CA43698
Supreme Court File No.: A963919
Supreme Court Registry: Vancouver
Heard before: Mr. Justice Leask

COURT OF APPEAL

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA FROM THE ORDERS OF MR. JUSTICE LEASK PRONOUNCED THE 28TH DAY OF JANUARY, 2010 AND THE 12TH DAY OF MAY, 2016 AT VANCOUVER BRITISH COLUMBIA

BETWEEN:

RAIN COAST WATER CORP.

RESPONDENT (PLAINTIFF)

AND:

HER MAJESTY THE QUEEN in Right of the Province of British Columbia, BILL VANDER ZALM, and RICHARD ROBERTS (a.k.a. DICK ROBERTS)

APPELLANTS (DEFENDANTS)

FACTUM OF THE RESPONDENT

(SEE APPEARANCES OVERLEAF)

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CHRONOLOGY OF KEY EVENTS AND DATES IN THE LITIGATION

14 Sept 1982	Mr. Colin Beach ("Mr. Beach") of the respondent posted his Application for a Water Licence at Freil Lake and below it, near Hotham Sound. The application specified that the water was to be used for "bulk and/or bottled production for human consumption, domestic and export, local operator use and local power supply". (*Rain Coast Water Corp. v. Her Majesty the Queen in Right of the Province of British Columbia, 2016 BCSC 845 ["Reasons"] per the Honourable Mr. Justice Leask, para. 8; Respondent's Appeal Book, Vol. 1, pg. 85*).
05 Dec 1982	Beach posted an application for a foreshore licence on the shore of Hotham Sound, near Jervis Inlet, below Freil Lake. (*Reasons, para. 8; Respondent's Appeal Book, Vol. 1, pg. 218*).
06 Jan 1983	Meeting held between Mr. Beach and J.W. Webber, Assistant to Comptroller of Water Rights, to discuss the respondent's application for a water licence. Mr. Beach is advised that it was necessary to have "an interest in land" to support a water licence. (*Reasons, para. 8*)
07 Jan 1983	Ms. Marion Refeen, Senior Processing Clerk, Ministry of Environment, confirmed to Mr. Beach that the quantity of water applied for was 25,000 acre feet per annum ("AFY").
11 Jan 1983	Mr. Beach writes to the Regional Water Manager and requests consideration of his application for a water licence for the reduced volume of 19,000 acre-feet per year, based on a study of the

	mean annual available water from Freil Lake, undertaken in consultation with Mr. P. J. Kluczynski, P.Eng. (*Reasons, para 8*)
24 Jan 1983	Mr. J. W. Webber, Assistant to the Comptroller of Water Rights, writes to Mr. Beach, stating as follows: "*… the concept of the bulk export of water by tanker ship is relatively new, and the Provincial Government is currently considering specific policies applicable thereto. It can, nonetheless, be anticipated that any water licence covering such export would be restricted to water for which there is no existing or planned foreseeable use within the Province and which would otherwise discharge to salt water. The Comptroller of Water Rights would determine the terms and conditions of any such water licence.*". (*Respondent's Appeal Book, Vol. 1, pg. 272)*
10 Feb 1983	Mr. J. E. Farrell, Deputy Comptroller of Water Rights, advises Mr. Beach to advertise his water licence application in the Vancouver Province or Vancouver Sun for one (1) edition.
23 Feb 1983	Mr. J. W. Webber, Assistant to the Comptroller of Water Rights stated in a letter to Mr. Beach, that "*the Provincial Government encourages a policy of environmental and integrated resource planning and use*".
25 Feb 1983	The Water Licence application of the respondent to store 19,000 AFY and to use water for bulk export from Freil Lake which flows southwest and discharges into Hotham Sound, Jervis Inlet (ocean), was advertised in classified section of The Province newspaper in Section 445, "LEGALS".
28 Feb 1983	Mr. P M. Brady, Comptroller of Water Rights, writes to the respondent advising that to date, it had been provincial policy to

	consider applications for licences to export water from remote coastal streams having relatively small watersheds and which discharge into the ocean. (*Reasons, para. 9*; *Respondent's Appeal Book, Vol. 1, pgs. 88, 275)*
21 March 1983	The respondent was incorporated as Coast Mountain Aquasource Ltd. ("Aqua"), in order to develop the Freil Lake Project, conceived by Mr. Beach. (*Reasons, para. 10*)
	The respondent deals with the Ministry of Lands, Parks and Housing of B.C. in order to secure a foreshore tenure in which to berth tanker ships on Hotham Sound, below Freil Lake, for the purpose of loading water by gravity from that source.
31 March 1983	The respondent submits extensive and detailed plans for its Freil Lake Project to the Lands and Water Management branches. (*Reasons, para. 10*)
06 April 1983	Mr. Beach meets with G. A. Rhoades, Regional Director, Ministry of Lands, Parks and Housing, to discuss the application for a foreshore lease. (*Reasons, para. 10*)
14 April 1983	Gary Robinson of the Water Management Branch confirms that the respondent had met all statutory requirements for the issue of a water licence at Freil Lake; including the payment of fees, filing proof of posting the application, service of the application on affected landowners, and publication of the application in the Vancouver Sun and Province on Feb 25, 1983.
21 April 1983	Respondent meets with Peter M. Brady, Comptroller of Water Rights regarding the respondent's correspondence with

companies marketing water in California, as well as transport companies regarding potential costs for shipping.

24 April 1983 — The respondent writes to Peter M. Brady (Mr. Brady"), Comptroller of Water Rights, regarding a meeting held in his office on April 21, 1983.

29 April 1983 — In a letter to the respondent, Mr. Brady indicates that his branch expected to have the policy issue (concerning bulk export of water from remote coastal sites) placed before the government within two or three months. Mr. Brady also states that the legislation does not permit the issuance of a water licence prior to the establishment of the appurtenant interest in land by the applicant. (*Respondent's Supplemental Appeal Book, Vol. 1, pg. 14*)

18 May 1983 — The Pacific Pilotage Authority of the Government of Canada informs the respondent that nearly any size of vessel could make the transit to Hotham Sound, and that there were no restrictions as to the length or deadweight tonnage.

25 May 1983 — Mr. Rhoades, Regional Director, Ministry of Lands, Parks and Housing, writes to Mr. Beach advising that the respondent's foreshore lease application on Hotham Sound had been disallowed. Mr. Rhoades further advises that the government wished to establish a policy for the export of fresh water, and states: *"You may again resubmit your application according to any policy which has been established at that time by Cabinet."* (*Reasons, para. 12*; *Respondent's Supplemental Appeal Book, Vol. 1, pg. 15; Respondent's Supplemental Appeal Book, Vol. 4 pg. 1499*)

08 June 1983 — Mr. Brady, Comptroller of Water Rights, states as follow in a letter to the respondent: "*…I would emphasize that, although you have made application therefor, no licence in respect of the diversion and use of water from Freil Lake for export purposes has yet been issued. Additionally, you currently do not possess the related, statutory property ownership status which is a mandatory qualification for the holder of a water licence. … With regard to the establishment of Provincial Government policy, this is the prerogative of Cabinet. At this time it is not known what procedures they will adopt …".* (*Reasons, para 13*)

15 June 1983 — Environment Minister Mr. Anthony J. Brummet ("Mr. Brummet") writes to the respondent's M.L.A., Jack Davis, advising that the "*water resource is owned by the Crown in right of the Province, and rights to its diversion and use can only be obtained by licences issued under the Water Act". (Respondent's Appeal Book, Vol. 1, pg. 79)*

20 June 1983 — Mr. Beach complains to the Office of the Ombudsman of British Columbia that he found the disallowance of his foreshore lease application unsatisfactory because of what he had been previously advised in the Feb 28 1983 letter from Mr. Brady, Comptroller of Water Rights. (*Respondent's Appeal Book, Vol. 1, pg. 275; Respondent's Appeal Book*)

29 June 1983 — Mr. Brady, Director, Water Management Branch, states as follows in a letter to the respondent:

"Your understanding concerning ownership status requirements is only partly correct. A lease such as the foreshore lease would satisfy this requirement. A permit over Crown land would not as

this is provided subsequent to the issue of a water licence. The disallowance of your lease application by the Regional Director, Lands and Housing, does very much prejudice the possibility of your getting a water licence. As stated in earlier correspondence and at our meeting on April 21, 1983, an application must establish the appurtenant interest in land before the licence can be issued.".

(*Reasons, para 14*; *Respondent's Appeal Book, Vol. 1, pg. 87*)

15 July 1983 — BC Hydro confirms in a letter to the respondent that it had no interest in the Freil Lake site for hydroelectric generation.

18 July 1983 — Mr. J. E. Farrell ("Mr. Farrell"), Deputy Comptroller of Water Rights, states in a letter to the respondent, regarding its application for a water licence on Freil Lake, that: "*the estimated mean annual inflow of 19,000 acre-feet …may not prove unreasonable*" and that "*… in normal circumstances, the quantity licenced would not exceed 80% of the mean annual inflow*". (*Respondent's Appeal Book, Vol. 1, pgs. 90-92*)

2 Aug 1983 — External Affairs Canada writes to the respondent, stating that export permits pursuant to the Export and Import Permits Act are not required for bottled water or for water exported via tanker ship.

30 Aug 1983 — British Columbia Ombudsman, Karl A. Friedmann, advises Mr. Beach, in regards to his complaint about the disallowance of the respondent's foreshore lease application, that Mr. Brummet, Ministry of Lands, Parks and Housing, preferred to postpone the meeting until he had more information about fresh water export

from Ministry of Environment officials and the Federal/Provincial jurisdictional issues on fresh water export were settled.

16 Sept 1983 — Mr. J.E. Farrell, Deputy Comptroller of Water Rights, meets with the respondent to discuss the Freil Lake project. Mr. Farrell advises that the WMB did not anticipate rejecting the respondent's application for a water license as a result of the rejection of the respondent's application for a foreshore lease, but rather that the WMB would be awaiting government policy prior to taking any further action [Emphasis by Leask, J.]. (*Reasons, para 15*)

30 Sept 1983 — Mr. Farrell, Deputy Comptroller of Water Rights, states as follows in a letter to the respondent:

"I confirm that your water licence application will remain in good standing pending a decision by Cabinet on the general policy covering the commercial export of water in bulk containers or tanker vessels. … As explained to you during your meeting with Mr. Marr, it is government policy to manage watersheds on an integrated resource-use basis. … Subject to Cabinet approval of the general policies pertaining to bulk export of water, it is proposed to implement an integrated, phased, project approval process. I would, therefore, suggest that the finalizing of terms of reference for an environmental impact study be held in abeyance pending the implementation of the proposed integrated approval process and resultant identification of the concerns to be addressed.". (*Reasons, para 16*; *Respondent's Appeal Book, Vol. 1, pgs. 82-84*).

4 Oct 1983 — Mr. Brummet, Minister of lands, parks and housing writes to the respondent, stating as follows:

	"Policy respecting the export of fresh water from the province has not yet been established. Until such time as export approval has been given and the regulations and procedures had been put into place, land applications for this purpose cannot be accepted. For this reason, your application cannot be reinstated by the Ministry. The disallowance of your application. At this time does not preclude you from making a new application in the future, according to any policy which has been established." (*Reasons para 17*; *Respondent's Supplemental Appeal Book, Vol. 6, pgs. 2036-2046*)
21 Oct 1983	Mr. Brummet, advises both of his deputy ministers that: *"our Ministries have approval to consider applications for export of fresh water from B.C. on their own merits in each case"* (*Reasons para 18*; *Appellant's Appeal Book, Vol. 1, pg. 60*)
31 Oct 1983	John C. Johnston, Deputy Minister, Lands Parks and Housing, writes to Ben E. Marr, Deputy Minister, Environment, and advises Mr. Marr that [Mr. Johnston] had reviewed the respondent's application with his staff and that they had concluded that: *"…it is best handled as a major project, similar to a major ski development or log handling development.".* Mr. Johnston further suggests that the Ministry of Lands, Parks and Housing take the lead role for the project. (*Reasons, para 19*; *Respondent's Supplemental Appeal Book, Vol. 6, pg. 2047; Respondent's Appeal Book, Vol.*)
16 Nov 1983	Mr. Brummet, Minister of Lands, Parks and Housing, and Environment, indicates in a letter to the respondent that its application to export water would be considered on its own merits

	with the view that such export would be acceptable if environmental and resource concerns were met. (*Reasons, para 20*)
22 Nov 1983	The Ministry of Forests writes to the respondent, stating that the records indicated that there was no such reserve. Nor is there one contemplated over the unnamed Creek flowing out of Freil Lake.
25 Nov 1983	Al Rhoades, Regional Director of the Ministry of Lands, Parks and Housing ("Mr. Rhoades"), advises J. W. Webber of the Water Management Branch that the respondent's cancelled application for a foreshore licence could be re-activated. At or around this time, Mr. Rhoades was advised by Mr. Beach that the respondent required the foreshore lease and the water licence before it could negotiate for the necessary funding (to build and operate the Freil Lake project). Mr. Rhoades advises Mr. Webber that his Ministry (Region) did not anticipate any major problem with the Respondent's foreshore lease application. (*Respondent's Appeal Book, Vol. 1, pg. 271*)
28 Nov 1983	A Province of B.C. memorandum states that now that the Province had confirmed its water export policy, the Ministry of Lands, Parks and Housing did not anticipate any major problem with the respondent's foreshore lease application.
5 Dec 1983	Mr. Farrell, Deputy Comptroller of Water Rights, indicates that he saw no major obstacle to granting the water licence which the respondent had applied for. (*Respondent's Supplemental Appeal Book, Vol. 6, pg. 2024-2025*).

6 Dec 1983	Al Rhoades, Regional Director of the Ministry of Lands, Parks and Housing, writes to the respondent, advising that its application for foreshore tenure would be accepted based on the information and policy requirements set out in the letter. (*Reasons, para 21*; *Appellant's Appeal Book, Vol. 1, pg.* 66)
7 Dec 1983	J. E. Farrell, Deputy Comptroller of Water Rights, advises Mr. Rhoades, in regards to the respondent's application for a foreshore lease and a water licence, that the latter was in good standing, but that the applicant (respondent) had not yet acquired the necessary land ownership status which would potentially allow him to acquire a water licence, and that, for this reason, the water licence application was substantially in abeyance pending a decision by the Lands Branch regarding the granting of a foreshore lease upon which the proposed project was predicated. Mr. Farrell also advises Mr. Rhoades that the Water Branch would not require the resubmission of material from Mr. Beach which generally met the statutory requirements of the Water Act and the requirements of the suggested procedures of the Lands Branch. (*Respondent's Appeal Book, Vol. 1, pg. 282*)
16 Dec 1983	The respondent again applies to the Lands Branch for a foreshore lease on Hotham Sound, below Freil Lake. (*Reasons, para 22*)
21 Dec 1983	A Province of B.C. memorandum regarding the respondent's water export project application refers to a normal term of foreshore lease being 30 years, and states that the foreshore lease and water licence should be inter-related as to terms and conditions. (*Reasons, para 23*; *Respondent's Supplemental Appeal Book, Vol. 6, pg. 2048*)

	In contradiction to the Province's memorandum of 21 Dec 1983, referred to above, in May 1985 the respondent was granted a 3 year foreshore licence, renewable at the Crown's discretion for 7 years, and in January 1986 the respondent received a 15 year water licence, which permitted 3 years to build works and commence using bulk water.
1984	The respondent submits to the Lands and Water Management Branches a detailed conceptual proposal to develop the Freil Lake water project, including positive responses from other government agencies. (*Respondent's Supplemental Appeal Book, Vol. 1, pgs. 154 - 364*).
24 Jan 1984	Respondent meets with Water Management Branch officials (Farrell, Webber and Smith) to discuss the respondent's water licence application. The respondent is advised that the policy on the rate for water licence (for export purposes) was still under review. (*Reasons para 24*)
24 Jan 1984	The Respondent reports to the Water Management Branch that 9,226 AFY was available from Freil Lake, after releases for aesthetics and oysters.
01 Feb 1984	Robert K. Cox of the Marine Resources Branch of the Ministry of Environment advises Dave Butler, the Crown's District Manager, Ministry of Lands, Parks and Housing, that the Marine Resources Branch, Shellfish Section, would not object to the respondent's facility going ahead based on the safeguards and guarantees the respondent had put forward in its proposal. (*Respondent's Appeal Book, Vol. 1, pg. 93*)

03 Feb 1984	Mr. Cox of the Marine Resources Branch advises the Comptroller of Water Rights that the Marine Resources Branch would like to see the minimum water flows to maintain larval oyster habitat maintained as specified on page 59 of Coast Mountain Aquasource Ltd.'s (the respondent's) application (*Respondent's Supplemental Appeal Book, Vol. 6, pg. 214*), reflecting potential shipment/export of 9,226 AFY after releases from the proposed Freil Lake reservoir for consideration of the aesthetic appearance of water falls and the larval oyster habitat of Hotham Sound.
07 Feb 1984	Respondent writes to Mr. Farrell, Deputy Comptroller of Water Rights, advising that he remained concerned with "removing the 'regulatory risks' associated with the proposed development. Respondent asks whether or not Mr. Farrell would grant an initial term of twenty years for a water licence, and if not, to tell him the maximum period for which a licence would be issued. Respondent asks Mr. Farrel for the water rate for 9,226 AFY. (*Reasons, para 25*; *Respondent's Appeal Book, Vol. 1, pgs. 94-96*)
08 Feb 1984	Mr. Brummet, Minister of Lands Parks and Housing, writes to the respondent acknowledging that Lands had received the respondent's application and conceptual proposal, and that Ministry staff had begun an analysis. Mr. Brummet also advised the respondent that his Ministry required *"ample evidence of complete financial research and planning, before the proposal can proceed to the next stage"*. (*Reasons, para 26*; *Respondent's Supplemental Appeal Book, Vol. 6, pg. 2051*)
21 Feb 1984	Mr. Farrell, Deputy Comptroller of Water Rights, writes to the respondent that *"it would be inappropriate for me to anticipate any specific terms and conditions which would apply with the issue of a*

[water] licence.", and advises the respondent that *"Policy on water licence fees is still being reviewed by government"* [Emphasis by Leask, J.]. (*Reasons, para 27*)

23 Feb 1984 — British Columbia Order in Council No. 333 is approved, stating that the comptroller shall settle the sum of the amount of the application fee and the amount of the first year rental payable under this tariff (THE PROVINCE. Reg. 240/60, the Water Act Regulation). Mr. Farrell does not inform the respondent of this new development, nor does he settle the amount of the application fee and first year rental payable by the respondent under that tariff.

