IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Moulton Contracting v. HMTQ,* 2009 BCSC 913

Date: 20090706
Docket: S067611
Registry: Vancouver

Between:

Moulton Contracting Ltd.

Plaintiff

And

Her Majesty the Queen in Right of the Province of British Columbia, Sally Behn, Susan Behn, George Behn, Chief Liz Logan, On Behalf of Herself and All Other Members of the Fort Nelson First Nation and the Said Fort Nelson First Nation

Defendants

Before: The Honourable Mr. Justice Slade

Reasons for Judgment

Counsel for the Plaintiff:	Chuck Willms, Katey Grist
Counsel for the Defendant, HMTQ:	Joel Oliphant
Place and Date of Trial/Hearing:	Vancouver, B.C. February 19, 2009
Place and Date of Judgment:	Vancouver, B.C. July 6, 2009

INTRODUCTION

[1] By license agreement dated June 27, 2006, Timber Sale License A66572 ("TSL"), British Columbia granted Moulton Contracting Ltd. the right to harvest Crown timber from a designated area of land. Moulton was also granted the right to enter the designated area for the purpose of exercising its rights under the TSL.

[2] In a Statement of Claim dated November 23, 2006, Moulton alleges that the Behn defendants and other members of the Fort Nelson First Nation ("FNFN"), or some of them, blockaded the only access road to the designated harvest area and prevented Moulton from exercising its harvest rights under the TSL.

[3] In this action, Moulton claims relief as against British Columbia and the individuals said to have blocked access to the harvest area.

[4] In its Statement of Defence, Her Majesty the Queen in right of British Columbia pleads that Moulton failed to mitigate its damages, and was contributorily negligent. The Crown bases this plea on the fact that Moulton did not seek an injunction to restrain the Behn defendants from blocking access to the harvest area.

[5] Moulton applies to strike the paragraphs of the Statement of Defence that plead a failure to mitigate and contributory negligence.

THE PROCEEDINGS

[6] Moulton sets out, as the basis for its right to harvest timber, the following:

> 1.00 Grant of Rights and Term
>
> 1.01 Subject to this License, the Licensee
>
> (a) may during the term of this License harvest Crown timber from the areas of land designated for harvest on the map attached as Exhibit "A" to this License (the cutting authority area), and
>
> (b) for the purpose of exercising the rights under this License may enter into these areas
>
> (Statement of Claim, para. 9)

> 1.02 Subject to paragraph 1.03, the Licensee may harvest all species and grades of timber situated on the cutting authority area in accordance with this License and Road Permits issued in association with this License.

[7] In paragraph 11 of its Statement of Claim, Moulton refers to a Crown grant of a road permit, on the following terms:

> 1.00 Grant of Rights
>
> 1.01 In consideration of the Permittee's right to harvest timber under License *A66573* and to provide access to that timber, subject to all Ministry of Forests legislation and regulations as amended from time to time, the Ministry Official grants to the Permittee a non-exclusive right to enter on and construct within the Permit Area a road, including such landings, gravel/sand pits, rock quarries and waste areas as are necessary for construction of the road or for access to the timber and the right to use and maintain that road, or to use and maintain a road, within the Permit Area described in paragraph 2.01, in accordance with the conditions/specifications described in the attached Schedules.

[8] There is, for the purposes of this application, no issue over the inclusion of the licensed harvesting area in the territory encompassed by Treaty 8.

[9] There is nothing in the TSL or the road permit that would subordinate the rights granted to Moulton to rights assured and protected by Treaty 8. The TSL does, however, provide for the following:

> 9.00 Aboriginal Rights, Aboriginal Title, Treaty Rights
>
> 9.01 Notwithstanding any provision of this License, if a court of competent jurisdiction
>
> (a) determines that activities or operations under or associated with this License will unjustifiably infringe an aboriginal right or title, or a treaty right,
>
> (b) grants an injunction further to a determination referred to in subparagraph (a), or
>
> (c) grants an injunction pending a determination of whether activities or operations under or associated with this License will unjustifiably infringe an aboriginal right or title, or a treaty right,
>
> the Timber Sales Manager, in a notice given to the Licensee, may vary or suspend this License, in whole or in part, or refuse to issue a Road Permit or other permit given to the Licensee, to be consistent with the court determination.

[10] In paras. 12-23 of the Statement of Claim, Moulton relates steps taken by the Crown to advise the FNFN of an amendment to the Forest Development Plan for the Fort Nelson timber supply area, which amendment enabled the grant of the TSL.

