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2011 CarswellBC 1693, 2011 BCCA 311

Moulton Contracting Ltd. v. British Columbia

Moulton Contracting Ltd., Respondent (Plaintiff) and Sally Behn, Susan Behn, Richard Behn, Greg Behn, Rupert Behn, Lovey Behn, Mary Behn and George Behn, Appellants (Defendants) and Her Majesty the Queen in Right of the Province of British Columbia, Respondent (Defendant/Third Party) and Chief Liz Logan, on Behalf of Herself and all other Members of the Fort Nelson First Nation and the said Fort Nelson First Nation, Respondents (Defendants)

British Columbia Court of Appeal

Chiasson J.A., Frankel J.A., Saunders J.A.

Heard: November 17-19, 2010
Judgment: July 6, 2011
Docket: Vancouver CA038107

Proceedings: Affirmed, [2010] B.C.W.L.D. 6043, [2010] B.C.W.L.D. 6061, [2010] 4 C.N.L.R. 132, 2010 CarswellBC 889, 2010 BCSC 506 (B.C. S.C.)

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Subject: Public; Property; Civil Practice and Procedure; Natural Resources; Constitutional

Aboriginal law.

Civil practice and procedure.

Natural resources.

***Saunders J.A.*:**

1 This appeal is from an order striking paragraphs of the appellants' statement of defence, thereby curtailing the breadth of issues in the action. The paragraphs were struck for lack of standing on certain issues pleaded,

and under R. 19(24) of the *Rules of Court.*

2 The appeal engages the viability of defences to an action for damages against individual members of the Fort Nelson First Nation who are alleged to have blocked a road by which the plaintiff, Moulton Contracting Ltd., intended to access an area to engage in logging activity. At their heart, these defences allege instruments said by Moulton to give it logging and road usage rights:

> 1) gave no such rights because the Province of British Columbia failed to consult in a meaningful way with the Fort Nelson First Nations, and
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> 2) interfere with Treaty 8 rights and are of no force and effect.

3 In striking paragraphs of the statement of defence, Mr. Justice Hinkson (at B.C.S.C.) reached three main conclusions. First, he concluded that individual members of the Fort Nelson First Nation do not have standing to advance the legal positions set out in those paragraphs because the rights asserted in those paragraphs are collective rights of the Aboriginal community. Second, he held that the challenge to the instruments said to give rights to log and use a road was an impermissible collateral attack on those instruments and should have been pursued through administrative law means. Third, he held that the constitutional arguments of federal exclusivity could not succeed in the circumstances pleaded and so could not fatally undercut the instruments.

4 The central contests in this appeal concern the right of individual defendants to challenge instruments they, but not the collective, say are invalid because they violate collective rights, and the potential legal viability of the challenge, if a challenge can be mounted. The case arises in the context of self-help behaviour by some or all of the appellants in response to proposed logging in an area in which they say the Behn family exercises treaty or Aboriginal rights to hunt and trap.

5 With that general outline, more should be said of the parties and the circumstances as we know them at this preliminary stage of the action. In this I rely upon the reasons for judgment and the statement of defence which, as to factual allegations, I have taken as true for the purposes of this discussion.

6 Moulton Contracting Ltd. was granted two timber sale licences (referred to in the pleadings and the learned judge's reasons for judgment as "TSLs") and one road permit by which it could log certain areas of land. The licences and road permit were granted by Her Majesty the Queen in Right of the Province of British Columbia.

7 The appellants are members of the Behn family. The judge described them all, with the exception of Susan Behn, as members of the Fort Nelson First Nation licenced to trap in what is known as the Behn Family Territory. That territory is within the Treaty 8 territory of the Fort Nelson First Nation. The land covered by the timber sale licences is within the Behn Family Territory.

8 There appears to be no dispute that at least some of the Behn defendants had a presence on a road that provided access to the land referred to in the timber sale licences, thereby impeding Moulton's access to the area it intended to log under the authority of the licences.

9 Moulton claims against the Behns, Her Majesty in Right of the Province of British Columbia, the Fort Nelson First Nation, and the Chief of the First Nation, Liz Logan. Against the Behn defendants, Chief Logan and the Fort Nelson First Nation, its claim sounds in damages for interference with contractual relations, and for

conspiracy to interfere with contractual relations and with its lawful use of the timber sale licences and road permit. Against the Crown, Moulton claims, not in the alternative to its allegations against the Behns, that it breached its contract with it by failing to provide access to the lands designated by the licences and by failing to consult with the Fort Nelson First Nation, and for negligent misrepresentation.

10 In their statement of defence the Behns dispute the characterization of their behaviour as a blockade, and contend they erected a lawful camp on their family territory pursuant to their exercise of their Treaty 8 rights. Some of the Behn defendants deny participating in the alleged blockade and say their only purpose for their attendance at the site of the disputed activity was to visit family members. Some portions of the Behns' statement of defence have not been challenged. However portions connected to the ramifications of the lands being within Treaty 8 are challenged. Most challenged portions were ordered struck from the statement of defence, and all but one of the paragraphs struck is in issue before us. The paragraphs of the statement of defence that the appellants contend have been wrongly struck are:

