

CANADA / JUDGMENT

British Columbia v. Greengen Holdings Ltd.

2023 BCCA 24

COURT

British Columbia Court of Appeal

DECIDED

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2023 BCCA 24 British Columbia v. Greengen Holdings Ltd.

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

British Columbia v. Greengen Holdings Ltd.,

2023 BCCA 24

Date: 20230118

Docket: CA47883

Between:

His Majesty the King in Right of the Province of British Columbia (Ministry of Forests, Lands and Natural Resource Operations; Regional Water Manager; Ministry of Environment)

Appellants

(Defendants)

And

Greengen Holdings Ltd., also known as Greengen Holdings Inc.

Respondent

(Plaintiff)

Before:

The Honourable Mr. Justice Groberman

The Honourable Mr. Justice Willcock

The Honourable Mr. Justice Hunter

The Honourable Mr. Justice Grauer

The Honourable Mr. Justice Marchand

On appeal from: An order of the Supreme Court of British Columbia, dated October 14, 2021 (Greengen Holdings v. Her Majesty the Queen in Right of the Province of British Columbia, Vancouver Docket S162484).

Counsel for the Appellants:

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Place and Date of Hearing:

Vancouver, British Columbia

October 18, 2022

Place and Date of Judgment:

Vancouver, British Columbia

January 18, 2023

Written Reasons by:

The Honourable Mr. Justice Hunter

Concurred in by:

The Honourable Mr. Justice Groberman

The Honourable Mr. Justice Willcock

The Honourable Mr. Justice Grauer

The Honourable Mr. Justice Marchand

Summary:

This appeal concerns the pleadings requirements for an action in misfeasance in public office pleaded directly against the Province and various government entities. In 2018, in response to an earlier strike-out application, this Court held that the respondent Greengen had pleaded a valid cause of action in misfeasance in public office. The Province applied again to strike the pleadings on the basis that Greengen had not named as defendants in the action the individual officials whose conduct was impugned. A chambers judge dismissed the application on the basis that this Court had already held that the pleadings set out a valid cause of action.

Held: Appeal dismissed. The only avenue open to the Province on this appeal is the submission that individual officials must be named as defendants in a misfeasance action, an issue not addressed in this Court's 2018 decision. Individuals must be named as defendants only when a remedy is sought against them personally, which is not the case in this claim. Greengen's pleadings as subsequently particularized give sufficient notice to the Province of the case to be met, and adequately identify the individual officials whose conduct is at issue. Greengen is entitled to bring a misfeasance claim directly against a public authority, provided that authority is authorized to make a decision. Government ministries are not decision-making entities, and the plaintiff is directed to substitute "Minister" for "Ministry" in the style of cause, and to show each of the public authorities in the style of cause as a separate defendant.

Reasons for Judgment of the Honourable Mr. Justice Hunter:

- [1] This appeal, brought at the pleadings stage, requires consideration of the proper parties to a claim of misfeasance in public office. The respondent Greengen Holdings Ltd. ("Greengen") has brought a misfeasance claim against the Crown and various governmental entities, but has not named the individuals whose conduct is impugned as defendants in the action. The Province's application to strike the respondent's pleadings was dismissed. The central question raised on this appeal is whether the failure to name the individuals as defendants is fatal to the claim. As well, this appeal requires clarification of the basis on which governmental entities may be held liable for misfeasance in public office.
- [2] In March of 2016, Greengen filed a Notice of Civil Claim against the Provincial Crown and various governmental entities claiming damages for misfeasance in public office. Greengen also filed an application for judicial review of the statutory decisions to which it took exception. The Province brought an application in Supreme Court Chambers for an order dismissing Greengen's civil claim as a collateral attack on the statutory decisions. The application was brought under Rule 9-5 of the Supreme Court Rules, among others. The chambers judge ordered a stay of the claim pending resolution of the judicial review application, and an appeal was taken to this Court. In a judgment indexed at 2018 BCCA 214 ("Greengen 2018"), this Court allowed the appeal, holding that Greengen had pleaded a valid civil cause of action that should be allowed to proceed.

- [3] In October 2021, the Province brought another application under Rule 9-5 seeking an order dismissing Greengen's action on the basis that Greengen had not sued the particular public officials whose conduct was the foundation of the misfeasance claim. The chambers judge hearing the application dismissed the application summarily on the ground that this Court had already held that Greengen had pleaded a valid cause of action. The Province appeals.
- [4] In *Greengen* 2018, this Court reviewed the pleadings filed by Greengen and held that Greengen had pleaded a valid cause of action. In other words, the elements of a cause of action in misfeasance in public office had been properly pleaded. I see no basis for reconsideration of that decision.
- [5] The issue raised on this appeal, namely whether the pleadings are fatally deficient because Greengen has not sued the particular public officials whose conduct is impugned, was not addressed by this Court in *Greengen* 2018. For the reasons that follow, I would not give effect to this ground. While Greengen would be required to claim against the particular public officials as defendants if they sought a remedy against them, it is not a requirement that a plaintiff do so when the misfeasance claim is made directly against public authorities. In such a claim, the plaintiff must identify the relevant public officials, to the extent that their identity is known, in order to ensure that the defendant knows the case it has to meet, and to ensure that the public officials whose conduct is questioned can be defended by the public authority for which they worked. That was done in this case through the vehicle of particulars.
- [6] We have been advised that discoveries are complete and a trial is scheduled for the spring of 2023. It is in the interests of justice that the trial proceed without further interlocutory applications seeking to derail the proceedings. For the reasons that follow, I would dismiss the appeal, but direct the respondent to amend the style of cause in respect of the government ministries to name the Minister rather than the ministry, and to show each public authority as a separate defendant.

