



## Claims for Misfeasance in Public Office: A Brief Summary

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May 25, 2007

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## **CLAIMS FOR MISFEASANCE IN PUBLIC OFFICE – A BRIEF SUMMARY**

In the last decade, plaintiffs unhappy with the economic impact that decisions or actions of public authorities have had on them have increasingly turned to the tort of misfeasance in public office as an avenue for obtaining compensation.

The tort of misfeasance in public office (also referred to as abuse of power or abuse of authority) has been on the Canadian jurisprudential radar screen since at least the late 1950's. However, because of changes in the law in the past decade that have expanded the scope of the tort, and corresponding limitations placed on the liability of public authorities for negligence, there has been a virtual explosion of cases on the topic in recent years.

### **Origins of the Tort**

The starting place for a discussion of this tort is the well-known decision of the Supreme Court of Canada in *Roncarelli v. Duplessis*, [1959] S.C.R. 121. Roncarelli, a member of the Jehovah's Witnesses, was a proprietor of a restaurant and held a liquor licence for that restaurant. He posted bail for nearly 400 Jehovah Witnesses who had been arrested for distributing printed material related to their faith contrary to by-laws. Maurice Duplessis, premier of Quebec during this time, directed the Quebec Liquor Commission to revoke Roncarelli's liquor licence and to declare him banned forever from obtaining a licence. Duplessis testified that he believed it was his right and his duty to remove the "privilege" of the licence from Roncarelli because of Roncarelli's support for the Jehovah's Witness campaign.

The Supreme Court of Canada found that Duplessis, as a matter of fact, caused the permit to be cancelled and therefore caused Roncarelli harm. The Court held that Duplessis was not acting in the exercise of his official power because his purpose was wholly irrelevant to the *Quebec Alcoholic Liquor Act*. Moreover, the right of cancellation of a permit was a power conferred on an independent commission and therefore was not a power that Duplessis could exercise. Finally, the Court also found that Duplessis intentionally inflicted damage upon Roncarelli.

This case is the classic depiction of what has become known as the "targeted malice" means of committing the tort of misfeasance in public office. For many years, it was necessary to demonstrate that the public official acted with the intention of causing harm to the plaintiff, in keeping with the decision in this case. Most government actors are not as blatant as Mr. Duplessis, who openly admitted his improper motive, which meant that very few plaintiffs brought successful claims relying on the tort. To succeed they had to have a "smoking gun" in the form of an admission by the defendant of his motive or a documentary record that demonstrated such a motive.

### **Expansion of the Tort in Recent Decisions**

However, in light of recent decisions, both in the United Kingdom and Canada, there is now a second way in which the tort may be committed that is less onerous for plaintiffs to prove.

In 2000, the House of Lords issued reasons for judgment in *Three Rivers District Council v. Bank of England*, [2000] 3 All E.R. 1.<sup>1</sup> The preliminary issue before them was whether a claim against the bank framed in the tort in misfeasance of public office was sustainable

The Bank of England had statutory authority over deposit-taking institutions. One institution, B.C.C.I., collapsed after fraud was committed on a large scale by senior staff. Several thousand depositors brought proceedings against the Bank of England for the tort of misfeasance in public office. The depositors alleged that senior officials at the Bank acted in bad faith by granting B.C.C.I. a license when they knew that was unlawful. They further alleged that the senior officials breached their statutory duty to supervise B.C.C.I. and to take steps to close B.C.C.I.

In considering the motion before it, the House of Lords set out the elements of the tort and confirmed what to that point had been an emerging concept – that there was a second branch of liability that did not require proof of targeted malice.

Lord Steyn, set out the elements of the tort as follows (pp. 8-11):

- (a) the defendant must be a public officer.
- (b) the defendant’s conduct must involve the exercise of power as a public officer, or the exercise of public functions.
- (c) the defendant must be shown to have one of two states of mind:
  - (i) targeted malice - conduct specifically intended to injure someone. This includes “bad faith” in the sense of exercising public powers for an improper or ulterior motive; or
  - (ii) acting with subjective knowledge that he has no power to do the act complained of and subjective knowledge that the act will probably injure the plaintiff; or acting with subjective reckless indifference with respect to the illegality of the act and subjective reckless indifference to the outcome.
- (d) the public officer must owe a duty to the plaintiff, which may be established by showing that the plaintiff has the right not to be damaged or injured by a deliberate abuse of power.
- (e) causation - the plaintiff must show that the defendant’s abuse of power caused him harm as a matter of fact.
- (f) the plaintiff must show that he has suffered damages that are not “too remote” from the defendant’s tortious act. The plaintiff must show not only that the defendant knew his act was beyond his powers, but also acted in the knowledge that his act

