

## Roncarelli v. Duplessis and Damages for Abuse of Power: For What Did It Stand in 1959 and For What Does It Stand in 2009?

David Mullan

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Résumé de l'article

De nos jours, le jugement *Roncarelli c. Duplessis*, et celui du juge Rand en particulier, est surtout reconnu pour sa contribution à une conception de l'exercice du pouvoir discrétionnaire basée sur la primauté du droit. Toutefois, d'un point de vue contemporain, la décision de la Cour suprême du Canada constitue non seulement un moyen judiciaire de contrer le traitement réservé aux Témoins de Jéhovah par le gouvernement Duplessis, mais aussi un développement important du droit sur la responsabilité gouvernementale envers les abus de pouvoir.

Dans cet essai, l'auteur explore cette dernière dimension du jugement afin d'établir les motifs pour lesquels la Cour a tenu Duplessis personnellement responsable des dommages occasionnés à Roncarelli. L'auteur examine aussi dans quelle mesure la Cour a transcendé l'article sur lequel reposait la responsabilité (l'article 1053 du *Code civil du Bas Canada*) et qui était également applicable en *common law*. De plus, l'auteur évalue l'impact subséquent de cet aspect du jugement. Comment les cours ultérieures ont-elles interprété la formulation, dans le jugement, des principes de responsabilité délictuelle ? Sur quels principes la responsabilité des acteurs étatiques envers les abus de pouvoir est-elle actuellement basée ? Ici encore, l'auteur conclut que l'état actuel du droit se rapproche plus de la vision épousée par le juge Rand pour fonder la responsabilité que de celle des autres juges ayant rendu l'opinion majoritaire.

## RONCARELLI V. DUPLESSIS AND DAMAGES FOR ABUSE OF POWER: FOR WHAT DID IT STAND IN 1959 AND FOR WHAT DOES IT STAND IN 2009?

*David Mullan\**

Today, *Roncarelli v. Duplessis* is most celebrated for the contributions that Justice Rand's judgment in particular made to a rule of law-based conception of the exercise of discretionary power. However, from a contemporary perspective, the Supreme Court of Canada's decision was seen not only as another significant judicial reining in of the Duplessis government's treatment of Jehovah's Witnesses, but also as an important development in the law governing governmental liability for abuse of power.

In this paper, the author explores the latter dimension of the judgment with a view to establishing the grounds on which the Court found Duplessis personally liable in damages to Roncarelli, and the extent to which it transcended the particular provision on which liability was based (article 1053 of the *Civil Code of Lower Canada*) and had application at common law. He also evaluates the subsequent impact of this aspect of the judgment. How have later courts read the judgment's articulation of the principles of delictual liability, and what are the current principles on which the liability of state actors for abuse of power are based? Here too, the author concludes that the current state of the law is closer to that espoused by Justice Rand than the bases on which the other members of the majority predicated liability.

De nos jours, le jugement *Roncarelli c. Duplessis*, et celui du juge Rand en particulier, est surtout reconnu pour sa contribution à une conception de l'exercice du pouvoir discrétionnaire basée sur la primauté du droit. Toutefois, d'un point de vue contemporain, la décision de la Cour suprême du Canada constitue non seulement un moyen judiciaire de contrer le traitement réservé aux Témoins de Jéhovah par le gouvernement Duplessis, mais aussi un développement important du droit sur la responsabilité gouvernementale envers les abus de pouvoir.

Dans cet essai, l'auteur explore cette dernière dimension du jugement afin d'établir les motifs pour lesquels la Cour a tenu Duplessis personnellement responsable des dommages occasionnés à Roncarelli. L'auteur examine aussi dans quelle mesure la Cour a transcendé l'article sur lequel reposait la responsabilité (l'article 1053 du *Code civil du Bas Canada*) et qui était également applicable en *common law*. De plus, l'auteur évalue l'impact subséquent de cet aspect du jugement. Comment les cours ultérieures ont-elles interprété la formulation, dans le jugement, des principes de responsabilité délictuelle ? Sur quels principes la responsabilité des acteurs étatiques envers les abus de pouvoir est-elle actuellement basée ? Ici encore, l'auteur conclut que l'état actuel du droit se rapproche plus de la vision épousée par le juge Rand pour fonder la responsabilité que de celle des autres juges ayant rendu l'opinion majoritaire.

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\* Professor Emeritus, Faculty of Law, Queen's University. This paper owed much to discussion and comments at the symposium on *Roncarelli v. Duplessis*. I have also been influenced in finalizing this paper by Mark Aronson's contribution to this Special Issue, as well as exchanges with him.

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In the perspective of history, *Roncarelli v. Duplessis* may be looked upon as a milestone chiefly in the interpretation of art. 1053 C.C.

Claude-Armand Sheppard<sup>1</sup>

## Introduction

In contemporary public law writing, *Roncarelli v. Duplessis*<sup>2</sup> presides over modern Canadian administrative law theory, principally through the judgment of Justice Rand, as a liberal, rights-based decision (unusual for its time) that gathered its normative force from underlying constitutional principles. The case concerned the protection of civil and political freedoms on which the formal constitution was based. Seen through the lens of the *Reference Re Secession of Quebec*<sup>3</sup> and its identification of the four underlying principles of the Canadian constitution, *Roncarelli* represents a spectacular affirmation of the rule of law (in various guises) as well as the protection of minorities.

In this paper, it is not my mission to call into question this current characterization of the decision in general and especially the judgment by which *Roncarelli* is most remembered. Indeed, it is a tribute to Justice Rand that his identification of the criteria by reference to which Prime Minister Duplessis's actions (and those of Liquor Commissioner Archambault) were to be judged has survived the test of time and massive evolution in the principles of Canadian judicial review of administrative action. Yet it also should not be surprising to find examples of judgments the sagacity and profundity of which become apparent long after their release.

The modern sense of the importance of the decision does not detract from those features that made it a historic landmark decision in Canadian public law from the day that it was released on 27 January 1959. First and foremost, as litigation, it is a poignant story of persistence in the face of seemingly insuperable obstacles. It is the ultimate triumph of citizens over unbridled government power exercised at the highest level: it is the operation of Diceyan principles in the best sense. In terms of the judicial review canon of its day, it represented a law teacher's dream example of the principle that discretionary decisions based on irrelevant factors (or, as Mark Aronson puts it, considerations that are not "functionally relevant to the regulatory scheme")<sup>4</sup>, taken for improper purposes, and dictated by an official without statutory authority were amenable to judicial

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<sup>1</sup> Claude-Armand Sheppard, "*Roncarelli v. Duplessis*: Article 1053 C.C. Revolutionized" (1960) 6 McGill L.J. 75 at 97, reprinted in (2010) 55 McGill L.J. v.

<sup>2</sup> [1959] 1 S.C.R. 121, 16 D.L.R. (2d) 689 [*Roncarelli* cited to S.C.R.].

<sup>3</sup> [1998] 2 S.C.R. 217, 161 D.L.R. (4th) 385.

<sup>4</sup> Mark Aronson, "Some Australian Reflections on *Roncarelli v. Duplessis*" (2010) 55 McGill L.J. 615 at 621.

review, but made possible only by reason of Maurice Duplessis's willingness to be frank about his role in the series of events that led to the cancellation of Frank Roncarelli's liquor licence.<sup>5</sup> It also reveals a majority of the Supreme Court of Canada that was not going to be distracted by overly technical arguments about the reach of notice and liability restrictions from confronting the merits of the claim that Roncarelli was advancing against the prime minister of Quebec. In short, the decision contains a lot of "good" statutory interpretation in the sense of purpose-driven, rights-informed readings of relevant provisions.<sup>6</sup> Perhaps most importantly, as suggested by the extract above from Claude-Armand Sheppard's contemporary assessment of the judgment, *Roncarelli* constituted a precedent that established new principles of delictual liability for abuse of public power.

