

Sally Behn, Susan Behn, Richard Behn, Greg Behn, Rupert Behn, Lovey Behn, Mary Behn, George Behn (appellants) v. 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)
(34404; 2013 SCC 26; 2013 CSC 26)

Indexed As: Moulton Contracting Ltd. v. British Columbia et al.

Supreme Court of Canada
McLachlin, C.J.C., LeBel, Fish, Abella, Rothstein, Cromwell, Moldaver, Karakatsanis and Wagner, JJ.
May 9, 2013.

Summary:

The plaintiff held a provincial permit to conduct logging operations on Aboriginal (Fort Nelson First Nation) land. That land included Behn family territory. The plaintiff sued the Behns and other members of the Fort Nelson First Nation for damages for allegedly blockading access to the logging lands. The Behns filed a statement of defence challenging the validity of the plaintiff's permit on the basis that the instruments the plaintiff said gave it logging and road usage rights: (1) gave no such rights because the Province failed to consult in a meaningful way with the Fort Nelson First Nation; and (2) interfered with Treaty 8 rights and were of no force and effect. The plaintiff moved to strike paragraphs of the statement of defence.

The British Columbia Supreme Court, in a decision reported at [2010] B.C.T.C. Uned. 506, allowed the motion. He concluded that: (1) individual members of the Fort Nelson First Nation did not have standing to advance the legal positions set out in those paragraphs because the rights asserted therein were collective rights of the Aboriginal community; (2) the challenge to the instruments was an impermissible collateral attack on those instruments and should have been pursued through administrative law means; and (3) the constitutional arguments of federal exclusivity could not succeed in the circumstances pleaded and so could not fatally undercut the instruments. The Behns applied for directions as to whether they needed leave to appeal the decision.

The British Columbia Court of Appeal, per Frankel, J.A., ruled that leave was not needed where the order at first instance was a final order. See 296 B.C.A.C. 103; 503 W.A.C. 103. The Behns appealed. At the commencement of the hearing two applications were made to adduce fresh evidence, one by the plaintiff and the other by the Crown. The Behns opposed the applications, and alternatively sought to introduce fresh evidence of their own.

The British Columbia Court of Appeal, in a decision reported at 309 B.C.A.C. 15; 523 W.A.C. 15, dismissed the applications to adduce fresh evidence. The court also dismissed the appeal. The court agreed with the motions judge on the first two issues. The court declined to address the constitutional issue (interjurisdictional immunity) where the vital facts necessary to

decide the issue were missing. The Behns appealed.

The Supreme Court of Canada dismissed the appeal with costs to the plaintiff.

Courts - Topic 2015

Jurisdiction - General principles - Controlling abuse of its process (incl. abuse of process by relitigation) - The Supreme Court of Canada discussed the doctrine of abuse of process - The court stated that the doctrine "... has its roots in a judge's inherent and residual discretion to prevent abuse of the court's process ... Arbour J. observed in C.U.P.E. [2003 SCC] that the doctrine is not limited to criminal law, but applies in a variety of legal contexts ... 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. ... 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 [2002 SCC] 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 ..., the Court held that an unreasonable delay that causes serious prejudice could amount to an abuse of process ... The doctrine of abuse of process is flexible, and it exists to ensure that the administration of justice is not brought into disrepute." - See paragraphs 39 to 41.

Criminal Law - Topic 251

General principles - Abuse of process - General principles (incl. time for raising issue) - [See **Courts - Topic 2015**].

