FASKEN MARTINEAU

Aboriginal Bulletin

August 2006 Fasken Martineau DuMoulin LLP

Ontario Court Restrains Mining Exploration as a Result of Failure of the Province to Consult with First Nation

Tracy A. Pratt, Toronto and Charles F. Willms, Vancouver

The Ontario Superior Court recently made a ruling that could significantly impact resource development in the far north. By ruling released July 28, 2006, Mr. Justice Smith dismissed the injunction motion of a junior exploration company and granted an interim injunction to Kitchenuhmaykoosib Inninuwug ("KI"), an Aboriginal community in the area of the company's mining claims and leases.

Largely, as a result of the Province of Ontario's failure to consult with the KI on granting exploration rights, the company was restrained from continuing its exploration activities pending consultation between the Province and the KI. The case is an unfortunate example of the consequences of the Crown's failure to consult being visited on private parties.

Platinex Inc. ("Platinex"), a small exploration company, sought an injunction preventing KI members from obstructing or interfering with its access to mining claims and leases in the Big Trout Lake area, 500 kilometres north of Thunder Bay. In February 2006, among other things, KI confronted Platinex in order to prevent the company from mobilizing a drill to the property to engage in phase one of its exploration program. Platinex contended that such confrontation was hostile and threatening and included, among other things, the blockade of a public road and the ploughing of the airstrip. KI said that it protested "peacefully" but its members were "resolute that they would stop the drill from getting to the site". Platinex ultimately vacated the property. After it departed, KI dismantled Platinex's camp. Platinex sought injunctive relief. KI brought a cross-injunction to prohibit Platinex from conducting any exploration activities on the Big Trout Lake property.

Platinex holds multiple mining claims and leases on Crown land in the Big Trout lake area. Although the claims are not situated on KI's reserve land, the claims are within KI's traditional territory (upon which the First Nation retains hunting, fishing and trapping rights). KI is a signatory to the James Bay Treaty ("Treaty 9"). By virtue of Treaty 9, KI ceded its land, including the land upon which the mining claims are situated, to the Crown. In 2000, KI commenced a treaty land entitlement claim ("TLE Claim"). The TLE Claim seeks to expand KI's reserve by approximately 200 square miles to be taken from its 23,000 square kilometers of traditional territory. In

February 2001, KI declared a unilateral "moratorium" on all development activities on its traditional lands, including the Big Trout Lake area, pending the resolution of its TLE Claim. Notwithstanding the "moratorium", KI engaged in discussions and consultations with Platinex over 7 years respecting exploration on the property.

Platinex argued, and the Court accepted that, without unobstructed access to its mining claims to proceed with its low impact exploration, the company would be insolvent by the end of the year. KI claimed that if Platinex was permitted to proceed with its low impact exploration, it would suffer irreparable harm from an environmental, ecological, archaeological and cultural perspective. Both parties filed extensive affidavit, including expert, evidence.

Mr. Justice Smith observed, at paragraph 56 of the decision, that an injunction remedy "is often not suited to situations involving Aboriginal issues particularly in view of the Crown's obligation of consultation and the importance of the principle of reconciliation." His Honour further commented that these factors push judges towards formulating creative solutions in Aboriginal cases where injunctive relief is sought.

Based principally on the balance of convenience, and in the spirit of, and to promote, reconciliation, the Court dismissed Platinex's motion and issued an interim order preventing Platinex from conducting any exploratory work on the Big Trout Lake property for 5 months subject to the following conditions:

1. KI forthwith release to Platinex any property removed by it or its representatives from Platinex's drilling camp located on Big Trout Lake and this property being in reasonable condition; and

2. KI immediately shall set up a consultative committee charged with the responsibility of meeting with representatives of Platinex and the Provincial Crown with the objective of developing an agreement to allow Platinex to conduct its two-phase drilling project at Big Trout Lake but not necessarily on land that may form part of KI's TLE Claim.

Although the Crown was not a party to the motions, Justice Smith addressed in some detail the issue of the Crown's duty to consult with a First Nation when actions are proposed which may impact Aboriginal rights and interests, here, the granting of mining claims/leases and extensions to Platinex. The Court adopted the principles pertaining to the Crown's fiduciary duty and duty to consult from *R. v. Sparrow* and *Haida Nation v. British Columbia (Minister of Forests)*. The Court described the process in which the Crown must engage for proper consultation as follows:

> [90] … The Crown must first provide the First Nation with notice of and full information on the proposed activity; it must fully inform itself of the practices and views of the First Nation; and it must undertake meaningful and reasonable consultation with the First Nation.
>
> [91] The duty to consult, however, goes beyond giving notice and gathering and sharing information. To be meaningful, the Crown must make good faith efforts to negotiate an agreement. The duty to negotiate does not mean a duty to agree but rather requires the Crown to possess a *bona fide* commitment to the principle of reconciliation over litigation. The duty to negotiate does not give First Nations a veto - they must also make *bona fide* efforts to find a resolution to the issues at hand.

