Citation: Polischuk v Winnipeg (City of), 2025 MBCA 78
Date: 20250912
Docket: AI24-30-10153

IN THE COURT OF APPEAL OF MANITOBA

Coram: Madam Justice Jennifer A. Pfuetzner
Mr. Justice David J. Kroft
Madam Justice Anne M. E. Turner

B E T W E E N :

	)	***J. I. Jardine***
	)	*for the Appellant*
DANIEL POLISCHUK	)	
	)	***S. J. Blake, K.C.,***
(Plaintiff) Appellant	)	***A. W. K. Challis*** *and*
	)	***A. M. Peterson***
- and -	)	*for the Respondent*
	)	
THE CITY OF WINNIPEG	)	*Appeal heard*
	)	***May 16, 2025***
(Defendant) Respondent	)	
	)	*Judgment delivered:*
	)	***September 12, 2025***

On appeal from *Polischuk v The City of Winnipeg*, 2024 MBKB 60 [the *reasons*]

KROFT JA

Introduction

[1] The plaintiff sued the defendant (the City) for lost income, alleging its conduct amounted to misfeasance in public office, wrongful interference with contractual relations (also known as unlawful means) and breach of procedural fairness. The impetus for the action was decisions taken by the

City's Public Works contract administrator, ultimately resulting in banning the plaintiff from providing heavy equipment services to the City.

[2] Despite the trial judge's disapproval of the manner with which the plaintiff was dealt, the trial judge dismissed the action because, in his view, the plaintiff failed to establish the requisite elements of the alleged wrongs.

[3] The plaintiff appeals the dismissal of the misfeasance in public office and wrongful interference with contractual relations claims. For the following reasons, I would dismiss the appeal.

Facts

[4] The plaintiff is a long-time heavy machine operator. He contracted his services exclusively to Schultz Transfer Ltd. (Schultz Transfer).

[5] Since 1999, Schultz Transfer's sole source of work was contracts with the City's Water Division and its Wastewater Division. The practical result of these working relationships was that all, or virtually all, of the plaintiff's income originated from the City.

[6] There were no contracts directly between the plaintiff and the City.

[7] The contracts between Schultz Transfer and the City permitted the relevant contract administrator to suspend or remove a machine operator for reasons related to attitude, performance or misconduct. The contracts also permitted the City to insist that Schultz Transfer not hire a subcontractor to whom the City reasonably objected. The two City employees most relevant to this case were Abe Wiebe (Wiebe), contract administrator, and Tim Evinger (Evinger), a supervisor in the Water Division.

[8] The events giving rise to the plaintiff's removal occurred in two time periods: March-April 2017 and November 2017. There was no evidence of complaints about, or deficiency in, the plaintiff's work, abilities or conduct leading up to 2017. The trial judge found the plaintiff had been a highly regarded, reliable and skilled equipment operator for the City.

[9] The March-April 2017 events are detailed in paragraphs 17 to 27 of the *reasons* and can be summarized as follows:

(a) An alleged failure by the plaintiff to wear proper safety gear while out of his backhoe and rudeness to a foreman assigned by Evinger to discuss the incident with the plaintiff. The plaintiff denied the rudeness allegation. The trial judge noted, although Evinger formally documented the incident, he never reported it to Schultz Transfer or the plaintiff, depriving them of an opportunity to address it.

(b) Evinger heard that a female co-worker of the plaintiff was offended by comments attributed to the plaintiff (which the plaintiff denied). The trial judge observed no formal complaint against the plaintiff was ever made by the co-worker and that the co-worker never expected the plaintiff would be prevented from working with her.

(c) A misunderstanding among crew members characterized by the trial judge as "petty" (*ibid* at para 19) but about which Evinger harboured blame towards the plaintiff.

(d) Schultz Transfer learned from an employee of the City that a certain lead hand was resentful of the plaintiff, to a point where the lead hand was prepared to lie to get the plaintiff in trouble. Despite knowing about Schultz Transfer's concerns, Evinger took no action to address them. Evinger was unhappy a City employee had fed information to Schultz Transfer.

