PROVINCIAL COURT OF NOVA SCOTIA
Citation: *R. v. Donn Fraser*, 2022 NSPC 24

Date: 20220623
Docket: 8509507
Registry: Pictou

Between:

Her Majesty The Queen

v.

Donn Lawrence Fraser

Judge:	The Honourable Judge Alain Bégin,
Heard:	April 5, 2022 and May 6, 2022, in Pictou, Nova Scotia
Decision	June 23, 2022
Charge:	264(2)(d) Criminal Code of Canada
Counsel:	Darcy MacPherson, for the Crown Attorney Stan MacDonald, for the Defendant

By the Court:

[1] This issue in this trial was straightforward - if a senior partner at a disintegrating law firm is overbearing and demanding of a managing partner in a very stressful office dynamic due to various interpersonal issues, does this meet the threshold for a charge of criminal harassment pursuant to s. 264(2)(d) of the Criminal Code?

[2] This was a criminal trial. The Crown had the onus of establishing beyond a reasonable doubt that Donn Fraser committed the offense with which he is charged. The onus of proof never switches from the Crown to the accused.

[3] Proof beyond a reasonable doubt does not involve proof to an absolute certainty. It is not proof beyond any doubt. Nor is it an imaginary or frivolous doubt. In ***R. v. Starr*** (2000) 2SCR 144, the Supreme Court of Canada held that this burden of proof lies much closer to absolute certainty than to a balance of probabilities.

[4] The Supreme Court of Canada in ***R. v. Lifchus*** [1997] 3 SCR 320 noted at paragraph 39:

> "39. Instructions pertaining to the requisite standard of proof in a criminal trial of proof beyond a reasonable doubt might be given along these lines:
>
> > The accused enters these proceedings presumed to be innocent. That presumption of innocence remains throughout the case until such time as the Crown has on the evidence put before you satisfied you beyond a reasonable doubt that the accused is guilty.
> >
> > What does the expression "beyond a reasonable doubt" mean?
> >
> > The term "beyond a reasonable doubt" has been used for a very long time and is a part of our history and traditions of justice. It is so engrained in our criminal law that some think that it needs no explanation, yet something must be said regarding its meaning.
> >
> > A reasonable doubt is not an imaginary or frivolous doubt. It must not be based on sympathy or prejudice. Rather, it is based on reason and

> common sense. It is logically derived from the evidence or absence of evidence.
>
> Even if you believe the accused is probably guilty or likely guilty, that is not sufficient. In those circumstances you must give the benefit of the doubt to the accused and acquit because the Crown has failed to satisfy you of the guilt of the accused beyond a reasonable doubt.
>
> On the other hand, you must remember that it is virtually impossible to prove anything to an absolute certainty and the Crown is not required to do so. Such a standard of proof is impossibly high.
>
> In short, if based on the evidence before the Court, you are sure that the accused committed the offence, you should convict since this demonstrates that you are satisfied of his guilt beyond a reasonable doubt."

[5] It is settled law that an accused person bears no burden to explain why their accuser made the allegations against them. Reasonable doubt is based on reason and common sense. It is logically derived from the evidence or the absence of evidence.

[6] Mr. Fraser did not testify, as is his right. Nor was any evidence called on his behalf. The burden was on the Crown to prove all of the essential elements of the offense beyond a reasonable doubt.

[7] A criminal trial is **not** a credibility contest.

[8] On the issue of credibility I am guided by the case of ***Faryna v. Chorny*** [1952] 2 DLR 34 where the Court held that the test for credibility is whether the witness's account is consistent with the probabilities that surrounded currently existing conditions. The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanor of the particular witness carried conviction of the truth. In short, the real test of the story of the witness in such a case must be how it relates and compares with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.

[9] Or as stated by our Court of Appeal in ***R. v. D.D.S.*** [2006] NSJ No 103 (NSCA), "Experience tells us that one of the best tools to determine credibility and reliability is the painstaking, careful and repeated testing of the evidence to see how it stacks up. How does the witness's account stand in harmony with the other evidence pertaining to it, while applying the appropriate standard of proof in a …criminal trial?"

[10] With respect to the demeanour of witnesses, I am mindful of the cautious approach that I must take in considering the demeanour of witnesses as they testify. There are a multitude of variables that could explain or contribute to a witness' demeanour while testifying. As noted in ***D.D.S.***, demeanour can be taken into account by a trier of fact when testing the evidence but standing alone it is hardly determinative.

[11] Credibility and reliability are different. Credibility has to do with a witness's veracity, whereas reliability has to do with the accuracy of the witness's testimony. Accuracy engages consideration of the witness's ability to accurately observe, recall and recount events in issue. Any witness whose evidence on an issue is not credible cannot give reliable evidence on the same point.

[12] Credibility, on the other hand, is not a proxy for reliability. A credible witness may give unreliable evidence. Reliability relates to the worth of the item of evidence, whereas credibility relates to the sincerity of the witness. A witness may be truthful in testifying, but may, however, be honestly mistaken.

[13] The Ontario Court of Appeal in ***R. v. G(M)*** [1994] 73 OAC 356 stated at paragraph 27:

> "Probably the most valuable means of assessing the credibility of a crucial witness is to examine the consistency between what the witness said in the witness box and what the witness has said on other occasions, whether on oath or not. Inconsistencies on minor matters or matters of detail are normal and are to be expected. They do not generally affect the credibility of the witness…But where the inconsistency involves a material matter about which an honest witness is unlikely to be mistaken, the inconsistency can demonstrate a carelessness with the truth. The trier of fact is then placed in the dilemma of trying to decide whether or not it can rely on the testimony of a witness who has demonstrated carelessness with the truth."

