



Appellants' co-counsel Richard Macklin and Julian Falconer

Tort of abuse in public office given new life by SCC ruling

By Thomas Claridge
Toronto

On the 300th anniversary of its introduction, the Supreme Court of Canada has breathed new life into the common-law tort of misfeasance in a public office.

Although the ruling dealt only with an alleged refusal by police officers to obey a statutory duty, lawyers who took part in *Odhavji Estate v. Woodhouse* say it has potentially broad ramifications for all types of public officials.

The 9-0 ruling overturned a decision of the Ontario Court of Appeal in which the majority held that police officers in the province could not be sued for refusing to co-operate with the

Special Investigations Unit (SIU), a provincial agency that investigates police shootings.

The appeal court said the tort applied only to abusive use of a power, not to deliberate breach of a duty.

In *Odhavji*, the parents and brother of Manish Odhavji, an unarmed suspect who was fatally shot on September 26, 1997, as he fled on foot from the scene of a bank robbery, are seeking damages for mental distress caused by the alleged wrongful death.

The lawsuit, launched after the SIU decided no officer at the scene should face criminal charges, involves allegations that up to 20 police officers disobeyed an order to remain segre-

gated, refused to turn over their notes and did not speak promptly to SIU investigators.

Toronto lawyer Julian Falconer, who with partner Richard Macklin represented the family, said the ruling "has breathed new life into a tort that's essential to any democracy. At the end of the day, we as a society are ill-served when public officials may rely upon a technical distinction between illegal acts done through abusing legal duties as opposed to abusing legal powers."

The appeal court decision had overturned a motion court's refusal to grant summary judgment to the police defendants.

see MISFEASANCE p.22

Special LSUC Convocation approves overhaul in 2006 of bar admission course

By John Jaffey
Toronto

In a special session of Convocation, the Law Society of Upper Canada voted 41-4 this month in favour of revamping and shortening its 45-year-old Bar Admission Course (BAC).

Starting in 2006, the existing program of substantive law lectures and exams will be eliminated. Instead, the law society will provide reference materials, learning tools and support services to enable candidates to self-study for two full-day licensing exams, which will test legal knowledge and analytical capabilities. Students-at-law will have a choice of three dates during their articles to write a barrister exam and a solicitor exam.

The only classroom instruction during the BAC will be a short course — four weeks was recommended — in legal skills,

including professional responsibility and practice management.

Articling will continue to be part of the BAC; there is a consensus among the benchers that the mentoring aspect should be emphasized.

In addition, although the exact length has yet to be decided, the new BAC will be about 11 weeks shorter than the existing program. New lawyers can expect to benefit by about \$15,800, through tuition savings of \$1,800 and about \$14,000 of additional earning power.

George Hunter, chair of the Task Force on the Continuum of Legal Education, said the new regime will make the BAC more relevant to the practice of law in the 21st century; remove unnecessary barriers to admission and respect principles of equity, and significantly reduce costs to students while continuing to serve the public interest.

see BAC p.27

Quebec youth court judge chastised for appearing on Via Rail commercials

By Luis Millan
Montreal

Judge Andrée Ruffo, an outspoken Quebec youth court judge known for her unbridled activism for children's rights, has become embroiled in a fresh controversy.

In the space of two weeks, she was castigated by the province's judicial council and lost a battle before the Quebec Superior Court in her bid to invalidate a job transfer.

The Conseil de la magistrature, whose mandate includes ensuring compliance with judicial ethics, castigated Judge Ruffo for participating in two August 2001 television commercials on the benefits of travelling using Via Rail and new trains she never rode on. She was not paid for the work, nor did she get benefits such as free tickets, a fee reduction for the purchase of future tickets or even privileges linked to passenger seating.

Nonetheless, the Conseil recommended that Judge Ruffo be

reprimanded for breaching judicial ethics, particularly Articles stating that judges should refrain from activities incompatible with their judicial office and should uphold the integrity and defend the independence of the judiciary, in the best interests of justice and society.

