



**SUPREME COURT OF CANADA**

**CITATION:** Behn v. Moulton Contracting Ltd., 2013 SCC 26

**DATE:** 20130509

**DOCKET:** 34404

**BETWEEN:**

**Sally Behn, Susan Behn, Richard Behn, Greg Behn, Rupert Behn,  
Lovey Behn, Mary Behn, George Behn**

Appellants

and

**Moulton Contracting Ltd. and Her Majesty the Queen in  
Right of the Province of British Columbia**

Respondents

- and -

**Attorney General of Canada, Chief Liz Logan, on behalf of herself and all  
other members of the Fort Nelson First Nation and the said Fort Nelson  
First Nation, Grand Council of the Crees (Eeyou Istchee)/Cree Regional  
Authority,**

**Chief Sally Sam, Maiyoo Keyoh Society, Council of Forest Industries,  
Alberta Forest Products Association and Moose Cree First Nation**

Interveners

**CORAM:** McLachlin C.J. and LeBel, Fish, Abella, Rothstein, Cromwell, Moldaver,  
Karakatsanis and Wagner JJ.

**REASONS FOR JUDGMENT:**  
(paras. 1 to 43)

LeBel J. (McLachlin C.J. and Fish, Abella, Rothstein,  
Cromwell, Moldaver, Karakatsanis and Wagner JJ.  
concurring)

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BEHN v. MOULTON CONTRACTING LTD.

**Sally Behn, Susan Behn, Richard Behn, Greg Behn,  
Rupert Behn, Lovey Behn, Mary Behn and George Behn**

*Appellants*

v.

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in Right of the Province of British Columbia**

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herself and all other members of the Fort Nelson First Nation  
and the said Fort Nelson First Nation, Grand Council of the  
Crees (Eeyou Istchee)/Cree Regional Authority, Chief Sally Sam,  
Maiyoo Keyoh Society, Council of Forest Industries, Alberta  
Forest Products Association and Moose Cree First Nation**

*Interveners*

**Indexed as: Behn v. Moulton Contracting Ltd.**

**2013 SCC 26**

File No.: 34404.

2012: December 11; 2013: May 9.

Present: McLachlin C.J. and LeBel, Fish, Abella, Rothstein, Cromwell, Moldaver,  
Karakatsanis and Wagner JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

*Civil procedure — Standing — Aboriginal law — Treaty rights — Duty to consult — Individual members of Aboriginal community asserting in defence to tort action against them that issuance of logging licences breached duty to consult and treaty rights — Whether individual members have standing to assert collective rights in defence.*

*Civil procedure — Abuse of process — Motion to strike pleadings — Members of Aboriginal community blocking access to logging site and subsequently asserting in defence to tort action against them that issuance of logging licences breached duty to consult and treaty rights — Whether raising defences constituted abuse of process.*

After the Crown had granted licences to a logging company to harvest timber in two areas on the territory of the Fort Nelson First Nation in British Columbia, a number of individuals from that First Nation erected a camp that, in effect, blocked the company's access to the logging sites. The company brought a tort action against the members of the Aboriginal community, who argued in their defences that the licences were void because they had been issued in breach of the constitutional duty to consult and because they violated their treaty rights. The logging company filed a motion to strike these defences. The courts below held that the individual members of the Aboriginal community did not have standing to assert collective rights in their defence; only the community could invoke such rights. They

also concluded that such a challenge to the validity of the licences amounted to a collateral attack or an abuse of process, as the members of the community had failed to challenge the validity of the licences when they were issued.

*Held:* The appeal should be dismissed.

The duty to consult exists to protect the collective rights of Aboriginal peoples and is owed to the Aboriginal group that holds them. While an Aboriginal group can authorize an individual or an organization to represent it for the purpose of asserting its Aboriginal or treaty rights, here, it does not appear from the pleadings that the First Nation authorized the community members to represent it for the purpose of contesting the legality of the licences. Given the absence of an allegation of authorization, the members cannot assert a breach of the duty to consult on their own.

