**COURT FILE NO.:** 06-0271
**DATE:** 2007-05-01

**ONTARIO**
**SUPERIOR COURT OF JUSTICE**



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|---|---|
| **B E T W E E N:** | |
| PLATINEX INC.<br>Plaintiff | *Neal J. Smitheman* and *Tracy A. Pratt*, for the Plaintiff |
| **- and -** | |
| KITCHENUHMAYKOOSIB INNINUWUG FIRST NATION, DONNY MORRIS, JACK MCKAY, CECILIA BEGG, SAMUEL MCKAY, JOHN CUTFEET, EVELYN QUEQUISH, DARRYL SAINNAWAP, ENUS MCKAY, ENO CHAPMAN, RANDY NANOKEESIC, JANE DOE, JOHN DOE and PERSONS UNKNOWN<br>Defendants | *Bryce Edwards* and *Kate Kempton*, for the Defendants other than Jane Doe, John Doe and Persons Unknown |
| | *Francis Thatcher* for the Intervenor, Independent First Nation Alliance |
| **AND BY WAY OF COUNTERCLAIM:** | **Court File No: 06-0271A** |
| KITCHENUHMAYKOOSIB INNINUWUG FIRST NATION, DONNY MORRIS, JACK MCKAY, CECILIA BEGG, SAMUEL MCKAY, JOHN CUTFEET, EVELYN QUEQUISH, DARRYL SAINNAWAP, ENUS MCKAY, ENO CHAPMAN, and RANDY NANOKEESIC,<br>Plaintiffs by Counterclaim | *Bryce Edwards* and *Kate Kempton*, for the Plaintiffs by Counterclaim other than Jane Doe, John Doe and Persons Unknown |
| **- and -** | |
| PLATINEX INC.<br>Defendant by Counterclaim | *Neal J. Smitheman* and *Tracy A. Pratt*, for the Defendant by Counterclaim |
| **- and -** | |
| HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO,<br>Third Party | *Owen Young* and *Ria Tzimas* for the Third Party |
| | **HEARD:** April 2, 3 & 4, 2007 |

**Mr. Justice G. P. Smith**

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**Reasons on Motion**

*Platinex v. Kitchenuhmaykoosib Inninuwug First Nation & A.G. Ontario* *Reasons On Motion*
*Court File No: CV-06-0271 & CV-06-0271A* *Mr. Justice G. P. Smith*

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**Overview**

[1] The motion before the court is for an interlocutory injunction to prevent a mineral exploration company from carrying out test drilling on the traditional lands claimed by an Aboriginal First Nation community.

[2] The land is encompassed by the James Bay Treaty (Treaty 9), of which the First Nation is a signatory. The terms of Treaty 9 surrendered the land to the Provincial Crown in return for the grant of reserve land.

[3] At issue before me are the competing interests and rights of the parties. On a larger scale, the broader question is the scope of the duties and rights of the Crown, third parties, and First Nations communities when development is proposed on traditional Aboriginal land that has been surrendered pursuant to the terms of a treaty.

[4] Viewed from an historical perspective this case is yet another battle in a larger ongoing conflict between two very different cultures. On one side of the battlefield is the non-aboriginal desire to develop the rich resources of the land. On the other side is the Aboriginal perspective that views the land as a sacred legacy given to them by the Creator to manage and protect.

**The Nature of the Proceedings to Date**



[5] On July 28, 2006, I made the following order:

> [138] Subject to the conditions listed below, an interim, interim order shall issue enjoining Platinex and its officers, directors, employees, agents and contractors from engaging in the two-phase exploration program as described in the affidavit of James Trusler and any other activities related thereto on the Big Trout Lake Property for a period of five months from today's date after which time the parties shall re-attend before me to discuss the continuation of this order and the issue of costs.
>
> 139] The grant of this injunction is conditional upon:
>
> > 1. KI forthwith releasing 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 failing which counsel may speak to me concerning the issue of damages;
> >
> > 2. KI immediately shall set up a consultation 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 Treaty Land Entitlement Claim.

[6] On January 26 of this year, a motion was heard to determine what evidence could be heard when deciding whether to make the injunction permanent until trial. At paragraphs 29 and 30 of my Reasons on that motion, released February 2, 2007, I commented:

> [29] The wording of my July order was purposely designed to afford appropriate protection at the time that the order was issued. As mentioned above, given the fluid nature of most situations, the degree of remedial protection and the predictability of future harm

> may vary depending upon the point in time that the case comes before the court. In other words there are times when the court must adopt a flexible and perhaps a creative approach commensurate with the situation at hand.
>
> [30] To put this concept in the language of injuctory relief, the balancing of the risks to the applicant and respondent and the assessment of irreparable harm and the balance of convenience may vary depending upon the time at which the matter is heard.



[7] That order also extended the interim, interim injunction until this hearing, and granted the provincial Crown (the "**Crown**"), as represented by the Minister of Northern Development and Mines ("**MNDM"**), leave to intervene in the April proceedings.

**The Factual Background – The Parties**

[8] The Plaintiff, Platinex Inc. ("**Platinex**"), is a junior exploration company that was incorporated pursuant to the laws of Ontario on August 12, 1998. It became a publicly traded company on the TSX Venture Exchange in November 2005. Platinex is in the business of exploratory drilling, and is not involved in the mining or development of property.

[9] The Defendant, Kitchenuhmaykoosib Inninuwug ("**KI**"), formerly known as Big Trout Lake First Nation, is an indigenous Ojibway/Cree First Nation, and is a Band under the *Indian Act*[1]. KI occupies a reserve on Big Trout Lake, approximately 580 kilometres north of Thunder Bay, Ontario. KI is a signatory to the 1929 adhesion to Treaty 9, the James Bay Treaty.

[10] The Independent First Nations Alliance ("**IFNA**") is an organization of four First Nations in northwestern Ontario (Kitchenuhmaykoosib Inninuwug, Muskrat Dam, Pikangikum, and Whitesand First Nations), whose members have treaty rights under the 1929-30 Adhesion to the

James Bay Treaty/Treaty No. 9, Treaty No. 5, and the Lake Superior Robinson-Superior Treaty of 1850. IFNA was added as an intervenor in the motion before the court by order dated March 2, 2007.

[11] Platinex holds as its main assets an unencumbered 100% interest in a contiguous group of 221 unpatented mining claims, and an unencumbered 100% interest in 81 mining leases, covering approximately 12,088 acres of the Nemeigusabins Lake arm of Big Trout Lake.

[12] Mineral exploration in the vicinity of Big Trout Lake dates back to 1969, when the Canadian Nickel Company ("**CANICO**") conducted an airborne survey and acquired claims in the area. During the 1970s, two other companies, International Minerals and Chemical Corporation and Canadian Occidental Petroleum Limited, were active in the vicinity of Big Trout Lake.

[13] Platinex acquired the 81 leases adjoining its claims from CANICO on February 10, 2006. Seventy-one of the claims were due expire on July 4, 2006, unless Platinex conducted certain work on these claims or unless MNDM provided an extension.

[14] A number of extensions have been granted to Platinex by the Ontario government ("**Ontario**") since 1999. In February 1999, MNDM granted an Exclusion of Time Order on all of the 221 Platinex claims, providing relief from the requirement to submit assessment work and allowing the claims to remain in good standing until July 17, 2000. On March 30, 2001, a second Exclusion of Time Order was granted by MNDM. On July 11, 2001, MNDM granted a

[1] *Indian Act*, R.S.C. 1985, c. I-5

third Exclusion of Time Order, which kept 63 of the claims in good standing until July 17, 2002. A fourth Exclusion of Time Order was granted on July 17, 2003.

[15] On June 28, 2006, the Mining and Land Commissioner issued a certificate of pending litigation to Platinex. This effectively preserves Platinex's claims in good standing with MNDM for the duration of this litigation, without requiring the company to perform any exploration work on them.

[16] The Big Trout Lake Property ("**the Property**"), which is the subject of this motion, is located in Northwestern Ontario, approximately 230 kilometres north of Pickle Lake, Ontario and 580 kilometres north of the City of Thunder Bay.

[17] The Property covers 19 square kilometres, or 12,088 acres, on the Nemeigusabins arm of Big Trout Lake. It is not situated on the KI reserve, but rather on KI's traditional lands, which encompass approximately 23,000 square kilometres. The KI reserve is located across Big Trout Lake. Accessible only by air in the summer and winter road in the winter, the Property is a vast tract of undeveloped boreal forest.

[18] Over the past 7 years, Platinex has engaged in ongoing discussions with members of KI respecting KI's claims on the Property, and Platinex's intended exploration and development of those claims.

[19] Platinex maintains that it must begin the drilling of exploratory holes on the property no later than July of this year, failing which it will become bankrupt. It plans to drill 24 to 80 holes in two phases, at six target sites. No precise location has yet been selected for the holes; site

selection will be determined by a variety of factors, including magnometer survey interpretation, ground conditions, weather, and sensitivity to KI's cultural and community issues.

[20] The company originally began its Phase One exploratory drilling in the winter of 2005/2006. It abandoned the drilling site, prior to undertaking any drilling, in February 2006, after being confronted by representatives of KI who were protesting against any work being performed on the Property.

[21] As early as 1999, Platinex knew that KI intended to file a treaty land entitlement claim ("**TLE**"). Platinex was also advised in February 2001 that KI was unilaterally imposing a moratorium on all development until proper consultation had taken place.

[22] KI had initially been in favour of Platinex's plans but, after community discussion, declared the moratorium on further development while negotiations and consultation took place.

[23] On February 7, 2001, Chief Donny Morris wrote to Simon Baker, one of the principals of Platinex, stating:

> This is to advise you that the Kichenuhmaykoosib Inninuwug are suspending all mineral activities in and around its traditional territories which they have occupied and used since time immemorial. This moratorium is effective as of today's date of February 07, 2001. The reasons for this moratorium are that the fact that Kitchenuhmaykoosib Inninuwug has submitted a Treaty Land Entitlement claim to the Federal Government for consideration in July 2000 and that the area of land under which your company has been conducting mineral exploration activities is covered by the land claim.