Background

- [7] Greengen is an independent developer of sustainable hydropower projects in B.C. In 2005, it sought to develop a run-of-river hydropower project on Fries Creek, near Squamish, British Columbia (the "Project"). Fries Creek is located within the traditional territory of the Squamish Nation. To develop the Project, Greengen required a water licence and a Crown land tenure.
- [8] Greengen submitted its applications through an office of Her Majesty the Queen in right of the Province of British Columbia (the "Province"), then known as the Integrated Land Management Bureau. In July 2006, Greengen was awarded an Energy Purchase Agreement by BC Hydro, under which it provided a \$300,000 performance bond. In December 2006, it obtained an archaeological overview assessment of Fries Creek, which indicated that the area had not been intensively utilized by First Nations people in the past and the Project

would not have a major impact on the valley. In April 2007, Greengen submitted a development plan for the Project to the Province.

- [9] In July 2007, the Province and the Squamish Nation entered into a land use agreement, which provided for the protection of 22 cultural sites within the traditional territory of the Squamish Nation, including Fries Creek. The Province agreed not to issue new Crown land tenures within the cultural sites.
- [10] In August 2009, Greengen's applications for a water licence and Crown land tenure were denied, respectively, by a regional water manager under the Water Act, R.S.B.C. 1996, c. 483, and the minister's delegate under the Land Act, R.S.B.C. 1996, c. 245. The decision refusing the water licence concluded that the Project was inconsistent with the land use agreement, would adversely impact the Squamish Nation's Aboriginal rights, and in any event could not be issued due to Greengen's failure to obtain an interest in land, a prerequisite for the granting of a water licence. The decision refusing the Crown land tenure cited the land use agreement with the Squamish Nation as an "important consideration" and referred to the Squamish Nation's concerns about the impact the Project would have on the practice of spiritual bathing.
- [11] On March 17, 2016, Greengen filed a Notice of Civil Claim against the Province and the Squamish Nation. The claim against the Squamish Nation has been dismissed, and no issues arise on this appeal in respect of that claim. Greengen also filed an application for judicial review of the decisions denying it the permits. That application has since been abandoned. The Province applied for dismissal of Greengen's claim as a collateral attack on the statutory decisions. In July 2017, in reasons indexed at 2017 BCSC 1280, Justice DeWitt-Van Oosten stayed Greengen's civil claim pending determination of the judicial review proceedings. Greengen appealed to this Court.
- [12] The central issue before this Court in Greengen 2018 was whether Greengen had pleaded a valid cause of action. Justice Fisher summarized the centrality of this issue at the outset of her judgment for the Court:
- [2] The doctrine of collateral attack stems from considerations related to the administration of justice. It serves to prevent a party from circumventing the effect of a decision and attacking it in the wrong forum. It does not go so far as to prevent a party from pursuing a valid civil action against a government body provided the essential character of the claim is not a claim for judicial review. These principles stem from cases such as *Garland v. Consumers' Gas Co.*, 2004 SCC 25, *British Columbia (Workers' Compensation Board) v. Figliola*, 2011 SCC 52, and most significantly here, *Canada (Attorney General) v. TeleZone Inc.*, 2010 SCC 62.
- [3] For the reasons that follow, I have concluded that Greengen has pleaded a valid civil cause of action that should be allowed to proceed. I would therefore allow the appeal.
- [13] The issues before this Court were explained in this way:

[22] I would define the issues in this appeal as follows:

1. Does the test established in *TeleZone* apply in the circumstances of this case?
2. Does Greengen plead a valid cause of action for misfeasance in public office?
3. Did the chambers judge err in ordering a stay of the civil action pending conclusion of the judicial review?

[14] The pleadings issue was considered under the heading, "Does Greengen plead a valid cause of action for misfeasance in public office?" Justice Fisher reviewed several leading cases on misfeasance in public office, including *Odhavji Estate v. Woodhouse*, 2003 SCC 69 ("*Odhavji*"), and concluded that:

[58] Although Greengen's pleadings for the legal basis are brief, they contain the essential elements of the cause of action for "Category B" misfeasance in public office as defined in *Odhavji Estate*.

[60] Greengen's pleadings reflect the elements of the tort as follows:

- 1) deliberate, unlawful conduct: the decisions were made "for collateral political or otherwise improper reasons" (NOCC at para. 67);
- 2) made with knowledge that the conduct is inconsistent with the obligations of the office, is *ultra vires*, or omits a legally required act: the Province knew that the decisions were "invalid, unlawful and *ultra vires*" (NOCC at paras. 70, 71); and,
- 3) made with awareness that the unlawful conduct is likely to injure the plaintiff: the Province knew that the decisions were likely to cause damage to Greengen, or alternatively, was recklessly indifferent to the possibility that the decisions were likely to cause damage (NOCC at paras. 70, 71).

[61] The material facts that support these elements, as well as the claim for damages, should be summarized with more particularity, but they are pleaded elsewhere in the NOCC. (For example, Greengen asserts that the Squamish Nation's claim of use for spiritual bathing was completely unsubstantiated and the Province knew this: NOCC paras. 48, 50–51, 54–57.) In this circumstance, the deficiencies in the pleading can be remedied by providing particulars.

[62] Ultimately, Greengen's action is founded on the refusal decisions and the financial losses consequent on them. In these circumstances, it should be entitled to pursue it.

