S.C.C. Court File No.: 41805

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

BETWEEN:

ONTARIO PLACE PROTECTORS

APPELLANT

AND:

HIS MAJESTY THE KING IN RIGHT OF ONTARIO AND ATTORNEY GENERAL OF ONTARIO

RESPONDENTS

AND:

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INTERVENERS

(Style of cause continued on next page)

FACTUM OF THE INTERVENER, BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION

(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*, SOR/2002-156)

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PART I -OVERVIEW OF POSITION AND RELEVANT FACTS

A. Overview

1. Since at least the early 18th century, courts have held government officials liable for the deliberate misuse of their public powers. Throughout the commonwealth, this liability has crystalized in the modern tort of misfeasance in public office. This tort seeks to guard against misconduct by government officials, a core function of the courts' jurisdiction to supervise the use of public power. The tort's very rationale reflects the fundamental constitutional principle that public powers must only be used for the public good.

2. Absolute immunities for misfeasance in public office, such as the one found in s. 17 of the *Rebuilding Ontario Place Act, 2023* ("***ROPA***"),[1] present a foundational threat to this long-standing principle. They directly impair the courts' ability to exercise their supervisory jurisdiction by eliminating an essential tool to guard against government misconduct. The tort reaches abuses of power that other remedies, like those available in judicial review, cannot. Its elimination thus risks creating enclaves where public powers may be abused unchecked, thereby undermining both the rule of law and the courts' core supervisory jurisdiction.

B. Facts

3. *ROPA* was enacted to facilitate the redevelopment of Ontario Place, an urban park on the Lake Ontario waterfront.[2] At issue is s. 17, which eliminates causes of action against the Crown, its servants, and related entities. Section 17(2) of *ROPA* expressly bars any remedy for "misfeasance" or "bad faith."[3] Ontario agrees that the purpose and effect of this provision is to immunize the Crown, its servants, and agents from civil liability with respect to the matters addressed in *ROPA*. Except as provided by or under *ROPA*, no compensation or remedy is available in relation to these extinguished causes of action.[4]

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[1] *Rebuilding Ontario Place Act, 2023*, Sch 2, SO 2023, c 25, [*ROPA*].
[2] *Ontario Place Protectors v Ontario*, 2025 ONCA 183 at para 1 [ONCA Decision].
[3] *ROPA*, *supra* note 1, s 17.
[4] Factum of the Respondents, His Majesty the King in Right of Ontario and Attorney General of Ontario [Ontario AG Factum], para 14.

PART II - POSITION ON THE QUESTION IN ISSUE

4. The British Columbia Civil Liberties Association ("**BCCLA**") intervenes on the first issue raised by the appellant: is s. 17 of *ROPA* constitutionally invalid because it trenches on the core jurisdiction of the superior courts under s. 96 of the *Constitution Act, 1867*?[5]

5. The answer is yes. Legislation that creates an absolute immunity for misfeasance in public office or the bad faith misuse of public powers impairs the core supervisory jurisdiction of the superior courts, contrary to s. 96 of the *Constitution Act, 1867*.

PART III -STATEMENT OF ARGUMENT

A. Liability for abuse of public powers is part of core jurisdiction

(a) Section 96 protects jurisdiction necessary to supervise executive action

6. Section 96 of the *Constitution Act, 1867* protects the "core jurisdiction" of superior courts as the "primary guardians of the rule of law".[6] The rule of law is maintained through the separation of judicial, legislative, and executive functions, with the task of interpreting, applying, and stating the law falling primarily to the judiciary.[7] This separation of powers allows for the implementation of the fundamental facets of the rule of law, including judicial oversight of the exercise of public powers.[8]

7. The superior courts' core jurisdiction includes those powers and jurisdictions essential to their role as the primary guardians of the rule of law. These essential functions include "any subject-matter jurisdiction that meets this criterion".[9] The core jurisdiction of the superior courts is not limited to those powers and subject-matter jurisdictions they held at the time of Confederation.[10] However, as illustrated in *Reference re Code of Civil*

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[5] Factum of the Appellant, Ontario Place Protectors, para 23.
[6] *Reference re Code of Civil Procedure (Que), art 35*, 2021 SCC 27 at paras 48, 63 [*CCP Reference*]
[7] *Ibid* at para 46.
[8] *Ibid* at para 47.
[9] *Ibid* at para 63.
[10] *CCP Reference*, *supra* note 6 at paras 48, 67.