"That she refused the remuneration that Via Rail offered her is not a mitigating factor," said the five-member council. "She found nevertheless a personal advantage, that is, to be frequently seen on television, which is an important medium that can contribute to increasing her notoriety."

Judge Ruffo argued that she did the commercial simply because she enjoys travelling by train and felt that it was "part of our heritage, that it opened up Canada, that there's no competition." Further, she maintained that the ad was not controversial or disrespectful of her judicial office. She also asserted that judges in part have not been

admonished for taking part in commercial activities such as agreeing to appear in advertising brochures after writing books.

But the council, after dismissing several legal challenges to its procedures, said her use of her love of trains as justification "appears to be very thin."

It said a judge who regularly patronizes a restaurant cannot use his or her name to promote its business.

"We dread the abuses such a practice could incur," the council said.

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Roncarelli v. Duplessis cited as having established tort in Canada

MISFEASANCE
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It reported Superior Court Justice Gerald Day's finding that misfeasance in a public office could be established by proving that a public officer intentionally engaged in acts beyond the scope of his or her office and could foresee with some certainty that the action could harm the plaintiff.

Writing for the appeal court majority, Justice Stephen Burnes concluded that the tort applied only to the unlawful exercise of a statutory or prerogative power that accompanied the public office.

But in a strong dissent, Justice Kathryn Feltman saw "no principled reason for drawing a distinction between a public official who improperly exercises a power and one who deliberately fails to carry out a duty, where they know or are recklessly indifferent to the fact that injury to those in the position of the appellants is the likely result."

Writing for the unanimous Supreme Court, Justice Frank Iacobucci agreed with Iacobucci.

Tracing the origins of the tort to *Ashby v. White* (1703), 2 Ld. Raym. 85, 92 E.R. 1293, in which a writ of *habeas corpus* was issued to a man who had been maliciously and fraudulently deprived of his vote, Justice Iacobucci agreed that in its essential form the tort was "limited to circumstances in which a public officer abused a power actually possessed."

Subsequent cases, however, have made clear that the ambit of the tort is not restricted in this manner."

He noted that in *Roncarelli v. Duplessis*, (1959) S.C.R. 121, "this Court found the defendant Premier of Quebec liable for directing the manager of the Quebec Liquor Commission to revoke the plaintiff's liquor licence. Although *Roncarelli* was decided at least in part on the

basis of the Quebec civil law of delictual responsibility, it is widely recognized as having established that misfeasance in a public office is a recognized tort in Canada."

Noting that Premier Maurice Duplessis had no authority to revoke the licence, he said that in *Roncarelli*, Justice Donald Martland observed that the plaintiff's complaint involved "the exercise of power which, in law, he did not possess at all."

Justice Iacobucci also rejected a contention by the defendants that the plaintiffs suffered no compensable damage, since the SIU investigation, which was ordered by the court, was not a result of the defendant's failure to co-operate with the SIU's investigation for which was "not foreign to tort law."

However, he went on to suggest that the family will face tough challenges. For one thing, there was a "well-established principle that misfeasance in a public office requires an element of 'bad faith' or 'dishonesty'."

"In a democracy, public officers must retain the authority to make decisions that, where appropriate, are adverse to the interests of certain citizens. Knowledge of harm is thus an insufficient basis on which to conclude that the defendant has acted in bad faith or dishonestly."

"A public officer may in good faith make a decision that she or he knows to be adverse to the interests of certain members of the public. In order for the conduct to fall within the scope of the tort,

the officer must deliberately engage in conduct that he or she knows will be inconsistent with the obligations of the office."

A further restriction on the tort was a requirement that the defendant be aware that the unlawful conduct would harm the plaintiff. "Liability does not attach to each officer who blatantly disregards his or her official duty, but only to a public officer who, in addition, demonstrates a conscious disregard for the interests of those who will be affected by the misconduct in question."