- [15] On February 7, 2019, the Province demanded particulars of, among other things, the individual public officers whose conduct was alleged to constitute misfeasance in public office. Greengen responded on February 22, 2019, identifying three individuals who "knew or were recklessly indifferent to the possibility that the Land and Water Decisions were invalid, unlawful, and ultra vires". A fourth individual was subsequently identified by Greengen in further response to the same demand for particulars.
- [16] On November 4, 2019, the Province filed another application to dismiss Greengen's pleading under Rule 9-7. This application was dismissed by Justice Milman, who concluded that "the application should be dismissed and the matter should proceed to trial": 2020 BCSC 467 at para. 9.
- [17] On September 14, 2021, the Province applied for leave to set down a hearing on a point of law under Rule 9-4 regarding the issue of whether Greengen is required to name an individual as a defendant. In dismissing the Province's application for leave under Rule 9-4, Justice Skolrood found that this Court already determined that Greengen has pleaded a valid cause of action in misfeasance, and advised the Province to revisit its plan to proceed with its proposed application under Rule 9-5 concerning the same issue: 2021 BCSC 2002.
- [18] Notwithstanding this advice, the Province brought yet another application for dismissal of the claim on October 4, 2021. The application sought an order "striking the amended notice of civil claim without leave to further amend, and dismissing the claim under Rule 9-5 (1)(a) and/or (b). The basis of this application was described this way:
- (i) misfeasance cannot be committed by the government at large; it is scandalous not to name the individual tortfeasor as a defendant;
 - (ii) failure to plead vicarious liability or material facts establishing vicarious liability is fatal to the claim;
 - (iii) (deleted on amended application)
 - (iv) there is no cause of action against the Province in misfeasance or for vicarious liability in misfeasance;
 - (v) the claim brought in misfeasance is scandalous.
- [19] This application was heard and dismissed by Justice Iyer on October 14, 2021, one month before the then-scheduled commencement of trial. In unpublished oral reasons for judgment, Justice Iyer dismissed the Province's application under Rule 9-5 for the same reason Justice Skolrood dismissed its application under Rule 9-4 -- because Greengen 2018 was dispositive of whether Greengen's pleading discloses a valid cause of action in misfeasance. The Province appeals.
- [20] The trial is now scheduled to proceed for 60 days starting in April 2023.

Position of the Parties

[21] The Province summarized its central argument in the Opening Statement of its factum in these terms:

For the tort of misfeasance in public office to have any reasonable prospect of success, the plaintiff must claim against the impugned individual servant (or "public officer") individually. Authorities from this Court overwhelmingly support this basic pleading requirement, and for good reason. Persons against whom intentional torts are alleged must be a party to that proceeding so they can properly defend themselves. Procedural fairness requires nothing less.

The claim advanced by Greengen Holdings Inc. is fundamentally and fatally flawed because it fails to meet this pleading requirement. It alleges the Province is directly liable for misfeasance arising from Greengen's denied applications to develop a hydropower project. Greengen does not name as a defendant any public officer who it alleges committed the tort.

[22] The Province relies on this Court's judgment in *J.P. v British Columbia (Children and Family Development)*, 2017 BCCA 308 ("J.P.") and cases that have followed J.P., for the proposition that failure to claim against the individual office holders whose conduct is impugned as defendants is fatal to a claim of misfeasance in public office.

[23] Greengen submits that issue estoppel prevents the Province from relitigating the validity of the pleadings, and that in any event, there is no definitive rule that requires plaintiffs to name the public officials whose conduct is impugned as defendants in a misfeasance claim.

[24] I am sympathetic to Greengen's position on issue estoppel. The issue the Province wishes to argue could have been raised before this Court at the time Greengen 2018 was being decided. The validity of the pleadings was squarely before the Court then, and it is not open to parties to bring serial applications seeking the same relief with different arguments. Nevertheless, I consider it appropriate to address the main issue the Province raises: whether a plaintiff alleging misfeasance in public office is required to name as defendants the public officials whose conduct is at issue. There is some uncertainty in the case law on this subject, and this division has been constituted with five judges in the event that any clarification of this Court's jurisprudence is required.

The context of this application

[25] This is an appeal from an application to strike out pleadings under Rule 9-5(1)(a). Such an application can succeed only if it is "plain and obvious" that the action cannot succeed. The Supreme Court judgment in *Odhavji* also considered (and ultimately dismissed) an application to strike pleadings of a misfeasance claim. The Court summarized the burden on the applicant in this way:

[15] The test is a stringent one. The facts are to be taken as pleaded. When so taken, the question that must then be determined is whether there it is "plain and obvious" that the action must fail. It is only if the statement of claim is certain to fail because it contains a "radical defect" that the plaintiff should be driven from the judgment.

- [26] The purpose of pleadings was reviewed recently in *Rain Coast Water Corp. v. British Columbia*, 2019 BCCA 201 at para. 157 ("*Rain Coast Water Corp.*"). Pleadings define the issues of fact and law for determination in an action and give opposing parties fair notice of the case to be met. If a party is unfairly disadvantaged by a failure to raise or properly particularise an issue in pleadings the court should not determine that issue. If it does, on appeal the result will be set aside.
- [27] This Court has already concluded in *Greengen* 2018 that *Greengen* has pleaded a valid cause of action in misfeasance. The narrow issue not addressed by *Greengen* 2018 and advanced by the Province in this appeal is the assertion that a misfeasance in public office claim is fatally flawed unless the individual public officials whose conduct is impugned are named as defendants in the action. This requirement is said to be based on the proposition that only the officials themselves can be directly liable for a misfeasance claim, and also on the assertion that naming the public officials as parties to the action is necessary to ensure fairness to those officials in the event they wish to participate in the trial to defend their conduct.

