

LIDSTONE & COMPANY

Looking for the "Stench of Corruption": Liability for Misfeasance, Bad Faith and Abuse of Public Office

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Introduction

- Disclaimer
- What we will cover:
 - Distinction between misfeasance and bad faith
 - Tort of Misfeasance in Public Office
 - Personal Liability vs Corporate Liability
 - Indemnity and Liability for Local Public Officers
 - Insurance and Defence Issues
 - Tips on avoidance
 - Questions

Misfeasance vs Bad Faith

- “Bad Faith” is a ground for challenging the validity of a local government action or decision
 - Can be raised in a judicial review proceeding
 - Does not require a corrupt motive
- Misfeasance in public office is a tort - a civil wrong entitling one to compensation for damages
 - Requires an action for damages
 - It is an intentional tort requiring deliberate unlawful conduct or intention to cause injury

Tort of Misfeasance in Public Office

- It is an intentional tort - requires proof of deliberate action
 - *Roncarelli v. Duplessis*, [1959] S.C.R. 121
- Involves deliberate misuse of power by a public officer:
 - Category A: a public officer engages in deliberate and unlawful conduct in their role as a public officer with an intention of injuring a person or class of persons
 - Category B: a public officer is aware their conduct is unlawful and that it is likely to injure the plaintiff
 - *Odhavji Estate v. Woodhouse*, 2003 SCC 69

Tort of Misfeasance in Public Office (cont'd)

“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. What distinguishes one form of misfeasance in a public office from the other is the manner in which the plaintiff proves each ingredient of the tort. In Category B, the plaintiff must prove the two ingredients of the tort independently of one another. In Category A, the fact that the public officer has acted for the express purpose of harming the plaintiff is sufficient to satisfy each ingredient of the tort, owing to the fact that a public officer does not have the authority to exercise his or her powers for an improper purpose, such as deliberately harming a member of the public. In each instance, the tort involves deliberate disregard of official duty coupled with knowledge that the misconduct is likely to injure the plaintiff.”

Odhavji Estate v. Woodhouse, 2003 SCC 69 para. 23

Tort of Misfeasance in Public Office (cont'd)

- Essential elements:
 - Conduct must be unlawful:
 - Breach of a statutory provision
 - Action in excess of jurisdiction or authority
 - Failure to perform a legally required action
 - Public officer must be aware conduct is unlawful
 - Use of public power to deliberately cause injury is always unlawful
 - Conduct so markedly inconsistent with relevant legislative context that intention to act unlawfully can be inferred
- Knowledge that injury to the plaintiff is likely

Tort of Misfeasance in Public Office (cont'd)

- Why is misfeasance relevant?
- While success rate of claims alleging misfeasance is not high, they can be costly, disruptive and challenging to defend, and they seem to be more commonly made in recent years, including in instances where misfeasance would not be expected.
- In part this may be a result of the >\$10 million award in *Greengen Holdings Ltd. v. British Columbia*, 2023 BCSC 1758 and 2049, notwithstanding the subsequent reversal of that outcome (2025 BCCA 115).

Personal Liability vs Corporate Liability

- Can a local government commit “misfeasance in public office”?
 - Traditional view that misfeasance could only be done by an individual and naming a specific individual defendant was required
- Above view now less certain and has been relaxed in recent decisions - it may be sufficient to identify specific individuals in the pleadings and, in some circumstances, it may be possible to advance a claim against a corporate defendant only

Wu v. Vancouver (City), 2019 BCCA 23

J.P. v. British Columbia (Children and Family Development),
2017 BCCA 308

British Columbia v. Greengen Holdings Ltd., 2023 BCCA 24

What Happens if you are sued?

- Claims alleging misfeasance can raise issues for defendants and lawyers that are routinely addressed, as well as those that are less routinely addressed related to matters that include:
 - Representation and conflicts;
 - Insurance;
 - Availability of indemnities; and
 - Terms of indemnities.

Representation and conflicts

- If there are multiple defendants, are there conflicting positions that cannot be addressed by a single counsel or that require or justify separate representation?
 - see *Gook Country Estates v. City of Quesnel et al*, 2006 BCSC 1382; *6165347 Manitoba Inc. v. City of Winnipeg et al*, 2025 MBKB 149
- Consider need for consent in writing to act for more than one client (LSBC Code of Professional Conduct Rules 3.4-5 to 3.4-9) and accompanying obligations, including those related to independent legal advice.
- Also consider how advice will be provided and instructions sought and received.

Insurance Issues

- Is there coverage and a duty of defend?
- Will depend on substance of the properly-pled non-derivative allegations, and terms of any applicable policy.
 - Basic principle stated in *Non-Marine Underwriters, Lloyds of London v. Scalera*, 2000 SCC 24;
 - Coverage provided: *Township of St. Joseph v. Lloyd's Underwriters* 2019 ONSC 5079;
 - Coverage provided, but in different context: *OSPCA v. Sovereign General Insurance Company* 2015 ONCA 702;
 - Coverage sort of provided, again in a different context: *EPCOR v. Municipal Electric Association Reciprocal Insurance Exchange*, 2022 ONCA 514;
- There may be split coverage depending on the allegations and remedies sought.

Liability for officers and employees

- Can officers and employees otherwise face personal liability for misfeasance?
- Local Government Act s. 738(2) says:
 - (2) No action for damages lies or may be instituted against a local public officer or former local public officer
 - (a) for anything said or done or omitted to be said or done by that person in the performance or intended performance of the person's duty or the exercise of the person's power, or
 - (b) for any alleged neglect or default in the performance or intended performance of that person's duty or the exercise of that person's power.

Liability for officers and employees (cont'd)

- However, LGA s. 738(3) says:
 - (3) Subsection (2) does not provide a defence if (a) the local public officer has, in relation to the conduct that is the subject matter of the action, been guilty of dishonesty, gross negligence or malicious or wilful misconduct, ...
- Question: does misfeasance come within the exception in LGA s. 738(3)?
- Answer: It depends; see guidance in *Ellis v. Denman Island LTC*, 2020 BCSC 935; *Probe v. Sherwood No. 159 (Rural Municipality)* 2024 SKCA 119; *Maharaj v. Rosetown*, 2025 SKCA 19; and *Rocky View (County) v. Wright*, 2021 ABQB 930.

Indemnities

- LGA s. 740(2) allows local governments to enact bylaws to provide for indemnification ... in accordance with the bylaw” and to indemnify a municipal official “by resolution in a specific case”.
- Further qualifications on above in LGA s. 740(3)-(6), including on local government being able to seek indemnity from official “guilty of dishonesty ... or malicious or wilful misconduct”.
- Local government continues to be vicariously liable even if local public officer’s actions involved malicious or willful misconduct - it is in the local government’s interest to have cooperation of local public officer.

Tips and Things to Consider

- Understand the nature of a decision and the legal authority for it
 - Relevant considerations
 - Limits on the authority
 - Technical conditions or requirements
- Appropriately document basis for the decision, including its authority.
- Consider making/clarifying indemnity bylaws to address allegations of misfeasance to ensure your local government is able to properly defend any claims against it and its local public officers and consider if bylaw excludes misfeasance from the scope of indemnity.
- Try not to include extraneous considerations when making a decision.
- Try not to link a decision to other “asks”.
- Do not delegate decisions to others unless explicitly authorized to do so.
- Be careful with what is said and recorded.

QUESTIONS?

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after the seminar.