It is on this last feature that I will focus my attention in this essay. For what proposition does *Roncarelli* stand on the extent to which statutory authorities are accountable in damages for actions that are amenable to judicial review? Why did Claude-Armand Sheppard regard the case as a groundbreaking decision on the scope of article 1053 of the *Civil Code of Lower Canada*? What relevance, if any, did it have to common law tort liability in similar settings? How have courts applied or extended *Roncarelli* subsequently? What represents the current law governing the liability of statutory authorities for action or inaction that gives rise to an application for judicial review? Is the current law compatible with the approach taken in *Roncarelli*, and to what extent does it represent an ap-

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<sup>5</sup> Notwithstanding Rand J.'s position on the rights of those who operated a business under licence from the state, and notwithstanding the lack of procedural rights accorded to Roncarelli at the time of the licence revocation, it is not in any real sense a leading authority on the applicability of the rules of natural justice or procedural fairness. Rand J. himself did not discuss this issue at any length beyond stating that the Liquor Commission was "an administrative tribunal which, in certain respects, is to act in a judicial manner" (*Roncarelli*, *supra* note 2 at 141). Of the other members of the majority, Abbott J. said nothing but Martland J. (with whom Locke and Kerwin JJ. concurred) expressed the opinion that, on the basis of *Nakkuda Ali v. Jayaratne* ((1950), [1951] A.C. 66 at 81, 10 C.R. 421 (P.C.)), it was doubtful that Roncarelli had any claim to natural justice before the Liquor Commission revoked his licence (*Roncarelli*, *supra* note 2 at 156). In dissent, Cartwright J. was of the same view (*ibid.* at 168). Taschereau and Fauteux JJ. did not address this point. Interestingly, in the Quebec Court of Appeal, Rinfret J., the only judge who would have found Duplessis liable, included a failure to give some sort of a hearing as among the factors giving rise to the prime minister's liability: *Duplessis v. Roncarelli*, [1956] B.R. 447 at para. 374 (C.A.) [*Roncarelli* (C.A.)]. Bissonnette J. addressed the issue of whether the Liquor Commission was obliged to give a hearing and answered this in the negative (*ibid.* at para. 42). Casey J. agreed with him on this point (*ibid.* at para. 80).

<sup>6</sup> But see Robert Leckey, "Complexifying *Roncarelli*'s Rule of Law" (2010) 55 McGill L.J. 721. Leckey develops a strong argument against the way in which the majority disposed of the defence based on the failure to give notice of intention to commence the proceedings as required under art. 88 C.C.P.

propriate set of principles for imposing civil liability for wrongdoing on statutory and prerogative authorities?

The examination will, however, be limited by the particular context of *Roncarelli*. More particularly, I do not want to engage in a detailed assessment of the principles on which public authorities are held accountable in negligence.<sup>7</sup> My concern is principally the ultra vires exercise of discretionary power by statutory and prerogative authorities and especially high-level functionaries such as the prime minister of Quebec and the chairman of the Quebec Liquor Commission.<sup>8</sup>

## I. What Did *Roncarelli* Decide on the Issue of Article 1053 Liability?

I suppose it might be possible to distill the holding on liability into the following proposition: acting in his personal capacity, Duplessis wronged Roncarelli and caused him damage for which Duplessis was found liable. However, this begs a number of questions. Why was Duplessis held to be acting in a personal rather than an official capacity? Aside from enabling the majority to circumvent a statutory provision as to notice, was this an otherwise essential ingredient in the imposition of liability? What precisely was the wrong committed by Duplessis? Was it a wrong that depended on proof of bad faith or malice, or was it much more broadly based, depending simply on proof of Duplessis's arrogation of a power that he did not at law possess or the exercise of power for a wrongful purpose? Was it a wrong that existed beyond the confines of article 1053 of the *Civil Code of Lower Canada* (C.C.L.C.) or did it depend on the particular language of that provision and its associated jurisprudence?

The reality is that it is difficult to construct support from the various judgments in *Roncarelli* for any particular theory or principles governing the liability of public officials in damages for acting in excess of power. On this issue at least, it is a decision of the sort that still sometimes surfaces today. In it, there are multiple judgments dealing with a critical issue in such differing ways that there is in reality no majority holding or *ratio*.<sup>9</sup>

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<sup>7</sup> As Aronson points out, however, there are indications that some courts see the existence of a duty of care as a component of the tort of misfeasance in public office (*supra* note 4 at 635ff.). He references *Odhavji Estate v. Woodhouse*, 2003 SCC 69, [2003] 3 S.C.R. 263 at para. 29, 233 D.L.R. (4th) 193 [*Odhavji*].

<sup>8</sup> In this paper, I will also eschew any discussion of the fascinating question of the level of damages appropriate in cases such as this, where the ultimate impact of the abuse of power or misfeasance in public office is the loss of a business, though in the context of a regulatory regime, where there was no ongoing entitlement to an annual renewal of a liquor licence. Suffice it to say that, on this point, the majority of the Supreme Court of Canada did not really have a developed and consistent theory of the principles governing the award and measurement of damages.

<sup>9</sup> See e.g. *Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995] 1 S.C.R. 3, 122 D.L.R. (4th) 129.

Indeed, an examination of the various judgments of the lower courts in this case does little to clarify the situation.

In finding Duplessis liable, the trial judge Justice Mackinnon held that the provision with respect to notice did not apply because Duplessis had no authority to interfere with the administration of the liquor licensing statute.<sup>10</sup> He was therefore not acting in the exercise of his functions. However, thereafter, it was not at all clear that this was also a sufficient basis for a finding of wrong under article 1053 C.C.L.C. That may have been predicated not just on Archambault having acted on the direction of Duplessis, who, in so directing, was acting outside of his official capacity, but also on the basis that Archambault was not entitled to cancel Roncarelli's licence "for the reasons used."<sup>11</sup> This raises three questions: Absent the notice provision, would it have been sufficient to establish that, irrespective of the propriety of the reasons for revocation, liability flowed from the fact that Duplessis was acting without authority in dictating a course of action to Archambault? Alternatively, would it have been sufficient for Roncarelli to have established that, as a result of Duplessis's intervention, Archambault had revoked his licence for improper reasons? Or, were both considerations (i.e., a lack of authority and improper reasons) necessary conditions for the imposition of liability on Duplessis?

The answers to these questions are not to be found elsewhere in the trial judgment. Indeed, Justice Mackinnon's discussion of the case law and academic writing refers to both acting for improper purposes and acting without authority, without any discussion of whether they are both necessary components of the wrong or whether either will do. What is, however, significant is that neither his conclusion nor the authorities discussed in any way predicated liability on a finding of malice or bad faith. The only reference to blameworthiness comes in a couple of citations to the effect that those in public office must not be negligent but must rather exercise due diligence in ensuring that they act within their powers.

The Quebec Court of Appeal's judgment was no more helpful. Four of the five judges allowed the appeal on the basis that Justice Mackinnon had erred in fact in holding that Archambault acted on the direction of Duplessis.<sup>12</sup> Of the four, Justices Bissonnette and Casey said little or nothing about the question of liability in the event that Duplessis had in fact given the order. Certainly, Justice Bissonnette was of the view that Duplessis had no authority to give such an order but did not go on to consider the legal consequences of any such finding.<sup>13</sup> Rather, Justice Bisson-

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<sup>10</sup> *Roncarelli v. Duplessis*, [1952] 1 D.L.R. 680 (Qc. Sup. Ct.).

<sup>11</sup> *Ibid.* at 700.

<sup>12</sup> *Roncarelli (C.A.)*, *supra* note 5.

<sup>13</sup> *Ibid.* at 453.

nette believed that the trial judge had erred in holding that Duplessis had made such an order. Justice Casey largely confined his judgment to the factual issue of whether Duplessis had in fact ordered Archambault to revoke the licence.

Justice Pratte, after citing a range of authorities, accepted that Duplessis did not have a blanket exemption from personal liability on the basis that he was a minister of the Crown. If Duplessis “*a commis, par abus de pouvoir ou autrement, une faute qui a causé préjudice au défendeur, il a engagé sa responsabilité personnelle.*”<sup>14</sup>

He went on to hold that there was simply no basis for any such personal responsibility. The evidence did not establish that Archambault had acted on the direction of Duplessis, and Duplessis’s subsequent remarks about the situation did not give rise to an independent cause of action against him in defamation. That aside, the judgment does not address with any specificity the question of whether Duplessis would have been liable had he dictated Archambault’s course of action either generally or for the reasons given by Duplessis and Archambault. Indeed, Justice Pratte specifically left undecided whether those reasons were consonant with the objects and purposes of the discretion to revoke licences conferred by the *Alcoholic Liquor Act*,<sup>15</sup> the liquor licensing legislation.

Justice Martineau accepted the same general principles that Justice Pratte identified with respect to the personal liability of Crown servants, including ministers. He did, however, elaborate that for there to be personal liability, “*il faudrait qu’il y ait un élément de négligence à ces erreurs pour en faire des quasi-délits.*”<sup>16</sup>

Later, he addressed the obligations of good faith that both Archambault and Duplessis owed in carrying out their responsibilities.<sup>17</sup> In this instance, he saw no basis for questioning the good faith of either. Returning to the question of negligence, Justice Martineau indicated that even if Archambault had revoked Roncarelli’s licence under orders from Duplessis, it would still be necessary to ask whether Duplessis’s actions were reasonable given the place, time, and circumstances.<sup>18</sup> He then finessed the argument that “*faute*” arose merely by reason of the fact that Duplessis did not have any authority in the liquor licensing process.<sup>19</sup> It had not been proven that Duplessis had dictated the outcome and the only remaining question was whether Duplessis had acted improperly or been

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<sup>14</sup> *Ibid.* at 462.