Can a Misfeasance in Public Office Claim be Made Directly Against Public Authorities Without Adding Individuals as Defendants?

- [28] The tort of misfeasance in public office may arise in at least two ways. A public official with specific statutory authority personal to that official may make a decision alleged to constitute misfeasance. For example, in *Odhavji*, Justice Iacobucci traced the origins of the tort to *Ashby v. White* (1703), 2 Ld. Raym. 938, 92 E.R. 126, in which Holt C.J. found that a cause of action lay against an elections officer who maliciously and fraudulently deprived Mr. White of the right to vote. In such a case, the claim will be made against that official, who must be named as a defendant, as the elections officer was in *Ashby v. White*. Misfeasance in public office can also arise when a decision is made by a governmental entity. Because municipalities and governmental ministries can only act through officials or employees, the conduct of particular individuals will be central to the determination of whether the tort has been made out. The central question raised by this appeal is whether a misfeasance claim can be made directly against a public authority, without adding as defendants the public officials who act on behalf of the authority, or whether the public officials must always be added as defendants.
- [29] The Supreme Court of Canada did not address this issue in *Odhavji*; the defendants in the misfeasance claim included both the individual police officers involved in a fatal shooting, as well as the Metropolitan Toronto Police Services Board (the public authority) and Her Majesty the Queen in right of Ontario. However, in explaining the elements of a misfeasance claim in *Odhavji* the Supreme Court relied heavily on a decision of the House of Lords that does consider the question, *Three Rivers District Council v. Bank of England* [2000] UKHL 33; [2000] 2 WLR 1220.

Three Rivers and the Scope of Public Office

- [30] In Three Rivers, the plaintiffs alleged that officers with the Bank of England improperly issued a licence to the Bank of Credit and Commerce International and then failed to close the bank when it became evident that the bank should be closed. The sole defendant was the Bank of England; the officers were not individually named as defendants. An issue arose as to whether the failure to name the officials was a defect in the pleadings.
- [31] Lord Steyn, who wrote the principal judgment for the House of Lords, began his explanation of the ingredients of the tort in this way:

The ingredients of the tort

It is now possible to consider the ingredients of the tort. That can conveniently be done by stating the requirements of the tort in a logical sequence of numbered paragraphs.

- (1) The defendant must be a public officer:

It is the office in a relatively wide sense on which everything depends. Thus a local authority exercising private-law functions as a landlord is potentially capable of being sued: *Jones v. Swansea City Council*. In the present case it is common ground that the Bank satisfies this requirement.

- [32] Lord Hobhouse, who delivered a concurring judgment, expressed the same view:

It is not necessary to discuss further who comes within the description 'holder of a public office'. It is a broad concept (*Calveley v. The Chief Constable of the Merseyside Police* [1989] AC 1228, *Henly v. The Mayor of Lyme* 5 Bing 91, 107-8) and has been further extended by recognising that there may be a vicarious liability of the relevant governmental authority for the acts of the public official. (*Racz v. Home Office* [1994] 2 A.C. 45.

- [33] Three Rivers came back to the House of Lords a year later. The plaintiff had amended its pleadings to conform with the elements of the tort explained by the House of Lords, and the issue was whether the claim was nevertheless bound to fail. In *Three Rivers District Council v. Governor and Company of The Bank of England* [2001] UKHL 16; [2001] 2 All ER 513, the House of Lords decided by a majority that the claim should proceed to trial. Lord Hope addressed the argument that the plaintiff had not linked allegations of dishonesty with particular officials of the bank, stating that "I consider that the Bank has been given sufficient notice of the claimants' case against their officials in the particulars when read with the documents": para. 62.

- [34] Lord Hutton addressed the same issue in more explicit terms:

126. Mr. Stadlen QC, for the Bank, submitted that the pleadings were defective because they did not allege that identified or identifiable bank officials took conscious decisions to do acts or to refrain from doing acts with the requisite guilty state of mind. I do not accept that submission. It is clear from the authorities that a plaintiff can allege misfeasance in public

office against a body such as a local authority or a government ministry (see *Dunlop v Woollahra Municipal Council* [1982] AC 158 and *Bourgoin SA v Ministry of Agriculture, Fisheries and Food* [1986] QB 716). Therefore I consider that the plaintiffs are entitled in their pleadings to allege in the manner they have done misfeasance in public office against the Bank without having to give particulars of the individual officials whose decisions and actions they claim combined to bring about the misfeasance alleged.

[Emphasis added.]

- [35] These judgments of the House of Lords provide strong support for the conclusion that misfeasance claims may be made directly against public authorities without the necessity of suing the individual officials whose conduct is at issue and without pleading vicarious liability.

