Cassels

Court Orders Province to Pay $10.125 Million for Blocking Project Opposed by First Nation

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Decision: *Greengen Holdings Ltd. v British Columbia (Ministry of Forests, Lands and Natural Resource Operations)*, 2023 BCSC 1758

On October 10, 2023, a British Columbia court ordered that the BC government pay a developer $10.125 million as compensation for unlawfully deciding not to issue permits for a hydro-electric project that had been opposed by the Squamish Nation. *Greengen Holdings Ltd. v British Columbia (Ministry of Forests, Lands and Natural Resource Operations)* (*Greengen*) appears to be the first case of a proponent successfully establishing the tort of "misfeasance in public office" for a project that was rejected due to Indigenous opposition.

Facts

The plaintiff, Greengen Holdings Ltd., had sought to develop a run of river hydro-electric project located on Fries Creek near the town of Squamish and required a land tenure over Crown land under the *Land Act* and a water license under the *Water Act* (the Permits).

The province, through the Integrated Land Management Bureau (the ILMB) and the Water Stewardship Division (the WSD), was responsible for approving the Permits. While the Squamish Nation initially seemed supportive of the project in 2006, by 2007 it wrote to the ILMB stating that it did not support the project. Between then and November 2008, various correspondence and meetings between the plaintiff, provincial representatives, and the Squamish Nation occurred to try and obtain the Squamish Nation's consent to the project.

However, on November 21, 2008, the Assistant Deputy Ministers for ILMB and WSD (who were not the statutory decision-makers) advised the plaintiff that the Permits were denied in a telephone call. Two formal decision letters from the statutory decision-makers (the Decision Letters) were released nine months later, in August of 2009.

The plaintiff claimed the decisions to deny the Permits were not made out for the reasons in the Decision

Letters, but rather were made for collateral political purposes, *inter alia*, the province's desire to avoid litigation with the Squamish Nation. The plaintiff argued the decision to deny the Permits was not made independently by the statutory decision-makers and thus represented an unlawful decision. The plaintiff also argued the Decision Letters themselves were unlawful as they improperly accepted the Squamish Nation's assertion of its Aboriginal rights without receiving further information.

Decision of the Court

The Court outlined the test for the tort of misfeasance in public office. The three elements which must be established by the plaintiff advancing the claim are:

1. Deliberate unlawful conduct in the exercise of public functions;
2. Knowledge or being reckless to the fact that the conduct is unlawful; and
3. Knowledge or being reckless to the fact that the conduct is likely to injure the plaintiff.

According to the Court, the purpose of the tort of misfeasance in public office is not intended to apply administrative law principles. For example, it is not enough to simply show that a decision was incorrect or unreasonable.[1] The tort is not aimed at bad administration or even negligence.[2] It requires proof of bad faith.[3] This can be established by concluding "that the acts in question could not reasonably have been performed in good faith or, in other words, that there is no other reasonable inference other than bad faith."[4] Such a circumstance can be demonstrated where an act is inexplicable or incomprehensible, to the point that it can be regarded as an actual abuse of power when considering the purposes for which such authority was intended to be exercised.[5]

On reviewing the history leading up to the Decision Letters, the Court determined that the statutory decision-maker for the ILMB had been initially prepared to grant the Permit in August 2008.[6] However, the Court found that by the November 2008 call with the Assistant Deputy Ministers, the intent was to advise the plaintiff that the applications for both Permits had been denied.[7]

The Court rejected the province's claim that the November 2008 call only related to the ILMB decision and not to the WSD decision and the suggestion that the denial communicated on the call was merely a "soft denial."[8] The Court noted that the Squamish Nation's opposition to the project was being actively considered by the province, all the way up to senior politicians and bureaucrats at the ministerial level, including that the project would impact the Squamish Nation's asserted spiritual practices.[9]

Finally, the Court concluded the statutory decision-makers for ILMB and WSD had not independently made the decision to deny the applications during the November 2008 call or in advance of it. Instead, the Court found that the ILMB's Assistant Deputy Minister made the decision and directed the statutory decision-makers to agree to it.[10]

The Court found that the three elements for the tort of misfeasance in public office had been met. The decision to deny the Permits communicated to the plaintiff in the November 2008 call was not lawful as it was made by persons other than the statutory decision-makers. As a consequence, the statutory decision-maker's authority was unlawfully fettered.[11] The Court noted that the provincial representatives were experienced and should have understood the statutory decision-making process. As a result, an inference could be drawn that they knew or were being reckless as to the unlawfulness of the decisions communicated in the November 2008 call.[12] Finally, the Court held it was trite knowledge that the decision to deny the Permits would bring injury to the plaintiff.[13]

After concluding that the plaintiff had made out its case for misfeasance in public office against the province, the Court considered the lost opportunity associated with the proposed hydro-electric project and awarded damages of $10.125 million.

Key Takeaways

The challenges faced by the plaintiff in *Greengen* may be familiar to industry proponents, particularly in British Columbia where permits and authorizations can be held up for prolonged periods due to Indigenous opposition. But the plaintiff's success in establishing the tort of misfeasance in public office may be difficult to replicate.

Without the November 2008 call, which predated the final formal decision by nine-months, it would have been substantially more difficult to establish the tort's three elements. As a result, *Greengen* may simply make governments more cautious when communicating with industry proponents, which may amplify the challenges navigating and understanding opaque regulatory processes, particularly in British Columbia.

But *Greengen* also highlights important steps that project proponents can take to help protect their interests through regulatory uncertainty. Building a record of engagement with a decision-maker may be just as important as with an interested Indigenous party. Bringing forward concerns, raising questions, and requesting clarity throughout the regulatory process can help create clarity, promote accountability, and may be useful upon subsequent review by a court.

Even if proponents are unable to establish the tort of misfeasance in public office, they still have administrative law rights to a fair process and timely decision-making which do not fall away simply because Indigenous rights are asserted.[14] Benefiting from these administrative rights may also depend on having a clear record of engagement with government decision-makers.

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[1] *Greengen Holdings Ltd. v British Columbia (Ministry of Forests, Lands and Natural Resource Operations),* 2023 BCSC 1758 at para. 147.

[2] *Ibid* at para. 147, citing *Slater v. Pedigree Poultry Ltd.*, 2022 SKCA 113 at para. 98.

[3] *Ibid* at para. 148, citing *Powder Mountain Resorts Ltd. v. British Columbia*, 2001 BCCA 619 at para. 8.

[4] *Ibid* at para. 156.

[5] *Ibid* at para. 157.

[6] *Ibid* at para. 177.

[7] *Ibid* at para. 195.

[8] *Ibid* at paras. 194—195; 204.

[9] *Ibid* at paras. 231; 242—244.

[10] *Ibid* at paras. 273; 278.

[11] *Ibid* at para. 282.

[12] *Ibid* at paras. 288—290.

[13] *Ibid* at para. 150.

[14] *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53 at paras. 12; 34.

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