# COURT OF APPEAL FOR ONTARIO

CITATION: Trillium Power Wind Corporation v. Ontario (Natural Resources), 2013 ONCA 683
DATE: 20131112
DOCKET: C56208

Blair, Tulloch and Lauwers JJ.A.

BETWEEN

Trillium Power Wind Corporation

Plaintiff (Appellant)

and

Her Majesty The Queen, in right of the Province of Ontario, as represented by the Ministry of Natural Resources, the Ministry of the Environment, and the Ministry of Energy

Defendant (Respondent)

Morris Cooper, for the appellant

Kim Twohig, Eunice Machado and Kristin Smith, for the respondent

Heard: March 22, 2013

On appeal from the judgment of Justice Robert F. Goldstein of the Superior Court of Justice, dated October 5, 2012, with reasons reported at 2012 ONSC 5619.

**By the Court:**

[1] The appellant Trillium Power Wind Corporation ("Trillium") is a developer of off-shore wind power projects in Ontario. Trillium's proposed wind power project was progressing under the regulatory structure set up under provincial legislation

when all such projects were cancelled by the Province of Ontario ("Ontario") in February 2011, during a provincial election campaign.

[2] Trillium pleaded the following causes of action in the statement of claim: breach of contract; unjust enrichment; taking without compensation (which the appellant characterizes as expropriation); negligent misrepresentation and negligence; misfeasance in public office; and intentional infliction of economic harm.

[3] Trillium has two complaints, in substance. First, it asserts that Ontario unlawfully deprived it of a lucrative off-shore wind-powered electric generation project, for an improper political purpose, specifically an electoral purpose. In a second, and narrower, complaint, it alleges that Ontario's decision specifically targeted Trillium with a view to crippling it financially so that it would not be able to contest the Government's actions. Trillium seeks to recover more than $2 billion in damages including more than $5 million in out-of-pocket expenses it incurred in pursuing the project.

[4] Ontario moved to strike the statement of claim and to dismiss the action under rules 21.01(1)(b), 21.01(3)(b), 21.01(3)(d), 25.06(1)(2)(8), and 25.11 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194. The motion judge struck the Statement of Claim without leave to amend and dismissed the action with costs on the basis that it disclosed no reasonable cause of action against Ontario.

[5] Trillium appeals.

[6] We agree with the motion judge that it was plain and obvious, and beyond all reasonable doubt, that the appellant could not succeed in its claims for breach of contract, unjust enrichment, taking without compensation, negligent misrepresentation and negligence, and intentional infliction of economic harm. These causes of action were therefore properly dismissed by him, for the reasons he gives. We do not reach the same conclusion, however, with respect to the claim for misfeasance in public office. We would allow the appeal on that cause of action alone and let the claim proceed, but only on the narrower basis that Ontario's conduct was specifically targeted to injury Trillium.

**The Regulatory Context for Wind Power Projects**

[7] The motion judge described succinctly and fairly the regulatory scheme for wind power projects at paras. 25-30 of his decision:

> The development and regulation of renewable energy projects engages several statutes and regulations, and at least three different ministers. The regulatory scheme for the production of power, the electricity market, and the development of renewable energy is complex and diverse. Failure to obtain every approval at every stage and from every authority will prevent the ultimate operation of a wind farm.
>
> The generation and management of electricity resources is governed by the *Electricity Act*, which sets up a highly detailed structure for generating electricity, hooking up power generation facilities to the electrical grid, the creation of an electricity market and a power

generation authority, and many other aspects of power generation. At every step of the regulatory process, the Minister of Energy has very broad discretion to issue policies and approvals. Of relevance here is the Feed-In-Tariff Program ("**the FIT**"). The FIT program is designed to procure energy from renewable energy sources. The *Electricity Act* provides the Minister of Energy with the discretionary authority to direct the Ontario Power Authority ("**the OPA**") to develop a FIT program. As an aside, Trillium claims that it provided expert data to the Ministry of Energy and that this data led to the enactment of the FIT sections of the *Electricity Act*, although this is a bare allegation with no facts pleaded in support of it. Trillium never obtained a contract to provide power to the OPA under the FIT.