08 Mar 1984 — Respondent writes to the water management branch, stating that:

"As indicated previously, I remain concerned with having a response to my letter of February 7, 1984 Mr. Farrell. In particular, I believe that it will be of significant, and possibly a critical, importance to have a licensing term of twenty years. The reasons for this matter not be self-evident. Regardless of what vessels may be selected for water transportation, it is clear that the proposed operation will involve considerable capital expenditures for discharge and distribution facilities. Without a guarantee of supply for twenty years, it may be impossible to demonstrate the economy of an imported supply of water from my proposed source." (*Reasons, para 28*)

12 Mar 1984 — Mr. Tom Smith, Head of Operation, Water Management Branch documents the field inspection of Freil Creek which he attended with Mr. Beach, Mr. Bowkett, Mr. Tomter, and Mr. Stewart, and he states that the field investigation confirms that the proposed

scheme was feasible. (*Respondent's Supplemental Appeal Book, Vol. 6, pg. 2052*)

13 Mar 1984 Mr. Tom Smith, Head of Operation, Water Management Branch, writes a memorandum to J.W. Farrell, Deputy Comptroller of Water Rights, and states:

"I raise this matter with you in writing since the need to know the fees structure for export of water is becoming critical, particularly in connection with the water application from Coast Mountain Aquasource Ltd (the respondent). As you are aware a meeting was held on February 29, 1984 with Lands, Parks and Housing (L.P.H.) and Forestry.

The conceptual proposal submitted by Mr. Beach was accepted and it was agreed that letters would be sent to Mr. Beach. L.P.H. will be sending a letter indicating approval in principle subject to submission and acceptance of the formal proposal. As agreed I would be writing to Mr. Beach telling him that I was recommending to you that processing of his application proceed towards the issue of a water licence again subject to his obtaining tenure to land.

In later discussion with L.P.H. I have learned that their letter will include an attachment, in essence a draft lease, setting out conditions in detail and their fee schedule. This is felt by L.P.H. to be necessary in order that Mr. Beach can prepare the formal proposal which involves knowledge of the detailed financial aspects of the project in order that he can develop markets. This is a fair approach with a proponent who is seriously pushing ahead with the venture.

It is now important that we are up front with Mr. Beach and advise him not only of the physical requirements but also the schedule of fees regarding export of water. He needs this for submission of the formal proposal.

In order that I can write Mr. Beach and fully inform him regarding - commitments in connection with water licensing would you please advise what can be said regarding fees."

Emphasis by Leask, J. (*Reasons, paras 29-39, 162-163*; *Appellant's Appeal Book, Vol. 1, pg. 313*).

03 Apr 1984 Mr. Al Rhoades, Regional Director, Ministry of Lands, Parks and Housing, provides approval in principle for the granting of a foreshore tenure on Hotham Sound to the respondent. (*Reasons, para 31*; *Respondent's Appeal Book, Vol. 1, pgs. 97-103*)

03 Apr 1984 Mr. Tom Smith, Head, Policy, Evaluation and Operations, Water Management Branch, writes to the respondent, stating as follows:

"I wish to advise you. I am recommending to the Comptroller but processing of your application for the diversion of water from Freil Creek proceed towards the issue of the water license subject to the completion by you of the formal proposal and the issue of a foreshore lease….

I realize you have an immediate need to know what the water license will contain, and for that reason I'm advising you further that my recommendation to the Comptroller would include, among other things, that the license issued with an initial term of 10 years and may be renewed at the discretion of the Comptroller for a

	further 10 years at the end of the initial period and each subsequent ten year period. The license will also set out requirements regarding the design of the works by registered professional engineer and the need to monitor the stream flow and diverted water." (*Reasons, para 32*).
19 Apr 1984	The Canadian Coast Guard grants an exemption to the respondent under the Navigable Waters Protection Act, in regards to its plans to install a dock and mooring buoys at Hotham Sound, British Columbia.
05 July 1984	B.C. Provincial Government issues a statement that applications for the bulk export of water discharging to the ocean would be considered on their individual merits. (*Reasons, para 33*)
04 Sept 1984	B.E. Marr, Deputy Minister of Environment, forwards a cabinet submission on proposed policies on the export of water to his colleague Sandy Peel, D.M. of Industry and Small Business Development. The August 31 1984 cabinet submission notes that the present rental fees were "unrealistically low". It recommends that licences for export purposes be issued with a term of 10 years, and that the fees for export purposes be fixed according to the tariff of fees attached as Appendix A to the cabinet submission. This was the fee structure that was subsequently adopted by cabinet. (*Reasons, para 34*; *Respondent's Appeal Book, Vol. 1, pg. 104*)
12 Sept 1984	A Summary of Cabinet Decisions indicates that, with respect to the "Water Export Policy", a decision was made in the following terms: *"Approved the Minister to proceed with policy but a price differential is to be established for bottled water. Higher price for*

bulk water exports.". (*Reasons, para 35*; *Respondent's Supplemental Appeal Book, Vol. 6, pgs. 2055-2067*)

07 Dec 1984 — J.E. Farrell, Deputy Comptroller of Water Rights, signs a Schedule of fees for water licences for Industrial purposes. One of the categories is "Export of Water." At the end of the Schedule is a note: "*For any use listed in this Schedule the application fee and annual rental shall not exceed $5,000.00 each*."
This Schedule is not disclosed to Mr. Beach or any other representative of the respondent at the time it was issued. It is eventually obtained through an application under the *Freedom of Information Act* in 1998, two years after the commencement of this legal action. (*Reasons, paras 36, 161, 162, 165*; *Respondent's Appeal Book, Vol. 1, pgs. 259-268*)

20 Feb 1985 — The respondent submits a detailed business plan dated December 14, 1984, to the Ministry of Lands, Parks and Housing, in support of its application for a foreshore tenure.

20 Feb 1985 — Mr. Beach advises J. W. Webber of the Water Management Branch that Mr. Rhoades, Regional Director, Lands, Parks and Housing had indicated that, subject to Mr. Beach posting a currently unspecified guarantee, the necessary foreshore lease would be forthcoming. Mr. Beach further advises Mr. Webber that he "now urgently required confirmation of the water charges applicable to his project for which purpose he had repeatedly contacted his local MLA and Norman Spector of the Premier's Office". Mr. Webber advises Mr. Beach that it was probable that the water rentals would not exceed the related provision already contained in earlier estimates.

25 Feb 1985 The respondent writes to the Ministry of Lands, Parks and Housing, stating:

“As you will observe, the principal departure from the submission of feet between the 1985, lies sequence of permitting and financing.

As explained by telephone to you Mr. John Gerbrandt this morning, we are requesting issue of the letter of commitment (Agreement) , and Letter of Consent to Occupy Foreshore, prior to undertaking the construction survey, geotechnical analysis, final engineering, the Limnology, etc., as these items will require expenditures in excess of $100,000.”

01 Mar 1985 The respondent writes to the Premier and Mr. Bennett regarding the water rates, saying that M.L.A. John Reynolds and the Minister of Tourism/Expo 86 had indicated their support for the respondent’s project to export bulk fresh water by ship from Freil Lake.

14 Mar 1985 The Premier, the Honourable Mr. William N. Vander Zalm, writes to the respondent advising that he is forwarding a copy of the respondent's correspondence to his colleague Mr. Pelton, Minister of Environment, so that he too may be aware of the respondent's remarks.

22 Mar 1985 Respondent writes to the Water Management Branch, requesting that the pending water licence be issued in the full amount applied for, i.e. – 25,000 AFY, or the volume determined as the mean annual inflow, 20,700 acre feet, and that the allowable amount for

	export be 9,226 acre feet as per proposed reservoir operation. The letter is stamped as having been received on March 28, 1985.
28 Mar 1985	By Order in Council 630, the Province of B.C. approves a tariff of fees and annual rentals with respect to applications and water licences for the industrial purpose of "commercial bulk export of water by marine transport vessels": $1.50 per acre-foot ("AF") for the application fee, $7.50 per AF per year ("AFY") as annual rent for the right to use water, plus $7.50 per AFY based on the volume actually used. (*Reasons, paras 37, 167*)
28 Mar 1985	The Respondent receives a formal offer of financing for between $2,000,000 and $2,600,000 to meet the requirements of its business plan, from Buckland, Murphy and Walsh (B.M.W.) of Canarim Investment Corporation Ltd., which is predicated upon the respondent receiving a water licence to divert 9,226 AFY. The proposed financings cannot be completed because: the Crown refuses to provide any assurance that if the water rental of $69,195 is paid, a licence for 9,226 AFY would be issued to the respondent by any particular date, or at all; and, because the Crown fails to charge the respondent a lawful water rate.
04 Apr 1985	The Respondent writes to the Comptroller of Water Rights, asking to reduce the volume of its water licence application on Freil Lake to 9,226 AFY as a result of the expensive water export licence rates the Crown was charging, and due to proposed releases of water from the proposed Freil Lake reservoir for aesthetic and environmental reasons including the habitat of larval oysters in Hotham Sound. (*Reasons, para 38*; *Respondent's Appeal Book, Vol. 1, pgs. 136-139*)

16 Apr 1985 — Mr. Farrell, Deputy Comptroller of Water Rights, writes to the respondent regarding its application for a water licence to export 9,226 AFY from Freil Lake, and indicates that an application fee of $13,839.00 and 1st year water rental of $69,195.00, plus fees of $20 for storage purpose, $66.70 with respect to a permit to occupy Crown land, less fees and rentals of $170.00 previously paid, resulting in a balance of $83,050, was owed by the respondent to the Province of B.C. (*Reasons, paras 39, 167*; *Respondent's Appeal Book, Vol. 1, pgs. 134-135*)

18 Apr 1985 — The Ministry of Lands, Parks and Housing writes to the respondent, approving the respondent's application for a disposition of the land under the Land Act, which contained "*non merger*" clause:

"The provisions of this agreement shall survive the execution and delivery of the license provided that any event of any contradiction between the provisions and terms and conditions of the lease, the latter shall prevail."

The respondent is offered a foreshore licence for a term of 3 years, renewable at the discretion of the Crown for an additional 7 years, and including terms on which the licence would be convertible into a lease of 30 years. However, the Crown subsequently denies the respondent's request to include the terms for conversion to a lease as an endorsement on the foreshore licence. (*Reasons para 40*)

25 April 1985 — The respondent writes to the ministry of lands, parks and housing, advising that discussions with Mr. Gerbrandt of that department,

	led the respondent to believe the commitment would be from 10 years, and that the respondent anticipated this as a requirement that stage, in order that the capital cost of government construction estimated at $1.5 million could be a motorized over 10 years. In the same letter, the respondent also whether the ministry would make the commitment for 10 years. (*Reasons, para 41*)
29 Apr 1985	Minister of Environment, Mr. Austin Pelton ("Mr. Pelton") writes to the respondent, advising that an Order in Council, approved on March 28, 1985, sets out the tariff for *"commercial bulk export of water by marine transport vessels*".
15 May 1985	The Crown issues Aquatic Land Licence No. 232354 (the "Foreshore Licence"), covering an area of foreshore of Hotham Sound, below Freil Lake, to the respondent for 3 years. The Foreshore Licence grants the respondent the right to occupy foreshore lands on Hotham Sound for the purpose of building and operating temporary and/or permanent works to facilitate the respondent's project to divert water for bottling purposes and for the purpose of bulk water export from Freil Lake via marine transport vessels. (*Reasons, para 42, 167*; *Respondent's Appeal Book, Vol. 1, pgs. 126-133*)
21 May, 1985	The Crown, as represented by J. E. Farrell, Deputy Comptroller of Water Rights, advises the respondent that payment of the application fee and first year rental would validate the respondent's water licence application and allow him to then adjudicate the application.

In the same letter of May 21, 1985, Mr. Farrell indicates that the "quantity adjustment to your water licence application stated in your April 4, 1985 letter was accepted". The quantity adjustment involved a reduction of the quantity from 19,000 acre-feet per year to 9,226 acre-feet per year. (*Respondent's Supplemental Appeal Book, Vol. 6, pg. 2069*)

12 Jun 1985 — The respondent asks the Crown, in view of the comprehensive business plan the respondent had submitted, the very significant expenditures in time, funds that it had already made, and the government policy to encourage private sector initiative to develop new business, to issue a water licence to the respondent to use 9,226 AFY from Freil Lake, subject to the respondent paying $13,839 in application fees (according to the tariff approved under Order in Council No. 630), by October 16, 1985, and further asks the Crown not to require payment of water rentals (of $69,195) until October 16, 1988 or until commencement of use of the water, whichever should occur first. (*Reasons, para 43*; *Respondent's Appeal Book, Vol. 1, pgs. 140-142*)

12 Jun 1985 — Mr. Jack Davis, a Crown M.L.A., advises its Minister of Environment that the government was making it unduly difficult for the respondent to get its business started and asked why it was taking a punitive approach towards the respondent's pioneer venture by requiring payment of a year's tax (rental) on water in advance of issuing a licence.

Mr. Davis suggests to the Minister of Environment that it would be reasonable to charge the respondent an application fee of some $14,000, but not the first year water rental of close to $70,000,

	before issuing a water licence to the respondent. (*Respondent's Appeal Book, Vol. 1 pgs. 143-144*)
19 Jun 1985	Mr. Davis advises the Crown that, with respect to its request that the respondent pay a year's water rental in advance of knowing whether a licence would be issued, he could not imagine anything geared more certainly to the project's demise, or a change in ownership Mr. Davis asks the Minister of Environment why the Crown was insisting on a substantial down payment (i.e. - application fee of $13,839 plus 1st year's water rental of $69,195) from the respondent, before it would advise the respondent whether or not it would receive a water licence. (*Respondent's Appeal Book, Vol. 1, pgs. 149-151*)
10 Jul 1985	A financing proposal is sent to the Respondent from West-Peak Ventures of Canada Ltd. The Province of British Columbia does not provide an answer in response.
25 Jul 1985	The Minister of Environment advises the respondent that its proposal to pay only the application fee and defer the annual rental fees until water was being used (a) was not acceptable, (b) did not conform to the Water Act, and (c) would set a precedent which he was not prepared to entertain. (*Reasons, para 44*; *Respondent's Appeal Book, Vol. 1, pgs. 152-153*)
08 Aug 1985	The respondent receives a letter of intent from Trac Resources Inc., re financing for the respondent's Freil Lake project, with an attached letter of April 16, 1985 from J. E. Farrell of the Water

	Management Branch to the respondent. (*Respondent's Appeal Book, Vol. 1, pgs. 154-159*)
09 Aug 1985	Mr. D. Grant Macdonald, Executive Vice President of Continental Carlisle Douglas sends a letter to Trac Resources Inc., re: underwriting agreement for financing for (the respondent's) Freil Lake Water Export project. (*Respondent's Appeal Book, Vol. 1, pg. 173*)
06 Nov 1985	Austin Pelton, Minister of Environment, advised that: "… A position has now been taken that a licence for the bulk export of water will be issued for an initial fifteen year period and upon application, the term of the licence may be extended by the Comptroller of Water Rights. The fifteen year initial period for the licence and the renewable feature should provide assurance to investors and allow projects for the bulk export of water to proceed from the conceptual stage to the operational stage." (*Respondent's Appeal Book, Vol. 1, pgs. 199-200*)
16 Jan 1986	The Respondent pays to the Crown $10,125 in respect of application fees and water rentals for the right to divert bulk water at the rate of 1,125 AFY. (*Respondent's Appeal Book, Vol. 1, pg. 207, 376*)
27 Feb 1986	The Crown issues Conditional Water License ("CWL") 64113 to the respondent which permits the storage and diversion of up to 1,125 AFY from Freil Creek for industrial (marine bulk purpose). The term of the licence is for 15 years. This was the respondent's export licence. (*Reasons, para 45, 167*; *Respondent's Appeal Book, Vol. 1, pgs. 210-212, 213*-214)

27 Feb 1986	The Crown issues Conditional Water License ("CWL") 64114 to the respondent which permitted the storage and diversion of up to 20,000 gallons of water per day, for industrial use (bottling of water for sale). This was the respondent's bottling licence. The licence did not have a fixed term. (*Reasons, para 46, 167*)
06 Jun 1986	The Crown advises the respondent that the term of the Foreshore Licence had been changed to 5 years, renewable in the discretion of the Crown for another 5 years. (*Reasons, para 47*; *Respondent's Appeal Book, Vol. 1, pg.* 133)
30 Sept 1986	Grace M. McCarthy, Minister of Economic Development, states to the respondent: "*Thank you for sending me a copy of your letter to the Premier, the Honourable W. N. Vander Zalm, regarding the export of water from Freil Lake. The project sounds very exciting and I am sure your promotional program will produce the desired results.*" (*Respondent's Appeal Book, Vol. 3, pgs. 990-991*)
06 May 1987	Grace M. McCarthy, Minister of Economic Development, states to the respondent: "*I have received a copy of your letter to the Honourable William N. Vander Zalm and read with interest about your plan to develop production facilities for exporting bulk and bottled high purity fresh water. … Thank you for bringing your project to our attention. The information and brochures which you enclosed indicate some unique and interesting product features …*". (*Respondent's Appeal Book, Vol. 3, pg. 992*)
29 May 1987	The Lands Branch distributes literature under the title of "CROWN LAND FOR GENERAL INDUSTRIAL DEVELOPMENT" which stated that shore land was available by lease for 30 years at 8% of

	the land value, or by licence of occupation for 10 years at 7.5% of the land value. However, despite comprehensive submissions made by the respondent, the Lands Branch does not offer the respondent a 30 year lease in 1987. (*Reasons, para 48*; *Respondent's Supplemental Appeal Book, Vol. 1, pg. 27*)
14 July 1987	B.C. bulk water export licence rates are increased by approximately 15% by way of Order in Council No. 1430. (*Reasons, para 49*)
23 Jun 1987	J. T. Hall, Regional Manager of the Lands Branch, writes to the Respondent, stating as follows: "The deadline for payment is August 10, 1987". The deadline he provided was fewer than 50 days from the date of his letter. (*Respondent's Appeal Book, Vol. 2, pgs. 409*)
26 Jun 1987	Margaret Annett of WCW sent to Tom Lee, Assistant Deputy Minister, Ministry of Forests and Lands, a revised copy of WCW's preliminary prospectus saying it was in the vetting stage at the Superintendent of Broker's Office. Ms. Annett states, "Tom, I would appreciate if you would treat this as a confidential document.", and thanks him for his "continued support". (*Respondent's Appeal Book, Vol. 2, pgs. 461-487*)
14 July 1987	In a letter to Premier Vander Zalm, the respondent states that it "*would be grateful for your efforts to see that the documentation we have asked for its provided to us*". In that regard, the respondent encloses its letter of the same date to Jack Davis, M.L.A., which specifies the documentation that the respondent was requesting, namely "full, true and plain disclosure" of all

	contracts and/or licencing arrangements between the Ministry of Forests and Lands and W.C.W. Western Canada Water Enterprises Inc., related to the export of water from Link Lake, Ocean Falls. (*Respondent's Appeal Book, Vol. 1, pg. 50*)
6 Aug 1987	The Crown responds in a letter to the respondent advising that WCW had been given *"… an exclusive period for the development of export exclusivity from this water source…"* (*Respondent's Supplemental Appeal Book, Vol. 1, pgs. 11-13*)
10 Aug 1987	Premiere Vander Zalm responds to the respondent. The respondent does not receive the requested documentation, rather, the respondent is provided with a copy of the August 6, 1987 letter from defendant Minister of Forests and Lands Dave Parker. (*Respondent's Appeal Book, Vol. 1, pg. 53*).
04 Sept 1987	A letter is sent from Premier Vander Zalm's office to Margaret R. Annett, President of Western Canada Water (WCW), confirming in regards to her request for a meeting with the Premier, that a "meeting has been scheduled for Wednesday, September 23, 1987 at 3:30 p.m. in the Premier's Office (Room 156 – West Annex) in Victoria.".
01 June 1988	D. A. Kasianchuk, Comptroller of Water Rights, directs a memorandum to J. E. Farrell, Deputy Comptroller, confirming that he had been informed by Bob Mitton, Executive Director (of the Lands Branch), that Cabinet had decided that Link Lake water export contract (between the Crown and WCW) should be extended to 25 years from the present 10 years, and that it should be renewable in 10 year increments after that. (*Respondent's Supplemental Appeal Book, Vol. 6, pg. 2029*)