Certain Aboriginal and treaty rights may have both collective and individual aspects, and it may well be that in appropriate circumstances, individual members can assert them. Here, it might be argued that because of a connection between the rights at issue and a specific geographic location within the First Nation's territory, the community members have a greater interest in the protection of the rights on their traditional family territory than do other members of the First Nation, and that this connection gives them a certain standing to raise the violation of their particular rights as a defence to the tort claim. However, a definitive pronouncement in this regard cannot be made in the circumstances of this case.

Raising a breach of the duty to consult and of treaty rights as a defence was an abuse of process in the circumstances of this case. Neither the First Nation nor the community members had made any attempt to legally challenge the licences when the Crown granted them. Had they done so, the logging company would not have been led to believe that it was free to plan and start its operations. Furthermore, by blocking access to the logging sites, the community members put the logging company in the position of having either to go to court or to forego harvesting timber after having incurred substantial costs. To allow the members to raise their defence based on treaty rights and on a breach of the duty to consult at this point would be tantamount to condoning self-help remedies and would bring the administration of justice into disrepute. It would also amount to a repudiation of the duty of mutual good faith that animates the discharge of the Crown's constitutional duty to consult First Nations.

### **Cases Cited**

**Referred to:** *Garland v. Consumers' Gas Co.*, 2004 SCC 25, [2004] 1 S.C.R. 629; *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511; *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 S.C.R. 388; *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53, [2010] 3 S.C.R. 103; *R. v. Kapp*, 2008 SCC 41, [2008] 2 S.C.R. 483; *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010; *R. v. Van der Peet*, [1996] 2 S.C.R. 507; *Taku River Tlingit First Nation v. British Columbia*

*(Project Assessment Director)*, 2004 SCC 74, [2004] 3 S.C.R. 550; *Komoyue Heritage Society v. British Columbia (Attorney General)*, 2006 BCSC 1517, 55 Admin. L.R. (4th) 236; *R. v. Sparrow*, [1990] 1 S.C.R. 1075; *R. v. Sundown*, [1999] 1 S.C.R. 393; *R. v. Marshall*, [1999] 3 S.C.R. 533; *R. v. Sappier*, 2006 SCC 54, [2006] 2 S.C.R. 686; *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77; *R. v. Power*, [1994] 1 S.C.R. 601; *R. v. Conway*, [1989] 1 S.C.R. 1659; *R. v. Scott*, [1990] 3 S.C.R. 979; *Canam Enterprises Inc. v. Coles* (2000), 51 O.R. (3d) 481, rev'd 2002 SCC 63, [2002] 3 S.C.R. 307; *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 S.C.R. 307.

### **Statutes and Regulations Cited**

*Constitution Act, 1982*, s. 35.

*Forest Act*, R.S.B.C. 1996, c. 157.

*Indian Act*, R.S.C. 1985, c. I-5.

*Supreme Court Civil Rules*, B.C. Reg. 168/2009, r. 9-5(1).

*Supreme Court Rules*, B.C. Reg. 221/90 [rep.], r. 19(24).

### **Treaties and Agreements**

Treaty No. 8 (1899).

## Authors Cited

Newman, Dwight G. *The Duty to Consult: New Relationships with Aboriginal Peoples*. Saskatoon: Purich, 2009.

Perell, Paul M. "A Survey of Abuse of Process", in Todd L. Archibald and Randall Scott Echlin, eds., *Annual Review of Civil Litigation 2007*. Toronto: Thomson Carswell, 2007, 243.

Woodward, Jack. *Native Law*, vol. 1. Toronto: Carswell, 1994 (loose-leaf updated 2012, release 5).

APPEAL from a judgment of the British Columbia Court of Appeal (Saunders, Chiasson and Frankel JJ.A.), 2011 BCCA 311, 20 B.C.L.R. (5th) 35, 309 B.C.A.C. 15, 523 W.A.C. 15, [2011] 3 C.N.L.R. 271, 335 D.L.R. (4th) 330, [2011] B.C.J. No. 1271 (QL), 2011 CarswellBC 1693, affirming a decision of Hinkson J., 2010 BCSC 506, [2010] 4 C.N.L.R. 132, [2010] B.C.J. No. 665 (QL), 2010 CarswellBC 889. Appeal dismissed.

*Robert J. M. Janes and Karey M. Brooks*, for the appellants.

