

## British Columbia Supreme Court Issues Rare Finding of Misfeasance in Public Office

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In an unusual victory for a plaintiff pursuing the tort of misfeasance in public office, [\*Greengen Holdings Ltd. v. British Columbia \(Ministry of Forests, Lands and Natural Resource Operations\)\*, 2023 BCSC 1758](#), the Province of British Columbia has been ordered to pay over \$10 million for a plaintiff's lost opportunity to achieve a completed and profitable hydro-electric project. Although judicial caution is applied to findings of misfeasance, the British Columbia Supreme Court found that public officials improperly denied regulatory permits for a hydro-electric project and awarded substantial damages to the project proponent.

### Background

Greengen Holdings Ltd. (“**Greengen**”) applied for permits from the Province to develop a hydro-electric project near Squamish, British Columbia. To develop the project, Greengen was required to obtain a water licence and land tenure over Crown land.

In February 2005, Greengen applied for a land permit from the Integrated Land Management Bureau (“**ILMB**”) in the Ministry of Agriculture and Lands. Concurrently, Greengen applied for a water licence from the Water Stewardship Division of the Ministry of Environment. Greengen was later awarded an energy purchase agreement from B.C. Hydro, which allowed Greengen to supply electricity to B.C. Hydro for 40 years at a fixed price.

The proposed project was located near two Squamish Nation cultural sites. The Squamish Nation disapproved of the project due to its impact on the community practice of spiritual bathing and noted its intention to require consultation. However, the Squamish Nation did not provide any further information on the purported impact.

In August of 2009, the statutory decision makers of the ILMB issued two decisions advising that the permits had been denied. This decision followed extensive communication between Greengen, the Province and other regulatory agencies. In particular, during a contested phone call earlier in time in November 2008, Greengen claimed the Assistant Deputy Ministers of two relevant agencies indicated the Province had denied Greengen's permit applications.

### Procedural History

Greengen commenced an action in March 2016 against the Province for misfeasance in public office. Greengen alleged the decisions to deny the permits were improper, as the Assistant Deputy Ministers made the decisions, rather than the appropriate statutory decision makers.

The British Columbia Court of Appeal denied two applications to strike by the Province, on the grounds that Greengen had pleaded a valid cause of action in misfeasance. The trial court also denied other interlocutory applications, including an application seeking to dismiss the claim for being time-barred.

A trial ran for 50 days commencing in April 2023, and the court issued its reasons for judgment on October 10, 2023.

### **Tort of Public Misfeasance**

The tort of misfeasance in public office is the misuse of authority by public officials. The tort is further defined by two alternative branches or categories: A) conduct that is specifically intended to injure a person or class of persons; or B) public officials who act with knowledge both that they have no power to do the act and that the act is likely to injure the plaintiff. The plaintiff must prove that a public official's conduct was deliberately unlawful, the public official was aware the conduct was unlawful, and the public official was aware the conduct would likely injure the plaintiff. As with other torts, the plaintiff must also prove that the public official's conduct was the legal cause of its injuries and the injuries suffered are compensable.

In *Greengen*, the court focused on the second category, namely the awareness of public officials that the conduct is unlawful and likely to injure the plaintiff. Unlawful conduct can arise from public officials improperly acting in excess of their statutory powers.

### **Unlawful Denial of Regulatory Permits**

The court concluded that the statutory decision makers did not independently decide to deny the permits. The statutory decision makers were either persuaded or told to deny the permits by some else in government. It further held that the permit denial decisions were made to maintain the Province's relationship with the Squamish Nation.

Although the trial judge considered alternative explanations, there was no reasonable explanation for the public officials' conduct. The defendants should have known or ought to have known that the decision to deny the permits was not their decision to make.

### **Damages**

The court awarded over \$10 million in damages for Greengen's lost opportunity for a profitable hydro-electric project. Greengen sought damages for its loss of present day cash flows, including compound interest, which was calculated in the range of \$53.8 to \$75.1 million. The court found that several contingency risks, such as obtaining secondary permits or endorsement from the Squamish Nation impacted the project's viability. It was estimated by the court that Greengen had an 18% chance of a wholly successful project. Accordingly, the damages were reduced to reflect the substantial barriers found by the court to the project's viability and expected profitability. Greengen was nevertheless awarded over \$10 million in damages.

### **Takeaways**

The standard to establish misfeasance in public office is high. Clear and convincing proof is required and misfeasance is not established simply because a statutory decision-maker is shown to be incorrect, or to have made an unreasonable decision. Nevertheless, in this case, the plaintiff was

able to obtain important pieces of evidence and key documents through freedom of information requests that confirmed its suspicions that it had a tort claim against the Province. However, with the case already reaching the Court of Appeal twice on interlocutory matters, the Province may decide to have the Court of Appeal weigh in further on whether there was deliberate unlawfulness by the public officials who dealt with Greengen's regulatory permits.