Indians, Inuit and Metis - Topic 3

General - Duty owed to Indians by Crown (incl. fiduciary duties, consultation duties and honour of the Crown) - The plaintiff held a provincial permit to conduct logging operations on Aboriginal (Fort Nelson First Nation (FNFN)) land - That land included Behn family territory - The plaintiff (Moulton) sued the Behns and other FNFN members for damages for allegedly blockading access to the logging lands - The Behns filed a statement of defence challenging the validity of the plaintiff's permit on the basis that the instruments the plaintiff said gave it logging and road usage rights: (1) gave no such rights because the Province failed to consult in a meaningful way with the FNFN; and (2) interfered with Treaty 8 rights and were of no force and effect - The plaintiff moved to strike paragraphs of the statement of defence - Hinkson, J., allowed the motion - He concluded, inter alia, that, individual FNFN members did not have standing to advance the legal positions set out in those paragraphs because the rights asserted therein were collective rights of the Aboriginal community - The British Columbia Court of Appeal agreed - The Behns appealed - The Supreme Court of Canada dismissed the appeal - Regarding the duty to consult, the court stated, inter alia, that it "... 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 ... But an Aboriginal group can authorize an individual or an organization to represent it for the purpose of asserting its s. 35 rights ... 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." - See paragraphs 26 to 32.

Indians, Inuit and Metis - Topic 3

General - Duty owed to Indians by Crown (incl. fiduciary duties, consultation duties and honour of the Crown) - [See second **Practice - Topic 2239**].

Indians, Inuit and Métis - Topic 503

Rights - General - Individuality v. collectivity - [See first **Indians, Inuit and Métis - Topic 3**].

Practice - Topic 2239

Pleadings - Striking out pleadings - Grounds - Abuse of process or delay - [See **Courts - Topic 2015**].

Practice - Topic 2239

Pleadings - Striking out pleadings - Grounds - Abuse of process or delay - The plaintiff held a provincial permit to conduct logging operations on Aboriginal (Fort Nelson First Nation) land - That land included Behn family territory - The plaintiff (Moulton) sued the Behns and other members of the First Nation for damages for allegedly blockading access to the logging lands - The Behns filed a statement of defence challenging the validity of Moulton's permit on the basis that the instruments Moulton said gave it logging and road usage rights: (1) gave no such rights because the Province failed to consult in a meaningful way with the Fort Nelson First Nation; and (2) interfered with Treaty 8 rights and were of no force and effect - Moulton moved to strike paragraphs of the statement of defence - Hinkson, J., allowed the motion on the basis of, inter alia, abuse of process; the challenge to the instruments was an impermissible collateral attack on those instruments and should have been pursued through administrative law means - The British Columbia Court of Appeal agreed - The Supreme Court of Canada dismissed a further appeal - The court stated that "... 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." - See paragraphs 37 to 42.

Practice - Topic 2239.4

Pleadings - Striking out pleadings - Grounds - Abuse of process - Collateral attack on administrative decision - [See second **Practice - Topic 2239**].

Cases Noticed:

- Garland v. Consumers' Gas Co., [2004] 1 S.C.R. 629; 319 N.R. 38; 186 O.A.C. 128; 2004 SCC 25, reld to. [para. 21].
- Haida Nation v. British Columbia (Minister of Forests) et al., [2004] 3 S.C.R. 511; 327 N.R. 53; 206 B.C.A.C. 52; 338 W.A.C. 52; 2004 SCC 73, reld to. [para. 27].
- Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage) et al. (2005), 342 N.R. 82; 2005 SCC 69, reld to. [para. 27].
- Little Salmon/Carmacks First Nation et al. v. Beckman et al., [2010] 3 S.C.R. 103; 408 N.R. 281; 295 B.C.A.C. 1; 501 W.A.C. 1; 2010 SCC 53, reld to. [para. 27].
- R. v. Kapp (J.M.) et al., [2008] 2 S.C.R. 483; 376 N.R. 1; 256 B.C.A.C. 75; 431 W.A.C. 75; 2008 SCC 41, reld to. [para. 28].
- Delgamuukw et al. v. British Columbia et al., [1997] 3 S.C.R. 1010; 220 N.R. 161; 99 B.C.A.C. 161; 162 W.A.C. 161, reld to. [para. 28].
- R. v. Van der Peet (D.M.), [1996] 2 S.C.R. 507; 200 N.R. 1; 80 B.C.A.C. 81; 130 W.A.C. 81, reld to. [para. 28].
- Taku River Tlingit First Nation et al. v. Tulsequah Chief Mine Project (Project Assessment Director) et al., [2004] 3 S.C.R. 550; 327 N.R. 133; 206 B.C.A.C. 132; 338 W.A.C. 132; 2004 SCC 74, reld to. [para. 29].
- Komoyue Heritage Society et al. v. British Columbia (Attorney General) et al., [2006] B.C.T.C. 1517; 55 Admin. L.R.(4th) 236; 2006 BCSC 1517, reld to. [para. 30].
- R. v. Sparrow, [1990] 1 S.C.R. 1075; 111 N.R. 241, reld to. [para. 33].
- R. v. Sundown (J.), [1999] 1 S.C.R. 393; 236 N.R. 251; 177 Sask.R. 1; 199 W.A.C. 1, reld to. [para. 33].
- R. v. Marshall (D.J.), Jr., [1999] 3 S.C.R. 533; 247 N.R. 306; 179 N.S.R.(2d) 1; 553 A.P.R. 1, reld to. [para. 33].
- R. v. Sappier (D.M.) et al., [2006] 2 S.C.R. 686; 355 N.R. 1; 309 N.B.R.(2d) 199; 799 A.P.R. 199; 2006 SCC 54, reld to. [para. 33].
- Toronto (City) et al. v. Canadian Union of Public Employees, Local 79 et al., [2003] 3 S.C.R. 77; 311 N.R. 201; 179 O.A.C. 291; 2003 SCC 63, reld to. [para. 39].
- R. v. Power (E.), [1994] 1 S.C.R. 601; 165 N.R. 241; 117 Nfld. & P.E.I.R. 269; 365 A.P.R. 269, reld to. [para. 39].
- R. v. Conway, [1989] 1 S.C.R. 1659; 96 N.R. 241; 34 O.A.C. 165, reld to. [para. 39].
- R. v. Scott, [1990] 3 S.C.R. 979; 116 N.R. 361; 43 O.A.C. 277, reld to. [para. 39].

Canam Enterprises Inc. v. Coles et al. (2000), 139 O.A.C. 1; 51 O.R.(3d) 481 (C.A.), revd. [2002] 3 S.C.R. 307; 296 N.R. 257; 167 O.A.C. 1; 2002 SCC 63, refd to. [para. 40].

Blencoe v. Human Rights Commission (B.C.) et al. (2000), 260 N.R. 1; 141 B.C.A.C. 161; 231 W.A.C. 161; 2000 SCC 44, refd to. [para. 41].

Authors and Works Noticed:

Newman, Dwight G., *The Duty to Consult: New Relationships with Aboriginal Peoples* (2009), generally [para. 28].

Perell, Paul M., *A Survey of Abuse of Process*, in Archibald, Todd L., and Echlin, Randall Scott, Eds., *Annual Review of Civil Litigation 2007* (2007), p. 243 [para. 39].

Woodward, Jack, *Native Law* (1994) (2012 looseleaf update, release 5), vol. 1, pp. 5-38 [para. 28]; 5-55 [para. 30].

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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;

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Rana Law, Calgary, Alberta, 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;

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Pape Salter Teillet, Toronto, Ontario, for the intervener, the Moose Cree First Nation.

This appeal was heard on December 12, 2012, by McLachlin, C.J.C., LeBel, Fish, Abella, Rothstein, Cromwell, Moldaver, Karakatsanis and Wagner, JJ., of the Supreme Court of Canada. LeBel, J., delivered the following decision for the court, in both official languages, on May 9, 2013.

Appeal dismissed.