<sup>15</sup> R.S.Q. 1941, c. 255.

<sup>16</sup> *Roncarelli (C.A.)*, *supra* note 5 at 481.

<sup>17</sup> *Ibid.* at 482.

<sup>18</sup> *Ibid.* at 493.

<sup>19</sup> *Ibid.* at 494-95.



negligent in not advising Archambault that he should not proceed on the proposed grounds. For Justice Martineau, this argument failed on the basis that if, as Roncarelli contended, Duplessis had no responsibilities with respect to the withdrawal of liquor licences, he could not be faulted for failing to advise Archambault that he was about to act improperly.<sup>20</sup>

The only dissent was that of Justice Rinfret. He rejected the argument that the decision at first instance should be reversed on evidential grounds. He also affirmed Justice Mackinnon's position that it was an abuse of discretion for Archambault to act under dictation from Duplessis and, in any event, to cancel the licence for the given reasons. Later, he appeared willing to concede that Duplessis as Attorney General or prime minister might have had some residual or exceptional authority over the liquor licensing process. However, even assuming that such an authority existed, it did not justify intervention in this case.<sup>21</sup>

Focusing on the basis for liability, Justice Rinfret first noted that he had no doubt that Duplessis had good intentions.<sup>22</sup> However, that did not immunize him from liability. He was personally liable for actions performed in his official capacity, and not just where there was malice or bad faith but also "*délict*". He elaborated on the concept of delict in this context by reference to common law authority. Quoting Halsbury, he asserted that liability could arise not just where a public officer transgresses the substantive law or infringes the legal rights of others, but, more generally, where a public officer does something without the backing of positive law.<sup>23</sup> Public officials, as opposed to private individuals, do not have authority to do anything in their public capacity that the law does not permit. They can do only that which is positively permitted. He then referred to Dicey's conception of vires as the foundation for the court's intervention—a conception that included not just powers exercised in excess of statutory authorization, but also actions taken for a wrong purpose.<sup>24</sup>

Ultimately, Justice Rinfret concluded that Duplessis was liable personally on a number of bases: exercising a discretion that was not his, acting on the basis of facts that were insufficient to support the conclusion he reached (i.e., Roncarelli's status as a Jehovah's Witness), failing to give Roncarelli a chance to defend himself, and acting without colour of right

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<sup>20</sup> *Ibid.* at 495.

<sup>21</sup> *Ibid.* at 511.

<sup>22</sup> *Ibid.* at 515-18.

<sup>23</sup> See Halsbury's *Laws of England*, 2d ed. (London, U.K.: Butterworths, 1931) vol. 6 at 389, n. 435, cited in *Roncarelli (C.A.)*, *supra* note 5 at 516.

<sup>24</sup> *Ibid.* See A.V. Dicey, *Introduction to the Study of the Law of the Constitution*, 9th ed. (London, U.K.: Macmillan, 1939) at 193. To the extent that I refer in this paper to the deployment of or reliance on Dicey's writings, I pass no judgment on whether that deployment or reliance was justified on a fair reading of Dicey's theories.

and not by virtue of the powers of his office.<sup>25</sup> These grounds also took Duplessis outside the protection of the notice provision in article 88 C.C.P.

As with Justice Mackinnon, it is unclear whether it is the combination of grounds that gives rise to the cause of action under article 1053 C.C.L.C. However, given Justice Rinfret's elaboration of the law discussed above, my sense is that it can be said with reasonable confidence that any one of these grounds would have sufficed to found liability. If true, this represents a very broadly based theory of personal liability on the part of public officials and it seems to be one that is not constrained by any notions of personal culpability such as malice, bad faith, or even negligence. This contrasts with the judgment of Justice Martineau, who would not countenance liability without proof of fault in the form of either negligence or bad faith.

At the Supreme Court of Canada, the judgment of Justices Martland and Locke, with Chief Justice Kerwin concurring on all relevant points, concluded that the cancellation was the result of an order by Duplessis. The question of liability was posed as the following: "whether the respondent's acts were justifiable as having been done in good faith in the exercise of his official function as Attorney-General and Prime Minister of the Province of Quebec."<sup>26</sup>

Nonetheless, in what follows, the judgment nowhere explicitly articulates what constitutes a lack of good faith in a context such as this. Addressing this point, Justice Martland simply holds that Duplessis had no role in relation to the Liquor Commission other than the giving of advice. He was therefore not acting in any of his official powers when ordering the cancellation. This begs the question of whether acting without power in this sense constitutes bad faith. Justice Martland then indicates that, even if acting independently, Archambault had no basis for acting for the reasons advanced, and, in any event, Archambault acted improperly in responding to the orders of Duplessis. How this relates to Duplessis's liability is not made clear, save to the extent that it reinforces the earlier conclusion that Duplessis was acting without any semblance of authority.

Justice Martland again returns to this theme of a total absence of authority in addressing the impact of article 88 C.C.P. In so doing, he does pay limited attention to Duplessis's knowledge and intentions in considering whether article 88 might be triggered because Duplessis "apparently ... thought it is was his right and duty to act as he did."<sup>27</sup> In the face of a total absence of authority and nothing on which Duplessis could found this belief, it was not an answer to the accusations against him.

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<sup>25</sup> *Roncarelli (C.A.)*, *supra* note 5 at 518.

<sup>26</sup> *Roncarelli*, *supra* note 2 at 153.

<sup>27</sup> *Ibid.* at 158.

In short, for the three judges who signed on to this theory of liability (Justices Martin and Locke, and Chief Justice Kerwin), notwithstanding the presence of the term “good faith” as an entry point to the discussion, the basis for liability was simply the exercise of powers that in law Duplessis did not possess. Moreover, this basis for liability took him outside the protection of article 88 C.C.P., notwithstanding what he might have believed, given that there was no basis in fact or law for such a belief.

Justice Abbott also predicated his judgment on the absence of authority but, in the context of both liability and the reach of the notice provision, article 88 C.C.P., he proceeded on a somewhat different basis than Justice Martland did. For Justice Abbott, irrespective of Duplessis’s belief that he was acting in the best interests of the Quebec populace, he must have known that in none of his various capacities did he have the legal authority to act as he did. He “was bound to know that he was acting without such authority,”<sup>28</sup> and liability under article 1053 C.C.L.C. flowed from this. In terms of article 88 C.C.P., in a case such as this, a public officer was not acting “in the exercise of his functions” so long as he did not have “reasonable ground for believing that such act was within his legal authority to perform.”<sup>29</sup> This obviously implies that Justice Abbott saw Duplessis’s state of mind as relevant to both liability and the application of article 88 C.C.P., though perhaps with a subtle difference between them. While in the case of liability the finding was based on imputed or assumed subjective knowledge, for the avoidance of article 88’s notice provision, the inquiry was based on what was reasonably or objectively deemed to be known.

Justice Rand, in a judgment delivered on behalf of himself and Justice Judson, took quite a different tack. He had no doubt that Duplessis had acted in “bad faith” in ordering Archambault to cancel the licence on the grounds advanced. In his famous statement, bad faith was present when a public officer acted “for the purposes of punishing a person for exercising an unchallengeable right [and] arbitrarily and illegally attempting to divest a citizen of an incident of his civil status.”<sup>30</sup> Duplessis’s involvement went so far beyond his justifiable capacity in relation to the Liquor Commission (i.e., giving advice) as to make it his personal act. Not only did this provide a basis for legal liability but it also disabled Duplessis from relying on article 88 C.C.P. There was no “colour of propriety” in his actions.<sup>31</sup> They were “quite beyond the scope of any function or duty commit-

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<sup>28</sup> *Ibid.* at 185.

<sup>29</sup> *Ibid.* at 186 [reference omitted].

<sup>30</sup> *Ibid.* at 143.

<sup>31</sup> *Ibid.* at 144.

ted to him.”<sup>32</sup> Consequently, his actions were taken in a private capacity, irrespective of the fact that he used the influence of his office in dictating a course of action to Archambault.

