

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:

**ATTORNEY GENERAL OF CANADA, ATTORNEY GENERAL OF QUÉBEC,
ATTORNEY GENERAL OF BRITISH COLUMBIA, ATTORNEY GENERAL OF
SASKATCHEWAN, ATTORNEY GENERAL OF ALBERTA,
ATTORNEY GENERAL OF YUKON,**

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)

JFK LAW LLP

Barristers and Solicitors
260 – 200 Granville Street
Vancouver, BC V6C 1S4

Brodie Noga / Emma Wall / Nathan Surkan

Tel: 604-687-0549
Fax: 604-687-2696
Email: bnoga@jfkllaw.ca; ewall@jfkllaw.ca;
nsurkan@jfkllaw.ca

**Counsel for the Intervener,
British Columbia Civil Liberties Association**

AND:

**BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION, ATHABASCA
CHIPEWYAN FIRST NATION AND MIKISEW CREE FIRST NATION
(JOINTLY), VUNTUT GWITCHIN FIRST NATION, LITTLE
SALMON/CARMACKS FIRST NATION, SELKIRK FIRST NATION AND
FIRST NATION OF NA-CHO NYÄK DUN (JOINTLY), CITY OF TORONTO,
GREENPEACE CANADA, ADVOCATES' SOCIETY, ECOJUSTICE, ONTARIO
PLACE FOR ALL, TORONTO FIELD NATURALISTS, DEMOCRACY WATCH
AND NATIONAL TRUST FOR CANADA (Jointly), CANADIAN CIVIL
LIBERTIES ASSOCIATION, ADVOCATES FOR THE RULE OF LAW,
ANIMAL JUSTICE AND CANADIAN CONSTITUTIONAL FOUNDATION**

INTERVENERS

ORIGINAL TO:

THE REGISTRAR OF THE SUPREME COURT OF CANADA

301 Wellington Street
Ottawa, ON K1A 0J1

COPIES TO:

**ERIC K. GILLESPIE PROFESSIONAL
CORPORATION**

393 University Avenue, Suite 2000
Toronto, ON M5G 1E6

Eric K. Gillespie

Tel: (416) 703-6362

Email: egillespie@gillespielaw.ca

**PALIARE ROLAND ROSENBERG
ROTHSTEIN LLP**

35-155 Wellington St W Toronto,
ON M5V 3H1

Andrew Lokan

Grace Bryson

Tel: (416) 646-4300

Email: andrew.lokan@paliareroland.com
grace.bryson@paliareroland.com

SUPREME ADVOCACY LLP

340 Gilmour St., Suite 100
Ottawa, ON K2P 0R3

Marie-France Major

Tel.: (613) 695-8855

Fax: (613) 695-8580

Email: mfmajor@supremeadvocacy.ca

Agent for Counsel for the Appellant

Counsel for the Appellant

ATTORNEY GENERAL OF ONTARIO

Civil Law Division
Constitutional Law Branch
720 Bay Street, 4th Floor
Toronto, ON M7A 2S9

S. Zachary Green

Hera Evans

Tel: (416) 992-2327
Email: zachary.green@ontario.ca
hera.evans@ontario.ca

Counsel for the Respondents

ATTORNEY GENERAL OF ALBERTA

Legal Services Division
10011-109 Street, 9th Floor
Edmonton, AB T5J 3S8

Nicholas Trofimuk

Tel: (780) 422-2917
Fax: (780) 242-6016
Email: nicholas.trofimuk@gov.ab.ca

**Counsel for the Intervener,
Attorney General of Alberta**

**ATTORNEY GENERAL FOR
SASKATCHEWAN**

Constitutional Law Branch
820 - 1874 Scarth Street
Regina, SK S4P 4B3

Tom Irvine, K.C.