> 26. As a result of the Crown's breach of the duty to consult, TSL A66572, TSL A66573 and the Road Permit were issued unlawfully and convey no rights to the Plaintiff which could be exercised so as to interfere with the Treaty 8 rights of the Fort Nelson First Nation, George Behn or Sally Behn.
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> . . .
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> 29. TSL A66572, TSL A66573 and the Road Permit, in the context of the existing interferences with the exercise of Treaty 8 rights in the Behn Family Territory and the territory of the Fort Nelson First Nation, constitute interferences with the ability of the Fort Nelson First Nation to exercise its rights pursuant to Treaty 8 of such severity that they cannot be authorized as merely "taking up" land within the meaning of Treaty 8. Instead these authorizations each constitute an infringement of the Treaty 8 rights. In particular, the exercise of the rights provided for in the relevant authorizations would effectively deny the Behn Family and other members of the Fort Nelson First Nation a meaningful opportunity to exercise their Treaty 8 rights.
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> . . .
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> 32. As such, as the relevant authorizations constitute infringements of the Treaty 8 rights of the Fort Nelson First Nation they impermissibly intrude into the exclusive legislative jurisdiction of Parliament and are therefore of no force and effect by application of the doctrine of interjurisdictional immunity.
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> 33. Additionally, the relevant authorizations constitute an unjustifiable prima facie infringement of Treaty 8 rights and are therefore of no force and effect.
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> . . .
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> 35. The mischief provisions of s. 430(1) of the *Criminal Code of Canada* have no application to the activities of the [sic] George Behn and Sally Behn or any person, as:
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> a. There are no lawful rights created by the Road Permit;
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> . . .
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> 38. For the reasons outlined above, s. 54(1) of the *Forest and Range Practices Act*, s. 11 of the *Forest Service Road Use Regulation* and s. 62 of the *Transportation Act* have no application to the actions in issue in

this proceeding as the alleged road has not been lawfully authorized.

. . .

41. George Behn, Sally Behn and Susan Behn deny that the tort of Interference with Contractual Relations has any application to the facts of this cases [sic] because:

a. There was no lawful contract between the Plaintiff and British Columbia for the reasons outlined above, namely that there has been a failure to consult with the Fort Nelson First Nation and the forestry activities authorized by British Columbia are of no force and effect by virtue of the doctrine of interjurisdictional immunity[.]

42. Furthermore, to the extent that the alleged tort can be made out, the Plaintiffs have suffered no damages on account of the alleged tort as the contract created no rights to harvest timber which could be lawfully exercised by the Plaintiff for the reasons described above.

11 As can be seen in the paragraphs just replicated, the Behns contend that the timber sale licences were issued unlawfully and gave no rights to Moulton to harvest the timber (paras. 26, 41 and 42) and that the road permit gave no lawful rights (para. 35(a)). They further contend that the timber sale licences and road permit are of no force and effect (paras. 32 and 33).

12 In addition to their statement of defence, the Behns filed a Notice of Constitutional Question asking whether the timber sale licences and road permit were given without adequate consultation and in breach the Crown's duty to consult, and whether the licences and road permit, or activities authorized by them, are *prima facie* infringements of their Treaty 8 rights to hunt and trap that cannot be justified. As relief they seek dismissal of the action against them.

13 In their statement of defence, the Fort Nelson First Nation and Chief Logan allege the treaty rights to which they refer are collective rights of all members of the Treaty 8 First Nations, say that as a whole they do not control who enjoys those rights or how members exercise those rights, and say the Crown did not meaningfully consult with the Fort Nelson First Nation. They deny Moulton's right to use the road until after January 12, 2007, and allege Moulton made insufficient enquires before it mobilized its equipment in the area. Further, they filed a third party notice against the Crown seeking contribution and indemnity in the event liability is found against them for Moulton's claim, saying any such liability will be founded on the alleged failure of the Crown to consult. It is significant that they do not contend the timber sale licences or road permit are invalid (except to the limited extent they say Moulton failed for a time to apply for authorization to use the road as required by the *Forest and Range Practices Act*, S.B.C. 2002, c. 69).

14 Moulton applied to strike the paragraphs of the Behns' statement of defence replicated above. The Crown applied to strike the third party notice of Fort Nelson First Nation and Chief Logan. The learned judge substantially allowed the applications to strike paragraphs of the Behns' statement of defence, and granted the application to strike the third party notice.

15 This appeal is from the order striking portions of the statement of defence. The Behns say the judge erred:

1. by applying principles applicable to standing to bring administrative actions or claims, rather than prin-

ciples applying to standing to raise a defence;

2. in holding it is an abuse of process to challenge the instruments in question when judicial review is available; and

3. in holding that interjurisdictional immunity is not a reasonable defence in the circumstances of this Treaty.

Preliminary Matters

16 At the commencement of the hearing two applications were made to adduce fresh evidence, one by Moulton Contracting Ltd. and the other by the Crown. The Behns oppose the applications, and in the alternative seek to introduce fresh evidence of their own.

17 The fresh evidence sought to be adduced by Moulton, in the form of notices to admit delivered by Moulton and the responses received, addresses the registered ownership of various traplines. The fresh evidence proposed by the Crown includes a writ of summons and statement of claim in action C965928, a notice of civil claim in action S106302, and certain correspondence. Action C965928 concerns lands that front the Alaska Highway. Action S106302 concerns rights to minerals underlying reserve lands. The correspondence concerns gas wells and related works in and about traplines and lands said to be the subject lands in this action.