Justice Rand adopted a narrower conception of liability than that adopted by Justice Martland, or indeed by Justice Mackinnon at first instance or Justice Rinfret in dissent in the Quebec Court of Appeal. It was liability based on malice, which Justice Rand defined as “simply acting for a reason and purpose knowingly foreign to the administration, to which was added here the element of intentional punishment by what was virtually vocation outlawry.”<sup>33</sup>

Today, courts describe this as the targeted malice limb of misfeasance in public office.<sup>34</sup> Nonetheless, in light of continuing definitional problems with what constitutes malice, highlighted later in this paper,<sup>35</sup> it is significant that Justice Rand was somewhat ambivalent about the state-of-mind component of the delict or tort. His ambivalence is apparent from Justice Rand’s response to the argument that, whatever his errors of law, Duplessis had acted in good faith in intervening in the affairs of the Liquor Commission. Here, Justice Rand’s response reflected an objective standard by which the prime minister’s conduct was to be judged. Irrespective of Duplessis’s beliefs, if they did not spring from “a rational appreciation” of the intent and purpose of the legislation,<sup>36</sup> they were not justifiable or properly advanced as a defence to a malice-based form of liability.

Indeed, Justice Rand’s reluctance to be definitive as to the scope of the wrong is reinforced by his refusal to deal with the argument that, even if Archambault had been justified in cancelling Roncarelli’s licence on the grounds advanced, Duplessis would have still been liable for acting with-

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<sup>32</sup> *Ibid.* This interpretation of art. 88 C.C.P. raises the issue of whether the majority judgments leave any room for the operation of that provision in the case of the art. 1053 C.C.L.C. liability of public officials. To the extent that, for Rand J., there appears to be a coincidence of the incidents of the delict and the basis for the avoidance of art. 88, the two may have collapsed into one. To the extent that Martland J. appears to envisage a role for art. 88 C.C.P. where there was some basis for the belief that illegal or ultra vires conduct was permitted, his broader version of the reach of art. 1053 C.C.L.C. does leave some room for art. 88 C.C.P. For Abbott J., one of the components of the wrong appears to be that Duplessis must have known that he had no authority to do what he was doing. In terms of his conception of the reach of art. 88 C.C.P., it is difficult to envisage a situation where the public official knew or must have known that she did not have authority but nevertheless had “a reasonable ground for believing” that she had authority. For more discussion on this issue, see Leckey, *supra* note 6 at 726.

<sup>33</sup> *Roncarelli*, *supra* note 2 at 141.

<sup>34</sup> See e.g. *Alberta (Minister of Infrastructure) v. Nilsson*, 2002 ABCA 283, 320 A.R. 88 at para. 116, 220 D.L.R. (4th) 474 [*Nilsson*].

<sup>35</sup> See Part III, below.

<sup>36</sup> *Roncarelli*, *supra* note 2 at 143.

out authority in bringing about the cancellation. He explicitly left for another day the argument put by F.R. Scott on behalf of Roncarelli, whether Roncarelli was entitled to “the continuance of that enjoyment ... free from the influence of third persons on that body *for the purpose only of injuring the privilege holder.*”<sup>37</sup>

In the emphasized portion of that quotation, however, Justice Rand adds a qualification to the proposition advanced by Scott. Phrased in that manner, the issue is not whether liability can flow simply from usurping a power and dictating a course of action to the person who in law possesses that power, but rather whether a public official can be liable if, with an intention to harm, he or she is instrumental in causing another public official to take action against a private citizen. So posed, the question is whether the rule in *Allen v. Flood*,<sup>38</sup> holding that the common law did not recognize such a wrong when the parties were private citizens, also applied when the person whose conduct being impugned was a public official.<sup>39</sup> The question that this characterization of the issue poses is whether Justice Rand is, by implication, indicating that the only possibility for liability in such instances is where the usurpation of authority and influence is accompanied by an intention to injure, and that he is not about to decide even that question in this context.

In dissent, Justice Cartwright rejected the argument that the grounds on which Archambault or Duplessis had acted were *ultra vires*. The basis on which Archambault had exercised his power to cancel the licence was not illegal. He had unfettered discretion and held an honest belief that cancellation was the right thing to do. Parroting Justice Bissonnette of the Quebec Court of Appeal, Justice Cartwright indicated there was no basis on which to hold Duplessis liable, particularly as there was no evidence that he had coerced an unwilling Archambault. He therefore did not need to consider the reach of article 88 C.C.P.

The remaining dissenting judges, however, decided the case on the basis of article 88 C.C.P. According to Justice Taschereau, Duplessis did not lose the protection of article 88 simply because he may have made a mistake in exercising his advice and law enforcement role as Attorney General. Justice Fauteux took the position that article 88’s notice requirement did not become inoperative simply because a public officer was acting in abuse of power, without jurisdiction, in violation of the law, or in bad faith. Notice still had to be given.

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<sup>37</sup> *Ibid.* [emphasis added].

<sup>38</sup> (1897), [1898] A.C. 1, 14 T.L.R. 125 (H.L.).

<sup>39</sup> Mark Aronson (*supra* note 4) deals with this aspect of the tortious liability of public authorities both at the time of *Roncarelli* and in its subsequent evolution.

Unlike Justice Taschereau, Justice Fauteux did express himself on the issue of whether there would have been liability under article 1053 of the *Civil Code of Lower Canada*, absent article 88 of the *Code of Civil Procedure*. For Justice Fauteux, Duplessis, while not acting in bad faith or maliciously, had arrogated to himself a power that he did not have at law by directing Archambault to cancel Roncarelli's licence. In simply acting illegally, Duplessis had brought himself within the reach of article 1053 C.C.L.C. To this extent, Justice Fauteux adopts the same principle of liability under article 1053 C.C.L.C. as apparently espoused by Justices Martland, Kerwin, and Locke. However, that still does not amount to a majority on this issue. The only way in which it would be possible to construct such a majority would be if there was any sense emerging from Justice Cartwright's judgment that Duplessis would have been liable if the basis for cancellation of the licence had been illegal.

In fact, there is an argument to be made that Justice Cartwright did accept that principle. If he did not believe that acting for an improper purpose or contrary to the *Alcoholic Liquor Act*<sup>40</sup> would have attracted liability, why did he take such pains to argue that Archambault had not abused his statutory discretion? He also specifically distinguished the Australian case of *James v. Cowan* in which, according to Justice Cartwright, a public authority had been held liable for wrongful taking of the plaintiff's goods simply on the basis that it was relying on an ultra vires order.<sup>41</sup> Here in *Roncarelli*, the order was not ultra vires.

If that analysis is correct, then there may have been a majority *ratio* in *Roncarelli* to the effect that where a public authority acts illegally or ultra vires and causes financial loss to the affected person, absent statutory protection in various forms, that action constitutes *faute* and attracts liability under article 1053 C.C.L.C. As a precondition to liability, there is no need to prove malice, bad faith, absence of an honest or reasonable belief as to the existence of the power asserted, or even negligence or recklessness. Nevertheless, Justice Cartwright would have had it otherwise were the power in question judicial or quasi-judicial. Under either common or civil law, on the strength of *McGillivray v. Kimber*,<sup>42</sup> there is seem-

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<sup>40</sup> *Supra* note 14.

<sup>41</sup> *James v. Cowan*, [1932] A.C. 542, 48 T.L.R. 564 (P.C. on appeal from H.C.A.), cited in *Roncarelli*, *supra* note 2 at 170.

<sup>42</sup> (1915), [1916] 52 S.C.R. 146, 26 D.L.R. 164 [*McGillivray* cited to S.C.R.]. This was a case in which the members of the pilotage authority were found liable for their conduct in withdrawing the plaintiff's pilot's licence. However, for the majority of the Court, a failure to plead that they were acting in a quasi-judicial capacity or that they were acting outside their quasi-judicial capacity was sufficient to prevent the defendants from arguing at the Supreme Court of Canada that they were immune from liability absent proof of malice or bad faith. In contrast, the minority would have dismissed the claim for damages on that very basis.

ingly no liability for illegality absent proof of “fraud, collusion, or malice.”<sup>43</sup>

In his 1960 case comment, Claude-Armand Sheppard characterizes the *ratio* of this aspect of the judgment somewhat differently and more narrowly.<sup>44</sup> Liability under article 1053 came into play when a public officer engaged in a particular form of illegal conduct—the usurpation of authority to force another public officer to do something that that second officer could have done perfectly legally on her own initiative.<sup>45</sup> Even so, he saw this conception of the reach of article 1053 in public law matters as potentially the “milestone” that history would view *Roncarelli* as having created.<sup>46</sup>

## II. Situating *Roncarelli* within 1959 Case Law on the Liability of Public Office Holders

### A. Common Law

Given the extent to which the anglophone judges, both majority and minority, used common law authorities interchangeably in the course of justifying their conceptions of the proper scope of the liability of public officers, there is a basis for the claim that they at least thought that they were writing a judgment that would apply outside of Quebec, though the source of liability in this instance was article 1053 C.C.L.C.