Tel: (306) 787-6307
Fax: (306) 787-9111
Email: tom.irvine@gov.sk.ca

**Counsel for the Intervener,
Attorney General of Saskatchewan**

BORDEN LADNER GERVAIS LLP

World Exchange Plaza
1300 – 100 Queen Street
Ottawa, ON K1P 1J9

Nadia Effendi

Tel: (613) 787-3562
Fax: (613) 230-8842
Email: neffendi@blg.com

Counsel for the Respondents

GOWLING WLG (Canada) LLP

160 Elgin Street, Suite 2600
Ottawa, ON K1P 1C3

Léa Desjardins

Tel: (613) 786-0211
Fax: (613) 563-9869
Email: lea.desjardins@gowlingwlg.com

**Agent for Counsel for the Intervener,
Attorney General of Alberta**

GOWLING WLG (Canada) LLP

2600 – 160 Elgin Street
Ottawa, ON K1P 1C3

Matthew Estabrooks

Tel: (613) 786-0211
Fax: (613) 563-9869
matthew.estabrooks@gowlingwlg.com

**Agent for Counsel for the Intervener,
Attorney General of Saskatchewan**

MINISTRY OF ATTORNEY GENERAL (BC)
1001 Douglas St
Victoria, BC V8W 9J5

Trevor Bant

Dario Balca

Tel: (250) 940-7565

Email: trevor.bant@gov.bc.ca

dario.balca@gov.bc.ca

**Counsel for the Intervener,
Attorney General of British Columbia**

BORDEN LADNER GERVAIS LLP

World Exchange Plaza

100 Queen Street, Suite 1300

Ottawa, ON K1P 1J9

Nadia Effendi

Tel: (613) 787-3562

Fax: (613) 230-8842

Email: neffendi@blg.com

**Agent for Counsel for the Intervener,
Attorney General of British Columbia**

**MINISTÈRE DE LA JUSTICE DU QUÉBEC -
DIRECTION DU DROIT**

CONSTITUTIONNEL ET AUTOCHTONE

1200, route de l'Église, 4e étage

Quebec, QC G1V 4M1

Anthony Papaioannou

Tel: (418) 643-1477

Fax: (418) 644-7030

anthony.papaioannou@justice.gouv.qc.ca

**Counsel for the Intervener,
Attorney General of Quebec**

NOËL ET ASSOCIÉS, S.E.N.C.R.L.

225, montée Paiement, 2e étage

Gatineau, QC J8P 6M7

Pierre Landry

Tel: (819) 771-7393

Fax: (819) 771-5397

Email: p.landry@noelassociés.com

**Agent for Counsel for the Intervener,
Attorney General of Quebec**

YUKON DEPARTMENT OF JUSTICE

Legal Services Branch

Government of Yukon

2134 Second Avenue, 2nd Floor

Whitehorse, YK Y1A 5H6

I.H. Fraser

Tel: (867) 667-5142

Fax: (867) 393-6379

Email: i.h.fraser@yukon.ca

CASSELS BROCK & BLACKWELL LLP

Park Place

Suite 3100, 666 Burrard Street

Vancouver, BC V6C 2X8

Fax: (604) 691-6120

SUPREME ADVOCACY LLP

340 Gilmour Street, Suite 100

Ottawa, ON K2P 0R3

Marie-France Major

Tel: (613) 695.8855

Fax: (613) 695.8580

Email: mfmajor@supremeadvocacy.ca

**Agent for Counsel for the Intervener,
Attorney General of Yukon**

Thomas Isaac

Tel: (604) 691-6108

Email: tisaac@cassels.com

Jared Enns

Tel: (778) 372-6787

Email: jenns@cassels.com

Jessica L. Lewis

Tel: (778) 372-6791

Email: jlewis@cassels.com

**Counsel for the Intervener,
Attorney General of Yukon**

DEPARTMENT OF JUSTICE CANADA

Ontario regional office
400-120 Adelaide Street West
Toronto, ON M5H 1T1

Christine Mohr

Anusha Aruliah

Tel: (647) 256-7538

Fax: (416) 952-4518

Email: Christine.Mohr@justice.gc.ca

Anusha.Aruliah@justice.gc.ca

**Counsel for the Intervener,
Attorney General of Canada**

JFK LAW LLP

260 - 200 Granville Street
Vancouver, BC V6C 1S4

Robert Janes, K.C.

Kaelan Unrau

Christina Joynt

Tel: (604) 687-0549

Fax: (604) 687-2696

Email: rjanes@jfkllaw.ca

**Counsel for the Intervener,
Athabasca Chipewyan First Nation and
Mikisew Cree First Nation**

**DEPARTMENT OF JUSTICE
CANADA**

National Litigation Sector
275 Sparks Street, St-Andrew Tower
Ottawa, ON K1A 0H8

Bernard Letarte

Tel: (613) 294-6588

SCCAgentCorrespondentCSC@justice.gc.ca

**Agent for Counsel for the Intervener,
Attorney General of Canada**

SUPREME LAW GROUP

440 Laurier Ave. West, Suite 200
Ottawa, ON K1R 7X6

Maira S. Dillon

Tel: (613) 691-1224

Fax: (613) 691-1338

Email: mdillon@supremelawgroup.ca

**Agent for Counsel for the Intervener,
Athabasca Chipewyan First Nation and
Mikisew Cree First Nation**

RATCLIFF LLP

500 - 221 West Esplanade
North Vancouver, BC V7M 3J3

Kate Blomfield**Rebekah L. Smith****Kaymi Yoon-Maxwell**

Tel: (604) 988-5201

Fax: (604) 988-1452

Email: kblomfield@ratcliff.com

**Counsel for the Intervener,
Vuntut Gwitchin First Nation, Little
Salmon/Carmacks First Nation, Selkirk First
Nation
and First Nation of Na-Cho Nyäk Dun**