> And at paragraph 28, "…it is essential that the credibility and reliability of the complainant's evidence be tested in the light of all of the other evidence presented…….While it is true that minor inconsistencies may not diminish the credibility of a witness unduly, a series of inconsistencies may become quite significant and cause the trier of fact to have a reasonable doubt about the reliability of the witness's evidence. There is no rule as to when, in the face of inconsistency, such doubt may arise, but at least the trier of fact should look to the totality of the inconsistencies in order to assess whether the witness's evidence is reliable. This is particularly so when there is no supporting evidence on the central issue…"

[14] A trier of fact is entitled to believe all, some, or none of a witness' testimony. I am entitled to accept parts of a witness' evidence and reject other parts. Similarly, I can afford different weight to different parts of the evidence that I have accepted.

[15] In the case of ***R. v. Reid*** (2003) 167 (OAC) the Ontario Court of Appeal stated that although the trial judge is at liberty to accept none, some, or all, of a witness' evidence, this must not be done arbitrarily. When a witness is found to have deliberately fabricated criminal allegations against the accused, the trial judge must have a clear and logical basis for choosing to accept one part of that witness' testimony while rejecting the rest of it.

[16] It is important to remind myself of my role, and duty, as the trial judge. The Nova Scotia Court of Appeal in ***R. v. Brown*** [1994] NSJ 269 (NSCA) confirmed at paragraph 17 that:

> "…There is a danger that the Court asked itself the wrong question: that is which story was correct, rather than whether the Crown proved its case beyond a reasonable doubt."

[17] And at paragraph 18 of that same ***Brown*** case the Nova Scotia Court of Appeal referred to paragraph 35 of the BC Court of Appeal case ***R. v. K.(V.)*** which stated:

[1] "I have already alluded to the danger, in a case where the evidence consists primarily of the allegations of a Complainant and the denial of the accused, that the trier of fact will see the issue as one of deciding whom to believe. Earlier in the judgement I noted the gender-related stereotypical thinking that led to assumptions about the credibility of Complainants in sexual assault cases which

> we have at long last discarded as totally inappropriate. It is important to ensure that they are not replaced by an equally pernicious set of assumptions about the believability of Complainants which would have the effect of shifting the burden of proof to those accused of such crimes."

[17] In the case of ***R. v. Mah*** 2002 NSCA 99, the Court stated:

> "The W.D. principle is not a magic incantation which trial judges must mouth to avoid appellate intervention. Rather, W.D. describes how the assessment of credibility related to the issue of reasonable doubt. What the judge must not do is simply choose between alternative versions and, having done so, convict if the complainant's version is preferred. W.D. reminds us that the judge at a criminal trial is not attempting to resolve the broad factual question of what happened. The judge's function is the more limited one of deciding whether the essential elements of the charge have been proved beyond reasonable doubt…the ultimate issue is not whether the judge believes the accused or the complainant or part or all of what they each had to say. The issue at the end of the day in a criminal trial is not credibility but reasonable doubt."

[18] The ***Mah*** case makes it clear that my function as a judge at a criminal trial is **not** to attempt to resolve the broad question of what happened. My function is more limited to having to decide whether the essential elements of the charges against the accused have been proved beyond a reasonable doubt. The onus is always on the Crown to prove the elements of the offenses beyond a reasonable doubt. The onus is not on the Defence to disprove anything.

The Crown Burden for Criminal Harassment

[19] To find Mr. Fraser guilty of criminal harassment, Crown counsel must prove each of these essential elements beyond a reasonable doubt:

i. that Mr. Fraser engaged in threatening conduct towards Ms. Saunders;
ii. that Mr. Fraser had no lawful authority to do what he did;
iii. that Mr. Fraser's conduct harassed Ms. Saunders;
iv. that Mr. Fraser knew that his conduct harassed Ms. Saunders;
v. that Mr. Fraser's conduct caused Ms. Saunders to fear for her safety; and

vi. that Ms. Saunders's fear was reasonable in the circumstances.

[20] If Crown counsel has not satisfied me beyond a reasonable doubt of each of these essential elements, I must find Mr. Fraser not guilty of criminal harassment.

[21] If Crown counsel has satisfied me beyond a reasonable doubt of each of these essential elements, I must find Mr. Fraser guilty of criminal harassment.

[22] To engage in threatening conduct means to do something that, in all the circumstances, including the relationship between Mr. Fraser and Ms. Saunders, a reasonable person would consider a threat or intimidation. The threat does not have to be carried out or repeated, but Mr. Fraser must intend that it be taken seriously.

[23] To have lawful authority to do something means that the law specifically allows a person to do what Mr. Fraser did in the circumstances in which he did it. In this case, Mr. Fraser was a senior partner in the same law firm as Ms. Saunders.

[24] If I have a reasonable doubt whether Mr. Fraser had lawful authority to do as he did in the circumstances, I must find Mr. Fraser not guilty of criminal harassment.

[25] If I am satisfied beyond a reasonable doubt that Mr. Fraser had no lawful authority to do as he did in the circumstances, I must go on to the next question.