[10] In the context of these events, Wiebe met with Evinger. Wiebe decided to ban the plaintiff from working for the Water Division (not the Wastewater Division). The trial judge found Wiebe's decision was based on Evinger's account and request, without further investigation, and to support Evinger who did not want the plaintiff working in the Water Division. The decision was communicated to Schultz Transfer without warning or opportunity to address the alleged concerns. The plaintiff was not afforded an opportunity to provide his version of the March-April 2017 allegations, which allegations, according to the trial judge, were meritless.

[11] The November 2017 events are detailed in paragraphs 28 to 39 of the *reasons*. They include allegations that, while performing work for the Wastewater Division, the plaintiff attempted to steal clean mud from a site shared with the Water Division. Evinger circulated the allegations among senior City employees, calling for the dismissal of the plaintiff and Schultz Transfer. Evinger also took issue with the plaintiff talking with other employees in a building used jointly by the Water Division and Wastewater Division and threatened to call the police.

[12] Shortly after the November 2017 events, Wiebe banned the plaintiff from performing any work for the City. Wiebe conceded he banned the

plaintiff because of the attempted theft allegation and the earlier incidents; made the decision to ban without real input from, or consultation with, Schultz Transfer or the plaintiff; and made the decision to ban the plaintiff to support fellow staff members, including Evinger. Similar to the March-April 2017 events, the trial judge found the November 2017 attempted theft allegations were without merit and the plaintiff's presence in a building used jointly by the Water Division and Wastewater Division to be inconsequential. He also found Wiebe's decision-making lacked independence and objectivity; neither the March-April 2017 nor the November 2017 bans were reasonable based on anything the plaintiff did.

[13] Other findings of the trial judge are central to this appeal:

(a) At the material times, Wiebe was acting in a private law capacity as administrator of a commercial contract between the City and Schultz Transfer.

(b) The City's actions, through Wiebe, likely amounted to an unlawful act against Schultz Transfer for which it could advance a claim through arbitration or a claim for breach of contract.

(c) The plaintiff suffered economic harm from Wiebe's conduct.

(d) Despite deficiencies in Wiebe's decision-making, he did not act in bad faith, dishonestly or with ill will towards the plaintiff.

(e) Wiebe did what he thought was best for the City and the other personnel involved. He thought he was acting properly and for

good reason; prioritizing concern for the City and its personnel ahead of concern for the plaintiff.

(f) Wiebe did not know enough about the plaintiff's work habits to know that, as a subcontractor for Schultz Transfer, the plaintiff would have no other source of income because of the bans.

(g) Wiebe did not intend to cause the plaintiff economic harm per se. The harm was incidental to, not the objective of, Wiebe's decisions.

[14] As stated in paragraph 1 herein, the plaintiff argued the City's conduct amounted to misfeasance in public office and wrongful interference with contractual relations. Despite significant expressions of sympathy for the plaintiff, the trial judge concluded the plaintiff failed to establish the requisite elements of the torts.

Grounds of Appeal

[15] The plaintiff submitted the trial judge:

(a) erred in finding the plaintiff failed to establish the intention required to establish wrongful interference with contractual relations; and

(b) erred in finding the plaintiff failed to establish any of the elements required to establish misfeasance in public office.

Ground One: Intention—Wrongful Interference With Contractual Relations

The Law Re: Wrongful Interference With Contractual Relations

[16] The leading case on wrongful interference with contractual relations is *AI Enterprises Ltd v Bram Enterprises Ltd*, 2014 SCC 12 [*AI Enterprises*]. *AI Enterprises* was recently extensively referenced and relied upon by this Court in *Ultracuts v Magicuts*, 2023 MBCA 71 [*Ultracuts*]. At paragraph 47 of *Ultracuts*, Beard JA summarizes the basic elements of the tort to be:

> (i) the defendant committed an unlawful act against a third party;
>
> (ii) the unlawful act caused economic harm to the plaintiff; and
>
> (iii) the defendant intended to cause economic harm to the plaintiff when committing the unlawful act.