16 June 1988 — Respondent writes to Tom F. Smith, Head of Licencing in the Water Management Branch, enclosing a copy of a WCW press release of June 1, 1988 which indicates that its contract had been extended to 25 years; that WCW's obligations to ship water or develop infrastructure had been removed; that the volumes of water available to WCW to ship will be increased to 100,000 acre feet per year; that the term of WCW's exclusive rights to ship water from Link Lake remained unchanged; and, that the terms of payment had been revised at WCW's request to facilitate its ability to enter into a long term contract. The respondent states to Mr. Smith: "We ask for assurances of equal value." (*Respondent's Appeal Book, Vol. 1, pgs. 58-59*)

17 June 1988 — Respondent writes to the Lands Branch "Hardship Committee", enclosing a copy of the same press release which had been sent to Mr. Smith the previous day. The respondent states: "*We consider it justifiable to ask for the details of that (competitor) company's agreement with Lands, prior to our being required to pay further fees. Please send us a certified copy of that agreement.*" – [P1, page 61]. The respondent is not provided with a certified copy of the agreement, nor any details from the Crown as to what it had negotiated with WCW. (*Respondent's Appeal Book, Vol.1, pgs. 60-61*)

20 June 1988 — S. L. Mazur, Regional Lands Manager, Ministry of Forests and Lands, writes to WCW, confirming the Province's intention to make a new agreement with WCW for a term of 25 years, allowing WCW to retain the exclusive right to ship water from Link Lake until March 21, 1990 with the payment for bulk water being 1.5% of gross sales of volume shipped. The letter does not say that WCW

will be required to pay water rentals in accordance to the Crown's published tariff. (*Respondent's Appeal Book, Vol. 1, pgs. 63-65*)

20 June 1988 — That same day, Mazur confirms the Province's intention as indicated above, and J. T. Hall, Regional Manager, Ministry of Forests and Lands, formally dispenses with the complaint from Mr. Mr. Beach of the respondent that the terms of his tenures for exporting water from Hotham Sound were inferior to those of WCW at Ocean Falls – (*Respondent's Appeal Book, Vol. 1, pg. 62*)

24 June 1988 — Respondent writes to Premier Vander Zalm stating *"… This morning you referred several times to your policy of open government. In spite of that policy, we have been denied an opportunity to see the contract between your government and W.C.W. Western Canada Water Enterprises Inc. We have asked several times for documentation of that licencing arrangement, via Hon. Jack Davis and Hon. John Reynolds, but have, to date, been denied. We continue to be charged substantial licencing fees and taxes, but have no indication that we are playing on a "level playing field" with the competition. To address this unhappy situation, please accept this formal request for a meeting. …*". Along with its June 24, 1988 letter to Premier Vander Zalm, the Respondent includes a June 9, 1988 "news release" of WCW. (*Respondent's Appeal Book, Vol. 1, pgs. 66-67*)

12 July 1988 — In the Premier's briefing notes of July 12, 1988, referring to T. F. Smith, P.Eng., Manager, Water Licensing Section, Water Management Branch, as the "MINISTRY CONTACT", reference is made to aforementioned WCW news release. *Respondent's Appeal Book, Vol. 1, pgs. 68-70*).

04 Aug 1988	In a letter to the respondent, Premier Vander Zalm declines to provide the Respondent with information as to the Crown's agreement or negotiations with the WCW. (*Respondent's Appeal Book, Vol. 4, pgs. 1245-1246*)
23 Sept 1988	Premier Vander Zalm signs B.C. Order in Council 1738, a water reserve purportedly made under Section 44 of the Water Act. The order reserves water for the Province for export and bottling.
07 June 1989	Respondent writes to Premier Vander Zalm explaining that to launch a water supply system with the best operating economy capital costs would be in the range of $50 million or more, and that investors had suggested that the respondent's project would be acceptably attractive if costs could be amortized a longer period (25 years). The respondent states that to appropriate these funds, a longer term was essential, and asks him to work with the Comptroller of Water Rights, the Minister of Environment and Cabinet, if necessary, to extend the term of its water licence to 25 years. (*Appellant's Appeal Book, Vol. 2, pgs. 676-679*)
14 June 1989	Premier Vander Zalm responds to the respondent indicating he had noted the points the respondent had raised relating to the term of the licence, however, rather than referring it to the Comptroller who had authority over the term of a water licence, he refers it to Elwood Veitch, a Crown minister with no authority over the matter. According to the June 1, 1988 memo from the Comptroller (*Respondent's Supplemental Appeal Book, Vol. 6, pg. 2029*), by that time Cabinet had already directed the 25 year term for WCW. (*Respondent's Supplemental Appeal Book, Vol. 1, pg. 46*)

17 June 1989	Elwood Veitch, Minister of Regional Development writes to the Respondent indicating that he was aware that the respondent had asked the Water Management Branch for a 10 year extension of its bulk water export licence. Veitch states, "*I wish you every success with what promises to be a most exciting new business for the Province.*". A copy of Veitch's letter is directed to Premier Vander Zalm. (*Respondent's Supplemental Appeal Book, Vol. 1, pg. 47*)
31 July 1989	Premier Vander Zalm wrote to the Respondent stating that he appreciated the Respondent's additional thoughts relating to licences for the "exportation of water in bulk quantity by tanker ship". Nevertheless, Vander Zalm failed to refer the matter to the appropriate official, being the Comptroller of Water Rights. (*Respondent's Appeal Book, Vol. 1, pg. 206*)
3 Aug 1989	D. A. Kasianchuk, Comptroller of Water Rights, writes to the Respondent, and represents that a water licence application from the respondent would be dealt with on its merits. (*Respondent's Appeal Book, Vol. 1, pgs. 291-294*) In response to the respondent's request for an extension of the term of its water licence, he indicates that he would seek Cabinet approval to extend the term of all bulk water export licences, despite being aware, and not informing the respondent, that Cabinet had already directed that WCW was to have the term of its water agreement increased to 25 years, and that it should be renewable in 10 year increments after that. (*Respondent's Supplemental Appeal Book, Vol. 6, pg. 2029*)

25 Sept 1989	The Province of British Columbia enters into a new water agreement with Western Canada Water Enterprises Inc. ("WCW"), giving it access to 42,635.3 AFY from Link Lake and Link River for bulk export purpose. WCW receives rights to that volume of water without being charging the upfront Water Act charges for bulk export licence application fees and water rentals according to the Water Act Tariff of July 14, 1987, referred to above. For a water licence for 42,635.3 AFY for bulk export purpose, the application fee would have been over $86,000 and the annual rent payable in advance would have been over $383,000, for a total of more than $469,000. These fees are waived in the case of WCW. The Crown does not advertise the opportunity for a private sector party to obtain such rights and dealt exclusively with WCW. (*Reasons, paras 78-80, 198-199, 201, 210, 215*; *Respondent's Appeal Book, Vol. 4, pgs. 1186-1244*)
14 Jan 1990	Respondent writes to Premier Vander Zalm seeking a meeting with him and Environment Minister John Reynolds with respect to their recent communications. (*Respondent's Appeal Book, Vol. 1, pg. 307; also Respondent's Appeal Book, Vol. 1 pgs. 303-304, 305*-306)
12 Feb 1990	The Office of Premier Vander Zalm responds to the respondent advising that: "*due to the demands on the Premier's schedule, a meeting is not possible at this time".* (*Respondent's Appeal Book, Vol. 1, pg. 308*)

19 April 1990	Nicholas R. Battista, Vice President of THE CIT GROUP writes to the respondent, confirming its potential interest in providing project financing for the respondent. (*Respondent's Supplemental Appeal Book, Vol. 4, pgs. 1308-1310*)
25 April 1990	Horst G. Mendgen, Vice President of Thyssen Canada Limited, writes to the respondent, expressing keen interest in suitable participation regarding the respondent's proposal to supply water to the City of Santa Barbara. (*Respondent's Supplemental Appeal Book, Vol. 1, pg. 89*)
30 April 1990	Gary W. Robinson, Head, Water Licence Administration, Water Management Branch, writes to the respondent advising that they would make "every reasonable effort to support [the respondent's] venture…" (*Respondent's Appeal Book, Vol. 1, pgs. 314-316*)
15 May 1990	A fax is sent from Margaret R. Annett, President of WCW to Premier Vander Zalm's office marked "V E R Y U R G E N T !!" stating: "*Premier Vander Zalm encouraged me on the evening of January 15 last, when he presided at the official opening of our state-of-the art bottling plant at Annacis Island, not to hesitate to look to him and his Government for support in our pioneering efforts. … we need the collaboration of our Government. Such collaboration ideally would entail the distinguished presence of an appropriate Cabinet representative (perhaps Mr. Reynolds – who knows our Company and its Principals well – if Mr. Veitch cannot alter his schedule) in Santa Barbara for most of Friday, May 18th …"* (*Respondent's Appeal Book, Vol. 3, pg.* 874)

17 May 1990 — Environment Minister Mr. John Reynolds writes 10 letters to various officials of the City of Santa Barbara, California, on behalf of the Government of British Columbia, promoting WCW. (*Reasons, paras 82-82, 131, 134, 211*; *Respondent's Supplemental Appeal Book, Vol. 4, pgs. 1495-1496, 1525-1534*)

22 May 1990 — Dave Parker, Minister of Crown Lands, states to Margaret Annett of WCW: "*Western Canada Water has enjoyed substantial benefits associated with exclusivity of source over the past four years and has had the opportunity to develop the industry in British Columbia and throughout the Pacific Rim*." (*Appellant's Appeal Book, Vol. 2, pg. 729*)

29 May 1990 — A letter from Premier Vander Zalm to Mayor Sheila Lodge and City Council, City of Santa Barbara states: "*I understand that Western Canada Water is in Santa Barbara at the present time working to secure a bulk water contract with you and I wish to confirm the details of the water supply agreement between the Company and the Province of British Columbia. … Our Province is indeed fortunate to be blessed with an abundance of natural resources. British Columbia water, both in quality and quantity, is one such resource that clearly has significant export potential – a potential that can be realized by the efforts of companies such as Western Canada Water*." (*Respondent's Appeal Book, Vol. 3, pg. 923*)

7 June 1990 — Fred Paley of Snowcap Waters makes a written request to Jack Hall of the Lands Branch for a copy of the "*Agreement Between: Western Canada Waters and Ministry of Crown Lands Your File No. 5403123".* Mr. Paley states: *"It is our concern that this agreement provides an unfair advantage to Western Canada Waters …*". (*Respondent's Appeal Book, Vol. 3, pg. 857*)

11 June 1990 — Mr. Mazur, Regional Director, Ministry of Crown Lands, advises Snowcap Waters, another water export proponent, that WCW had an agreement with his Ministry for purchase of +42,000 acre feet of water, at a rate which exceeded water management licencing fees. This is a misrepresentation, as shown by a Ministry of Environment Briefing Note of February 221, 1991. (*Respondent's Appeal Book, Vol. 3, pg. 851; Respondent's Appeal Book, Vol. 3, pgs. 789-850*)

12 June 1990 — Toshio Horio, Deputy General Manager, Project Engineering Department of Toyo Menka Kaisha, Ltd., of Tokyo, Japan, writes to the respondent, expressing conditional interest in participating in the respondent's water project by bringing its financial resource available and providing services to develop and construct the project.

13 June 1990 — J. B. Kim, General Manager of Hyundai Canada Inc., writes to the respondent, stating: "Through the study of your proposal, we are very interested in collaborating business with for the project of supplying water to the City of Santa Barbara" (*Respondent's Supplemental Appeal Book, Vol. 1, pg. 93*)

12 July 1990 — In a letter to Margaret Annett of WCW, Vander Zalm states: "*Western Canada Water has enjoyed a substantial marketing edge over the last few years as a result of exclusivity and, although it is recognized that exclusivity of source is a good marketing tool, it is in direct contravention of our Government's water management policies. By copy of this letter, I am requesting my colleague, the Honourable John Reynolds, Minister of Environment, to review the*

	water allocation issues at Ocean Falls…". (*Respondent's Appeal Book, Vol. 3, pgs. 920-921*)
20 July 1990	Philip J. Lockwood, V.P. Project Development, SCI Contractors Inc. of Seattle, Washington, writes to the City of Santa Barbara confirming that it was a joint venture partner with the respondent, regarding water supply to Santa Barbara. (*Respondent's Supplemental Appeal Book, Vol. 1, pg. 95*). SCI supplies its corporate literature, indicating that it has bonding capacity in Canada of $200,000,000 and of $225,000,000 in the United States. (*Respondent's Supplemental Appeal Book, Vol. 1, pgs. 98-103*)
Summer 1990	The respondent applies for a licence for approximately 13,000 AFY to support a bid to ship water to Santa Barbara, but abandons its application because Santa Barbara decided to build a desalination plant at a cost of some US$30 million
03 Aug 1990	Ministry of Crown Lands writes to the respondent (*Appellant's Appeal Book, Vol. 2, pg. 734*) concerning overdue rental on its foreshore licence 232354. The Crown relies on this letter as adequate notice of proposed cancellation of the licence. In 2010 the Court finds that the letter was not adequate notice, as it did not comply with the licence, the Land Act, or Crown's policy on notice. (*Rain Coast Water Corp. v. British Columbia, 2010 BCSC 114, at para 55; Respondent's Appeal Book, Vol. 3, pgs. 946-950*)
14 Aug 1990	Mr. Mazur of the Lands Branch writes to Margaret Annett of WCW, referring to his telephone discussion with her on August 10, 1990, and confirms his Ministry's intention to provide Fred Paley of Snowcap with a copy of the WCW – Crown Lands Water Sales

	Agreement with the royalty rates blacked out. (*Respondent's Appeal Book, Vol. 3, pg. 852*)
14 Aug 1990	Ms. Annett of WCW writes to Jerry Lampert, Principal Secretary, Office of the Premier, Victoria, THE PROVINCE., asking for his help in keeping WCW's contract with the Provincial Government confidential and assuring the City of Santa Barbara that WCW is able to deliver water from Ocean Falls, despite the claims of the Heiltsuk Band. (*Respondent's Appeal Book, Vol. 3, pgs. 853-854*)
21 Aug 1990	Ms. Annett of WCW writes to Jerry Lampert, Principal Secretary to the Premier, thanking him for interceding on behalf of WCW following her urgent communication with him the previous week concerning the confidentiality of WCW's contractual arrangements with the Crown. (*Respondent's Appeal Book, Vol. 3, pg. 855*)
21 Aug 1990	Ms. Annett of WCW writes to Patrick Kinsalla (sic – Kinsella) of The Progressive Group, thanking him for the advice he "proffered regarding Jerry Lampert" in the context of WCW's "urgent need to ensure that the Provincial Government preserved the confidentiality of [WCW's] contractual arrangement with the Crown." (*Respondent's Appeal Book, Vol. 3, pg. 856*)
7 Sept 1990	Respondent writes to Mr. Henry Boas of the Lands Branch, including a proposal for a 30 year foreshore lease at Hotham Sound, pursuant to an invitation to do so from Ross Douglas of the Lands Branch. (*Respondent's Appeal Book, Vol. 1, pgs. 317-321*)
5 Nov 1990	In a letter from Theresa Hudson of Premier Vander Zalm's office, the Respondent is again told "*On behalf of Premier Vander Zalm, thank you for your recent letter requesting a meeting be scheduled*

between yourself and the Premier. Unfortunately, due to commitments on the Premier's schedule, it is not possible to accommodate your request at this time. I have, however, placed your letter on current file for consideration should an opportunity arise in the near future.". (*Respondent's Appeal Book, Vol. 2, pg. 448*)

20 Nov 1990 Mr. Boas, the Regional Manager of the Lands Branch, pens a letter to the respondent advising that if the respondent does not pay the rental fee on the Foreshore Licence by November 30, 1990, the Licence would be cancelled. The said letter has the words "NOT SENT" written across it, and is not received by the Appellant until after it was produced in this litigation.

Despite the proposed advice to the respondent in the November 20, 1990 letter that it would have until November 30, 1990 to pay the rental, the handwritten direction on that letter reads as follows:

"Advise 1. License is cancelled for non-compliance with our letter of 90:08:03 2. Application for lease already denied by letter of August 27, 1990. New application required if he wishes to pursue this." (*Respondent's Appeal Book, Vol. 1, pgs. 325-326,* 327; *Rain Coast Water Corp. v. British Columbia, 2010 BCSC 114, at para 11*)

20 Nov 1990 Gary W. Robinson, Head, Water Licence Management, writes a letter to the respondent referring to three options to the respondent with respect to its bulk water licence, Conditional Water Licence 64113. He states that it was understood that, depending on the reply of the Ministry of Crown Lands to the respondent's letter of October 10, 1990 to Mr. Boas requesting a 30 year foreshore

lease, the respondent would proceed with one of the three options. Mr. Robinson's letter leads the respondent to believe that it would receive a reply to its letter of October 10, 1990 to Mr. Boas; however, no reply was received. Instead, the respondent's Foreshore Licence was cancelled effective November 28, 1990. (*Respondent's Appeal Book, Vol. 1, pgs. 247-249*)

22 Nov 1990 — Mr. Dave Parker (Mr. Parker"), Minister of Lands, writes to the respondent stating he was enclosing the general terms of the Province's contract with Western Canada Water regarding use of water near Ocean Falls (*Respondent's Appeal Book, Vol. 2, pgs. 778-781*).