Canadian Jurisprudence

- [36] The broad approach to the concept of public office articulated in *Three Rivers* was applied by the Ontario Superior Court of Justice in *Georgian Glen Developments Limited v. The Corporation of the City of Barrie* (2005), 13 M.P.L.R. (4th) 194. In that case, Howden J. cited *Three Rivers* in concluding that misfeasance in public office could be advanced against government ministries and bodies as well as individual office holders:
- [11] The plaintiff in this case has sued the municipality, a municipal corporation, rather than an individual officer or officers. The caselaw demonstrates that courts have not maintained any distinction between officer holders and the office itself. The tort of misfeasance in public office has been sustained against a wide variety of defendants including individual officer holders, municipalities and government ministries and bodies. The seminal case of *Three Rivers District Council v. Bank of England* (2002) W.L.R. 1220 (H.L.) noted that the term "public office" has a wide meaning. *Three Rivers* and the other cases implicitly suggest that proceedings can be maintained against an individual office holder as well as against an entire entity as in this case.
- [37] The Ontario Court of Appeal considered this issue in *Ontario Racing Commission v. O'Dwyer*, 2008 ONCA 446 ("O'Dwyer"). The plaintiff's claim was that one of the Racing Commission's officials had placed a telephone call to the plaintiff's employer that had led to his not being rehired by the raceway as a starter. The official was identified in the judgments but was not named as a defendant. The trial judge held, and the Court of Appeal affirmed, that the elements of misfeasance in public office had been made out. On the question of the scope of the public officer requirement, the Court of Appeal said this:
- [43] The requirement that the tort be committed by a "public officer" was addressed in the seminal case of *Three Rivers D.C. v. Bank of England* (No. 3), [2000] 2 W.L.R. 1220, in which the House of Lords commented that public office is to be defined in "a relatively wide sense". The decision in *Jones v. Swansea City Council*, [1990] 1 W.L.R. 1453 (C.A.), was cited for the purpose of demonstrating that a collective public body such as a council can be liable for the

tort. The decision in *Three Rivers* was largely adopted into Canadian law through the Supreme Court decision in *Odhavji Estate v. Woodhouse*.

- [38] A similar approach was taken by the Saskatchewan Court of Appeal in *Saskatchewan Power Corporation v. City of Swift Current*, 2007 SKCA 27 ("Saskatchewan Power"). The governmental entity that had been sued argued, and the chambers judge found, that "as the tort required a mental element of 'bad faith' or 'dishonesty', it was necessary for the plaintiff to identify the officer or employee who acted in bad faith or dishonestly, and further, the specific facts of the conduct must be pleaded": at para. 22. The Saskatchewan Court of Appeal did not accept this argument, explaining that it "confuses the City's claim of direct liability as against Sask Power with a claim based upon vicarious liability" and that a "corporation may itself be found liable for an intentional tort" even though it acts through the medium of individuals who are its directing mind: at para. 29. The Court held that it was open to the plaintiff to allege misfeasance directly against Saskatchewan Power, and that the identity of the individual officer holders was a matter of evidence, not an essential element of the tort: at para. 29.
- [39] The Province argues that Saskatchewan Power should be restricted to cases of corporate defendants who have as a matter of policy set out a path that constitutes misfeasance in public office, but I cannot agree. The conclusion that a governmental entity, including a Minister, may be liable for a direct claim in misfeasance in public office based on conduct of their employees or officials follows directly from *Three Rivers* and the Canadian judgments that have incorporated its reasoning.
- [40] A recent judgment of the Saskatchewan Court of Appeal in *Pedigree Poultry Ltd. v. Saskatchewan Broiler Hatching Egg Producers' Marketing Board*, 2022 SKCA 113, applied *Saskatchewan Power*, *O'Dwyer* and *Three Rivers* to conclude that "a claim for misfeasance in public office can be brought against a public authority alone and that the identity of the individual or individuals responsible for the tortious conduct need not necessarily be named in the pleadings": at para. 120. The Court went on to conclude that since the claim could be made directly against the public authority, it was not necessary to consider the appellants' alternative argument about the failure of the plaintiffs to plead vicarious liability: at para. 129.
- [41] The Alberta Court of Appeal upheld a finding of misfeasance in public office made against a governmental entity alone in *Alberta (Minister of Infrastructure) v. Nilsson*, 2002 ABCA 283 (cited in *Odhavji* at para. 19). The Ontario Court of Appeal also held that misfeasance in public office had been adequately pleaded in a case brought solely against Her Majesty the Queen in right of the Province of Ontario: *Granite Power Corp. v. Ontario*, (2004), 72 O.R. (3d) 194. In *Granite* the claim was based upon alleged misfeasance by "the Minister and/or his offices and staff": at para. 34.

- [42] This Court has refused to strike claims made directly against the Canada Revenue Agency ("CRA") based on allegations of misfeasance by officials of the CRA not named as defendants, although the specific issue raised in this appeal was not addressed by the Court: see *Leroux v. Canada Revenue Agency*, 2012 BCCA 63 (referring to "claims against the federal Crown for misfeasance in public office": at para. 18), and most recently *Myers v. Canada (Attorney General)*, 2022 BCCA 160. In *Powder Mountain Resorts Ltd. v. British Columbia*, 2001 BCCA 619, (also cited in *Odhavji* at para. 19), the plaintiffs brought a misfeasance claim against Her Majesty the Queen in right of the Province of British Columbia and William Vander Zalm, then premier of the province. The plaintiffs alleged that Mr. Vander Zalm and four other officials who were not named as defendants had committed the tort of abuse of public office for which the province was vicariously liable. The action was dismissed at trial on the merits, and the dismissal was confirmed by this Court. There was no suggestion that the failure to name the four additional officials as defendants was a relevant consideration.
- [43] The Province has relied on this Court's judgment in *Moses v. Lower Nicola Indian Band*, 2015 BCCA 61, but I do not consider that this judgment was intended to state a principle of general application concerning direct claims against public authorities. *Moses* was an appeal from an application to strike a claim of misfeasance involving the alleged wrongdoing of five band councillors. Justice Newbury, writing for this Court, expressed concern about equating the band councillors (who together performed the legislative duties of the "Band Council") with the "Band" (an executive body and separate legal entity from the Band Council). In that case, the Councillors whose actions were impugned did not comprise or carry out the duties of the "Band" (which was named as a defendant). This explains the skepticism expressed about whether "the Band itself" could be said to have committed misfeasance in public office.
- [44] Two judgments of the Federal Court of Appeal place greater emphasis on the identification of the public officials whose conduct was at issue, but neither suggest there is a requirement that the public official be named as a defendant when the claim is advanced against a public authority.
- [45] In *Merchant Law Group v. Canada Revenue Agency and Attorney General of Canada*, 2010 FCA 184 ("Merchant"), the Federal Court of Appeal confirmed the striking out of a class action misfeasance claim against the CRA on jurisdictional grounds, but went on to consider the need for identification of the public officials whose conduct was at issue. The CRA argued that plaintiffs pleading the tort of misfeasance in public office "must always state the actual name of the individuals who committed the alleged misfeasance": at para. 37. Justice Stratas held that "such a requirement, if applied strictly in every case, would impose too onerous a burden upon plaintiffs in some cases. In addition, it would go beyond the level of particularity necessary to fulfil the purposes of pleadings in civil proceedings": at para. 37. He then stated that the individuals involved should be identified, if not by name, in some other way, as a material fact that must be pleaded, explaining that "it may be impossible for a plaintiff to identify by name the particular individual who was responsible", but identifying