[17] In *Ultracuts*, the focus was on element (i) which, ultimately, the plaintiff in that case failed to establish. In contrast, the focus of the present appeal is element (iii).

[18] *AI Enterprises* also speaks to the *type* of conduct targeted by the tort of wrongful interference with contractual relations and to the *scope* of the tort. As to type of conduct, the tort "captures the intentional infliction of economic injury on C [the plaintiff] by A [the City]'s use of unlawful means against B [Schultz Transfer]" (*AI Enterprises* at para 23). As to scope, the tort is to be narrow in its application (see *ibid* at paras 29, 32-35). The important policy

reasons for a narrow application are canvassed in *AI Enterprises* and need not be repeated for the purposes of this decision.

[19] In specific reference to element (iii)—the intention to cause economic harm—the Supreme Court of Canada describes the required intention as akin to "aiming at" or "targeting" (*AI Enterprises* at para 95) the plaintiff. This is consistent with the narrow application of the tort overall. It is not sufficient that the harm to the plaintiff be an incidental consequence of the defendant's conduct even where the defendant realizes it is extremely likely harm to the plaintiff may result (see *AI Enterprises* at paras 95, 97). The Supreme Court describes as apt the following passage from *Alleslev-Krofchak v Valcom Limited*, 2010 ONCA 557 at para 50, leave to appeal to SCC refused, 33907 (31 March 2011):

> [I]ntentional interference with economic relations requires that the defendant intend to cause loss to the plaintiff, either as an end in itself or as a means of, for example, enriching himself. If the loss suffered by the plaintiff is merely a foreseeable consequence of the defendant's actions, that is not enough.

(See *AI Enterprises* at para 96.)

Positions of the Parties

Plaintiff's Position

Legal Errors

[20] First, the plaintiff submits the trial judge erred at law by applying the wrong test for determining intention or by failing to consider a required

element of the intention test. He says the applicable standard of review is correctness.

[21] The plaintiff argues the trial judge's treatment of intention was too narrow given comments made by Beard JA in *Ultracuts* about the following passage in *AI Enterprises* at para 95:

> The Court of Appeal of England in *Douglas v. Hello! Ltd.*, [2005] EWCA Civ 595, [2005] 4 All. E.R. 128 . . . identified *five types of intention which might be relevant in this context: (a) an intention to cause economic harm to the claimant as an end in itself; (b) an intention to cause economic harm to the claimant because it is a necessary means of achieving an end that serves some ulterior motive; (c) knowledge that the course of conduct undertaken will have the inevitable consequence of causing the claimant economic harm;* (d) knowledge that the course of conduct will probably cause the claimant economic harm; (e) knowledge that the course of conduct undertaken may cause the claimant economic harm coupled with reckless indifference as to whether it does or not: para. 159. *In my opinion, the first two of these species of intention represent the core intention required for the unlawful means tort*.
>
> [emphasis added]

[22] The comments of Beard JA from *Ultracuts* at paras 45-46 are:

> While Cromwell J appears to have rejected the third type of intention, being "knowledge that the course of conduct undertaken will have the inevitable consequence of causing the [plaintiff] economic harm" (at para 95), *he does not comment on how that differs from the second type of intention. This may be problematic in practice, because direct evidence of an intention to bring about a result is often not available and resort must be had to inferences that arise where that result is the natural/inevitable consequence of what a person knew would flow from his deliberate actions*.
>
> In my view, for reasons that will become clear, it is not necessary for this Court to resolve this issue.

[emphasis added]

[23] Relying on Beard JA's reference to Cromwell J not commenting on the differences between the second and third types of intention, the plaintiff submits the test for the intention element of the tort of interference with contractual relations as set out in *AI Enterprises* is now unclear and/or open for reconsideration by this Court.