Mr. Parker misrepresents that the agreement had been "inherited" by his Ministry, and went on to state, "". The agreement that was in effect as of November 22, 1990 had not been inherited by his ministry, rather, it was an entirely new agreement signed on September 25, 1989. (*Respondent's Appeal Book, Vol. 4, pgs. 1186-1244*)

29 Nov 1990 — Mr. Roberts as Regional Director signs a letter to the respondent advising that its foreshore license had been cancelled. (*Respondent's Appeal Book, Vol. 1, pgs. 126-133;*; *Respondent's Appeal Book, Vol. 1, pgs. 328*-329)

29 Nov 1990 — At the time of cancellation, the respondent is still pursuing financing for and intending to implement its business plan dated April 1990. (*Respondent's Supplemental Appeal Book, Vol. 6, pgs. 1912-1987*)

08 Dec 1990	Mr. Beach attends a meeting at the ministry of crown lands with Mr. N. McLeod, his lawyer Mr. Sperling, and Mr. McNaughton. At that meeting, Mr. Beach tenders $3500 to Mr. Roberts of the Ministry of Crown Lands to reinstate the respondent's Aquatic License 232354. (*Respondent's Appeal Book, Vol. 1, pgs. 336-354*)
14 Dec 1990	Respondent writes to O. Shimizu of Mitsui & Co. (Canada) Ltd., in regards to solving the "growing water problem in Tokyo", and providing information about the Freil Lake project. The Respondent indicates that it held a foreshore licence, as it had been advised by the defendant Roberts on December 8, 1990 that the licence would be re-instated.
17 Dec 1990	A letter is sent from Premier Vander Zalm's office to the respondent once again stating that "*due to demands on the Premier's schedule a meeting is not possible at this time*". (*Respondent's Appeal Book, Vol. 2, pg. 449*)
31 Dec 1990	Mr. Roberts writes a letter to the respondent advising that he was told by the respondent's lawyer Mr. Sperling on December 8 1990 that the procedure utilized in cancelling the respondent's licence 232354 was improper, but that an internal review had revealed that they had followed standard Ministry procedure and therefore they could not agree. (*Respondent's Appeal Book, Vol. 2, pgs. 451-452*)
27 Dec 1990	In a Briefing Note to his attention, Premier Vander Zalm is advised by Ross Curtis of the Trade Policy Branch, in regards to a visit by delegation of officials from the County of Santa Barabara and surrounding water districts to discuss water exports from British

	Columbia, that *"…The Province cannot enter into discussion of the relative merits of one water export proposal over another…"* (*Respondent's Appeal Book, Vol. 3, pgs. 951-952*)
31 Dec 1990	The defendant Roberts, Regional Director of Crown Lands, writes to the Respondent regarding its foreshore licence, stating as follows: "*An additional item that we reviewed, pursuant to comments made by Mr. Spearing during the December 8th meeting, was the appropriateness of the procedure utilized in cancelling the Licence in question on November 29, 1990. Our review has revealed that we followed standard Ministry procedure and therefore, we are not able to agree with the position taken by Mr. Spearing on this matter.*". (*Respondent's Appeal Book, Vol. 2, pgs. 451-452*)
01 Jan 1991	The defendant Parker, Minister of Crown Lands, promotes the sale of water from WCW to the Government of the Kingdom of Saudi Arabia, stating as follows – "*RE: "Canadian Glacier" Still Bottled Water" – "W.C.W. Western Canada Water Enterprises Inc. has all necessary permits required to bottle up to 522.6 acre/feet of water per year from Ocean Falls, British Columbia. This is more than sufficient to fulfill a contract for monthly shipments of one million cases (each case containing 12 one and one-half litre bottles) per year*". (*Respondent's Appeal Book, Vol. 2, pg. 454*)
February 1991	The Crown is advised of the Provincial policies and regulations regarding the export of water being inconsistent with the General Agreement on Tarrifs and Trade (GATT) or the Free Trade Agreement (FTA). (*Respondent's Appeal Book, Vol. 3, pgs. 962-987*)

14 Feb 1991 — In a legal opinion by government lawyer J.D. Ebbels attached as Appendix B to the Cabinet Submissions of the same date, the Crown is advised: "*Re: Moratorium on Water Export Licences – Further to your request of February 13, 1991, we have the following comments regarding the legal implications of a moratorium on water exports pending the completion of a review of the current licensing regime. … In the absence of an amendment to the Water Act, there is no authority to interfere with the legal rights of existing licencees. … Pending licence applications for bulk export that are interrupted by a moratorium may give rise to claims for compensation by the applicants. The likelihood of success would depend on the circumstances of each application, particularly the status of the application and any representations made to the applicant as to the likelihood of success of the application. …*" (*Respondent's Appeal Book, Vol. 2, pgs. 615-616*)

20 Feb 1991 — Dave Parker, Minister of Crown Lands, writes to the respondent offering to reinstate the respondent's foreshore licence on certain conditions, one of those conditions being that the respondent pay water rentals to the Ministry of Environment. (*Appellant's Appeal Book, Vol. 3, pgs. 808-809*)

The September 25, 1989 Agreement with WCW, to which Mr. Parker's own ministry was a party, provided WCW with access to water without charging for water rentals (*Respondent's Appeal Book, Vol. 4, pgs. 1186-1244; Respondent's Supplemental Appeal Book, Vol. 4, pg. 1493*)

04 Mar 1991 — The Goleta Water District of California issued a detailed Request for Proposals on water to be delivered by marine transport in

volumes up to 10,000 AFY to be delivered through mid-1998. (*Reasons, para 84*; *Appellant's Appeal Book, Vol. 3, pg. 810*)

04 Mar 1991 — The respondent files an application for an additional bulk water export licence, in the amount of 15,054 AFY from Freil Lake, and indicates that the water was needed in connection with supply to Goleta. (*Reasons, para 85*; *Respondent's Appeal Book, Vol. 1, pgs. 355*-356)

5 Mar 1991 — George Deukmejian (former Governor of California) writes to William Vander Zalm, Premier of British Columbia, stating as follows: "*Goleta would like to know if they will have a choice of vendors. As a public entity it is not likely to select on a single source basis. In the event of no choice, the decision may very well be to go to desalination, with no tankered water from British Columbia…*" industry."
The letter is stamped as having been received in at the office of Premier Vander Zalm on March 13, 1991.

08 Mar 1991 — Premier Vander Zalm writes to the Goleta Water District referring to WCW having a 25 year contract with the Province of B.C. to take water out of Link Lake for bulk export purpose. (*Reasons, paras* 86, 131, 134, 213; *Appellant's Appeal Book, Vol. 3, pg. 854; Respondent's Appeal Book, Vol. 3, pg. 900; Respondent's Supplemental Appeal Book, Vol. 4, pg. 1503*)

11 Mar 1991 — Water supply proposals are due for submission to the Goleta Water District, which receives proposals from the respondent, WCW, and Sun Belt Water Inc. ("Sun Belt"), a California company which was intending to source water from Snowcap Waters Ltd. of

B.C. (“Snowcap”). (*Respondent’s Supplemental Appeal Book, Vol. 2, pgs. 546-750*)

12 Mar 1991 — A briefing note is produced recommending a moratorium on export of water. (*Respondent’s Supplemental Appeal Book, Vol. 6, pgs. 1989-1990*)

14 Mar 1991 — The Goleta Water District Board rejects the advice of its review committee, which was to select WCW as its supplier of bulk water delivered by marine transport, and instead decides to negotiate with Sun Belt, which initially appeared to have the low bid at a gross price of US$108 million. The respondent’s price was US$126 million, and WCW’s was US$152 million. (*Reasons, paras 88, 214*; *Respondent’s Supplemental Appeal Book, Vol. 5, pgs. 1606-1623*)

15 Mar 1991 — Ms. Annett of WCW writes to Vander Zalm, advising him about the competition for a contract to ship water to the Goleta Water District. She informs Vander Zalm that Sunbelt Water of Santa Barbara (Sun Belt) had been given ten days to negotiate and complete a contract with Goleta.
Ms. Annett ends her letter saying, “*I hope this information is useful to you in your government’s decision regarding Sunbelt, Snowcap and Aquasource’s requests for additional water licences*.” (*Respondent’s Appeal Book, Vol. 1, pgs. 32-33*)

15 Mar 1991 — A cabinet debriefing note states “*OIC is planned to put a moratorium on licences*”. The moratorium was imposed March 18th effective March 20th. (*Reasons, para 90*; P14-3619). (*Respondent’s Appeal Book, Vol. 2, pgs. 656-657*)

15 Mar 1991 Mr. Parker writes a letter to Ms. Annet of WCW:

"In the spring of 1990, my Cabinet colleagues and I decided not to extend exclusivity of source to Western Canada Water at link Lake as that would be inconsistent with governments current water management policies.

At that time I also indicated my Ministries intention to fully cooperate with Western Canada Water, regarding the issues within our water sales agreement. The time has come to migrate Western Canada Water to more conventional means of accessing the water resources at Link Lake.

By copy of this letter I am instructing my regional director in Williams Lake, Mr. Steve Mazur, to take the steps necessary to transfer for the water licenses we currently hold on your behalf directly to which (sic) Canada Water". (*Reasons, para 91*, *Appellant's Appeal Book, Vol. 3, pg. 895*)

15 Mar 1991 Ms. Annet of WCW writes to the Premier Vander Zalm, copied to Mr. Veitch and Mr. Cliff Serwa, Minister of Environment:

"I have two primary concerns. Firstly, Sun Belt made it clear in the public meeting last night that the two small Canadian companies with which, they are dealing (Aquasource and Snowcap) are, in effect, "fronts" for a purely American operation, put in place to avoid British Columbia's restriction on transferring water licences to non-Canadians. The issue of this restriction and how Sun Belt plans on getting around it was discussed in great detail in a public meeting last night. Aquasource and Snowcap are both small or

non-existent companies trying to merely sell their water to Sun Belt.

Our concern is that we know from our dealings with the provincial government since 1985 that it is important that a Canadian company develop this business.

… I hope that this information is useful to you in your governments' decision regarding Sun Belt, Snowcap and Aquasource's request for additional water licences."

(*Reasons, para 89*; *Respondent's Appeal Book, Vol. 1, pgs. 32-33*)

15 Mar 1991 — Order in Council 331 is drafted on Friday, March 15, 1991. (*Respondent's Appeal Book, Vol. 2, pg. 668*)

18 Mar 1991 — The moratorium is imposed, effective March 20, 1991. (*Reasons, paras 90, 131, 134, 214, 215*; *Respondent's Appeal Book, Vol. 2, pgs. 668*-671)

20 Mar 1991 — A Cabinet meeting is held; debriefing notes dated March 22 1991 provide a record of Cabinet's reaction to being advised that Cliff Serwa, Minister of Environment, was going to announce the moratorium later that day. (*Respondent's Supplemental Appeal Book, Vol. 4, pgs. 1390-1391*)

10 May 1991 — There is a new directive on bulk water export implemented, stating that, pending policy review and direction, BC lands will not approve Land Act applications for bulk water export and that the Ministry of Lands and Parks must be in step with the moratorium

	and public review process. (*Reasons, para 93*; *Respondent's Supplemental Appeal Book, Vol. 6, pg. 1991*)
17 June 1991	Richard Roberts, Regional Director of Crown Lands, communicates with the respondent regarding its potential ability to re-stake, re-apply for and potentially obtain a foreshore tenure at Hotham Sound, but fails to advise the respondent of the directive of May 10 1991 against processing such an application. (*Appellant's Appeal Book, Vol. 3, pg. 933-936*)
23 Sept 1991	Deputy Comptroller of Water Rights cancels the respondent's water licences for lack of a land tenure (foreshore licence). (*Respondent's Appeal Book, Vol.1, pgs. 333-335*)
23 Oct 1991	Dave Parker, Minister of Crown Lands, advises the respondent that, since the respondent's water licences had been cancelled, his ministry would disallow the respondent's application for a surface tenure (foreshore lease). (*Appellant's Appeal Book, Vol. 3, pg. 941*)
12 Dec 1991	Order in Council No. 1531 is approved, extending the moratorium on the issuance of water licences for the purpose of bulk export by marine transport.
25 Jun 1992	Order in Council No. 1040 is approved, extending the moratorium on the issuance of water licences for the purpose of bulk export by marine transport.
31 Jan 1994	Premier Glen Clark and Moe Sihota recommend legislation including a prohibition on the removal of water resources from the

	Province, but exempting bottled water removals. (*Respondent's Appeal Book, Vol. 3, pg. 1123*)
28 Jun 1994	Order in Council No. 0861 is approved, extending the moratorium on the issue of licences for the bulk export of water by marine transport.
6 April 2000	City of San Diego writes to the respondent, advising that it was always open to new and more efficient ways to deliver fresh water to its customers and was willing to explore commercially viable options with various companies, and so was willing to review a proposal if one was submitted by the respondent. (*Respondent's Supplemental Appeal Book, Vol. 5, pg. 1794*)
11 Sept 2000	Stephen N. Arakawa, Manager, Water Resource Management Group, Office of the General Manager, Metropolitan Water District of Southern California, writes to the respondent, with respect to its inquiry regarding marine transport of potable water supplies to Southern California, saying "We look forward to receiving a proposal from Rain Coast Water Corporation.". (*Respondent's Supplemental Appeal Book, Vol. 5, pgs. 1795-1796*)
30 April 2002	Joyce Murray, Minister of Water, Land and Air Protection, writes to the respondent. Citing the *Water Act*, she states that all bulk water removals are prohibited excepting under those pre-existing operations "grand-parented" under the *Act*. (*Respondent's Supplemental Appeal Book, Vol. 4, pg. 1459*)
29 May 2002	The respondent writes to the Water Management Branch, and submits an application for a water licence to withdraw 500,000

	acre-feet per year from Henderson Lake. (*Respondent's Supplemental Appeal Book, Vol. 4, pg. 1460-1461*)
June 2005	San Diego County Water Authority reports that it had established an agreement with the city of Carlsbad to develop a regional seawater desalination facility at the Encina Power Station, and that a regional project led by the Water Authority could provide enough water for more than 100,000 typical households.

OPENING STATEMENT

The respondent says that the judgment under appeal is essentially correct. Fact and law demonstrated the commission of the torts of misfeasance in public office and unlawful means by the appellants. The appeal is fundamentally an impermissible attempt to conduct a *trial de novo*. The trial judge was entitled to rely on his ruling of January 28, 2010 that the respondent's foreshore licence was unlawfully cancelled, because the appellants did not pursue their appeal of it. He made no palpable and overriding error. From the failure of appellants to lead oral evidence, he drew appropriate adverse inferences. His findings of credibility, fact and the inferences he drew, explicitly and inferentially, are entitled to deference on appeal. He was also correct to allow a further hearing and the adduction of further evidence to assist the Court to properly assess damages.

The respondent's constitutional claims, including *ultra vires* violations of exclusive federal jurisdiction over international trade and commerce and indirect taxation, were not decided the trial judge. To allow this appeal, this Court would have to decide and reject the respondent's constitutional claims, which were heard on November 13, 2012 during the first portion of the trial. If this Court were to overturn the trial judge's tort findings, this action could not be dismissed, without the respondent's undecided tort claim relating to the alleged unconstitutional acts also being dismissed. Making the constitutional declarations sought would underscore the trial judge's tort findings, and would be elemental to a further Category B misfeasance finding, arising from the Crown having failed to charge the respondent water licence fees and annual rentals of not more than $5,000 each, dating from 1984, and from the recommendation of *ultra vires* legislation (the impugned parts of *Water Protection Act*). The interests of judicial economy and the objective of timely access to justice, in a case that has been going on for more than twenty years, support the resolution of the remaining constitutional and associated tort issues by this Court in the within appeal.

PART 1 – STATEMENT OF FACTS

1. The trial judge correctly found that the respondent suffered damages (which remain to be assessed) as a result of numerous incidences of intentional wrong-doing from 1984 to 1991, involving the willful concealment of water rates; the respondent being deprived of an opportunity to obtain rights to export of water from Ocean Falls, British Columbia; unlawfully favouring the respondent's competitor, W.C.W. Western Canada Water Enterprises Inc. ("WCW"), as to exclusivity of source for export and bottling, the cost and duration of rights, and market access, which was restricted by way of moratorium timed to prefer WCW in a competition to supply water to Goleta, California; in addition to the unlawful cancellation of and failure to reinstate the respondent's land and water rights.[1]

2. "Kafkaesque" is an apt description, used by the trial judge, for conduct in the context of one of his misfeasance findings. The respondent was repeatedly advised by the appellant Crown that it could not acquire or have a water licence in good standing, unless it had a land tenure After its land tenure was unlawfully cancelled, and it had paid the rentals owed, Lands Minister Parker disallowed the respondent's re-application for a land tenure, using the excuse that the respondent's two water licences (for bottling and bulk export) had been cancelled. They had been cancelled in part due to respondent's lack of its unlawfully cancelled land tenure, the cancellation of which also involved misfeasance.[2]

3. "Kafkaesque" is also an accurate description of the appellants' conduct in this litigation. The appellant Crown ignored the Rules of Court in failing to answer interrogatories delivered on October 26, 2006, some of which went to the heart of the misfeasance found by the trial judge. Interrogatories about the timing of the

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[1] *Reasons,* paras. 168, 176-178, 183, 185, 210, 214, 215, 221

[2] *Reasons,* paras. 181; *Rain Coast Water Corp. v. Her Majesty the Queen in Right of the Province of British Columbia,* 2010 BCSC 114 (CanLII) [*Rain Coast* (3)]

moratorium, a misrepresentation that legislative counsel had no concern with it, and knowledge of legal authority that the Crown's September 25, 1989 agreement with WCW was unlawful, were all unanswered.[3]

4. The appellant Crown also declined to admit its own water rate schedule of December 7, 1984 signed by J. E. Farrell, Deputy Comptroller of Water Rights ("Farrell"), which stipulated maximum water licence application fees and annual rentals of $5,000 each, re "Export of water" (the "1984 Schedule"), despite the fact it had been sent to Mr. Beach of the respondent by L. Walters of the Water Management Branch ("WMB"), on May 11, 1998.[4]

5. Further, despite having been duly served with appointments for the continuation of their Examinations for Discovery, the appellants Roberts and Vander Zalm failed to appear, and certificates of their non-appearance were obtained. No Crown defendants appeared at trial to testify in their own defense. The Crown had no witness, except Bill Annett (formerly of WCW), who was found not to be credible. Mr. Beach's evidence for the respondent, on the other hand, was accepted by the trial judge. Material facts are set out in the respondent's Chronology of Events and the Reasons for Judgment; some key material facts (omitted by the appellants) are cited below.