a particular group of individuals who were dealing with the matter, one or more of whom were allegedly responsible, by "job positions, an organizational branch, an office, or a building" would usually provide sufficient particularity to fulfill the purposes of pleadings: at para. 38.

- [46] In *Adventure Tours Inc. v. St. John's Port Authority*, 2011 FCA 198, Justice Stratas reiterated the nature of the obligation on plaintiffs to identify, but not necessarily to name, the individuals whose conduct is at issue. He clarified that *Merchant* requires the statement of claim asserting misfeasance to "identify the individuals who "count" for the purposes of this tort" but "names are not necessarily required": at para. 61.
- [47] The Ontario Court of Appeal took a similar approach in *Grand River Enterprises Six Nations Ltd. v. Attorney General (Canada)*, 2017 ONCA 526. The plaintiffs sued the Attorney General of Canada in misfeasance in public office. The claim did not name each of the Ministers alleged to have committed misfeasance. An application to strike the claim was dismissed. On appeal, the Crown argued that the claim was deficient in not pleading the material facts grounding the allegations against each Minister. The Court of Appeal held that it was sufficient to identify the group of individuals said to be responsible for misfeasance in public office by title instead of by name: at paras. 87-90.
- [48] The case law is consistent in the United Kingdom, as adopted in Canadian jurisprudence, and in the reasoning of Canadian courts. A claim in misfeasance in public office may be made directly against a public authority, and where such a claim has been made, there is no requirement to add the individual officials whose conduct is impugned as defendants in the action. As Justice Stratas points out in *Merchant*, it may not be possible in every case for a plaintiff to identify by name the particular individual who was responsible for the impugned decision. It follows from this that a plea of vicarious liability is not required for a direct claim of misfeasance against a public authority.
- [49] The authorities are not quite so uniform in determining whether the names of the individual office holders must be pleaded as material facts, or at all. The analysis of this Court in *J.P.*, as well as Justice Stratas' analysis in *Merchant*, convinces me that in claims of misfeasance made directly against a public authority, the individual officials whose conduct is at issue (to the extent known to the plaintiff) must be identified, either in the statement of facts in the Notice of Civil Claim or in particulars as required.

J.P. and Trial Fairness

- [50] The requirement that a plaintiff in a misfeasance claim directly against a public authority identify to the extent possible the individual office holders whose conduct is at issue serves two purposes. In most cases, it will be necessary to enable the defendant to know the case to be met. This is the pleadings requirement. It also ensures the individual office holders understand that their conduct is being impugned, so that they may take whatever steps they consider appropriate to defend their actions. This is the fairness requirement.

- [51] The importance of fairness to the individual officials was the focus of the judgment in J.P. The judgment in J.P. did not involve an application to strike pleadings. It was the judgment on appeal of a trial order after a 91-day trial in which a social worker was found to have committed the tort of misfeasance in public office. The circumstances of this finding can fairly be described as extraordinary. A family law proceeding under both the Divorce Act, R.S.C. 1985, c. 3 and the former Family Relations Act, R.S.B.C. 1996, c. 128, had been combined for trial with a civil proceeding brought against the Province for negligence, breach of fiduciary duty and a declaration that the Director of Child, Family and Community Services had acted in bad faith toward the plaintiff. Misfeasance in public office was not pleaded as a cause of action until after the close of final submissions. At that point, the evidence was closed. The social worker in question had testified without any inkling that he was in jeopardy of being found to have committed the tort of misfeasance in public office. He was never cross-examined on the bad faith allegation and none of the Ministry social workers testified that he had acted in bad faith. The Further Amended Notice of Civil Claim, alleging for the first time misfeasance in public office, was not filed until four days before the trial judge issued his reasons for judgment. No claim was ever made against the social worker in the pleadings.
- [52] This Court allowed the appeal, set aside the orders in the civil proceeding, and dismissed the Notice of Civil Claim. Madam Justice D. Smith wrote the comprehensive judgment for the Court. She identified many defects in the trial process, including the acceptance of expert testimony from an individual who had knowingly misrepresented her qualifications to the court. She concluded that the trial judge's findings about the social worker's conduct amounted to palpable and overriding error, specifying and elaborating upon 12 different factual errors. She further concluded that the judge's adverse finding of credibility with respect to the social worker was coloured not only by misapprehension of the evidence on critical points, but by the judge's acceptance of the plaintiff's speculative conspiracy narrative.
- [53] At the conclusion of her analysis of the misfeasance finding, Justice Smith made these comments:
- [350] The tort of misfeasance in public office is an extremely serious claim. Finding someone liable for such egregious conduct requires, at the very least, that the individual be a named party in the Notice of Civil Claim so that they may defend the claim against them. []
- [54] The Province submits that this statement supports the conclusion that in any claim of misfeasance in public office, the individual whose conduct is at issue must be named as defendant. I do not agree. The point being made in J.P., in my view, is that it is fundamentally unfair to find an individual liable for the tort of misfeasance in public office without naming that person as a party to the lawsuit so that the allegation can be defended. In J.P., the trial judge found the social worker committed the tort, although the case had been pleaded against the governmental entity. If the plaintiff was seeking a remedy against the social worker, the social worker should have been a defendant in the suit. If no remedy

