# THE GR COURT DOCKET

October 16, 2019

## "It's Game Day!": The Summary Dismissal of a Misfeasance Claim

By Stephen Thiele

In sports, players and coaches prepare for "Game Day". In the days prior to a game, they will review video of their opponent, hold meetings to develop and review a game plan, and diligently practice so that they will be fully ready when the game starts. Everyone wants to win and for those teams who want to win at every opportunity, they know that the preparation which takes place away from the playing arena or playing field will greatly improve their chances when the game is played.

It can also be expected that a team who is not prepared for game day highly risks losing, and losing badly.

Summary judgment motions in civil litigation share a similar theme.

What does or does not happen in the courtroom often depends on what takes place before a judge takes his or her seat on the bench to hear the summary judgment motion.

Summary judgment motions are dependent on evidence, and therefore parties who fail to adequately file evidence to either support their action or their defence risk losing.

Litigants can't fight a motion for summary judgment on the basis that the evidence they might rely upon will be provided to the court at a later date. Like sports teams, litigants need to be prepared for "Game Day."

In the recent case of *CMT v. Government of PEI*,[1] the Plaintiffs' lack of preparedness as a result of failing to file evidence in response to a motion for summary judgment contributed to the Plaintiffs' case being dismissed.

This case is noteworthy for three reasons.

First, the judge comprehensively analyzed the PEI summary judgment rules, which have been adopted from Ontario's rule 20.

Second, the judge thoroughly examined the issue of misfeasance in public office and concluded, among many things, that persons who are privately engaged by government or government either in the capacity of an outside legal counsel or an external consultant cannot be liable for the intentional tort.

Finally, this decision emphasizes that a party responding to a summary judgment motion cannot rest on its laurels and rely

Continued on page 2



**Gavin J. Tighe**
Partner
416.865.6664
gjtighe@grllp.com

**Stephen Thiele**
Partner
416.865.6651
sthiele@grllp.com

**Alexander Melfi**
Associate
416.865.6712
amelfi@grllp.com

on an argument that it will adduce further and better evidence at trial in the hopes of defeating the motion.

## The Action

The Plaintiffs' action arose out of a series of events that took place between 2010 and 2014.

In or around that time, the Mi'kmaq Confederacy of Prince Edward Island proposed to licence and regulate online gambling in the province.

Various professionals and consultants were engaged and a working group was established. A UK company was also engaged to design and establish an electronic payments platform. However by February 2012, the government decided to withdraw its support for the proposal because it was viewed that the proposed scheme contravened the *Criminal Code*.

Four months later, in a separate development, a memorandum of understanding was entered into by a government agency and a numbered company to explore the establishment of a financial services centre on the island.

But in September 2012, someone who had connections with the numbered company came under investigation for suspicious trading activities. The numbered company and one of the Plaintiffs were also subjects of the investigation. The investigation concluded that over $700,000 had been raised in contravention of PEI's securities laws and a securities law National Instrument, which resulted in a settlement agreement between the securities regulator and those under investigation in which the contraventions of the law were acknowledged.

The Plaintiffs' proposed establishment of a global transaction platform in PEI was based on the design model that had been proposed for online gambling. But again, the government eventually did not proceed with the establishment of any global transaction platform for the island, and the Plaintiffs sued for breach of contract, misfeasance in public office and spoliation of evidence on the part of some government actors.

Eventually the Defendants, some of whom were lawyers in private practice or were private consultants, brought separate summary judgment motions to dismiss the Plaintiffs' claim.

Critical to the motions was the Plaintiffs' failure to provide evidence to support the pleaded causes of action.

## Elements of a Summary Judgment motion

PEI's summary judgment rule is exactly the same as Ontario's rule 20. Accordingly, all of the tests that apply to a summary judgment motion in Ontario apply to a summary judgment motion in PEI, and all of the powers possessed by an Ontario judge in determining a summary judgment motion are possessed by a judge in PEI.

Summary judgment motions are governed by a two-part test.