However, even accepting this, there was no consensus among the majority or Justice Cartwright (of the non-Quebec judges) in dissent as to what precisely was the basis of liability. Certainly, Justice Abbott referenced Dicey and the proposition that public officials were liable in their personal capacity for “every act done without legal justification” and “in

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<sup>43</sup> *Halsbury's Laws of England*, 2d ed. (London, U.K.: Butterworths, 1931) vol. 26 at 284-85, cited in *Roncarelli*, *supra* note 2 at 169.

<sup>44</sup> Sheppard, *supra* note 1. For other contemporaneous commentary, see Edward McWhinney, Case Comment on *Roncarelli v. Duplessis* (S.C.C.), (1959) 37 Can. Bar Rev. 503. This was also a comment on *Lamb v. Benoit* ([1959] S.C.R. 321, 17 D.L.R. (2d) 369), another of the Supreme Court of Canada's Jehovah's Witnesses decisions, this time imposing liability on the Provincial Police of Quebec for false arrest and malicious prosecution.

<sup>45</sup> Sheppard, *supra* note 1 at 95-96.

<sup>46</sup> *Ibid.* at 97. Writing some five years later, W.I.C. Binie (now Binie J. of the Supreme Court of Canada) described *Roncarelli* as an example of the maxim that “hard cases make bad law,” even as interpreted by Sheppard and not creating civil liability for all forms of public official illegality or ultra vires conduct: W.I.C. Binie, “Attitudes toward State Liability in Tort: A Comparative Study” (1964) 22 U.T. Fac. L. Rev. 88 at 105. (I am grateful to my colleague and contributor to the symposium, Mark Walters, for drawing my attention to this article.)

excess of their lawful authority.”<sup>47</sup> However, Justice Rand (with whom Justice Judson concurred) was far more guarded, declining to answer the question of whether there would have been liability had the Liquor Commission acted for proper purposes but under dictation from Duplessis as usurper of authority, to use Sheppard’s terminology. His finding of liability was integrally connected with his discernment of bad faith and improper purpose, with bad faith perhaps defined expansively to include the irrational conception of the scope of one’s power. Moreover, Justice Martland (with Chief Justice Kerwin and Justice Locke concurring), while defining the critical issue in terms of “good faith”, did not thereafter return to any consideration of the components of good faith but instead focused on the legality of Duplessis’s actions. Meanwhile, Justice Cartwright (in dissent) also seemed to base his finding on his conception that the actions of the Liquor Commission (and Duplessis) were *intra vires*.

How does this match up against existing common law authorities on the liability of public officers? First, even on the judgment’s own terms, it is clear that contemporary common law principles did not impose liability for all instances of illegal or *ultra vires* action. As the Supreme Court of Canada itself had made clear in *McGillivray*, where a statutory authority was discharging a judicial or quasi-judicial function, there was no liability “in the absence of fraud, collusion, or malice.”<sup>48</sup> Also, while it is accurate to assert, as did Justice Cartwright, that in the Australian appeal of *James v. Cowan*, the Judicial Committee of the Privy Council imposed liability on the basis of simple illegality, that illegality was nonetheless tied into two known torts that did not depend upon proof of malice, bad faith, or an improper purpose.<sup>49</sup> There, the minister had made an *ultra vires* order for the seizure of fruit. That order directly led to trespass and wrongful seizure by the officials executing the decision on behalf of the minister. As such, it was consistent with what leading writers characterized as the common law position at that time: “In the absence of statutory immunity, every individual is liable for the commission of wrongful acts and for such omissions of duty *as give rise to actions in tort at common law or for breach of statutory duty*.”<sup>50</sup>

Viewed as a common law case, *Roncarelli* can be seen as consistent with *James v. Cowan*. The intervention of Prime Minister Duplessis led to a wrongful seizure of goods for which he was held liable. However, there are problems with that analysis. There seems little doubt that the Court would have held the prime minister liable even if there had been no police

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<sup>47</sup> Dicey, *supra* note 24 at 193, cited in *Roncarelli*, *supra* note 2 at 184.

<sup>48</sup> See *McGillivray*, *supra* note 42 and accompanying text.

<sup>49</sup> See *James v. Cowan*, *supra* note 41.

<sup>50</sup> E.C.S. Wade & G. Godfrey Phillips, *Constitutional Law*, 4th ed. (London, U.K.: Longmans, 1950) at 300 [emphasis added], cited in Sheppard, *supra* note 1 at 96.



raid and no seizure, but simply an order to revoke the licence without more. Thus, the majority judges describe the wrong committed not as an ultra vires order to cancel a licence and to follow that cancellation up with a police raid and seizure of liquor, but simply as an ultra vires order to cancel a licence, although Duplessis was held responsible in damages for the value of the goods seized.

The deployment of Dicey and Halsbury notwithstanding, there is little reason to accept the proposition that, if *Roncarelli* holds that public official liability flows simply from illegality, the judgment reflected existing common law principles. E.C.S. Wade, in his case comment on the first instance decision that appeared in the *Canadian Bar Review*,<sup>51</sup> sought to explain the decision from a common law perspective on a narrower basis, albeit ambivalently. In order to establish tortious liability at common law, it was necessary to establish not just illegality but also bad faith.<sup>52</sup> Wade continued:

In the present case the malice of the defendant would appear to consist in the existence of his improper motive, that is, one which the law does not allow or sanction. He acted intentionally in ordering the revocation of the permit; he knew, or ought to have known, that he had no power in law so to order.<sup>53</sup>

Indeed, whatever the situation in 1959, by 1971 it was clearly established that Canadian common law did not countenance the existence of the principle that illegality itself was sufficient to trigger liability. Delivering the judgment of the Supreme Court of Canada in *Welbridge Holdings Ltd. v. Greater Winnipeg* (a case of municipal liability),<sup>54</sup> Justice Laskin, as he then was, quoting the American legal academic K.C. Davis, stated that “[i]nvalidity is not the test of fault and it should not be the test of liability.”<sup>55</sup>

If mere invalidity did not necessarily lead to liability, and the essence of the wrong here was the order to cancel the licence and not the seizure that came out of that order, what precisely was the common law tort for which Duplessis would have been liable had these events occurred in a common law province? It is on this point, of course, that in subsequent ju-

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<sup>51</sup> E.C.S. Wade, Case Comment on *Roncarelli v. Duplessis* (*Sup. Ct.*), (1951) 29 Can. Bar Rev. 665.

<sup>52</sup> *Ibid.* at 666, 670.

<sup>53</sup> *Ibid.* at 671.

<sup>54</sup> (1970), [1971] S.C.R. 957, 22 D.L.R. (3d) 470 [*Welbridge* cited to S.C.R.]. This principle was also held to be part of Quebec public law even under art. 1457 C.C.Q., the successor to art. 1053 C.C.L.C. See *Enterprises Sibeca v. Freighsburg (Municipality of)*, 2004 SCC 61, [2004] 3 S.C.R. 304 at para. 20, 243 D.L.R. (4th) 513, Deschamps J. [*Enterprises Sibeca*].

<sup>55</sup> Kenneth Culp Davis, *Administrative Law Treatise* (St. Paul, Minn.: West, 1958) vol. 3 at 487, § 25.12, cited in *Welbridge*, *supra* note 54 at 969.

risprudence the judgment of Justice Rand (with Justice Judson concurring) came to be treated as though it had majority support.

### ***B. Article 1053 of the Civil Code of Lower Canada***

While it is feasible to construct from the outcome in *Roncarelli* a theory of public law liability at common law that is consistent with the weight of both contemporary authority and subsequent evolution in the jurisprudence, the question still remains whether such a reading of *Roncarelli* is consistent with the existing Quebec law of that time.

