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Province punished in costs in flawed consultation case: *Moulton Contracting Ltd. v. British Colombia*[1]

Case Background

The Province of British Columbia has been punished with a substantial costs award made against it arising out of a flawed consultation process with the Fort Nelson First Nation. This is the follow up decision to the trial outcome in *Moulton Contracting Ltd. v British Columbia*[2], whereby the British Columbia Supreme Court held the Province of British Columbia liable to Moulton Contracting Ltd. ("Moulton") for failing to disclose information relating to Moulton's Fort Nelson Timber Sales Licences ("TSL").

The original action stemmed from events in October 2006 when the Behn family, who are members of the Fort Nelson First Nation ("FNFN"), established a blockade to halt Moulton's logging operation. The company had purchased two Timber Sales Licences from the Province of British Columbia to log in the area, but as a result of the blockade were unable to do so and suffered substantial economic damages. Moulton subsequently brought an action against FNFN and their Chief, the Behn family, and the Province.

The Court dismissed the claims made against the Behn family, Chief Logan and FNFN, but in a novel interpretation of the law

[1] 2014 BCSC 993

[2] *Moulton Contracting Ltd v British Columbia*, 2013 BCSC 2348.

found the Province liable for breaching an implied contractual term in the TSL that it had (1) adequately consulted and discharged its duty to First Nations, and that it (2) was unaware of any dissatisfaction expressed by First Nations with the consultation process. The Province had failed to disclose to Moulton both that FNFN had expressed dissatisfaction with the consultation process and that the Behn's intended to block Moulton's access to the logging area. Damages of $1.75 million were awarded to Moulton for the Province's breach of these implied contractual terms.

Ruling on Costs

On June 5, 2014 the judgement on costs was issued. It largely penalized the Province for failing to accept an earlier settlement offer, sanctioned the Behn's for setting up the blockade, and sanctioned FNFN and Chief Logan for failure to disclose certain documents in a timely and reasonable manner.

Specifically, Moulton was awarded double costs against the Province, a punitive measure due to their earlier rejection of Moulton's $1.5 million settlement offer. The Court determined that the offer to settle ought to have reasonably been accepted, and that the relationship between terms of the settlement and the final judgement justified the award.[3]

The Province argued that Moulton's costs should then be limited only to successful claims against the Province, however the Court found that it would not be just to apportion costs so as to force Moulton to bear them in order to pursue the Behn's and FNFN. The exception to this were costs from three days of trial related to an unsuccessful claim specifically against FNFN, the Behn's and Chief Logan.

Also of note, despite their success at trial the Behn's were disentitled to costs. According to the Court, they should not have

[3] *Moulton*, *ibid* at para 18, referencing the British Columbia Supreme Court Civil Rules R.9-1(6).

used a blockade to express their opposition when they had other legal means such as judicial review available. As such, the order to bear their own costs was intended to "serve as a disincentive to others who might consider attempting to resolve land use disputes through extra-legal means such as blockades."[4]

FNFN and Chief Logan were entitled to 2/3 costs, reduced for failing to provide full disclosure in a timely manner that unduly drew out the discovery process and inconvenienced opposing parties. FNFN and Chief Logan sought indemnity from the Province in the event that they were found liable. Though they were not found liable, the Court addressed their claim by noting that if they had been liable; their participation in the blockade would have disentitled them to such indemnity.

Moulton sought a *Sanderson*[5] order against the Province that would require the Province to pay the costs of both FNFN and Chief Logan. The Court developed the following guidelines for the proper exercise of discretion by the court when considering *Sanderson* and *Bullock* orders:

1. The threshold test is whether it is reasonable to join the defendants;
2. After meeting the threshold test, granting the order is entirely at the judge's discretion and must be just and fair;
3. The trial judge must consider the conduct of the unsuccessful defendant in relation to the grounds of the successful defendant's alleged liability; and
4. Where there are independent causes of action alleged with unconnected breaches, an order will not normally be granted unless the unsuccessful defendant's conduct can be shown to have caused the plaintiff to bring or continue an action against the successful defendant.[6]

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[4] *Moulton*, supra note 2 at para 35.

[5] The order originated in *Sanderson v Blyth Theatre Co*, [1903] 2 KB 533 (CA), and is codified in the British Columbia Supreme Court Civil Rules, R.14-1(18).

[6] *Moulton*, *supra* note 2 at para 74.

The Court found that the threshold was met, and while several factors against granting the order were considered, the Judge determined that the overlap of issues involving the Province and the other defendants was significant enough to warrant granting the order.

The underlying trial decision is under appeal by both the Province and Moulton. In the meantime, *Moulton Contracting Ltd. v British Columbia* remains a strong judicial warning to governments that if they fail to adequately consult that they will be held legally accountable, not only to the First Nations, but also to private industry when private industry is harmed by the government's failure to meet its constitutional obligations to First Nations.

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a cautionary note