Wind power projects must obtain a Renewable Energy Approval pursuant to s. 47.3 of the *Environmental Protection Act*, R.S.O. 1990, c. E.19 ("**the EPA**"). The Minister of the Environment has broad policy powers under the EPA:

> *47.7 (1) The Minister may, in writing, issue, amend or revoke policies in respect of Renewable Energy Approvals.*

The Director under the Part V.O.1 of the EPA has very broad powers to grant, amend, or terminate Renewable Energy Approvals:

> *47.5 (1) After considering an application for the issue or renewal of a Renewable Energy Approval, the Director may, if in his or her opinion it is in the public interest to do so,*
>
> > *(a) issue or renew a renewable energy approval; or*

> *(b) refuse to issue or renew a renewable energy approval.*
>
> *(2) In issuing or renewing a renewable energy approval, the Director may impose terms and conditions if in his or her opinion it is in the public interest to do so.*
>
> *(3) On application or on his or her own initiative, the Director may, if in his or her opinion it is in the public interest to do so,*
>
> > *(a) alter the terms and conditions of a renewable energy approval after it is issued;*
> >
> > *(b) impose new terms and conditions on a renewable energy approval; or*
> >
> > *(c) suspend or revoke a renewable energy approval.*

Trillium did not obtain a Renewable Energy Approval.

Finally, the release of Crown land for testing and, ultimately, the construction of wind farms is the responsibility of the Minister of Natural Resources, who has discretionary authority to manage Crown land under the *Public Lands Act,* R.S.O. 1990, c. P.43 ("**the Public Lands Act**"). As noted earlier in these reasons, the MNR issued a wind power policy under which Trillium obtained Applicant of Record status. The policy provided for a three-stage process: first, testing and review; second, wind power development and review; and third, permits for the development of a wind farm. It is only after the third stage that Trillium would have been able to apply for any of the other approvals. Trillium had not yet reached the third stage of the approval process. [Emphasis in original.]

[8] The regulatory regime has broad discretion built into it at many junctures "in the public interest."

**The Factual Context**

[9] We have largely adopted the specific factual context set out in the decision under appeal at paras. 4-15. The development of wind power was the subject of much discussion and study by federal and provincial agencies and departments, as well as non-governmental stakeholders. The Ministry of Natural Resources ("the MNR") issued Policy PL 4.10.04 on the subject of Wind Power Development on Crown Land In January 2004, which was updated in November 2004 and in April 2008. It set out the process by which wind resources would be tested and developed on Crown land. It stated:

> The Province of Ontario recognizes the economic and environmental benefits of increasing the use of wind energy to generate electricity and also recognizes that Crown land can play a role in providing areas for renewable energy production. To meet the need for a fair, consistent, orderly and timely approach to consideration of the disposition of Crown land to support wind energy, MNR has developed a windpower policy and procedure to provide for:
>
> 1) the testing of wind resources on Crown land, and
>
> 2) the subsequent development of wind farms on Crown land.

[10] The policy expressly provided that it applied to the "discretionary disposition" of Crown lands, including a lake bed.

[11] An offshore wind farm is used to generate electricity by connecting large wind turbines to the electrical grid. It is best set up beyond the sight of people on shore to avoid aesthetic issues. The water must be relatively shallow and the bedrock sufficiently hard to support the weight of large turbines. The wind must blow strongly and reliably. There must be ready access to the provincial power grid.

[12] Trillium pleads that it had found such a spot in Lake Ontario near Main Duck Island off Prince Edward County. It entered into the required process to develop and construct a wind farm there. That process contemplated: the lease of part of the lake bed under Lake Ontario from the Crown; regulatory approvals for building a wind farm including an environmental assessment; and a contract to supply electricity to the power grid.

[13] In May 2004 Osiris Energy Corporation, the corporate predecessor of Trillium, applied to lease Crown land in particular "grid cells" in the waters of Lake Ontario near Main Duck Island. The MNR responded with a letter acknowledging the receipt of the application and indicating the next steps, but cautioned: "Acceptance of your application or a request to attend a pre-screening meeting does not in any way infer a commitment on the part of the Crown to further entertain your application."

