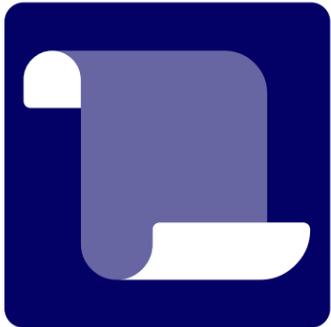


Helpful Guide to the Tort of Misuse of Process Involving Proceedings Initiated With a Collateral Purpose and Ulteriorly Motivated



Legal processes are sometimes illicitly used for a purpose other than which the proceeding was designed and intended such as the use of criminal prosecution or regulatory complaints as a means of insituting hardship or oppression or even for the purpose of gaining an advantage in other legal proceedings. The tort of abuse of process, sometimes referred to as misuse of process, was defined in *Harris v. GlaxoSmithKline Inc.*, [2010 ONCA 872](#) whereas it was stated:

[27] At para. 48 of his reasons, the motion judge defined the constituent elements of the tort of abuse of process as follows:

The case law authorities establish that there are four constituent elements to the tort of abuse of process: (1) the plaintiff is a party to a legal process initiated by the defendant; (2) the legal process was initiated for the predominant purpose of furthering some indirect, collateral and improper objective; (3) the defendant took or made a definite act or threat in furtherance of the improper purpose; and (4) some measure of special damage has resulted ...

And in *Neff v. Patry*, [2008 BCSC 163](#) as:

[160] The tort of abuse of process is more often found in civil than in criminal context. The elements are that:

(a) the defendant must have used the legal process for a purpose other than it was designed to serve, in other words for a collateral or illicit purpose,



(b) the defendant must also have done some definite act or made some definite threat in furtherance of the improper purpose; and

(c) some measure of damages must be shown.

[161] In *Guilford Industries Ltd. v. Hankinson Management Services Ltd.* (1973), [1973 CanLII 1065 \(BC SC\)](#), 40 D. L. R. (3d) 398, [1974] 1 W.W.R. 141 (B.C.S.C.), Mr. Justice Anderson refers at ¶26 to Fleming on Torts to illustrate the essential difference of the tort of abuse of process from the tort of malicious prosecution.

... Quite distinct, however, are cases where a legal process, not itself devoid of foundation, has been perverted to accomplish some extraneous purpose, such as extortion or oppression. Here an action will lie at the suit of the injured party for what has come to be called abuse of process.

...

Unlike malicious prosecution, the gist of this tort lies not in the wrongful procurement of legal process or the wrongful launching of criminal proceedings, but in the misuse of process, no matter how properly obtained, for any purpose other than that which it was designed to serve. (Rest. S 682.) It involves the notion that the proceedings were 'merely a stalking-horse to coerce the defendant in some way entirely outside the ambit of the legal claim upon which the court is asked to adjudicate', (*Varawa v. Howard Smith* (1911) 13 C.L.R. 35, 91 (Isaacs J.)) and it is therefore immaterial whether the suit thus commenced was founded on reasonable cause or even terminated in favour of the instigator. The improper purpose is the gravamen of liability.

The tort of misuse of process at first glance may appear equivalent to the tort of malicious prosecution; however, there are key differences; for example, in misuse of process the proceeding may involve some genuine substance and the proceeding

allegedly initiated as an abuse may have some teeth and therefore be founded or partially founded which is contrary to the malicious prosecution tort in which the commenced matter culminate in full favour of the accused; however, with misuse of process the allegations giving rise to an improperly motivated proceeding may culminate against the accused; *McTaggart v. Ontario*, [1991 CanLII 8313](#);

[28] Fleming, op. cit, at p. 589 distinguishes the tort of abuse of process from malicious prosecution as follows:

Quite distinct, however, are cases where a legal process not itself devoid of foundation has been perverted to serve some extraneous purpose such as extortion or oppression. ... Unlike malicious prosecution, the gist of this tort lies not in the wrongful procurement of legal process or the wrongful launching of criminal proceedings, but in the misuse of process, no matter how properly obtained for any purpose other than that which it was designed to serve.

Commence Without Awaiting Conclusion

Furthermore, the misuse of process litigation may be commenced prior to conclusion of the proceedings from which the misuse of process litigation arises and therefore prior to a determination of whether the allegations within the improperly motivated proceeding are founded or otherwise; *A.M. v. Matthews*, [2003 ABQB 942](#):

[6] In order to make a claim for abuse of process it is not necessary to prove that the proceedings to which it relates have been concluded.

...

[25] It will be noted from this outline that while the tort of malicious prosecution cannot arise until after the predicate action is concluded, there is no such requirement in relation to the tort of abuse of process. It will also be noted that what has been described as the second element of the tort of abuse of process may not be an element of the tort so much as a reminder that proof of the oblique motive will presumably not be made out without evidence of some overt threat, since the motives which underlie a lawsuit are not, themselves, actionable.

In certain circumstances, such as where discovery of the misuse of process arises well before conclusion of the misused process, it may be crucially necessary to commence an action for the tort of misuse of process before the misused process is concluded due to the running of a limitation period, among other things. Legal strategy will assist in determining whether misuse of process litigation ought to be, or await, the conclusion of the misused process. Per *Neff*, while citing *Guilford*, as well as the *McTaggart*, it is possible that while the misused process may have some merit and the illicitly brought process may proceed according to that merit, the tortiousness arises separately. Simply stated, while the illicitly brought process may have some teeth and actually be prosecuted, unlike a malicious prosecution case which must conclude as well as conclude fully in favour of the accused, the tort of misuse of process arises even if the allegations within the misused process bear some merit; however, it is the separate and collateral purpose for which the misused process was initiated that gives rise to the separate tortiousness of the misused process. Essentially, when a process is initiated, the process must be used for the genuine purpose of the process itself, and if the process was initiated for an ulterior purpose, something outside of, and beyond, the pursuit of the natural outcome for which the process actually exists in law, then the process itself is being misused regardless of whether there is some foundation to the allegations.

Summary Comment



While the tort of malicious prosecution may be more well known and more frequent, the tort of misuse of process appears less onerous to prove in certain circumstances. So long as the accused can demonstrate that the purpose of commencing a procedure was for a collateral ulterior purpose rather than the genuine purpose of the procedure, an action in misuse of process may succeed.

