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Mining Exploration and the Crown's Duty to Consult Aboriginal Peoples: The Ontario Superior Court of Justice's decision in *Platinex v. Kitchenuhmaykoosib Inninuug First Nation*

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On May 1, 2007, G.P. Smith J. of the Ontario Superior Court of Justice rendered his judgment in *Platinex v. Kitchenuhmaykoosib Inninuug First Nation* ("*Platinex Decision*"),¹ a case involving an application by a First Nation for an injunction to prohibit a mining company from carrying out test drilling on provincial Crown lands. The court declared that the company had the right to carry out exploration activities on the lands in question, subject to ongoing consultation with the First Nation in respect of future exploration and development activities.

Background

In 1929, the Kitchenuhmaykoosib Inninuug First Nation ("KI") adhered to Treaty No. 9 ("Treaty"), pursuant to which KI received certain reserve lands and treaty rights in exchange for the surrender of its Aboriginal interests in the lands subject to the Treaty. Under the Treaty, KI received an 85-square mile reserve ("KI Reserve") on lands situated approximately 580 kilometres north of Thunder Bay. The Treaty also provides KI with the right to pursue traditional harvesting rights throughout the surrendered land ("Surrendered Territory"), including hunting, fishing and trapping, subject to the Crown being able to take up land for development purposes such as mining.

In July 2000, KI filed a treaty land entitlement claim ("TLE Claim") asserting that the KI reserve was improperly calculated, and that KI was entitled to an additional 197 square miles. KI's claim was not to any specific parcel of land, but rather to an area of land to be agreed upon in consultation with the federal and provincial governments. In February 2001, KI declared a moratorium on further development in its asserted traditional territory pending negotiation and consultation with the provincial and federal governments regarding the TLE Claim.

Platinex Inc. ("Platinex") holds a number of mining claims and leases ("Properties") on Crown land situated within the Surrendered Territory. In 2005 and 2006, Platinex prepared to commence drilling some 24 – 80 exploratory holes ("Drilling Program").

In February 2006, Platinex sent a drilling team and drilling equipment to a camp on the Properties, in response to which KI demanded that Platinex cease all exploratory activities. Several members of KI subsequently travelled to the camp to protest against the work being done.

Related Proceeding in the Ontario Supreme Court of Justice

On July 28, 2006, G.P. Smith J. granted an "interim, interim injunction" prohibiting Platinex from proceeding with the Drilling Program, and dismissed Platinex's application for an injunction prohibiting members of KI from blockading certain access roads to the Properties.² G.P. Smith J. held that although Platinex faced possible insolvency, Platinex was the "author of its own misfortune" as it knew there were serious issues regarding drilling on the Property when it issued a prospectus to raise funds. He ruled that because the Surrendered Territory and KI's right to harvest thereon was the essence of KI's cultural identity, KI faced potential irreparable harm if exploration and development were to occur without adequate consultation, which had not occurred at that time. The balance of convenience favoured the granting of an injunction to KI. The court also ordered KI to set up a consultation committee to seek an agreement with the Platinex and the provincial government to allow the Drilling Program to proceed.

Despite attempts by Platinex and the provincial government to reach an agreement with KI, no agreement was reached, and KI sought an interlocutory injunction in April 2007 preventing Platinex from conducting its exploratory drill program.

Position of the Parties

KI sought further injunctive relief on the basis that adequate consultation had not occurred in respect of the adverse effects of the Drilling Program and future exploration activities on KI's treaty rights and TLE Claim. Platinex argued that the potential harm to KI's treaty rights was minimal, and that the TLE Claim was weak or non-existent.