[24] Second, the plaintiff submits the trial judge erred in law by failing to consider required elements of what the plaintiff describes as the "legal test" expressed by the Supreme Court in *AI Enterprises*. The phrase "legal test" is used by the plaintiff to describe the first two types of intention identified in *Douglas v Hello Ltd*, [2005] EWCA Civ 595 (BAILII) [*Douglas*].

[25] In reference to the *second* type of intention, the plaintiff submits the trial judge failed to address whether there was an intention to cause economic harm as a necessary means of achieving an end that *serves some ulterior motive*. Had the trial judge done so, the plaintiff says he would have concluded the intention element was satisfied given his finding that Wiebe's decisions to ban the plaintiff were made to support Evinger (a supervisor who clearly did not care for the plaintiff) without independently verifying information provided to him by Evinger. In other words, the plaintiff argues that Wiebe intentionally inflicted economic harm on the plaintiff to serve the ulterior motive of supporting Evinger.

[26] In reference to the *first* type of intention, the plaintiff submits the trial judge erred in law by failing to analyze whether Evinger's intention to inflict harm, carried out through Wiebe, satisfied the intention requirement.

Despite acknowledging the decision to ban the plaintiff was Wiebe's to make, the plaintiff says the City should not be able to avoid liability where Wiebe acted unquestioningly on information provided by a supervisor bent on getting rid of the plaintiff.

[27] Third, the plaintiff submits the trial judge erred in law by imputing into the intention analysis a requirement for the plaintiff to establish the City acted with malice or ill will towards the plaintiff. In support of this argument, the plaintiff cites the trial judge's finding that Wiebe believed he was acting in the best interests of the City and without malice or ill will towards the plaintiff. He also relies on language in *AI Enterprises* cautioning against broadening the tort of interference with contractual relations by basing it solely on vague legal concepts such as commercial morality or malice (see para 33).

Error Applying Facts to the Law

[28] Alternatively, the plaintiff submits the trial judge erred in his application of the facts to the law and that the standard of review is palpable and overriding error. The relevant facts are as set out in paragraphs 4 to 14 herein and need not be repeated.

The City's Position

[29] The City submits the trial judge committed no legal errors in respect of intention. It says he properly identified *AI Enterprises* as the "key precedent" (the *reasons* at para 66) and correctly cited the relevant principles articulated therein and by this Court in *Ultracuts.* As such, the City says it is

not open to, or necessary for, this Court to reconsider the intention test for establishing interference with economic relations.

[30] More generally, the City submits that, at its core, the plaintiff's appeal is an attempt to have this Court revisit findings of fact made by the trial judge against the plaintiff's interest. The City says no palpable and overriding error has been established by the plaintiff and, as such, deference is owed to the trial judge's decision. The City's position is the same in response to the plaintiff's alternative allegation that the trial judge erred in his application of the facts to the law.

Decision—Ground One

[31] The standard of review applicable to alleged legal errors one through three is correctness (see *Ultracuts* at para 86; *Housen v Nikolaisen*, 2002 SCC 33 at para 8 [*Housen*]).

[32] In my opinion, the law pertaining to the tort of wrongful interference with contractual relations is as set out in *AI Enterprises*, relied upon in *Ultracuts*, and summarized in paragraphs 16 to 19 herein. That law was properly cited by the trial judge. Beard JA's passing observation in *Ultracuts* about Cromwell J not explaining how the second type of intention in *Douglas* differs from the third (see paras 21 and 22 herein) neither muddies the law nor opens it up for reconsideration. Beard JA's comments address the nature of the evidence typically available to prove intention and are in *obiter*. As acknowledged by Beard JA herself, the issue was immaterial to her decision, which did not turn on the intention component of the tort.

[33] In his factum, the plaintiff, relying on *AI Enterprises*, suggests the first two types of intention cited from *Douglas* by Cromwell J, comprise the test for the intention element of the tort. When Cromwell J's comments in paragraphs 95 and 96 of *AI Enterprises* are read in their entirety and in context, he is not so much declaring the two types of intention in *Douglas* to be *the test*; rather, he views them as the best examples (out of the five cited) of the *nature* of the conduct that will meet the intention requirement.