[11] In paras. 24 and 25 Moulton says that the Crown knew that George Behn was exercising treaty rights, and that the timber sale provided for in the TSL was within his licensed trapping area.

[12] It is said in para. 27 that Mr. Behn wrote to the Ministry of Forests to request cancellation of the TSL and called for an assessment of the cumulative impacts of previous forestry work, and of the additional impacts that the timber sale would create, in order that "you know, and can explain fully to me and my family, the degree of infringement you are contemplating".

[13] It is alleged in para. 30 that on October 2, 2006 and thereafter, the Behn defendants blockaded the only access road to the TSL harvest area, and prevented Moulton from constructing a road under the road permit and harvesting timber.

[14] On learning that Moulton had demanded that the Behns desist from obstructing access to the harvest area, FNFN, by its legal counsel, advised that, if litigation is commenced against the Behns, the FNFN would apply to the court to intervene in the proceeding "given its related interests in the matter and the Ministry's failure to adequately consult with the First Nation" (Statement of Claim paragraph 32).

[15] Moulton asserts these causes of action against British Columbia:

1. breach of contract for failing to provide access to land designated under the TSL;

2. breach of contract for failing to consult with the FNFN in respect of the grant of the TSL; and

3. negligent misrepresentation that it had consulted with the FNFN in respect of the grant of the TSL.

[16] As against the Behn defendants, Moulton claims:

> 1. conspiracy with intent to commit unlawful conduct, in particular to obstruct a forest service road or a highway, contrary to the *Criminal Code of Canada*, R.S.C. 1985, c.c-46, the *Forest and Range Practices Act*, S.C.B. 2002, c. 69, and the *Forest Service Road Use Regulation,* B.C. Reg. 70/2004; and
>
> 2. interference with the exercise of Moulton's contractual rights under the TSL.

[17] In its Statement of Defence, the Crown says:

> 3. In answer to the Statement of Claim as a whole and the allegations in paragraphs 9-39 in particular, the Province states that the Timber Sales Licenses ("TSLs") for sites A66572 and A66573 were tendered and thereafter granted to the Plaintiff in accordance with valid Provincial legislation and after fulfillment of the Province's duty to consult with and accommodate relevant aboriginal groups, including the Fort Nelson First Nation ("FNFN"), and at the request of the FNFN, consultation with George Behn.
>
> 4. In further answer to the Statement of Claim as a whole, the Province states that the Plaintiff is in possession of a good and valid TSL and road permit but has taken no steps to enforce its right under those documents against those who have, without legal right, denied the Plaintiff access to the cut blocks in issue.

[18] Particulars of the steps taken by the Province to fulfil its duty to consult are set out in paras. 7. In subparagraph xvii, the Crown says:

> Since the blockade was erected, the Province has worked tirelessly to resolve the issue through negotiation and compromise, despite the attempt of George Behn, through his intransigence, to exercise a veto over the Ministry of Forest and Range decisions, and without regard for the refusal of the Plaintiff to seek to enforce its rights through the courts.

[19] In para. 12, British Columbia says:

> In further answer to the Statement of Claim as a whole, and in specific response to the allegations of fact in paragraphs 40-42, the Province submits that the Plaintiff failed to take responsible steps to mitigate its alleged damages by seeking any available legal remedies. The Province states that the Plaintiff thereby contributed to such damages, which damages are not admitted but denied, and the Province pleads and relies upon the *Negligence Act*, R.S.B.C. 1996, c. 333.

[20] In para. 14, the following appears:

> In further answer to the allegations in the Statement of Claim as a whole, and to paragraphs 50-51 in particular, the Province states that those who have blockaded the road have done so without legal right, and that any damages suffered by the Plaintiff, should damages be proven, have been caused exclusively by those who have chosen to blockade rather than test the question of their right of redress through the courts.

[21] In their Statement of Defence, at para. 9, the Behn defendants rely on rights reserved by Treaty 8 to hunt and trap, and say that such rights "were exercised in tracts of land associated with different and extended families. These extended families were headed by a headman". It is said, in para. 10, that:

> The Behn family is one of the families with which there is an associated family territory in which the members of that extended family exercised their treaty rights (the "Behn Family Territory"). The Behn Family Territory originally covered a very large area and even the modern trap line of George Behn (which is a smaller part of the Behn Family Territory) covers an area of approximately 79,000 hectares. George Behn is the headman of the Behn family.

[22] Para. 12 contains allegations of the adverse impact of forestry and oil and gas exploration on the Behn Family Territory.