Procedure, the powers and jurisdictions of pre-Confederation courts remain relevant to the core jurisdiction test.[11]

8. Core jurisdiction must be guarded jealously. As Lamer CJ remarked in *MacMillan Bloedel*, removal of any part of the superior courts' core jurisdiction "emasculates the court, making it something other than a superior court".[12] The superior courts' role as the cornerstone of the judicial system requires that they be able to act as the primary guardians of the rule of law.[13] Legislation that 'maims' the superior courts by circumscribing powers essential for this duty will impermissibly interfere with this core jurisdiction.[14]

(b) For centuries courts have used liability to guard against abuses of power

9. Prior to Confederation, the Crown was generally immune from civil suit; however, Crown servants were not immune for their tortious conduct. The corollary of the maxim "the Crown can do no wrong" was that Crown servants could not invoke the authority delegated to them by the Crown to excuse their tortious conduct.[15]

10. One basis on which Crown servants could be held liable was for the deliberate abuse of their powers. Indeed, liability for misfeasance in public office has a long lineage as part of the courts' role in overseeing the exercise of public powers. Constant throughout that history is judicial concern for guarding against abuses of public power and ensuring that victims of such abuses have effective recourse.

11. This Court has traced the modern tort of misfeasance in public office at least as far back as the famed 1703 decision in *Ashby v White*, in which the House of Lords held an elections officer liable for maliciously and fraudulently preventing a cobbler from voting in a Parliamentary election.[16]

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[11] *Ibid* at paras 83-84, 93-94, 107-111.
[12] *MacMillan Bloedel Ltd v Simpson*, [1995] 4 S.C.R. 725 at para 30 (SCC).
[13] *CCP Reference*, *supra* note 6 at para 48.
[14] *CCP Reference* at para 63.
[15] Malcolm Rowe & Manish Oza, "Tort Claims Against Public Authorities" (2022) 60:1 Alta L Rev 1 at 5.
[16] *Ashby v. White*, [1703] 1 E.R. 417, EngR 37, 1 Bro PC 62, (HL) [*Ashby* HL], BCCLA Book of Authorities [BoA], Tab 1; *Odhavji Estate v Woodhouse*, 2003 SCC 69 at para 18

12. *Ashby* resulted in two important holdings. First, that Crown officials can be held liable for abusing their powers. Second, that the jurisdiction to grant remedies for the harm caused by such abuses rests with the courts. The King's Bench majority dismissed the action, in part, because it found that matters arising from the plaintiff's right to vote fell within Parliament's exclusive jurisdiction. However, the House of Lords ruled that the courts, not Parliament, had the jurisdiction to remedy a deliberate breach of that right.[17]

13. This assertion of the courts' jurisdiction was expressly tied to their role in promoting the rule of law. The House of Lords adopted the dissenting reasons of Lord Holt CJ, who concluded that by imposing liability for abuses of power, the courts would encourage public officials to adhere to the law and discourage such "mischief" that "tends to the prejudice of the peace of the nation."[18]

14. *Ashby* is an important case in the history of English constitutional law,[19] and the principles it recognized were received in Canada by virtue of the preamble of the *Constitution Act, 1867*.[20] Shortly before Confederation, the New Brunswick Supreme Court held that a public officer's liability for willfully making a false election return was "quite in accordance with common sense and justice, and with the principles which are firmly established in similar cases in England."[21]

15. Following Confederation, Canadian courts continued to recognize the principle that officials may be liable for abusing their authority.[22] In *McGillivray v. Kimber*, this Court held

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[*Odhavji Estate*]*; Resler v Anglin*, 2026 SCC 23 at para 76 [*Resler*]. One commentator has traced the tort's origins as far back as 1364 where court official were held liable for deliberately mishandling a writ of summons: see Harry Wruck, "The Continuing Evolution of the Tort of Misfeasance in Public Office" (2008) 41:1 UBC L Rev 69 at 71 [Wruck], BoA Tab 4.