[24] Exhibit G to the affidavit of Chief Donny Morris is a copy of the Resource Development Protocol developed by KI. That protocol states that its purpose is "to describe the process for consultation with Kitchenuhmaykoosib Inninuwug **prior to** and during development activities on KI lands." (emphasis added)

[25] As indicated in its development protocol, KI is not opposed to development on its traditional lands; however, KI wishes to be a full partner in any development, and to be fully consulted at all times. The acceptance of any proposal for development will depend on its merits, and whether the development respects KI's special connection to the land and its duty, under its own law, to protect the land.

[26] The KI Development Protocol sets out the following steps required for an agreement to allow exploration to go forward:

(1) initial discussion with Chief and Council;

(2) discussions with the community;

(3) consultation with individuals affected by the development;

(4) follow-up discussions with the community;

(5) referendum; and

(6) approval in writing.

[27] Any decision to allow development on KI traditional lands is a community-based decision, and one that cannot be made solely by the Chief or Band Council.

[28] Platinex had several meetings with members of KI, including the Chief, the Band Council, and certain individuals. However, the KI consultation protocol was not followed, nor was a development agreement signed. Chief Morris states at paragraph 32 of his affidavit that

> [a]t several times in 2004 and 2005, I refused to sign a memorandum of understanding, agreement, or letter of support for Platinex's exploration activities, because the community process was not complete, and because the ongoing consensus was that exploratory drilling should not be permitted.

[29] In January 2006, Platinex asked for a meeting with the entire community. KI agreed to the meeting, to allow Platinex to voice its position, and to allow Platinex to hear the concerns of KI band members. After receiving the agenda for the meeting, it became clear to Platinex that it would not be able to change KI's decision regarding the moratorium, and Platinex cancelled the meeting.

[30] On or about February 16, 2006, KI became aware that Platinex had sent a drilling team to its camp on Nemeigusabins Lake, and that drilling equipment was to be transported onto the property by winter road.

[31] On February 19, 2006, Chief Donny Morris and Deputy Chief Jack McKay attended the Platinex camp to deliver a letter to the drilling crew. In the letter, KI demanded that Platinex cease all exploratory activities.

[32] In response to a number of radio announcements made by Chief Morris and others, several members of KI traveled to Platinex's drilling camp to protest against further work being done. There is a significant difference in opinion as to what happened next.

[33] Platinex and its representatives state that Chief Morris confronted them in a hostile and threatening fashion, stating that the road was blockaded. They further state that the runway for the airstrip was purposely ploughed by members of KI, and that they were given the impression that the drilling team would have to leave within hours, before the landing strip was completely ploughed under, since that would prevent anyone from leaving the area by plane.

[34] Platinex maintains that it was clear to the members of the drilling crew that their safety was in jeopardy, and that the only viable option was for them to leave as quickly as possible. On February 25 and 26, 2006, the entire drilling crew flew out of the area, abandoning the drilling site and leaving much of their equipment behind.

[35] KI denies that there was any threat of harm to the drilling crew, and asserts that the protest was conducted in a peaceful fashion.

[36] Platinex brought this action for damages and injunctive relief. KI issued a counterclaim seeking its own injunction, and brought a third party claim against Ontario, alleging that the provincial *Mining Act*[2] is unconstitutional.

**The Motion Brought by Platinex**

[37] Platinex brought a motion for an order to, *inter alia*, strike paragraph 3 and exhibit 3 of the affidavit of Phillip Rouse, sworn March 26, 2007. Philip Rouse is a law clerk employed by Bryce Edwards, one of KI's legal counsel.

[2] *Mining Act*, R.S.O. 1990, c. M.14

[38] The grounds for that motion were that the affidavit was served in violation of Rule 39 in that it was served after the completion of examinations and without leave of the court and because it offends Rule 4.02 of the Rules of Professional Conduct. Paragraph 3 of the affidavit attaches two documents as exhibit 3. The first document was an email from Bryce Edwards documenting a telephone conversation with a representative of the Specific Claims Branch of the Department of Indian and Northern Affairs. The second document is a fax to Mr. Edwards from Kate Duncan, Indian and Northern Affairs Canada dated March 23, 2007 attaching a report prepared for the Specific Claims Branch.

[39] Having reviewed Mr. Rouses's affidavit, I agree with the position taken by Platinex that paragraph 3 and the attached exhibits offend the general rule against hearsay evidence.

[40] It would be improper for Mr. Edwards to act as counsel and to rely upon his own affidavit. Likewise, it is improper for Mr. Edwards to communicate that evidence to his law clerk and then rely upon that law clerk's affidavit. Essentially, this would be attempting to do indirectly that which he is prohibited from doing directly.

[41] The motion to strike paragraph 3 and exhibit 3 from Philip Rouse's affidavit is granted.

**KI's Treaty Land Entitlement Claim and Treaty 9**

[42] Understanding KI's position requires an understanding of its TLE claim and of Treaty 9.

[43] The James Bay Treaty, also known as Treaty 9, was negotiated and signed in 1905 and 1906. KI's predecessor, the Trout Lake Band, adhered to the treaty on July 5, 1929. The land covered by the Treaty includes most of northern Ontario north of the height of land; to James and

Hudson Bays in the north; to the boundary of Quebec to the east; and is bordered on the west by Manitoba.

[44] The Treaty provides for the surrender to the Crown of Aboriginal title to approximately 90,000 square miles of land, in exchange for certain reserve lands. The surrender of the land extinguished "all rights, titles and privileges", so that KI's rights became treaty rights, and the land became provincial Crown land.

[45] The size of the KI reserve was measured to be 85 square miles, which was be based upon a formula of one square mile for a family of five or, for smaller families, 128 acres per person. KI asserts that the area of their reserve was improperly calculated, and that it is entitled to approximately 197 additional square miles.

[46] Treaty 9 provides, in part, as follows:

> And whereas, the said commissioners have proceeded to negotiate a treaty with the Ojibeway, Cree and other Indians, inhabiting the district hereinafter defined and described, and the same has been agreed upon, and concluded by the respective bands at the dates mentioned hereunder, the said Indians do hereby cede, release, surrender and yield up to the Government of the Dominion of Canada, for his Majesty the King and His successors for ever, all their rights titles and privileges whatsoever, to the lands included within the following limits, that is to say: That portion or tract of land lying and being in the province of Ontario, bounded on the south by the height of land and the northern boundaries of the territory ceded by the Robinson-Huron Treaty of 1850, and bounded on the east and north by the boundaries of the said province of Ontario as defined by law, and on the west by a part of the eastern boundary of the territory ceded by the Northwest Angle Treaty No. 3; the said land containing an area of ninety thousand square miles, more or less. And also, the said Indian rights, titles and privileges whatsoever to all other lands wherever situated in

> Ontario, Quebec, Manitoba, the District of Keewatin, or in any other portion of the Dominion of Canada.
>
> And His Majesty the King hereby agrees and undertakes to lay aside reserves for each band, the same not to exceed in all one square mile for each family of five, or in that proportion for larger and smaller families…

[47] In return for a surrender of all rights and title to the land by the Band, the Crown promised to lay aside reserves. Any unfulfilled promise for land can give rise to a treaty land entitlement claim, or TLE.

[48] Treaty 9 also promises that the signatories have the right to pursue traditional harvesting rights throughout the surrendered tract of land, including hunting, fishing, and trapping. This right is "subject to such regulations as may from time to time be made by the government of the country, acting under the authority of His Majesty", and subject to land that "may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes."

[49] As early as January 13, 1999, KI had indicated its intention to proceed with its TLE claim to both Platinex and the federal and Ontario governments. The claim is based upon the assertion that it was entitled to a reserve based upon its current population, rather than on the population of its predecessor band in 1929. If successful, this will add approximately 197 square miles to KI's reserve.

[50] In June 1967, the Trout Lake Band passed a resolution that divided it into five separate bands. That decision was later amended to create 8 bands, of which KI is one.

[51] Both the federal and provincial Crown initially took the position that the entire Trout Lake Band, including the 8 bands more recently created, was entitled to a total land grant of 129

square miles. Notwithstanding this position, both the federal and provincial Crown agreed to grant a further 204.87 square miles for the reserves of the 8 new communities, resulting in a total land grant of 330.87 square miles.

[52] By a 1975 Order-in-Council, Ontario formally transferred these reserve lands to the Trout Lake Band. In 1976, the government of Canada issued an Order-in-Council setting aside those same lands as reserves for the band. Both Orders-in-Council specified that two distinct types of land were being transferred: first, 126 square miles was transferred specifically as entitlement land pursuant to Treaty 9; and second, approximately 204.8 square miles was transferred as land in excess of any treaty land entitlement, to meet the economic and social needs of the band. Ontario concedes that KI has an arguable case that the original Trout Lake Band may have had an entitlement to additional reserve land of between 3.4 and 7.2 square miles over and above the 126 square miles originally allotted to it. This possible entitlement, it submits, has already been addressed by the grant of an additional 204.87 square miles of land.

[53] Ontario's position is that the extra 204 square miles was a gift and, although it was not to be considered as treaty entitlement land, it satisfies any outstanding treaty land entitlement. As a result, Ontario views KI's TLE claim as being very weak or non-existent.

[54] KI has expressed outrage over this position, viewing it as sharp dealing and an outrageous breach of the integrity, promises, and honour of the Crown. Without honour it argues, there is no possibility of achieving reconciliation through consultation in the absence of good faith. In short, KI asserts that Ontario's rejection of its TLE is proof that an injunction is necessary since Ontario cannot protect that which it denies exists.

[55] KI formally filed its TLE claim in May 2000. By letter dated March 15, 2007, the Ontario Secretariat for Aboriginal Affairs ("**OSAA**") declined the claim, on the basis that KI's entitlement to land under Treaty 9 had been satisfied. The federal government has not yet taken any position on the claim, and to date KI has not commenced an application for judicial review of the OSAA decision.

[56] KI's claim is not to any specific piece of land, but rather to an area of land to be agreed upon in consultation between KI and both the provincial and federal governments.

[57] Although these additional lands have not yet been specifically demarcated, KI asserts that they would necessarily be within KI's traditional territory.