[14] In October 2004 Trillium paid about $35,000 in fees to MNR as part of the application. The MNR acknowledged the payment and further indicated in a letter: "This letter acknowledges that the company is proceeding with the review of the site for the purpose of wind testing and that receipt of the above fees in no way guarantees that the site will be approved for wind power testing or development."

[15] In December 2005 MNR informed Trillium that it was the "Applicant of Record" for the grid cells in the area of Main Duck Island. Trillium pleads that Applicant of Record status granted it specific rights that, subject to Trillium's compliance with "established steps," would in due course have led to contractual status as a wind power supplier.

[16] In November 2006 MNR advised Trillium that it was imposing a moratorium on offshore wind power development in order to conduct environmental and social studies. The moratorium was lifted in January 2008. On December 1, 2008, Trillium received a letter from the MNR advising that it had been granted Applicant of Record status for the same grid cells. The letter advised that there were two phases of development related to Applicant of Record status. The first phase granted Trillium three years to test for wind power. The second phase gave Trillium the opportunity to go through the environmental assessment process and obtain the other necessary approvals to operate a wind farm. The letter continued:

> There are no rights or tenure associated with this Applicant of Record status and it does not constitute MNR approvals of your proposed project. In addition, this Applicant of Record status does not provide the right to make any alterations or improvements on Crown land.

[17] Applicant of Record status did not give Trillium any right or authority to begin constructing the wind farm.

[18] The appellant's factum describes the events leading to the lawsuit:

> The Plaintiff then notified the Office of the Premier of Ontario on February 9, 2011, and the Office of the Ministry of Energy on February 10, 2011, that it intended to close its [$26 million] financing with Dundee Corporation late on the afternoon of Friday, February 11, 2011. At 2:00 p.m., on Friday, February 11, 2011, the Government of Ontario issued a press release stating that offshore wind development in Ontario would be cancelled. The press release appeared on the Ontario Environmental Bill of Rights Registry website.
>
> The Plaintiff was never given any prior notification of the intention or decision to cancel offshore wind development, and no subsequent or other communications have ever been issued by any of the Ministries, nor has MNR made any proposal to refund the monies which the Plaintiff paid to obtain its status as Applicant of Record. No Orders in Council, other legislation or policy statements have ever been issued.

[19] A news release was issued at 2:00 p.m. on February 11, 2011 by the Ontario Ministry of Environment website. It stated that off-shore wind projects were being "suspended":

> Ontario is not proceeding with proposed offshore wind projects while further scientific research is conducted.
>
> No Renewable Energy Approvals for offshore have been issued and no offshore projects will proceed at this time. Applications for offshore wind projects in the Feed-In-Tariff program will no longer be accepted and current applications will be suspended. [Emphasis in original.]

[20] By contrast, the policy decision notice registered on the Environmental Bill of Rights Registry on February 11, 2011 stated that the projects were being "cancelled":

> During this time [of necessary scientific research], applications for off-shore wind projects in the Feed-In-Tariff program will no longer be accepted and current applications will be cancelled; the MNR will be cancelling all existing Crown land applications for offshore wind development that do not have a Feed-In-Tariff contract, including those with Applicant of Record status. MNR will not be accepting any new Crown land applications for offshore wind development. When there is greater scientific certainty, consideration of offshore wind development will resume.

[21] Trillium claims that Ontario's actions were "precipitous, highhanded and constituted bad faith Ministerial decisions for political election expediency," and that Ontario's "decision and the cancellation and confiscation in February, 2011 was specifically targeted to stop Trillium Power's offshore wind project in Lake Ontario before Trillium Power had the financial resources to litigate with the Province of Ontario." The latter assertion is based on the fact that the Province's

notice of cancellation occurred mere hours before the financing arranged by Trillium to complete the remaining approval process was to close, as the Province knew. The financing did not close.

**The Decision under Appeal**

[22] The motion judge dismissed all of the appellant's claims, including the claims for negligence and negligent misrepresentation. He dismissed the claim for misfeasance in public office for related reasons.

