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The Supreme Court of B.C. confirms that allegations of failure to consult or treaty right infringement do not justify self-help remedies

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Overview

On April 15, 2010, the Supreme Court of B.C. released Reasons in an application to strike pleadings, brought by the plaintiff, Moulton Contracting Ltd. (“Moulton”). Moulton claims damages from the Fort Nelson First Nation (“FNFN”), from all members of the FNFN (in a representative claim) and from members of a family who are also members of the FNFN (the “Family Defendants”) for preventing Moulton from harvesting two Timber Sale Licenses (“TSLs”) in Northeast British Columbia. In the application, Moulton sought to strike paragraphs from the Family Defendants’ Statement of Defence. These paragraphs included allegations that the Family Defendants were not liable for preventing the harvesting because the Crown failed to consult them prior to granting the TSLs, and because the TSLs infringed on their treaty rights and were therefore invalid. Moulton succeeded in its application and the Court found that the Family Defendants could not rely on a failure to consult or an infringement of a treaty right in defence to the tort claim.

Facts

Moulton is a logging company that applied for and was granted two TSLs and a road permit, within land to which Treaty 8 applies, from the provincial Crown. The FNFN is a signatory to Treaty 8 and the Family Defendants are all members of the FNFN.

The underlying action includes a claim by Moulton for intentional interference with contractual relations and conspiracy to intentionally interfere with contractual relations. Moulton began the action after several members of the FNFN blocked Moulton from using the only access road to the TSLs and the road permit, and prevented Moulton from harvesting the TSLs

The Family Defendants alleged that the TSLs and road permit constituted an unjustifiable infringement of their Treaty 8 rights, and that the Crown failed to fulfill its duty to consult when it issued the TSLs and the road permit to Moulton. The Family Defendants further alleged that treaty rights fall within the jurisdiction of federal Parliament and that the Province could not infringe the treaty rights; therefore, the TSLs and the road permit were of no force or effect under the doctrine of interjurisdictional immunity. Moulton applied to strike these portions of the Family Defendants’ defence.

Decision

Moulton argued that the Family Defendants’ defences were bound to fail for two reasons: (1) the doctrine of interjurisdictional immunity does not apply as Treaty 8 authorized the Crown to “take up” lands for logging purposes; and (2) the duty to consult is a procedural right, and its breach had been addressed through judicial review of the Crown’s decision that led to the issuance of the TSLs and the road permit. In addition, the Province, another defendant in the action, argued that the Family Defendants did not have the standing to claim that their treaty rights were breached or that the duty to consult was not fulfilled in the circumstance of this case.

A. The Treaty Rights Defence

With respect to the treaty rights defence, the Chambers Judge found that because Treaty 8 specifically permitted the provincial Crown to “take up” lands, interjurisdictional immunity could not invalidate the provincial authorizations. Under Treaty 8, the government is entitled to take up land for “settlement, mining, lumbering trading or other purposes” and when the land is taken up, the right to exercise treaty rights to hunt, fish and trap on that land is restricted or ended. This distinguished the situation from that in *R v. Morris*,¹ where the Douglas Treaties have no such qualification on the treaty rights that it protects.

The Family Defendants asserted that their deliberate actions, which prevented Moulton’s access to the TSLs and road permit, were necessary to protect their treaty rights and were not a wilful disregard for the law. However, the Chambers Judge found that the “treaty rights guaranteed by s. 35 of the *Constitution Act*, 1982 do not provide for civil immunity for unlawful tortious conduct”.² Where treaty rights

have been accepted as defences to regulatory prosecutions, the constitutionality of statutory provisions had been at issue (see, eg., *R. v. Sappier*,³ *R. v. Morris*). In this case, the Family Defendants were not challenging the constitutionality of the provincial legislation; instead, they were attempting to use treaty rights to justify tortious conduct.

The Chambers Judge also found that the Family Defendants were aware they could seek either judicial review of the Province's decisions or injunctive relief, but did not pursue either of those avenues. The Judge found that the defence of "self-help remedies", such as establishing a blockade, amounts to embarrassing or scandalous pleadings that will cause the parties unnecessary expense. The Chambers Judge concluded those parts of the Family Defendants' pleadings relating to their "self-help remedy" should be struck.

B. The Consultation Defence

With respect to the Family Defendants' defence that the Crown had not fulfilled its duty to consult prior to granting the TSLs and the road permit, Moulton argued that the proper course for a challenge to the validity of the provincial authorizations is through the *Judicial Review Procedure Act*, and not in defence to a civil action. Had this course of action been pursued, the validity of the authorizations would have been challenged in the proper framework. The Family Defendants argued they were not asking for prerogative relief and that it was Moulton, and not them, who chose the forum. They argued they should be able to raise the lawfulness of the TSLs and the road permit as part of their defence, relying on the Ontario decision of *Keewatin v. Ontario* (Ministry of Natural Resources) (2003), 66 O.R. (3d) 370 (S.C.J.).

The Chambers Judge found *Keewatin* distinguishable because the Family Defendants did not challenge the forestry legislation, as had the plaintiffs in *Keewatin*, but instead focussed on the Ministry's specific decision that led to the grant of the TSLs and the road permit. After surveying the other authorities relied on by the Family Defendants, the Chambers Judge found that, at best, the invalidity of Crown-issued permits may be raised in defence to a civil action if those permits had been found invalid by the appropriate authority. The Judge concluded that the Family Defendants' decision not to seek judicial review or injunctive relief with respect to the grants of the TSLs and the road permit disentitled them from raising their validity as a defence in this tort action. Permitting the defences to stand would be an abuse of process.

The Chambers Judge also noted the defences were in violation of the doctrine of collateral attack, which prevents a party from undermining previously issued orders. As the Family Defendants were aware they could challenge the provincial authorizations by way of judicial review, but specifically chose not to pursue this avenue, their attempt to challenge those authorizations in these proceedings was, in effect, a collateral attack to the means intended to resolve those questions of validity.

C. Standing

The Chambers Judge concluded the Family Defendants lacked standing to raise the treaty rights defences and the consultation defences because treaty rights are collective and must be dealt with on behalf of the community. The Judge noted that individual members of a First Nation may be appropriate representatives to raise these collective claims, but maintained that the Family Defendants were not charged with the authority of the FNFN to advance the defences on behalf of the FNFN and that the FNFN, as a defendant, was advancing its own position in the action.

The Chambers Judge also rejected the argument that where aboriginal rights were at issue, there was no presumption of validity of Crown instruments. The Judge noted that there was no challenge to the legislation under which the TSLs and road permit were granted and said "the granting of licences or other rights by the Crown to non-aboriginal third parties must be assumed to be valid unless a Court finds otherwise".

Implications

The case confirms that self-help remedies have no place in the law of reconciliation of aboriginal rights and Crown sovereignty. If aboriginal people believe that government authorized conduct infringes aboriginal rights, they should resort to available legal processes and not self-help. The case also confirms that collective rights should be asserted by those with the authority to deal with those collective rights. In addition, the Courts will scrutinize the rights claimed to determine whether the person asserting the right has the standing to assert the collective or communal right.

[Click here](#) to read the Supreme Court's decision on *Moulton Contracting Ltd. v. Her Majesty the Queen in Right of the Province of British Columbia*, 2010 BCSC 506

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Footnotes

1. 2006 SCC 59.
2. At para. 82
3. 2006 SCC 54