6. Mr. Beach paid the requested application fees and annual water rentals in January 1983; the appellant Crown granted no water rights at that time, and instead began a delay in the issue of a water licence that lasted more than three years.[5]

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[3] RB V2, pg. 681, *Retaruke Timber Co. Ltd. v. Rodney County Council* (1984) 2 N.Z.L.R. 129 (H.C.); Supplemental Respondent's Appeal Book ("S.R.A.B")., V4, pg. 1487

[4]Respondent's Appeal Book ("RB"), V1, pg. 259; RB, V1, pg. 263

[5] Reasons, paras. 39; RB, V1, pg. 208; Transcript – V1, pg. 341, line 24; RB, V1, pg.134

7. On April 14, 1983, Mr. Robinson of the WMB confirmed that Mr. Beach had reduced the volume of his Freil Lake water licence application to 19,000 AFY and had met all statutory requirements to qualify for the issue of a water licence[6], reflecting that the appellant Crown knew all along that the proper interpretation of the *Water Act*, was that the respondent did not require to have obtained an interest land, in order to obtain a water licence.

8. On July 18, 1983, Farrell advised respondent, that the estimated (Freil Lake) mean annual inflow of 19,000 acre-feet may not prove unreasonable, that in normal circumstances the quantity licenced would not exceed 80% of the mean annual inflow, that WMB later determined a new mean annual Freil Lake runoff estimate of 20,678 AFY; the Marine Resources Branch had no objection to the respondent's proposal to use 9,226 AFY from Freil Lake according to its proposed regime; and the only reason the respondent reduced its application to 1,125 AFY was the appellant Crown's failure to inform it of applicable water rates under B.C. Reg. 501/81 or the 1984 Schedule[7].

9. On February 7, 1984, the respondent advised Farrell that 9,226 AFY was available from Freil Lake after releases from storage for the oyster habitat and aesthetics, and asked him for the annual fee for a water licence for 9,226 AFY, but that, in his letter of February 21, 1984, Farrell was unresponsive, and the delay of the respondent's project by the appellant Crown continued.[8]

10. On March 7, 1984, Colin Beach of the respondent took John Bowkett of Bowkett Chartering, Helge Tomter, Western Regional Manager for Federal Commerce and Navigation, Colin Stewart and Tom Smith of the WMB, on an airplane trip for a field

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[6] Appellant's Appeal Book ("AB"), V1, pg.28

[7] RB, V1, pg.90; AB, V1, pg. 58 & 59; AB,V2, pg. 466 & 467; Appellant's Factum, Appendix of Enactments (p. 56); RB, V1-259

[8] RB,V1, pg.94; AB,V1, pg. 307

inspection of the respondent's Freil Lake project site, resulting in a report by Smith, which stated, "The field inspection confirmed the proposed scheme as feasible…".[9]

11. On March 13, 1984, Mr. Smith of WMB advised Farrell to be up front with Mr. Beach and provide him with the fee schedule for export of water - (ref. - the "Water Rate Memo").[10]

12. On April 3, 1984, Mr. Rhoades of the Lands Branch made the potential issue of a foreshore lease to the respondent subject to requirements that were impossible to fulfill: he required respondent to demonstrate a "Five year earnings history", without granting any tenure.[11]

13. In July 1984, regarding the opportunity to export water from Ocean Falls, B.C., the respondent sought terms of reference from Ray Williston (of Ocean Falls Corporation – "OFC", a Crown corporation) and asked to be kept appraised, but Mr. Williston did not provide any; in September 1985, Mr. Bigelow of Trillium Projects made a proposal to others, but not the respondent; in January 1986, Mr. Wakabayashi declined to provide information to the respondent, indicating that negotiations were limited to those with WCW and Pacific Rim Water Resources Inc. ("PRW"), but he subsequently invited a proposal from Contimex International Corp.[12]

14. On December 7, 1984, Farrell signed the 1984 Schedule, with the maximum $5,000 rate for application fees and annual rentals, re "Export of water", but failed to ever disclose it to respondent, or inform it about it; it was concealed from respondent, and

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[9] S.RB,V6, pg.2052

[10] AB,V1, pg.313

[11] RB,V1, pg.97

[12] RB, V1, pg.392-393; RB, V3, pg.924; AB, V2, p.559; RB, V1, pg.45; Transcript, V2, pgs. 425-435; pg. 432, line 47 – pg. 433, line 5

not disclosed until it was sent to Mr. Beach by Mr. Walters of WMB, on May 11, 1998, in response to a freedom of information request.[13]

15. That the appellant Crown failed to inform the respondent of and conduct itself according to government policy, reflecting that the issue of licences of occupation were issuable "when a land interest was not sought", and mandating the issue of 30 year foreshore leases over unsurveyed foreshore intended for industrial development, despite the fact that the respondent proposed to construct and operate water works and a tanker ship loading facility with an estimated cost of $1,500,000 on such foreshore.[14]

16. In August – September, 1984, the appellant Crown confirmed its knowledge of federal power over water export (and therefore, lack of provincial power), that the "Water Comptroller may set application and annual rental fees that do not exceed $5,000", and that there was a potential market in California for bulk water shipped from the coast of British Columbia.[15]

17. The respondent had submitted a substantive proposal for a foreshore lease that was more than 200 pages long, which was in evidence before the trial judge.[16]

18. The respondent would have accepted the March 28, 1985 financing offer from Mess'rs. Buckland, Murphy and Walsh of B.M.W. Group, c/o Canarim Investment Corporation ("Canarim"), if the appellant(s) had informed Mr. Beach of an applicable water rate (under B.C. Reg. 501/81 or the 1984 Schedule), and that, instead, WCW received financing from Canarim and others of over $1.1 million.[17]

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[13] Reasons, para. 36, 107, 166

[14] S.RB, V1, pg.25; RB

V1, pgs.114,111 & 117; S.RB, V1, pg.166 & 230

[15] RB, V1, pg. 104 & 105

[16] S.RB, V1, pg. 154; Transcript, V1, pg. 326

[17] AB, V1, pg. 390; Transcript, V1, pg. 346; RB, Appellant's Factum, Appendix of Enactments (p. 56), RB, V2, pg.532

19. In April-May, 1985, Farrell required the respondent to pay $83,050, including an application fee of $13,839, and a water rental of $69,195, based on the rate for the water "quantity allowed" under Order in Council ("OIC") 630, but declined to provide any assurance that he would allow the respondent to use the quantity, 9,226 acre-feet per year ("AFY"), on which he based the rental, if the respondent paid it: he charged for the "quantity allowed" without allowing the respondent to use it, thereby treating the water rental as an additional application fee, in apparent violation of OIC 630.[18]

20. In April–May, 1985, when the Lands Branch offered the respondent a licence of occupation, it indicated terms on which a 30 year lease would be issuable, but later declined respondent's request to include those terms in the licence, which invalidated them by way of a NON-MERGER clause.[19]

21. The respondent received financing proposals in July 1985 from Tim Brock of West-Peak Ventures of Canada, and in August 1985, from Trac Resources Inc., for up to $2,602,050, with financial backing for an initial phase of $600,000, from investment dealer Continental Carlisle Douglas, which the respondent would have accepted but for government failure to inform him of a water rate according to the 1984 Schedule or B.C. Reg. 501/81, or at least tell him that the rentals requested, if paid, would be reimbursed if the licence applied for was not issued.[20]

22. In January 1986 payment of $10,208.70 that the respondent made with respect to its water licence application and annual rental was more than the allowable rates under the 1984 Schedule and B.C. Reg. 501/81 (which respondent says should have applied).[21]

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[18] RB, V1, pg. 295; AB, V2, pg.441; Transcript – V1, pg. 341:26 – pg. 344:24

[19] RB, V1, pg.121; AB, V2, pg.423; RB, V1, pg.124; RB, V1, pg.126; Transcript – V1, pg. 373:13-374:15

[20] RB V1, pg. 43, 154, 160; Transcript, Vol. 1, pg. 41:33 – pg. 43:12; pg. 344:43 – pg. 346:35; pg. 372; V1 - pgs. 294-295

[21] Transcript, V1, pg. 349; RB, V1, pg.207

23. Other competing companies, Glacier Water Exports and Canada's Finest Natural Waters Inc., were granted foreshore tenures with ten year terms, while the respondent was granted only a 3 year term, and WCW was granted a 25 year term[22].

24. The respondent complained to the Lands Branch, WMB, and appellant Vander Zalm about its perception that there was not a level playing field between the respondent and WCW in terms of access to provincial water resources, and that the appellant Vander Zalm, on August 4, 1988, told the respondent he did not think that the Province's negotiations with WCW should be made public.[23]

25. That on June 15, 1992, S. L. Mazur of the Lands Branch advised the respondent that WCW had been "billed" for 1992 Water Act fees for 42,635.3 acre-feet of water ($441,275.00), and that, when acting as the Crown's witness at his Examination for Discovery, he testified that "We didn't send them a bill."[24]

26. Rather, the appellants focus on allegedly missing or late water export licence rentals, based on rates approved under OIC 630, OIC 1430, and/or OIC 889, which respondent says the appellant Crown knew were unlawful (i.e. - unconstitutional) when they were enacted[25].

27. The appellants incorrectly assert that in November (1988) "Lands offered to convert the respondent's Licence of Occupation into a foreshore lease with a term of 30 years"; in fact, at that time, Lands advised of conditions under which the respondent could

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[22] Transcript V1, pg. 380-381; S.RB, V1, pgs. 29-36; S.RB, V4, pg. 1487; RB, V1, pg. 126

[23] RB, V1, pg. 66; AB V2, pgs. 640 & 649; Transcript – V2, pg. 659:19 – 660:11; RB, V4, pg. 1245

[24] RB, V3, pg. 993; Transcript of Mazur discovery (May 16, 2006) – pg. 519, 520, 536-538 – part of read-ins at trial

[25] S.RB, V6, pg. 2028; RB,V2, pg.746-747; S.RB, V4, pg. 1501-2; RB, V1, pg. 105

apply to have its licence converted to a lease, but did not offer to convert it to a lease, and said nothing about a potential 30 year term.[26]

PART 2 – ISSUES ON APPEAL

A. The Limitation Period Issue
B. The Tort of Misfeasance in Public Office
C. The Unlawful Means Tort
D. Continuation of Trial to Assist the Court to Assess Damages
E. Constitutional Questions and Associated Tortious Conduct

PART 3 – ARGUMENT

A. THE LIMITATION PERIOD ISSUE

28. The appellants argue that postponement of the six year limitation period (s.6 (4) of the *Limitation Act*, R.S.B.C. 1996, c. 266), regarding causes of action that arose before November 25, 1990 should not be allowed. The trial judge correctly found that the respondent was entitled to postponement of the limitation period as a result of the willful concealment of the 1984 Schedule.[27]. It was not disclosed to the respondent until 1998, the appellant Crown failed to list it on its list of documents, and the respondent had to go to the extent of making an F.O.I. request to get it.[28]

29. On September 24, 2012, the respondent delivered a Notice to Admit to the appellant Crown, seeking admissions regarding the 1984 Schedule. However, in its Reply of October 9, 2012, the appellant Crown denied that Farrell approved it, and denied the authenticity of the document, even though it had been sent to the respondent under cover of the May 11, 1998 letter from Mr. Walters. The respondent says the refusal to

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[26] Appellants' factum, para. 5; AB, RB, V2, pg. 655

[27] RB V1, pg. 259; Reasons, para.162-168, & 221

[28] RB, V1, pg. 263, Transcript - Vol. 1, pg. 332, line 1 – pg. 334, line 4

admit the 1984 Schedule was further willful concealment, giving rise to postponement of the otherwise applicable six year limitation period. Moreover, that document was denied at trial.[29]

30. The claims relating to the successfully impugned conduct that took place after November 25, 1990 are not statute-barred. The respondent filed its claim on November 25, 1996, within the applicable six year limitation period. Most of the proven misconduct conduct requires no extension of the limitation period. The judgment under appeal is based primarily on misconduct which occurred less than six years before the claim was filed. As most of the misconduct that forms the basis of the judgment occurred less than six years before the claim was filed, no part of the judgment should be reversed for exceeding the limitation period. There is another reason: the tortfeasor in 1984 was Farrell, who became a repeat tortfeasor in 1991, when he cancelled the respondent's water licences.

31. The respondent says that the trial judge's dismissal of the appellants' limitation period argument is correct, based on legal authority, the documentary record, and the testimony of Mr. Beach at trial[30]. The appellants attempted to advance, for the third time, essentially the same argument they unsuccessfully attempted in 2008 and again at trial[31]. The respondent submits that their argument is spurious, as the matter was correctly disposed of by the trial judge in his written reasons[32] and his 2008 ruling, which was not appealed, rendering the issues dealt with in it *res judicata*.

32. The appellants argue that there were no findings of fact to support the conclusion that the appellants willfully concealed or delayed the production of documents. However, the trial judge relied on evidence and submissions, and found that document disclosure

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[29] RB, V1, pg. 263; Transcript - Vol. 6, pg. 1841, line 21-23

[30] *R. v. Braich,* [2002] 1 SCR 903; Transcript, Vol. 1, pg. 33, line 31 – pg. 334, line 4.

[31] Appellants' factum, para. 29-35; Reasons, paras. 108 -109; *Rain Coast Water Corp. v. British Columbia*, 2008 BCSC 1182 [*Rain Coast* (1)]

[32] Reasons, para. 106-109, in the context of para. 104, 162-168, and 221

of important relevant documents was delayed to an extent that defendant's reliance on the *Limitation Act* must fail. The respondent had made a lengthy written submission, filed April 12, 2013 on the matter. The trial judge was not required provided substantial detail as to how he reached his decisions.[33]

33. The Supreme Court has held that reasons for judgment may be important to clarify the basis for the [decision under appeal] but, on the other hand, the basis may be clear from the record. To be sufficient, reasons for judgment must allow the parties to "know the basis for the decision", allow the public to "know what has been decided and why"; and provide a basis for "meaningful appellate review". Respondent asserts that the trial judge's reasons on the limitation period issue did so. Regarding the postponement issue, "what the trial judge…stated in the context of the record, the issues and the submissions of counsel at trial", was legally sufficient: [34]

34. Although the trial judge did not specify which documents disclosure of which was delayed to such an extent that appellants' defense failed, it is implicit that he was referring to the late disclosure (or concealment) of, among others, the 1984 Schedule.

35. The appellants argue that there was no evidence of how the failure to produce documents affected the respondent's knowledge regarding causes of action advanced, and that the respondent already knew that the maximum $5,000 rates under B.C. Reg. 501/81 were applicable. While it claimed that those rates applied, it did not know it, because no document showing that they applied was disclosed to respondent until the 1984 Schedule was disclosed in 1998. The trial judge relied on the testimony of Mr. Beach that he first learned of the 1984 Schedule in 1998, two years after this action was commenced, as a result of a freedom of information request[35]. Before 1998 the

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[33] *Maydak v. United States of America*, 2004 BCCA 478 (BCCA); *Simpson v. Canada (Attorney General)*, 2012 FCA 82 (FCA); *R. v. Vuradin*, [2013] 2 S.C.R. 639 (para. 21); *Woolaston v. Minister of Manpower and Immigration*, [1973] S.C.R. 102 (SCC).

[34] *R v R.E.M*. 2008 SCC 51 at paras. 20 and 37

[35] Reasons, para 166; Transcript V1, pg. 33:31 – pg. 334:4

respondent could not possibly have known of a reasonable prospect of success with a misfeasance claim arising from willful concealment of the 1984 Schedule, because it did not know of its existence until 1998. In any event, postponement is not a question of the plaintiff's knowledge at any given time; rather the issue is whether important relevant documents were willfully concealed[36]; the 1984 Schedule certainly was.

36. The August 31, 1984 Cabinet Submission, is an important relevant document the disclosure of which was long delayed; it was not listed until October 30, 2006, some 22 years after it was written; it gave rise to the respondent's amended pleading of tortious conduct based on the Crown proceeding to regulate with respect to the export of water, knowingly unlawfully and with reckless disregard to prospective damage to the respondent. The September 6, 1985 letter from Mr. Bigelow of Trillium Projects, which relates to the unlawful preferential treatment of WCW, is another important, relevant document long withheld from the respondent; it was not listed by appellants until December 13, 2004. It provided terms for an opportunity to qualify to export water from Ocean Falls, that were willfully concealed from the respondent at material times. Mr. Beach testified that he or the respondent was not given the opportunity Trillium described in said letter.[37]

37. Without such these important documents the respondent was not in a position to known it had right to bring an action (i.e. – that all the elements of the cause of action existed).[38] The respondent also argues that willful concealment need not be of documents, and may be of opportunity.

38. The appellant Crown's September 25, 1989 agreement with WCW, relating to the pre-1990 unlawful preferential treatment of WCW, was wilfully concealed from the respondent by the appellant Crown, and the appellant Parker (Minister of Crown Lands)

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36 *Cimolai v. Hall et al*., 2005 BCSC 31 at paras. 355 to 367

[37] RB, V1, pg. 105; RB, V3, pg. 924; Transcript - V2, pg. 423:4 – 428:21

[38] *Bera v. Marr* (1986), 1 B.C.L.R. (2d) 1 (CA)

fundamentally misrepresented its terms in his November 22, 1990 letter, with enclosure to Colin Beach of the respondent.[39]

39. On October 22, 2001, Mr. DeBeck of the Attorney General Ministry wrote to Mr. Beach, advising him that OIC 331 was drafted on March 15, 1991, but on August 31, 2009, the appellant Crown stated it was "unaware when OIC 331 was drafted".[40] The appellant Crown never did produce the legislative counsel tag or caution that purportedly accompanied OIC 331 to Cabinet.[41]

40. The appellants rely on this Court's decision in *Iezzi v. British Columbia.* However, this Court's analysis in *Iezzi* is distinguishable. In *Iezzi*, the plaintiff failed to act on information it had.[42] In the case at bar, the respondent, by way of a freedom of information request, sought information, which turned out to be critical evidence which had been intentionally concealed by the appellant Crown at material times.[43]. Thus, the respondent succeeded in obtaining the 1984 Schedule, but not until 1998, two years after commencement of the action. The trial judge found Mr. Beach credible[44].