While there is no doubt that article 1053 C.C.L.C. hinges on proof of “*faute*”, as early as 1935 Carl Goldenberg described *faute* for these purposes in expansive terms: “A positive act constitutes a ‘*faute*’ when it is the doing of an act prohibited by law.”<sup>56</sup>

However, Sheppard is skeptical of the reach of this assertion, at least in terms of public law liability. Indeed, like Wade commenting on the trial judgment, Sheppard, in an attempt to reconcile liability based on article 1053 C.C.L.C. and the common law status of Quebec public law, speaks of the need to develop article 1053 jurisprudence where gaps exist by reference to “our public law of English origin.”<sup>57</sup> Interestingly, the principle of English public law that he then went on to identify was “that every act not *specifically authorized* is prohibited,”<sup>58</sup> itself a broad reading of Goldenberg as extending beyond acts *specifically prohibited* by law, rather than any sense of a theory of liability based on conduct that resulted in a known tort, including the bad faith exercise of public power. For article 1053 C.C.L.C., that proposition became: “[A]nyone causing damages is liable unless authorized by law to inflict them.”<sup>59</sup> This then logically led Sheppard to the conclusion that, irrespective of the failure of the Supreme Court of Canada to deal decisively with the relevant principles of liability under article 1053 C.C.L.C., Duplessis would have been liable “even if he had ordered the Commission to exercise its discretion in a manner which by itself would have been lawful and would not have constituted a fault on the part of the latter.”<sup>60</sup>

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<sup>56</sup> Carl Goldenberg, *The Law of Delicts Under the Civil Code of Quebec* (Montreal: Wilson & Lafleur, 1935) at 11, cited in Sheppard, *supra* note 1 at 93.

<sup>57</sup> *Ibid.* at 93.

<sup>58</sup> *Ibid.* [emphasis added]. In other words, a prohibition arising by virtue of statutory interpretation (such as taking account of an irrelevant factor) is just as much a prohibition for these purposes as a statutory provision that explicitly forbids certain actions.

<sup>59</sup> *Ibid.* at 96.

<sup>60</sup> *Ibid.*

For Sheppard, this was “the most significant, though controversial, contribution of this memorable case to our law.”<sup>61</sup> However, to the extent that he treats this proposition as following from the even broader proposition that liability flowed from the doing of a prohibited or illegal act, the outcome is seemingly consistent with the private law thrust of article 1053 C.C.L.C. identified by Goldenberg in 1935. More importantly, it is a much broader basis for public law liability than existed under contemporary common law, at least as explained by the commentators. It is only in the earlier propositions of Dicey and Halsbury, cited at various points in *Roncarelli*, that one can see any equation between that position and a theory of the common law liability of public officials.

### III. *Roncarelli* through 2009 Eyes

Given the dramatic nature of the facts in *Roncarelli* and the difficulty of establishing the truth in similar or analogous circumstances, it is not surprising that there is a dearth of Canadian case law examining the limits of the liability of public officers for illegal action, at least outside the domain of wrongful arrest and imprisonment, and the wrongful seizure of property.

Over ten years passed before the Supreme Court of Canada itself cited *Roncarelli* for the first time. It is interesting to note that in *Canada (Conseil des Ports Nationaux) v. Langelier* in 1969, Justice Martland, delivering the judgment of the Court, referred to Dicey’s conception of the responsibility in damages of public officials who act outside their authority, noting Justice Abbott’s approval of this principle in *Roncarelli*.<sup>62</sup> However, as identified already, less than a year later in *Welbridge*, Justice Laskin pronounced that invalidity was not the test of liability.<sup>63</sup> In the course of that judgment, only passing reference was made to *Roncarelli*. In 1973’s *Roman Corp. v. Hudson’s Bay Oil and Gas*,<sup>64</sup> the Supreme Court of Canada again faced a situation in which the plaintiff was, *inter alia*, relying directly on *Roncarelli* as a basis for a claim against the prime minister and one of his cabinet ministers. Here too, Justice Martland spoke for the Court. In the last substantive paragraph of his judgment, he described liability in *Roncarelli* as based on the finding that Duplessis had acted “without legal justification and for a wrongful purpose.”<sup>65</sup> However, in what may be a more telling statement, he went on to distinguish *Roncarelli* on the basis that the defendants in this instance, “as Ministers of

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<sup>61</sup> *Ibid.* at 97.

<sup>62</sup> (1968), [1969] S.C.R. 60 at 65, 2 D.L.R. (3d) 81.

<sup>63</sup> *Welbridge*, *supra* note 54.

<sup>64</sup> [1973] S.C.R. 820, 36 D.L.R. (3d) 413 [*Roman Corp.* cited to S.C.R.].

<sup>65</sup> *Ibid.* at 831.

the Crown, were acting in the performance of their public duties in enunciating, in good faith, Government policy.”<sup>66</sup> Earlier, Justice Martland had also stated that there was no evidence that that policy had been adopted “with a view to injuring the appellants.”<sup>67</sup>

The foregoing suggests that bad faith or an intent to injure may be a necessary component of *Roncarelli* liability, at least at Canadian common law. Indeed, the notion that mere illegality was insufficient became even clearer in the first common law application of *Roncarelli* to establish liability, *Gershman v. Manitoba (Vegetable Producers’ Marketing Board)*.<sup>68</sup> Delivering the judgment of the Manitoba Court of Appeal sustaining a finding of liability against the Manitoba Wheat Board, Justice O’Sullivan clearly regarded bad faith as an essential component of *Roncarelli* liability, the principles of which he stated were applicable throughout Canada. He cited with approval the trial judge’s description of liability as founded on a “glaring abuse of power.”<sup>69</sup> This was a “flagrant abuse of public power aimed at” the respondent.<sup>70</sup> He then characterized the wrong in this case not as simply acting “without legal justification and for a wrongful purpose,”<sup>71</sup> but as having “caused knowingly substantial damage to the plaintiff.”<sup>72</sup> This act did not represent “good faith” in the exercise of the wheat board’s “official powers”.<sup>73</sup> Subsequently, he twice formulated the wrong in somewhat different terms but, in each, there was an element of conduct beyond merely acting illegally. It was tortious for the wheat board “to use its authority for the purpose either of driving the Gershman family out of business or of punishing the plaintiff for his representations.”<sup>74</sup> Finally, Justice O’Sullivan spoke of the wheat board acting “not in the execution of its public duty but for purposes and by means outside the scope of the statute from which it derived its powers.”<sup>75</sup>

However, as the judgment of Justice O’Sullivan and the analysis above illustrates, even conceding that the cause of action demands proof of bad faith, there remained serious uncertainty as to what actually con-

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<sup>66</sup> *Ibid.*

<sup>67</sup> *Ibid.* at 830.

<sup>68</sup> (1976), 69 D.L.R. (3d) 114, [1976] 4 W.W.R. 406 (Man. C.A.) [*Gershman* cited to D.L.R.].

<sup>69</sup> *Ibid.* at 123, citing *Gershman v. Manitoba (Vegetable Producers’ Marketing Board)* (1975), 65 D.L.R. (3d) 181 at 191, [1976] 2 W.W.R. 432.

<sup>70</sup> *Gershman*, *supra* note 68 at 123.

<sup>71</sup> *Ibid.*, discussing *Roman Corp.*, *supra* note 64, Martland J.

<sup>72</sup> *Gershman*, *supra* note 68 at 124.

<sup>73</sup> *Ibid.*

<sup>74</sup> *Ibid.* at 125.

<sup>75</sup> *Ibid.*

stituted bad faith for these purposes.<sup>76</sup> At its broadest, it could mean simply acting improperly or for a wrongful purpose without more. In other words, knowledge of illegality, aside from the deliberateness of the actions, formed no part of the wrong. In this form, of course, there is little or no discernible difference between it and liability simply arising out of illegality or ultra vires action. At the other extreme would be a form of liability based not just on knowledge of illegality or an impermissible purpose, but a wilful intention to harm the target. In between would be a range of other possibilities such as Justice Rand's position that an irrational but apparently honest belief on the part of a public officer in the legality of what he or she was doing would not be a defence.

Nonetheless, it is clear from *Roman Corp.* and *Gershman* that the development of Canadian common law in this domain, mirroring that of other Commonwealth jurisdictions, was focused primarily on the content of bad faith and malice in some form or another. The concept of liability flowing from illegality, attributed to Dicey and apparently favoured by some of the judges in *Roncarelli*, was no longer part of the mix.

At common law, the culmination of this evolution came seven years ago in the judgment of the Supreme Court of Canada in *Odhavji*, where a claim was brought against the Toronto police for what was by this time commonly described as the tort of misfeasance in public office.<sup>77</sup> After an examination of relevant Canadian and Commonwealth authorities, Justice Iacobucci, delivering the judgment of the Court, summarized the principles of liability as based on two components: "i) deliberate unlawful conduct in the exercise of public functions; and ii) awareness that the conduct is unlawful and likely to injure the plaintiff."<sup>78</sup>

Along the path to these conclusions, Justice Iacobucci made it clear that proof of an unlawful exercise of a statutory or prerogative power was not a necessary component of the tort.<sup>79</sup> However, the purpose of this approach was to include usurpations of power within the ambit of the tort, like that in *Roncarelli* itself,<sup>80</sup> and also situations involving omissions or failures to act—in other words, involving illegality in a broader sense.<sup>81</sup> Usefully, he also made the point that this description of the components of the tort embraces each of what are sometimes treated as two different categories. He wrote, "Category A involves conduct that is specifically in-

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<sup>76</sup> For similar views on the fluidity of the concept of "malice", see Aronson, *supra* note 4 at 627ff.