[17] *Ashby* HL, *supra* note 16; *Resler*, *supra* note 16 at para 77.
[18] *Ashby v. White* (1703), 2 Ld. Raym. 938, 92 E.R. 126 at 137 [*Ashby QB*], BoA Tab 2.
[19] Mark Aronson, "Misfeasance in Public Office: A Very Peculiar Tort" (2011) 35:1 Melb U L Rev 1 at note 20 [Aronson], BoA Tab 5.
[20] *The Constitution Act, 1867*, 30 & 31 Vict, c 3.
[21] *Stiles v Gilbert*, 9 NBR 421 at 429-430 (SC).
[22] See e.g. *Harris v Marter*, 15 NBR 165 at 175 (SC).

liable defendants who, out of political animus, wrongfully invoked their powers under the *Canada Shipping Act* to summarily deprive the plaintiff of his harbour pilot's licence.[23]

16. In *Roncarelli v Duplessis*, this Court expanded the tort of misfeasance in public office and set the contours of its modern application in Canadian law. The majority held Premier Duplessis liable for ordering the Quebec Liquor Commission to cancel the plaintiff's liquor licence as punishment for lawful acts in support of a religious minority.[24] In so doing, this Court recognized that the tort of misfeasance in public office is concerned with the distinct harm resulting from bad-faith exercises of public power.[25] As Justice Rand wrote in his concurring reasons, abuses of public powers pose an existential threat to the rule of law:

> That, in the presence of expanding administrative regulation of economic activities, such a step and its consequences are to be suffered by the victim without recourse or remedy, that an administration according to law is to be superseded by action dictated by and according to the arbitrary likes, dislikes and irrelevant purposes of public officers acting beyond their duty, **would signalize the beginning of disintegration of the rule of law as a fundamental postulate of our constitutional structure**.[26]

17. Since *Roncarelli,* the tort of misfeasance in public office has received broad recognition throughout the Commonwealth. The courts of the United Kingdom, Australia, and New Zealand have all recognized the tort as forming part of the law of their respective countries.[27] In *Odhavji Estate*, this Court adopted the modern view of the UK House of Lords in *Three Rivers District Council v Bank of England [No 3]* that the "rationale of the tort is that in a legal system based on the rule of law, executive or administrative power 'may be

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[23] *McGillivray v Kimber*, 52 SCR 146 at 151-153 (SCC) [*McGillivray*]. The mover of the resolution to retire the plaintiff candidly admitted he did so because the plaintiff was a member of the Liberal party: *Ibid* at 154.

[24] *Roncarelli v Duplessis*, [1959] SCR 121 (SCC) [*Roncarelli*].
[25] *Resler*, *supra* note 16 at para 81.
[26] *Roncarelli*, *supra* note 25 at 142 [emphasis added].
[27] *Three Rivers District Council v Bank of England [No 3]*, [2000] UKHL 33, 3 All ER 1 [*Three Rivers*]; *Garrett v. Attorney-General*, [1996] NZCA 430, [1997] 2 N.Z.L.R. 332; *Northern Territory of Australia v. Mengel*, [1995] 185 CLR 307, 129 A.L.R. 1.

exercised only for the public good' and not for ulterior and improper purposes."[28] An absolute immunity for misfeasance would upend this foundational principle.

B. Immunities for misfeasance would create enclaves from judicial oversight

18. That s. 17 of *ROPA* may preserve remedies for judicial review, and may not impair *Charter* or other constitutional remedies,[29] does not cure its intrusion on the core jurisdiction of the superior courts. While judicial review remedies are necessary for the courts' supervisory role, they cannot address all misuses of public power. Without the ability to impose liability for bad faith uses of public power, the superior courts will be left toothless to remedy the worst abuses.

19. The tort of misfeasance in public office occupies a unique position at the intersection of private and administrative law.[30] The tort may resemble private law causes of action insofar as compensation may be paid to a private litigant. However, only public officers may commit it, only deliberate and unlawful conduct resulting in damage will amount to its commission, and its very purpose is to "serve as a tool against misconduct by government officials."[31]

20. Judicial review serves a distinct and separate purpose from the tort of misfeasance in public office.[32] The aim of judicial review is generally to address the legality, reasonableness, and fairness of the procedures employed and actions taken by government decision-makers.[33] However, the tort of misfeasance in public office addresses deliberate unlawfulness that causes damage. In such circumstances, a further opportunity for a lawful decision may well be a hollow victory or entirely moot. A plaintiff may not even discover the bad faith of the public official until long after the time for judicial review has passed.[34] As Professor Chamberlain writes in a passage recently endorsed by this Court:

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[28] *Odhavji Estate*, *supra* note 16 at para 26.
[29] *ONCA Decision*, *supra* note 2 at paras 33-35, 37, 44.
[30] *Resler*, *supra* note 16 at para 84. See also Aronson, *supra* note 19 at 2.
[31] *Ibid*.
[32] *Ibid* at paras 84-87.
[33] *Canada (Attorney General) v TeleZone Inc*, 2010 SCC 62 at paras 24, 26 [*Telezone*].
[34] *Ibid* at para 26.

> The gist of the tort is the deliberately unlawful act, not the rightness or wrongness of the decision. . . . [I]f one examines successful misfeasance cases, **it is clear that most plaintiffs are not interested in having the decision retaken. Typically, the relevant opportunity has already been lost. . . .** This highlights that the goals of judicial review and misfeasance in a public office are entirely separate . . .[35]

21. Immunizing public officials for their misfeasance thus removes an integral tool for supervising executive powers. Indeed, it is well established that legislatures can never "entirely shield administrative decision-making from curial scrutiny" and legislation that ousts such scrutiny offends s. 96 of the *Constitution Act*, 1867.[36]

22. If legislatures can bar superior courts from providing an effective remedy for the damages caused by abuses of power, the courts' ability to scrutinize such odious unlawful acts will be impaired. Injured parties will have little incentive, and may well be unable, to undertake the expense and burden of litigation only to obtain a symbolic judgment. Emasculating the courts in such a way undermines their role as the primary guardians of the rule of law.

23. The prospect of judicial review remedies also does little to dissuade an official intent on abusing their powers. Where the wrongful act causes immediate damages (e.g., in cancelling a liquor licence) or is irreversible (e.g., in destroying property), an official willing to disregard the law may well be unmoved by the prospect of a future declaration of illegality. Moreover, if the illegal act is intended to intimidate the victim and others like them (as in *Roncarelli*) the damage may well be the point.

24. Neither can *Charter* remedies replace the tort of misfeasance in public office because not all abuses of power will infringe a *Charter* right. For instance, in *Roncarelli*, Rand J. recognized that the executive has sweeping powers over the regulation of economic

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[35] Erika Chamberlain, "When Unlawfulness Becomes Tortious: Misfeasance in a Public Office and Administrative Law" (2015) 44 Adv Q 489 at 502 [Chamberlain], BoA Tab 3 [cited in *Resler*, *supra* note 16 at para 86] [emphasis added].

[36] *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 24; *Canadian Council for Refugees v Canada (Citizenship and Immigration)*, 2023 SCC 17 at para 77; *Crevier v AG (Québec) et al*, [1981] 2 SCR 220.

activities,[37] which are generally unprotected by the *Charter*. Such powers provide ample opportunity for malicious officials to cause harm outside of the reach of *Charter* remedies.

C. Justifications for private law immunities do not apply to misfeasance in public office

25. The unique public law nature of the tort of misfeasance in public office distinguishes it from other private law actions that may ordinarily be within the legislatures' jurisdiction to alter or extinguish.[38] No other tort is concerned with the deliberate misuse of public authority.[39] And unlike other private law immunities, an immunity for such wrongs raises distinct public law concerns and therefore requires unique treatment.

26. First, the policy concerns invoked to justify immunizing public officials from liability *as if* they were private actors do not apply to abuses of public power. Private law immunities are often justified on the basis that holding public officials to private law standards interferes with their good faith pursuit of the public interest.[40] Accordingly, civil immunity is justified insofar as it facilitates the execution of the public interest. For instance, British Columbia invokes the province's *Wildfire Act*,[41] to argue that the specter of "private law" liability could have a chilling effect on the work of wildfire fighters who, in the "good faith" exercise of their statutory powers, may need to destroy structures on private lands.[42]

27. This concern does not arise with the tort of misfeasance in public office, which imposes liability for the bad faith and intentional misuse of public power "outside the proper scope of public law".[43] The tort does not impose liability for private misconduct such as negligence, poor judgment, or bad practice.[44] To bring a viable claim, a plaintiff must plead