[34] To me, more significant is Cromwell J's confirmation that the intention must be in the nature of "aiming at" or "targeting" (*AI Enterprises* at para 95) and that "[i]t is not sufficient that the harm to the plaintiff be an incidental consequence of the defendant's conduct, even where the defendant realizes that it is extremely likely that harm to the plaintiff may result" (*ibid*). These comments are consistent with the Supreme Court's view that a narrow approach to intention is to be followed in cases of wrongful interference with contractual relations. To repeat, the trial judge understood this and correctly articulated the relevant legal principles in his reasons.

[35] Similarly, based on my interpretation of *AI Enterprises* and *Ultracuts*, I disagree with the plaintiff's suggestion the trial judge erred in law by failing to apply one or more components of the intention test. My last comment extends to the plaintiff's allegation the trial judged erred in *law* by failing to analyze whether Evinger's intention to inflict harm satisfied the intention requirement. I agree with the City that acceding to the plaintiff's arguments risks expanding the scope of wrongful interference with contractual relations contrary to the Supreme Court's direction in *AI Enterprises*.

[36] In my view, the plaintiff's third legal error argument—that the trial judge erred by imputing into the intention analysis a requirement for the plaintiff to establish the City acted with malice or ill will towards the plaintiff—also fails. It is true that, in his reasons, the trial judge found as a fact that Wiebe's actions were not motivated by dishonesty, malice or ill will. Those findings were all available to him on the record and relevant when addressing the plaintiff's overall allegation that he was intentionally harmed by Wiebe. It does not follow that, because he made those findings, the trial judge adopted malice or ill will as a *requirement* for satisfying the intention element of the tort of wrongful interference with contractual relations. I do not read the reasons of the trial judge as having done so and reject the plaintiff's argument in that regard.

[37] Lastly, I turn to the plaintiff's submission that the trial judge erred in applying the facts to the law. The standard of review for this question is palpable and overriding error (see *Ultracuts* at para 86; *Bereskin Estate, Re*, 2014 MBCA 15 at para 12; *Housen* at para 10).

[38] Simply put, those facts were reasonably determined by the trial judge based on the record before him and, when they are applied to the law in *AI Enterprises* and *Ultracuts*, amply support the trial judge's conclusion that the plaintiff failed to establish the intention element of the wrongful interference with contractual relations tort.

[39] No reversible error has been established by the plaintiff. I would dismiss ground one of the plaintiff's appeal.

Ground Two: Misfeasance in Public Office—Failed to Meet Requirements

The Law Re: Misfeasance in Public Office

[40] The legal principles pertaining to misfeasance in public office are set out in the leading Supreme Court decisions of *Odhavji Estate v Woodhouse*, 2003 SCC 69 [*Odhavji*] and *Ontario (Attorney General) v Clark*, 2021 SCC 18 [*Clark*] and summarized by this Court in the recent decision of *6165347 Manitoba Inc v Robinson*, 2025 MBCA 33 at para 170 [*Robinson*]:

> (1) It is an intentional tort whose distinguishing elements are:
>
> (a) deliberate and unlawful conduct in the exercise of public functions; and
>
> (b) awareness that the conduct is unlawful and likely to injure the plaintiff.
>
> (2) The plaintiff must also prove the other requirements common to all torts, including:
>
> (a) that the tortious conduct was the legal cause of their injuries; and
>
> (b) that the injuries suffered are compensable in tort law.
>
> (3) Misfeasance in public office involves egregious behaviour and is applied with caution and restraint;
>
> (4) It provides redress for egregious intentional misconduct, not for what may be, at worst, maladministration, official incompetence or bad judgment in the execution of public duties;
>
> (5) Because misfeasance in public office is an intentional tort, the actions and motivations of each individual actor involved must be considered separately;
>
> (6) The courts must strike a careful balance between curbing unlawful behaviour by governmental officials, on the one hand, and, on the other, protecting those charged with making decisions for the public good from unmeritorious claims by those adversely affected by their decisions;

