

Court finds British Columbia liable for misfeasance in public office for decisions denying regulatory permits

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Authors: [Maureen Killoran, KC](#), [Sander Duncanson](#), [Sean Sutherland](#), [Erin Bower](#), [Ashley Light](#)

On October 10, 2023, the Supreme Court of British Columbia (the Court) in *Greengen Holdings Ltd v British Columbia (Ministry of Forests, Lands and Natural Resources Operations)* (the Decision) found the Province of British Columbia (the Province) liable for misfeasance in public office because senior government officials who did not hold the applicable statutory authority decided to deny regulatory permits for a hydroelectric project.

This Decision is a novel application of misfeasance in public office to hold government officials accountable for unlawful and improper interference in regulatory and decision-making processes and has important implications for future claims against government in the regulatory approvals context.

Background

The plaintiff, Greengen Holdings Ltd (Greengen), sought to develop a hydroelectric project (the Project) on Fries Creek, near the town of Squamish, B.C. Greengen began the regulatory approvals process for the Project in 2005.

The Project required a land tenure pursuant to s. 11 of the *Land Act*^[i] and a water license pursuant to s. 7 of the then *Water Act*^[ii] (the Permits). Certain appointed officials within the Ministry of Agriculture and Lands' Integrated Land Management Bureau and Ministry of Environment's Water Stewardship Division (the Statutory Decision Makers) held statutory authority to issue the Permits under the *Land Act* and the *Water Act*, respectively.^[iii]

Two Squamish Nation cultural sites were located near the proposed Project site.^[iv] The Squamish Nation began to express opposition to the Project in 2007, on the basis that the Project would impact the community's practice of spiritual bathing at these cultural sites. However, the Squamish Nation did not provide further information on these purported impacts when provincial officials requested it.

The Statutory Decision Makers issued two Decision Letters in August 2009 that advised in writing that the Permits had been denied. The Decision Letters followed a lengthy process involving extensive communications between Greengen and the relevant provincial ministries and regulatory agencies.^[v] These communications included a contested November 2008 phone call (the November Call) between Greengen representatives and the Assistant Deputy Ministers of the two relevant provincial agencies (the Assistant Deputy Ministers), during which Greengen claimed the Assistant Deputy Ministers (who were not the Statutory

Decision Makers) communicated that the Province decided to deny the Permits.^[vi]

Greengen brought a claim against the Province for misfeasance in public office. Greengen claimed that the Assistant Deputy Ministers, rather than the Statutory Decision Makers, made the decision to deny the Permits.^[vii] The Court found in favour of Greengen on this claim.

Greengen made two additional claims for misfeasance in public office: (1) that the Province made the decision to deny the Permits for “collateral political purposes”^[viii] related to the Province’s relationship with the Squamish Nation; and (2) that the Province’s decision was unlawful because provincial officials accepted the Squamish Nation’s assertions regarding spiritual bathing and the impacts of the Project on this practice without receiving further information.^[ix] The Court denied Greengen’s claim on these additional issues, but left the door open for future claims raising similar allegations to succeed.

Misfeasance in public office

Misfeasance in public office is a tort concerned with the misuse of power by government officers. There are two categories of misfeasance in public office: (1) conduct by a public officer that is specifically intended to injure a person or class of persons; and (2) conduct by a public officer that falls outside of their statutory powers.^[x] In either category, the plaintiff must also prove they suffered an injury, that the tortious conduct caused their injury, and that their injury is compensable in tort law.^[xi]

Greengen focused on the second category, the test for which requires: (1) deliberate unlawful conduct by a public officer in the exercise of public functions; and (2) awareness that this conduct is unlawful and likely to injure the plaintiff.^[xii] Unlawful conduct can be a straightforward breach of statutory provisions or, as in this case, arise from a public official acting in excess of their statutory powers or for an improper purpose.^[xiii]

Courts have historically urged judicial caution in applying misfeasance in public office. Indeed, there are very few Canadian decisions finding liability.^[xiv]

The Court’s decision

The Assistant Deputy Ministers improperly made the decision

The Court found that the Assistant Deputy Ministers engaged in conduct that fell outside of their statutory powers by deciding to deny the Permits, as communicated on the November Call. This was unlawful because either: (1) the Assistant Deputy Ministers made the decision, not the Statutory Decision Makers; or, at the very least, (2) the impact of the Assistant Deputy Ministers’ communications was to fetter the Statutory Decision Makers’ decision-making authority for improper purposes—namely, the Assistant Deputy Ministers’ decision that the Project should not be allowed to proceed without the agreement of the Squamish Nation.^[xv]