Under the first part, the moving party is required to show that there is no material fact in issue which would create a genuine issue requiring a trial.

Under the second part, once the moving party has discharged his or her burden, the responding party is required to adduce evidence to establish that the position taken in his or her pleading has a real chance of success.

The court recognized that both parties on a motion for summary are obligated to be "put their best foot forward" or, in other words, "lead trump or risk losing". What this means is that a party cannot indicate to the court that they

intend to rely on "further or better evidence at trial" to prove their case. Instead a party is obligated to present the court with specific facts to refute allegations or evidence that harms their case, and the Court is entitled to assume that all such evidence is in fact before it on the motion.

The failure to provide such facts and evidence will be fatal to a party's case.

In summing up a party's obligation on a summary judgment motion, Gavin Tighe, senior partner at Gardiner Roberts LLP who represented two of the moving parties in this case, explained that when a motion for summary judgment is heard before the court "It's Game Day!".

On the separate motions, the Defendants attacked the nature and the quality of the Plaintiffs' evidence.

They submitted that the Plaintiffs had failed to provide any "direct" or "personal" evidence to support their allegations.

In contrast, the Plaintiffs contended that they would produce the necessary evidence at trial.

The court rejected the Plaintiffs' position. The Plaintiffs had not put their best foot forward and accordingly the motions judge dismissed their action.

## Misfeasance in Public Office

With respect to the claim of misfeasance in public office, the Plaintiffs alleged that the various Defendants had deliberately and unlawfully exercised public functions and knowingly acted for an improper purpose in denying them the benefits of establishing a global transaction platform for PEI.

Each of the Defendants denied these allegations and some of the Defendants contended that they weren't even public office holders.

To succeed on an action for misfeasance in public office, a Plaintiff must prove that the Defendant is: (i) a public officer, (ii) performing a public function (or failing to do so); (iii) who knew his or her conduct was unlawful, (iv) who deliberately acted unlawfully, (v) who knew his or her conduct was likely to injure the plaintiff, (vi) whose tortious conduct was the legal cause of the Plaintiff's injuries, and (vii) and that the injuries are compensable in tort law.

If any of these seven elements is missing or not proven, an action for misfeasance in public office will fail.

An action for misfeasance in public office will also fail if a public official honestly believes that his or her actions are lawful and there is no intent to cause the Plaintiff harm or knowledge that harm will likely result from the public office holder's action.

Negligence, mismanagement or poor judgment will not give rise to a claim for misfeasance in public office, which is an intentional tort.

In this action, the clients represented by Gavin Tighe and Alexander Melfi of Gardiner Roberts LLP, were both lawyers. One was in private practice and represented a government agency that was a party to the memorandum of understanding. The second was a private consultant who had been retained by one of the Plaintiffs in connection with the memorandum of understanding.

These Defendants argued that they were not "public agents" for the purposes of the tort and that even if the tort applied to them, they never engaged in conduct that was designed to or was likely to harm the Plaintiffs.

As well, these Defendants contended that the

Plaintiffs had failed to provide any evidence showing that they had been engaged in such conduct.

The court concluded that neither of these two Defendants was a public servant at any material time. They were private professionals and were not part of the public service. They did not perform any public functions whatsoever, and had merely been employed by their respective clients. This was enough to have the action against them dismissed.

In any event, absent any evidence being led by the Plaintiffs to show otherwise, the claims made against these two Defendants was found to be without merit.

## Representation by Gardiner Roberts LLP

**Gavin Tighe**, a partner and specialist in civil litigation, and **Alexander Melfi**, a senior litigation associate, represented two of the Defendants in the Plaintiffs' action.

Gavin and Alexander were successful in getting the Plaintiffs' claims against the firm's clients dismissed and obtaining an award of costs on a substantial indemnity basis.

*(This newsletter is provided for educational purposes only, and does not necessarily reflect the views of Gardiner Roberts LLP.)*

---

1 2019 PESC 40