[58] The proposed exploration activities by Platinex are within KI's traditional territory, and therefore potentially within the scope of the land claim.

[59] KI argues that its land claim is not in issue in the motion before the court, but asks for injunctive relief to protect the basis of the claim. KI's concern is that, if exploration is allowed to proceed, it could have a negative impact on KI's claim by removing that area of land being developed from consideration.

**The *Mining Act* and the Mining Sequence**

[60] The *Mining Act* provides prospectors with the right to enter upon Crown lands to prospect for minerals, and to stake and work claims, without first having to purchase the land.

[61] Staking a claim is an initial step that takes place before the exploratory stage, and typically includes the staking process as well as walking the land and gathering rock and soil samples. The holder of a staked claim has the exclusive right to explore for minerals and the right to lease the claim, but no rights or interest in the claim or any right to remove minerals.

[62] Section 50 of the *Mining Act* requires that a claim holder perform assessment work in the amount of $400.00 per year to maintain the claim in good standing, failing which the claim is forfeited to the Crown.

[63] Land that is subject to a mining claim remains unpatented Crown land. All other uses commonly associated with Crown land continue, including any traditional harvesting rights described in Treaty 9.

[64] Mineral production cannot take place on a mining claim. For this to occur, a mining lease must be obtained from the Crown. This is granted upon fulfillment of the requirements set out in the *Mining Act*.

[65] The process of searching for a mine and bringing it to production is referred to as the "mining sequence", and may unfold over a period of several years. The sequence may include the following stages:

- Regional survey
- Land acquisition
- Early exploration
- Intermediate exploration
- Advanced exploration

- Development/production
- Closure/rehabilitation

[66] Currently, MNDM views Platinex as being in the early to intermediate stages of exploration. KI points to the lack of Crown oversight and protection in the early stages of the mining sequence and a seemingly uninterested view of any harm that may occur to Aboriginal interests.

[67] KI's third party claim challenges the constitutionality of the *Mining Act*, stating that, without consultation with the particular affected Aboriginal party or knowing what is happening on the ground with exploration work, the Crown does not and cannot comprehend the nature and extent of the impact of exploration activities on Aboriginal land, rights, ways of life, and culture.

**New Evidence since the June 2006 Hearing**

[68] In addition to the evidence that was available in June 2006, the evidence before the court includes new evidence, such as:

- the evidence of the consultation process;
- the affidavit of Roger Townshend dated along with attached exhibits including the report of Dr. Janet Armstrong;
- the transcript of the cross-examination of Roger Townshend (March 15, 2007);
- the letter dated March 17, 2007 from OSAA to KI Chief Donny Morris rejecting KI's TLE claim;
- the affidavit of Christine Kaszycki, Assistant Deputy Minister, MNDM; and
- the transcript of the examination of Christine Kaszycki (March 16, 2007).

[69] MNDM and IFNA also filed comprehensive motion records and factums, and participated fully in the motion.

**The Duty to Consult**

[70] KI has the right to be consulted when any of its rights protected by s. 35 of the *Constitution Act, 1982*, are likely to be affected by a proposed government action.[3]

[71] The mining claims and leases granted by the Crown to Platinex, and that company's interest in drilling on land within the Treaty 9 boundary, gives rise to a potential adverse impact to KI. It is this potential adverse impact that has triggered the Crown's duty to consult with KI.

[72] 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.

[73] When considering the scope of the duty to consult and the potential impact or harm of an activity on Aboriginal rights, it is important to differentiate between established rights and asserted rights.

[74] In this case, KI's harvesting rights are established by Treaty 9, whereas the TLE claim is an asserted right. Neither gives KI a proprietary interest in the tract of land in question, which is

[3] *Haida Nation v. British Columbia (Minister of Forests)* 2004, 245 D.L.R. (4th) 33 (S.C.C.); *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage*) (2005), 259 D.L.R. (4th) 610 (S.C.C.); *Hiawatha First Nation v. Ontario (Minister of the Environment)*, [2007] O.J. 506 (Div. Ct).

owned by the Crown under s. 109 0f the *Constitution Act*, and which is unencumbered by Aboriginal title.

[75] Both MNDM and Platinex submit that the potential harm to the land, and to KI's treaty harvesting rights, is minimal. The harm is capable of mitigation, especially when balanced against the Crown's right to take up land for mining and other purposes.

[76] Second, they maintain that KI's TLE is weak or non-existent and should not preclude Platinex's exploratory drilling, for a variety of reasons:

(1) it has been rejected by Ontario/OSAA;

(2) the leases and claims in question pre-date the filing of the TLE claim in 2000;

(3) the exploratory drilling is transient, and could not possibly compromise KI's TLE claim;

(4) even if KI is entitled to more reserve land, it has no right to unilaterally select this land, especially land that is subject to pre-existing third party rights; and

(5) in the event that KI is entitled to more land, any such entitlement has already been satisfied.

[77] KI does not agree that the harm proposed by the drilling is minimal, categorizing this position as an assumption unsupported by any evidence. Citing the *Mikisew* case, KI argues that minimal impact can be, and is, very serious from the Aboriginal perspective, especially when it infringes on hunting, fishing, or trapping.

[78] Chief Donny Morris expressed KI's fear of harm regarding its TLE, when he stated that

> [s]hortly after the TLE claim was submitted, KI issued a moratorium on resource development on our traditional land. Until the TLE is settled and our Treaty rights are honoured, we are not willing to have parts of our traditional territory taken off the table by activities that create incompatible interests, such as mineral exploration.[4]



**What Does Consultation Mean?**

[79] *Webster's Dictionary* defines the word 'consult' as "to deliberate, counsel, to have regard to, to ask the advice or opinion of."[5]

[80] *Black's Law Dictionary* defines 'consultation' as "the act of asking the advice or opinion of someone; a meeting in which parties consult or confer; the interactive methods by which states seek to prevent or resolve disputes."[6]

[81] The purpose of consultation is to promote reconciliation. As Lamer J. stated in *Delgamuukw*,

> ultimately, it is through negotiated settlements, with good faith and give on all sides, reinforced by the judgment of this Court, that we will achieve…the basic purpose of s. 35(1) - the reconciliation of the pre-existence of Aboriginal societies with the sovereignty of the Crown.[7]

[82] Consultation does not mean that parties must reach an agreement. They must, however, deal with each other in good faith. This was addressed by the Supreme Court in *Haida*:

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[4] The affidavit of Chief Donny Morris, sworn May 16, 2006, at para. 20
[5] *Webster's Ninth New Collegiate Dictionary*, (Springfield, MA: Merriam–Webster Inc., 1987)
[6] *Black's Law Dictionary, 7th ed.* (St. Paul, MN: West Group, 1999)
[7] *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, at paras. 1123-24

> At all stages, good faith on both sides is required. The common thread on the Crown's part must be "the intention of substantially addressing [aboriginal] concerns" as they are raised (*Delgamuukw*, *supra*, at para. 168), through a meaningful process of consultation. Sharp dealing is not permitted. However, there is no duty to agree; rather, the commitment is to a meaningful process of consultation. As for aboriginal claimants, they must not frustrate the Crown's reasonable good faith attempts, nor should they take unreasonable positions to thwart government from making decisions or acting in cases where, despite meaningful consultation, agreement is not reached: … Mere hard bargaining, however, will not offend an aboriginal people's right to be consulted.
> …
>
> This process does not give aboriginal groups a veto over what can be done with land pending final proof of the claim. The aboriginal "consent" spoken of in *Delgamuukw* is appropriate only in cases of established rights, and then by no means in every case. Rather, what is required is a process of balancing interests, of give and take.[8]

[83] In addition to fostering reconciliation, one of the primary purposes of the consultation process is to facilitate the exchange of information, and to allow each party to acquire a greater and deeper knowledge of the interests and position of the other. As information is shared, it may become apparent that modification of one party's position is appropriate. This has been described in various cases, including by the Supreme Court in *Haida*, as the stage of accommodation:

> When the consultation process suggests amendment of Crown policy, we arrive at the stage of accommodation. Thus the effect of good faith consultation may be to reveal a duty to accommodate. Where a strong *prima facie* case exists for the claim, and the consequences of the government's proposed decision may adversely affect it in a significant way, addressing the aboriginal concerns may require taking steps to avoid irreparable harm or to minimize the effects of infringement, pending final resolution of the underlying claim. …

[8] *Haida Nation, supra* note 4, at paras. 42 and 48

> … The terms "accommodate" and "accommodation" have been defined as to "adapt, harmonize, reconcile" . . . "an adjustment or adaptation to suit a special or different purpose . . . a convenient arrangement; a settlement or compromise": *Concise Oxford Dictionary of Current English* (9th ed. 1995), at p. 9. The accommodation that may result from pre-proof consultation is just this – seeking compromise in an attempt to harmonize conflicting interests and move further down the path of reconciliation. A commitment to the process does not require a duty to agree. But it does require good faith efforts to understand each other's concerns and move to address them.[9]



**The Consultation Process**

[84] In my reasons delivered on February 2, 2007, I stated:

> [33] Consultation is a multi-faceted concept. It serves many purposes including fostering the principle of reconciliation. It also is relevant when a court considers the concepts of irreparable harm and the balance of convenience, two of the essential requirements for the grant of injunctory relief.
>
> [35] In paragraph 91 of my judgment [released July 28, 2006] I wrote:
>
> > [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 consult does not give first Nations a veto-they must also make bona fide efforts to find a resolution to the issues at hand.

[9] *Haida Nation, supra* note 4, at paras. 47 and 49

> [36] In paragraphs 110, 111 and 112 I commented on the relationship between the duty to consult and the balance of convenience test 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 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.
> >
> > [112] Balancing the respective positions of the parties, I find that the balance of convenience favours the granting of an injunction to KI.
>
> [37] Clearly at the time that the initial motion was heard (June 22 and 23, 2006) consultation with the Crown was minimal or non-existent at best. Platinex had unilaterally decided to terminate discussion and to move in its drilling crew.
>
> [38] In view of my direction that consultation take place the question arises as to whether the risk of harm and balance of convenience that existed in June 2006 has changed. An applicant may be refused an interlocutory injunction if there are reasonable steps that could be taken to avoid the harm or to ensure that the harm is not irreparable. *Syntex Inc. v. Novopharm Ltd.* (1991), 36 C.P.R. (3d) 129 (F.C.A.); leave to appeal to the S.C.C. refused 39 C.P.R.