*Charles F. Willms and Bridget Gilbride*, for the respondent Moulton Contracting Ltd.

*Keith J. Phillips and Joel Oliphant*, for the respondent Her Majesty the Queen in Right of the Province of British Columbia.

*Brian McLaughlin*, for the intervener the Attorney General of Canada.

*Allisun Rana and Julie Tannahill*, for the interveners Chief Liz Logan, on behalf of herself and all other members of the Fort Nelson First Nation and the said Fort Nelson First Nation.

*John Hurley and François Dandonneau*, for the interveners the Grand Council of the Crees (Eeyou Istchee)/Cree Regional Authority.

*Christopher G. Devlin and John W. Gailus*, for the interveners Chief Sally Sam and the Maiyoo Keyoh Society.

*John J. L. Hunter, Q.C., Mark S. Oulton and Stephanie McHugh*, for the interveners the Council of Forest Industries and the Alberta Forest Products Association.

*Jean Teillet and Nuri G. Frame*, for the intervener Moose Cree First Nation.

The judgment of the Court was delivered by

LEBEL J. —

## I. Introduction — Overview



[1] This appeal raises issues of standing and abuse of process in the context of relations between members of an Aboriginal community, a logging company, and a provincial government. After the Crown had granted licences to a logging company to harvest timber in two areas on the territory of the Fort Nelson First Nation (the “FNFN”) in British Columbia, a number of individuals from that First Nation erected a camp that, in effect, blocked the company’s access to the logging sites. The company brought a tort action against these members of the Aboriginal community, who argued in their defence that the licences were void because they had been issued in breach of the constitutional duty to consult and because they violated the community members’ treaty rights.

[2] The logging company filed a motion to strike these defences. The courts below held that the individual members of the Aboriginal community (the “Behns”), did not have standing to assert collective rights in their defence; only the community could raise such rights. The courts below also concluded that such a challenge to the validity of the licences amounted to a collateral attack or an abuse of process, as the Behns had failed to challenge the validity of the licences when they were issued.

[3] The Court is asked to consider in this appeal whether an individual member or group of members of an Aboriginal community can raise a breach of Aboriginal and treaty rights as a defence to a tort action and, if so, in what circumstances. But, as this question of standing is not determinative for the purposes

of this appeal, the Court must also decide whether the doctrine of abuse of process applies in this case.

[4] For the reasons that follow, I would dismiss the appeal.

## II. Facts

[5] As this is an appeal from a decision on a motion to strike pleadings, the following facts are taken from the pleadings. The Behns are, with one exception, members of the FNFN, a “band” within the meaning of the *Indian Act*, R.S.C. 1985, c. I-5. The FNFN is a party to Treaty No. 8 of 1899, which covers an area comprising parts of Alberta, British Columbia, Saskatchewan and the Northwest Territories. The Behns allege that they have traditionally hunted and trapped on a part of the FNFN’s territory that has historically been allocated to their family.

[6] Moulton Contracting Ltd. (“Moulton”) is a company incorporated pursuant to the laws of British Columbia. On June 27, 2006, the British Columbia Ministry of Forests (the “MOF”) granted Moulton two timber sale licences and a road permit (the “Authorizations”) pursuant to the *Forest Act*, R.S.B.C. 1996, c. 157. These Authorizations entitled Moulton to harvest timber on two parcels of land within the FNFN’s territory, both of which are within the Behn family trapline. The Behns stated in their Amended Statement of Defence that the FNFN manages its territory by allocating parts of it (called traplines) to specific families:

While the rights provided for in the Treaty # 8 extended throughout the tract described in the treaty, most of the aboriginal people comprising the Fort Nelson First Nation traditionally ordered themselves so that the rights to hunt and trap set out in Treaty 8 were exercised in tracts of land associated with different extended families. These extended families were headed by a headman. [A.R., at p. 89]

[7] Before granting the Authorizations, the MOF had contacted representatives of the FNFN and individual trappers, including George Behn, the headman of the Behn family, in developing and amending its forest development plan (the "FDP"). The MOF contacted the FNFN in August 2004 and individual trappers, including Mr. Behn, in September 2004 to notify them that additional harvesting blocks were being proposed. The trappers it contacted were invited to advise it of any concerns they had or provide it with comments by October 20, 2004. MOF officials met a representative of the FNFN in November 2004 to discuss consultation on the proposed amendment to the FDP. The issue of funding to enable the FNFN to provide information to the MOF was discussed at that meeting. Funding was ultimately refused. On January 31, 2005, the MOF wrote to the FNFN to advise it that archaeological impact assessments would be conducted for certain areas proposed for harvesting in the amendment to the FDP. Two archaeological impact assessments were completed in August 2005, and copies of them were delivered to the FNFN. The MOF and the FNFN met again on September 21, 2005 to discuss the proposed amendment further.