[26] Did Mr. Fraser's conduct harass Ms. Saunders? To prove that Mr. Fraser's conduct harassed Ms. Saunders, Crown counsel does not have to show that Ms. Saunders was subjected to repeated little attacks or constant rapid assaults without any break.

[27] Mr. Fraser's conduct harassed Ms. Saunders if it distressed, tormented or badgered Ms. Saunders. I must consider what Mr. Fraser did and said, and how he acted in the circumstances that preceded, accompanied or followed them. If what Mr. Fraser did annoyed Ms. Saunders continually or chronically, this element of the offence has been proven.

[28] If I am not satisfied beyond a reasonable doubt that Mr. Fraser's conduct harassed Ms. Saunders, I must find Mr. Fraser not guilty of criminal harassment.

[29] If I am satisfied beyond a reasonable doubt that Mr. Fraser's conduct harassed Ms. Saunders, I must go on to the next question.

[30] Did Mr. Fraser know that his conduct harassed Ms. Saunders? This element involves knowledge, a state of mind, Mr. Fraser's state of mind. Crown counsel must prove beyond a reasonable doubt that Mr. Fraser knew that his conduct harassed Ms. Saunders. To 'know' something is to be aware of it, at the time you do it.

[31] There is more than one way for Crown counsel to prove that Mr. Fraser knew that his conduct harassed Ms. Saunders. Mr. Fraser's knowledge that his conduct harassed is proven if I am satisfied beyond a reasonable doubt that Mr. Fraser was actually aware (actually knew) that his conduct harassed Ms. Saunders.

[32] Mr. Fraser's knowledge is proven if I am satisfied beyond a reasonable doubt that Mr. Fraser was aware (knew) that there was a risk that his conduct harassed Ms. Saunders, but went ahead anyway, not caring whether the conduct harassed Ms. Saunders or not. In other words, Mr. Fraser was aware of the risk that his conduct harassed Ms. Saunders, but he went ahead (proceeded) anyway and acted as he did despite the risk.

[33] To determine whether Mr. Fraser knew that his conduct harassed Ms. Saunders, I must consider all the evidence including anything Mr. Fraser and Ms. Saunders said or did or failed to say or do in the circumstances. I must consider their words and conduct before, at the time and after Mr. Fraser did what he did. I must consider the nature of what happened or didn't happen between Mr. Fraser and Ms. Saunders, any words or gestures that may have accompanied it (included any alleged threats) and anything else that indicates Mr. Fraser's state of mind when he may have harassed Ms. Saunders.

[34] I may infer, as a matter of common sense, that a (sane and sober) person usually knows the predictable consequences of their conduct. That is simply one way for me to determine a person's actual state of mind, what he actually knew about the consequences of his conduct. However, I am not required to reach that conclusion (draw that inference) about Mr. Fraser's knowledge. Indeed, I must not do so if, on the whole of the evidence I have a reasonable doubt whether Mr. Fraser knew his conduct harassed Ms. Saunders.

[35] If I am not satisfied beyond a reasonable doubt that Mr. Fraser knew that his conduct harassed Ms. Saunders, I must find Mr. Fraser not guilty of criminal harassment.

[36] If I am satisfied beyond a reasonable doubt that Mr. Fraser knew or that his conduct harassed Ms. Saunders, I must go on to the next question.

[37] Did Mr. Fraser's conduct cause Ms. Saunders to fear for her own safety? This element concerns Ms. Saunders's state of mind as a result of what Mr. Fraser did. What effect did Mr. Fraser's words or conduct have on Ms. Saunders's state of mind? If what Mr. Fraser did or said caused Ms. Saunders to fear for her own safety, this essential element has been proven. I must consider all the circumstances in making my decision.

[38] If I am not satisfied beyond a reasonable doubt that Mr. Fraser's conduct caused Ms. Saunders to fear for her own safety, I must find Mr. Fraser not guilty of criminal harassment.

[39] If I am not satisfied beyond a reasonable doubt that Mr. Fraser's conduct caused Ms. Saunders to fear for her own safety, I must find Mr. Fraser not guilty of criminal harassment.

[40] Was Ms. Saunders's fear reasonable in all the circumstances? This question requires me to consider whether Ms. Saunders's fear for own safety because of Mr. Fraser's conduct was reasonable in all the circumstances. Would a reasonable person in the same circumstances as Ms. Saunders fear for her own safety as a result of what Mr. Fraser did?

[41] A reasonable person is a person of normal temperament, fortitude and level of self-control. She is not exceptionally excitable or easily intimidated or scared. She is sober, not drunk, and is aware of the prior history and relationship between Mr. Fraser and Ms. Saunders.

[42] If I am not satisfied beyond a reasonable doubt that Ms. Saunders's fear for her own safety was reasonable in all the circumstances, I must find Mr. Fraser not guilty of criminal harassment.

[43] If I am satisfied beyond a reasonable doubt that Ms. Saunders's fear for her own safety was reasonable in all the circumstances, I must find Mr. Fraser guilty of criminal harassment.

