



by Robert C. Worthington

Misfeasance in public office

A TOPIC RARELY TALKED about in public procurement, or even within governments generally, is the possibility of a government official abusing the powers of their office for improper reasons. Given the currency of the topic, however, in this article we seek to shed some light on what could become tomorrow's headline, the tort of misfeasance in public office.

In common law, persons who exercise the legal powers of the Crown (called public officers or public officials) are subject to a tort (civil wrong) action if they abuse their powers. Called in law misfeasance in a public office, this tort was first created in England in a case called *Ashby v. White* (1703) 92 E.R. 126, where a person, maliciously and fraudulently deprived of their right to vote by an election official, sued the election official for damages and won.

The tort came to Canada in a case called *Roncarelli v. Duplessis* [1959] S.C.R. 121, where the Quebec premier improperly ordered the manager of the Quebec Liquor Commission to revoke Roncarelli's liquor license because Roncarelli had provided bail money to several Jehovah's Witnesses whom Duplessis had had arrested. The Supreme Court of Canada (SCC) found the premier had no grounds for ordering this, did not even have the power to make such an order, and had done so only out of malice.

The tort languished for many years in the backwaters of the law, until the recent SCC decision in *Odhavij Estate v. Woodhouse* [2003] S.C.J. No. 74. The case involved alleged misconduct of police, and really only involved (in this appeal) whether police officers can be found liable for the deliberate failure to carry out their duties where they know or are recklessly indifferent to resulting injury likely to occur to another person. In previous law, the tort applied only to the unlawful exercise of a statutory power that accompanied the public office, as had been decided by the split decision of the Ontario Court of Appeal in the case.

The SCC however, unanimously disagreed and said the tort was wider than that in its application and that it requires an element of bad faith or dishonesty. "In a democracy, public officials 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 upon which to conclude that the defendant has acted in bad faith or dishonestly... A public officer may in good faith make a decision that he or she knows to be adverse to interests of certain members of the public."

However, a public officer may not "deliberately engage in conduct that he or she knows will be inconsistent with the obligations of the office."

The public officer must also know, or at least be aware, that their conduct will harm another person. "Liability does not attach to each officer who blatantly disregards his or her official duty..." In such a scenario, where a public official consciously harms another person while purporting to be acting in the course of their duty, it is up to that public official's employer to discipline or fire them. But, a citizen cannot sue a public official for mis-

feasance. However, if a public officer, "in addition, demonstrates a conscious disregard for the interests of those who will be affected by the misconduct in question," then the tort of misfeasance may be found (if the facts support it).

As the court stated, "...the underlying purpose of the tort is to protect each citizen's reasonable expectation that a public officer will not intentionally injure a member of the public through deliberate and unlawful conduct in the exercise of public functions."

While the *Odhavij Estate* case involved alleged police misconduct, the decision has much broader implications for all public officials, more particularly overly zealous officials who deliberately engage in illegal acts for improper purposes. The tort could, for example, be applied to those officials who regulate or issue licenses, tax rulings, customs seizures, and any regulatory body that has the power to issue rulings or orders. It would also apply to any level of government, be it federal, provincial/territorial, municipal or even aboriginal, for what matters is not the level of the public official but instead the public official's conscious harming of a citizen by exercising their official powers.

This decision is also in line with a recent trend of the SCC (*Mackin v. New Brunswick* (Minister of Finance) [2000] S.C.C.A. No. 21 and *R. v. Golden* [2001] S.C.J. No. 81) to hold public officials and the state accountable for deliberate illegal conduct, specifically rejecting the ancient notion that the King can do no wrong (Crown immunity) and further reducing the scope of royal prerogative (the power of the state to govern with immunity from lawsuit).

Citizens can ensure accountability of public officials without having to submit to illegally-taken actions by a public official such as false arrest, improper refusal of licensing, improper border seizures, or improper orders of any kind.

All those who exercise public powers should take special note. With the tort law of misfeasance in public office, improper motives combined with unlawful exercise of discretionary powers can and will create personal liability for the public official to the citizen they have harmed. ♪

Robert C. Worthington is president of Worthington & Associates Ltd (www.purchasinglaw.com), a Vancouver-based company specializing in business education and training in purchasing law. He has lectured on law for public and private corporation in-house seminars, as well as at the University of British Columbia. He is the author of the Purchasing Law Handbook and several legal texts.

Did you know?

Check out In the News @
www.summitconnects.com