[8] The MOF approved the amendment to the FDP. On June 2, 2006, it put the two timber sale licences relevant to this appeal up for sale. After granting the

Authorizations to Moulton, the MOF wrote to George Behn on June 28, 2006 to advise him that Moulton had been awarded licences to harvest timber within his trapping area. In that letter, George Behn was advised to contact Moulton directly to confirm the date its harvesting operations were to commence. The MOF again wrote to Mr. Behn on July 17, 2006 to advise him that the operations would begin on August 1, 2006. On August 31, 2006, George Behn wrote to the MOF, requesting that the Authorizations granted to Moulton be cancelled and seeking consultation. No copy of this letter was sent to Moulton.

[9] Between September 19 and September 22, 2006, Moulton started moving its equipment to one of the two sites to which the Authorizations applied. On September 25, 2006, the MOF notified Moulton that there was a potential problem with George Behn. The MOF requested that Moulton move its operations to the second site. Moulton replied that it could not do so because it had commitments to a mill to deliver timber from the first site.

[10] In early October 2006, the Behns erected a camp on the access road leading to the parcels of land to which the Authorizations applied. The camp blocked access to the land where Moulton was authorized to harvest timber.

[11] On November 23, 2006, Moulton filed a statement of claim in the British Columbia Supreme Court against the Behns, Chief Logan on behalf of herself and the FNFN, and the Crown. Moulton claimed damages from the Behns for interference with contractual relations. In their statement of defence, the Behns denied that their

conduct was unlawful. They alleged that the Authorizations were illegal for two reasons. First, the Crown had failed to fulfil its duty to consult in issuing the Authorizations. Second, the Authorizations infringed their hunting and trapping rights under Treaty No. 8.

[12] Moulton applied under Rule 19(24) of the *Supreme Court Rules*, B.C. Reg. 221/90 [repealed] (now Rule 9-5(1), *Supreme Court Civil Rules*, B.C. Reg. 168/2009), to have a number of paragraphs struck out of the Behns' statement of defence on the ground (1) that it was plain and obvious that they did not disclose a reasonable defence, or (2) that the relief being sought in them constituted an abuse of process. In substance, the paragraphs Moulton sought to have struck related to the Behns' allegations that the Authorizations were invalid because they had been issued in breach of the Crown's duty to consult and because they violated the Behns' treaty rights, and to their allegations that their acts were neither illegal nor tortious. The Crown supported Moulton's application and further submitted that the Behns lacked standing to raise a breach of the duty to consult or of treaty rights, as only the FNFN had such standing.

### III. Judicial History

#### A. *British Columbia Supreme Court, 2010 BCSC 506, [2010] 4 C.N.L.R. 132*

[13] Hinkson J. held that the Behns lacked standing to raise the defences pertaining to the duty to consult and treaty rights. He stated that although Aboriginal

and treaty rights are exercised by individuals, they are collective in nature. As a result, they are not possessed by nor do they reside with individuals. He mentioned that collective rights can be asserted by individuals only if the individuals are authorized to do so by the collective. Hinkson J. found that the FNFN had not authorized the Behns to assert these rights.

[14] Hinkson J. also held that the impugned paragraphs in which the Behns submitted that the Authorizations were invalid had to be struck out as an abuse of process under Rule 19(24) of the *Supreme Court Rules*. He reasoned that the Behns could not be permitted to introduce the subject matter of the invalidity of the Authorizations now in their statement of defence, as they should instead have applied for judicial review.

[15] It should be noted that the trial then proceeded from September to November 2011 in the British Columbia Supreme Court on the basis of the paragraphs that had survived the motion to strike. The trial judge has reserved his judgment until this Court disposes of this appeal.