[23] The Behn defendants deny that they erected a blockade on the access road to the TSL. They say that they have erected a lawful camp on their family territory pursuant to their treaty rights (para. 17).

[24] The Behn defendants say, in para. 25, that the Ministry of Forests failed to meaningfully consult with the FNFN when deciding to issue the TSL and road permit. It is alleged that, as a result, these tenures were "issued unlawfully and convey no rights to the Plaintiff which could be exercised so as to interfere with the Treaty 8 rights of the FNFN, and the Behns" (para. 26).

[25] In para. 26, the Behn defendants plead that the tenures relied upon by the plaintiff constitute infringements of treaty rights, and "impermissibly intrude into the exclusive legislative jurisdiction of parliament and are therefore of no force and effect by application of the doctrine of interjurisdictional immunity".

[26] In their Statement of Defence, Chief Logan and the FNFN say that British Columbia did not meaningfully consult with them. They also plead that George Behn's treaty rights exist by the fact that he is a member of "a Treaty No. 8 First Nation" (para. 5), and, in para. 3, that:

> ...treaty rights are collective rights and shared amongst individual members of the Treaty No. 8 First Nations. Neither the Chief nor the Council of the Fort Nelson First Nation or the Fort Nelson First Nation as a whole have any control over who enjoys those rights or any control as to how individual members exercise their rights.

ISSUE

[27] Is there a basis, on the application of Rule 19(24) of the *Rules of Court*, to strike British Columbia's plea of mitigation and contributory negligence, to the extent that these are based on the fact that the plaintiff did not seek an injunction to restrain the Behn defendants from preventing access to the harvest area?

LAW

Rule 19(24)

[28] Rule 19(24) of the *Rules of Court* allows the court to strike out or amend the whole or any part of a pleading on the ground that:

(a) It discloses no reasonable claim or defence as the case may be,

(b) It is unnecessary, scandalous, frivolous or vexatious,

(c) It may prejudice, embarrass or delay the fair trial or hearing or the proceeding, or

(d) It is otherwise an abuse of the process of court

[29] The test under Rule 19(24)(a) is whether it is plain and obvious that the pleadings disclose no reasonable defence.

[30] In *Hunt v. Carey Canada Inc.,* [1990] 2 S.C.R. 959, 49 B.C.L.R. (2d) 273, the Supreme Court of Canada reviewed the criteria for striking a pleading under R. 19(24)(a) of the B.C.S.C. *Rules of Court*. The Court reconfirmed the stringent standard of proof on such applications, firmly embracing the "plain and obvious" test.

[31] The Court elaborated on the meaning of "plain and obvious" finding that a claim should not be dismissed unless the outcome is "beyond a reasonable doubt" and that "if there is a chance that the [claim] might succeed" the claim should not be struck (979-980).

[32] The Court found that claims "fit to be tried" – assuming the truth of the underlying constituent facts – should not be struck irrespective the complexity or novelty of the claim, or the potential for a strong defence to the claim (980).

[33] The Court observed that when a pleading reveals a "difficult and important point of law, it may well be critical that the action be allowed to proceed" (990).

[34] Finally, the Court concluded that "only if [a claim] is certain to fail because it contains a radical defect ranking with the others listed in R. 19(24) of the British Columbia *Rules of Court* should [a claim] be struck out under R. 19(24)(a)" (980).

[35] In *Berscheid v. Ensign*, [1999] B.C.J. No. 1172 (B.C.S.C.), this Court, at paragraphs 33 and 34, summarized the criteria to determine whether it is "plain and obvious" that a claim discloses no reasonable cause of action:

i) whether there is a question to be tried regardless of complexity or novelty;

ii) whether the outcome of a matter is beyond reasonable doubt;

iii) whether the matter raises serious questions of law or questions of general importance;

iv) whether pleadings might be amended; and

v) whether there is an element of abuse of process.

[36] Any doubt as to the merits of a claim should be resolved in favour of permitting the pleadings to stand: *McGauley v. British Columbia* (1989), 39 B.C.L.R. (2d) 223 (B.C.A.).

[37] As with R. 19(24)(a), the authorities impose the highest standard of proof in applications under R. (19)(24)(b) and (c). Applications to strike pleadings by summary process under R. 19(24) are reserved for "plain and obvious cases": *Western Approaches Ltd. v. Duke* (1982), 36 B.C.L.R. 44 (S.C.).