41. It would be an equally egregious error to dismiss the respondent's tort claim with respect to the appellant Crown's recommendation of the enactment of the *Water Protection Act* in 1994 on the basis that it was not pleaded until 2009, when the respondent finally amended its claim, because the Cabinet documents that gave rise to it, which dated from 1993-1994, were not disclosed to the respondent until at least as late as December 16, 2008.[45]

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[39] S.RB, V4, pg.1487; RB, V4, pg.1245; RB, V2, pg. 778-9; see para. 62

[40] R.A.B, V2, pgs. 665 and 668

[41] Transcript – V2, pg. 673:14-674:21

[42] *Iezzi v. British Columbia* 2012 BCCA 200, para. 3 and 13

[43] Reasons, para. 166-169

[44] Reasons, para. 97

[45]RB, V4, page 1353; RB, V3, pg. 1100; RB, V3, pg. 1125

B. THE TORT OF MISFEASANCE IN PUBLIC OFFICE

42. Respondent submits that the trial judge made no error in law or fact in his findings of misfeasance in public office.[46]

1) Misfeasance of Farrell – Failure to Disclose Water Rate

43. The trial judge correctly found misfeasance arising from Farrell's conduct (and appellant Crown liability on the basis of "*respondent superior*")[47] based on documentary evidence, proper inference and the testimony of Mr. Beach.[48]

44. The appellants say, "... in the 1984 Tariff (Schedule), Farrell noted that the fees for "export of water" were "Presently same as Mineral Trading (a) Purpose", and "subject to review and may be segregated into a separate category". The appellants failed to mention that this Tariff (the 1984 Schedule) stipulated that*: "*For any use listed in this Schedule the application fee and annual rental shall not exceed $5,000.00 each*."* The appellants assert that "When the respondent applied for a licence to obtain water for export purposes, and at all times until a new tariff of fees and charges for export was approved by Cabinet on March 28, 1985, the fees payable with respect to a water licence for export were calculated according to the Mineral Trading Purpose (a) under the Regulation.". There is no evidence to support that assertion. Respondent further says that the 1984 Schedule is evidence that the appellant Crown could not charge the respondent more than $5,000 each for the application fee and annual rental for a water licence, regardless of the quantity of water allocated. The appellants say that "the trial judge did not find that there was a legal obligation on Farrell to disclose the 1984

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[46]Reasons, para. 149-158, and 161

[47] Crown Proceedings Act RSBC 1996 s.2(c); *Jones v. Swansea City Council*, [1990] 1 W.L.R. 1453 (C.A.).

[48] Reasons, paras. 162-168; A-V1-28, A-V1-26, A-V1-30, R-V1-87, A-V1-46, A-V1-55, A-V1-300, R-V1-94, A-V1-307, A-V1-312, A-V1-313, A-V1-354, R-V1-263, OIC 630 (S.RB, V6, pg. 2028), R-V1-295

Schedule, even if that tariff had applied." The trial judge found that Farrell committed Category A misfeasance:[49] it is inferential that he did so on the basis that Farrell intentionally failed to fulfill his duty to inform the respondent of the 1984 Schedule, after he was advised in the Water Rate Memo in March 1984 (nine months earlier) that it was important to be up front with Mr. Beach and advise him of the Schedule of fees regarding water export. The appellants incorrectly confused a duty of care in negligence, with a failure to meet a duty to act in misfeasance.[50]

45. The respondent submits that the trial judge's finding of intent to injure on the part of Farrell arose by reasonable inference from his failure to inform the respondent about water rates in 1984, despite the Water Rate Memo. That finding is supported by subsequent facts. In 1985, referring to OIC 630, Farrell advised the respondent: "<u>The new tariff sets the charges payable in respect of any application proposing the bulk export of water.</u>" (underlining added). However, regarding the respondent's application for a water licence for 9,226 AFY, instead of just charging the application fee of $13,189 for that quantity, according to OIC 630, he also charged $69,195 (half the annual rental for that quantity), based on the "quantity allowed" rate under OIC 630, but with no assurance of the issue of a licence for 9,226 AFY, or any other quantity; i.e. - Farrell charged the annual rental amount according to the approved rate for the "quantity allowed" as an incremental application fee, while declining to allow or to commit to allow any quantity of water to be used, and unreasonably declined to exercise his discretion to issue a letter of commitment with respect to the issue of the water licence applied for, or accept any funds in escrow, pending the issue of a licence, or say that

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49 See: *Odhavji Estate v Woodhouse*, 2003 SCC 69 (CanLII) at para 19; *Roncarelli v Duplessis*, 1959 CanLII 50 (SCC), [1959] SCR 121; *Three Rivers District Council v Bank of England (No. 3)*, [2000] 3 ALL ER 1.; *Alberta (Minister of Public Works, Supply & Services) v Nilsson*, 2002 ABCA 283 (CanLII); *Pedigree Poultry Ltd v Saskatchewan Broiler Hatching Egg Producers' Marketing Board, Mervin Slater*, 2016 SKQB 366 (CanLII)

[50] Appellants' factum, paras. 44-46; RB, V1, pg. 259; Reasons, paras. 162-168; AB, V1, pg. 313

if the respondent paid the requested fees and annual rentals he would issue the licence by any particular time, or failing that, that he would reimburse at least for rentals paid.[51]. The respondent says this is further evidence of intention to injure the respondent, and more "Kafkaesque" behavior.

2) Misfeasance of Appellant Roberts – Foreshore Licence Cancellation

46. The trial judge correctly found misfeasance in relation to the conduct of Mr. Roberts based on findings made in his January 28, 2010 ruling that the respondent's foreshore licence was unlawfully cancelled, the Affidavit of Alan N. McLeod, and documentary evidence to which he made reference implicitly or explicitly.[52].

47. The respondent says this misfeasance finding is well-grounded in the trial judge's reliance on the December 31, 1990 letter from Roberts, and the record, including the Crown's tenure cancellation policy, the Affidavit of Alan N. McLeod, and the findings in the January 28, 2010 ruling that the licence was unlawfully cancelled. Also, the record reflects that when Roberts advised the respondent that its foreshore licence had been cancelled, the Crown knew and he knew that the respondent had not been given adequate notice, and so the cancellation was unlawful. Prior to the cancellation, Roberts asked Henry (Mr. Boas) to proceed with cancellation if reasonable. However, the November 20, 1990 letter (marked "Not Sent") from Mr. Boas did not proceed with the cancellation; rather, it stipulated a deadline for payment of rentals, and offered to convert the licence to a lease. Mr. Beach, whom the trial judge found credible, testified that he did not receive that letter. The "NOT SENT" letter bears a hand-written direction, in the same hand as Roberts' signature on the cancellation letter of November 29, 1990, to proceed with cancellation; however, as Boas didn't do it, Roberts did it himself, despite the fact that the respondents' letters of September 7,

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[51] Reasons, para. 39, 43, and 167; R-V1-295, S.RB, V6, pg. 2028; AB, V2, pg. 441; Transcript – V1, pg. 339:1 – 343:39; AB, V2, pg. 409

[52] Reasons, paras. 172-178 and 182-183; A-V2-752, R-V1-126; RB,V1, pg.336 ; A-V2-756; RB, V3, pg. 946

1990 and October 10, 1990 had not been answered. Respondent says that it is inferential that the appellants, the Crown and Roberts, knew it could not proceed with the cancellation as it was done, despite which Roberts unlawfully cancelled the licence, reflecting that he intended to injure the respondent. Respondent says that the foregoing is further evidence of government dealing in bad faith, with the intention to injure the respondent, and of further "Kafkaesque" behaviour. [53]

3) Misfeasance of Appellant Crown - Ocean Falls Water Export Opportunity

48. The trial judge correctly made a misfeasance finding against the Appellant Crown, with respect to the initial selection of WCW (to export water from Ocean Falls) as being a clear example of giving favorable treatment to one competitor at the expense of others, including the plaintiff (respondent), and against the public interest.[54] Based upon the testimony of Mr. Beach, the "not credible" evidence of Mr. Annett, documentary evidence referenced, and findings of fact set out in his Reasons, the trial judge correctly found that "the plaintiff (respondent) was given no opportunity to compete with WCW".[55]

49. The respondent did not "disavow" interest in exporting water from Ocean Falls. When it expressed interest to Mr. Williston in 1984, it had Del Monte and Canada Dry U.S.A. as potential customers. In 1986 it was planning a potential 50 million gallons per day supply of water, intending the involvement of Bechtel, Inc., to southern California. On January 7, 1986, the respondent inquired of Henry Wakabayashi as to water for export from Ocean Falls. On January 14, 1986, he replied, indicating there was no

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[53] AB, V2, pg. 756; RB, V3, pg. 946*, Rain Coast Water Corp. v. British Columbia* 2010, BCSC 114 ["*Rain Coast (3*)"]; RB, V1, pg. 336; AB,V2, 752; RB, V1, pg. 327; RB, V1, pg. 325; Reasons, para. 96-97; Transcript - V2, pg. 592:1-42; RB, V1, pg. 317 and 322; Reasons, paras. 180-181.

[54] *Shell Canada Products Ltd. v. Vancouver (City),* [1994] 1 SCR 231

[55] Reasons, paras. 188-197; 215-216; Transcript – V2, pg. 423:4-45; RB, V1, pg. 292-293; A.A.B, V1, pg. 326-327; RB, V1, pg. 38; RB, V1, pg. 39; pg. 40; RB, V3, pg. 924; RB, V2, pg. 401; S.RB, V5, pg.1850; RB, V1, pg.378; AB, V2, pg. 548; RB, V2, pg. 407

opportunity, but later invited a proposal from Mr. Aziz of Contimex International Corporation.[56]

4) Misfeasance of Appellants Vander Zalm, Serwa, Crown - O.I.C. 331/91

50. The trial judge made findings of fact, against the Appellants, Vander Zalm, Serwa and the Crown, which were supported by documentary evidence, and he drew proper inferences, to support the misfeasance findings he made in relation to the imposition of Order in Council No. 331 of March 18, 1991 (the "Moratorium").[57]

51. The trial judge did not embark on "impermissible speculation" when he concluded that appellants Vander Zalm and Serwa "urged" Cabinet to impose the Moratorium. He did not overlook "compelling evidence that the Moratorium was recommended by staff". There is no compelling evidence it was recommended by any staff member for any rational public interest reason. On the contrary, the appellant Crown was warned Cabinet against making a moratorium. The appellants rely on an unsigned March 12, 1991 briefing note, bearing the name of Kasianchuck (Comptroller of Water Rights), which irrationally recommended a moratorium, despite a promise of legal action by Snowcap, "if the licence is not granted in accordance with established procedure". The trial judge referred to this document as "just a bunch of typewriting that isn't from anybody". On February 14, 1991, Mr. Ebbels, Senior Solicitor, Ministry of Attorney General, warned of a potential requirement to compensate applicants whose applications were interrupted by a moratorium. The appellant Crown failed to call Kasianchuk to testify as to whether he recommended the Moratorium, and if so, why.

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[56] AB, V1, pg.326; S.RB, V1, pg.22; S.RB, V6, pg. 2071; S.RB, V6, pg. 2073; S.RB, V4, pg.1392; S.RB, V6, pg. 2076

[57] Reasons, para. 82-92, 211-214, 215 (sub. 3), & 216; S.RB, V4, pg.1525-1534; S.RB, V4, pg.1495; AB, V3, pg. 810; RB, V1, pg. 357; S.RB, V5, pg.1746; AB, V3, pg. 854; R.A.B, V3, pg. 900; Transcript V3, pg. 1023:30-39; S.RB, V5, pg.1606; S.RB, V5, pg.1614; AB, V3, pg. 897; RB, V2, pg. 656; RB, V2, pgs. 668; AB, V3, pg. 895; RB, V1, pg. 11-27; RB, V3, pg. 887

The appellant Crown failed to call any witness to provide a rationale for the Mortarorium or explain its timing, and failed to answer Interrogatories about that issue.[58]

52. The March 12, 1991 briefing note refers to Snowcap demanding the issue of a licence to qualify to bid for supply of water to the Goleta Water District, and inexplicably states: "… BC Environment must decide that the proposed water export (by Snowcap) does not impact undesirably on environmental resources values." Two other documents reflect that that BC Environment had already made that decision: a February 21, 1991 briefing note states "While there are some unresolved issues such as treatment of ballast water, we believe that these issues can be solved or mitigated and should not preclude issuance of a licence"; a March 6, 1991 briefing note states, "BC Environment has not identified any significant impacts and on technical ground feels that a conditional licence of 7500 AF could be granted".[59] Accordingly, the respondent says the March 12, 1991 briefing note was a ruse.

53. The appellants argue that there is no evidence that Kasianchuk intended to injure the respondent. While that is not a defence to the trial judge's misfeasance finding, the respondent says there is ample evidence he intended to injure the respondent.[60]

54. Documentary evidence relating to the duration of licences and cost of water rights also substantiates that Kasianchuk intended to injure the respondent by ensuring that it was held at a commercial disadvantage to WCW.[61] There is also documentary evidence relating to water reserves and exclusivity which further substantiates that

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[58] Appellants' factum, para. 82; RB, V2, pg. 681-757; AB, V3, pg. 861; Transcript – Vol. 2, pg. 674: 15-17; RB V2, pg. 615; RB, V2, pg. 681

[59] RB, V2, pg. 752-754; RB, V2, pg. 652

[60] Reasons, paras. 84-85; S.RB, V5, pg. 1746; RB, V1, pg. 357; A-V3-810; R-V1-360; RB, V1, pg. 291; RB, V4, pg. 1341;

[61] RB, V1, pg. 199; RB, V2, pg. 547; RB, V2, pg. 677; RB-V1-288; RB, V1, pg. 289; RB-V4-1186; RB-V3-789; RB-V1-297; S.RB, V4, pg. 1331; RB,V1, pg.376; RB, V1, pg. 208

Kasianchuk intended to injure the respondent, by ensuring it remained at a commercial disadvantage to WCW.[62]

55. The recommendation of the Moratorium and the Moratorium itself were both irrational. The August 31, 1984 Cabinet Submission summary reflects government knowledge of federal authority over water export (therefore lack of British Columbia authority). A draft February 6, 1991 Cabinet Submission does not recommend a moratorium; it states: "… the current water regime appears to run afoul of GATT and FTA rules on export restrictions and export taxes. Therefore, the solutions to these problems cannot include any type of prohibition on exporting water in tanks or other types of containers." It also referred to reviewing the WCW contract to "permit all firms to compete on a level playing field". A related February 7, 1991 memo from Deputy Minister Allen to Deputy Minister Dalon, refers to "licensing problems related to exports", and a fourteen member "Task Force on Water Use and Exports", but there is no evidence that it or any of its members recommended the Moratorium, blocking Snowcap, the respondent and others from acquiring sufficient water rights to compete with WCW for the Goleta contract.[63]

56. Also, rather than recommending a Moratorium, Ross Curtis of the Trade Policy Branch advised Vander Zalm that the Government of British Columbia supports the export of water in cases where the water is surplus to local and provincial requirements, and where the export operation does not impact undesirably on other resource values including environmental and land use concerns. Moreover, despite the fact that the order in council information sheet related to the OIC 331 is entitled "Water Reserve to permit investigation of suitability of streams for export"; task force member Jim Mattison of WMB subsequently advised: "… after careful review of ministry files as well as the collected corporate memory, there is no record or

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[62] RB, V1, pg. 291; RB, V1, pg. 301; RB, V1, pg. 295; AB, V2, pg. 467; RB, V1, pg. 297; RB, V1, pg. 303; RB, V1, pg. 305; OIC 1738 of Sept. 23, 1988 (see Appendix of Enactments); RB, V2, pg. 564; RB, V2, pg. 560; V4, pg. 1338

[63] S.RB, V6, pg. 1989; RB, V1, pg. 105; V3, pg. 962; RB, V2, pg. 681

recollection of any specific or generic studies of British Columbia streams respecting their suitability for commercial bulk export of water". The respondent says this is further evidence that OIC 331 was made for an ulterior motive: "providing assistance to WCW", as the learned trial judge found.[64]

57. The appellants say the matter was discussed again in the Cabinet meeting on March 15, 1991 and the decision was made to implement the moratorium. There is no evidence that a Cabinet meeting took place on March 15, 1991.

58. Bruce DeBeck of the Attorney General ministry reported that "Order in Council 331/91 was drafted on March 15, 1991, examined by a lawyer in the Legislative Council office, signed by the Minister of Environment and the Presiding Member of the Executive Council, and approved and ordered on March 18, 1991 by the Lieutenant Governor in Council". Debriefing notes dated March 22, 1991 are a record of Cabinet's deliberations of March 20, 1991, the day that Serwa announced the Moratorium (OIC 331); those notes report that Serwa told Cabinet that he was going to announce a Moratorium on water exports, that it had great concern about how Snowcap would react, and that Serwa did not know the implications. Despite this, he proceeded with the announcement, and the order was not rescinded. These notes, when considered in the context of Ms. Annett's letter of March 15, 1991 to Vander Zalm, reflect that Vander Zalm, Serwa and Veitch acted as Cabinet in proceeding with OIC 331. Appellants correctly say that there was no evidence at all before the trial judge as to the deliberations of Cabinet on the day the OIC was created. However, there are debriefing notes as to Cabinet's deliberations at its March 20, 1991 meeting. The lack of evidence as to Cabinet's deliberations on the day OIC 331 "was created" (or at any other time, with respect to whether Cabinet should consent to it) supports the learned trial judge's finding of misfeasance with respect to the timing of OIC 331. There has been no production of a debriefing note reflecting that a Moratorium eliminating competition to WCW, such as OIC 331, was considered and consented to by Cabinet. The only inference that can be drawn from

[64] RB, V3, pg. 951; RB,V3, pg. 922; S.RB,V6, pg. 1988; Reasons, para. 134

these facts is that Vander Zalm, Serwa and Veitch acted as Cabinet in indicating its consent to OIC 331.[65]

59. The appellants say there is no evidence that Vander Zalm read or even saw the letter of March 15, 1991 to him from Mrs. Annett of WCW, which was indicated to have been copied to Ministers Serwa and Veitch. However, there is evidence that their offices probably received that letter via facsimile transmission on March 15, 1991. The letter shows WCW's fax number. The British Columbia March 1991 government directory shows the office fax numbers of Vander Zalm, Serwa and Veitch. The B.C. Tel bill to WCW for its fax number reflects that fax transmissions were sent to their offices from WCW's fax number on March 15, 1991. The appellants have not disclosed any fax transmissions received from WCW on that day. The respondent says that the trial judge was correct in his finding that the contact between Mrs. Annett and the Premier with respect to the Goleta Water District and, particularly, the timing of the O.I.C. (OIC 331) could make out a Category A misfeasance but certainly fulfilled the conditions for a Category B misfeasance. In making OIC 331, there was at least reckless disregard for its negative impact on the commercial prospects of the respondent, Snowcap and Sun Belt, and reckless disregard for its prospective illegality, whether as a breach of exclusive federal constitutional power, as excess of the authority of section 44 of the Water Act, or otherwise. Legislative Counsel R. A. Adamson indicated that Cabinet was cautioned that OIC 331 would be vulnerable to a potentially successful legal challenge for exceeding the authority of the Water Act; the appellant Crown had also been advised not to pursue a moratorium for other reasons (breach of international trade law and requirement to compensate affected water licence applicants), as indicated in the exhibits with the unanswered Interrogatories of October, 2006. Moreover, OIC 331 contradicted advice to the

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[65] Appellants' Factum, para. 81; RB, V2, pg. 668; S.RB, V4, pg. 1390; S.RB,V4, pg. 1482; Appellants' Factum, para. 82; RB,V2, pg. 669; RB, V2, pg. 656 and 658, Reasons, para. 214-215

respondent from Environment Minister Pelton that "Section 44 of the Water Act will not be used for the purpose of export of water …"[66].