*B. British Columbia Court of Appeal, 2011 BCCA 311, 20 B.C.L.R. (5th) 35*

[16] Saunders J.A., writing for the Court, agreed with Hinkson J. that the Behns lacked standing to assert that the duty to consult owed to the FNFN had not been met and that collective rights had been infringed by the issuance of the Authorizations. She said, at para. 39, that “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”. In this case, the Behns had received no such authorization by the FNFN. Saunders J.A. was careful to point out that she was not suggesting that collective rights could never provide a defence to individual members of an Aboriginal community.

[17] Saunders J.A. also concluded that the defences raised by the Behns constituted an impermissible collateral attack upon the Authorizations granted to Moulton. She added that this conclusion was not incompatible with the proper administration of justice, since the FNFN, as a collective, had the capacity to challenge the Authorizations through a number of legal avenues. She therefore upheld Hinkson J.’s conclusion that the impugned defences constituted an abuse of process.

#### IV. Analysis

##### A. *Issues*

[18] Three issues must be addressed in this appeal. First, can the Behns, as individual members of an Aboriginal community, assert a breach of the duty to consult? This issue raises the question to whom the Crown owes a duty to consult. Second, can treaty rights be invoked by individual members of an Aboriginal community? These two issues relate to standing.

[19] The third issue relates to abuse of process. Does it amount to an abuse of process for the Behns to challenge the validity of the Authorizations now that they are being sued by Moulton after having failed to take legal action when the Authorizations were first issued even though they objected to their validity at the time?

#### B. *Positions of the Parties*

##### (1) Behns

[20] The Behns submit that the Court of Appeal erred in holding that they lacked standing to assert defences based on treaty rights and that challenging the validity of the Authorizations constituted an impermissible collateral attack. The Behns contend that the principles related to standing apply to the assertion of a claim, not of a defence. As a result, they do not apply in this case, since the Behns are simply defending against an action. In the alternative, the Behns assert that they have standing because, as members of the FNFN, they have a substantial and direct interest in their rights under Treaty No. 8.

[21] On the collateral attack issue, the Behns argue, relying on *Garland v. Consumers' Gas Co.*, 2004 SCC 25, [2004] 1 S.C.R. 629, that the defences they assert do not constitute a collateral attack, since they are not parties to the Authorizations. Alternatively, they submit that, if the impugned paragraphs do constitute a collateral attack, the attack is permissible, because the legislature did not



intend that any attempt to question the lawfulness of the Authorizations could be made only by applying for judicial review.

[22] Finally, the Behns submit that the principle of the rule of law will be violated if they cannot assert their defences. They contend that whether their conduct was lawful cannot be determined without also addressing the lawfulness of the Authorizations.

(2) Moulton

[23] Moulton responds that the Behns have no standing to raise a defence based on Aboriginal or treaty rights, because only the FNFN, as the collective, can assert a claim that these rights have been infringed. Moulton also contends that the Crown's duty to consult is owed to the collective, not to individual members of the collective. Responding to the Behns' submission that they have standing because they are only seeking the dismissal of the action, Moulton submits that they are relying on an affirmative defence that requires an order declaring the Authorizations to be invalid. Moulton adds that the activity for which the Behns are now being sued — erecting and participating in a blockade — is not a right protected under Treaty No. 8. Finally, since the Behns could have challenged the legality of the Authorizations by applying for judicial review when they were issued, Moulton submits that it amounts to a collateral attack for the Behns to challenge their validity now as a defence to a tort claim.

### (3) Crown

[24] According to the Crown, the collective nature of Aboriginal and treaty rights means that claims in relation to such rights must be brought by, or on behalf of, the Aboriginal community. Although the Crown recognizes the Behns' interest in their treaty rights, it submits that their position on this issue disregards two factors: (1) the issue arising in the litigation concerns a defence to a claim related to a blockade, not to the exercise of hunting or trapping rights; and (2) the FNFN is named as a party to the proceedings and therefore represents the community in them. The Crown further submits that having a substantial and direct interest in a treaty right does not entitle an individual to bring a treaty rights claim or defence.