[38] In *Citizens for Foreign Aid Reform Inc. v. Canadian Jewish Congress* (1999), 36 C.P.C. (4th) 266, [1999] B.C.J. No. 2160 at para. 47. (S.C.) this Court elaborated on the criteria for striking pleadings under Rules 19(24)(b) and (c), namely, that it is "scandalous", "frivolous" or "vexatious", or that it may "prejudice, embarrass or delay the fair trial or hearing...":

i) An "embarrassing" and "scandalous" pleading is one that is so irrelevant that it will involve the parties in useless expense and will prejudice the trial of the action by involving them in a dispute apart from the issues: *Keddie v. Dumas Hotels Ltd.* (1985), 62 B.C.L.R. 145 at 147 (.C.A.).

ii) An allegation which is scandalous will not be struck if it is relevant to the proceedings. It will only be struck if irrelevant as well as scandalous: *College of Dental Surgeons of B.C. v. Cleland* (1968), 66 W.W.R. 499 (B.C.C.A.).

iii) A pleading is "unnecessary" or "vexatious" if it does not go to establishing the plaintiff's cause of action or does not advance any claim known in law: *Strauts v. Harrigan*, [1992] B.C.J. No. 86 (S.C.).

iv) A pleading that is superfluous will not be struck out if it is not unnecessary or otherwise objectionable: *Lutz v. Canadian Puget Sound Lumber and Timber Co.* (1920), 28 B.C.R. 39 (C.A.).

v. A pleading is "frivolous" if it is obviously unsustainable, not in the sense that it lacks an evidentiary basis, but because of the doctrine of estoppel: *Lutz v. Canadian Puget Sound Lumber and Timber Co.*

Duty to Mitigate

[39] The law of mitigation was set out in *British Westinghouse Electric and Manufacturing Company, Limited v. Underground Electric Railways Company of London, Limited*, [1912] A.C. 673 at 689 (H.L.), and adopted by the Supreme Court of Canada in *Asamera Oil Corporation Ltd. v. Sea Oil and General Corporation*, [1979] 1 S.C.R. 633 at 660, 89 D.L.R. (3d) 1:

> We start of course with the fundamental principle of mitigation authoritatively stated by Viscount Haldane L.C. in *British Westinghouse Electric and Manufacturing Company, Limited v. Underground Electric Railways Company of London, Limited*, at p. 689:
>
> > The fundamental basis is thus compensation for pecuniary loss naturally flowing from the breach; but this first principle is qualified by a second, which imposes on a plaintiff the duty of taking all reasonable steps to mitigate the loss consequent on the breach, and debars him from claiming any part of the damage which is due to his neglect to take such steps.
> >
> > ... this second principle does not impose on the plaintiff an obligation to take any step which a reasonable and prudent man would not ordinarily take in the course of his business.

[40] The obligation to mitigate damage may not include commencing proceedings against another even where there may be a prima facie right to the relief sought:

> Ought the plaintiff as a reasonable man to enter on the litigation suggested? It was agreed that the defendant must offer him an indemnity against the costs, and it was suggested on the defendant's behalf that (i) if an adequate indemnity were offered, (ii) if the proposed defendant appeared to be solvent, and (iii) if there was a good prima facie right of action against that person, it was the duty of the injured party to embark on litigation to mitigate the damage suffered. This is a proposition which, in such general terms, I am not prepared to accept, nor do I think I ought to entertain it here, because I am by no means certain that the foundations for it exist. ...

Pilkington v. Wood, [1953] 2 All E.R. 810 at 813.

[41] In *Pilkington v. Wood*, the defendant solicitor provided negligent advice concerning title to a vendor's property. Despite the defendant's offer to indemnify the plaintiff in an action against the vendor to obtain clear title, the Court declined to find that the plaintiff failed to mitigate its loss. In reaching this conclusion, the Court considered that an action against the vendor would constitute a "complicated and difficult piece of litigation" and that the plaintiff's loss was occasioned by the defendant's solicitor's advice.

[42] *McGregor on Damages* has set out eight rules regarding the standard of mitigation, which the courts have accepted. The fourth rule states:

> (iv) A claimant need not risk undertaking uncertain litigation against a third party.
>
> *McGregor on Damages,* 17th ed. (London: Sweet & Maxwell, 2003) at 253-260.

POSITION OF PARTIES

The Plaintiff, Applicant

(1) A Complex Issue, and an Off-Loading of a Crown Responsibility

[43] Moulton says that, in the present circumstances, reasonable steps to mitigate do not include the pursuit of an interlocutory injunction. Moulton says "it is plain and obvious that an application for an interlocutory injunction in a matter involving a conflict between commercial rights and aboriginal treaty rights, where the Crown's duty to consult is at issue, is difficult and complex litigation, with uncertain results". The plea of failure to mitigate, to the extent that it is based on a "failure" to seek an interlocutory injunction, discloses no reasonable defence and should be struck pursuant to Rule 19(24)(a).