18 This fresh evidence, says Moulton, demonstrates that the members of the Behn family held five traplines, not just the one described in the statement of defence, and that George Behn is not the headman of either the Rupert or the Richard Behn Family Collective as alleged in the statement of defence. Moulton agrees that the substance of the fresh evidence existed at the time of the hearing before the judge, but maintains the evidence was unknown to it. It contends the evidence is relevant to the motion to strike the Behns' pleadings under R. 19(24)(b) to (d) as it further demonstrates that the Behns' pleadings are scandalous, embarrassing or an abuse of process.

19 The test for admission of fresh evidence, as was said in *Topgro Greenhouses Ltd. et al. v. Houweling*, 2004 BCCA 39, is set out in *Palmer v. The Queen*, [1980] 1 S.C.R. 759 at 775-76:

(1) The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases: see *McMartin v. The Queen*, [1964] S.C.R. 484.

(2) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial.

(3) The evidence must be credible in the sense that it is reasonably capable of belief, and

(4) It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.

20 In my view the fresh evidence proposed by Moulton does not meet the criteria for admission. Setting aside the issue of its availability to Moulton before the motions to strike pleadings were heard, Moulton's fresh evidence does not appear to me to go to the heart of the legal issues before us, being the legal ability of the Behns to advance a collective treaty right in response to the claim for damages arising from their individual ac-

tions, the characterization of portions of the statement of defence as a collateral attack, and the constitutional issue of interjurisdictional immunity. Only in the event we conclude these issues should be resolved in favour of the appellants does the trial court need to enquire into the substance of the matters addressed in the fresh evidence, being the nature of the Behns' holdings and the relationship of family members to each other. That enquiry will be a factual one that cannot, and should not, be undertaken at this stage. In other words, I do not consider that the fresh evidence proposed by Moulton satisfies the second or fourth test for its admission at this late stage of the proceedings.

21 Although the Crown's proposed fresh evidence addresses a different factual matter, I likewise do not consider it satisfies the second or fourth test for admission. It relates to other land and mineral issues between the Fort Nelson First Nation and the Crown, and even if accepted is not capable of determining the issues before us. It seems to me this appeal should be determined on the record before us.

22 I would dismiss the applications to adduce fresh evidence, and I have considered the grounds of appeal on the basis of the record before us.

Discussion

Standard of Review

23 The order was made at a pleadings stage before the evidence was fully developed. Because the order came so early in the litigation, only if the pleadings are doomed to fail may they be struck under R. 19(24). In the well known words from *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, the question is whether it is "plain and obvious" that the pleading must fail. The trial judge recognized this high standard in his reasons for judgment. Likewise a pleading should not be lightly struck for lack of standing.

24 The question is whether the judge erred in his application of this high standard for striking pleadings. The issue for us is whether the judge is correct that the paragraphs he ordered struck, even if proved, cannot provide an answer to Moulton's claim.

The Standing Issue

25 The impugned paragraphs of the statement of defence allege the Crown both failed to consult adequately with the Fort Nelson First Nation prior to issuing the instruments to Moulton and, in issuing the instruments, interfered with the ability of the Fort Nelson First Nation to exercise its Treaty 8 rights, the latter said to be an impermissible intrusion into the exclusive legislative jurisdiction of Parliament. In these pleadings the Behns deny the validity of the instruments that Moulton says gave it the right to log and the interference with which caused the damages it seeks to recover. Thus through these paragraphs the Behns deny their actions were unlawful by saying Moulton had no rights that were impeded by their actions, and deny that Moulton suffered damages by saying Moulton had no right to harvest the timber.

26 The judge held, as a complete reason to strike those defences, that they rely upon duties owed to or collective rights of the Fort Nelson First Nation, which the Behns lack standing to assert. He reasoned:

> [58] In answer to these submissions, the Behn defendants argued that any person may raise the question of the constitutionality of a law relied upon in a prosecution, citing *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 as authority for that argument.

> [59] In this case, however, the Behn defendants are not challenging the constitutionality of a law. Rather, what they are challenging is the decision and the decision making process of the Ministry of Forests to amend the [Forest Development Plan], which resulted in the granting of the TSLs and the Road Permit. As I will discuss below, in this case such an argument should be resolved through the judicial review process and not in a civil action.
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> [60] The Behn defendants argued that it would be odd to accept that George Behn is a holder of a hunting right but then find that he cannot assert that right if he is sued in relation to the manner in which he exercised his right. I do not accept that this argument is of assistance with respect to the issues to be resolved on Moulton's application. It is not George Behn's hunting rights that he is relying on. Granted he and his family have pled that their hunting rights have been infringed, but the action against him, and the defence to it, is not with respect to any exercise of his hunting rights; rather, it is with respect to his blockade, along with others, of the access of Moulton to areas "taken up" by the Crown and licenced to Moulton.
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> [61] The Behn defendants argued, as well, that they could pursue their pleadings as representatives, citing *Nemaiah Valley Indian Band v. Riverside Forest Products Ltd.*, [1999] B.C.J. No. 2459 (S.C.). There, Mr. Justice Vickers determined that to be a representative plaintiff for a First Nation, one did not have to be a Chief. In my view, this case does not assist the Behn defendants, where the leadership of their First Nation is a party to the proceedings, and has chosen the position that is to be advanced on behalf of the members of that First Nation.
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> [62] I conclude that the Behn defendants do not have standing to raise the impugned sections of their amended statement of defence. Treaty rights are collective rights dealt with on behalf of the aboriginal community. The Behn defendants have not demonstrated that their family has been charged with the authority to deal with the Crown in relation to those rights, and, in this case, the leadership of the Fort Nelson First Nation is a separate party to the proceedings, advancing a position on behalf of their First Nation. ...
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> [Emphasis added.]

