BC Supreme Court issues rare damages award for misfeasance in public office

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Introduction

The BC Supreme Court has ordered the Province to pay over $10 million in damages for committing the tort of misfeasance in public office—the first case to ever order damages for this tort in BC (see *Greengen Holdings Ltd. v British Columbia (Ministry of Forests, Lands and Natural Resource Operations)*, 2023 BCSC 1758).

The trial judge concluded that the Province unlawfully denied permits, on the basis that senior government officials interfered in the decision for improper political purposes. Although subject to a potential appeal, this case could have significant implications for businesses seeking regulatory approvals, public authorities, and First Nations.

Background

This matter spans nearly 20 years, with Greengen Holdings Ltd. originally applying for permits in 2005. Greengen Holdings Ltd. sought to develop a hydro-electric project near Squamish, BC To proceed with the project, Greengen required a land tenure over Crown land and a water licence.

Greengen applied for a land permit from the Integrated Land Management Bureau (ILMB) in the Ministry of Agriculture and Lands in 2005. At the same time, Greengen applied for a water license from the Water Stewardship Division (WSD) of the Ministry of Environment. Shortly after applying for the permits, BC Hydro awarded Greengen an energy purchase agreement, under which Greengen could supply electricity to BC Hydro at a fixed price for 40 years.

In 2007, the Squamish Nation wrote to the ILMB, asserting their disapproval of the project and their intention to require consultation. In July 2008, the Squamish Nation asserted that the project would impact a creek that was used for spiritual bathing.

On Aug. 25, 2008, Alec Drysdale, the decision-maker for the ILMB wrote an email stating that, after reviewing the file, “we are comfortable approving the tenure”. Despite

this email, the ILMB later denied Greengen a permit. The trial judge found that this reversal was due to improper government conduct.

In the fall of 2008, the WSD sought further information about the Squamish Nation's objections to the permits, including ways to mitigate any impacts. Chief Williams of the Squamish Nation expressed that the Nation did not want the project, but he did not provide further information about the potential impacts on the Nation's cultural practices.

On Nov. 21, 2008, two Assistant Deputy Ministers, who were not the statutory decision makers, called Greengen's representatives to tell them that the permits were being denied (the November Call). Nearly nine months latter, in August 2009, the statutory decision makers for the ILMB and the WSD issued formal decision letters denying the permits.

Procedural history

In March 2016, seeking damages for its lost business opportunity, Greengen sued the Province and identified four individuals as the alleged wrongdoers: the two decision-makers, the Minister of Agriculture and Lands, and the Assistant Deputy Minister of the ILMB. Greengen also filed an application for judicial review.

The Province brought two applications to strike, both of which resulted in rulings by the BC Court of Appeal in Greengen's favour.[1] The BC Court of Appeal held that Greengen pleaded a valid cause of action in misfeasance. The Province filed other interlocutory applications, including one seeking to dismiss Greengen's claim for being time-barred, which the BC Supreme Court refused.[2]

The trial started in April 2023, requiring 50 days of hearing, and concluded in July 2023. The trial judge issued his reasons for judgment on Oct. 10, 2023.

The tort of misfeasance in public office

The tort of misfeasance in public office allows a person to sue a holder of government office for misuse of public power. There are two ways this can happen: (1) conduct by a public officer that is specifically intended to injure a person or class of persons, or (2) the public officer acts with knowledge both that she or he has no power to do the act complained of and that the act is likely to injure the plaintiff.

In *Odhavji Estate v. Woodhouse*, 2003 SCC 69, the Supreme Court of Canada held that a plaintiff must prove that the public official:

- engaged in deliberate unlawful conduct in the exercise of public functions;
- was aware that the conduct was unlawful; and
- was aware that the conduct was likely to injure the plaintiff.

The plaintiff must also prove that the public officer's actions caused their loss and that the injuries are compensable. Additionally, the plaintiff is required to identify the alleged wrongdoers, although they need not name the individuals as parties to the action.