"In sum, I believe that the underlying purpose of the tort is to protect each citizen's reasonable expectation that a public officer will not intentionally ignore a member of the public through deliberate and unlawful conduct in the exercise of public functions."

"In the final analysis," he said, "I would allow the appeal in respect of the actions for misfeasance in a public office. If the facts are taken as stated, it is not plain and obvious that the plaintiffs may well face an uphill battle, but they should not be deprived of the opportunity to prove each of the constituent elements of the tort."

The court did strike a claim for negligence against the Metropolitan Toronto Police Services Board and the Ontario government, concluding that neither was sufficiently involved in the day-to-day affairs of the police to be targets of the lawsuit.

Peter Flincko, who represented Urban Alliance on Race Relations in an intervention to support the appellants, said the appeal court's decision "posed a serious risk to the ability of individual citizens to protect themselves from abuses of functions by public officials and, by extension, to effect remedial social reform."

However, the potential of civil lawsuits to act as a catalyst for social reform "requires that the courts refrain from unduly circumscribing the scope of a given cause of action. It is important that causes of action remain flexible for appropriate application in new and different contexts."

The Fasken Martineau DuMoulin LLP lawyer said the Supreme Court ruling "should not strike anyone as alarming. In essence, the court simply affirmed the notion that a public official is not allowed to deliberately abuse his or her authority for the purpose of causing harm to another person. In other words, this decision means that the rule of law is alive and well in Canada."

He said the decision "is relevant to anyone who has any type of dealings with public officials given the omnipresence of government regulation in modern-day life, that essentially means everybody." But it would be "particularly relevant to business people."

He said examples of fields of activity in which this tort has

been, or might foreseeably be, raised, include:

- regulatory orders respecting the development or inspection of housing;
- orders and determinations by municipal councils and planning officials respecting land use/development and environmental protection matters;
- import and export laws and customs orders by customs officers;
- tax rulings by the Canada Customs and Revenue Agency and provincial tax authorities; and
- the issuance and regulation of licences for various regulated businesses such as taxi-cabs, bars and restaurants.

Roncarelli v. Duplessis, [1959] S.C.R. 121, 20 D.T.R. 222 (S.C.). See also *Day v. British Columbia*, [1997] 3 S.C.R. 1132 (S.C.).

'An area of fundamental importance in a free and democratic society'

Toronto

Writing lawyer Julian Falconer stated in his intervention in the Supreme Court's ruling in *Odhavji Estate v. Woodhouse* that the tort of misfeasance in a public office is "an area of fundamental importance in a free and democratic society that is of such a nature that it is in the public interest to protect it from being eroded by public officials and, by extension, to effect remedial social reform."

The judgment "reflects how not only a private citizen can sue with legal police conduct, but on a much broader level, how private citizens are ensured access to the courts when subjected to illegal conduct by public officials across the board."

view "that some public officials should enjoy immunity from suit for breaching a legal duty in contrast to abusing a legal power sends a clear signal that 'privately' administered approaches to questions of state accountability are not consistent with the rule of law."

He said the ruling has application "in areas of litigation across the board wherever a party, be it individual or corporate, has one in every twelve public officials deliberately engaging in illegal acts for an improper purpose."

"I am of the view that the question of a corporation's reliance on this tort is the subject of state accountability in the relatively restricted arena of public officials who engage in any form of extra-legal conduct."

He said judgments such as *Mackin v. New Brunswick (Minister of Finance)*, [2000] 1 S.C.R. 13, and *R. v. Golden*, [2001] S.C.J. No. 81, "reflect a trend to ensure state accountability in the face of deliberate illegal conduct."

Whether from a personal plaintiff's point of view or that of a corporate litigant, "the reality is that the party's reliance on access to the courts is a major bulwark against illegal state conduct. To allow the private citizen (and the corporate litigant) to sue the state agency against another individual against another individual is to ensure that private citizens will be empowered to ensure state accountability on their own."

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