27 The Behns contend the judge erred in these passages by confusing the concept of standing to raise a defence with the concept of standing to exercise a right, by confusing the concept of standing with the concept of authority, and by misunderstanding the jurisprudence before him. The Fort Nelson First Nation takes no position on this issue, other than to ask us not to make any decision or statement concerning its internal governance structure relating to consultation processes.

28 Moulton supports the conclusion of the judge, as does the Crown. They say the question of standing to advance a particular legal position does not depend on the characterization of the position as a defence or a claim, but rather depends on the capacity of the litigant to advance the legal position. They say the result in this case is consistent with the broader interests of discouraging self-help, of encouraging good faith resolution of issues between parties with the capacity to resolve them, and of advancing the efficacy of the legal process.

29 In my view, the judge was correct in concluding the Behns lack standing to assert that the duties owed to the Fort Nelson First Nation were not met or that its collective rights were infringed by the grant to Moulton of the timber sale licences and road permit, and consequently in holding that the Behns cannot seek to avoid liability by attacking those instruments.

30 At the outset a word should be said as to the terminology of "duty" and "right". The paragraphs struck

from the statement of defence allege a failure to consult, and breach of treaty and First Nations rights said to raise constitutional issues. It is clear from the jurisprudence that the duty to consult derives from obligations owed to fulfill the honour of the Crown but that the duty is not synonymous with a substantive right; see for example *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511and *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69. In *Mikisew*, para. 57 Justice Binnie referred to consultation as a procedural right, in contrast to substantive rights. Without delving further into the nuances of the terminology, in referring to communal, collective or First Nations rights, I refer to both the procedural right to be consulted in accordance with the Crown's duty, and such substantive rights as are raised by the pleadings.

31 Moulton and the Crown frame the proposition in wide terms, and say the Behns cannot advance a collective right in defence of the action. I would not frame the proposition so broadly, if to do so suggests collective rights can never provide a defence to an individual. For example, in a claim against a First Nations person for a fishing or hunting violation, a collective right that is said to apply to the individual may be raised in defence. The distinguishing feature of this case is the central attack upon instruments held by Moulton as the premise for defences advanced by the Behns. Those defences are to the effect that Moulton had no valid rights and so had no lawful right with which the Behns interfered or conspired to interfere, and accordingly that Moulton suffered no damages. To reach the point of success on these defences, the Behns must clear the hurdle of invalidating Moulton's rights to log and use the road. Yet the rights they assert in order to denigrate Moulton's claim are communal rights of the Fort Nelson First Nation, and the Behns are not authorized to speak on behalf of the Fort Nelson First Nation. And, while joined as defendants, the Fort Nelson First Nation and Chief Logan have not advanced the position that the instruments which underlie Moulton's claim are invalid by reason of lack of consultation or infringement of a federal constitutional power. At most, Chief Logan and the Fort Nelson First Nation complain of the degree of consultation and refer to a statutory reason that Moulton may not have been able to use the road permit until January 12, 2007; they stop short of alleging the instruments are invalid or that they give no rights to Moulton.

32 The proposition that it does not lie in the mouth of individual members of the Fort Nelson First Nation to attack these Crown granted instruments, whether as an offensive move by starting a claim or as a defensive move in response to a claim, leaves to the Fort Nelson First Nation the responsibility of speaking on behalf of the collective through its authorized representatives. It leaves to the First Nation the decision as to when and how to engage in the consultation spoken of in the jurisprudence, when and how to settle issues in the collective's best interests, and when not to settle, making all of these decisions bearing in mind their history, the community's present and future needs, expectations and challenges, and the nature of the issues presented.

33 The nuances of consultation and the spectrum of significance that may be engaged in talks involving First Nations is apparent in the range of remedies that may be ordered in response to a failure to consult sufficiently. A declaration that consultation was insufficient does not necessarily result in nullification of instruments already granted. In *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43, [2010] 2 S.C.R. 650referring to *Haida Nation*, and Dwight G. Newman, *The Duty to Consult: New Relationships with Aboriginal Peoples* (Saskatoon: Purich Publishing, 2009), Chief Justice McLachlin expressed the remedies issue in these terms:

> [37] The remedy for a breach of the duty to consult also varies with the situation. ...
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> [38] ... consultation is "[c]oncerned with an ethic of ongoing relationships" and seeks to further an ongoing

process of reconciliation by articulating a preference for remedies "that promote ongoing negotiations": ...

34 It seems to me the proposition that the Behns have standing because they assert a defence rather than a claim, a shield rather than a sword, is to put form over substance. It is, further and in my view, to expose the respectful resolution of issues between the provincial (or federal) government and the First Nation to the risk of an end-run, whereby individuals may engage in self-help rather than using available legal channels and, when challenged by court process, then litigate individually these communal rights. In this sense, allowing individuals to assert a position on a collective right may have unexpected consequences and, simply, lacks order.