The unlawful act may arise from a breach of the statute, from the public officer acting in excess of their powers, or for an improper purpose.[3] To determine these issues, the court will often have to make inferences about the public officer's intentions. There is a high bar for inferring knowledge or recklessness of the conduct—the court must be able to conclude that there is no other reasonable inference other than bad faith. The Supreme Court of Canada has described the threshold as "inexplicable and incomprehensible, to the point that it can be regarded as an actual abuse of power."[4]

However, the tort of misfeasance is not directed at mere maladministration or negligence, nor is it meant to compensate for incorrect decisions made by a decision-maker where bad faith is absent.[5]The BC Court of Appeal has, on several occasions, explicitly urged judicial caution and restraint in the application of this tort.[6]

Decision on liability

Following an extensive review of the evidence, the trial judge in *Greengen* concluded that the statutory decision-makers did not independently make the decisions denying the permits; rather, an Assistant Deputy Minister either persuaded Mr. Drysdale to deny the permits or told Mr. Drysdale that the permits would be denied. The trial judge further found that decision was made to appease the Squamish Nation.

The trial judge was mindful of the high bar required to make these findings and considered alternative explanations, including whether Mr. Drysdale simply changed his mind before the November Call. However, the trial judge found no reasonable or lawful explanation for the conduct. Even if the defendants did not know their acts were unlawful, they were reckless as to whether it was.

Damages

Greengen sought expectation damages to put it in the position it would have been in had the permits been issued. After reviewing expert evidence about the earning potential of the project, the trial judge found that Greengen's best case scenario was a project with $56.25 million in cash flow. However, the trial judge deducted 82 per cent from the award to account for negative contingencies. In other words, the court found that Greengen had only an 18 per cent chance of achieving a wholly successful project. The trial judge thus awarded Greengen damages of $10.125 million.

Key takeaways

Several important implications arise from this decision for businesses, statutory decision makers, and First Nations.

- Anyone who suffers damages from unlawful government actions may have a claim in tort for misfeasance in public office, but there remains a high bar to pass for a claim based on misfeasance.
- *Greengen* follows a recent decision by the Saskatchewan Court of Appeal in *Slater v. Pedigree Poultry Ltd.*, 2022 SKCA 113. In *Slater*, the Court upheld an award of damages for misfeasance where an agricultural marketing board acted, at least in part, out of personal animosity towards the plaintiff. *Greengen*

indicates that a claim for misfeasance can succeed even if there is no finding of personal animosity. Despite these recent decisions, however, there remains a high bar to establish misfeasance.

- Statutory decision makers may face heightened risks of claims for misfeasance in public office. *Greengen* underscores the importance of lawful decision-making processes.
- Since *Haida v. British Columbia*,2004 SCC 73,courts have clearly defined an obligation on the Crown to consult First Nations prior to making decisions that could have an adverse effect on a First Nation's constitutionally protected Aboriginal rights. *Greengen* provides a significant consideration for **how** the Crown must undertake consultation and incorporate the information it receives from First Nations.
- The circumstances of *Greengen* demonstrate the importance of transparent consultation processes with First Nations. The Court in *Greengen* did not make any final determinations about the duty to consult, but the case raises questions about the extent that the Crown requires clear, timely, and specific information from a First Nation about potential impacts of a Crown decision on asserted aboriginal rights if the Crown is to deny an application on the basis of the results of consultation.

We will continue to monitor future developments in the law of misfeasance in public office, including any appeal of the decision in *Greengen*.

If you have further questions about this topic, please reach out to any of the key contacts below.

Footnotes

[1] See *Greengen Holdings Ltd. v. British Columbia (Ministry of Forests, Lands and Natural Resource Operations)*, 2018 BCCA 214, and *British Columbia v. Greengen Holdings Ltd*., 2023 BCCA 24.

[2] *Greengen Holdings Ltd. v British Columbia (Ministry of Forests, Lands and Natural Resource Operations)*, 2020 BCSC 467.

[3] *Powder Mountain Resorts Ltd. v. British Columbia*, 2001 BCCA 619 at para. 67.

[4] *McCullock Finney c. Barreau (Québec)*, 2004 SCC 36 at para. 39.

[5] *Slater v. Pedigree Poultry Ltd.*, 2022 SKCA 113 at para. 98, leave to appeal to SCC ref'd, 40476, 40482, 40485 (11 May 2023).

[6] See, e.g., *Powder Mountain Resorts Ltd.* at para. 9 and *Rain Coast Water Corp. v. British Columbia*, 2019 BCCA 201 at para. 3.

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