Case Law re. Criminal Harassment

[44] The Alberta Court of Appeal provides guidance on the requirements for a criminal harassment conviction. At paras. 16-18 of ***R. v. Sillipp*** **(1997) 120 CCC (3d) 384 (Alta CA)** the Court noted as follows (emphasis added):

> 16 In the case at bar, Murray, J. told the jury that the term "harass" embraced something more than a complainant being "vexed, disquieted or annoyed". He spoke of appropriate synonyms and mentioned some being "tormented, troubled, worried, plagued, bedeviled and badgered". The charge, taken as a whole, emphasizes to the jury that **proof beyond a reasonable doubt that a complainant has been troubled, worried or badgered, will not suffice; proof beyond a reasonable doubt that a complainant has been vexed, disquieted or annoyed will not suffice. The trial judge told the jury that "something substantially more than that" was required.**
>
> 17 In fact, s. 264 articulates the additional requirement. It is that, in all of the circumstances, the conduct of the accused caused the complainant reasonably to fear for her safety or the safety of anyone known to her.
>
> 18 In the result, a proper charge to a jury in a criminal harassment case must include reference to the following ingredients of the crime, all of which must be proved beyond a reasonable doubt:
>
> 1) It must be established that the accused has engaged in the conduct set out in s. 264 (2) (a), (b), (c), or (d) of the Criminal Code.
> 2) It must be established that the complainant was harassed.
> 3) It must be established that the accused who engaged in such conduct knew that the complainant was harassed or was reckless or wilfully blind as to whether the complainant was harassed;
> 4) It must be established that the conduct caused the complainant to fear for her safety or the safety of anyone known to her; and
> 5) It must be established that the complainant's fear was, in all of the circumstances, reasonable.

[45] In ***R. v. Kosikar*** **(1999) 138 CCC 3d 217 (Ont CA)** the Ontario Court of Appeal equated harassment to feeling tormented, troubled, worried continually, or chronically plagued, bedeviled and badgered.

[46] ***Kosikar*** also held that a single incident could constitute harassment.

[47] In ***R. v. Scuby*** **(2004) 181 CCC (3d) 97 (BCCA)** the BC Court of Appeal held that in considering whether repeated communications constitute criminal

harassment that regard must be had to both the content and the repetitious nature of the calls, together with the context in which the calls were made.

[48] In ***R. v. Burns***, ***2008*** **ONCA 6 CanLII** the Ontario Court of Appeal **defined threatening conduct as a "tool of intimidation which is designed to instill a sense of fear in the recipient" and noted that the impugned conduct is to be viewed objectively, with due consideration for the circumstances in which they took place, and with regard to the effects those acts had on the recipient.**

[49] I also refer to the case of ***R. v. Martynkiw,*** **1998 ABQB 1037** (CanLII) which stated as follows at paragraphs 23 to 25 (emphasis added):

> 23. …He made no threats. He gave no indication of a propensity to violence.
>
> 24. **[His] conduct was rude, vexatious, annoying** and invasive of his neighbor's privacy. [They] were justifiably upset by it. Clearly [he] conducted himself in a very eccentric manner. I accept that it **would be aggravating and disconcerting** to be obliged to live next to him when he behaved as he did.
>
> 25. **As socially undesirable as [his] conduct was, however, it was not criminal**. Viewed objectively, the conduct was not reasonably capable of causing [her] to fear for her daughter's safety…

[50] I also note the case of ***R. v. Moyse,*** **2010 MBPC 21** (CanLII) as very applicable to our present case wherein at paragraphs 68 to 70, and 92-93, Justice Harapiak stated (emphasis added):

> 68. …There are a number of points in the email and text correspondence were a tone of "or else" coloured [his correspondence…The implication was that he had information he could use against her in some way…he ended a message by saying "Fuck you and just you wait" Wait for what?...later that day he demanded a return call, threatening in the event she didn't comply, to call her son's school…This was childish, and vindictive, but was it threatening conduct in the criminal sense?"
>
> 69. …"Conduct which is mean, petty, uncooperative and spiteful is not the stuff of criminal law." (***R. v. Browning***)

> 70. …The Crown has asked that I infer threatening conduct from some of the language that [he] used in text and email messaging. I am not prepared to do that**. [He] behaved badly, was rude and nasty and petulant. He threw virtual temper tantrums by email and text message when ignored. [She], however, was ignoring him. He had a legitimate reason to contact her…and she was being uncooperative with him…**
>
> 92. …although I am convinced that there was some degree of harassing behaviour I am not satisfied it was criminal in nature. I am also not satisfied that [she] had reasonable grounds for her fear, either on an objective or subjective basis.
>
> 93. I am of the view **that [he] behaved very badly and created unnecessary stress for [her] at a very difficult point in her life. I am not convinced a criminal offence has occurred, however**…

[51] The cases of ***Law Society of Upper Canada v. Marshall,*** *2009 ONLSP 0096****, Re. Monarch Foods Co. Ltd and Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees, Local 647 1978 Can LII 3449*** *(ONLA), and the* ***Univar Canada Ltd. V. Teamsters Chemical, Energy and Allied Workers Local Union No. 1979011*** *CanLII 93878 (ONLA),* submitted by the Crown are labour standards cases and what, in essence, constitutes a respectful workplace. I reject these cases as being applicable to the criminal standard for harassment pursuant to charges under the Criminal Code **as what may be a toxic workplace from a labour standards perspective does not mean that it is criminal in nature.**

My Analysis of the Evidence

[52] I have reviewed all of the evidence that was presented at the trial, along with all of the Exhibits. It is not my function as a trial judge when rendering a decision to act as a court reporter and recite all of the evidence that I have heard and considered. It suffices for me to highlight the pertinent parts. Further, any quotes that I attribute to a witness may not be an exact quote, but paraphrases and captures the essence of their testimony.