60. On January 18, 1994, Susan Butler of the Ministry of Environment advised Mr. Beach, of a Cabinet Submission, signed by the Minister of Economic Development, which supported the decision to make Order in Council 331; however, no such Cabinet Submission has been produced. The respondent says that if such a document existed, the appellant Crown would have produced it to support its argument that OIC 331 was a bona fide act, and the fact that such a document has not been produced is further support for the trial judge's tort finding.[67]

5) Misfeasance – Minister Parker's Letter of October 23, 1991

61. The trial judge correctly found that Minister Parker's letter of October 23, 1991 constituted a further Category B misfeasance of office, based on facts set out in his judgment, which arose from documentary evidence, and his failure to testify. Appellants argue that there is no evidence that Crown Lands Minister Parker intended to injure the respondent. The respondent says that a finding of intent to injure arose by inference of the October 23, 1991 letter, the prior unappealed finding that the respondent's foreshore licence was unlawfully cancelled, and related Crown documents. Parker's ministry and the WMB had repeatedly advised that the respondent could not obtain a water licence without a land tenure; yet he denied a land tenure because the respondent held no water licence(s). The trial judge correctly found this was Kafkaesque; during the trial he said, "It's kind of what they call black or gallows humour". [68]

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[66] Appellant's Factum, para. 108; RB, V1, pg. 32; RB, V1, pgs.11-27; RB, V3, pg. 887; RB, V1, pg. 105; Transcript – V2, pg. 673:14-674:30; RB, V2, pg. 681; RB, V1, pg. 195

[67] RB, V3, pg. 988; Transcript, V2, pg. 605:28 - pg. 606:32

[68] Reasons, para. 185; RB, V1, pg. 282; RB, V1, pg. 328; S.RB, V4, pg. 1479; *Rain Coast* (3); July 91 receipt - V1, pg. 354; RB, V1, pg. 333; AB, V3, pg. 941; AB, V1, pg. 30; AB, V1, pg. 64; Transcript, V2:16:17

62. The trial judge's conclusion that Parker intended injury is strengthened by inference of his letter of November 22, 1990 to Colin Beach, with enclosure, referring to his ministry's September 25, 1989 Agreement with WCW, in which misrepresented that $215,000 (the amount of royalties, purportedly pre-paid by WCW) was "in excess of Water Act fees that would have been payable"; those fees (as of the date of the letter) included an application fee of $86,870.60, plus annual rental for 42,635.3 AFY at $9.00 per acre-foot or portion thereof per year for two years (= $383,717.70 x 2 years = $767,435.40), yielding a total of $854,306 (far more than $215,000). Moreover, in February 1991, having no authority over water licence rentals, Parker required, as one of the conditions of the possible re-instatement of the respondent's unlawfully cancelled foreshore licence, that the it pay all arrears (of water licence rentals) that it (purportedly) owed to the Ministry of Environment, when WCW was not being charged such rentals, and the Cabinet Submission of February 6, 1991 had raised issues as to the WCW contract, fees and rentals payable under the Water Act, and permitting "all firms to compete on a level playing field"[69].

6) Misfeasance by Farrell - Cancellation of Water Licences

63. The trial judge did not characterize the cancellation of the respondent's water licences as a "straightforward example of Catch 22 type reasoning". He said that in relation to the assertion in the October 23, 1991 letter from Parker that, "the Regional Office will be disallowing your application for surface tenure". The appellants could not use the respondent's lack of the Licence of Occupation (foreshore licence) as a

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[69] RB, V2, pg. 778; RB, V3, pg. 789; RB,V4, pg.1186; S.RB, V4, pg.1502; Reasons, paras. 202 and 208; AB, V3, pg. 808; RB,V3, pg. 962

basis for cancelling its water licences because, as the trial judge previously found that it was unlawfully cancelled.[70]

64. Moreover, the respondent says that Farrell must have known that the foreshore licence was knowingly improperly cancelled, and so his reliance on respondent's lack of a land tenure was equally malevolent: a letter of November 20, 1990 (the same day as the aforementioned "NOT SENT" letter from Boas, which was never received at material times by the respondent) from Farrell's WMB colleague, Gary W. Robinson, Head of Water Licence Management, provided three options to the respondent with respect to its water licence, and advised that it was understood that, depending on the reply of the Ministry of Crown Lands to the respondent's letter of October 10, 1990 to Mr. Boas, requesting a 30 year foreshore lease, the respondent would proceed with one of the three options. However, there never was a response to that letter, so the respondent never had an opportunity to select one of the three options. A copy of Mr. Robinson's letter was directed to the Ministry of Crown Lands; accordingly, it knew that the respondent expected, and had a right to a response to its October 10, 1990 letter to Mr. Boas, in order that the respondent could then select one of the three options. Instead, the respondent's foreshore licence was unlawfully cancelled, effective November 28, 1990.[71] The respondent says that both the Lands Branch and Water Management Branch acted in in bad faith by proceeding with the cancellations, without the respondent ever receiving a response to its October 10, 1990 letter to Mr. Boas.[72]

65. Parker did not offer unconditionally to reinstate respondent's licence of occupation. It was a conditional offer of reinstatement, which was unacceptable, because he required respondent to pay export water rentals over which he had no authority, at

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[70] Appellants' Factum, para. 89; Reasons, para. 180; AB, V3, pg. 941; RB, V1, pg. 328; *Rain Coast* (3)

[71] Reasons, paras. 161, 169, 172, 174, 176, 182; also *Rain Coast* (3); RB, V1, pg. 247; Transcript, Vol. 2, pg. 592, line 1-27; RB, V1, pg. 322; RB, V1, pg. 328

[72] RB, V1, pg. 322; RB, V1, pg. 328; RB, V1-333

rates which were not being assessed against WCW, and which were based on regulations the Crown knew, when they were enacted, it had no constitutional authority to impose.[73]

66. The appellants say, "The Water Management Branch advised the respondent that if it reapplied for its foreshore tenure, this would satisfy the Water Management Branch, and that the Branch would not take steps to cancel its water licence because the respondent lacked an interest in land". Contrary to this advice, after the respondent re-applied for a foreshore tenure, Farrell went ahead and cancelled the respondent's water licences, using its lack of an interest in land as an excuse. This was "Kafkaesque" and is another reason why the water licence cancellations constituted misfeasance.[74] The respondent submits that the cancellation of its water licences was unlawful, because it was done in violation of Water Management Branch advice, as stated above. Moreover, the water licence cancellations were unlawful, because Farrell relied on respondent's arrears of licence payments at rates he knew WCW was not being charged, and which, in any event, the appellant Crown knew were based on tariff rates for export it had no power to impose.[75]

C. THE UNLAWFUL MEANS TORT

67. The trial judge correctly relied on documentary evidence, and the lack of testimony on behalf of the appellants, in finding unlawful conduct and applying the test for the unlawful means tort, as set out in *A.I. Enterprises v. Bram Enterprises*.[76]

68. The appellants argue that "the trial judge did not identify any possible cause of action that either Sun Belt or Snowcap could have advanced and in the circumstances there

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[73] RB, V1, pg. 355; RB, V1, pg. 105; S.RB, V4, pg. 1502; RB, V3, pg. 789

[74] Appellants' factum, para. 93; S.RB, V4, pg. 1479; RB, V1, pg. 333

[75] RB, V1, pg. 333; RB, V3, pg. 789; RB, V1, pg. 105

[76] *A.I. Enterprises v. Bram Enterprises* 2014 SCC 12; Reasons; paras. 121-135; S.RB, V4, pg. 1525-1534; S.RB, V4, pg.1495; RB, V3, pg. 900; RB, V1, pg.32; RB, V2, pg. 668

was none". This is incorrect. The trial judge found there was unlawful conduct directed at Snowcap and Sun Belt, and that they could have brought actions for misfeasance if they had suffered a loss as a result of appellants' conduct. The third party must have suffered "an actionable civil wrong or conduct that would be actionable if it had caused loss".[77] The respondent submits there was causation in relation to Reynolds' letters. In any event, it is not necessary to show that his letters caused damage for the third parties (Snowcap and Sun Belt) to have had an actionable civil wrong arising from them. Reynolds' conduct constituted an actionable civil wrong because it may have influenced Santa Barbara and the Goleta committee to select WCW over the respondent, Snowcap and Sun Belt, and because it was part of an on-going pattern of action, including the Moratorium, all motivated by the ulterior motive of preferring WCW. Reynolds' conduct was unlawful because he was a promoting company with an unlawful agreement with the appellant Crown, providing it with illegal advantages over the respondent, Snowcap and Sun Belt. Further, his conduct alone did not form the basis of either of the trial judge's tort findings in respect of the preferential treatment of WCW.[78]

69. The respondent submits that the trial judge made no palpable and overriding error in finding that unlawful activities directed at Sun Belt caused an economic loss to the respondent. The unlawful activities directed at Sun Belt were also correctly found to have been directed at the respondent, and whether they are considered as misfeasance or unlawful means, they were nonetheless, as the trial judge found, a cause of economic loss to the respondent.

70. The appellants say "respondent would not have received a contract to supply water to either Santa Barbara or Goleta – no one did". The respondent would have, but for tortious conduct of the appellants, secured or participated in a contract to supply water from Freil Lake to Goleta; it therefore, it suffered a compensable loss of a

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[77] *A. I. Enterprises*, para. 26

[78] Reasons, paras. 131-134, 199-210 & 215; Appellants' Factum, para. 98-99; RB, V3, pg. 923; see also footnote 74

chance, the value of which remains to be assessed. The respondent relies on the testimony and affidavits of Katherine Crawford, of Goleta[79], the findings of the trial judge in his January 15, 2010 Reasons for Judgment in this matter, and other evidence and testimony of Mr. Beach, Mr. Fletcher, Mr. Weiner, Mr. Walsh, Mr. Macdonald, Mr. Langer, and Mr. Ohashi, in relation to damages arising from proven torts in 1984-1991, reflective of losses of commercial opportunity to profit in the respondent's bottled water and consumer beverage product enterprise[80]

71. The trial judge did not err in finding that the respondent had a contract with Sun Belt. The respondent's March 8, 1991 letter to Sun Belt is evidence of an intention to contract with Sun Belt, and so the trial judge made no palpable and overriding error. Further, in view of the testimony and affidavits of Katherine Crawford and John DeLoreto, and the prior tortious conduct, whether the respondent had a contract with Sun Belt is not of particular significance. As the trial judge observed, "They (Sun Belt) were not a front for you is the point". The respondent could have met Goleta's needs, without Sun Belt, by relying on its potential partner, Mitsui, and debt financing from CIT Group. Ms. Crawford explained why Sun Belt would have been disqualified and Goleta would have dealt with the respondent. However, in the circumstances, the respondent was improperly deprived of an opportunity to contract with Sun Belt to help meet Goleta's needs.[81]

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[79] Transcript, Vol. 3, pg. 1028, line 25-44; page 1029, line 32-44; S.RB, V3, at pages 1108-1147

[80] Appellants' Factum, para. 102; Reasons, paras. 131, 133, 215, 221; *Rain Coast Water Corp. v. British Columbia* 2010 BCSC 54 [*Rain Coast* (2)]; S.RB, V5, pg. 1552; RB, V1, pg. 390; RB, V1, pg. 160; Transcript – V1, pg. 77:15-78:35; V1, pg. 344:42-346:47; RB, pg. 502, line 15 & pg. 503, line 3; Transcript – RB, V2, p. 503, line 3-30; S.RB, V2, pg.368; S.RB, V6, pg.1912; R.S.A.B., V4, pgs. 1347-1349; S.RB, V2, pg.546

[81] Appellants' Factum, paras. 102-104; S.RB, V4, pg.1347; *Rain Coast* 2 at paras. 29-30; Transcript, Vol. 2, pg. 596:45 – 597:5, pg. 668:27 – 669:22; S.RB, V4, pg.1348; S.RB, V4, pg.1308 ; S.RB V3 at pg. 1108, 1128 and 1134; Reasons, para. 133

72. The respondent submits that it suffered injury as a result of the Moratorium, including a loss of opportunity to supply water to Goleta and to do business with Sun Belt and Snowcap. However, causation of loss with respect shipping water profitably to Goleta arose not just from the Moratorium, but also from prior tortious conduct. Assessment of the value of those damages remains to be done at the continuation of the trial.

73. Such assessment would have to reflect due consideration of the respondent's documented losses of opportunity to obtain equity and debt financing from various identified sources, to formalize relationships with identified potential venture partners, bulk and bottled water customers, which had expressed interest, and to profit from sales, marketing and distribution of the respondent's bottled water products, under its MOUNTIE and AQUASOURCE brands, and related consumer beverage products, using water from Harmony Falls, below Freil Lake, B.C., according to its business plans.[82]

74. The respondent says that, but for the wrong-doing that occurred in 1984-1990, the respondent would already have had a licence for enough water to meet Goleta's needs, at the pre-existing lawful rental of not more than $5,000 per year under BC Reg. 501/81, or the 1984 Schedule, and so would have been unaffected by the moratorium (OIC 331). The respondent reduced the quantity of water applied for from 9,226 AFY to 1,125 AFY only because of the export rate structure that was imposed against the respondent.[83]

75. Mr. Beach also testified that, but for the fact he was not advised of the applicable water rate, he would have accepted the financing proposal of B.M.W. Group

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[82] Reasons, para. 214; RB, V1, pgs. 43, 83, 79, 81, 89, 93, 104, 105, 112, 17, 22, 23, 24, 78, 80, 123, 126, 112, 114, 117, 118; V4, pg. 1311,1313, 1314, 1316, 1317, 1329, 1330, 1347, 1348; S.RB, V5, pg. 1552; V2, pg.368; V6, pg.1912

[83] Appellants' factum appendix; RB, V1, pg. 259; V1, pg. 90; AB, V1, pg. 59 ; AB, V1, pg. 58; Transcript – V1, pg. 349:27-47; pg. 353:6 – 354:1

(Buckland, Murphy and Walsh of Canarim Investment Corporation). Mr. Walsh testified he would have been happy to provide the financing. Instead of the respondent obtaining financing from Canarim, WCW did: Canada Trust reported that WCW received $461,959.00 from Canarim, out of a total of $1,151,389.88 raised for WCW on its primary underwriting. A further sum of $4,210,002.05 was provided to WCW within a week of WCW signing its September 25, 1989 Agreement, after which WCW went to raise a further $12,000,000.[84]

76. Fred Paley of Snowcap Waters Ltd. testified that he was told by Vander Zalm and other government officials in December 1990 that Snowcap would be getting its licence in time for Goleta in March. Paley also testified that he received a phone call from Richard Dalon (Deputy Minister of Environment) and another official of the Waters Branch, two hours before the moratorium was announced, advising him that it was going to be announced; that he replied, “Well, that leaves us without water”, and that they said, "Well, why don't you go buy your water from Western Canada Water?"[85]. The respondent says this evidence is further support for the trial judge's finding that the appellants the Crown and Vander Zalm committed the unlawful means tort, as a result of having had an ulterior motive for OIC, namely, providing assistance to WCW, and thereby harming the respondent, Snowcap and Sun Belt.