[23] The motion judge centered his decision in respect of negligence, negligent misrepresentation and misfeasance in public office on the reasoning of the Supreme Court of Canada in *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 S.C.R. 45. The motion judge held, at para. 61, that "core policy" decisions are immune from suit. He relied particularly on certain observations made by McLachlin C.J.C. in *Imperial Tobacco*, who said, at para. 87:

> The weighing of social, economic, and political considerations to arrive at a course or principle of action is the proper role of government, not the courts. For this reason, decisions and conduct based on these considerations cannot ground an action in tort.

[24] McLachlin C.J.C. described "core policy" government decisions, at para. 90 of *Imperial Tobacco*, as being: "decisions as to a course or principle of action that are based on public policy considerations, such as economic, social and political factors, provided they are neither irrational nor taken in bad faith."

[25] This understanding of the decision in *Imperial Tobacco* led the motion judge to conclude, at para. 62:

> In my view, the Defendant correctly characterizes the decision to impose a moratorium as a "core policy decision". The stated reason for the moratorium was that further scientific studies were required, a reason very directly "*based on public policy considerations, such as economic, social and political factors*". The Defendant clearly possessed the power to impose the moratorium. This is exactly the type of policy decision that is protected from suit. [Emphasis in original.]

[26] The motion judge stated, at paras. 32 and 33:

> In my view, it is clear that the Defendant, acting through various ministers of the Crown, was empowered to set or alter policy with regard to the development of wind power. Each of the statutes confers a broad discretion with regard to every aspect of renewable energy, from the release of Crown land for testing to the granting of a contract to supply energy and hook up to the grid...
>
> Thus, I disagree with Trillium. It is clear that the actions of the Defendant were not illegal. It is also clear from a review of the Claim and the regulatory scheme that Trillium had not obtained the requisite approvals to construct and operate a wind farm at the time the moratorium was imposed. These basic findings determine much of what follows.

[27] The motion judge added, at para. 52: "In my view that is what has occurred here: the defendant exercised its regulatory authority to impose a moratorium." He said, at para. 56: "I see no reason why the Minister would not be permitted to change the policy in accordance with the public interest."

[28] The motion judge addressed the claim of misfeasance in public office directly at paras. 20, 64, 65, and 66 of his decision, concluding at para. 69: "Since I have already found that there was nothing unlawful about the decision to impose a moratorium on offshore wind power, that alone is sufficient to dismiss this aspect of the Claim."

**Issues**

[29] The issues raised by the parties distil to two:

> (i) Is the appellant's claim for misfeasance in public office tenable as a matter of law?
>
> (ii) Is the appellant's claim for misfeasance in public office adequately pleaded?

**Analysis**

[30] The analytical framework for assessing whether to strike out a pleading on the ground that it discloses no reasonable cause of action under Rule 21.01(1)(b) of the *Rules of Civil Procedure*, is set out by Paul M. Perell and John W. Morden in *The Law of Civil Procedure in Ontario*, 1st ed. (Markham: LexisNexis Canada Inc., 2010), at p. 445:

> The following principles apply to a Rule 21 motion to strike a pleading for failing to disclose a reasonable cause of action or defence: (a) the material facts pleaded must be deemed to be proven or true, except to

> the extent that the alleged facts are patently ridiculous or incapable of proof; (b) the claim incorporates by reference any document pleaded and the court is entitled to read and rely on the terms of such documents as if they were fully quoted in the pleadings; (c) novelty of the cause of action is of no concern at this stage of the proceeding; (d) the statement of claim must be read generously to allow for drafting deficiencies; and (e) if the claim has some chance of success, it must be permitted to proceed.

[31] The test is not in dispute: the claim will only be dismissed where it is "plain and obvious" that it has no reasonable prospect of success: *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959; *Imperial Tobacco*, at paras. 17-19; *Taylor v. Canada (Attorney General)*, 2012 ONCA 479, 111 O.R. (3d) 161 at para 22. While the court must accept as true the material facts as pleaded, this obligation does not extend to bald conclusory statements of fact, unsupported by material facts.

[32] We address the issues in turn.