Mary Jane Saunders

[53] Ms. Saunders testified that she has been a lawyer since 2012. At the relevant times both she and Mr. Fraser worked at the law firm MacMac&Mac. Ms. Saunders was on the Management Committee along with Joel Sellers and Heather MacDonald (Donn Fraser's spouse).

[54] On May 26, 2021 she called 9-1-1 because Mr. Fraser came to her office after she had told him not to. Ms. Saunders did not feel comfortable dealing in person with Mr. Fraser and she had told him on May 24, 2021 that all communications between them should be via email, and that if he came to her office that she would call the police**. It is important to note that the communications between Ms. Saunders and Mr. Fraser only dealt with her responsibilities as a member of the Management Committee. There were never any threats by Mr. Fraser to Ms. Saunders.**

[55] On May 26, 2021 the door to Ms. Saunders' office was open when Mr. Fraser approached. Mr. Fraser stops in the doorway, not entering her office, and he states to Ms. Saunders "Answer the question, M.J." to which Ms. Saunders responds "Donn, I told you what I would do" and she immediately turns her back to Mr. Fraser and calls 9-1-1. Mr. Fraser then enters her office and sits down on a chair.

[56] There are no allegations by Ms. Saunders of any threats being made by Mr. Fraser either before or after she calls 9-1-1.

[57] Ms. Saunders ignores Mr., Fraser while she is on the phone and Mr. Fraser is repeating "Answer the question, it's a simple question." The question that Mr. Fraser wanted answered was why there was a special partners' meeting being called so close to a regularly scheduled meeting. It was clear that Mr. Fraser wanted an answer to this question from his previous emails, and from his attendance at her office on May 26, 2021.

[58] The email exchanges do not show Ms. Saunders answering this question for Mr. Fraser. Ms. Saunders, when asked if she considered answering the question, responded to the Crown "I did not know what there was to answer."

[59] **Ms. Saunders never asked Mr. Fraser to leave her office before she called the police. Ms. Saunders never asked Mr. Fraser to leave her office after she called 9-1-1**.

[60] Ms. Saunders noted a change in behaviour by Mr. Fraser in March 2020. He would have outbursts at partners meetings, and she stated that she started to fear him, and that she did not want to be near him. By August 2020 she was afraid to go to partners meetings with Mr. Fraser.

[61] Ms. Saunders acknowledged in her direct examination **that "I wasn't the target of his rage"** but she still felt fearful of Mr. Fraser. However, Ms. Saunders assumed that she would be a target for Mr. Fraser as she was part of the Management Committee as of March 2021.

[62] When the police arrived at her office on May 26, 2021, Mr. Fraser gets into a verbal confrontation with the police. He questions their right to be in the office, and he asks them if they wanted a copy of the *Criminal Code.*

[63] After the police arrive the decision is made by Ms. Saunders and the office manager, Ms. Macdonald, to close the office.

Cross-examination of Ms. Saunders

[64] Ms. Saunders acknowledged that Mr. Fraser had recommended Ms. Saunders for her position on the Management Committee. Ms. Saunders also acknowledged that the direction of the law firm in March 2021 was a very serious issue, with the dissolution of the law firm as a real possibility. There was division among the partners. **Ms. Saunders knew of these serious issues, and divisions amongst the partners, when she took on her position on the Management Committee.**

[65] Ms. Saunders acknowledged that she took on her role on the Management Committee knowing of these issues and **knowing that she would have to respond to emails and deal with the lawyers** (and staff) in the law firm as part of her responsibilities. Ms. Saunders knew that some of her duties as a result of these issues would be unpleasant.

[66] Ms. Saunders had previously witnessed anger at the partners meetings, and she acknowledged that the business of running a law firm could be confrontational.

[67] Ms. Saunders acknowledged that she is uncomfortable with conflict, yet she agreed to step into the position on the Management Committee in a law firm with serious conflict issues.

[68] Ms. Saunders also acknowledged that MacMac&Mac had an open-door policy. Ms. Saunders also acknowledged that the law firm had a dispute resolution policy that stated that people should meet in person to resolve issues.

[69] Ms. Saunders acknowledged that she and Mr. Fraser had different practice areas and that they had minimal contact on a daily basis.

[70] Ms. Saunders agreed that Mr. Fraser did not get angry at every partners meeting. She also agreed that the firm was closed due to Covid-19 from March 2020 to June 2020. There were no in-person partners meeting, with them only occurring by Zoom.

[71] The partners meetings from June 2020 to August 2020 also occurred by Zoom.

[72] Between November 2020 to February 2021 Mr. Fraser did not attend the partners meetings. It was only contact by email, which was Ms. Saunders' preference.

[73] There was a partnership meeting in March 2021, and there were no partners meetings in April and May 2021. For the period of March 2021 to May 2021 Ms. Saunders and Mr. Fraser only had contact at one meeting.

[74] Ms. Saunders acknowledged that there were no threats made against her by Mr. Fraser at the March 2021 in-person meeting, even though there were raised voices between Mr. Fraser and Joel Sellers at that meeting. Mr. Sellers would also yell and swear at the partners meetings.

[75] Ms. Saunders acknowledged that Mr. Fraser <u>never</u> expressed any violence towards her from January 2021 to May 2021.

[76] Ms. Saunders agreed that Mr. Fraser never raised his voice towards her at any of the meetings, and in fact that Mr. Fraser never threatened violence towards <u>anyone</u> at the various meetings.