35 This approach, in my view, is consistent with jurisprudence describing treaty rights and *sui generis* First Nation rights as communal. For example, in *Delgamuukw v. B.C.*, [1997] 3 S.C.R. 1010 Chief Justice Lamer said at para. 115:

> A further dimension of aboriginal title is the fact that it is held communally. Aboriginal title cannot be held by individual aboriginal persons; it is a collective right to land held by all members of an aboriginal nation. Decisions with respect to that land are also made by that community. This is another feature of aboriginal title which is *sui generis* and distinguishes it from normal property interests.
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> [Emphasis in original.]

36 Since *Delgamuukw* this proposition has not been disputed. The communal nature of Aboriginal rights has been repeatedly affirmed: see, for example, *R. v. Sappier*; *R. v. Gray*, 2006 SCC 54, [2006] 2 S.C.R. 686; and *R. v. Sundown*, [1999] 1 S.C.R. 393.

37 In *Queackar-Komoyue Nation v. British Columbia*, 2006 BCSC 1517, Mr. Justice Davies considered the standing of individual members of an Aboriginal community to challenge, through a representative action, an environmental certificate issued by the British Columbia Minister of the Environment. He reviewed *Oregon Jack Creek Indian Band v. Canadian National Railway Co.* (1989), 34 B.C.L.R. (2d) 344 (C.A.), aff'd [1989] 2 S.C.R. 1069, 63 D.L.R. (4th) 607; *Sawridge Band v. Canada*, 2001 FCA 399, 283 N.R. 112; *R. v. Marshall*, [1999] 3 S.C.R. 533, 4 C.N.L.R. 301; *R. v. Chevrier*, [1989] 1 C.N.L.R. 128, 6 W.C.B. (2d) 43 (Ont. Dist. Ct.); *R. v. Trotchie*, 2002 SKPC 99, 225 Sask. R. 187; and *R. v. Simon*, [1985] 2 S.C.R. 387. Mr. Justice Davies then said, correctly in my view:

> [35] After having considered the totality of the evidence and the submissions of all counsel, I have concluded that the decided case law does not support the petitioners' assertion that self-appointed aboriginal persons have, in the past, and should in this case, be allowed standing as individuals to assert collective treaty or other collective aboriginal rights on behalf of an aboriginal community.

38 To like effect in *Canadian National Railway v. Brant*, 96 O.R. (3d) 734, [2009] 4 C.N.L.R. 47 (S.C.J.), Justice Strathy said:

> [50] Aboriginal title, treaty rights and Aboriginal rights are a right held by Aboriginal people in common and they cannot be asserted by individual members of the community.

39 The Behns correctly observe that these cases address the standing of First Nations persons to commence an action, rather than defend a claim against them. However, as I have sought to explain, the characterization of the matter as shield or sword ignores the substance of the First Nations interest asserted. In the pleadings struck,

the Behns do not assert a First Nations right to engage in the "blockade" activity of which Moulton complains. Instead they challenge instruments issued by the Crown and say they are invalid. To succeed in these defences they require a declaration of invalidity. Such an attack on a non-Aboriginal party's rights, on the basis of treaty or constitutional propositions, requires authorization by the collective in whom the treaty and constitutional rights inhere.

40 This reasoning applies not only to the consultation defence raised but also, and perhaps more significantly, to the treaty and constitutional/interjurisdictional immunity defence. The land involved in this case is within Treaty 8 lands. In considering the high importance of recognizing the Fort Nelson First Nation as the sole authority for managing the advancement of treaty and constitutional First Nations rights, it is of note that the Treaty provides for the "taking up" (of lands) from time to time for established purposes, including lumbering. Thus, any assertion by the Behns that Moulton's timber sale licences and road permit are invalid on the basis of treaty or constitutional grounds necessarily engages the application of the Treaty itself, which is a matter for the collective Aboriginal community.

41 For these reasons I conclude the judge was correct in finding the Behns lacked standing to advance the defences set out in the paragraphs of his order that are in issue in this appeal. Absent a challenge by the Fort Nelson First Nation, the instruments in issue may not be attacked by individual members of the Fort Nelson First Nation on the basis of inadequate consultation or on any other basis engaging constitutional or treaty rights.

42 Given the context of the case, it is, perhaps, useful to also address some of the issues arising under R. 19(24).

Abuse of Process

43 The judge held, in the alternative to his conclusion on the standing issue, that the paragraphs in issue in this appeal should be struck under R. 19(24) as an abuse of process. He found these paragraphs were an impermissible collateral attack upon instruments given to Moulton by the Crown, and that absent an order made in a review process, which was available, invalidity of the instruments could not be asserted in defence to Moulton's actions. In other words, the judge held that the Behns must take the instruments as valid unless and until they were set aside through procedures provided for that purpose, in proceedings engaging all of the necessary parties.

44 In reaching his conclusion the judge reviewed *Berscheid v. Ensign*, [1999] B.C.J. No. 1172 (S.C.); *Cosens Bay Property v. Canada (Minister of Environment, Lands and Parks)*, [1993] B.C.J. No. 1061 (S.C.) and its application in *Malahat Indian Band v. British Columbia (Minister of Environment, Lands and Parks)*, [1998] B.C.J. No. 2798 (S.C.); *TeleZone Inc. v. Canada (Attorney General)*, 2008 ONCA 892; *Keewatin v. Ontario (Ministry of Natural Resources)* (2003), 66 O.R. (3d) 370 (S.C.J.); *Williams v. College Pension Board of Trustees*, 2005 BCSC 788, rev'd 2007 BCCA 19; *Mikisew*; *Frontenac Ventures Corporation v. Ardoch Algonquin First Nation*, 2008 ONCA 534; and *Relentless Energy Corporation v. Davis*, 2004 BCSC 1492.

