

Supreme Court of Canada holds Aboriginal rights cannot be used to justify road blockades

In the latest important decision from the Supreme Court of Canada on aboriginal law, the court held that individual members of an Aboriginal group cannot invoke "self-help" remedies—such as blockades—when claiming that the government breached its duty to consult the Aboriginal group before making a decision affecting the group.

In *Behn v Moulton Contracting Ltd*, 2013 SCC 26, the dispute arose when members of an Aboriginal group blockaded logging activity within Treaty 8 territory. The logging company, Moulton Contracting, was obstructed in carrying out authorized harvesting activities within the traditional territory of the Fort Nelson First Nation by various members of the band. Moulton Contracting commenced a lawsuit for damages against the blockading individuals, the Aboriginal group and their Chief, and the Crown. The individual members of the Aboriginal group filed a defence to the claim disputing that the government permits and authorizations issued to the logging company were lawful and, consequently, granted no rights to the logging company to harvest the timber or access the area. The individual defendants tried to shield themselves from legal liability by asserting that the Crown not only failed to consult adequately with the Aboriginal group prior to issuing the licences and permit to the logging company

but also, in issuing the authorizations, impeded the ability of the Aboriginal group to meaningfully exercise its Treaty 8 rights.

The logging company and the Crown successfully applied to the British Columbia Supreme Court to strike out these defences to the lawsuit on the basis that individual members of the Aboriginal group had no standing to assert constitutional claims relating to Treaty Rights that belonged to the Aboriginal community as a whole. The Aboriginal individuals' subsequent appeal to the British Columbia Court of Appeal was denied.

On further appeal to the Supreme Court of Canada, the court unanimously endorsed the approach taken by the two lower B.C. Courts, and dismissed the individual band members' appeal. Three key issues were addressed by the Court:

- whether individual members of an Aboriginal community can assert a breach of the duty to consult;
- whether treaty rights can be invoked by individual members of an Aboriginal community; and
- whether it amounts to an abuse of process for Aboriginal individuals to challenge the validity of government issued authorizations as a defence to a legal claim when, despite objecting to their validity at the time of issuance, they failed to take legal action to challenge the government authorizations.

In answer to whether individual members of an Aboriginal community can assert a breach of the duty to consult, the court determined that the duty to consult exists to protect the collective rights of Aboriginal peoples, and while an Aboriginal group can authorize an individual to represent it in asserting its aboriginal rights, individual members cannot assert these rights in the absence of the group's authorization.

Following a comparable reasoning in its answer to whether treaty rights can be invoked by individual members of an Aboriginal

community, the court highlighted the dual nature of these rights and held that such rights are collective in nature, but treaty rights are exercised by individual members. The court expressed a reluctance to narrowly prescribe when an individual Aboriginal community member may assert rights that are collective in nature as a defence to a claim against an individual, finding that a final decision on this issue was not necessary in this case.

On the third question, the court made its strongest pronouncement by finding that the actions of the Aboriginal individuals in attempting to challenge the legitimacy of the government issued permits through a collateral attack in the litigation brought by the logging company was an abuse of the court's process. The failure by the Aboriginal individuals to legally challenge the issuance of the government authorizations to the logging company in the first instance was fatal to the individuals' ability to later plead defences against the logging company based on a breach of the duty to consult or treaty rights violations. The court reminded litigants that the abuse of process doctrine is intended to preserve the court's inherent and residual discretion to prevent abuse of the court's process. By failing to object in a timely manner to the alleged flaws in the process by which the logging company obtained the government authorized permits, the Aboriginal individuals effectively prejudiced the logging company by forcing it to choose between litigating and stopping work under valid authorizations after it had expended substantial costs to start its operations. The court determined that to allow the individuals who blocked road access to the area of the logging operations to raise as a defence the alleged violation of aboriginal rights would be tantamount to condoning self-help remedies and would bring the administration of justice into disrepute. The clarity and force of the court's unanimous statement was quite extraordinary. Justice Lebel stated at paragraph 42 of the judgment:

[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.

This case is important because it sends a clear message that Aboriginal groups and individuals cannot challenge the legitimacy of government authorized permits through collateral attack. Instead, they must use existing legal avenues for pursuing appropriate remedies, such as through judicial review, and that "self-help" remedies have no place in our judicial system.

by [Joan Young](#)

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[a cautionary note](#)

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