[85] Since July 28, 2006, there have been ongoing discussions between KI and representatives of Platinex and the Crown. I do not propose to recite in detail the extent of the consultation process, save and except for a general review of the process and of the positions of the respective parties.

[86] In my reasons of July 28, 2006, I commented at para. 139 on the failure of both the Crown and Platinex to consult with KI, and ordered KI to "immediately set up a consultation

committee charged with the responsibility of meeting with representatives of Platinex and the Provincial Crown".



[87] Consultations have taken place since July and, although not successful in reaching an agreement, have been beneficial in identifying KI's fears and concerns, and in exchanging information.

[88] The evidentiary record indicates that all parties have attempted to understand and address each other's concerns, and that significant accommodations have been made.

[89] Both MNDM and Platinex take the position that KI has unreasonably and effectively stalled the consultation process. In support of their position, they state that by the end of March, 2007, KI's consultation committee had been made available to meet only once with the Crown and Platinex. That single meeting was in September 2006, at Big Trout Lake, for the purpose of discussing the protocol and process. Further, they submit that

> in the eight months since the court granted KI a conditional interim, interim injunction, the committee has not met once with the Crown and Platinex to consult on matters of substance with respect to the potential impact of Platinex's proposed drilling campaign on the KI community and its s.35 rights, or to attempt to … [develop] an agreement to allow Platinex to conduct its two-phase drilling project at Big Trout Lake.

[90] Platinex summarized the difficulties that it has experienced in attempting to consult with KI in paragraph 49 of its factum:

(a) funding required by KI to engage in substantive consultations has not been provided;

(b) the scope of information sharing by Ontario has been limited;

(c) the appropriate signatories to the protocol are unclear;

(d) the scope of subsequent strategic land use consultations (separate and apart from the Platinex drill program) is undefined; and

(e) the linking of a KI community health study to the commencement of the Platinex project has resulted in delay.

[91] Platinex also alleges that part of the problem has been KI's refusal to allow Platinex and/or MNDM to meet directly with the KI community, and the insistence that all discussion take place with KI's litigation counsel. Another issue has been KI's insistence that a consultation protocol be executed by Chief Morris, Minister Bartolucci, Minister Ramsey, and James Trusler, before substantive discussions take place.

[92] According to Platinex, it was willing on October 5, 2006, to proceed with draft #6 or #7 of the protocol, and it also agreed to execute draft #10 on October 31, 2006.

[93] KI maintains that neither MNDM nor Platinex has any serious intent of effecting reconciliation with KI in respect of the Platinex project or otherwise, and that MNDM and Platinex believe that mining interests trump Aboriginal and treaty rights.

[94] Further, KI submits that MNDM and Platinex's pre-determined position that KI's TLE claim is without merit, and that mining interests take up or remove such lands from selection by KI if the TLE is ultimately accepted, necessitate an injunction to protect KI's land claim and treaty rights until trial, as opposed to further consultation.

[95] KI also argues that to require it to agree, at the outset, to allow the drilling project to proceed effectively means that the Aboriginal party is disentitled in all such cases to seek and

obtain an injunction, which is contrary to the finding in the *Haida* case that Aboriginal parties are entitled to injunctive relief.

[96] KI's consultation needs are summarized in paragraph 157 of their factum, as follows:

- the need for consultation protocol;
- the need for sufficient time;
- the need for funding;
- the need for land use study;
- the desire for a subsequent strategic-planning level consultations (not as part of the Platinex consultations); and
- the need for more information and analysis now as a "catch-up" (to understand what has already happened to the land, due to failure of Crown to consult in the past).

[97] With respect to the funding issue, KI referred to the PDAC e3 standards, which Platinex had agreed to uphold, which state that "…you , as the proponent, will often be required to supply financial support to the First Nations with which you are in dialogue in order to allow them to develop comfort with the engagement process". Further, KI argues that there was no meaningful consultation with the Crown, since the Supreme Court's direction in *R. v. Sparrow* requires funding to allow an Aboriginal community to be engage in a fair and meaningful way in the consultation process. KI, like many Aboriginal communities, is impoverished and cannot afford to hire the expertise that is needed to participate fully in the process.

[98] A fundamental concern of KI's is the question of whether the duty to consult consists simply of the requirement of intent, with no requirement to effect the intent. If this is so, it argues that the concept of the honour of the Crown is meaningless, and Aboriginal rights are only afforded second class status and treatment.

**The Issue of the Scope of the Consultation Process**

[99] The scope of the duty to consult varies with the circumstances of each case, the strength of the claim, the nature of the right that is affected, and the anticipated degree of impact of the activity.

[100] Both MNDM and Platinex submit that the Crown's duty to consult with respect to KI's established or asserted rights is at the lower end of the spectrum described in the *Haida* and *Mikisew* cases.

[101] The scope and content of the duty to consult may also change over time, as the potential impact of the activity evolves and changes. The shifting nature of this duty was addressed in *Haida* as follows:

> In this respect, the concept of a spectrum may be helpful, not to suggest watertight legal compartments but rather to indicate what the honour of the Crown may require in particular circumstances. At one end of the spectrum lie cases where the claim to title is weak, the Aboriginal right limited, or the potential for infringement minor. In such cases, the only duty on the Crown may be to give notice, disclose information, and discuss any issues raised in response to the notice …
>
> At the other end of the spectrum lie cases where a strong *prima facie* case for the claim is established, the right and potential infringement is of high significance to the Aboriginal peoples, and

> the risk of non-compensable damage is high. In such cases deep consultation, aimed at finding a satisfactory interim solution, may be required. While precise requirements will vary with the circumstances, the consultation required at this stage may entail the opportunity to make submissions for consideration, formal participation in the decision-making process, and provision of written reasons to show that Aboriginal concerns were considered and to reveal the impact they had on the decision. This list is neither exhaustive, nor mandatory for every case. …
>
> Between these two extremes of the spectrum just described, will lie other situations. Every case must be approached individually. Each must also be approached flexibly, since the level of consultation required may change as the process goes on and new information comes to light. The controlling question in all situations is what is required to maintain the honour of the Crown and to effect reconciliation between the Crown and the Aboriginal peoples with respect to the interests at stake. Pending settlement, the Crown is bound by its honour to balance societal and Aboriginal interests in making decisions that may affect Aboriginal claims. The Crown may be required to make decisions in the face of disagreement as to the adequacy of its response to Aboriginal concerns. Balance and compromise will then be necessary.[10]

[102] Whenever the rights of parties and the nature of the relationship are contained and described in a treaty, the wording of the treaty is relevant to determining the scope of the duty to consult. 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. The treaty foresaw that the Crown might take up land at some point of time in the future, and that this would affect Aboriginal harvesting rights.

[103] The Supreme Court has recognized in *Mikisew* that the duty to consult will vary depending upon the extent of the impact of the taking up of land on traditional harvesting rights:

[10] *Haida Nation, supra* note 4, at paras. 43,44, and 45

> The Crown has a treaty right to "take up" surrendered lands for regional transportation purposes, but the Crown is nevertheless under an obligation to inform itself of the impact its project will have on the exercise by the Mikisew of their hunting and trapping rights, and to communicate its findings to the Mikisew. The Crown must then attempt to deal with the Mikisew "in good faith, and with the intention of substantially addressing" Mikisew concerns (Delgamuukw, at para. 168). This does not mean that whenever a government proposes to do anything in the Treaty 8 surrendered lands it must consult with all signatory First Nations, no matter how remote or unsubstantial the impact. The duty to consult is, as stated in *Haida Nation*, triggered at a low threshold, but adverse impact is a matter of degree, as is the extent of the Crown's duty. Here the impacts were clear, established and demonstrably adverse to the continued exercise of the Mikisew hunting and trapping rights over the lands in question.[11]

[104] The focus of the consultation in the case before me appears to have been on process rather than on substantive issues, with the major difference between the positions of the parties being one of scope.

[105] KI views exploratory drilling as the thin edge of the wedge that can only lead to further activity on the land that is increasingly more invasive. This difference of perspective was clearly articulated during the cross-examination of MNDM Assistant Deputy Minister Christine Kaszycki, when she said:

> I think the challenge with respect to the development of the [consultation] protocol has centred principally on the issue of scope in the agreement around what should be a reasonable scope of consultations associated with the order as directed by Justice Smith on July 28th. Ontario has taken a position that we would

[11] *Mikisew Cree First Nation, supra* note 4, at para. 55

> undertake discussions and consultation on issues related to mineral exploration and mine development, the spectrum of activities from a broader strategic perspective in addition to those which would focus principally on the Platinex undertaking. And the community has positioned themselves to request broader base strategic land use planning in general and has not supported the narrowing of scope to mineral exploration and mine development.
>
> So the challenges there are really with respect to scope. You know, at one end of the spectrum being focused specifically on the Platinex activities. At the other end of the spectrum, being focused on broad base land use planning. And Ontario, I guess, in the middle being focused on willing to expand scope in future discussions but limiting it and narrowing it to mineral exploration and mine development.
>
> And associated with the scope issue are the issues of funding, et cetera. I mean, they are all inter-related to one another. So I think that has principally been the challenge, just defining what this consultation reasonably should be about given the nature of the Platinex activity and also the view of Ontario that we are willing to enter into discussions with the community on a broader base of activities related to mineral exploration and mine development.[12]

[106] KI submits that Platinex and MNDM's view of the scope of consultations is directly related to their view of the impact of development as being minimal and inconsequential. That perspective, KI argues, is narrow and insensitive, since even a "minimal impact can be very serious from the Aboriginal perspective, if it includes the claimants' hunting ground or trap line."[13]

[107] Platinex and MNDM believe that consultations have stalled because of KI's unrealistic view of the scope of the duty, and its attempt to expand this duty well beyond the boundaries that have to date been recognized in Canadian law. This position, they argue,

translates into a veto of any activities on Crown land whenever Aboriginal consent is not obtained.



