

# WHAT'S IN A NAME: NO NEED TO SUE PUBLIC OFFICIALS INDIVIDUALLY

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In a turn of direction, the British Columbia Court of Appeal has made it easier to bring claims of misfeasance against government officials.

## Procedural History

In March of 2016, Greengen Holdings Ltd. (“**Greengen**”) was unhappy with its treatment at the hands of various public officials relating to a proposed run-of-river hydro electric project. Greengen filed a Notice of Civil Claim against the Province of British Columbia (the “**Province**”) and various governmental entities claiming damages for misfeasance in public office.<sup>[1]</sup> Greengen’s claim was based on the denials a water license by the Regional Water Manager under the *Water Act*, RSBC 1996, c 483 and a Crown land tenure by the minister’s delegate under the *Land Act*, RSBC 1996, c 245.<sup>[2]</sup>

The Province began a series of procedural moves intended to strike out or curtail the Greengen claim- all without success. First the Province brought an application to dismiss Greengen’s civil claim on the basis that it was not properly described in the claim.<sup>[3]</sup> On appeal, the Court of Appeal held that Greengen had pleaded the elements of a misfeasance claim, and that any “deficiencies in the [claim] can be remedied by providing particulars”.<sup>[4]</sup> The Province then demanded particulars of the individuals whose conduct was impugned. Greengen responded by identifying four individual government officials within the body of the claim, but did not add them as parties. The Province brought a second application under Rule 9-7 of the Supreme Court Civil Rules for an order dismissing Greengen’s claim on the basis that it is time-barred by virtue of the expiry of the governing six-year limitation period. The Court dismissed the application.

The Province brought a third application to dismiss Greengen’s action, now on the basis that Greengen had not sued the individual public officials whose conduct was the basis of the misfeasance claim. The British Columbia Supreme Court dismissed the application on the basis that the Court of Appeal had already held that Greengen had pleaded a valid cause of action.<sup>[5]</sup> The Province appealed, and, the British Columbia Court of Appeal dismissed the appeal.<sup>[6]</sup>

## Appeal Decision

In *Odhavji Estate v Woodhouse*, the Supreme Court of Canada identified elements of misfeasance in public office as follows:

First, the public officer must have engaged in deliberate and unlawful conduct in his or her capacity as a public officer. Second, the public officer must have been aware both that his or her conduct was unlawful and that it was likely to harm the plaintiff.<sup>[7]</sup>

Further, as noted by the Court of Appeal, “in order to be liable in misfeasance, a defendant must hold public office, either as an individual or as a public authority (i.e., an entity who is authorized to make a decision), or be a person who is vicariously liable for such a decision-maker.”<sup>[8]</sup>

The key issue on appeal was whether a claim for misfeasance in public office could be made directly against public authorities without adding the individuals as named defendants. The Court of Appeal held that it was not necessary to add individual officials as defendants, the requirement to name individuals only applies when a remedy is sought against them personally. Further, the particulars provided by Greengen gave sufficient notice to the Province of the case to be met and sufficiently identified the individual officials whose conduct is at issue.

In its analysis, the Court of Appeal did note the lack of clarity in the style of cause regarding the number of defendants in the action. Despite the lack of clarity, the Court of Appeal noted that it was still clear that the action was directed at the authorities responsible for the issuance of the water license and Crown land tenures. Accordingly, the Court provided certain directions to Greengen to address and amend the style of cause (for example, to name the Minister as a defendant, rather than the Ministry).<sup>[9]</sup>

The Court of Appeal concluded “when the claim is made against public authorities, it is not necessary to add individual officials as defendants, as long as they are identified in such a way as to allow the defendants to understand the case to be met and to inform the individuals so that they know that their conduct is at issue.”<sup>[10]</sup>

### Takeaway

It has long been the case that claims in misfeasance needed to identify the officer whose conduct is being impugned. Historically, this was understood to mean that the public official must be also a named party defendant. This has now been clarified. While the importance of properly identifying the party whose conduct is impugned remains an important step in any litigation, it does not mean they must be named as parties defendants in every case. The decision in *Greengen* holds that when bringing a claim of misfeasance in public office against public authorities, it is not necessary to add individual officials as defendants, when the party responsible in law for such individuals is already a named party. However, it remains the case that the

individual officials must be identified in such a way in the body of the claim as to allow the defendant public authorities and the individual officials to understand the case to be met. This procedural clarification will no doubt make it easier to sue government, to limit costs exposure and discourage procedural moves intended to curtail the plaintiff's claims.

[1] *British Columbia v Greengen Holdings Ltd.*, 2023 BCCA 24 at para 2.

[2] *British Columbia v Greengen Holdings Ltd.*, 2023 BCCA 24 at para 10.

[3] *British Columbia v Greengen Holdings Ltd.*, 2023 BCCA 24 at para 2.

[4] *Greengen Holdings Ltd. v. British Columbia (Ministry of Forests, Lands and Natural Resource Operations)*, 2018 BCCA 214 at para 61.

[5] *British Columbia v Greengen Holdings Ltd.*, 2023 BCCA 24 at para 27.

[6] *British Columbia v Greengen Holdings Ltd.*, 2023 BCCA 24 at para 73.

[7] *Odhavji Estate v Woodhouse*, 2003 SCC 69 at para 23.

[8] *British Columbia v Greengen Holdings Ltd.*, 2023 BCCA 24 at para 64.

[9] *British Columbia v Greengen Holdings Ltd.*, 2023 BCCA 24 at paras 64-69.

[10] *British Columbia v Greengen Holdings Ltd.*, 2023 BCCA 24 at para 72.

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### **A Cautionary Note**

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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