

Case Brief - *Behn v. Moulton Contracting Ltd.*, 2013 SCC 26

The Supreme Court of Canada struck out certain defences raised by members of the Behn family in response to a tort action by a logging company. Moulton had sued the Behns for setting up a camp that effectively blocked the company's access to a logging site located within the Behn family's trapline. The Behns raised several defences, including an asserted breach of the duty or consultation as well as reliance on their Treaty rights as beneficiaries to Treaty No. 8 and as members of the Fort Nelson First Nation.

The Plaintiffs, Moulton Contracting, supported by the Province of British Columbia, successfully brought a preliminary motion to have the defences struck based on the proposition that only the First Nation could raise the Treaty rights as a defence.

The court decided the case on the basis of abuse of process. It held that as the Behns had not legally challenged the logging permits when they were issued, to allow the Behns to raise a defence based on treaty rights and the duty to consult would be "tantamount to condoning self-help remedies and would bring the administration of justice into disrepute".

Having found against the Behns on the issue of abuse of process, the court declined to conclude on whether the Behns as individuals could invoke Treaty rights in defence to Moulton's tort claim. This aspect of the judgment appears to overturn at least part of the judgment from the BC Court of Appeal which would have denied the Behns standing to raise their Treaty rights as a defence as well.

The court also found that the Behns could not assert a breach of the duty to consult because that duty was owed to the Fort Nelson First Nation. Since the First Nation had not authorized the Behns to represent it for the purpose of contesting the logging authorizations, the Behns were unable to claim a breach of the duty of consultation.

This decision leaves open the possibility that individuals may be able to assert Aboriginal or Treaty rights held by the indigenous collectives to which they are members. Significantly, the court in *Moulton* held that although Aboriginal rights are collective in nature, certain rights have both collective and individual aspects and may be exercised by individual members or assigned to them. The court also confirmed that an Aboriginal group can authorize an individual or an organization to represent it for the purpose of asserting Aboriginal or Treaty rights. It remains to be seen under what conditions the court in the future will accept the assertion of collectively-held rights by an individual outside of a regulatory offence or criminal proceeding.

Devlin Gailus represented the Intervenor, Chief Sally Sam and the Maiyoo Keyoh Society in this proceeding.