As the Assistant Deputy Ministers were both experienced government employees that understood the statutory decision-making process, the Court concluded that they knew or should have understood that the decision to deny the Permits was not their decision to make.^[xvi]

Causation and damages

As a result of the Assistant Deputy Ministers' misfeasance, the Court concluded that Greenglen lost an opportunity for a profitable hydroelectric project and was entitled to damages.^[xvii] Greenglen asked to be put in the position it would have been in had the Permits been issued, calculating damages in the range of \$53.8 million to \$75.1 million (which represented the present day value of cash flows lost by Greenglen, including compound interest).^[xviii] However, the Court ultimately awarded only \$10.125 million in damages based on several "contingency risks" of the Project not reaching commercial operation or achieving the projected financial targets.^[xix] These risks included that Greenglen might not have secured the necessary secondary permits or support from the Squamish Nation to develop the Project.^[xx] The Court considered these risks to be "substantial potential barriers both to [the Project's] viability and its expected probability", and concluded that Greenglen had only an 18% chance of a wholly successful Project.^[xxi]

The Court declined to address the duty to consult claims

As an additional ground for misfeasance, Greenglen claimed that the Statutory Decision Makers improperly accepted the Squamish Nation's assertions regarding spiritual bathing without receiving necessary information from the Squamish Nation to support such a finding.^[xxii] Greenglen argued that this ran counter to the notion that consultation is not one-sided, but is a reciprocal obligation that requires Indigenous communities to share information with the Crown to support their claims, a requirement that has been repeatedly confirmed by the courts.

The Court declined to address the issue in full because it had found the claim for misfeasance was made out based on the November Call.^[xxiii] Further, while the Court found that one of the Statutory Decision Maker's reasoning process to accept the Squamish Nation's assertions at face value was "probably unreasonable", the Court concluded that the errors did not rise to the level of bad faith.^[xxiv]

Therefore, the Decision leaves open the possibility of a similar claim succeeding in the future if there is a sufficient basis for it.

Significance of decision for resource project proponents and other regulated industries

This case exemplifies how improper decision-making in the regulatory approvals and statutory decision-making context can give rise to misfeasance claims. The Decision makes clear that a statutory decision must be made by the individual or body that the legislature has appointed under statute. Senior government officials cannot make decisions that the legislature has not assigned to them, nor can they improperly influence the decisions of other government officials.

Historically, improper influence or decision-making was dealt with in applications for judicial review. In judicial review, the evidentiary record is presumptively limited to the materials before the decision-maker, monetary damages are not available, and the typical remedy is to quash an improper decision and direct a redetermination. The Decision opens the door to a civil proceeding for damages for the lost opportunity of a positive decision where there is

misfeasance. In such a civil proceeding, pre-trial documentary and oral discovery is available to explore the decision-making process, as well as cross-examination of government officials involved.

For project proponents and other regulated entities that see a redetermination process as a hollow remedy given the possibility of a second adverse decision, an alternative route of a damages claim fills an important gap in access to justice for unlawful government action. Accordingly, the Decision confirms that government may be liable for the monetary losses that its unlawful actions in the decision-making process cause to affected parties.

[i] *Land Act*, RSBC 1996, c 245.

[ii] *Water Act*, RSBC 1996, c 483.

[iii] *Greengen Holdings Ltd v British Columbia (Ministry of Forests, Lands and Natural Resource Operations)*, 2023 BCSC 1758 21 [*Greengen Holdings*] at paras 3, 4.

[iv] *Greengen Holdings* at para 17.

[v] *Greengen Holdings* at para 6.

[vi] *Greengen Holdings* at para 10.

[vii] *Greengen Holdings* at para 10.

[viii] *Greengen Holdings* at para 20.

[ix] *Greengen Holdings* at para 11.

[x] *Odhavji Estate v Woodhouse*, 2003 SCC 69 at para 22 [*Odhavji*].

[xi] *Odhavji* at para 32.

[xii] *Odhavji* at para 22.

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

[xiv] *Powder Mountain* at para 8.

[xv] *Greengen Holdings* at para 282

[xvi] *Greengen Holdings* at paras 288, 291.

[xvii] *Greengen Holdings* at paras 336, 337.

[xviii] *Greengen Holdings* at para 373.

[xix] *Greengen Holdings* at paras 480, 411.

[xx] *Greengen Holdings* at paras 421, 464, 481.

[xxi] *Greengen Holdings* at para 414.

[xxii] *Greengen Holdings* at para 11.

[xxiii] *Greengen Holdings* at paras 327, 328

[xxiv] *Greengen Holdings* at paras 315-317.