[44] Moulton says that the Crown's plea of mitigation and contributory negligence brings into play considerations similar to those addressed by the courts in

connection with the position taken by the Crown that private litigants should seek the assistance of the court to enforce the laws of Canada and British Columbia through injunction orders in situations of civil disobedience. Reference is made to numerous cases in which the court has been critical of the stance taken by the B.C Crown. These include:

1) *MacMillan Bloedel Ltd. v. Simpson,* [1996] 2 S.C.R. 1048, 137 D.L.R. (4th) 633, at paras. 34 and 35;

2) *British Columbia (A.G.) v. Sager,* 2004 BCSC 720, 29 B.C.L.R. (4th) 351, at paras. 18-25;

3) *Relentless Energy Corporation v. Davis,* 2004 BCSC 1492, 34 B.C.L.R. (4th) 336 at para. 14;

4) *R. v. Clark,* 2001 BCCA 706, 207 D.L.R. (4th) 522, at para. 18;

5) *International Forest Products Limited v. Kern*, 2000 BCSC 888, at para. 29;

6) *Slocan Forest Products Limited v. Doe*, 2000 BCSC 150;

7) *International Forest Products Limited v. Kern*, 2000 BCSC 1141, 78 B.C.L.R. (3d) 168, at para. 57;

8) *Central Kootenay (Regional District) v. Jane Doe,* 2003 BCSC 836, 228 D.L.R. (4th) 252.

[45] The plaintiff also refers to the policy of the Province that, unless enforcement provisions are inserted in the Orders, the Crown will not enforce them: *Telus Injunction Re: Enforcement Order*, 2006 BCSC 441, 52 B.C.L.R. (4th) 280, at paras. 4, 10.

[46] The plaintiff refers to the provision of the policy that says the Province will not prosecute protestors for acts of civil disobedience where public demonstrations

obstruct or interfere with the rights of others, except where physical harm or serious property damage is reasonably apprehended (Criminal Justice Branch, Ministry of Attorney General Crown Counsel Policy Manual, *Civil Disobedience and Contempt of Related Court Orders*, effective March 15, 2004).

[47] Moulton characterizes the Crown's position as a failure to assert its authority to grant a resource tenure, and to take means available to it to deal with acts of civil disobedience.

(2) Plea of Mitigation Raises Irrelevant Matters of Law and Fact

[48] Moulton says that the actions of some members of the FNFN, including the Behn defendants, raise issues of treaty rights and consultation that lie outside of the relationship between the plaintiff and the Crown. A plea that calls upon a private person to vindicate the authority of the Crown to issue a resource tenure would engage an individual in the dispute over treaty rights that arise only between the Crown and a person or entity asserting aboriginal or treaty rights, and is irrelevant to the issues between Moulton and the Crown. To the extent that the Crown seeks to offload any role it may have to play in supporting its own authority to grant a forest tenure, the plea is scandalous.

[49] As for the plea of contributory negligence based on "failure" to seek an interlocutory injunction, the plaintiff refers to s. 1(1) of the *Negligence Act*, R.S.B.C. 1996, c. 333:

> 1(1). If by the fault of 2 or more persons damage or loss is caused to one or more of them, the liability to make good the damage or loss is in proportion to the degree to which each person was at fault.
>
> ...
>
> 1(3). Nothing in this section operates to make a person liable for damage or loss to which the person's fault has not contributed.

[50] The plaintiff says that it is plain and obvious that it can not be liable for failing to seek an injunction to enjoin the blockade, and therefore could not be "at fault" under the *Negligence Act*.

The British Columbia Crown

[51] The Crown refers to decisions in which it has been found that the pursuit of injunctive relief is a reasonable measure toward mitigation of loss:

1. *Timberline Haulers Ltd. v. Grande Prairie*, (1988), 89 A.R. 188, 59 Alta L.R. (2d) 43 (Q.B.) (aff'd on other grounds, (1990), 110 A.R. 116, 76 Alta.L.R. (2d) 184 (C.A.));

2. *Marlay Construction Ltd. v. Mount Pearl*, (1989), 77 Nfld. & P.E.I.R. 221 (Nfld. S.C.T.D.). (rev'd on other grounds (1996), 145 Nfld & P.E.I.R. 140 (Nfld. S.C.C.A.)).