**(a) What is the basis of the appellant's misfeasance claim?**

[33] The motion judge gathered together the allegations in the statement of claim at paras. 64-65 of his reasons:

> Trillium pleads misfeasance in public office:
>
> > *74. Trillium Power further states that in the events as described herein the defendants had no legal authority and were not in the exercise of any statutory power or purpose. The defendant's*

> *February 11, 2011 decision to terminate offshore wind power in Lake Ontario constituted an invalid decision, either made negligently or, in the alternative, made deliberately as a misfeasance in office by Ministers of the Crown.*

Although it is not entirely clear what facts Trillium relies on in support of this allegation, the following paragraphs appear to be connected:

> *58. Trillium Power states that the Government's actions were precipitous and high-handed, and constituted bad faith Ministerial decisions for political expediency, with specific concern for geographic areas of the Province completely unrelated to [the activities of] Trillium Power. Those areas, predominantly near Lake Erie and Lake Huron, constituted ridings that were perceived by the Provincial Government as susceptible to loss in the forthcoming election.*
>
> *59. Trillium Power states further that the Defendant knew and was well aware that there were no water quality issues relating to offshore wind development in relation to Trillium Power specifically, and in relation to offshore wind generally. Consequently, Trillium power states and the fact is that the only science involved in the Defendant's February 11, 2011 decision was political science.*

[34] The motion judge also referred to para. 61 of the statement of claim. We would add para. 54 of the statement of claim to the group of allegations related to misfeasance in office. Paras. 54 and 61 state:

> Trillium Power states that the Defendant's decision to issue the press release on February 11, 2011, was done in bad faith and was specifically a consequence of Trillium Power's prior notification of their scheduled

> closing of financing with Dundee Corporation, with the intent to stop the process and confiscate Trillium Power's offshore wind power development before it could be financed for approximately $26 million dollars, to begin construction of its proposed initial site south-west of Main Duck Island, in east Lake Ontario.
>
> Trillium Power further states that the Defendant's decision and the cancellation and confiscation in February, 2011 was specifically targeted to stop Trillium Power's offshore wind power project in Lake Ontario before Trillium Power had the financial resources to litigate with the Province of Ontario.

[35] To these paragraphs of the statement of claim we would also add the appellant's response to the demand for particulars, to which the motion judge referred at para. 20 of his reasons:

> Trillium further particularized that "misfeasance in public office" applied to Energy Minister Duguid, Environment Minister Wilkinson, Natural Resources Minister Jeffrey, and Premier McGuinty along with their senior staff. The particulars of the "misfeasance in public office" include:
>
> > 1. The decision by the governing Liberal Party to place political expediency in relation to an upcoming election over the public interest in "Green Energy".
> >
> > 2. The named Ministers issued a press release in advance of the October 2011 provincial election for purely political reasons related to close races in ridings held by the Liberal Party. The named Ministers knew the press release would destroy Trillium's financing.

[36] As we read the statement of claim, the essence of Trillium's complaint in support of the misfeasance in public office claim is two-fold. Trillium asserts that the Premier, his Ministers named above, and their staff acted in bad faith:

> a) for purely political motives of electoral expediency in order to win more seats in the upcoming election, when they knew that their actions would harm Trillium; and,
>
> b) in a way that specifically targeted Trillium by cancelling Ontario's wind power projects in order to undercut Trillium's pending financing and thereby place Trillium in a position where it would not have the resources to litigate against Ontario.

**(b) Is the appellant's claim for misfeasance in public office tenable as a matter of law?**

[37] The appellant pleads the tort of misfeasance in public office and does not assert a claim for judicial review of a governmental administrative decision. Its claim is essentially based upon the two categories of "bad faith" allegations summarized in the preceding paragraph. Trillium argues that these allegations fall within the *Imperial Tobacco* qualification that a governmental decision is immune from suit, unless it is "taken in bad faith".

[38] In *Odhavji Estate v. Woodhouse*, 2003 SCC 69, [2003] 3 S.C.R. 263, at paras. 28, 30 and 32, Iacobucci J. set out the essential elements of a claim in tort for malfeasance in public office. As explained there, and in subsequent

decisions of this Court, the plaintiff must show that (in addition to the usual tort requirements of causation and consequent damages):

> a) The public official engaged in unlawful conduct in the exercise of his or her public functions; and,
>
> b) The public official was aware that the conduct in question was unlawful and was likely to injure the plaintiff.