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<sup>1</sup> The case came before the House of Lords a second time, giving them further opportunity to discuss the tort in the context of the plaintiffs’ amended pleadings; that decision is reported at [2001] 2 All E.R. 513.

would probably injure the plaintiff or a person of the class of which the plaintiff was a member.

The Three Rivers decision was cited with approval by the Supreme Court of Canada in *Odbanji Estate v. Woodhouse*, [2003] 3 S.C.R. 263. This case was also a decision on a preliminary motion to strike. The Court accepted that there are two branches to the tort of misfeasance in public office, which it labelled “Category A” and “Category B”. Iacobucci J. states as follows at paragraph 22:

Category A involves conduct that is specifically intended to injure a person or class of persons. Category B involves a public officer who acts with knowledge both that she or he has no power to do the act complained of and that the act is likely to injure the plaintiff.

The Court went on to find that there were two elements common to each form of the tort. 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.

### **Diluted Requirement for Proving Intent in Category B Cases**

It is important to note that the tort of misfeasance in public office continues to be an intentional tort – negligent or inadvertent conduct will not found a claim. However, a plaintiff can now succeed under Category B by demonstrating reckless indifference or wilful blindness by the public officer to both his or her lack of statutory authority and as to the foreseeable harm.

An Alberta case, *Alberta (Minister of Infrastructure) v. Nilsson*, [2002] A.J. No. 1474 (C.A.), leave to appeal dismissed, [2003] S.C.C.A. No. 35, is an example of a successful Category B claim.

In 1974, Nilsson’s land was within an area that became subjected to a regulation that created a restricted development area (land freeze). The Crown registered a caveat against the land and when Nilsson’s request to develop the land was refused by the Minister, Nilsson offered to sell the land to the Crown. In 1977, the 1974 regulation was ruled to be *ultra vires*, but the government amended the enabling legislation to validate the regulation. In 1978, a third party offered to purchase the land but the Crown refused to lift the caveat. The Crown had persisted with the refusals for development in the guise of protecting the land as a greenbelt, but it was later revealed that Nilsson’s land was being targeted as land for a future transport corridor. In 1987, the parties entered into an agreement pursuant to the *Expropriation Act*. Nilsson sued the Crown for abuse of public office claiming that the Crown had committed *de facto* expropriation. Nilsson argued that Crown’s conduct was an attempt to depress land values.

The Court used circumstantial evidence to infer that the Crown, at a minimum, was aware of a risk that their conduct was illegal. This inference was drawn on a totality of the evidence, notably based on the fact that the Crown used detailed language in a press release to hide the purpose of their conduct and persisted with the disguised purpose (para. 125). Secondly, the Court also found that the appeal judge did not err in finding that Cabinet was aware of the risk of harm to landowners (para. 139).

One statement of the trial court in *Nilsson* (para. 107) is frequently quoted by plaintiffs’ counsel:

...zealous servants over-step their authority for what they believe is the best interests of the public without due regard for individuals consequently harmed, or when executive decisions are made which bend the rule and injure a few to avoid politically undesirable consequences.

### **Plaintiffs Still Fail More Often Than They Succeed**

One should not form the false impression that actions based on this tort are easy to win and that there have been numerous successful claims as a result. Far more claims fail than succeed. Two recent examples of failed claims in British Columbia illustrate the types of problems plaintiffs face in establishing the requisite intention: *First National Properties Ltd v. Highlands (District)* (2001), 198 D.L.R. (4<sup>th</sup>) 443 (B.C.C.A.) and *Powder Mountain Resorts Ltd. v. British Columbia*, [2001] 11 W.W.R. 448 (B.C.C.A.).