**The Principles of Injunctive Relief**

[108] Rule 40 of the *Rules of Civil Procedure*[14] provides:

> 40.01 An interlocutory injunction or mandatory order under section 101 or 102 of the *Courts of Justice Act* may be obtained on motion to a judge by a party to a pending or intended proceeding. R.R.O. 1990, Reg. 194, r. 40.01.
>
> 40.02 (1) An interlocutory injunction or mandatory order may be granted on motion without notice for a period not exceeding ten days. R.R.O. 1990, Reg. 194, r. 40.02 (1).
>
> (2) Where an interlocutory injunction or mandatory order is granted on a motion without notice, a motion to extend the injunction or mandatory order may be made only on notice to every party affected by the order, unless the judge is satisfied that because a party has been evading service or because there are other exceptional circumstances, the injunction or mandatory order ought to be extended without notice to the party. R.R.O. 1990, Reg. 194, r. 40.02 (2).
>
> (3) An extension may be granted on a motion without notice for a further period not exceeding ten days. R.R.O. 1990, Reg. 194, r. 40.02 (3).
>
> (4) Subrules (1) to (3) do not apply to a motion for an injunction in a labour dispute under section 102 of the *Courts of Justice Act*. R.R.O. 1990, Reg. 194, r. 40.02 (4).
>
> 40.03 On a motion for an interlocutory injunction or mandatory order, the moving party shall, unless the court orders otherwise, undertake to abide by any order concerning damages that the court may make if it ultimately appears that the granting of the order has

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[12] Question 779 from the transcript of the cross-examination of Christine Kaszycki held March 19, 2007.
[13] *Mikisew Cree First Nation*, *supra* note 4, at para. 47
[14] *Rules of Civil Procedure*, R.R.O. 1990, Reg. 1994

> caused damage to the responding party for which the moving party ought to compensate the responding party. R.R.O. 1990, Reg. 194, r. 40.03.

[109] The principles governing the grant of an interlocutory injunction are well established. An applicant must meet three tests:

(i) the applicant must show that the claim presents a serious question to be tried as to the existence of the right alleged and a breach thereof, actual or reasonably apprehended;

(ii) the applicant must establish that without an injunction, irreparable harm will occur; and

(iii) the balance of convenience must favour the grant of the injunction.[15]

[110] All three components of the test must be proven to qualify for injunctive relief.

[111] With respect to the first requirement, there is no issue that there is a serious question to be tried. This case has wide-ranging implications on any future development on First Nations traditional land.

[112] The issue of irreparable harm is the central issue in this case, and for that reason I will address the evidence as it relates to this issue first.

[113] The assessment of the issue of whether irreparable harm will occur, and the balance of convenience between the parties, must be conducted in relation to what right or interest it is entitled to protection. It is trite to observe that, for a court to order injunctive relief, the applicant must demonstrate that it has a recognizable legal right requiring protection.

**Irreparable Harm**

[114] In paragraph 9 of its factum, KI summarizes its argument that it will suffer irreparable harm to its land and to its TLE claim:

> **Irreparable Harm – Connection to Lands:** No evidence on the record now challenges the evidence of irreparable harm to KI's connection to the land. New evidence further supports evidence of risks to KI in this way. Thus, the finding of this honourable Court of July 28, 2006 as to this type of irreparable harm must stand.
>
> **Irreparable Harm – TLE Claim:** The evidence supports the strength and validity of KI's TLE claim. Regardless, Ontario has now officially stated that it does not accept KI's TLE claim, based on an unsupportable proposition: that land Ontario officially insisted in the 1970s was *not* given to fulfil the TLE, nonetheless has fulfilled KI's TLE entitlement. Taken seriously, Ontario's argument means that Ontario's words, enshrined in an Order in Council, have no meaning. This is a dishonourable result; it has the appearance of sharp dealing. Given the patently unreasonable nature of Ontario's decision, KI intends to make further submissions to Ontario and take such further steps as are necessary. The TLE is still a live issue, and drilling activity by Platinex will result in further legal and practical impediments to KI's ability to select TLE lands. Thus the finding on July 28, 2006 as to this type of irreparable harm is further supported, because the harm is worse than originally thought. Accordingly, the finding of July 28, 2006 must stand.

[115] The new evidence that has been adduced since June 2006 has altered my finding of irreparable harm as it relates to both KI's TLE and its connection to the land at this point in time.

**The Evidence of Harm to KI's Connection to the Land**

[15] *RJR MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311

[116] KI's treaty rights are enshrined in Treaty 9, and are protected by Section 35 of the *Constitution Act, 1982*. These rights include traditional harvesting rights (hunting, fishing and trapping), subject to the rights of the Crown, which are also described in the treaty and which include the right to take up land for mining and other purposes.

[117] The evidence presented to this court in June 2006, and also in April 2007, included affidavits from a number of KI band members, describing the impact that the drilling activity proposed by Platinex would have on their use of and connection to the land.

[118] In paragraphs 79 and 80 of my Reasons of July 28, 2006, I commented on the special relationship that KI had with the land:

> [79] Irreparable harm may be caused to KI not only because it may lose a valuable tract of land in the resolution of its TLE Claim, but also, and more importantly, because it may lose land that is important from a cultural and spiritual perspective. No award of damages could possibly compensate KI for this loss.
>
> [80] It is critical to consider the nature of the potential loss from an aboriginal perspective. From that perspective, the relationship that aboriginal peoples have with the land cannot be understated. The land is the very essence of their being. It is their very heart and soul. No amount of money can compensate for its loss. Aboriginal identity, spirituality, laws, traditions, culture, and rights are connected to and arise from this relationship to the land. This is a perspective that is foreign to and often difficult to understand from a non-Aboriginal viewpoint.

[119] In 1983, as part of a self-government initiative, the Big Trout Lake First Nation released a report entitled "Keeping our Land in the Way That Has Been Handed On to Us From Our Ancestors". Part of that report described the Aboriginal view of their relationship to the land.

1. Natural resources – The concept of natural resources is foreign to the cultural world view of the Big Trout Lake First Nation. In the non-aboriginal world view of the governments in Ottawa and Toronto, natural resources defines a fundamental division or opposition between people and land.

   In this non-aboriginal world view "people" and "natural resources" are conceptually set against each other.

   This speaks to the deepest aspects of the relationship between non-aboriginal society and the land with everything that the Creator has placed in it. This relationship is one of estrangement.

   For our people of the Big Trout Lake First Nation, the land and all that the Creator has placed in it, is regarded differently. The non-aboriginal society refers to "natural resources". But for our people, we approach what non-aboriginal people call natura resources firstly in relation to our identity with our land. The Creator made the land, and we were placed in it to be a part of it together with all things that constitute the land, we are a part of this creation. We have the responsibility of protection of the land. Therefore, in self-government negotiations concerning the land we wish firstly, that negotiations account for a holistic concept of lands to refer to the land. Then we can deal with what constitutes the land; trees, fish, animals, birds, plants etc. We must name what we are talking about when it involves the land. The white man must learn to begin this. The term natural resources implies that natural resources are objects. They are spiritually disconnected from human beings.

   For the people of the Big Trout Lake First Nation what non-aboriginal society refers to as natural resources are the centre of the expression of the created order with which our people are in intimate relationship. They are a part of the land (aski) of which we are also a part.

   These relationships are only possible within a community-based approach. The emphasis of the world view of our people at the Big Trout Lake First Nation is to maintain our special bonds with our land – which is the ground, the animals, the water, the fish, the trees, and us – all of what

> has been made by the Creator in our territories. The emphasis is on retaining an intimate named relationship with everything that the Creator placed in our lands. This is a character of dialogue between our people and our land. this is our love for our lands. We take our responsibility to protect the land given to us by the Creator as essential to our identity.
>
> …
>
> 2. …
>
> When we say this we do not mean that economic activity is not important for the people of the Big Trout First Nation. Non-aboriginal governments have divided this activity into subsistence and commercial categories. This reflects an attitude that our society is less civilized or less developed. But our people have always engaged in economic activity for both domestic and commercial (trading) purposes. We do not draw distinctions between them. The relationship to land is the same whether we fish for food or run a tourist operation for commercial purposes. All of these are for our livelihood. The land has been important for maintain the economic well-being of our Big Trout First Nation people. The problem in this regard has been that non-Aboriginal government have systematically attempted to dominate and control our relationships to land.

[120] In paragraph 9 of his affidavit, sworn June 5, 2006, Chief Donny Morris described the KI community's fear that exploration will have a negative impact on his people's connection with the land:

> 9. Anything that may disrupt this fragile system, or sacred relationship with and stewardship of the land, the safety of our drinking water, or our ability to hunt, fish and trap, is of great concern to our people, who live in circumstances best described as marginal.

[121] After conducting a survey to measure community response to mineral development, Chief Morris stated that the community was divided in its opinion; that

> slightly more KI people at the time were opposed to resource extraction. Reasons for opposition included lack of consultation, endangerment of waterways, destruction of the land, desecration of the land, and interference with traditional activities.[16]

[122] Both the affidavit of Chief Morris and the KI Consultation Protocol make it clear that the community is not opposed to economic development,

> …provided that such development is done in a way that respects our sacred connection with the land, and our duty to the Creator to protect and preserve the land. This, I am willing to discuss the possibility of exploration on our traditional territories, without prejudice to our right as KI people to act to protect the land, if necessary.[17]

[123] The KI Consultation Protocol indicates that KI is interested in "…developing successful partnerships and working relationships with companies interested in development opportunities on KI lands."[18] Further, it goes on to state:

> Decision making processes which effect the health and well-being of Kitchenuhmaykoosib Inninuwug must involve the community in every step of the process. We want the consultation process to lead to decisions that are complementary to our values and processes, and recognize the cultural and traditional practices of our people.[19]

[124] Several affidavits were filed by KI Band members, describing their fear of the impact that development would have on the health and cultural, societal, and spiritual fabric of the community. In her affidavit, sworn June 7, 2006, Mary Childforever described the

[16] The affidavit of Chief Donny Morris, sworn June 5, 2006, at para. 27.
[17] The affidavit of Chief Donny Morris sworn June 5, 2006 at para. 21.
[18] The KI Consultation Protocol, para. 1.2.8.

connection between the loss of self-determination and control over the land, and the alarming suicide rates, health problems, crime, substance addiction, and family breakdown within the community.