[25] On whether the impugned paragraphs constitute an impermissible collateral attack, the Crown submits that the question is whether the claimant is content to let the government's decision stand. In the instant case, the impugned defences raise an unequivocal challenge to the validity and legal force of the Authorizations. Furthermore, the Crown submits that the Behns could have challenged the validity of the Authorizations by applying for judicial review instead of blockading a road.

### C. *Standing*

#### (1) Duty to Consult

[26] In defence to Moulton's claim, as I mentioned above, the Behns argue, *inter alia*, that their conduct was not illegal, because the Crown had issued the

Authorizations in breach of the duty to consult and the Authorizations were therefore invalid. The question that arises with respect to this particular defence is whether the Behns can assert the duty to consult on their own in the first place.

[27] In *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511, this Court confirmed that the Crown has a duty to consult Aboriginal peoples and explained the scope of application of that duty in respect of Aboriginal rights, stating that “consultation and accommodation before final claims resolution, while challenging, is not impossible, and indeed is an essential corollary to the honourable process of reconciliation that s. 35 [of the *Constitution Act, 1982*] demands”: para. 38. In *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, [2005] 3 S.C.R. 388, the Court held that the duty to consult applies in the context of treaty rights: paras. 32-34. The Crown cannot in a treaty contract out of its duty to consult Aboriginal peoples, as this duty “applies independently of the expressed or implied intention of the parties”: *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53, [2010] 3 S.C.R. 103, at para. 61.

[28] The duty to consult is both a legal and a constitutional duty: *Haida Nation*, at para. 10; *R. v. Kapp*, 2008 SCC 41, [2008] 2 S.C.R. 483, at para. 6; see also J. Woodward, *Native Law*, vol. 1 (loose-leaf), at p. 5-38. This duty is grounded in the honour of the Crown: *Haida Nation*, *Beckman*, at para. 38, *Kapp*, at para. 6. As Binnie J. said in *Beckman*, at para. 44, “[t]he concept of the duty to consult is a valuable adjunct to the honour of the Crown, but it plays a supporting role, and

should not be viewed independently from its purpose.” The duty to consult is part of the process for achieving “the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown”: *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, at para. 186, quoting *R. v. Van der Peet*, [1996] 2 S.C.R. 507, at para. 31; *Haida Nation*, at para. 17; see also D. G. Newman, *The Duty to Consult: New Relationships with Aboriginal Peoples* (2009).

[29] The duty to consult is triggered “when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it”: *Haida Nation*, at para. 35. The content of the duty varies depending on the context, as it lies on a spectrum of different actions to be taken by the Crown: *Haida Nation*, at para. 43. An important component of the duty to consult is a requirement that good faith be shown by both the Crown and the Aboriginal people in question: *Haida Nation*, at para. 42. Both parties must take a reasonable and fair approach in their dealings. The duty does not require that an agreement be reached, nor does it give Aboriginal peoples a veto: *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 S.C.R. 550, at paras. 2 and 22; *Haida Nation*, at para. 48.

[30] The duty to consult exists to protect the collective rights of Aboriginal peoples. For this reason, it is owed to the Aboriginal group that holds the s. 35 rights, which are collective in nature: *Beckman*, at para. 35; Woodward, at p. 5-55. But an Aboriginal group can authorize an individual or an organization to represent it for the

purpose of asserting its s. 35 rights: see e.g. *Komoyue Heritage Society v. British Columbia (Attorney General)*, 2006 BCSC 1517, 55 Admin. L.R. (4th) 236.

[31] In this appeal, it does not appear from the pleadings that the FNFN authorized George Behn or any other person to represent it for the purpose of contesting the legality of the Authorizations. I note, though, that it is alleged in the pleadings of other parties before this Court that the FNFN had implicitly authorized the Behns to represent it. As a matter of fact, the FNFN was a party in the proceedings in the courts below, because Moulton was arguing that it had combined or conspired with others to block access to Moulton's logging sites. The FNFN is also an intervener in this Court. But, given the absence of an allegation of an authorization from the FNFN, in the circumstances of this case, the Behns cannot assert a breach of the duty to consult on their own, as that duty is owed to the Aboriginal community, the FNFN. Even if it were assumed that such a claim by individuals is possible, the allegations in the pleadings provide no basis for one in the context of this appeal.