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[37] *Roncarelli*, *supra* note 25 at 142. See e.g., *Ontario Racing Commission v. O'Dwyer,* 2008 ONCA 446; *Gershman v Manitoba Vegetable Producers' Marketing Board*, 1976 CanLII 1093.
[38] *Authorson v Canada (Attorney General)*, 2003 SCC 39 at paras 54–55.
[39] *Resler*, *supra* note 16 at paras 85-86.
[40] *Nelson (City) v Marchi*, 2021 SCC 41 at para 1 [*Marchi*].
[41] *Wildfire Act*, SBC 2004, c 31, s 66.1.
[42] Factum of the Intervener, Attorney General of British Columbia at paras 9–11.
[43] *Resler*, *supra* note 16 at para 85.
[44] Chamberlain, *supra* note 36 at 494, BoA Tab 3.

material facts that could establish wilful misuse of the defendants' powers. All a defendant need show to escape liability is that they intended to act in the public interest.

28. Private law immunities may also be justified by the courts' lack of competence to assess the policy choices of administrative decision makers.[45] But abuses of power have no policy rationale. Rather, the abuse of public power creates a relationship that lacks a basis in public law and instead renders the power "private as between the official and the person against whom they are used".[46]

29. To adapt British Columbia's counterfactual, it would surely shock the public conscience to immunize an official who, invoking the *Wildfire Act* as mere pretext, burned down a plaintiff's home purely because they were a member of a certain political party or because of some private feud. There is no need to shield such egregious misconduct by public officials to facilitate the good faith discharge of their duties. On the contrary, to do so would undermine confidence that public powers will be used only for the public good. Indeed, despite the high-stakes context, the *Wildfire Act* expressly does *not* immunize firefighters "in relation to anything done or omitted in bad faith."[47]

30. Immunities for misfeasance also cannot be justified as preventing a flood of unmeritorious actions. The tort is expressly designed so that it is "not a free-for-all that allows anyone to bring civil claims seeking damages against public officers."[48] Rather, the requirements of bad faith and material damages are high bars that protect public officers from being sued for errors made in good faith.[49] In fact, commentators have remarked that few cases are actually brought to court and unmeritorious claims are typically struck for the failure to plead the material facts.[50]

31. On the other side of the ledger, it is decidedly good policy to discourage officials from misusing the powers entrusted to them. Since *Ashby,* courts have recognized that

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[45] *Marchi*, *supra* note 46 at paras 42-45.
[46] *Resler*, *supra* note 16 at para 85.
[47] *Wildfire Act*, *supra* note 47, s. 66.1(3);
[48] *Resler*, *supra* note 16 at para 87.
[49] *Ibid*.
[50] Wruck, *supra* note 16 at 74, BoA Tab 4; Chamberlain, *supra* note 36 at 508, BoA Tab 3.

liability for abuses of power discourages the intentional disregard of law, which is corrosive to the "peace of the nation".[51] Rand J. reiterated this view in *Roncarelli*,[52] and it remains as much a commonsense proposition today as it did then.

32. Moreover, the history of the tort of misfeasance in public office, and *Roncarelli* in particular, illustrates that its victims may well be political minorities, targeted for expressing politically unpopular views, and that state power has been maliciously wielded to silence such expression, and may well be again.[53] Providing access to a meaningful remedy in such circumstances not only upholds the rule of law but re-affirms the whole of Canada's constitutional structure, including the unwritten constitutional norms of democracy and protection of minorities.[54]

PART IV -SUBMISSIONS ON COSTS

33. The BCCLA does not seek costs and asks that costs not be awarded against it.

PART V - ORDER SOUGHT

34. The BCCLA takes no position with respect to the disposition of the appeal.

DATED at Vancouver this 13th day of July, 2026.

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[51] *Ashby QB*, *supra* note 18 at 137, BoA Tab 2.
[52] *Roncarelli*, *supra* note 25 at 142.
[53] See paragraphs 9 to 17 above.
[54] *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 at para 32 (SCC).

PART VII -TABLE OF AUTHORITIES

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30.	Harry Wruck, “The Continuing Evolution of the Tort of Misfeasance in Public Office” (2008) 41:1 UBC L Rev 69	11, 30