See also, *Pikangikum First Nation v. Nault*, 2012 ONCA 705, at para. 54, leave to appeal refused, [2013] S.C.C.A. No. 10; *St. Elizabeth Home Society v. Hamilton (City)*, 2010 ONCA 280, at para. 20; *Granite Power Corporation v. Ontario* (2004), 72 O.R. (3d) 194 (C.A.), leave to appeal to S.C.C. dismissed [2004] S.C.C.A No. 409, at paras. 37-39.

[39] It is clear from *Odhavji Estate*, as well, that "bad faith" conduct in the exercise of executive or administrative authority – that is, the exercise of power for an improper or ulterior purpose, such as doing so only for the specific purpose of injuring someone – may constitute the type of "unlawful conduct" required for the tort. It does not follow, however, that a public official may not make any decision that he or she knows may harm someone's interests. Iacobucci J. addressed this issue as well, at para. 28:

> The requirement that the defendant must have been aware that his or her conduct was unlawful reflects the well-established principle that misfeasance in a public office requires an element of "bad faith" or "dishonesty". In a democracy, public officers must retain the authority to make decisions that, where appropriate, are adverse

> to the interests of certain citizens. Knowledge of harm is thus an insufficient basis on which to conclude that the defendant has acted in bad faith or dishonestly. A public officer may in good faith make a decision that she or he knows to be adverse to interests of certain members of the public. In order for the conduct to fall within the scope of the tort, the officer must deliberately engage in conduct that he or she knows to be inconsistent with the obligations of the office. [Emphasis added.]

[40] Ontario roots its defence of the motion judge's decision in the Supreme Court's determination in *Imperial Tobacco*. McLachlin C.J.C. stated, at para. 91: "[W]e may conclude that where it is "plain and obvious" that an impugned government decision is a policy decision, the claim may properly be struck on the ground that it cannot ground an action in tort." She added, however, that: "If it is not plain and obvious, the matter must be allowed to go to trial."

[41] The motion judge accepted Ontario's argument and dismissed the claim for misfeasance.

**Discussion**

[42] We would set aside the dismissal of the claim for misfeasance in public office, but we would permit the action for misfeasance to continue based only upon the allegation that the Government's decision to suspend or cancel the province's wind power program was specifically targeted at Trillium in order to injure it by crippling its financial capacity. We would not permit it to continue in

conjunction with what we would call the "political/electoral expediency" allegations.

[43] We first address the reasons for setting aside the dismissal and then turn to consider the permissible scope of the continuing action.

[44] McLachlin C.J.C.'s statement at para. 91 of *Imperial Tobacco* that summary judgment is available to enforce immunity must be read in the context of her earlier statement, that the immunity only applies to "true" or "core" policy decisions and then only to those that are "neither irrational nor taken in bad faith": see paras. 74 and 90.

[45] In *Imperial Tobacco*, no allegations were made that government officials acted in bad faith or for an improper purpose. This case is different. Trillium has pleaded that Ontario's actions were done in bad faith and for an improper purpose.

[46] Once a plaintiff asserts a claim for bad faith in the context of a claim of misfeasance in public office that is at least plausible on the facts alleged, the motion judge is required to accept those facts as true for the purposes of a rule 21 motion, provided that they are not patently ridiculous or incapable of proof. To the extent the motion judge may have suggested otherwise, in his comment at para. 32 of his reasons that "[t]he determination of whether the Defendant's actions were illegal is a legal issue", we respectfully disagree. The legal issue is

whether the Defendant's actions give rise to a claim in law, based on the facts as pleaded.