(7) The ambit of the tort is narrow, and proof of the requisite mental element must be commensurate with the seriousness of the wrong alleged, which is among the most egregious of tortious misconduct;

(8) While an inference of malice or improper motive need not be the only reasonable inference drawn by a trial judge, such an inference must be grounded in evidence and there must be proof commensurate with the seriousness of the wrong;

(9) A trial judge must rely on logic, common sense and experience, taking into account the totality of the evidence when deciding when to draw an inference;

(10) There is a distinction between an inference grounded in the evidence and one based on speculation. An inference can be reasonably and logically drawn from an established fact or group of facts, whereas speculation is mere conjecture based on guesswork. If there is an evidentiary gap between the established facts and a proposed inference, the inference is unavailable, and it is an error for a judge to draw it; and

(11) . . . [T]here is only one civil standard of proof and that is proof on a balance of probabilities. Evidence must be scrutinized with care by the trial judge in deciding whether it is more likely than not that an alleged event has occurred. Seriousness of the allegations or consequences does not change the standard of proof. However, it is a factor for the trial judge to consider in weighing the evidence.

[citations omitted]

[41] These legal principles are not disputed by the parties.

Positions of the Parties

Plaintiff's Position

[42] In respect of this ground of appeal, the plaintiff once again submits the trial judge committed a number of legal errors reviewable on a correctness standard. In particular, he states the trial judge erred by:

(a) failing to apply key elements of the test for establishing misfeasance in public office;

(b) relying on cases regarding "the exercise of public functions" without affording the parties an opportunity to address them; and

(c) concluding there was no bad faith on the part of the City without referring to any law and contrary to the law defining bad faith.

[43] The plaintiff also alleges the trial judge erred in his application of the facts to the law reviewable on the standard of palpable and overriding error.

The City's Position

[44] The City submits the trial judge relied upon and applied the correct legal principles. He found, as fact, that Wiebe was not acting in a public officer capacity, did not knowingly act unlawfully and did not know the alleged unlawful conduct was likely to harm the plaintiff. The trial judge committed no palpable and overriding error.

Decision—Ground Two

[45] After reviewing *Odhavji*, referring to *Clark* (this Court's decision in *Robinson* had not been issued at the time) and summarizing the positions of the parties, the trial judge states (the *reasons* at para 52):

> I find that [the plaintiff's] misfeasance claim fails on three distinct and essential elements of this tort. Specifically, [Wiebe]:
>
> (i) was not acting in a public officer capacity when he exercised his role as contract administrator for this contract;
>
> (ii) did not know, nor did he have subjective disregard, that the manner he exercised his contract administrator obligations was unlawful; and
>
> (iii) did not know, nor did he have subjective disregard, that the alleged unlawful conduct was likely to harm [the plaintiff].

[46] After setting out these findings, he proceeded to explain each one in more detail.

[47] As for his first finding, the trial judge came to his conclusion after citing two authorities for the proposition that not every act of a public official relates to the exercise of public authority (*Des Champs v Conseil des écoles séparées catholiques de langue française de Prescott-Russell*, 1999 CanLII 660 (SCC) [*Des Champs*] and *Taylor v British Columbia*, 2020 BCSC 1936 [*Taylor*])[1] and then weighing and applying the evidence before him. In his assessment, at best, Wiebe was a public officer acting in a private law capacity as administrator of the commercial contract between the City and Schultz Transfer. Administration of the Schultz Transfer contract was subordinate or

[1] The principle that not every wrong committed by a public officer will amount to abuse of office has been recognized by more than one legal scholar (see GHL Fridman, *The Law of Agency*, 7th ed (London, UK: Butterworths, 1996) at 357; Erika Chamberlain, "Fiduciary Aspects of Misfeasance in a Public Office" (2014) 39:2 Queen's LJ 733 at 758).

incidental to any broader duty to the public Wiebe may have had in his role in Public Works (see the *reasons* at paras 54-55).