The Decision

General Law

G.P. Smith J. noted that "the scope of the duty to consult and the consideration of whether the Crown and by implication Platinex have fulfilled this duty is the question that more than any other lies at the heart of this case,"³ and cited the Supreme Court of Canada decisions of *Delgamuukw v. B. C.*⁴ and *Haida Nation v. B. C.*⁵ as follows: the Crown's duty to consult with a First Nation arises wherever the Crown has knowledge of the potential existence of an Aboriginal interest (including a treaty right) and contemplates a decision that may adversely affect such Aboriginal interest and, although an agreement does not ultimately have to be reached, the Crown must have a *bona fide* commitment to the principle of reconciliation over litigation.⁶

G.P. Smith J. confirmed the *Haida* principle that the scope of the duty to consult (where it arises) exists on a spectrum, and will vary depending on the strength of the particular claim to the Aboriginal interest in question and the degree of the potential adverse effect of the decision on such Aboriginal interest.⁷ He also noted that the scope and content of the duty to consult may change over time, as the potential impact of an activity evolves and changes:⁸ for example, as mining activities related to a potential mine become more intrusive, deeper consultation may be required.

Adequacy of Consultation

The court accepted that the primary purposes of the consultation process include:

- the promotion of reconciliation of the pre-existence of Aboriginal societies with the sovereignty of the Crown (as discussed in *Delgamuukw*);⁹ and
- the exchange of information to allow each party to acquire a greater and deeper knowledge of the interests and position of the other (as discussed in *Haida*).¹⁰

The court also accepted that consultation does not mean that parties must reach an agreement, but does mean that *both* the Crown *and* First Nations must consult in good faith.¹¹

In this instance, the mining claims and leases granted to Platinex, and Platinex's interest in drilling on land within the Surrendered Territory, gave rise to a potential adverse effect on KI's treaty right to hunt and its TLE Claim. The court noted that the KI may not "fully appreciate the fundamental fact that all Aboriginal title and interest in the land was surrendered when Treaty 9 was signed", and that the "right that remains is the right for KI to be consulted when there is a taking up of land that may have a harmful impact on the traditional harvesting rights, as described in the treaty."¹² The result is that "Treaty 9 provides the Crown with unencumbered title to the land in question, and with a limited right to displace traditional harvesting rights by taking up land to provide for a variety of activities, including mining."¹³

In this case, the court found that consultations had taken place over a period of nine months, and "although not successful in reaching an agreement, have been beneficial in identifying KI's fears and concerns, and in exchanging information."¹⁴ The court also noted that Platinex had been ready to sign a draft Memorandum of Understanding ("Draft MoU") with KI relating to the identification and mitigation of adverse effects of Platinex's exploration program on KI's treaty rights.

Based on the foregoing, the court acknowledged that the Draft MoU was "a reasonable and responsible beginning of accommodating KI's interests and, at this point in time, is sufficient to discharge the Crown's duty to consult."¹⁵

Injunctive Relief

Because adequate consultation in respect of the drilling program had occurred, G.P. Smith J. held that the relatively high burden required to establish a successful claim to injunctive relief

had not been met.¹⁶ However, G.P. Smith J. ordered that Platinex should not be given a *carte blanche* to proceed with its entire exploration project and that KI should have the right to ongoing consultation with respect to all aspects of the impact Platinex's exploration.¹⁷ Accordingly, the court set out a time limit for the process and ordered that the parties agree to a memorandum of understanding (presumably based on the Draft MoU) and a consultation protocol before May 15, 2007.¹⁸

Commentary

The *Platinex* Decision raises a number of important issues, but perhaps the two most relevant to natural resource industries relate to:

- the degree of consultation required to satisfy the Crown's duty to consult; and
- the obligations of third parties in respect of the Crown's duty to consult.

Scope of the Crown's Duty to Consult

This case presented the opportunity for the court to provide some clear direction on the degree of consultation that is required in respect of exploration programs that have a relatively minor footprint. Unfortunately, the court did not provide any direction on this issue, instead simply holding that the Draft MoU was sufficient to discharge the Crown's duty to consult without identifying exactly what the duty entailed.

Some direction is available, however, from a review of the provisions of the Draft MoU in the light of the court's description of the Aboriginal interests in question.

The court noted the following:

- the drilling was to take place on Crown land that, as a result of the surrender of Aboriginal rights and title upon adhesion to Treaty 9, were unfettered by Aboriginal title;¹⁹
- the only KI interests in the land are its treaty rights, being the treaty right to harvest and the TLE Claim;²⁰ and
- potential adverse effects of the Drilling Program on the treaty right to harvest has not been demonstrated to be significant,²¹ and there is no reliable evidence that the exploration project would adversely affect the TLE Claim.²²

In light of the Supreme Court of Canada's comments in *Haida*, the foregoing factors all suggest that the scope of the duty to consult in respect of Platinex's Drilling Program would not be at the more onerous end of the spectrum of consultation.

