**Case brief: Hudson Bay Mining & Smelting Co, Limited v Dumas et al, 2014 MBCA 6**

[March 5, 2014 at 11:07am](https://www.facebook.com/notes/devlin-gailus-westaway-law-corporation/case-brief-hudson-bay-mining-smelting-co-limited-v-dumas-et-al-2014-mbca-6/672826956088860)

The Manitoba Court of Appeal has upheld an injunction against members of the Mathias Colomb Cree Nation, confirming that they are not entitled to hold protests that block access to an active mine site. This case contrasts with the recent British Columbia Supreme Court case *Moulton Contracting Ltd v British Columbia*, 2013 BCSC 2348, in which the court refused to award damages against Fort Nelson First Nation members who participated in a similar blockade. The two cases together provide some guidance on the law in this area, but leave other questions unanswered.

Devlin Gailus recently posted a summary of the *Moulton* decision: [http://bit.ly/DGMoulton](http://l.facebook.com/l.php?u=http%3A%2F%2Fbit.ly%2FDGMoulton&h=CAQFExA41&s=1). To recap, that case was about a group of Aboriginal land users, members of the Behn family, who set up a blockade to stop Moulton from accessing its Timber Sale Licenses, which were located on land used by the Behns for hunting and trapping. Moulton was unable to log the timber, and lost a significant amount of money. Moulton claimed damages against the Behns for intentional interference with economic relations and for civil conspiracy, but it failed to prove the elements of these claims. The Behns were found not to have committed any unlawful act, and were not liable to Moulton for damages.

In the *Hudson Bay* case, the respondents set up a protest on a private access road built by the applicant Hudson Bay, temporarily blocking access to a large mine. Hudson Bay applied for an injunction to prevent the respondents from holding such protests at the site in the future. In this case, the injunction was granted. What makes this case different from*Moulton*, where the court saw nothing unlawful about the Behns’ blockade?

There are a few factual differences between the two cases. First, Moulton had no exclusive right to land – only the right to remove timber – while Hudson Bay had an ownership interest in the land. Second, Moulton had not established its right to use the third-party access road on which the blockade was established, while Hudson Bay had constructed its own access roads. Third, Moulton was seeking damages for harm already done, which requires proof of harm and causation; in contrast, Hudson Bay was seeking an injunction to prevent interference with its interests, which is forward-looking and can be granted based on likely outcomes.

The most significant difference between the two cases, though, may be the different legal arguments presented to the court. The injunction in *Hudson Bay* was granted primarily on the basis of nuisance. Nuisance is any substantial and unreasonable interference with the use and enjoyment of land, and the court in that case was satisfied that preventing access to the mine for even a few hours met that test. In *Moulton*, the blockade lasted several months, but Moulton did not claim nuisance and the court did not consider it.

Although Moulton did not have the exclusive interest in land that Hudson Bay did, the British Columbia courts have held that “profits à prendre” such as the right to harvest timber are sufficient to ground a claim in nuisance (see *Canadian Forest Products v Sam*, 2011 BCSC 676 at para 98). The other factual differences between the cases do not seem to preclude a nuisance claim. Whether Moulton could, in fact, have been successful in a claim of nuisance against the Behns remains an unanswered question. Aboriginal rights holders considering blockade actions should therefore be cautious about taking an overly optimistic view of the *Moulton* decision, and should be aware that liability in nuisance remains a serious risk. The courts have not been kind to First Nations exercising these “self help” remedies.