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Kafkaesque Abuse of Power in Former B.C. Government

Misfeasance in public office is a difficult claim to prove. A successful action requires plaintiffs to demonstrate that a public officer engaged in deliberate misconduct knowing that such misconduct was likely to cause harm to the plaintiff. In many cases, evidence of the requisite mental element is lacking.

However, as the recent B.C. Supreme Court decision in *Rain Coast Water Corp. v Her Majesty the Queen in Right of the Province of British Columbia* (“Rain Coast”) demonstrates, where courts are willing to rely on the concept of collective misfeasance in assessing the actions of public officials, plaintiffs may find more success in proving abuse of power.

Rain Coast was one of several water export companies vying for potentially lucrative licenses to export water. Over a period of several years, the plaintiff had alternating success in obtaining one of two necessary licenses. However, the plaintiff was unable to secure both licenses simultaneously because of a series of “Kafkaesque” (as the trial judge put it) bureaucratic entanglements. Meanwhile, a competitor of Rain Coast owned by a former B.C. Cabinet Minister was successful in securing governmental approval for bulk water export.

The trial judge found misfeasance in public office on three grounds:

- (i).the province’s failure to disclose the existence of a \$5,000 maximum tariff to Rain Coast;
- (ii).the unlawful cancellation of one of Rain Coast’s licenses; and
- (iii).the preferential treatment of Rain Coast’s competitor.

On the first two issues, the trial judge held British Columbia liable despite the fact that different officials were involved in each act, relying on the vicarious liability doctrine of *respondeat superior*.

With respect to the preferential treatment of Rain Coast’s competitor, the trial judge held not only the relevant official, then-Premier William Vander Zalm liable, but also the Province itself on the basis that it was a “collective public body.” Although initially of the view that it would be “difficult” to establish the requisite mental elements for the Province itself, the trial judge concluded that in the “unusual circumstances” of

this case, it would be appropriate to do so.

The decision in *Rain Coast* highlights one way in which plaintiffs may find increasing success in proving the tort of misfeasance in public office, but also raises challenging questions about the appropriateness of relying on concepts of collective knowledge and action in holding large governmental bodies liable. An award of damages has yet to be made in this case.

*With notes from
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