## (2) Aboriginal or Treaty Rights

[32] The Behns also challenge the legality of the Authorizations on the basis that they breach their rights to hunt and trap under Treaty No. 8. This is an important issue, but a definitive pronouncement in this regard cannot be made in the circumstances of this case. I would caution against doing so at this stage of the proceedings and of the development of the law.

[33] The Crown argues that claims in relation to treaty rights must be brought by, or on behalf of, the Aboriginal community. This general proposition is too narrow. It is true that Aboriginal and treaty rights are collective in nature: see *R. v. Sparrow*, [1990] 1 S.C.R. 1075, at p. 1112; *Delgamuukw*, at para. 115; *R. v. Sundown*, [1999] 1 S.C.R. 393, at para. 36; *R. v. Marshall*, [1999] 3 S.C.R. 533, at paras. 17 and 37; *R. v. Sappier*, 2006 SCC 54, [2006] 2 S.C.R. 686, at para. 31; *Beckman*, at para. 35. However, certain rights, despite being held by the Aboriginal community, are nonetheless exercised by individual members or assigned to them. These rights may therefore have both collective and individual aspects. Individual members of a community may have a vested interest in the protection of these rights. It may well be that, in appropriate circumstances, individual members can assert certain Aboriginal or treaty rights, as some of the interveners have proposed.

[34] Some interesting suggestions have been made in respect of the classification of Aboriginal and treaty rights. For example, the interveners Grand Council of the Crees and Cree Regional Authority propose in their factum, at para. 14, that a distinction be made between three types of Aboriginal and treaty rights: (a) rights that are exclusively collective; (b) rights that are mixed; and (c) rights that are predominantly individual. These interveners also attempt to classify a variety of rights on the basis of these three categories.

[35] These suggestions bear witness to the diversity of Aboriginal and treaty rights. But I would not, on the occasion of this appeal and at this stage of the

development of the law, try to develop broad categories for these rights and to slot each right in the appropriate one. It will suffice to acknowledge that, despite the critical importance of the collective aspect of Aboriginal and treaty rights, rights may sometimes be assigned to or exercised by individual members of Aboriginal communities, and entitlements may sometimes be created in their favour. In a broad sense, it could be said that these rights might belong to them or that they have an individual aspect regardless of their collective nature. Nothing more need be said at this time.

[36] In this appeal, the Behns assert in their defence that the Authorizations are illegal because they breach their treaty rights to hunt and trap. They recognize that these rights have traditionally been held by the FNFN, which is a party to Treaty No. 8. But they also allege that specific tracts of land have traditionally been assigned to and associated with particular family groups. They assert in their pleadings that the Authorizations granted to Moulton are for logging in specific areas within the territory traditionally assigned to the Behns, where they have exercised their rights to hunt and trap. On the basis of an allegation of a connection between their rights to hunt and trap and a specific geographic location within the FNFN territory, the Behns assert that they have a greater interest in the protection of hunting and trapping rights on their traditional family territory than do other members of the FNFN. It might be argued that this connection gives them a certain standing to raise the violation of their particular rights as a defence to Moulton's tort claim. But a final

decision on this issue of standing is not necessary in this appeal, because another issue will be determinative, that of abuse of process.

#### *D. Abuse of Process*

[37] The key issue in this appeal is whether the Behns' acts constitute an abuse of process. In my opinion, in the circumstances of this case, raising a breach of the duty to consult and of treaty rights as a defence was an abuse of process. If the Behns were of the view that they had standing, themselves or through the FNFN, they should have raised the issue at the appropriate time. Neither the Behns nor the FNFN had made any attempt to legally challenge the Authorizations when the British Columbia government granted them. It is common ground that the Behns did not apply for judicial review, ask for an injunction or seek any other form of judicial relief against the province or against Moulton. Nor did the FNFN make any such move.

[38] Had the Behns acted when the authorizations were granted, clause 9.00 of the timber sale agreements provided that the Timber Sales Manager had the power to suspend the Authorizations until the legal issues were resolved: trial judgment, at para. 16. Moulton would not then have been led to believe that it was free to plan and start its logging operations. Moreover, legal issues like standing could have been addressed at the proper time and in the appropriate context.