[77] Exhibit 4 is an email from March 19, 2021 wherein Mr. Fraser tells Ms. Saunders that as head of the litigation department that he did not want Ms. Saunders giving work to one of the litigation lawyers without going through him. Four days later Ms. Saunders has still not responded so Mr. Fraser prompts her for a reply. Mr. Fraser goes to Ms. Saunders' office to get a response and she advises

him that it would be dealt with by the Management Committee. Mr. Fraser then leaves her office without issues or threats.

[78] Mr. Fraser then sends an email to the Management Committee on March 24th on this issue. Even though no threats were made by Mr. Fraser in either his office visit, or his email to the Management Committee, Ms. Saunders tells Mr. Fraser in an email on March 24th "Please communicate to me via email only."

[79] Mr. Fraser responds on March 24th via email, "Your closing direction regarding communication is not an option, particularly for someone sitting in a management position. You are expected to do your job, fully and properly, including discussions as necessary with any lawyer. Trust this is all clear."

[80] Ms. Saunders agreed that in April 2021 that she had acknowledged to Mr. Fraser that she had an obligation to respond to the partners in the firm.

[81] By May 2021 the lines were clearly drawn between the partners, with Mr. Fraser on one side, and with Ms. Saunders and Mr. Sellers on the opposite side. As well, by this time Mr. Fraser had told the partners that he might have to sue them. By March 2021 Ms. Saunders was part of a complaint with the Barristers' Society against Mr. Fraser.

[82] Ms. Saunders acknowledged that at no time prior to May 26, 2021 had Ms. Saunders ever told Mr. Fraser that she was afraid of him.

[83] Ms. Saunders also acknowledged that in early May 2021 that Mr. Fraser came and spoke to her about the expenses for Bruce MacIntosh. She had initially not responded to Mr. Fraser so Mr. Fraser attends at her office for a more comprehensive response. She gives Mr. Fraser the response, and he leaves her office without issues or threats.

[84] To be clear, after the demand by Ms. Saunders in March 2021 that Mr. Fraser only communicate by email, that Mr. Fraser in facts attends at her office in early May 2021, she provides him the answer he is looking for, and Mr. Fraser departs her office. No threat, no issues, and no calls to 9-1-1.

[85] On another occasion, Mr. Fraser sought an answer on an issue and stated that he would come to her office for an answer if she did not respond, and Ms. Saunders provides the response and Mr. Fraser never attends at her office.

[86] The unresolved issue on May 26th was that Mr. Fraser was wanting to know why a special meeting was being called to discuss draws when he felt it could be dealt with as part of the regular partners meetings.

[87] Exhibit 1 contains a series of emails for May 21-24, 2021 regarding the special meeting. On May 24th an email is sent by Mr. Fraser stating in part, "In no world does someone properly sit in management and expect to get to behave like you and Joel have been doing in terms of refusing to respond. **Answer the questions put to you…If you do not respond I will simply come to see you and Joel, and we will talk about it in person…" There are no threats in this email by Mr. Fraser.**

[88] Ms. Saunders responds to Mr. Fraser 25 minutes later stating, "I have asked you before to only communicate with me by email. This request has not changed. Do not show up at my door and stop threatening to show up at my door. If you ignore this and you do show up I will not communicate I will simply call the police." This was sent despite Mr. Fraser showing up at Ms. Saunders' office door three times (in March, April and early May 2021) after her demand otherwise in March 2021 and there were no issues with Mr. Fraser attending at her office door.

[89] Not learning from the three previous occasions when Mr. Fraser left her office without issue upon her giving him the response he was entitled to as a partner in the law firm, and as Ms. Saunders was obligated to provide on behalf of the Management Committee, Ms. Saunders instead chooses on May 26th to not respond to Mr. Fraser, but to instead simply turn her back on Mr. Fraser and call 9-1-1. She does not ask him to leave. She just turns and calls 9-1-1.

[90] Ms. Saunders tells the 9-1-1 operator that she had asked Mr. Fraser to leave her office, and that he had refused. This was untrue.

[91] Ms. Saunders agreed that by calling 9-1-1 that she might make Mr. Fraser angry. And she further agreed that by doing so she was prepared to escalate the situation. These are not the actions of someone who is afraid, but the actions of someone who is angry.

[92] On re-direct examination Ms. Saunders indicated that outside of her office that Mr. Fraser was not yelling, although his tone was aggressive with the police.

Mary Jane MacDonald

[93] Courts must exercise caution when considering the demeanour of a witness while testifying as many factors can affect a witness while they are testifying. Keeping this demeanour caution in mind, it was very clear to the Court that there was animus by Ms. MacDonald towards Mr. Fraser.

[94] Ms. MacDonald testified that she was the office manager at MacMac&Mac from July 2014 to September 2021. The incident in question occurred around 0945.

[95] Ms. MacDonald confirmed that Mr. Fraser was demanding that Ms. Saunders answer his question. She also confirmed that matters got heated between Mr. Fraser and the police.

[96] As the confrontation between Mr. Fraser and the police drags on, with neither side yielding any ground, she and Ms. Saunders make the decision to close the law firm for the day. It remains closed the following day.

[97] Ms. MacDonald testified that Mr. Fraser's behaviour had changed in 2020, and she began to fear for his health as he would become extremely angry, and he would get into arguments with Joel Sellers. At one point Mr. Fraser told Mr. Sellers that he was incompetent.

Cross-examination

[98] Ms. MacDonald confirmed that when she arrived at Ms. Saunders office that the office door was open, and that Mr. Fraser was seated in a chair.

