NEGLIGENT MISREPRESENTATION AND MUNICIPAL OFFICIALS

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NEGLIGENT MISREPRESENTATION
INTRODUCTION

• A defendant’s misrepresentation is generally made by oral or written words however conduct may also create a misleading impression and lead to finding of misrepresentation.

• Although the traditional view was that silence would not usually suffice to found an action, the SCC has said that, in the appropriate circumstances, an implied representation can give rise to liability.
Accordingly, omissions and half-truths may be actionable as negligent misrepresentations.

If the silence renders inaccurate or incomplete an express or implied representation, a failure to divulge needed information can give rise to a misrepresentation.
The Elements of Negligent Misrepresentation

• (1) There must be a duty of care based on a special relationship between representor and representee;
• (2) The representation in question must be untrue or misleading;
• (3) The representor must have acted negligently in making this misrepresentation;
• (4) The representee must have relied in a reasonable manner on the negligent misrepresentation; and
• (5) The reliance must have been detrimental to the representee in the sense that damages resulted.

Queen v. Cognos, [1993] 1 S.C.R. 87
The Plaintiff’s Onus

- In order to succeed, the Plaintiff must establish each of the five elements of the tort.
- In addition, the limiting principles relating to damages apply to the tort of negligent misrepresentation including certainty, remoteness, mitigation and contributory negligence.
- The negligent misstatement must be the proximate cause of the loss.
- Causation alone is not enough, the negligent misstatement must be the proximate cause of the damage, or not too remote as to bar recovery.
FUTURE EVENTS

TRUMP
AMERICA YOU CAN BE MY EX-WIFE!
Representations as to a Future Event

PD Management Ltd. v. Chemposite Inc., 2006 BCCA 489

• A representation is “a statement...in regard to some past or existing fact, circumstance or state of facts”.
• A misrepresentation must pertain to a matter of fact to be actionable.
• A statement about something that will happen in the future is not actionable ... or is it?
Defence Successful:

P.S.D. Enterprises Ltd. v. New Westminster (City), 2012 BCCA 319

• The Plaintiff applied for rezoning to operate a liquor store
• A senior City planner stated that third reading was when the substantive decision was made by council. He stated that council “had never turned down a bylaw at fourth reading”
• The Plaintiff arranged his affairs based on receiving third reading of the rezoning bylaw, instead of fourth as his lawyer advised
• Third reading was in fact rescinded and the relevant bylaw never passed
Defence Successful:

• The Court held that in essence the representation was that because a fourth reading had never been denied in the past, it would not in the future be denied to the Plaintiff.

• The Court held that this was a representation as to a future event and therefore not actionable.

• Often there is a fine line between statements of opinion or predictions which are not actionable and representations of fact which are.
Defence Unsuccessful

• At a council meeting, the Reeve assured the Plaintiff that a road would be rebuilt so that the Plaintiff could proceed with a development. The Reeve stated “there is going to be a road this summer”.

• The road was not built as promised and the Plaintiff was unable to develop.

_Moin v. Blue Mountains (Town) (2000)_
Defence Unsuccessful

• The municipality argued that it could not be liable for statements regarding future events.
• The Court rejected the defence and held that the representation in essence was that Council had already decided to upgrade the road so that it would be available when needed by the Plaintiff.
• This was not a statement of intention or of future occurrences. Instead, it was a statement representing an existing commitment.
Contributory Negligence
Contributory Negligence:

- Contributory negligence is a partial defence where the defendant establishes that the Plaintiff has taken insufficient care for their own interests and by doing so partially caused or contributed to their own loss.
- A finding of negligent misrepresentation requires a finding of reasonable reliance on the part of the Plaintiff.
- Nevertheless, it is possible to raise the defence of contributory negligence for negligent misrepresentation.
Contributory Negligence


- Court found contributory negligence on the part of the purchaser
- The City’s response stated that the information was provided “for convenience only” and would not absolve the purchaser from any future inspections or demands for compliance
- However, the purchaser did have some knowledge about a prior work order and combined with the purchaser’s knowledge of the business to be purchased, should have alerted the plaintiff to make further investigation or specific inquiries
- This decision has been criticized.
Summary:

- Future representations can be interpreted as statements of present intent.
- Contributory negligence can be dismissed when the Court has already decided that reliance was reasonable.
- Communication between officials and consistent processes for reviewing information can be the difference between being wrong and being negligent.
The Perfect Storm – Case Study # 1
The Plaintiff (a corporate development company) purchased a large portion of waterfront property that for decades had previously been used as a plywood mill.