The Draft MoU contains fairly significant commitments by Platinex designed to identify and mitigate the effects of the drilling program on KI's Aboriginal interests, including:

- the retention of an archaeologist to identify and protect potential burial sites;
- the retention of an environmental consultant to independently review the proposed exploration program;
- the retention of a qualified environmental monitor from among the KI;
- the seeking of input from the KI community generally, and KI trapline holders specifically, regarding potential impacts to hunting and trapping activities;
- preferential employment and procurement in favour of the KI;
- the sharing of drilling results with the KI;
- the development of an exploration and post-exploration consultation protocol;
- the provision of compensation for disruption of any traplines;
- the conducting of a peer review of all technical information relating to Platinex's activities by a technical consultant; and
- the negotiation of an access agreement by a specified date to allow Platinex to conduct its drilling program.

It is not clear if these commitments represent the minimum required to discharge the duty to consult, or whether less onerous commitments would have been sufficient given the limited nature of the Aboriginal interests in this case. However, the spectrum approach set out in *Haida* suggests that less onerous commitments may have sufficed in this instance.

Delegation of the Crown's Duty

This case involved a company ensuring that consultation was "done right." The court does not focus on any significant consultative actions taken by the provincial government, and instead focuses almost exclusively on consultation carried out by Platinex.

Haida expressly confirmed that the duty to consult lies with the Crown, and that the Crown can only delegate "procedural aspects" of consultation to third parties. However, in practice various government ministries consistently look to proponents to carry out almost all consultation, causing many proponents to question the line between "procedural aspects" of consultation and "all aspects" of consultation.

The *Platinex* Decision seems to accept this broad interpretation of the scope of consultation that can be delegated to a proponent by the Crown. If *Platinex* had not proactively engaged the KI in consultation and negotiated the Draft MoU, the Crown's duty to consult may not have been satisfied and the injunction preventing exploration may have continued.

Accordingly, while the court in the *Platinex* Decision notes that Aboriginal interests "do not [...] automatically trump competing rights, whether they be government, corporate or private in nature,"²³ the decision also makes it clear, albeit implicitly, that proponents seeking to carry out activities on land subject to Aboriginal interests must take proactive steps to ensure that appropriate consultation is being carried out by the regulators, and where this is not the case, proponents must take proactive steps to ensure that consultation sufficient to discharge the Crown's duty to consult with potentially affected First Nations occurs.

Finally, it is worth noting that the court applied the traditional test respecting the availability of injunctive relief to this case, underscoring the application of Canadian law generally to Aboriginal legal matters.

¹ Court File No. CV-06-0271 & CV-06-0271A (Ont. S.C.J.).

² *Platinex v. Kitchenuhmaykoosib Inninuwug First Nation*, [2006] O.J. No. 3140 (Ont. S.C.J.).

³ *Ibid.* at para. 72.

⁴ [1997] 3 S.C.R. 1010.

⁵ 2004, 245 D.L.R. (4th) 610 (S.C.C.).

⁶ *Platinex*, *supra* note 1 at para. 84.

⁷ *Ibid.* at para. 99.

⁸ *Ibid.* at para. 101.

⁹ *Ibid.* at para. 81.

¹⁰ *Ibid.* at para. 83.

¹¹ *Ibid.* at para. 82.

¹² *Ibid.* at para. 150.

¹³ *Ibid.* at para. 102.

¹⁴ *Ibid.* at para. 87.

¹⁵ *Ibid.* at para. 160.

¹⁶ *Ibid.* at para. 157.

¹⁷ *Ibid.* at para. 184.

¹⁸ *Ibid.* at para. 188.

¹⁹ *Ibid.* at para. 148.

²⁰ *Ibid.* at para. 148.

²¹ *Ibid.* at para. 170.

²² *Ibid.* at para. 162.

²³ *Ibid.* at para. 171.

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