[99] She also confirmed that she did not hear anything coming from Ms. Saunders' office as she approached it. Voices were not raised.

[100] Ms. MacDonald acknowledged that she and Mr. Fraser are not close stating "We were never close."

[101] Ms. MacDonald confirmed that Mr. Fraser had previously raised with the partnership that he felt that Ms. MacDonald was insubordinate. The issue was still active on May 26, 2021.

[102] Ms. MacDonald confirmed that Joel Sellers would be upset and use profanity at partners meetings, and that Julie MacPhee would holler at partners meetings. Joel Sellers would shake with anger at the partners meetings. It is clear

from her evidence that Mr. Fraser was not the only partner prone to unprofessional conduct at the partners meetings.

DSgt Jason MacKinnon

[103] DSgt MacKinnon received a 9-1-1 call at approximately 0955. He is the first on the scene. Upon arrival at MacMac&Mac he is escorted to Ms. Saunders office. Ms. Saunders tells him that she had asked Mr. Fraser to leave her office. That is not true from her own testimony.

[104] Mr. Fraser, who is highly agitated, speaks over Ms. Saunders and states that he has a right to be in her office. Mr. Fraser then tells DSgt. MacKinnon, in direct language, "multiple, multiple times" to get out of the office. Mr. Fraser also questions the police's right to be in the law firm.

[105] Mr. Fraser refuses to leave Ms. Saunders' office as he was still waiting for his answer from Ms. Saunders.

[106] While DSgt. MacKinnon felt that if the situation was not resolved that it could escalate into something physical, he did not report any threatening conduct towards Ms. Saunders by Mr. Fraser.

[107] After Ms. Saunders leaves her office and the heated discussion continues between DSgt. MacKinnon and Mr. Fraser, Mr. Fraser is noted to be highly agitated and highly aggressive.

Cross-examination

[108] DSgt. MacKinnon confirmed that as he approached Ms. Saunders office that her door was open, and **that he did not hear any raised voices coming from the office. He could not hear anything coming from her office.**

[109] DSgt. MacKinnon would not agree that Mr. Fraser never threatened Ms. Saunders, but there certainly was no threat charge arising from that day against Mr. Fraser before this Court. It is clear from the evidence of the civilian witnesses, including Ms. Saunders, that Mr. Fraser did not make any threats against Ms. Saunders. I do not accept DSgt. Mackinnon's evidence in this regards.

[110] DSgt. MacKinnon agreed that he was also raising his voice with Mr. Fraser. This would not have helped to diffuse the situation.

[111] DSgt. MacKinnon on re-direct admitted that he had misgivings as to how his interactions with Mr. Fraser unfolded on that day.

Sherri MacDonald

[112] Ms. S. MacDonald has been a paralegal for 27 years. She described Ms. Saunders as a hardworking lawyer who always remained calm. She further stated that she has never seen Ms. Saunders upset and that Ms. Saunders was able to deal with difficult situations.

[113] She is not at her desk when Mr. Fraser first arrives at Ms. Saunders' office, but she did catch these phrases:

- "wanted an answer to an email"
- "wanted her to do her job"
- "not happy he got no answer"
- "he wasn't happy"

[114] Ms. S. MacDonald said that Mr. Fraser was "talking at" Ms. Saunders and that "he wasn't yelling, but he was condescending."

[115] Contrary to the evidence of Ms. Saunders, Ms. S. MacDonald stated that she heard Ms. Saunders ask Mr. Fraser to leave her office. She testified that she heard Ms. Saunders state, "If you don't leave my office I am going to call the police." The difficulties with this evidence is that:

1. Ms. S. MacDonald stated she was not there when Mr. Fraser first came to Ms. Saunders office, and
2. We know from Ms. Saunders that the call to the police was immediate without any request for him to leave her office

[116] Ms. S. MacDonald also testified that it was the police who said that the office was closed and that everyone should leave. We know otherwise from the evidence of Ms. Saunders and Ms. MacDonald that it was them that made the decision to close the office.

Cross-examination

[117] Ms. S. MacDonald stated that she did not think that it was out of the ordinary for Mr. Fraser to come to Ms. Saunders' office. The door to Ms. Saunders' office was open.

[118] Mr. Fraser told Ms. Saunders that it was her job to answer his question. **Mr. Fraser was not yelling, and he was not being aggressive**. It was an uncomfortable communication between them.

[119] Mr. Fraser was condescending to Ms. Saunders.

[120] Mr. Fraser's tone of voice did not change after Ms. Saunders had called the police.

Cst. MacPherson

[121] Cst. MacPherson attended on the scene with DSgt. MacKinnon. She confirmed that Mr. Fraser was not happy with the police attendance at the office, questioned their authority to be there, and demanded in direct language that they leave the premises.

[122] She described Mr. Fraser as "angry, red-faced, sharp and loud."

[123] She confirmed that it was Ms. Saunders and Ms. MacDonald that made the decision to close the office.

[124] It is clear from the evidence of the police that Mr. Fraser was belligerent and aggressive towards them, but this was after Ms. Saunders had called 9-1-1 and Mr. Fraser's comments were directed towards the police, and not Ms. Saunders.