was sought against the individual, it would have been sufficient to identify the individual in the pleadings, without the necessity of adding the social worker as a defendant. The statement in J.P. should not be taken as a requirement that in all misfeasance claims, the individual whose conduct is impugned must be added as a named party to the litigation.

- [55] The Province also relies on this Court's judgments in *Rain Coast Water Corp. and Wu v. Vancouver (City)*, 2019 BCCA 23, in support of its position that the individual office holders whose conduct is at issue must always be named as defendants in a misfeasance action. In my view, these judgments should be read as reinforcing the conclusion in J.P. that if a plaintiff seeks a remedy against an individual for the tort of misfeasance in public office, fairness requires that the individual be named as a party to the action. But, where a claim is made directly against the public authority responsible for an impugned decision, plaintiffs do not require findings of liability against specific individuals and they are not required to seek them.
- [56] In *Rain Coast Water Corp.*, a claim for misfeasance in public office was brought against both Her Majesty the Queen in right of the Province of British Columbia and two public officials whose conduct was impugned. The claim was successful at trial. This Court allowed the appeal, primarily on the basis that "there was no evidence, direct or circumstantial, of any deliberate unlawfulness by any Crown defendant associated with the WCW Agreements": at para. 162. Justice Dickson referenced J.P. and confirmed that "alleged tortfeasors are entitled to notice when serious claims of wrongdoing are levelled against them and to the opportunity to defend themselves against any such claim": at para. 151. It was unnecessary to discuss the distinction between direct claims against a public authority and claims against individuals because both were made defendants in that case.
- [57] In *Wu v. Vancouver (City)*, 2019 BCCA 23, a claim of misfeasance against the City of Vancouver was dismissed at trial, but the City was found liable for "a novel private law duty of care to make a decision within a reasonable time in accordance with the applicable bylaws": at para. 2. This Court concluded that the City did not owe the plaintiffs the asserted duty of care and allowed the appeal: at para. 82. The Court went on to consider the misfeasance claim, although that claim had been dismissed at trial on the basis of a limitations issue. Citing J.P. this Court stated that "in an action alleging misfeasance of public office or abuse of office the plaintiff(s) must name as defendant(s) the public official(s) who are alleged to have abused their office": at para. 93. I agree with the statement in *Wu* to the extent that it addresses claims made against individuals, but not with respect to claims made directly against public authorities. The misfeasance claim in *Wu* had been dismissed at trial. It was not necessary for the Court to go further to consider the distinction between claims against individuals and claims against public authorities and it did not undertake this analysis. In these circumstances, I do not consider that the statement in *Wu* is dispositive of the question of whether individual public officials whose conduct is impugned must be named as defendants in claims of misfeasance made directly against a public authority.

- [58] Bringing a claim directly against a public authority does not obviate the necessity of identifying the individuals whose conduct on behalf of the authority is challenged. The egregious fact situation in J.P. illustrates one reason the individual officials whose conduct is at issue (to the extent known by the plaintiff) must be identified. Identification assists with the primary purpose of the pleadings, to enable the defendant to understand the case to be met. Identification also gives the individual officials notice that their conduct is at issue (even if a finding is not sought against them personally) and the opportunity to take steps they consider appropriate to defend their actions. J.P. offers a clear example of the risk to the plaintiff if the individual officials are not adequately identified and trial fairness precludes a finding against them.
- [59] In my respectful opinion, however, it goes too far to state that the individual official whose conduct is at issue must always be named as a party in the Notice of Civil Claim. It is not consistent with the common law jurisprudence on the development of this tort and is not necessary to ensure fairness to the individual official. No authority has been brought to our attention from any other common law jurisdiction stating that in every misfeasance claim, the failure to add individual officials as defendants is fatal to the claim. Unless the claim is made solely against the individual office holders, what is necessary is notice to the defendant, who will in the normal course give notice to the individuals. The identity of the individual official, to the extent the plaintiff knows it, must be pleaded, either in the Notice of Civil Claim or in particulars of that claim should they be required.
- [60] The Province has submitted that it is "scandalous" for the plaintiff to identify individuals as having committed misfeasance in public office without adding them as defendants so that they can defend themselves. I see no merit in this submission. Once an individual is identified as having their conduct put in question, it is open to the individual to apply to be added as a party if they wish. It does not seem a likely scenario, but it is an available one. It is more likely that the plaintiff will name the individual officers as defendants, if for no other reason than to obtain discovery from them. But I can see no requirement in the common law, or in principles of procedural fairness, to do so, as long as the individual officials whose conduct is at issue are adequately identified.
- [61] While I consider it open to a plaintiff to add the individual officials as parties to a misfeasance claim brought against a public authority, I note that even that practice has been criticized. In *Adams v. Law Society of England and Wales*, [2012] EWHC 980 (QB), a plaintiff brought a claim in misfeasance in public office against the Law Society and ten of its employees. The lawsuit was dismissed on summary judgment, but in doing so, Justice Foskett questioned the appropriateness of naming all the individuals as defendants in a misfeasance claim brought against the public authority responsible for their actions:
161. For my part, I would have thought it only when absolutely necessary that the individuals would have to be made defendants in their own right. In the normal course of events, the proceedings can be launched against the institution (with, as I have said, the individuals said to be responsible for the misfeasance identified in the pleadings, the assertion being made

that the institution is vicariously liable for their acts) and a defence can be awaited. If the defence asserts that an individual was acting outside the scope of his or her employment and vicarious liability is denied, then an application to amend [to] join the individual concerned could be made.