45 Referring to *Relentless Energy*, the judge said:

> [111] ... I am unable to accept that that decision supports the proposition that First Nations have the ability to question the legitimacy of Crown-issued permits in the context of a defence to a civil claim. Instead, it appears that the defence is available in a civil action only if their legitimacy is rejected by the appropriate authority.

46 The judge then held:

> [113] It is apparent from the material before me that the defendant George Behn was aware that injunctive relief was a potential remedy for the resolution of whether the TSLs and the Road Permit ought to have been granted as early as August 31, 2006, when he wrote to Bill Warner, the Regional Executive Director of the Northern Interior Forest Region of the Ministry of Forests and Range, and stated that until cumulative impact assessments were undertaken, he and his family would take the position that their Aboriginal and Treaty rights were infringed and that they could apply for an injunction to stop any work under the TSLs.
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> [114] By October 19, 2006, the defendant George Behn must be taken to have been aware that judicial review was another means by which to have his concerns addressed by the Court, as that avenue was then raised by the defendant, Fort Nelson First Nation. His choice, and that of the other Behn defendants, was advertent; they cannot now be permitted to attack the contractual rights of a third party's by challenging them in these proceedings. To allow them to do so, in the circumstances, would amount to an abuse of process: *Shuswap Lake Utilties Ltd. v. Mattison*, 2008 BCCA 176at para. 59.
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> [115] I accept the submission of Moulton that the choice of the Behn defendants not to avail themselves of the remedies of either judicial review or injunctive relief with respect to the grants of the TSLs and the Road Permit renders their attempt to defend the case against them in tort, by alleging a procedural right, an abuse of process.

47 The judge next approached this issue from the perspective of the law on collateral attack as abuse of process. He reviewed (2001), 55 O.R. (3d) 541 (C.A.), aff'd 2003 SCC 63, and *Braithwaite v. Nova Scotia Public Service Long Term Disability Plan Trust Fund* (1999), 176 N.S.R. (2d) 173 (C.A.). The judge concluded the pleadings were an impermissible collateral attack upon the timber sale licences and road permit:

> [119] The Behn defendants argued that the doctrine of collateral attack has no application to this case because they are not bringing what amounts to a judicial review application and they do not seek any relief (beyond costs) from Moulton.
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> [120] I am unable to agree. I am satisfied that the doctrine of collateral attack applies in this case. The Ministry of Forests made a decision to amend the FDP, which resulted in the authorization of the TSLs and the Road Permit. The appropriate means to challenge this authorization is by way of judicial review. The Behn defendants knew that this was an available option, but neither they nor the representatives of the Fort Nelson First Nation specifically chose to challenge the validity of the TSLs and the Road Permit through that means. I conclude that the attempt by them to do so in these proceedings is, in effect, a collateral attack to the avenue and means that is intended to resolve the validity of that which they purport to challenge in these proceedings.
>
> [121] Just as the defendants did in *Relentless Energy*, the Behn defendants should have pursued their claims of invalidity in the appropriate forum, and cannot be permitted to avoid doing so by introducing the issue into these proceedings for determination.

48 The Behns say the judge erred in finding an abuse of process. The Fort Nelson First Nation takes no position on this issue.

49 The Behns contend the judge first went astray on this issue when he reasoned that Crown authorizations

are presumed to be constitutional:

> [80] ... I am unable to agree that there is no presumption that in aboriginal cases the actions of the Crown or those relying upon impugned Crown authorizations should be presumed to be lawful for the reasons set out earlier in these Reasons.

50 They say the presumption of which he spoke is outdated and, linked to other errors in reasoning, led to an incorrect conclusion. In particular, they say the rule against collateral attack is inapplicable and the judge erred in concluding that judicial review or injunctive relief are the only avenues by which the constitutional lawfulness of the government action in this case may be tested. They observe that there have been no proceedings testing the validity of the instruments and until this action there was no *lis* between them (the Behns) and any other person. Thus they say the instruments are not "orders" against them, and the doctrine of collateral attack does not apply. Approaching the issue from a different angle, and addressing the judge's conclusion that judicial review is the correct procedure to assess the validity of the instruments, the Behns say that they seek no relief against a decision maker, that they do not seek a remedy in the nature of a prerogative writ, and in particular, that they do not seek a determination of the validity of the instruments as between the Crown and Moulton. They rely upon *R. v. Nikal*, [1996] 1 S.C.R. 1013, 133 D.L.R. (4th) 658 and *Taku River Tlingit First Nation v. Tulsequah Chief Mine Project*, 1999 CanLii 5674 (B.C.S.C.), leave ref'd 1999 BCCA 442 (Chambers), leave ref'd 1999 BCCA 550 and urge this court to find the pleadings are not an abuse of process.

51 After the hearing of this appeal three decisions relevant to this issue were released by the Supreme Court of Canada: *Canada (Attorney General) v. MacArthur*, 2010 SCC 63; *Canadian Food Inspection Agency v. Professional Institute of the Public Service of Canada*, 2010 SCC 66; and *Canada (Attorney General) v. TeleZone*, 2010 SCC 62. The latter case is the appeal from *TeleZone*, the Ontario Court of Appeal decision cited earlier. We asked for and received submissions from the parties on the application of these cases to this appeal.