The plant was left with industrial contamination and was fraught with developmental issues and risks including environmental clean-up, First Nations issues, foreshore issues and poor market conditions.

Most significantly, the property was land locked by a railroad crossing which required a right of way across the railway in order to legally access the land.

The Plaintiff alleged that through a series of words and actions the municipality and its then mayor and planners made representations assuring the Plaintiff that a crossing agreement would be implemented in a timely manner.
• The Plaintiff claimed it relied on the representations in expending funds to develop the property.
• The Plaintiff was unable to complete the development, attract investors and/or sell the property.
• The property was foreclosed upon, the Plaintiff declared bankruptcy.
• The Plaintiff sued the TVR and its then mayor for negligent and fraudulent misrepresentation seeking damages in the range $20 million including the loss opportunity to develop and/or sell the property.
The Legal Claim

- The two main pleadings advanced by the Plaintiff were:
  1. Unjust Enrichment
  2. Negligent Misrepresentation
Unjust Enrichment

Essential elements of unjust enrichment:

1. An enrichment of the defendant;
2. A corresponding deprivation to the plaintiff; and
3. An absence of any juristic reason for the deprivation – meaning there is no reason in law or justice for the defendant’s retention of the benefit.
Unjust Enrichment

- Defendants argued no deprivation to the Plaintiff.
- The law of restitution is not intended to provide windfalls to plaintiffs who have suffered no loss.

*Air Canada v. British Columbia*  
[1989] SCJ No. 44

- The Plaintiff did not suffer any loss
Negligent Misrepresentation

- The Plaintiff’s central complaint was that the municipal defendants negligently misrepresented the status of a crossing agreement prior to and following the purchase of the property and throughout the planning and development of the property.
The Five Part Queen v. Cognos Test (Again)

• (1) There must be a duty of care based on a special relationship between representor and representee;
• (2) The representation in question must be untrue or misleading;
• (3) The representor must have acted negligently in making this misrepresentation;
• (4) The representee must have relied in a reasonable manner on the negligent misrepresentation; and
• (5) The reliance must have been detrimental to the representee in the sense that damages resulted.
1. Plaintiff Not Falsely Induced to Purchase Property

- Plaintiff was aware that no crossing agreement was in place and that obtaining an agreement would be a significant development issue.
- Defendants characterized the evidence as demonstrating that the municipality “desired a crossing” not that it guaranteed it.
- Plaintiff waived the conditions on the contract for purchase and sale with knowledge of the crossing agreement had not been formalized and that a public crossing would be necessary.
2. No Misrepresentation or Reasonable Reliance

- The alleged misrepresentations were irrelevant as the Plaintiff was already committed to developing the property and did not change its position in reliance on anything said or done by the Defendants after it purchased the property.
- The Plaintiff did not rely on statements made by the Defendant.
- If it did, the reliance was not reasonable because the Plaintiff knew the crossing agreement had not been formalized.
3. Representations of Future Events Not Actionable

- All of the Defendant’s representations clearly relate to a future event, and could not attract liability
  - Plaintiff alleged that the Defendants represented that “access would be available”;
  - The municipality “desired a crossing”; or
  - A crossing agreement “would be put in place and would be public”.
Case Study #1: Negligent Misrepresentation

- No Evidence that the crossing agreement was the reason the property could not be developed and/or could not be sold
DAMAGES
Damages

- A plaintiff who establishes negligent misrepresentation is entitled to reliance damages.

- This means the plaintiff is to be put in the position they would have been in if that misrepresentation had not been made, not if the misrepresentation had been true.