[39] In *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77, Arbour J. wrote for the majority of this Court that the doctrine of abuse of process has its roots in a judge's inherent and residual discretion to prevent abuse of the court's process: para. 35; see also P. M. Perell, "A Survey of Abuse of Process", in T. L. Archibald and R. S. Echlin, eds., *Annual Review of Civil Litigation 2007* (2007), 243. Abuse of process was described in *R. v. Power*, [1994] 1 S.C.R. 601, at p. 616, as the bringing of proceedings that are "unfair to the point that they are contrary to the interest of justice", and in *R. v. Conway*, [1989] 1 S.C.R. 1659, at p. 1667, as "oppressive treatment." In addition to proceedings that are oppressive or vexatious and that violate the principles of justice, McLachlin J. (as she then was) said in her dissent in *R. v. Scott*, [1990] 3 S.C.R. 979, at p. 1007, that the doctrine of abuse of process evokes the "public interest in a fair and just trial process and the proper administration of justice". Arbour J. observed in *C.U.P.E.* that the doctrine is not limited to criminal law, but applies in a variety of legal contexts: para. 36.

[40] The doctrine of abuse of process is characterized by its flexibility. Unlike the concepts of *res judicata* and issue estoppel, abuse of process is unencumbered by specific requirements. In *Canam Enterprises Inc. v. Coles* (2000), 51 O.R. (3d) 481 (C.A.), Goudge J.A., who was dissenting, but whose reasons this Court subsequently approved (2002 SCC 63, [2002] 3 S.C.R. 307), stated at paras. 55-56 that the doctrine of abuse of process

engages the inherent power of the court to prevent the misuse of its procedure, in a way that would be manifestly unfair to a party to the

litigation before it or would in some other way bring the administration of justice into disrepute. It is a flexible doctrine unencumbered by the specific requirements of concepts such as issue estoppel. See *House of Spring Gardens Ltd. v. Waite*, [1990] 3 W.L.R. 347 [C.A.], at p. 358.

One circumstance in which abuse of process has been applied is where the litigation before the court is found to be in essence an attempt to relitigate a claim which the court has already determined. See *Solomon v. Smith, supra*. It is on that basis that Nordheimer J. found that this third party claim ought to be terminated as an abuse of process. [Emphasis added.]

[41] As can be seen from the case law, the administration of justice and fairness are at the heart of the doctrine of abuse of process. In *Canam Enterprises* and in *C.U.P.E.*, the doctrine was used to preclude relitigation of an issue in circumstances in which the requirements for issue estoppel were not met. But it is not limited to preventing relitigation. For example, in *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 S.C.R. 307, the Court held that an unreasonable delay that causes serious prejudice could amount to an abuse of process: paras. 101-21. The doctrine of abuse of process is flexible, and it exists to ensure that the administration of justice is not brought into disrepute.

[42] In my opinion, the Behns' acts amount to an abuse of process. The Behns clearly objected to the validity of the Authorizations on the grounds that the Authorizations infringed their treaty rights and that the Crown had breached its duty to consult. On the face of the record, whereas they now claim to have standing to raise these issues, the Behns did not seek to resolve the issue of standing, nor did they contest the validity of the Authorizations by legal means when they were issued.

They did not raise their concerns with Moulton after the Authorizations were issued. Instead, without any warning, they set up a camp that blocked access to the logging sites assigned to Moulton. By doing so, the Behns put Moulton in the position of having either to go to court or to forgo harvesting timber pursuant to the Authorizations it had received after having incurred substantial costs to start its operations. To allow the Behns to raise their defence based on treaty rights and on a breach of the duty to consult at this point would be tantamount to condoning self-help remedies and would bring the administration of justice into disrepute. It would also amount to a repudiation of the duty of mutual good faith that animates the discharge of the Crown's constitutional duty to consult First Nations. The doctrine of abuse of process applies, and the appellants cannot raise a breach of their treaty rights and of the duty to consult as a defence.

## V. Conclusion

[43] For these reasons, I would dismiss the appeal with costs to the respondent Moulton.

*Appeal dismissed with costs.*

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