[125] In her affidavit, sworn June 5, 2006, Mary Jane Moonias expressed her fears that development would have a negative impact on traditional ways of life, including hunting, trapping, and fishing; and her fear that it could threaten the quality of drinking water on Nemeigusabins Lake.

[126] Ms. Moonias stated that she believed that drilling would interfere with her family's hunting of beaver, geese, moose, and other traditional foods, because the noise and pollution would scare away animals. She concluded by stating: "I do not want money. I want what the land can give me. I want to live in peace and according to our traditional ways, in the lands that have been my home for my whole life, and my ancestors' home before that."

[127] The drilling activity proposed by Platinex is restricted to 24 - 80 drill holes, measuring 2 inches in diameter, in an area of approximately 50 square kilometres. Platinex submits that the evidence demonstrates that its drilling program will have a minimal impact on the land; that any impact will be temporary; that proper environmental safeguards are in place; and that the evidence of harm is speculative and lacks credibility.

[128] Platinex submits that there is no expert scientific evidence to dispute this conclusion. Both Platinex and MNDM argue that without reliable evidence that the land on which the drilling is to be done is off the table in the context of the TLE claim how can there be

[19] The KI Consultation Protocol, Para. 1.1.3.

any finding of irreparable harm. As well, both submit that as long as there is the opportunity to consult the possibility exists that any harm can be repaired and addressed by accommodation.

[129] Because KI does not have the right to select land but only to participate in an discussion about which land will be selected, Platinex and MNDM argue that without proof of a right there can be no finding or irreparable harm.

[130] Platinex hired AMEC Earth & Environmental ("**AMEC**") to assess the environmental impact of its proposed drilling program. AMEC's report is attached to the affidavit of James Marrelli, sworn March 14, 2007. That report states that the proposed program will have "minimal, if any negative impacts" and that "any negative impact will be low and temporary in nature."

[131] The letter of James Marrelli, dated March 13, 2007, best describes Platinex's most recent position regarding how ongoing consultation can manage any harm that may result from its drilling program:

> Platinex has been urging the consultation committee to commence substantive discussions for months. Notwithstanding that no substantive discussions had taken place on the initial expiration of the interim interim order, Platinex agreed in January 2007 to extend the injunction for three months on the basis that good faith efforts to complete the consultation would allow the company to commence its exploratory program at the end of March 2007. Virtually nothing has happened in those three months and now KI seeks further delay. Ultimately, Platinex wants nothing more than to promote and achieve a healthy long-term relationship with the KI community and to commence its exploratory drilling with the support and blessing of the community. Just as KI insisted on a signed consultation protocol before substantive discussions could begin, the company requires assurances that true consultation will take place immediately and within a reasonable timeframe.

Accordingly, Platinex is willing to delay the April hearing to May 22- 25, 2007 on the execution of a Memorandum of Understanding ("MOU") and a band resolution endorsing the MOU. The broad terms of MOU should be as follows:

1. In principle, the KI community supports Platinex conducting its 24 to 80 hole exploration drill program based on the accommodation of KI's concerns as set out in the below table 2 and subject to the terms delineated in #2 through #7 below.

**KI Community Concern** **Platinex Accommodation**

**Potential burial sites in the vicinity of the Platinex claims.**

(a) The burial site that has been identified will be marked as an area for no disturbance and a buffer of 100 metres kept around the site;

(b) Platinex will retain an archaeologist for the purpose of the exploratory drill program;

(c) The archaeologist will pre-screen any proposed holes;

(d) Platinex will follow any recommendations of the archaeologist;

(e) The archaeologist's findings will be shared with the KI Community

(f) Platinex will continue to seek KI local and traditional knowledge about potential burial or other archaeological-significant sites.

**Environmental impact of the proposed drilling**

(a) Platinex retained AMEC Earth and Environmental to conduct an independent review and provide an expert opinion of the proposed exploration program;

(b) Platinex will implement the AMEC - recommended or equivalent mitigation measures as set out in table 1 of the AMEC Report (attached);

(c) Platinex will obtain any necessary governmental permission or approvals for the proposed exploration program;

(d) Platinex will comply with its environmental policy;

(e) Platinex will comply with the E3 environmental standards; and

(f) Platinex is willing to retain from KI, or elsewhere, a qualified environmental monitor during the exploratory drilling.

**Impact on hunting/trapping**

(a) Platinex will seek input from the KI community respecting the goose and moose hunts when determining the timing of the drilling and the routing of helicopter activity;

(b) Platinex will seek input from Jacob Nanokeesic (who holds the only MNR-registered trapline on the lands of the Platinex claims) respecting his trapping activities;

(c) Platinex will implement the proposed mitigation measures respecting wildlife suggested by AMEC in its Report; and

(d) Platinex will attempt to address reasonable concerns raised by other identified section 35 rights holders concerning hunting/trapping activities on the lands of the claims.

**The use of KI supplies and services/employment**

(a) To the extent that they are available and cost competitive, Platinex will use the services and supplies from the KI community during the proposed exploratory drilling;

(b) Although employment opportunities are minimal at the early exploratory stage, Platinex will use KI community members where appropriate for transportation, etc.; and

(c) There is a possibility that Platinex will request to establish a field office during the exploration.

**Participation in future decision making**

(a) Subject to the execution of confidentiality agreements, Platinex will share the results of its exploratory drilling with KI; and

(b) Platinex will develop, in collaboration with KI and any other identified section 35 rights holder, a process for consultation during and after the exploratory stage.

**Compensation**

(a) Platinex will provide reasonable compensation to Jacob Nanokeesic for loss of revenue resulting directly from a disruption of his trap lines.

2. The KI consultation committee, in conjunction with Platinex's and Ontario's consultation representatives, will retain the appropriate technical expert to review the information produced by Ontario and Platinex, including the AMEC environmental report, and to conduct a peer review or provide other appropriate advice respecting potential cumulative environmental impacts. This review also may include advice respecting ecological issues (not duplicative of the report of Justina Ray). KI must look to Ontario for funding of this work.

3. The KI consultation committee may conduct a review to identify any other (currently unknown) KI, or other First Nation member, who may be affected directly by the Platinex exploratory drill program. KI must look to Ontario to fund principally this review. Platinex, however, will contribute a reasonable sum.

4. As a result of the activities of #2 and #3 above, the consultation committee will meet with the KI community in Big Trout Lake to discuss any additional concerns that have arisen and potential accommodation.

5. The consultation parties are committed to reaching, by mid-April 2007, an access agreement to allow Platinex to conduct its 24-80 hole exploration drill program.

6. The consultation parties will agree that additional consultation will take place in the event of any further exploration and/or development of the claims/leases beyond the 24 to 80 hole program. Such consultations could include the appointment of a KI Resource Development Officer.

> 7. As a term of a more formal access agreement between Platinex and KI supported by a band resolution, Platinex is committed to:
>
> (a) having KI participate in the company by:
>
> (i) investment through the issuance of warrants; and/or
>
> (ii) membership on the Platinex board of directors; and/or
>
> (b) establishing a fund to benefit the community calculated as a percentage of all monies spent on the exploration drill program.[20]



[132] MNDM supports Platinex's approach and direction as contained in the proposed MOU, maintaining that the scope of accommodation must be directed, not at the details of a consultation protocol, but rather at how the drilling project is to proceed and how it should be managed, including the participation of the parties.

[133] KI rejected the proposal in its entirety, stating that the position of MNDM and Platinex was unreasonable, and that the proposal represented a breach of the Crown's duty to consult in a bona fide and meaningful fashion. In view of KI's lack of trust, it believed that the first step was to reach an agreement on a consultation protocol.

[134] With respect to how it has conducted the consultations, KI views the position that it has taken as being reasonable and accommodating,

> which taken as a whole shows KI engaging with Platinex and Ontario, trying to make its concerns known, addressing Ontario and Platinex's concerns, and offering over and over again ways to make the consultations process work.[21]

[20] The letter of James Marrelli dated March 13, 2007, attached as exhibit to his affidavit sworn March 14, 2007.
[21] Paragraph 110 of the Factum of KI.

[135] KI views the insistence by Platinex (supported by MNDM) that it agree in advance to the drilling project, before any substantive consultations could be held and become enshrined in a consultation protocol, as patently unreasonable.

**The Evidence of the Harm to KI's Treaty Land Entitlement Claim**

[136] It is not the purpose or task of this court to comment on or decide whether KI's TLE claim is valid, except to assess the strength of the claim as part of the balancing of the risks of the proposed activity in the context of whether injunctive relief should be granted.

[137] The concern that Chief Morris has expressed, on behalf of KI, is that mining activity could take the land on which it is conducted off the table for selection purposes, assuming the claim is successful.

[138] As mentioned above, KI's TLE claim was filed in 2000 and rejected by OSAA in March of this year, on the basis that KI's entitlement to land under Treaty 9 had already been met. Although this is a factor for this court to consider when assessing the strength of the claim, this does not mean that the claim has been finally adjudicated. KI may still pursue judicial review of the decision, persuade Ontario to change its position, or bring a lawsuit against the Crown. Additionally, the federal government has not yet indicated its position on the claim; if they decide it is meritorious, it is possible they may lobby Ontario to change their position.

[139] On the April 2007 motion for an interlocutory injunction, KI supplemented the evidence that it relied upon in June 2006 with an affidavit sworn by Roger Townshend, one of its

legal counsel. In his affidavit, Mr. Townshend provided opinion evidence on matters of history, policy, and law.

[140] MNDM challenged the admissibility of Mr. Townshend's opinion. It was ultimately agreed between counsel, and accepted by this court, that his evidence was not being proffered as opinion evidence, but rather to show the nature of the TLE claim that KI presented to OSAA.