[48] In my opinion, the trial judge's finding that Wiebe's decision to terminate the plaintiff's services was not an exercise of his public authority is reasonable based on the record before him. He committed no palpable and overriding error in respect thereto, nor in applying those facts to the law of misfeasance in public office (see *Housen* at paras 24-25, 28).

[49] The allegation the trial judge erred in law by citing *Des Champs* and *Taylor* is without merit. It is clear from the record that, during argument, the City submitted Wiebe was not exercising public authority or a public function. It was a live issue, and it was open to the plaintiff to reply thereto, including by filing additional cases. This is not a situation where any party was caught by surprise or denied a fair process. The fact the trial judge, who was given no authorities on point, cited two cases in support of his acceptance of the City's position does not change that.

[50] Turning now to the trial judge's second finding—Wiebe was not aware the conduct was unlawful. This finding is the culmination of the facts and observations identified in paragraphs 58 to 60 of the *reasons*, many of which are referred to in paragraph 13 herein. At the risk of repetition, these include Wiebe thought he was acting properly and for good reason, he was acting without dishonesty or bad faith, he did what he thought was best for the City and its employees, and he had no ill will against the plaintiff (a person he did not even know). These findings, including that Wiebe was not aware of any unlawfulness of his conduct, are reasonable based on the record before the trial judge. He committed no palpable and overriding error in respect

thereto, nor in applying those facts to the law of misfeasance in public office (see *Housen* at paras 24-25, 28).

[51] I mention at this point the plaintiff's submission the trial judge erred at law by finding no "bad faith" without reference to and, in fact, ignoring cases that speak about the meaning of the phrase. The seed for this argument is the following passage (*Odhavji* at para 28):

> As a matter of policy, I do not believe that it is necessary to place any further restrictions on the ambit of the tort. 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.

[52] The trial judge was well aware of and, at paragraph 48 of the *reasons,* quoted from this passage. The message of the paragraph does not turn exclusively on bad faith. In fact, the Supreme Court in *Odhavji* refers to bad faith *or* dishonesty. The plaintiff does not question the trial judge's finding that Wiebe was not acting dishonestly. Moreover, the references in the passage to dishonesty, bad faith and other limiting features of the tort all lead to the ultimate point that, to successfully establish the tort of misfeasance in public office, the officer must deliberately engage in conduct they know to be inconsistent with the obligations of the office. In my opinion, the trial

judge understood and correctly applied the law (see *Housen* at paras 8-9). Even if there was merit to the plaintiff's bad faith argument, it would be inconsequential given the plaintiff's failure to establish other elements of the tort of misfeasance in public office.

[53] Turning now to the trial judge's third finding—Wiebe was not aware that the alleged unlawful conduct was likely to harm the plaintiff. This finding was reasonably available to the trial judge on the record before him, explained in paragraphs 62 and 63 of the *reasons*, and summarized in paragraph 13 herein. Once again, at the risk of repeating myself, the trial judge found in April 2017, Wiebe did not know enough about the plaintiff's extreme work habits to understand he would be financially harmed by being restricted to working for departments other than the Water Division; in both April and November 2017, Wiebe could not have known that the plaintiff's sole source of income was Schultz Transfer's contracts with the City and Wiebe neither intended to harm, nor foresaw harming, the plaintiff financially. The trial judge committed no palpable and overriding error in respect of those facts or in applying them to the law of misfeasance in public office (see *Housen* at para 28).

[54] I end my discussion of this ground of appeal by reiterating that the tort of misfeasance in public office is an intentional tort. It is narrow in scope and is to be applied with caution and restraint. It involves deliberate and unlawful conduct/egregious intentional misconduct in the carrying out of public functions. Maladministration, official incompetence or negligence will

not suffice (see *Robinson* at para 170). The trial judge was mindful of these characteristics throughout his analysis.

Conclusion

[55] In the circumstances, I would dismiss the plaintiff's appeal in its entirety. The City is entitled to costs in accordance with the Court of Appeal tariff.

_____ JA

I agree: _____ JA

I agree: _____ JA