[52] The Crown agrees that a plaintiff is not required to risk significant amounts or entertain speculative ventures in endeavouring to mitigate loss. Its contention is that the issues that would arise on an application by the plaintiff for an interlocutory injunction against the Behn defendants are not complex, and that the outcome, while not assured, is not highly uncertain.

[53] The Crown bases its position on the following:

1. Treaty rights are collective rights and, in order to demonstrate the valid exercise of a treaty right, an individual must demonstrate that he or she acts with the authority of the aboriginal community (*R. v. Marshall*, 2003 NSCA 105, [2004] 1 C.N.L.R. 211 at para. 29). Here, there is nothing to suggest that the Behn defendants acted with the authority of the Fort Nelson First Nation, assuming it to be the community that holds, collectively, the treaty rights.

2. The use of a blockade is improper, even as an exercise, or means of securing, an aboriginal or treaty right: *R. v. Manuel*, 2008 BCCA 143, 293 D.L.R. (4th) 713, at para. 62.

3. The Crown pleads that the TSLs were granted pursuant to valid provincial legislation and at all material times remained good and valid

and were not avoided by application for judicial review or otherwise. It says that Moulton can, in an application to enjoin the blockade, rely on the presumption of validity. This, says the B.C. Crown, is in essence a private matter between Moulton and the Behn defendants, and, further that:

> Irrespective whether an injunction application involves treaty or aboriginal rights, this Court has demonstrated that the use of blockades is improper even as an expression of, or as a means of preserving, an aboriginal right. Hence, the question of treaty rights would be peripheral to the main issue, namely, the removal of a blockade: *R. v. Manue.*

4. The Crown pleads, under the heading "Damages and Mitigation":

> In further answer to the allegations in paragraphs 40-42, the Province states that the blockade directly affected the private rights of the Plaintiff as the valid holder of the TSLs, and did not affect the public at large. Consequently, prudent conduct would suggest that the Plaintiff and not the Province seek an immediate legal remedy enjoining the blockade.

[54] The Crown argues that, as the pursuit of an interlocutory injunction by the plaintiff would be a reasonable step in mitigation of its loss, the plaintiff cannot satisfy the criteria for striking a pleading under Rule 19(24)(a).

[55] On an application of the criteria set out in *Burscheid v. Ensign,* the Crown says, in summary, that an application to strike a pleading or claim is an extraordinary remedy. Such relief is granted only when it is plain and obvious that a pleading is certain to fail, or when the outcome of the matter is beyond a reasonable doubt such that the pleadings contain a radical defect ranking with a scandalous or vexatious pleading or one which might cause prejudice or embarrassment or delay a fair hearing.

[56] It is argued, further, that it cannot be known with the requisite "certainty" (*Hunt v. Carey,* at paras. 32 and 33) that its mitigation plea will fail because the criteria best suited to determine the complexity of an injunction application, namely the trial itself, has yet to occur. A question of whether an injunction application was

"reasonable" is a question of fact, best determined by weighing all available evidence at trial: *Benjamin v. Mosher*, [1953] 1 D.L.R. 826 (N.S.T.D.).

[57] Finally, it is argued that, as Moulton's action names the individuals allegedly responsible for the blockade, it cannot now complain that it was unreasonable to embark upon litigation, even if it was to prove complex and difficult, to seek to enforce its rights by interlocutory injunction.

ANALYSIS

Crown's Refusal to Challenge Blockade

[58] Moulton invokes a policy of the Provincial Government that it will not pursue criminal law sanctions where protestors stand in the way of the exercise of private interests, except where injury or property damage may result.

[59] Moulton argues that the position of the Crown in this matter amounts to an off-loading on to private citizens of its responsibility to uphold the rule of law.

[60] The case law referred to, by citation, in para. 45 above, developed around the failure of the Attorney General of the Province to invoke the criminal law, leaving it to private interests to seek remedies in the courts. The basis for judicial criticism of this policy is that the court is placed in a position of being asked to "tell peace officers that they should do what they are already required to do" (*Telus Injunction Re: Enforcement Order*, at paras. 4, 10).

[61] In the absence of a suggestion that the actions of the Behn defendants amounted to a criminal or other statutory offence, there is no basis for comment or findings in relation to the "hands-off" policy of the Attorney General's branch of Government.

Is an Injunction Application a Reasonable Measure in Mitigation?