52 The Behns observe that *TeleZone* is the lead decision. The case addresses a claim for damages launched in the Ontario Superior Court arising from a ministerial rejection of Telezone's application for a licence to provide telecommunications services. In declining to accept the Crown's submission that the claim represented a collateral attack upon the ministerial decision, and that the matter was required to be addressed through judicial review in the Federal Court of Canada, Justice Binnie referred at para. 60 to the description of collateral attack in *Wilson v. The Queen*, [1983] 2 S.C.R. 594 at 599:

> ... an attack made in proceedings other than those whose specific object is the reversal, variation, or nullification of the order or judgment.

He referred as well to *R. v. Litchfield*, [1993] 4 S.C.R. 333, and *Garland v. Consumers' Gas Co.*, 2004 SCC 25, [2004] 1 S.C.R. 629, quoting this passage from the latter:

> Based on a plain reading of this rule, the doctrine of collateral attack does not apply in this case because here the specific object of the appellant's action is not to invalidate or render inoperative the Board's orders, but rather to recover money that was illegally collected by the respondent as a result of Board orders. Consequently, the collateral attack doctrine does not apply.

53 Justice Binnie held, taking the *Garland* approach and on the basis that TeleZone was not seeking to avoid the consequences of the ministerial order, that the doctrine of collateral attack did not apply.

54 The Behns contend that to characterize the defences they pleaded as a collateral attack on the instruments, there first must be an order against them. Such was the case in *Cimaco International Sales Inc. v. British Columbia*, 2010 BCCA 342, in which this court considered a claim for damages said to arise from suspension of the plaintiff's business licence. Madam Justice Kirkpatrick held:

> [59] It is plain that Cimaco's core allegation is that the Authority misinterpreted the Regulation and knew it had no basis on which to suspend Cimaco's license. All of its allegations are linked to this central allegation.
>
> . . .
>
> [62] For all of the above reasons, Cimaco's civil action against the Authority was fundamentally ill-advised, bound to fail, and constituted an impermissible collateral attack on the Authority's reconsideration decision.

55 Both *Litchfield*, referred to in *TeleZone*, and *Garland* contain passages that support the Behns' submission that a collateral attack requires an order against them. At para. 72 of *Garland*, for example, it is said:

> ... all involve a party, bound by an order, seeking to avoid the effect of the order by challenging its validity in the wrong forum.
>
> [Emphasis added.]

56 The Behns submit that *TeleZone* holds, further, that even if a claim can be characterized as a collateral attack, it is not impermissible if a collateral attack is required to adjudicate the claim. They say this holds equally for a defence.

57 Notwithstanding the forceful submissions of the Behns, in my view the defences pleaded represent an impermissible collateral attack upon the instruments granted to Moulton by the Crown. I agree this is an unusual case; normally it is the party against whom the order is made that is said to be engaging in a collateral attack. Such was the case in *Litchfield*, *Garland* and *TeleZone*. Those cases, therefore, did not address an attack upon a decision by a member of a collective, whose collective could have challenged the decision, but did not. In these unusual circumstances, it seems to me one must look further for the answer and determine whether, in the words of *Wilson v. The Queen*, this is an attack "whose specific object is the ... nullification of the order or judgment", or in the words of Justice Arbour in *Toronto (City)* at para. 34 this is a "... contest about whether that decision has legal force."

58 Allowing that there will be instances in which a party may be allowed to attack the substance of a decision en route to determining a claim in damages, in my view this is not a case for that approach. *Garland*, *MacArthur*, *Canadian Food Inspection Agency* and *TeleZone* all were cases in which the validity of the government orders or decisions was immaterial to the claims for damages. That is not the case here, where the essence of the impugned pleading is that the government instruments are invalid. I agree with the judge that such a pleading is an abuse of process.

59 Standing back from this conclusion, and with an eye to the proper administration of justice, one may ask whether this leaves the Behns, or persons in their position, without recourse when faced with Crown granted instruments they say were granted outside the law. It does not. The Fort Nelson First Nation had the capacity to challenge the instruments through whatever proper spokespersons or avenues in its wisdom it might use. Injunction proceedings are available, on short notice, to preserve Aboriginal rights where appropriate. There may be

other legal avenues open to the First Nation as a collective. In other words, legal forums exist whereby Aboriginal interests may be protected and advanced, leaving the Aboriginal community to determine its course in the spirit of reconciliation encouraged in the jurisprudence, and leaving individual positions to be determined within the Aboriginal community.

60 Last, the Behns are critical of the judge's reference to a presumption of constitutionality. In his reasons for judgment the judge, as part of his discussion on the third issue, referred to the constitutional question, but spoke of a presumption of lawfulness. The statement was, in my view, correct in its application to administrative decisions to grant governmentally regulated instruments. In this case, the validity of the instruments are challenged. In my view the presumption applies until an instrument, in proceedings engaging the principles of the law of judicial review, is found invalid.

61 As the core allegation in these paragraphs is that the Crown-granted licences and road permit are invalid, I consider the struck defences are an impermissible collateral attack upon the instruments held by Moulton. For this reason, and independently of my conclusion on the standing issue, I would not accede to the second ground of appeal.