- [62] Justice Fosskett went on to observe that "leaving aside the seriousness of such an allegation and the anxieties induced in people who probably thought they were merely doing their job at the time of the material events, [naming the individuals as defendants] has the potential for increasing costs significantly and unnecessarily": para. 162.
- [63] J.P. was an unusual case in which fairness to the individual office holder assumed paramount importance because of the extreme unfairness of the trial process in that case. It serves as an important reminder that in some (though not all) allegations of misfeasance, the sting of the allegation will fall on public officials more than the governmental entities for which they work. In those cases, fairness to the individual reinforces the pleadings requirement that the individuals whose conduct is at issue must be identified in such a way that they will receive notice of the allegations. If the claim is made against the individuals alone, they must be named as defendants. In my opinion, however, there is no categorical rule that in a claim for misfeasance in public office brought against a public authority the individual official whose conduct is impugned must be added as a party to the claim.

Are the Public Authorities in this Claim Properly Identified?

- [64] 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. In this case, the Amended Notice of Civil Claim seeks relief against "the Government Entities" responsible for the decisions. No individual official is identified.
- [65] The defendant in this case is shown as "His Majesty the King in Right of the Province of British Columbia (Ministry of Forests, Lands and Natural Resource Operations; Regional Water Manager; Ministry of Environment)". The style of cause is confusing, in that it is not clear whether there is a single defendant or several. On full consideration of the allegations it is clear that the allegations of misfeasance in public office are directed at the public authorities responsible for the issuance of water licences and land tenures.
- [66] The Regional Water Manager is a decision maker, having statutory decision-making powers under the Water Act, and is a proper defendant in respect of the allegations of misfeasance surrounding water licences.

- [67] The Ministry of Forests, Lands and Natural Resource Operations and the Ministry of Environment are not proper defendants in the misfeasance claim, because they are not public authorities with decision-making authority. The proper defendants are the Minister of Forests, Lands and Natural Resource Operations and (at least arguably) the Minister of Environment, who do have relevant decision-making authority directly or through their delegates.
- [68] During oral argument, the division raised this issue and the respondent agreed that the named defendant on a direct liability claim ought to have been the Minister, and advised that it would not object to an amendment being required. The Province expressed the view that it would be prejudiced by a change at this late stage of proceedings, but I am not satisfied that this technical correction will prejudice the Province or any of the Government entities engaged in this litigation. I would direct the respondent to amend the style of cause to replace "Ministry" with "Minister". Further, to avoid confusion, the three public authority defendants (the Regional Water Manager and the two Ministers) should be clearly named as defendants in their own right rather than as parenthetical parties.
- [69] Given the manner in which the proceedings have been advanced, these modifications are purely technical in nature, and should not necessitate further pre-trial procedures.
- [70] I have not addressed the possibility of a vicarious liability claim as vicarious liability has not been pleaded. It may be that His Majesty the King could be impleaded through vicarious liability, but I do not consider it necessary to address this issue further. Correcting the claim against the ministries should be sufficient to regularize the style of cause so that this claim can proceed to trial without further delay.

Conclusion

- [71] In *Greengen* 2018, this Court held that the plaintiff had pleaded the elements of a misfeasance claim, and that any "deficiencies in the pleading can be remedied by providing particulars": at para. 61. The Province sought particulars of the individuals whose conduct was impugned and *Greengen* responded by naming four government officials. This was the procedure directed by this Court in *Greengen* 2018 and I see no basis for striking the pleading because the names of the individuals were identified in particulars and not in the original Notice of Civil Claim. I note that this approach is consistent with the procedure adopted by this Court in *Carhoun & Sons Enterprises Ltd. v. Canada (Attorney General)*, 2015 BCCA 163, where specific individuals were not identified in the misfeasance pleadings but the Court permitted the plaintiff to amend its pleadings to identify them: para. 134.
- [72] The only issue open to the Province to raise as a pleadings issue following *Greengen* 2018 was the assertion that there is a rule that individual office holders must be added as defendants in a misfeasance claim. I have concluded that 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. I consider that Greengen's Notice of Civil Claim and particulars give sufficient notice to the Province of the case to be met, and adequately identify the individual office holders whose conduct Greengen intends to criticize. If allegations of misconduct are made against any other individual government officials during the trial, the trial judge will be in a position to ensure fairness to such individuals, having in mind the principles and result in J.P.

[73] For these reasons, I would dismiss the appeal. As well, I would direct that the style of cause be corrected by substituting "Minister" for "Ministry" and removing the parentheses in order that the proper decision-makers are named as defendants.

"The Honourable Mr. Justice Hunter"

I AGREE:

"The Honourable Mr. Justice Groberman"

I AGREE:

"The Honourable Mr. Justice Willcock"

I AGREE:

"The Honourable Mr. Justice Grauer"

I AGREE:

"The Honourable Mr. Justice Marchand"

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