[62] The question is whether, in the present circumstances, a plea of failure to mitigate, and contributory negligence, both on the basis of a failure to seek an

interlocutory injunction, can be sustained in the light of the principles governing the application of Rule 19(24)(a). This determination involves a consideration of the issues that arise in Moulton's claim against the Crown and the issues that may arise if Moulton sought an injunction to restrain the Behn defendants from preventing access to the TSL territory.

[63] Where, as here, the impugned pleas are particularized, the question becomes whether, in all the circumstances, the pursuit of an interlocutory injunction is a reasonable measure to take in mitigation.

[64] The question is whether, under the current state of the law, a person in possession of a tenure granted by the Crown need only establish its right under the granted tenure, and interference with that right, to obtain injunctive relief, or whether that person may be called upon to vindicate the right of the Crown to grant the tenure in order to obtain injunctive relief.

Crown Argument

[65] Consistent with its Statement of Defence, the Crown argues:

> Irrespective whether an injunction application involves treaty or Aboriginal rights, this Court has demonstrated that the use of blockades is improper even as an expression of, or as a means of preserving, an Aboriginal right. Hence, the question of treaty rights would be peripheral to the main issue, namely, the removal of a blockade: *R. v. Manuel.*

[66] In *R. v. Manuel*, the appellants were charged with an offence under s. 423(1)(g) of the *Criminal Code of Canada.* It was alleged that they blocked a highway. They raised the defence of colour of right. The question framed by Levine J.A. of the B.C. Court of Appeal, was "...whether there was any reasonable doubt that the appellants' honestly believed they had the legal right to block Sun Peaks road in light of the uncertainly and conflict of legal rights" (at para. 58).

[67] Levine J.A. said, at para. 62:

> The appellants testified that they were familiar with *Delgamuukw* and the concept of aboriginal law and aboriginal title. As such, they must be taken to be aware of the attendant uncertainties and the processes for reconciliation

> of aboriginal and common law perspectives on land ownership, and that none of those processes includes blockades of highways. Such "self –help" remedies are not condoned anywhere in Canadian law, which includes aboriginal, common, and criminal law, and they undermine the rule of law.

[68] Levine J.A. found that there was no error in the trial judge's conclusion that the appellants did not honesty believe they had the legal right to block the road.

Injunctions in Cases Involving Aboriginal and Treaty Rights

[69] It is by no means clear that Levine J.A.'s dictum concerning "self help" remedies would, on an application by a private party for an injunction, prevent the court from embarking on a balance of convenience analysis that takes account of the potential for non-compensable damage to the exercise of treaty rights.

[70] Moulton cites the decision of this Court in *Relentless Energy Corporation v. Davis*, where the plaintiff, the holder of a provincially granted resource tenure, became embroiled in complex issues of treaty rights when it sought an injunction to restrain persons who, by direct action, interfered with the exercise of its tenured rights. The claim was based on wrongful interference with its tenured rights. Satanove J. found that the defendants would suffer irreparable harm if the injunction were to be granted, due to the potential for incremental encroachment on hunting and trapping within the territory encompassed by Treaty 8.

[71] Moulton also refers to the decision of the Ontario Superior Court of Justice in *Platinex Inc. v. Kitchenumaykoosib Inninuwug First Nation* (2006), 272 D.L.R. (4th) 727 at 729 (Ont. Sup. Dt.J.). There, the plaintiff brought an application for an injunction to prevent the interference with tenured mining rights by members of the First Nation, who asserted rights under Treaty 9. The defendants succeeded in their cross application for an injunction to prevent the exercise of the rights granted by the Province of Ontario, notwithstanding that the court recognized that this may result in the bankruptcy of the plaintiff. Although the plaintiff's employees reasonably feared for their safety when confronted by members of the First Nation, the conduct of the latter did not preclude it from obtaining an injunction. The court exercised its discretion to relieve the First Nation of the requirement that it provide an undertaking

to pay damages in the event that the plaintiff's exploratory activities were ultimately determined to have been wrongfully enjoined.

[72] It cannot be assumed that a plaintiff who seeks to enjoin persons claiming interference with treaty rights would be relieved of the general requirement of an undertaking for damages if an injunction is granted.

[73] A broader review of the jurisprudence on injunction applications by private holders of Crown granted resource tenures, when faced with blockades or other self help remedies, would dissuade all but those who are already heavily invested, and who have deep pockets, from seeking such relief.