D. CONTINUATION OF TRIAL TO ASSIST THE COURT TO ASSESS DAMAGES

77. Assuming his judgment is upheld on any tort finding, or if this Court finds that there was a tort committed in relation to any of the alleged unconstitutional conduct, a further hearing to enable the proper assessment of damages would be necessary to

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[84] AB,V1, pg. 390; Transcript V1, pg. 344:27 – 346:35; V1, pg. 77:15-79:26; RB, V2, pg. 532; S.RB, V4, pg. 1511; pg. 1512; pg. 1535

[85] Transcript. pg. 1523, line 17-39 & p. 1524, lines 7-16

assist the Court in arriving at the proper quantum of damages, and it would be a miscarriage of justice not to allow that.[86]

78. The trial judge had an unfettered discretion to allow further evidence and submissions.[87] During the trial, it was clarified by the trial judge that there would be a further hearing, if necessary, regarding quantification of damages, and there was no objection from counsel.[88] The trial judge stated, “So a ruling that there’s liability will need to include a ruling that there’s – damages need to be assessed.”[89]

79. Respondent’s counsel proposed that the trial judge accept a binder of documents that Mr. Benning, the respondent’s expert, had relied upon. He referred to “some documents that aren’t in the material”; the trial judge replied, “If you need to refer to them in submissions, fine.” Further submissions on damages remain to be made, involving documents that aren’t in the material.[90] The appellants incorrectly state, "both parties completed submissions on quantum issues".[91] Mr. Benning, who was retained as the respondents' expert witness, testified that he thought that the respondents' projections would be proven through evidence from the respondent. This was not done to the extent intended, because the trial judge proposed that there would be a further opportunity, and there was an issue with a lack of court time being available.[92] The appellants also incorrectly say that the trial judge found that "he could not assess damages". The transcript reflects that he wanted to hear further evidence and submissions to assist the Court in arriving at a proper quantum of

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[86] Reasons, para. 219

[87] *Hyyniak v. Mauldin*, 2014 SCC 7 (SCC) at para 83; *Imperial Manufacturing Group Inc. v. Decor Grates Incorporated*, 2015 FCA 100 (FCA)

[88] *Lam v. Chiu*, 2014 BCCA 32 at paras. 45-47

[89] Transcript - V7, pg. 2057:13-39, pg. 2168:45-47; pg. 2169:6-33; pg. 2170:17-21; pg. 2170:33 - pg. 2171:4

[90] Vol. 6, pg.1839:28-31; 1840:20-27

[91] Appellants’ factum at para. 110

[92] Transcript – Vol. 5, pg. 1627; V7, pg. 2057: 13-23

damages.[93] An appeal of the decision to allow further evidence and submissions on damages is entitled to deference for three reasons: it was a discretionary order; it was made by the trial judge; and it was made in the course of the trial, which had not concluded when he made it and has not since concluded.[94]

E. CONSTITUTIONAL QUESTIONS & RELATED TORTIOUS CONDUCT

1) Ultra Vires Acts of the Government and Legislature of British Columbia

80. Respondent submits the constitutional questions to this Court by a Notice of Constitutional Question filed on 16 December 2016[95]. The respondent raised them by a notice filed on 15 March 2012.[96] The issue was argued at trial on 13 November 2012.[97] mid-way through the trial.[98] The trial judge did not find it necessary to decide the constitutional questions.[99]

81. Respondent alleges the following orders in council (OIC's) and part of the *Water Protection Act* R.S.B.C. 1994, c. 34, ("*WPA"*) constituted regulation of export trade in a commodity (water), a matter falling exclusively to the Parliament and Government of Canada pursuant to section 91(2) of the *Constitution Act*, 1867 and therefore *ultra vires* the Crown appellant.[100]

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[93] Appellants' factum at para. 110; Reasons, para. 218-219

[94] *Hryniak v. Mauldin* 2014 SCC 7 at para. 83; *Imperial Manufacturing Group Inc. v Décor Grates Incorporated* 2015 FCA 100

[95] Notice of Constitutional Question filed on 16 December 2016

[96] Notice of Constitutional Questions filed on 15 March 2012, RB, V4, pg. 1468

[97] Notice of Application dated October 30, 2012, RB, V4, pg. 1251

[98]For written submissions therein, see Notice of Application Book, RB, V4, pg. 1251

[99] Reasons, at para. 217

[100] *Id*. at para. 1(a), 1(b), and 1(c)

a. OIC's 630/1985, 1430/1987, and 889/1988, applied discriminatorily high rates for application fees, licences and use of water, for "commercial bulk export by marine transport vessels", as contrasted with other industrial use rates;

b. OIC 1738/1988 reserved for the exclusive use of the Crown, the unrecorded waters of Link Lake and Link River and their tributaries "for the industrial purpose of commercial bulk export of water by marine transport vessels and bottling of fresh water for sale", rights which were contracted to WCW without imposing the licensing fees and restrictions the Crown applied to others.

c. OIC's 331/1991, 922/1991, 1531/1991, 1040/1992; 0861/1994 imposed and extended a moratorium on the issuance of further licences for the commercial bulk export of bulk water by marine transport, which was made permanent by legislation (*WPA*).

d. The *WPA*, ss. 7(1) (a) and (b), prohibiting the issue of further such licences, and the WPA, 5(c), prohibiting the removal or export of water from British Columbia in containers with a capacity of more than 20 liters, packaged in British Columbia.

82. Respondent also submits that by imposing higher rates for commercial bulk export of water by marine transport vessels than for other industrial uses, the appellant Crown imposed an indirect export tax, in violation of the exclusive authority of the Parliament of Canada, pursuant to subsection 91(3) of the *Constitution Act, 1867.*[101]

83. The constitutional challenges arise from the respondent's loss of business opportunity, caused in part by the appellant Crown's evolving water export policy, dating from 1983. This policy initially allowed for the commercialization of the export of Crown water as a commodity. Then, a series of orders imposed and continued a moratorium on further licences, followed by the *WPA*, prohibiting bulk water exports (the "Water Export Policy").[102]

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[101] *Id.* at para 2

[102] 2012 Application, RB, V4, pg. 1251

84. The Affidavit of Colin A. Beach, in support of the 2012 Application and the "Crown Documents", filed with it, highlight the purpose and intended effect of the Water Export Policy, Crown knowledge of constitutional violations, reckless indifference to illegality, and damages, elements of misfeasance.[103] Appellant's counsel did not cross-examine Mr. Beach on his Affidavit, nor was any affidavit evidence adduced, or objection raised to the Crown Documents relied on by the respondent.

85. The appellant Crown was repeatedly advised that their policy violated federal trade and commerce jurisdiction, was *ultra vires*, and, carried a substantial risk of constitutional attack.[104] A 1984 Cabinet Submission reflects actual knowledge of illegality (by inference of knowledge of federal power over water export).[105] A 1993 document advised Cabinet that a constitutional challenge would almost certainly succeed and potentially result in tens of millions of dollars in damages or compensation having to be paid.[106] In this context, Cabinet was warned of punitive damages being payable if bad faith was proven and that proceeding with the legislation could call into question the very legitimacy of government.[107]

2) The "Pith and Substance" of the Impugned Acts

86. In 2007, the Supreme Court of Canada (SCC) stated: "It is now well established that the resolution of a case involving the constitutionality of legislation in relation to the division of powers must always begin with an analysis of the 'pith and substance' of the impugned legislation."[108] Respondent challenges only specific OICs, not the

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[103] Beach Affidavit, RB, V4, pg. 1284

[104]S.RB, V4, pg., 1356, 1357, 1358, 1373, 1411, 1430,1445, 1446

[105]RB, V1, pg. 105

[106]RB, V4, pgs. 1356, 1357, 1430

[107]RB, V4, pg. 1357

[108]*Canadian Western Bank v. Alberta*, [2007] 2 S.C.R. 3, (S.C.C.) at para. 25

Water Act itself, and only particular provisions of the *WPA*. Respondent submits that the "pith and substance" of the laws under attack can only be characterized as isolated, transparent *ultra vires* invasions of federal trade and commerce jurisdiction. In 2016, the SCC reaffirmed in *Rogers Communications* that "[t]he first step in a division of powers analysis is to determine whether the level of government or the entity exercising delegated powers possesses the authority under the Constitution to enact the impugned statute or adopt the impugned measure".[109]

87. In determining the 'pith and substance' of the statute or measure a court must consider both the purpose and effect of the challenged governmental action. "In making that inquiry, the court considers both intrinsic evidence, contained in the enactment and extrinsic evidence, "such as that of the circumstances in which the measure was adopted".[110] Respondent submits that the language of the impugned OIC's and parts of the *WPA*, and the circumstances prompting their enactment focus on and do nothing but restrict and enjoin export trade in bulk water. They stand apart from otherwise valid provincial purposes of general application such as the management or conservation of Crown property *within* the province. Ancillary provincial justification for invading federal jurisdiction does not exist where the focus of the provincial enactment is a direct usurpation of federal power[111], as in this case.

88. In *Rogers*, the SCC rejected arguments of only "incidental effects on federal jurisdiction" and "double aspect".[112] Respondent submits that the task of characterization in this instance is simpler and more straightforward than in *Rogers.* All of the impugned government enactments dealt directly with licensing, pricing, restricting or prohibiting the export of water from British Columbia. The appellant

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[109]*Rogers Communications Inc. v. Chateauguay (Ville)*, (Rogers Case) [2016] 1 S.C.R. 467; *Id*. at para 34, citing *Goodwin v. British Columbia (Superintendent of Motor Vehicles)*, 2015 SCC 46, [2015] 3 S.C.R. 250, para. 30

[110]*Rogers Communications at para 36*

[111]*Rogers Communications at para 36*

[112] *Id*. paras. 43-56

Crown restricted and then shut down the stream of export commerce in bulk water the Crown had previously allowed, involving private sector participation and investment. The Supreme Court of Canada has insisted that constitutional boundaries must be maintained.[113] The case at bar, even more so than the facts at large in *Rogers*, demonstrate a stark violation of constitutional limits demarcated by the federal division of powers. This Court need go no further for purposes of determining that the government enactments challenged herein were and remain *ultra vires* the appellants.

3) The Doctrine of Inter-jurisdictional Immunity

89. Application of the doctrine of inter-jurisdictional immunity would lead to the same *ultra vires* determinations. This doctrine "is predicated on the constitutional validity of the impugned statute or measure"[114]. It would operate to protect "the 'core' of a legislative head of power from being impaired by a government at the other level".[115] In this case, the extent of "impairment" of federal trade and commerce jurisdiction in relation to bulk water exports is essentially complete, going to the level of "sterilization" or "paralysis" of any possible co-ordinate federal jurisdiction over export trade in water, an intrusion well in excess of what is required to trigger application of the doctrine which is a "midpoint between sterilization and mere effects".[116]

90. The SCC further characterizes this doctrine as one of limited application, typically being reserved for situations already covered by precedent. While there is no direct precedent on point in relation to bulk water exports, there is analogous precedent in relation to provincial interference with the flow of export trade in other commodities, even where, on their face, the provincial laws under attack were of purportedly

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[113] *Rogers* at para 39 quoting *Reference Re Securities Act* 2011 SCC 66 at para. 62

[114]*Rogers* at para 35

[115]*Rogers* at para 59 citing *Quebec (Attorney General) v. Canadian Owners and Pilots Association* 2010 SCC 39 ("*COPA*") at para 25 and 26

[116]*Rogers* at para 70, citing *COPA*, at para 44

general application.[117] Such is the case here where respondent's business focused on profiting from bulk and bottled water export business, including offshore bottling, using water that otherwise would discharge into the sea. The doctrine of inter-jurisdictional immunity can be relied upon by the respondent.

4) Water Export Licence OIC rates - *Ultra Vires* Indirect Tax

91. The discriminatory high rates licence and rentals of Crown water for export under OIC's 630/85, 1430/87 and 889/88 constituted an indirect tax on that commodity for that purpose, pursuant to Supreme Court of Canada authority.[118]

5) The Doctrines of Reading Down and Severability

92. By application of the doctrines of severability and reading down, no violence is done to the legitimate *intra vires* provincial legislative and regulatory framework for the management, conservation and regulation of water resources in the Province of British Columbia.[119]

6) Rationale for Decision on Constitutional Questions & Related Tort Claims

93. The constitutional questions should be decided because the answers to them are fundamental to issues that underlie the history of the case, from the early 1980's: the Crown violating the Constitution, and doing so knowingly unlawfully, to harm the respondent and prefer WCW, and for the ulterior motive of political popularity, while

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[117] *Canadian Industrial Gas and Oil Ltd. v. Government of Saskatchewan* [1978] S.C.R 545; *Central Canada Potash Co. and Attorney General of Canada v. Government of Saskatchewan* [1979] 1 S.C.R. 42; 2012 Application, Part 3, paras. 11-16, RB V4, pg. 1267-1270

[118] RB V4, pgs. 1271-1273; RB, V3, pg. 986

[119] 2012 Application, Part I, paras. 41-45 see P.W. Hogg, 1 *Constitutional Law of Canada* (2 Vols., 5th Ed. Supp.) (Toronto: Carswell) pgs. 15-27

recklessly disregarding the prospect of significant damage to the respondent, in the form of loss of opportunity to ship water from coastal British Columbia sources to known and emerging bottled and bulk water markets. These issues require a decision as they are elemental to a further finding of Category B misfeasance, and further potential compensatory and punitive damages.

94. The answer to the constitutional question as to the *vires* of the water export licence rate orders should be provided because if the export rates were unconstitutional, then the $5,000 maximum annual rentals under B.C. Reg. 501/81 or the 1984 Schedule would have applied continuously, in which case the respondent would not have had arrears of rentals and would have been licenced for sufficient water to meet Goleta's needs.

95. The answer to the constitutional question as to the vires of OIC 331 of March 1991 (the "moratorium") and its extensions up to the time of the *Water Protection Act* (WPA) was enacted, and a decision on the related tort claim that was pleaded, are required to provide causation for on-going losses the respondent claimed, and as a basis for additional punitive damages. But for these moratoria orders, the respondent's water licence application made on March 4, 1991 for 15,054 AFY from Freil Lake would have been processed, and it would have pursued and developed bulk and bottled water export commerce.

96. The answer to the constitutional question as to the *vires* of the impugned part of the *WPA* - (the 20 liter limit on the capacity of container that can be used to remove water from British Columbia) – is required as an element of factual causation and misfeasance, and as a basis for additional punitive damages. In the late 1990's and in the early part of this century, the respondent was wrongfully deprived of an opportunity to develop its Henderson Lake project, involving the Uchucklesaht First Nation, and bulk shipments of water (via tanker ships or other forms of marine transport system, involving containers of more than 20 liters' capacity) to municipal

purchasers in California, including, among others, the City of San Diego and the San Diego County Water Authority.[120]

97. The appellant Crown interceded to block the project, relying on the WPA, which had been recommended to the Legislature by the then Premier Clark and Minister Sihota, who were knowledgable of its illegality (unconstitutionality) and of prospective liabilities (damage).[121]

98. Premier Glen Clark and government Minister Moe Sihota recommended the making of legislation (WPA), including a prohibition on the removal of water resources from the Province, but exempting bottled water removals[122], despite these statements in Cabinet documents:

(1) “An Act to prohibit all “unbottled” water exports would constitute a “direct ban on export.” (2) “Provincial jurisdiction based on proprietary rights to water would not bolster the constitutionality of a direct ban on export, as in a prohibition of all “unbottled” water exports, since a direct ban seeks to regulate the export of water, at least in part, at a point where the Province no longer owns it.”[123] (3) “The Province “cannot enact legislation which is aimed at the regulation or prohibition of water exports”.[124] (4) “A direct provincial prohibition on water exports would almost certainly be successfully challenged as exceeding the Province’s jurisdiction.”[125] (5) “Such an approach would be challenged in the courts on constitutional grounds as an encroachment on the federal jurisdiction over trade and commerce.”[126] (6) “In the

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[120] S.RB, V4, pgs. 1406, 1413, 1414, 1415, 1416, 1445, 1446, 1448, 1450, 1451, 1462, 1466, 1478, S.RB, V5, pgs. 1788, 1790, 1791, 1794, 1795, 1797, 1825, 1827, 1828, 1932, 1833, 1835, 1836, 1839, 1842

[121] S.RB, V4, pgs., 1356, 1357, 1358, 1373, 1411, 1430, 1445, 1446; 1459, 1460, RB, V1, pg. 105; V4, pgs. 1356, 1357, 1430

[122]S.RB, V4, pg. 1411, 1445, 1446

[123]S.RB, V4, pg. 1356 & 1373

[124]S.RB, V4, pg. 1373

[125] S.RB, V4, pg. 1356-7

[126] S.RB, V4, pg. 1357

event of a legal challenge by affected individuals, action outside of existing known legal constraints could be construed as evidence of bad faith on the part of government. Damages have been awarded for administrative action taken in bad faith."[127] (7) "The effect of any restriction of water export on existing activities and rights will affect the number of legal challenges and claims for compensation arising from that restriction."[128] (8) "… it is understood that a blatant export ban is unconstitutional and its implementation may raise questions as to whether the government is abiding within existing rules of law and whether such action calls into question the legitimacy of government itself"[129] (9) "Significant claims for compensation are expected notwithstanding grandparenting and are expected to be in the tens of millions of dollars."[130]

7) Authority for this Court to Decide the Constitutional Questions and the Related Tort Claim that was Pleaded

99. The constitutional claims were fully argued orally and in writing at trial in 2012. The related tort claims were not dealt, but all the documents supporting them were in the trial record, and supporting legal authority was submitted. The appellants should have anticipated that those arguments would be made, and so they had their chance to call witnesses and defendants to counter the respondent's position, but chose not to. No further evidentiary base is needed to decide liability alleged to have arisen from the Crown proceeding knowingly unlawfully with the alleged unconstitutional orders and legislation, and with reckless indifference to prospective damage. Respondent submits that the decision of this Court in *Orange Julius* is reliable authority for this Court to decide these issues, and that it would be in the interest of judicial economy and consistent with the objective that justice not be further delayed.[131]

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[127] S.RB, V4, p. 1357

[128] S.RB, V4, p. 1357-8

[129] S.RB., V4, pg. 1377

[130] S.RB., V4, pg. 1430

[131] *Orange Julius et al v. Surrey et al*, 2000 BCCA 467 at paras. 73-75

PART 4 – ORDERS SOUGHT

1. That the Appeal be dismissed with costs.
2. That the matter be remitted to the Supreme Court of British Columbia Trial Division, for dates to be set for the continuation of the trial for the assessment of damages.
3. That British Columbia Order in Council Nos. 630/85, 1430/87, 889/88, 1738/88, 331/91, 922/1991, 1531/1991, 1040/1992; and 0861/1994 be declared unconstitutional, *ultra vires* British Columbia, and null and void, *ab initio.*
4. That the *Water Protection Act* R.S.B.C. 1994, c. 34, ss. 5(c), 7(1) (a) and (b), be declared unconstitutional, *ultra vires* British Columbia, and null and void, *ab initio.*
5. That the appellant Crown be found liable for damages to be assessed for misfeasance in public office with respect to the planning and recommendation to the Legislature of British Columbia of the legislation that became the *Water Protection Act* R.S.B.C. 1994, c. 34,ss. 5(c), 7(1) (a) and (b).
6. That the respondent be awarded punitive and aggravated damages forthwith in such amount as this Honourable Court deems appropriate; and
7. Such further and alternative relief as this Honourable Court may deem fit.

All of which is respectfully submitted.

Dated in the City of Vancouver, Province of British Columbia, on August 21, 2017

George Douvelos

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Respondent's Counsel

LIST OF AUTHORITIES

Three Rivers District Council v Bank of England (No. 3), [2000] 3 ALL ER 1
Retaruke Timber Co. Ltd. v. Rodney County Council (1984) 2 N.Z.L.R. 129 (H.C.)
Rustad Bros. and Co. v. The Queen (1988), 23 B.C.L.R. (2d) 188 (S.C.).
Shell Canada Products Ltd. v. Vancouver (City), [1994] 1 SCR 231
Simpson v. Canada (Attorney General), 2012 FCA 82 (FCA)

APPENDIX OF ENACTMENTS

Enactment	Citation or date
Crown Proceedings Act RSBC 1996	s.2(c)
Land Act	RSBC 1979, c. 214
Limitation Act	RSBC 1996, c. 266
Ocean Falls Corporation Act	SBC 1973, c. 64
Ocean Falls Corporation Repeal Act	SBC 1983 c. 7 (index c. 304.1), in effect by regulation 31 Mar 1986
Water Act	RSBC 1979, c. 429
Water Regulation, BC Reg 240/1960	05 December 1960
BC Reg 501/81	21 December 1981
OIC 630/85	28 March 1985
OIC 1430/1987	16 July 1987
OIC 553/1987	19 March 1987
OIC 1738/88	23 September 1988
Water Regulation, BC Reg 204/1988	01 June 1988
Water Protection Act	1 June 1995
OIC 331/91	18 March 1991
OIC 922/91	20 June 1991
OIC 1531/91	12 December 1991
OIC 1040/92	25 January 1992
OIC 0861/1994	28 June 1994