[141] The report of historian Janet Armstrong was attached as an exhibit to Mr. Townshend's affidavit in support of KI's claim that it had an unfulfilled TLE entitlement. Dr. Armstrong was not cross-examined on the content of her report.

[142] In considering and dismissing the merits of KI's TLE claim, OSAA reviewed and considered the affidavit of Roger Townshend and the attached report of Dr. Armstrong.

**Discussion:**

***Irreparable Harm***

[143] While all parties share the belief that established and asserted rights trigger the obligation of the Crown to consult with Aboriginal groups when a Crown-sanctioned activity threatens Aboriginal rights held by those groups, it is readily apparent that the parties have very divergent views of the scope of this duty.

[144] It is also apparent that these different viewpoints stem from a fundamental disagreement surrounding the legal rights that each party seeks to protect. The degree of harm that the taking up imposes is directly related to the question of whether all that is required of the Crown is consultation or whether the harm is so great that only injunctive relief will protect the right being infringed upon.

[145] KI takes a broad and expansive view of the scope of the duty to consult; a view that justified the declaration of a moratorium on development until agreement was reached on a comprehensive protocol, along with appropriate levels of funding.

[146] Platinex and MNDM agree that KI's established and asserted Aboriginal rights, protected by s. 35, trigger a duty to consult. However, they state that the duty is limited and has been adequately met, so that there is no legal rationale to prohibit the drilling project from continuing.

[147] While it is completely understandable, in view of the Aboriginal relationship to land, why KI wishes to proceed cautiously and to have a consultation protocol in place before any drilling begins, the fact remains that the drilling is to take place on Crown land unfettered or unencumbered by Aboriginal title. The consultation process cannot be used in an attempt to claw back rights that were surrendered when Treaty 9 was signed.

[148] From reading the many affidavits filed by KI band members, it appears that those affiants, including Chief Donny Morris, may not fully appreciate the fundamental fact that all Aboriginal title and interest in the land was surrendered when Treaty 9 was signed. 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.

[149] When this court granted an interim, interim order in July 2006, it made the order conditional upon KI setting up a consultation committee **to develop an agreement to allow Platinex to conduct its drilling project.** (emphasis added) At that point in time, consultation had been minimal, and there was an incomplete and inadequate understanding of the interests, needs, and positions of the parties and of the potential harm that drilling could present.

[150] My review of what has transpired since the release of my decision on July 28, 2006, is that all parties have made *bona fide* efforts to consult and accommodate. However, because of the fundamental differences regarding the scope of the duty to consult and the parties' legal rights, no agreement has been forthcoming and no consideration has been given to the possibility of Platinex proceeding with its drilling project.

[151] The respective positions of the parties are understandable and reasonable when viewed from their perspectives.

[152] The consultation process has been helpful, in that it has fleshed out the positions of the parties. This is evidenced by the fact that 13 drafts of a consultation protocol have been exchanged.

[153] The record of the consultation process indicates that there were discussions and agreement on a number of issues, including some level of funding for KI.

[154] It is apparent from reading the affidavits of the band members that the KI community wishes to have its integrity and honour respected. Community members want to be treated as full partners, and not as second class citizens. They want to have their fears and concerns heard and appreciated.

[155] This court understands, respects, and acknowledges this perspective. This court accepts that, as an Aboriginal community, KI has a unique cultural and spiritual relationship to the land, and a need to carefully and responsibly carry out the Aboriginal imperative to act as stewards of the land. In 1854 Chief Norah Seattle [Sealth] in a memorable speech explained the Aboriginal dilemma inherent in the urge to develop the land and their spiritual and cultural perspective: If all the beast were gone, we would ide from a great loneliness of spirit, for whatever happens to the beast, happens to us. All things are connected. Whatever befalls the earth befalls the children of the earth. [22]

[156] The grant of an injunction is an extraordinary remedy, in that it prevents a party from pursuing a course of action before a trial has been held on the merits. A court is called upon to predict that, without an order, harm will occur. Any prediction of risk must be based upon evidence that is reliable and relevant. Speculation, assumption, and fear cannot provide the foundation for such an order. The evidence must establish a probability that irreparable harm will occur.[23]

[157] I find that the evidence of harm to the land, harvesting rights, and KI community and culture fails to meet the relatively high standard of probability required for the grant of

[22] Chief Sealth, quoted in *Morris Berman, Coming to Our Senses* (New York: Bantam Books, 1990), p. 63.

injunctive relief. Much of this evidence was based upon assumptions and fear of what may transpire, and is not causally connected to Platinex's proposed drilling program.

[158] The fear of cultural, environmental, and spiritual harm as described by Mary Childforever cannot reliably be linked to Platinex's proposed development.

[159] There can be no doubt that many Aboriginal communities, including KI, have suffered, and continue to suffer, on many levels. Poverty, substance abuse, suicide, and depression are widespread. Aboriginal youth feel isolated and cutoff from their traditions, culture, and language. These problems are real, serious, and tragic, but there is insufficient evidence to satisfy me that the drilling project contemplated by Platinex will exacerbate these problems.

[160] Platinex has agreed to proceed cautiously, in stages, with constant consultation and attention to community concerns, and under the supervision of this court. I find that the proposed MOU that Platinex and MNDM are prepared to sign represents, generally speaking, 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.

[161] Treaty 9 contemplates and foreshadows that there would be a taking up of land for mineral development, and that there would be consultation with First Nations. This is exactly what is now happening. This was commented on by the Supreme court in *Mikisew*:

> I agree with Rothstein J.A. that not every subsequent "taking up" by the Crown constituted an infringement of Treaty 8 that must be

[23] *Operation Dismantle Inc. et al. v. The Queen et al.* (1985), 18 D.L.R. (4th) 481 (S.C.C.)

> justified according to the test set out in Sparrow. In Sparrow, it will be remembered, the federal government's fisheries regulations infringed the aboriginal fishing right, and had to be strictly justified. This is not the same situation as we have here, where the aboriginal rights have been surrendered and extinguished, and the Treaty 8 rights are expressly limited to lands not "required or taken up from time to time for settlement, mining, lumbering, trading or other purposes". (Emphasis added.) The language of the treaty could not be clearer in foreshadowing change. Nevertheless the Crown was and is expected to manage the change honourably.
>
> It follows that I do not accept the Sparrow-oriented approach adopted in this case by the trial judge, who relied in this respect on Halfway River First Nation v. British Columbia (Ministry of Forests) (1999), 178 D.L.R. (4th) 666, 1999 BCCA 470. In that case, a majority of the British Columbia Court of Appeal held that the government's right to take up land was "by its very nature limited" (para. 138) and "that any interference with the right to hunt is a prima facie infringement of the Indians' treaty right as protected by s. 35 of the Constitution Act, 1982" (para. 144 (emphasis in original)) which must be justified under the Sparrow test. The Mikisew strongly support the Halfway River First Nation test but, with respect, to the extent the Mikisew interpret Halfway River as fixing in 1899 the geographic boundaries of the Treaty 8 hunting right, and holding that any post-1899 encroachment on these geographic limits requires a Sparrow-type justification, I cannot agree. The Mikisew argument presupposes that Treaty 8 promised continuity of nineteenth century patterns of land use. It did not, as is made clear both by the historical context in which Treaty 8 was concluded and the period of transition it foreshadowed**.** [24]

[162] The strength of KI's asserted TLE claim is also a concern. There is no reliable evidence that the exploration project will adversely affect it. Even if the TLE is successful, there is insufficient evidence that the activities proposed by Platinex will compromise KI's ability to

[24] *Mikisew Cree First Nation, supra* Note 4, at paras. 31-32.

select land to satisfy any entitlement. The treaty does not give First Nations the right to select land unilaterally, nor does it provide KI with a veto.

[163] The presence of third party interests may limit the land that is available for selection should KI succeed with its claim. Platinex, for example, staked its claims and received mining leases with the exclusive right to work the claim prior to the filing of KI's TLE claim.

[164] Ontario has an arguable case that KI has received lands in excess of what could be the most generous assessment of its entitlements under Treaty 9.

[165] Ontario also has an arguable case that a band's treaty land entitlement must be calculated based on the population of the band at the date of the treaty, not on the basis of the present day population as proposed by KI.

***The Balance of Convenience***

[166] The new evidence that has been adduced since June of last year, has changed my view of where the balance of convenience lies.

[167] Assessing the balance of convenience involves balancing the harm that each party will suffer and whether that harm can be compensated for in damages.[25]

[168] In my July 28, 2006, reasons I found that the balance of convenience at that point in time favoured KI, and that the financial harm to Platinex was outweighed by the harm to KI's spiritual and cultural connection to the land and to its ability to select lands in its TLE claim.

[25] *American Cyanamid Co. v. Ethicon Ltd.*, [1975] A.C. 396 (H.L.)

[169] The harm that Platinex will likely suffer if it cannot conduct its proposed drilling operation is that it will go out of business, since the Trout Lake claims and leases are its major asset. It has managed to survive until now, but I am satisfied that there is a very strong probability that it could not survive until trial if an injunction were granted, even with an order expediting trial. Being put out of business is irreparable harm that cannot be readily compensated for in damages.[26]

[170] The harm that KI will suffer as a result of damage to the land itself will relate to a maximum of 80 drill holes, of approximately 2 inches in diameter, in 12,080 square acres of wilderness. I have already commented that the evidence of harm to treaty harvesting rights, culture, Aboriginal tradition, and the community is inconclusive.

[171] Aboriginal rights deserve the full respect of Canadian society and judicial system. Those rights do not, however, automatically trump competing rights, whether they be government, corporate, or private in nature.[27]

[172] After balancing the respective interests of the parties in relation to the harm that each would suffer, I find that the evidence supports a finding that the balance of convenience favours Platinex.

**Disposition**



[26] *Red Chris Development Co. v. Quock*, [2006] B.C.J. No. 2206 (S.C.); *674834 Ontario Ltd. (c.o.b.Coffee Delight) v. Culligan of Canada, Ltd.*, [2007] O.J. No. 979 (S.C.J.)
[27] *Kruger inc. c. Première nation des Betsiamites*, [ 2006] J.Q. no 3932 (C.A.)