In *First National*, the developer plaintiff wished to obtain rezoning of a large parcel of undeveloped land which he owned. The plaintiff entered into negotiations with the mayor and the approving officer. The mayor, prior to his election, had advocated for the preservation of the property as park land. The plaintiff was unable to have the property rezoned and began discussions with numerous parties to grant options for purchase. In the end, the Province of British Columbia bought a majority of the lands from the plaintiff. During the course of negotiations with a third party, the mayor forwarded the third party information regarding the plaintiff's difficulties in obtaining rezoning. The third party forwarded the information to the Province, which used this knowledge in negotiating a lower price for the purchase of a large portion of the land. After the purchase of the land, the Province was able to obtain rezoning from the municipality for the same parcel of land that the municipality declined to rezone for the plaintiff. The plaintiff's request for rezoning for its 30 acre parcel of land adjoining the Province's rezoned parcel was denied. The plaintiff alleged that the mayor and approving officer committed abuse of public office.

This case considered the extent to which an official elected on a particular platform can pursue that objective without acting for an improper purpose bringing home liability for misfeasance in public office. The British Columbia Court of Appeal held that the defendant's motive was not malice, but rather more akin to political belief (para. 64). An improper purpose would be obtaining a private collateral advantage or acting to injure the plaintiff (paras. 39-40). Acting to preserve the land as park lands was not inherently improper. Knowledge that a decision, made in pursuit of a political objective, will adversely affect private interests is insufficient to prove malice. The Court held that courts should be cautious in attributing impropriety to political beliefs and therefore tainting otherwise lawful conduct as abusive (para. 64). While the Court held that it was improper for the defendant to aid other parties in negotiations by sharing information known to him by reason of his office, the Court held that the plaintiff failed to establish that the defendant's conduct caused the plaintiff a loss (para. 65).

In *Powder Mountain*, the plaintiff ("PMR") responded to a call by the Province of British Columbia for "expressions of interest" in the development of a ski resort. PMR was the only party to respond; it argued that a contract was formed between PMR and the Province when the Province accepted the submission of their proposal. The provincial Cabinet rejected PMR's proposal and PMR alleged that this rejection was a breach of contract and that the Cabinet members involved committed the tort of abuse of public office.

The Court found that the plaintiff failed to establish either branch of the tort. There was no finding of targeted malice because there was no evidence that any of the Cabinet members were motivated by a desire to injure PMR. Rather, the evidence demonstrated that the Cabinet members were acting in the best interests of the Province. The fact that the Cabinet members knew that their decision would adversely affect PMR is not enough to support a finding of targeted malice (para. 70). The Court also found that the plaintiff failed to establish the second branch of the tort. None of the Cabinet members performed an unlawful or *ultra vires* act, nor did they act with a wilful disregard as to whether there was a risk that their conduct was unlawful (para. 71).

## Recovery of Damages

The tort of misfeasance in public office is not actionable *per se*, which means that the plaintiff must prove some actual damage to recover compensation. However, the Manitoba Court of Appeal has held that general damages in a case of misfeasance of public office are “at large”. Therefore, in addition to any calculable economic loss, the plaintiff will also be able to recover a liberal award for losses quantified by “gut reaction rather than by calculator”: *Uni-Jet Industrial Pipe Ltd. v. Canada (Attorney General)*, [2001] M.J. No. 167 at para. 67 (C.A.). These at large damages would compensate the plaintiff for things like harm to reputation, hurt feelings and damage to self-esteem and emotional well-being. If the conduct of the public official is particularly egregious, an award of aggravated or punitive damages may also be made.

## Unresolved Questions

There are still live questions that remain to be resolved in the jurisprudence. They include the following:

- what is meant by “public officer” and, in particular, the extent to which governmental control has to be exercised over the individual for them to be deemed a public officer;<sup>2</sup>
- whether legislative action can ever serve as the basis for a claim for misfeasance in public office;
- whether plaintiffs could pursue an action of misfeasance against a collective body as opposed to an individual government actor; and
- the extent to which a court is entitled to imply the requisite intent from a documentary record.<sup>3</sup>

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<sup>2</sup> There is some discussion of this issue in *Freeman-Maloy v. Mardsen* (2006), 267 D.L.R. (4<sup>th</sup>) 37 (Ont. C.A.).

<sup>3</sup> As noted above, this issue arose in *Alberta (Minister of Infrastructure) v. Nilsson*. This issue also arose in *E. (D.) (Guardian ad litem) v. British Columbia* (2005), 252 D.L.R. (4<sup>th</sup>) 689 (B.C.C.A.), where the public officers in question were deceased.

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