Interjurisdictional Immunity

62 The Behns say, as well, that the judge erred in striking paragraphs 29, 32 and 33 as disclosing no reasonable defence. Those paragraphs allege the instruments impinge on exclusive federal jurisdiction and are, therefore, invalid. The judge held:

> [75] Some of the impugned sections of the Behn defendants' amended statement of defence assert that because the Crown's authorization of the TSLs and Road Permit violated their Treaty 8 rights, that authorization is invalid under the doctrine of interjurisdictional immunity. The essence of their argument is that the Crown has no power to directly or indirectly infringe treaty rights because treaty rights fall within a "core" of a Federal head of power — Indians and Lands reserved for Indians — under s. 91(24) of the *Constitution Act*, [*1867*]; therefore, any provincial law which impairs these matters is not applicable.
>
> [76] I agree with the submission of Moulton with respect to the applicability of the doctrine of interjurisdictional immunity to the facts of this case. Treaty 8 specifically permits the provincial Crown to "take up" lands for logging purposes. Unlike the Douglas Treaties discussed in *R. v. Morris*, [2006] 2 S.C.R. 915, the rights granted to First Nations under Treaty 8 are subject to the rights of the government to make regulations and to take up land; therefore, the doctrine of interjurisdictional immunity cannot apply to invalidate the TSLs and the Road Permit.
>
> [77] Because of the government conduct expressly permitted by the terms of Treaty 8, federal exclusivity does not arise.
>
> [78] I therefore conclude that the impugned sections of the Behn defendants' amended statement of defence which deal with interjurisdictional immunity (paragraphs 29, 32, 33) should be struck as they disclose no reasonable defence to Moulton's claim.

63 The Behns rely upon , [2007] 2 S.C.R. 3, 2007 SCC 22; , [2007] 2 S.C.R. 86, 2007 SCC 23; and , [2006] 2 S.C.R. 915, 2006 SCC 59, which they say impose a limit on provincial interference with the core of a matter within federal jurisdiction. They say the lands involved are treaty lands and therefore within the federal head of

power over "Indians and Lands reserved for the Indians" set out in s. 91(24) of the *Constitution Act, 1867*. The Behns contend, citing *Mikisew*, that although Treaty 8 permits "taking up" by the Crown for lumbering, that ability is not unlimited. Here, they say, the cumulative effect of successive takings-up crosses the line and threatens the Fort Nelson First Nation's rights, requiring the application of interjurisdictional immunity.

64 The passage of *Mikisew* to which the Behns refer is:

> [48] What Rothstein J.A. actually said at para. 18 is as follows:
>
> > With the exceptions of cases where the Crown has taken up land in bad faith or has taken up so much land that no meaningful right to hunt remains, taking up land for a purpose express or necessarily implied in the treaty itself cannot be considered an infringement of the treaty right to hunt.
> >
> > [Emphasis added.]
>
> The "meaningful right to hunt" is not ascertained on a treaty-wide basis (all 840,000 square kilometres of it) but in relation to the territories over which a First Nation traditionally hunted, fished and trapped, and continues to do so today. If the time comes that in the case of a particular Treaty 8 First Nation "no meaningful right to hunt" remains over *its* traditional territories, the significance of the oral promise that "the same means of earning a livelihood would continue after the treaty as existed before it" would clearly be in question, and a potential action for treaty infringement, including the demand for a Sparrow justification, would be a legitimate First Nation response.
>
> [Emphasis in original.]

65 Moulton, supported by the Crown, urges us to uphold the judge's conclusions on this issue. It says that interjurisdicitonal immunity has no relevance and, in any case, is a doctrine of limited application. Moulton refers to *Kruger v. The Queen*, [1978] 1 S.C.R. 104; *Dick v. The Queen*, [1985] 2 S.C.R. 309; *R. v. Alphonse* (1993), 80 B.C.L.R. (2d) 17 (C.A.); *R. v. Meshake*, 2007 ONCA 337; *Halfway River First Nation v. British Columbia (Ministry of Forests)*, 1999 BCCA 470; and *Saanichton Marina Ltd. v. Claxton* (1989), 36 B.C.L.R. (2d) 79 (C.A.), in urging us to find that there is no federal law that conflicts with the timber sale licences or road permit.

66 I do not consider the issue of interjurisdictional immunity should be resolved on this pleadings motion. The Behns, supported by Chief Logan and the Fort Nelson First Nation, advance a theory, based upon jurisprudence from the Supreme Court of Canada, that I cannot say is doomed to fail. The issue would require evidence to determine the degree of "taking up" and the effect of such "taking up" on the core of the Fort Nelson First Nation's "Indianness."

67 There is much merit in the comments of Madam Justice Southin in *Stoney Creek Indian Band v. Alcan Aluminum*, 1999 BCCA 527at para. 37, that it is not "in the broad public interest ... that a profoundly important question of constitutional law should be decided without the vital facts, both those *inter partes* and constitutional." I would decline, therefore, to address the judge's reasons for judgment on the issue variously referred to as the constitutional issue on "taking up" or interjurisdictional immunity.

Conclusion

68 As I would not accede to either of the first two grounds of appeal, I would dismiss the appeal. I also

would dismiss the applications to adduce fresh evidence.

***Chiasson J.A.*:**

I AGREE:

***Frankel J.A.*:**

I AGREE:

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