tort of internet harassment was necessary to address behaviour like the defendant’s, and to allow courts to impose a







meaningful consequence:

99 **Online harassment, bullying, hate speech, and cyber stalking straddle criminal and civil law.** Harmful internet communication has prompted many jurisdictions to amend or pass legislation to deal with the issue. The courts too have been challenged to recognize new torts

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or expand old ones to face the challenges of the internet age of communication. The academic commentators are almost universal in their noting that, while online harassment and hateful speech is a significant problem, there are few practical remedies available for the victims.

[...]

104 [...] this is a developing area of the law. The law of defamation provides some recourse for the targets of this kind of conduct, but that recourse is not sufficient to bring the conduct to an end or to control the behaviour of the wrongdoer. The reasons that follow explain this conclusion, which provides a foundation for this court's conclusion that the **common law tort of harassment should be recognized in Ontario. "Harassment" describes what Atas has been doing, and ordering Atas to stop harassment provides remedial breadth not available in the law of defamation.**

[...]

168 In my view, **the tort of internet harassment should be recognized** in these cases because Atas' online conduct and publications **seek not so much to defame the victims but to harass them. Put another way, the intent is to go beyond character assassination: it is intended to harass, harry and molest** by repeated and serial publications of

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defamatory material, not only of primary victims, but to cause those victims further distress by targeting persons they care about, so as to cause fear, anxiety and misery. The social science literature referenced above makes it clear that **real harm is caused by serial stalkers such as Atas.** [Emphasis added]

Similarly, in *385277 Ontario Ltd v Gold*, 2021 ONSC 4717, [2021] OJ No 3626, Myers J extended an interim injunction prohibiting the defendants from continuing an ongoing campaign of harassment and disparagement on social media, which had been granted as a preliminary measure in relation to an action alleging trespass, defamation, and harassment. Myers J expressly recognized the existence of a tort of internet harassment, and discussed the need for it:

49 Online harassment has become a major issue in Canadian society. In the ten days before I heard this motion, I dealt with *four* other civil cases in which relief was



sought due to online harassment.

50 **Current law is not always adequate to deal with internet harassment.** One problem with existing tort law is that, generally, torts require proof of physical or provable mental injury. The tort of intentional infliction of mental suffering, for example, requires proof that the plaintiff has suffered, "visible and provable illness." See: *Merrifield v. Canada (Attorney General)*, 2019 ONCA 205 (CanLII), at para. 45. Similarly, the tort of assault, requires a threat arousing fear of imminent harm. See: *Larbi v. Canada Revenue Agency*, 2021 ONSC 3240 (CanLII),

51 Harassment is different. Its goal is to vex, to bother, to upset, to hurt feelings, and to intimidate.

[...]

54 The point of harassment is to cause mental suffering or to change another's behaviour by subjecting them to unwelcomed torment. It may but need not lead to "visible and provable illness". It may not create a threat of imminent physical harm. Ms. Gold mouthed many threats of

physical harm. None was really "imminent".

55 **Existing torts do not necessarily capture the mischief or harm intended by online harassment meant to intimidate.**

[...]

71 **I am prepared to recognize that it is unlawful harassment, to use the internet in a manner that is outrageous in character, duration, and extreme in degree, with the intent to coerce behaviour by causing fear, anxiety, emotional upset, or impugning the dignity of the plaintiff online.** In my view this is an incremental step in the development of the law that goes no further than required to deal with the case before me. [Emphasis added]

In *Skwark v Vallittu*, 2022 MBKB 211, [2022] MJ No 211, Perlmutter ACJ observed that the tort of online harassment had not been recognized in Manitoba, but was not prepared to strike a pleading asserting a claim based on that tort. Perlmutter J granted an interim restraining order prohibiting the defendant from continuing to make statements on social media or to the plaintiff's clients and business associates, and allowed the underlying action seeking damages based inter alia on the tort of online harassment to proceed to trial:

47 The tort of online harassment is a burgeoning area of the law, at least in Ontario. As is apparent by the plaintiff's allegations here, in light of modern realities, **there may be good reason to recognize and provide redress relating to harassment online.** In the circumstances at hand, the novelty of this cause of action is not a reason to strike out the related allegations in the statement of claim. [Emphasis added]

As these cases illustrate, Alberta is one of few Canadian jurisdictions where an independent tort of harassment has received express judicial recognition to date. However, courts both inside and outside Alberta also appear to acknowledge a need for development of the law in this area, and we may expect courts to continue to grapple with the question of whether new rights and remedies should be afforded, and what framework should govern their application.



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