<sup>77</sup> *Odhavji*, *supra* note 7.

<sup>78</sup> *Ibid.* at para 32.

<sup>79</sup> *Ibid.* at para. 17.

<sup>80</sup> *Ibid.* at para. 19.

<sup>81</sup> *Ibid.* at para. 21.

tended to injure a person or class of persons. Category B involves a public officer who acts with the knowledge both that she or he has no power to do the act complained of and the act is likely to injure the plaintiff.”<sup>82</sup>

According to Justice Iacobucci, there is no difference in principle between Category A and Category B. Rather, in Category A, both elements of the tort are established by proof of the fact of a specific intention to injure. “[A] public officer does not have the authority to exercise his or her powers for an improper purpose, such as deliberately harming a member of the public.”<sup>83</sup>

However, in terms of both *Roncarelli* and other authorities, there are problems with *Odhavji*. More specifically, Justice Iacobucci finds the principles he articulates to be consistent with the finding in *Roncarelli*, a case in which the defendant “intentionally exceeded his powers for the express purpose of interfering with a citizen’s economic interests.”<sup>84</sup> It is worth recollecting that, in *Roncarelli*, Justice Martland, writing for three members of the majority, rejected the argument that Duplessis should not be liable because he believed he possessed the authority to do what he did. For those three judges, whatever Duplessis’s subjective belief in the scope of his powers, it was no answer to the issue of liability, and only relevant to a defence based on article 88 C.C.P. and lack of notice to the extent that there was some basis in fact or law for that belief. Even Justice Rand defined targeted malice in terms that included irrational belief on the part of the public officer in the legality of what was done. It was only Justice Abbott who seemingly based liability on the fact that Duplessis must have known that he had no legal authority to do what he did. What is clear is that there was certainly not a majority in *Roncarelli* supporting the proposition that intention (in the sense of knowingly acting illegally) was a component of the tort.

The same is true of the leading English decision in the field,<sup>85</sup> as interpreted and applied by the British Columbia Court of Appeal prior to *Odhavji*.<sup>86</sup> “Reckless indifference”<sup>87</sup> to the legality of the actions suffices

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<sup>82</sup> *Ibid.* at para. 22.

<sup>83</sup> *Ibid.* at para. 23.

<sup>84</sup> *Ibid.* at para. 30 [emphasis changed by author].

<sup>85</sup> See *Three Rivers District Council v. Bank of England (No. 3)*, [2001] UKHL 16, [2000] 2 W.L.R. 1220, [2001] 2 All E.R. 513 [*Three Rivers* cited to W.L.R.].

<sup>86</sup> See *Powder Mountain Resorts Ltd. v. British Columbia*, 2001 BCCA 619, 159 B.C.A.C. 14, 94 B.C.L.R. (3d) 14 [*Powder Mountain*]. See also *Nilsson*, *supra* note 34.

<sup>87</sup> *Ibid.* at para. 7, Newbury J.A., citing *Three Rivers*, *supra* note 85 at 1231, Lord Steyn. There is subsequent Ontario authority that assumes that Iacobucci J., by citing both *Three Rivers* and *Powder Mountain*, accepted bad faith to include recklessness as to whether the conduct was illegal. See e.g. *Foschia v. Conseil des Écoles de Langue Française du Centre-Est*, 2009 ONCA 499, 178 A.C.W.S. (3d) 143 at para. 24.

under Category B. Given that Justice Iacobucci in *Odhavji* referred to both the leading English authority and Justice Newbury's judgment in the British Columbia Court of Appeal on this point without critical comment,<sup>88</sup> the question becomes whether Justice Iacobucci's ultimate sense that knowledge of illegality is a component of the tort includes "reckless disregard or indifference" within the realm of knowledge.

In fact, under Quebec civil law, "bad faith" encompasses not just deliberate wrongdoing but also recklessness. Under article 1457 of the *Civil Code of Québec* (C.C.Q., the successor to article 1053 C.C.L.C.), the Supreme Court of Canada has held that, as far as public authorities are concerned, liability is engaged on the basis of "bad faith", including "serious carelessness or recklessness."<sup>89</sup> According to Justice LeBel in *Finney*,

recklessness implies a fundamental breakdown of the orderly exercise of authority, to the point that absence of good faith can be deduced and bad faith presumed. The act, in terms of how it is performed, is then inexplicable and incomprehensible, to the point that it can be regarded as an actual abuse of power, having regard to the purposes for which it is meant to be exercised.<sup>90</sup>

Interestingly, in terms of how the Court now regards *Roncarelli*, this statement follows a description of *Roncarelli* as an authority for the proposition that intentional fault amounts to bad faith.<sup>91</sup> Before elaborating (as quoted above), Justice LeBel states that bad faith must nevertheless encompass more than that before elaborating as quoted. Subsequently, in *Enterprises Sibeca*, Justice Deschamps cites Justice LeBel's statements before formulating the concept of bad faith slightly differently. Bad faith includes

acts that are so markedly inconsistent with the relevant legislative context that a court cannot reasonably conclude that they were performed in good faith. What appears to be an extension of bad faith is, in a way, no more than an admission in evidence of facts that amount to circumstantial evidence of bad faith where the victim is unable to present direct evidence of it.<sup>92</sup>

The question then becomes whether this broader concept of "bad faith" for the purposes of article 1457 C.C.Q. is also applicable at common law. After referring to *Welbridge* (a common law case) for the proposition that, absent proof of bad faith, courts do not impose liability on the policy-

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<sup>88</sup> *Odhavji*, *supra* note 7 at para. 25.

<sup>89</sup> *Finney v. Barreau du Québec*, 2004 SCC 36, [2004] 2 S.C.R. 17 at para. 39, 240 D.L.R. (4th) 410 [*Finney*].

<sup>90</sup> *Ibid.*

<sup>91</sup> *Ibid.*

<sup>92</sup> *Enterprises Sibeca*, *supra* note 54 at para. 26.

making processes of municipalities,<sup>93</sup> Justice Deschamps confines herself to civil law authorities in teasing out the content of “bad faith”. It is noteworthy that *Finney* is discussed but not *Odhavji*. In *Finney*, Justice LeBel derives his sense of bad faith exclusively from civil law authorities without reference to *Odhavji*. Nonetheless, it is arguable that at least on this point the principles of liability are the same for Canadian common law jurisdictions as for Quebec.

Under the 1991 *Civil Code of Québec*, article 1376 provides: “The rules set forth in this Book apply to the State and its bodies, and to all other legal persons established in the public interest, *subject to any other rules of law which may be applicable to them.*”<sup>94</sup> According to Justice Deschamps in *Enterprises Sibeca*, the qualification to article 1376 means that “[w]hen a public law rule is identified and determined to be applicable, it must be incorporated into the law of civil liability.”<sup>95</sup>

In this context, Justice Deschamps identifies an applicable and relevant public law principle: municipalities acting in a legislative or policy-making capacity have immunity from liability, absent proof of bad faith. The content of that principle has to be defined by reference not to normal civil law principles, but to relevant public law standards. Her subsequent discussion of the content of “bad faith” continues to take place in that context. Given that the public law of Quebec remains the common law, save the qualification in article 1376 C.C.Q.,<sup>96</sup> the Supreme Court of Canada’s conception of bad faith should apply to both Quebec and the common law provinces. The uncertainty left by Justice Iacobucci’s judgment in *Odhavji*

<sup>93</sup> *Ibid.* at para. 20.

<sup>94</sup> Art. 1376 C.C.Q. [emphasis added].

<sup>95</sup> *Enterprises Sibeca*, *supra* note 54 at para. 18.