CITY SOLICITOR'S OFFICE

City of Toronto
26th Floor, 55 John Street
Metro Hall
Toronto, ON M5A 0T4

Christopher Henderson**Matthew Cornett**

Tel: (416) 397-7106

Email: christopher.henderson@toronto.ca
matthew.cornett@toronto.ca

**Counsel for the Intervener,
City of Toronto**

GOLDBLATT PARTNERS LLP

20 Dundas St W, Suite 1039
Toronto, ON M5G 2C2

Louis Century**Jamie Shilton**

Tel: (416) 979-4388

Email: lcentury@goldblattpartners.com

**Counsel for the Intervener,
Greenpeace Canada**

CHAMP AND ASSOCIATES

43 Florence Street
Ottawa, ON K2P 0W6

Bijon Roy

Tel: (613) 237-4740

Fax: (613) 232-2680

Email: broy@champlaw.ca

**Agent for Counsel for the Intervener,
Vuntut Gwitchin First Nation, Little
Salmon/Carmacks First Nation, Selkirk
First Nation and First Nation of Na-Cho
Nyäk Dun**

SUPREME ADVOCACY LLP

340 Gilmour St., Suite 100
Ottawa, ON K2P 0R3

Marie-France Major

Tel.: (613) 695-8855 ext 102

Fax: (613) 695-8580

Email: mfmajor@supremeadvocacy.ca

**Agent for Counsel for the Intervener,
City of Toronto**

GOLDBLATT PARTNERS LLP

270 Albert Street, Suite 1400
Ottawa, ON K1P 5G8

Colleen Bauman

Tel: (613) 235-5327

Fax: (613) 235-3041

Email: cbauman@goldblattpartners.com

**Agent for Counsel for the Intervener,
Greenpeace Canada**

STOCKWOODS LLP

77 King Street West, Suite 4130 Toronto,
ON M5K 1H1

Stephen Aylward

Spencer Bass

Tel: (416) 593-7200

Fax: (416) 593-9345

Email: stephena@stockwoods.ca

**Counsel for the Intervener,
Advocates' Society**

ECOJUSTICE CANADA SOCIETY

1910-777 Bay Street, PO Box 106
Toronto, ON M5G 2C8

Ian Miron

Kegan Pepper-Smith

Tel: (416) 368-7533

Email: imiron@ecojustice.ca

kpsmith@ecojustice.ca

Counsel for the Intervener, Ecojustice

CAVALLUZZO LLP

300-474 Bathurst Street
Toronto, ON M5T 2S6

Jackie Esmonde

Sydney Lang Clémence

Thabet Tel: (416)

964-1115

Fax: (416) 964-5895

Email: jesmonde@cavalluzzo.com

**Counsel for the Intervener,
Ontario Place for All, Toronto Field
Naturalists, Democracy Watch and National
Trust for Canada**

CONWAY BAXTER WILSON LLP

400-411 Roosevelt Avenue
Ottawa, ON K2A 3X9

Chris Trivisonno

Tel: (613) 780-2008

Fax: (613) 688-0271

Email: ctrivisonno@conwaylitigation.ca

**Agent for Counsel for the Intervener,
Advocates' Society**

GOLDBLATT PARTNERS LLP

270 Albert Street, Suite 1400
Ottawa, ON K1P 5G8

Colleen Bauman

Tel: (613) 235-5327

Fax: (613) 235-3041

Email: cbauman@goldblattpartners.com

**Agent for Counsel for the Intervener,
Ontario Place for All, Toronto Field
Naturalists, Democracy Watch and
National Trust for Canada**

LAX O'SULLIVAN LISUS GOTTLIEB LLP
145 King Street West, Suite 2750
Toronto, ON M5H 1J8

Jonathan C. Lisus
John Carlo Mastrangelo
Tel: (416) 598-1744
Fax: (416) 598-3730
Email: jlisus@lolg.ca

**Counsel for the Intervener,
Canadian Civil Liberties Association**

MCCARTHY TÉTRAULT LLP
Suite 5300, Toronto Dominion Bank Tower
Toronto, ON M5K 1E6

Aya Schechner
Alexandra Ing
Tel: (416) 601-7885
Fax: (416) 868-0673
Email: aschechner@mccarthy.ca
aing@mccarthy.ca

**Counsel for the Intervener,
Advocates for the Rule of Law**

CIRCLE BARRISTERS
180 John Street
Toronto, ON M5T 1X5

Sujit Choudhry
Mani Kakkar
Erica McLachlan
Tel: (416) 436-3679
Email: sujit.choudhry@circlebarristers.com
mani.kakkar@circlebarristers.com
erica.mclachlan@circlebarristers.com

**Counsel for the Intervener,
Animal Justice Canada**

MICHAEL SOBKIN
LAW CORPORATION
331 Somerset Street West
Ottawa, ON K2P 0J8

Michael J. Sobkin
Tel: (613) 282-1712
Fax: (613) 288-2896
Email: msobkin@sympatico.ca

**Agent for Counsel for the Intervener,
Canadian Civil Liberties Association**

LENCZNER SLAGHT LLP

130 Adelaide Street West, Suite 2600
Toronto, ON M5H 3P5

Paul-Erik Veel

Jennah Khaled

Tel: (416) 865-2842

Email: pveel@litigate.com
jkhaled@litigate.com

**Counsel for the Intervener,
Canadian Constitution Foundation**

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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

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*

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

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

[*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

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:

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

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

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

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.



Brodie Noga, Emma Wall, Nathan Surkan

JFK LAW LLP

Counsel for the British Columbia Civil
Liberties Association

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).

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