The Court found that the "evidentiary record indicates that it [Ontario government] has abdicated its responsibility and delegated its duty to consult to Platinex while, at the same time was making several decisions about the environmental impact of

Platinex's exploration programmes, the granting of mining leases and lease extensions". His Honour emphasized the importance of meaningful consultation by the Crown and pointed to the failure of these obligations by the Crown as promoting "industrial uncertainty" to companies wishing to explore and develop land and resources on the traditional lands of Aboriginal peoples. In holding that the balance of convenience favoured KI, Justice Smith stated, in part, as follows:

> [110] A decision to grant an injunction to Platinex essentially would make the duties owed by the Crown and third parties meaningless and send a message to other resource development companies that they can simply ignore Aboriginal concerns.
>
> [111] The grant [sic] of an injunction enhances the public interest by making the consultation process meaningful and by compelling the Crown to accept its fiduciary obligations and to act honourably.

In granting KI a conditional injunction, the Court also exercised its discretion to relieve KI from providing an undertaking for damages. In this regard, His Honour observed that relief against the undertaking requirement "is not uncommon" in Aboriginal cases "given that many First Nations are impoverished". The Court stated further, at paragraph 122, that:

> [122] Unfortunately, this issue highlights the difficulty in meeting the strict requirements of injunctive relief in cases involving Aboriginal issues. Large wealthy corporations issuing law suits for millions of dollars could disentitle First Nations from qualifying from the right to claim injunctive relief. This result cannot be deemed to be in accordance with the principles of equity.

The decision has several troublesome aspects for continued resource development in northern Ontario. It could be argued that the decision inferentially sanctions KI's unilateral "moratorium" on any resource development on its traditional territory pending the resolution of its TLE Claim. TLE Claims may take years to wind through the government process and/or the Courts. The ability for Aboriginal communities to impose a "moratorium" at will, and without regard to third party interests introduces a level of uncertainty for resource development companies.

Moreover, the decision arguably places resource development companies in the untenable position of having the "onus" of satisfying themselves that the government has fulfilled its constitutional duties to First Nations on each occasion that such duty may arise. This raises the question of what a prudent company must do to satisfy itself that all government obligations have been fulfilled. In particular, the decision could impact the activities of resource development companies in terms of their financing efforts and otherwise.

Another aspect of the decision worth noting is that, although the Court found that KI may suffer irreparable harm from a "cultural and spiritual perspective", it did not identify precisely what that harm would be vis-à-vis the proposed low impact exploration on the claims. Rather, it appeared to rely upon, and accept as satisfactory proof, general concepts of Aboriginal connectedness to "the land".

Finally, the granting of an injunction to the KI when the judge accepted that the KI confronted Platinex in order to stop the drilling is of concern. Normally self help remedies have been of concern to the court when injunctive relief is later sought but in this case, the judge did not refer to the law on self help in deciding to grant the injunction. One point that is made clear by the judgment is that when the Crown fails in its duty to consult, private parties may suffer. The judgment provides a strong direction to the

governments, which do not have consultation policies, or do not apply those policies where they exist, to promulgate and apply appropriate consultation polices in relation to resource decisions. Failure to do so will definitely delay or inhibit resource development in Canada.

Another aspect of the decision worth noting is that, although the Court found that KI may suffer irreparable harm from a "cultural and spiritual perspective", it did not identify precisely what that harm would be vis-à-vis the proposed low impact exploration on the claims. Rather, it appeared to rely upon, and accept as satisfactory proof, general concepts of Aboriginal connectedness to "the land". The Court did not find that KI would suffer irreparable harm from Platinex's proposed exploration from an environmental, ecological or archaeological perspective.

For more information on the subject of this bulletin, please contact the authors:

Tracy A. Pratt
416 865 4429
tpratt@tor.fasken.com

Charles F. Willms
604 631 4789
cwillms@van.fasken.com

For More Information About Our Aboriginal Practice Group

Vancouver

Charles F. Willms**
604 631 4789
cwillms@van.fasken.com

Kevin O'Callaghan
604 631 4839
kocallaghan@van.fasken.com

Joanna Mullard
604 631 4812
jmullard@van.fasken.com

Calgary

Sandy Carpenter
403 261 5365
scarpenter@cgy.fasken.com

Peter Feldberg
403 261 5364
pfeldberg@cgy.fasken.com

Toronto

Charles Kazaz
416 868 3517
ckazaz@tor.fasken.com

Montréal

André Durocher
514 397 7495
adurocher@mt.fasken.com

Anne Drost
514 397 4334
adrost@mtl.fasken.com

**National Director