<sup>96</sup> In *Sainte-Anne-de-Bellevue (Ville de) c. Papachronis* (2007 QCCA 770, [2007] R.R.A. 549 at paras. 22-23), the Quebec Court of Appeal endorsed Deschamps J.’s position in *Enterprises Sibeca* holding that liability of municipalities was governed by common public law principles when they act in a legislative or regulatory capacity. However, with respect to operational matters, there was no applicable or relevant common public law principle and art. 1457 C.C.Q. governed the issue of liability. As far as legislative and regulatory action was concerned, this meant that there could be liability only on proof of bad faith or where the exercise of power was irrational. See *Saint-Hilarion (Municipalité de) c. 3104-9364 Québec inc.*, 2009 QCCA 2375 at para. 55. With respect to operational decisions, the principal criterion for finding of fault is whether a reasonably prudent person placed in the same position would have acted in the same manner (*ibid.* at para. 59), and a municipality cannot avoid liability by establishing that it or its agents acted in good faith (*ibid.* at para. 61). All of this, however, begs the question of whether there is an identifiable *and* applicable public law rule in the case of ministers of the Crown and other high-level public officials exercising or purporting to exercise power at an operational level, or whether the test for liability in such matters remains that of art. 1457 C.C.Q. On municipal liability, see also *Joly c. Salabery-de-Valleyfield (Ville de)*, 2007 QCCA 1608 at paras. 29-33. See generally Denis Lemieux, “Le rôle du Code civil du Québec en droit administratif” (2005) 18 Can. J. Admin. L. & Prac. 119.



is resolved in favour of bad faith extending at least to recklessness as to the legality of a purported exercise of statutory or prerogative power.

It should be noted that Justice LeBel's discussion of "bad faith" in *Finney* takes place in the context not of establishing the components of liability, but of giving meaning to a limitation of liability provision in the relevant legislation. On the issue of whether proof of bad faith is a necessary component of liability under article 1457 C.C.Q., Justice LeBel states that "illegality is not necessarily synonymous with civil fault, or a source of delictual liability."<sup>97</sup> He continues:

[T]he rules of civil liability that are applicable to the actions of the Barreau are the general rules set out in art. 1457 CCQ, with *the changes* that reflect the nature of the faults that are required in order to establish liability that is limited by the partial or qualified immunity granted by s. 193 of the *Professional Code*.<sup>98</sup>

Does this suggest that article 1457 liability does not always require proof of bad faith, although it does not produce liability on all occasions on which a public officer acts illegally? *Enterprises Sibeca* does not necessarily resolve this question in that the issue of liability in that case arose in the very particular context of the legislative and policy-making functions of a municipality, not public officials generally.

## Conclusion

While there is no doubt that *Roncarelli* was a landmark decision on the delictual liability of public office holders, discerning what it actually decided on that point is a highly problematic exercise. There is a case to be made that, at least for the purposes of article 1053 C.C.L.C., a majority of the judges in the Supreme Court of Canada (as well as possibly Justice Mackinnon at first instance and Justice Rinfret in dissent in the Quebec Court of Appeal) proceeded from the premise that liability arose simply by virtue of the fact that Duplessis acted illegally. What particular form or conception of illegality produced that outcome is, however, uncertain. Was it the fact that Duplessis usurped a power that he did not have and caused Archambault to cancel Roncarelli's licence? Or was it because he not only arrogated to himself that power but also caused Archambault to exercise it for improper reasons?

Claude-Armand Sheppard argued that it was the former and that, in doing so, the Court established a new principle of delictual liability under article 1053. Any such form of delictual liability in which "*faute*" depended simply on proof of illegality closely paralleled the position that some of the judgments attributed to Dicey and Halsbury. Public office holders were

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<sup>97</sup> *Finney*, *supra* note 89 at para. 31 [reference omitted].

<sup>98</sup> *Ibid.* at para. 40 [emphasis added].

personally responsible for their illegal or ultra vires actions. However, such an assertion was certainly not reflective of the predominant common law position in 1959. Where the consequence of an illegal or ultra vires action was a known tort, such as wrongful imprisonment or wrongful seizure of property where fault was not otherwise a component of the tort, liability might flow automatically. In other contexts, such as the liability of judicial or quasi-judicial bodies, proof of bad faith or malice was of the essence in the cause of action. In other contexts, it was negligence.

Subsequently, in both common and civil law, the conception of general responsibility for illegalities did not take hold, and neither did the broader interpretations of the holding in *Roncarelli*. Rather, what happened is that, for the most part, the judgment that really came to matter was that of Justice Rand (Justice Judson concurring). The *ratio* was commonly seen as one to the effect that where a public officer acts in bad faith (perhaps including the intentional exercise of an authority that he or she does not possess and for which there is no rational basis for belief in that authority), liability will flow both at common law and under the *Civil Code of Québec*. At common law, this was one example of the emerging tort of misfeasance in public office or abuse of public power, a tort that was fault-based but required proof of fault at a higher level than that of mere negligence.

Thereafter, the debates in the case law centred on what counted as bad faith for these purposes—a debate that now seems to have been resolved in favour of the inclusion of recklessness with respect to the legality of the power being exercised, but which may also include a sense of constructive bad faith whenever a power is exercised in a way that is “markedly inconsistent” with the relevant legislative context and purpose.<sup>99</sup> This comes perilously close to the way in which Wade elaborated the *ratio* of the judgment of Justice Mackinnon at first instance, and of Justice Rand of the Supreme Court of Canada in *Roncarelli*. Malice or bad faith includes for these purposes situations where a public officer “knew, or ought to have known” that he or she had no power to make the order that he or she did,<sup>100</sup> in the sense of both subject-matter jurisdiction and animating purposes.

As far as the personal liability of public officers is concerned, whether or not they are protected by an exemption from liability, there is certainly a case for predicating liability on the existence of some form of fault or absence of good faith. Whether the state itself should also enjoy this degree of protection is, of course, another question. At least since the judgment of Justice Laskin for the Supreme Court of Canada in *Welbridge*, the general

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<sup>99</sup> See *supra* note 92 and accompanying text.

<sup>100</sup> See *supra* note 53 and accompanying text.

principle of government liability law in Canada has been that adopted by the Supreme Court of the United States in *Dalehite v. United States*.<sup>101</sup> Government entities should not be subject to liability simply on the basis of injury-causing illegalities. To impose “the added threat of private damage suits”<sup>102</sup> to the normal remedies of judicial review would not be in the public interest. In particular, it would create an incentive for governments to pay too little heed to broader public interests and make policy exercise discretion in a defensive liability-avoidance manner.

What we learn from *Roncarelli* is that there were once strong voices in favour of a much more broadly based conception of liability that would extend general responsibility in damages for illegal conduct to public officials in their personal capacity. There are all sorts of situations where even today the exercise of discretionary power is subject to negligence or even no-fault liability. As exemplified by *Hill v. Hamilton-Wentworth Regional Police Services Board*,<sup>103</sup> the Supreme Court of Canada continues to try to work out when negligence liability should be imposed on the exercise of discretionary powers—in that instance, on the investigation of crime and the apprehension of criminals.

As professionalism in public life is receiving increased attention, there are clearly questions as to whether the Supreme Court of Canada, following other Commonwealth jurisdictions, has chosen the correct path in seeing *Roncarelli* as a foundation for an overarching tort or delict of misfeasance in public office or abuse of power that is based on bad faith or malice, as opposed to one based on negligence, or simple illegality. After all, within such a broader framework, it would still be possible to enact statutory limitations and immunities where they are thought desirable.

However, in the absence of any great push to re-examine that question,<sup>104</sup> *Roncarelli*, as interpreted through a 2009 lens, does serve as a

<sup>101</sup> 346 U.S. 15, 73 S. Ct. 956 (1953) [cited to U.S.].

<sup>102</sup> *Ibid.* at 59.

<sup>103</sup> 2007 SCC 41, [2007] 3 S.C.R. 129, 285 D.L.R. (4th) 620.

<sup>104</sup> It is, however, interesting that there are elements of this debate in the current uncertainty about the principles of liability for constitutional torts, and, indeed, instances where courts have imposed that form of liability on the basis of a breach of an individual's Charter right, causation, and foreseeability of damage without proof of malice. For discussion, see Lisa J. Mrozinski, “Monetary Remedies for Administrative Law Error” (2009) 22 Can. J. Admin. L. & Prac. 133 at 163-73; David Stratias, “Damages as a Remedy Against Administrative Authorities: An Area Needing Clarification” (Paper presented at the Canadian Institute for the Administration of Justice Annual Conference, *Taking Rights Seriously*, Ottawa, 30 September–2 October 2009) (on file with the author). Subsequently, in *Vancouver (City of) v. Ward* (2010 SCC 27), the Supreme Court of Canada held that proof of malice or bad faith, or indeed negligence, was not a general requirement of liability for violation of Charter rights. For references to Australian hostility to the whole enterprise of “constitutional torts”, see Aronson, *supra* note 4 at n. 79 and accompanying text.

graphic example of both the common law and civil law's condemnation of bad faith or malice on the part of public officials—a condemnation that extends not only to recognition of the overarching tort of misfeasance in public office, but also to the restrictive reading of statutory provisions immunizing public officials from liability for their actions or inactions.

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