[47] Here, the motion judge found that even if the Ministers whose conduct is being questioned in this case had exercised their authority for political purposes, the exercise of that authority was itself immune to judicial review. He said at para. 63:

> Trillium also pleads that the moratorium was imposed for fundamentally political, specifically electoral reasons, and that it is untrue that scientific reasons were at the heart of the decision to proceed with a moratorium. Leaving aside the question of misfeasance in public office, which I turn to below, making a decision for a political purpose would still not ground a cause of action. Chief Justice McLachlin in *Imperial Tobacco* explicitly mentions political factors as a legitimate public policy consideration. The remedy for a political decision that a party does not agree with is found in the ballot box, not the courtroom. Political factors are not illegitimate. A government may well be justified in not proceeding with a project on the [basis] of vigorous community opposition. Democratic governments are supposed to be sensitive to public opinion. Courts are manifestly ill-equipped to determine which types of political considerations are legitimate and which are not, which is why our analysis is confined to legality.

[48] We agree with the motion judge that political "core policy decisions" are generally immune from review by the courts in the context of a civil tort action. The exception for irrational and bad faith decisions, as McLachlin C.J.C. observed in *Imperial Tobacco*, and Iacobucci J. noted in *Odhavji Estate*, is quite

narrow. The appellant takes its stand on that narrow exception, but, as we will explain, this affects the permissible scope of the continuing action.

[49] At para. 32 of his reasons, the motion judge observed:

> ... [T]he Defendant, acting through various ministers of the Crown, was empowered to set or alter policy with regard to the development of wind power. Each of the statutes confers a broad discretion with regard to every aspect of renewable energy, from the release of Crown land for testing to the granting of a contract to supply energy and hook up to the grid.

[50] In that respect, a decision by the Ontario Government to continue, suspend, or discontinue its province-wide offshore wind power policy initiative is a decision "as to a course or principle of action that [is] based on public policy considerations": *Imperial Tobacco*, at para. 90. Those considerations happen to involve "political factors". Ontario's decision therefore falls within the type of "core policy decisions" that are immune from attack unless they are irrational or taken in bad faith. Here – except to the extent they specifically targeted Trillium in order to injure it financially – Ontario's decision was neither irrational nor made in bad faith.

[51] We do not see how the decision can be said to be "irrational" based on the allegations in the statement of claim. The government's stated reason for suspending or cancelling its wind power policy was that further scientific study was required. While Trillium does not accept that this was the real reason for the

cancellation, and pleads that the government was "well aware that there were no water quality issues relating to offshore wind development" and that "the only science involved [in the decision] was political science", those allegations may make the decision debateable, but they do not make it irrational.

[52] Nor can the impugned decision be said to have been made in bad faith for purposes of the "political/electoral expediency" claim, in our view. A core policy decision made by the Executive based on political considerations or electoral expediency does not, on its own, constitute "bad faith" for purposes of a tort claim based on misfeasance in public office.

[53] This is so even if the government actors were aware that such a decision might negatively impact the interests of Trillium or other offshore wind-power. To repeat the observations of Iacobucci J. in *Odhavji Estate*, cited above:

> In a democracy, public officers must retain the authority to make decisions that, where appropriate, are adverse to the interests of certain citizens. Knowledge of harm is thus an insufficient basis on which to conclude that the defendant has acted in bad faith or dishonestly... In order for the conduct to fall within the scope of the tort, the officer must deliberately engage in conduct that he or she knows to be inconsistent with the obligations of office. [Emphasis added.]

[54] In that broader sense, it is not "inconsistent with the obligations of office" for the Premier and his or her Ministers to respond to public pressure, even where that response is designed to shore up the government's electoral base

and win more seats in an election. Ministerial policy decisions made on the basis of "political expediency" are part and parcel of the policymaking process and, without more, there is nothing unlawful or in the nature of "bad faith" about a government taking into account public response to a policy matter and reacting accordingly. That is what governments do, in pursuit of their political and partisan goals in a democratic society. See *Comeau's Sea Foods Ltd. v. Canada (Minister of Fisheries & Oceans)*, [1997] 1 S.C.R. 12; *Ontario Federation of Anglers & Hunters v. Ontario (Minister of Natural Resources)*, [2002] O.J. No. 1445 (C.A.); *Equity Waste Management of Canada v. Halton Hills (Town)* (1997), 35 O.R. (3d) 321 (C.A.).