Editor: Jana A. Andersen

Criminal Law - Topic 251

General principles - Abuse of process - General principles (incl. time for raising issue) - The Supreme Court of Canada discussed the doctrine of abuse of process - The court stated that the doctrine "... has its roots in a judge's inherent and residual discretion to prevent abuse of the court's process ... Arbour J. observed in C.U.P.E. [2003 SCC] that the doctrine is not limited to criminal law, but applies in a variety of legal contexts ... 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. ... 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 [2002 SCC] 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 ..., the Court held that an unreasonable delay that causes serious prejudice could amount to an abuse of process ... The doctrine of abuse of process is flexible, and it exists to ensure that the administration of justice is not brought into disrepute." - See paragraphs 39 to 41.

Indians, Inuit and Metis - Topic 3

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was an impermissible collateral attack on those instruments and should have been pursued through administrative law means - The British Columbia Court of Appeal agreed - The Supreme Court of Canada dismissed a further appeal - The court stated that "... 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." - See paragraphs 37 to 42.

Indians, Inuit and Métis - Topic 503

Rights - General - Individuality v. collectivity - The plaintiff held a provincial permit to conduct logging operations on Aboriginal (Fort Nelson First Nation (FNFN)) land - That land included Behn family territory - The plaintiff (Moulton) sued the Behns and other FNFN members for damages for allegedly blockading access to the logging lands - The Behns filed a statement of defence challenging the validity of the plaintiff's permit on the basis that the instruments the plaintiff said gave it logging and road usage rights: (1) gave no such rights because the Province failed to consult in a meaningful way with the FNFN; and (2) interfered with Treaty 8 rights and were of no force and effect - The plaintiff moved to strike paragraphs of the statement of defence - Hinkson, J., allowed the motion - He concluded, inter alia, that, individual FNFN members did not have standing to advance the legal positions set out in those paragraphs because the rights asserted therein were collective rights of the Aboriginal community - The British Columbia Court of Appeal agreed - The Behns appealed - The Supreme Court of Canada dismissed the appeal - Regarding the duty to consult, the court stated, inter alia, that it "... 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 ... But an Aboriginal group can authorize an individual or an organization to represent it for the purpose of asserting its s. 35 rights ... 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." - See paragraphs 26 to 32.

Practice - Topic 2239

Pleadings - Striking out pleadings - Grounds - Abuse of process or delay - The Supreme Court of Canada discussed the doctrine of abuse of process - The court stated that the doctrine "... has its roots in a judge's inherent and residual discretion to prevent abuse of the court's process ... Arbour J. observed in C.U.P.E. [2003 SCC] that the doctrine is not limited to criminal law, but applies in a variety of legal contexts ... 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. ... 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 [2002 SCC] 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 ..., the Court held that an unreasonable delay that causes serious prejudice could amount to an abuse of process ... The doctrine of abuse of process is flexible, and it exists to ensure that the administration of justice is not brought into disrepute." - See paragraphs 39 to 41.

Practice - Topic 2239.4

Pleadings - Striking out pleadings - Grounds - Abuse of process - Collateral attack on administrative decision - The plaintiff held a provincial permit to conduct logging operations on Aboriginal (Fort Nelson First Nation) land - That land included Behn family territory - The plaintiff (Moulton) sued the Behns and other members of the First Nation for damages for allegedly blockading access to the logging lands - The Behns filed a statement of defence challenging the validity of Moulton's permit on the basis that the instruments Moulton said gave it logging and road usage rights: (1) gave no such rights because the Province failed to consult in a meaningful way with the Fort Nelson First Nation; and (2) interfered with Treaty 8 rights and were of no force and effect - Moulton moved to strike paragraphs of the statement of defence - Hinkson, J., allowed the motion on the basis of, inter alia, abuse of process; the challenge to the instruments was an impermissible collateral attack on those instruments and should have been pursued through administrative law means - The British Columbia Court of Appeal agreed - The Supreme Court of Canada dismissed a further appeal - The court stated that "... 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." - See paragraphs 37 to 42.