Summary/Decision

[125] As noted, to find Mr. Fraser guilty of criminal harassment, Crown counsel had to prove each of these essential elements beyond a reasonable doubt:

i. that Mr. Fraser engaged in threatening conduct towards Ms. Saunders;
ii. that Mr. Fraser had no lawful authority to do what he did;
iii. that Mr. Fraser's conduct harassed Ms. Saunders;
iv. that Mr. Fraser knew that his conduct harassed Ms. Saunders;
v. that Mr. Fraser's conduct caused Ms. Saunders to fear for her safety; and
vi. that Ms. Saunders's fear was reasonable in the circumstances.

[126] I will address points i., ii., iv., and vi.

i. The Crown has failed to establish that that Mr. Fraser engaged in threatening conduct towards Ms. Saunders for the following reasons:

- No threats were ever made by Mr. Fraser towards Ms. Saunders
- Mr. Fraser was seeking an answer to a work-related question that he was entitled to
- Prior attendances by Mr. Fraser to Ms. Saunders' office ended with Ms. Saunders providing Mr. Fraser with an answer to a question and his leaving her office without issue, threats or violence
- All witnesses reported that there was no yelling or noises coming from Ms. Saunders' office
- A reasonable person would not find the actions by Mr. Fraser threatening
- In referring to the ***Burns*** case, the conduct by Mr. Fraser was not a 'tool of intimidation which was designed to instill a sense of fear in the recipient'
- **Viewing the conduct by Mr. Fraser objectively, I find as fact, and in law, that the conduct by Mr. Fraser that occurred in a workplace environment regarding a workplace matter, was not threatening.**

ii. The Crown has failed to establish that Mr. Fraser had no lawful authority to do what he did for the following reasons:

- This was a workplace matter wherein a partner at a law firm was seeking a response from the Management Committee to a legitimate question
- The law firm had an open-door policy
- The law firm a dispute resolution policy that encouraged matters be resolved through in-person meetings
- Ms. Saunders acknowledged that she had an obligation as a member of the Management Committee to respond to questions from other partners at the law firm
- In referring to the ***Moyse*** case, "[He] behaved badly, was rude and nasty and petulant. He threw virtual temper tantrums by email and text message when ignored. **[She], however, was ignoring him. He had a legitimate reason to contact her…and she was being uncooperative with him…**" It is clear that Ms. Saunders did not respond to Mr. Fraser's question, and that on previous occasions when she responded he would leave her alone.

- **I find as fact, and in law, that Mr. Fraser had the lawful authority to demand an answer from Ms. Saunders, and to attend at her office as he had on previous occasions, to obtain an answer to his question.**

iv. The Crown has failed to establish that Mr. Fraser knew that his conduct harassed Ms. Saunders for the following reasons:

- His emails were strictly related to the business of the law firm and her position on the Management Committee
- Many of his emails included other lawyers in the law firm
- While his emails were demanding, they were neither threatening nor excessive
- After Ms. Saunders had asked him to stay away from her office in March 2021, he attended on three other occasions without incident. This is not behaviour by Ms. Saunders that would indicate to someone that they felt harassed by them
- Ms. Saunders never told Mr. Fraser that she was afraid of him or felt harassed by him
- The prior history between Mr. Fraser and Ms. Saunders had Mr. Fraser supporting Ms. Saunders in becoming a member of the Management Committee
- Ms. Saunders confirmed that she was never the target of Mr. Fraser's rage
- **I find as fact that Mr. Fraser never knew, nor should have known, that his conduct was harassing Ms. Saunders.**

v. The Crown has failed to establish that Mr. Fraser's conduct caused Ms. Saunders to fear for her safety for the following reasons:

- There were no threats towards Ms. Saunders by Mr. Fraser before his attendance at her office as noted by Mr. Fraser in Exhibit 1, "I will simply come see you…and we will talk about it in person…"
- There were no raised voices coming from the office
- No violence was expressed towards Ms. Saunders by Mr. Fraser in the period of Jan 2021 and May 2021, and in fact they had limited contact during this period
- Ms. Saunders chose to escalate the situation by calling 9-1-1
- Ms. Saunders never asked Mr. Fraser to leave her office

- Mr. Fraser had attended at her office on three occasions since her request in March 2021 without incident, and with Mr. Fraser leaving after she provided him with the answer to his question
- The behaviour by Mr. Fraser at the partners meetings was not any worse than Joel Sellers' behaviour, but Ms. Saunders was aligned with Mr. Sellers
- Ms. Saunders agreed to be on the Management Committee for a law firm that had serious dysfunction and toxicity, knowing that she did not do well with conflict
- In referring to the ***Martynkiw*** case, "[His] conduct was rude, vexatious, annoying….as socially undesirable as [his] conduct was, however, it was not criminal." The conduct by Mr. Fraser pales in comparison to the behaviour by Mr. Martynkiw.
- And in referring to the ***Moyse*** case, ". [He] behaved badly, was rude and nasty and petulant. He threw virtual temper tantrums by email and text message when ignored. [She], however, was ignoring him. He had a legitimate reason to contact her…and she was being uncooperative with him…I am of the view that [he] behaved very badly and created unnecessary stress for [her] at a very difficult point in her life. I am not convinced a criminal offence has occurred, however…" The behaviour by Mr. Fraser pales in comparison to the behaviour by Mr. Moyse.
- **I am not satisfied that the behaviour by Mr. Fraser was criminal in nature. I am not satisfied that Ms. Saunders had reasonable grounds for her fear, either on an objective or subjective basis.**

[127] The Crown has failed to discharge its burden for several the elements of the offence. Mr. Fraser is not guilty.

Judge Alain Bégin, JPC