[55] Accordingly, it is only to the extent that Ontario's decision was *not* made for political purposes, but was made with the specific intention of injuring the plaintiff, that the decision is subject to attack in tort. Political motivation for the decision may or may not become relevant – should Ontario choose to raise it by way of defence, for example – in determining what was, in fact, the real motivation for the decision. But the "political/electoral expediency" aspects of such a decision cannot, standing alone, provide a basis for a claim in tort for

misfeasance in public office. Therefore, they are not properly a part of the allegations in the statement of claim in this case.[1]

[56] It follows that Trillium should be entitled to proceed based on the allegations that the Government's actions were specifically meant to injure the appellant. The appellant asserts that the Government's actions were targeted to stop Trillium's offshore wind project before Trillium's financing was in place in order to deprive Trillium of the resources to contest the Government's decision to cancel the wind projects in Ontario. Paragraphs 54 and 61 of the statement of claim (except for the reference to "confiscation") are examples of this plea.

[57] It cannot be said, at this stage of the proceedings, that it is "plain and obvious" that those allegations will not succeed at trial.

**(c) Is the appellant's claim for misfeasance in public office adequately pleaded?**

[58] The necessary elements of a claim for misfeasance in public office, from the decision of the Supreme Court in *Odhavji Estate*, at paras. 28, 20 and 32, are set out above. For convenience, we will repeat them here. To pass muster in

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[1] Nothing in these reasons should be taken to suggest that the discretionary exercise of governmental authority is completely unfettered. This case provides an example of circumstances in which that exercise of discretion may, within limits, be subject to attack in tort law. Generally, however, attacks on the exercise of Ministerial discretion are the province of administrative law, not tort law, although the appellant has chosen to frame this action in tort law.

pleading misfeasance in public office, Trillium must plead materials facts capable of establishing:

a) deliberate unlawful conduct by a public officer in the exercise of a public function, being conduct that he or she knows to be inconsistent with the obligations of the office;

b) awareness that the conduct is unlawful and likely to injure the plaintiff; and

c) other requirements common to all torts including that the tortious conduct is the legal cause of the plaintiff's injuries and that the injuries suffered are compensable in tort law.

**Discussion**

[59] The pleading is disorganized and prolix, and must be brought into conformity with the ruling in the previous section of these reasons. That said, in our view the specific factual allegations in paras. 54 and 61 of the statement of claim are sufficient to pass muster as a valid pleading of misfeasance in public office. The pleading makes allegations about specific public officials and their specific unlawful purpose in acting as they did: *L.(A.) v. Ontario (Minister of Community and Social Services)* (2006), 83 O.R. (3d) 512, leave to appeal refused, [2007] S.C.C.A. No. 36, at para. 37.

[60] We are alive to the problem pointed out by the Federal Court of Appeal in *St. John's Port Authority v. Adventure Tours Inc.*, 2011 FCA 198, per Stratas

J.A., at para. 63 that a bald pleading is especially problematic in cases alleging abuse in public office. Stratas J.A. pointed out that: "it is all too easy for a plaintiff who is aggrieved by governmental conduct to assert, perhaps without any evidence at all, that "the government" acted, "knowing" it did not have the authority to do so, "intending" to harm the plaintiff." That said, we do not agree with the motion judge that the pleading is "completely bald". This pleading is detailed and as fact-specific as the appellant can be at this stage of the proceeding. The allegations link to actual events, documents and people.

[61] To quote Moldaver J.A., in *Granite Power* at para. 40, on the facts pleaded, including the particulars, "there exists a narrow window of opportunity for [the appellant] to make out its claim in misfeasance." The appellant cannot provide more particulars now because many of the necessary supporting facts would be within Ontario's knowledge and control, and there has been no document production or discovery.

[62] For these reasons we allow the appeal on misfeasance in public office alone, and otherwise dismiss the appeal. We strike the statement of claim and grant the appellant thirty days in which to prepare, serve and file an amended statement of claim.

[63] The appellant is entitled to costs in this court, fixed by agreement at $15,000 all-inclusive, and at $20,000 all-inclusive for the motion below.

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