[173] For the reasons stated above, KI's motion for an interlocutory injunction is dismissed.

[174] Section 97 of the *Courts of Justice Act*[28] provides that the Superior Court of Justice "may make binding declarations of right whether or not any consequential relief is or could be claimed."

[175] In its notice of motion, in addition to its request for injunctive relief, KI has asked this court to consider "such further and other relief as this court deems just." A prayer for relief of this nature provides a court with the authority to issue a declaratory judgment.[29]

[176] A declaratory judgment is a judicial statement confirming or denying a legal right, which is founded on the concept of judicial intervention. The inherent function of a court is to declare the rights of the parties seeking judicial intervention. The premise underlying the declaratory recourse "is that judicial recognition of certain rights should not be withheld from the parties for reasons relating strictly to the procedural obstacles characteristic of other judicial remedies."[30]

[177] In order for a court to consider issuing a declaratory remedy, there must be evidence of harm that is more than remote. There has been a general reluctance of court to provide remedies "where the causal between an action and the future harm alleged to flow from it cannot be proven".[31] Courts do not have the jurisdiction to issue a declaration where there is no

[28] *Courts of Justice Act*, R.S.O. 1990, c. C.43
[29] *R. v. Bales et al, Ex parte Meaford General Hospita*l (1971), 17 D.L.R. (3d) 641
[30] Lazar Sarna, *Law of Declaratory Judgments* (Toronto: Carswell, 1988), at p. 2
[31] *Operation Dismantle*, *supra* note 27, per Dickson J. at pp. 456-58

right in jeopardy. [32] In this case, Platinex and MNDM have acknowledged that the drilling project will have an impact on KI's Treaty rights, upon the land, and upon KI's TLE claim.



[178] A declaratory order need not be final; it can be interim or temporary in nature, depending upon the facts and circumstances of the case.[33]

[179] The Superior Court of Justice has a broad discretion in deciding whether or not to issue a declaratory order. While judicial discretion has boundaries, this remedy represents

> "…an innovative tool; while the uses of the declaration cannot be said to be infinite, there is no reason to think that the final boundaries of the remedy have already been set. The impact on judgments lies not in their technical development of a point of procedural law, but rather in their alignment of the scope of the recourse with the actual function of the court: the evolution of the declaratory judgment is a direct reflection of the development of the court as a social institution, and a willingness or a reluctance to grant an order even as a matter of pure discretion is an indicator, especially in the field of administrative law, of the self-confidence, creativity and force of the judicial forum."[34]

[180] As mentioned in my Reasons released July 28, 2006, the injunctive remedy can often be ill-suited to cases where Aboriginal rights and interest are at stake. In paragraphs 56, 57, and 58 of my July 28, 2006, Reasons, I made the following comments:

> The nature of the remedy of injunctive relief 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.
>
> As noted by Allan Donovan and Mariana Storoni,

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[32] *Power v, Ough*, [1931] O.R. 184 (C.A.)
[33] *Peralta v. Ontario (Minister of Natural Resources)* (1984), 46 C.P.C. 218 (Ont. H.C.).
[34] Sarna, *Law of Declaratory Judgments, supra* note 34, at p. 213

> When the Crown either consults and accommodates inadequately or fails to consult and accommodate at all before authorizing a third party to conduct land or resource-based activities that will adversely affect Aboriginal rights and title, First Nations are left with few options to protect their interests.

Similarly, in *Haida Nation v. British Columbia (Minister of Forests)*, the Supreme Court stated:

> Interlocutory injunctions may offer only partial imperfect relief. First, as mentioned, they may not capture the full obligation on the government alleged by the Haida. Second, they typically represent an all-or-nothing solution. Either the project goes ahead or it halts. … Third, the balance of convenience test tips the scales in favour of protecting jobs and government revenues, with the result that Aboriginal interests tend to "lose" outright pending a final determination of the issue, instead of being balanced appropriately against conflicting concerns…. Fourth, interlocutory injunctions are designed as a stop-gap remedy pending litigation of the underlying issue. Aboriginal claims litigation can be very complex and require years and even decades to resolve in the courts. An interlocutory injunction over such a long period of time might work unnecessary prejudice and may diminish incentives on the part of the successful party to compromise.

[181] Should this court simply dismiss the motion by KI for interlocutory relief, this could exacerbate the conflict that already exists between the parties. Additional conflict could potentially create a situation where self-help remedies, civil disobedience, and confrontation occur. Respect for the rule of law may suffer.

[182] In the proper case the grant of an injunction can be appropriate to protect Aboriginal rights that are at risk of harm. This case however, is not one of them. An injunction is an all or nothing remedy. The nature of the competing rights of the parties in this case do not fit into such a framework. Instead, those interests must be judiciously balanced on an ongoing basis

with careful attention paid to the concerns and perspective of each party. Only in this way will reconciliation and a fair and just accommodation be achieved.



[183] It is not in the interests of the parties or the judicial process to allow an environment of conflict and distrust to prevail. Such an atmosphere does not, and cannot, promote the fundamental principle of reconciliation that is at the very heart of balancing Aboriginal interests and rights with those of others. Once again the comments made by Lamer C.J.C. in *Delgamuukw* are important to repeat and remember:

> …ultimately, it is through negotiated settlements, with good faith and give and take on all sides, reinforced by the judgment of this Court, that we will achieve…the basic purpose of s. 35(1) – 'the reconciliation of the pre-existence of Aboriginal societies with the sovereignty of the Crown."[35]

[184] I am not convinced that Platinex should be given a *carte blanche* to proceed with its entire exploration drilling project at this time. Development should proceed slowly, with Ontario, Platinex, and KI fully engaged in the consultation process each step of the way, and with each prepared to make accommodations as the need arises.

[185] The grant of an interim declaratory order allows this court to stay involved as development progresses, to allow the parties to return to court and seek whatever order(s) may be necessary whenever agreement and accommodation cannot be reached. In this way, KI will know that their concerns and fears are being heard and respected, with the hope that ultimately development will be for the mutual benefit of all parties, and not just Platinex.

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[35] *Delgamuukw, supra* note 112, at paras. 1123-24

[186] Ongoing supervision will serve to promote a more precise balancing of the rights of the parties, with the ultimate goal of with achieving fairness.

[187] It is important to note that, while Ontario is a party to the motion, it is not a party to the main action. Even if it were a party, the *Proceedings Against the Crown Act* prohibits this court from making an order directly against it.[36] Nevertheless, the Crown is directly involved in this proceeding, because the honour of the Crown is in issue, and because its duty to consult has been triggered by the involvement of protected s. 35 rights.

[188] In the interests of protecting the rights of the parties, respect for the rule of law, and the administration of justice, this court will exercise its discretion and issue the following interim declaratory order:

1. The motion brought by KI is dismissed;
2. KI shall have the right to ongoing consultation with respect to all aspects of the impact that Platinex's drilling project may have on its treaty harvesting rights and asserted Treaty Land Entitlement claim;
3. By no later than May 15th, the parties shall implement a consultation protocol, timetable, and Memorandum of Understanding. Failing this, after hearing further submissions from the parties, this court shall make whatever orders it deems appropriate. The consultation protocol shall address, but is not limited to, the following terms:
    - Potential burial sites in the vicinity of the Platinex claim;

[36] *Proceedings Against the Crown Act*, R.S.O. 1990, c. P. 27, s. 14

- Environmental impact of the proposed drilling;
- Impact on hunting and trapping;
- Participation in decision-making;
- The use of KI supplies and services / employment; and
- Compensation and funding

4. Subject to this court being satisfied that a proper protocol is in place, either by way of agreement or by court order, Platinex shall be permitted to undertake Phase One of its exploration drilling program. Phase One shall commence on June 1, 2007, and shall consist of the drilling of 24 test drill holes;
5. The supervision of the court shall include, but is not limited to, a review of a proposed drilling timetable, the scope and content of a consultation protocol, all aspects of the Phase One exploratory drilling program, and provisions for compensation and funding;
6. In order to provide speedy access to the court, taking into account the fact that most counsel are resident in Toronto and not in northwestern Ontario, the parties shall forthwith consult with the Trial Co-coordinator to fix a timetable for no less than three teleconferences. The first teleconference shall take place before the drilling project commences, and the last shall take place after the completion of Phase One. If the parties require additional time to address any issues, they may make further arrangements with the Trial-coordinator.

7. Subject to whatever agreements are made by the parties, this court reserves the right to make whatever further orders it deems just including the right to make an order that no further drilling take place.

[189] The issue of costs is reserved to a date to be set by the court.

_____
The Hon. Mr. Justice G. P. Smith

**Released:** May 1, 2007

**COURT FILE NOS.:** 06-0271
**DATE:** 2007-05-01

**ONTARIO**
**SUPERIOR COURT OF JUSTICE**
**B E T W E E N:**

PLATINEX INC.

Plaintiff

**- and –**

KITCHENUHMAYKOOSIB INNINUWUG FIRST NATION, DONNY MORRIS, JACK MCKAY, CECILIA BEGG, SAMUEL MCKAY, JOHN CUTFEET, EVELYN QUEQUISH, DARRYL SAINNAWAP, ENUS MCKAY, ENO CHAPMAN, RANDY NANOKEESIC, JANE DOE, JOHN DOE and PERSONS UNKNOWN,

Defendants

**AND BY WAY OF COUNTERCLAIM:**
**Court File No: 06-0271A**

KITCHENUHMAYKOOSIB INNINUWUG FIRST NATION, DONNY MORRIS, JACK MCKAY, CECILIA BEGG, SAMUEL MCKAY, JOHN CUTFEET, EVELYN QUEQUISH, DARRYL SAINNAWAP, ENUS MCKAY, ENO CHAPMAN, RANDY NANOKEESIC,

Plaintiffs by Counterclaim

**- and –**

PLATINEX INC.

Defendants by Counterclaim

**- and –**

HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO,

Third Party

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**REASONS ON MOTION**

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Patrick Smith S.C.J.

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**Released:** May 1, 2007