*Evenchick v Ottawa (City), (1998) 46 MPLR (2d) 303 (ONCA)*
Where a negligent misrepresentation induces a party to enter into a contract, the injured party who seeks damages in tort is entitled, so far as money can do so, to be put in the same position that he would have been in had the negligent statement not been made, not the position he would have been had the statement been true...
Defence Summary

- The Plaintiff’s claim against the municipal defendants must fail because:
  1. There was no misrepresentation.
  2. The Plaintiff did not rely on the Defendants.
  3. Plaintiff cannot establish causation.
  4. Plaintiff suffered no loss.
The Smoking Gun – Case Study #2
The Plaintiff (a numbered development company) entered into a contract of purchase and sale for a large piece of waterfront property subject to rezoning approval (this condition was later waived)

- The Plaintiff sought to develop the property
- The municipality was unaware of the subject clause
- An attempt was made to get a preliminary verbal commitment on re-zoning from the municipality
- At no time prior to completion did the Plaintiff make any inquiries regarding the issue of archaeology on the property.
- Documentation within provincial government existed that indicated the property contained an archaeological site which would limit development.
The documentation in the municipality’s possession was received from the Province in 1998 (the municipality did not have a computerized system for archiving).

However, the documentation was unfiled in storage which the current municipal employees and officials were unaware of until document production in the litigation (i.e. The Smoking Gun).
• The Plaintiff was unable to rezone the property for the desired development

• The Plaintiff sued the sellers, realtors and district alleging the failed disclosure of archaeology limited its ability to rezone and as a result the Plaintiff suffered a loss (i.e. misrepresentation by omission)
The Legal Claim

- Plaintiff pleaded negligent misrepresentation against the municipality for failing to advise it of the archaeology on the property and the effect and limitations that would have on development
Defence Summary
Representation was not untrue or misleading

- Plaintiff met with municipal employee and was aware that there was no guarantee regarding re-zoning approval
- Unreasonable for Plaintiff to expect the municipal employee to list every possible factor affecting a rezoning application
Representation was not untrue or misleading

- Municipal employee provided “broad strokes” of re-zoning process which was neither misleading or inaccurate
1. Representation Was Not Negligent

- “…it is not reasonable to assume that a municipal employee will provide every piece of information about a property relevant to the question asked, and thus not reasonable to rely on their response. Even an inaccurate statement in the context of a preliminary inquiry will not be found to be negligent.”

*Beaver Lake Industrial Park Inc. v. City of Kelowna et al, 2006 BCSC 486*

- Here, the Plaintiff knew “he was only in the pre-application stage of an uncertain process and that his proposal was a long way from fruition”.

2. No reliance, reasonable or otherwise

- The Plaintiff did not rely on the municipality’s representations as to the likelihood of success of achieving rezoning.
- However, on the fact that there had been other developments in the area which had been successful.
- The Plaintiff was advised to contact a number of government agencies and the Plaintiff did not contact any of them.
3. Contributory Negligence

- Plaintiff admitted doing no due diligence beyond a meeting with the municipal representative.
- No one else did any due diligence on behalf of the Plaintiff.
- To the extent there was any limited due diligence conducted by the Plaintiff it did not result in a change of behavior.
- The Plaintiff prematurely removed the subject clauses
The Plaintiff’s claim against the municipality must fail because:

- There was no misrepresentation at all.
- The Plaintiff did not rely on discussions with the municipal employee.
- It was unreasonable to rely on discussions with the municipal employee.
- The Plaintiff made its own decision.
RISK MANAGEMENT
Risk Management

- A specific inquiry, based on specific information for a clear purpose, requires more care on the part of the official answering
Risk Management

• Advice of professional advisors to municipal council should be heeded

• Ultimate destination of the information provided must be kept in mind
Risk Management

• Inter-departmental communication is key
• A consistent process of file review and the information that it contains should be developed and followed
Risk Management

- Municipal planners should request more information before giving an opinion.
- A perfect or complete answer need not be given, but one must understand the facts before giving an opinion as to the likelihood of acceptability of a business plan within a certain zoning.
- You can be wrong, but not negligent.