[74] If, notwithstanding that legal proceedings were taken due to the exercise of a "self-help remedy" in the form of a blockade, and the issue of treaty and infringement rights is engaged, the plaintiff would find itself in complex litigation with no certainty as to outcome. Here, the notice by the FNFN of its intention to intervene put Moulton on notice that an injunction application would raise treaty rights issues.

Treaty Rights, and Issues Between Moulton and the Crown in right of British Columbia

[75] The causes of action asserted by Moulton are breach of contract and negligence. The former is based on allegations that the Crown failed to provide access to land designated under the TSL, and failed to consult with the FNFN in respect of the grant of the TSL. The latter alleges that British Columbia misrepresented that it had consulted with the FNFN in respect of the grant of the TSL. Moulton's plea that the Crown failed to consult may invite inquiry into the nature of the treaty rights that may be infringed upon by timber harvesting, as the depth of consultation is sensitive to the importance of the right at issue (*Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511).

[76] As the Crown does not rely on the existence of a treaty right as a defence to the plaintiff's claims of breach of contract and negligence, treaty rights issues are not relevant to the plaintiff's claim against it.

[77] The Crown says that Moulton cannot complain about the mitigation plea on the basis that it raises treaty rights issues, as it has invited those issues by joining the Behn defendants and the FNFN as defendants. But it is these defendants, not Moulton, that raised these issues. It cannot be determined at this stage whether the issues between Moulton and the other defendants will result in a full exposition of the treaty and constitutional issues as pled.

Necessity of Trial to Determine Issue

[78] Pleas of failure to mitigate and contributory negligence may, as they do here, raise matters that would not arise in the course of a trial to determine liability on the basis advanced by the plaintiff. Where, as here, a particularized plea of failure to mitigate and contributory negligence would cause an inquiry into complex areas of fact and law, with an unpredictable outcome, the submission that the matter should be left for trial loses its force.

Is the Impugned Plea "Scandalous", "Frivolous", or May it "Prejudice, Embarrass, or Delay the Fair Trial or Hearing..."?

[79] Issues over the existence and infringement of aboriginal and treaty rights arise as a consequence of actions taken by government under legislative authority. Private interests are indirectly affected when the exercise of resource tenures may infringe on an aboriginal or treaty right. When the holder of the tenure finds itself on the front line of a confrontation with persons asserting infringement of an aboriginal or treaty right, its choices, acting lawfully, are to retreat or to seek injunctive relief. It may also, as here, assert a claim against the Crown.

[80] If the private tenure holder opts to seek injunctive relief, the basis in law for the right that it asserts is the tenure, which in turn is authorized by legislative enactment. The underlying issue, therefore, is between the Crown and the party that asserts the infringement of the aboriginal or treaty right.

[81] The foregoing is illustrated by reference to the Statements of Defence of the Behn defendants and the FNFN. In their Statement of Defence, the Behn

defendants assert a failure on the part of the Ministry of Forests to adequately consult with the FNFN and that, in consequence, the TSL and the road permit “were issued unlawfully and convey no rights to the plaintiff...”. The Behn defendants also assert that the Province has no jurisdiction to authorize infringement of treaty rights and “as such...the relevant authorizations constitute infringements (of treaty rights)...as they impermissibly intrude into the exclusive legislative jurisdiction of parliament and are therefore of no force and effect...”. In its Statement of Defence, the FNFN also alleges a failure on the part of the Province of British Columbia to consult in relation to proposed forestry development within Treaty 8. To the extent that an application for injunction results in an inquiry into infringement, consultation, accommodation and justification, the relevant information will be in the possession and control of the Crown. It would be unfair to impose upon a private litigant an obligation to litigate these issues in mitigation.

[82] It is settled law that private entities holding resource rights under Crown granted tenures have no duty to consult with affected aboriginal peoples. This is a duty owed by the Crown (*Haida Nation*). In addition, issues over justification (on an application of the test in *R. v. Sparrow*, [1990] 1 S.C.R. 1075, 70 D.L.R. (4th) 385), where there is an infringement, engage the Crown and not the tenure holder. Of course, resource users often engage with aboriginal collectivities to pursue private accommodations; a form of practical reconciliation. But this is not the issue here.

[83] The question of the availability of injunctive relief against those who assert aboriginal and treaty rights is not relevant to the issues that arise as between the plaintiff and defendant in a claim for breach of contract and negligence. If allowed to stand, the plea would involve the parties in useless expense. It is, accordingly, both embarrassing and scandalous.

CONCLUSION

[84] The plea of failure to mitigate and the plea of contributory negligence, based on failure to pursue injunctive relief, are struck.

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The Honourable Mr. Justice H.A. Slade