COURT FILE NO.: 06-0271
DATE: 2008-03-17

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:	
PLATINEX INC. 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 Defendants	*Christopher Reid*, for the Defendants other than John Cutfeet, Jane Doe, John Doe and Persons Unknown and Plaintiffs by Counterclaim other than John Cutfeet. *Julian Falconer*, for John Cutfeet.
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, Plaintiffs by Counterclaim	*Christopher Reid*, for the Defendants other than John Cutfeet, Jane Doe, John Doe and Persons Unknown and Plaintiffs by Counterclaim other than John Cutfeet. *Julian Falconer*, for John Cutfeet.
- and -	
PLATINEX INC. Defendant by Counterclaim	*Neal J. Smitheman* and *Tracy A. Pratt*, for the Defendant by Counterclaim
- and -	
HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO, Third Party	*Owen Young* and *Ria Tzimas* for the Third Party
	HEARD: January 25, 2008

Mr. Justice G. P. Smith

Reasons On Sentencing

Overview

[1] On December 14, 2007 I made an order finding the Respondents, Donny Morris, Jack McKay, Bruce Sakakeep, Darryl Sainnawap, Cecilia Begg, Samuel McKay, Enus McKay and Evelyn Quequish to be in contempt of the order of this court dated October 25, 2007 by impeding or threatening to impede Platinex and or its representatives' access to exploration property for the purposes of undertaking archeological pre-screening and the subsequent drilling of the 24 drill holes of Phase One of its drilling programme. The Respondent, John Cutfeet is defending the motion and a date for his trial has been scheduled.

[2] All contemnors are community leaders and are members of the KI Band administration.

[3] The matter was adjourned until January 25, 2008 to hear the submissions of counsel. Today has been scheduled for disposition.

Background

[4] This case highlights the clash of two very different perspectives and cultures in a struggle over one of Canada's last remaining frontiers. On the one hand, there is the desire for the economic development of the rich resources located on a vast tract of pristine land in a remote portion of Northwestern Ontario. Resisting this development is an Aboriginal community fighting to safeguard and preserve its traditional land, culture, way of life and core beliefs.

[5] Platinex Inc. is in the business of exploratory drilling.

[6] The Defendant, Kitchenuhmaykoosib Inninuwug, ("**KI**"), formerly known as Big Trout Lake First Nation, is an indigenous Ojibwa/Cree First Nation, and is a Band under the *Indian Act*, occupying a reserve on Big Trout Lake. KI is signatory to the 1929 adhesion to Treaty 9, the James Bay Treaty.

[7] Platinex holds as its main asset 221 unpatented mining claims and 81 mining leases covering approximately 12,080 acres of the Nemeigusabins Lake Arm of Big Trout Lake.

[8] The Big Trout Lake Property is located in Northwestern Ontario approximately 230 kilometres north of Pickle Lake, Ontario and 580 kilometres north of the City of Thunder Bay. Accessible only by air in the summer and winter road in the winter, it is a vast tract of undeveloped boreal forest.

[9] The property that Platinex wishes to explore covers 19 square kilometres on the Nemeigusabins Arm of the Big Trout Lake. It is not situated on the KI reserve, but on KI's traditional lands, which encompass approximately 23,000 square kilometres. The KI reserve is located across Big Trout Lake.

[10] The October 25, 2007 order of this court allowed Platinex to proceed with Phase One of its drilling project and ordered members of KI along with any person having notice of the order, not to impede, interfere or obstruct Platinex or its representatives' access to the exploration property.

[11] On November 1, 2007 Platinex faxed a drilling timetable to KI. KI responded the next day stating that KI and its members "want no such activity other than the traditional customary practices to be permitted on these lands". With respect to Platinex's access to the property the letter stated:

> "As for your proposed arrival in the community on November 6, 2007, please be advised that the membership of Kitchenuhmaykoosib Inninuwug are reaffirming that your admittance into the community IS NOT allowed and this has been demonstrated to you once before".

[12] When Platinex and its representatives flew into the community on November 6 a large number of individuals including the Respondents before the court prevented them from entering the airport building. Chief Morris and the O.P.P. First Nation police officer threatened arrest if they "trespassed" on KI land. After several hours Platinex abandoned its efforts and left the community.

[13] The focus of Platinex is clear - the company wishes to proceed with the business of exploration on the traditional, non-reserve lands of KI.

[14] The perspective of KI is more complex. KI fears that further encroachment on their traditional land will threaten their way of life and culture, and ignores, diminishes, and disrespects them. Although interested in possible commercial and economic opportunities, KI views the issues of sovereignty, cultural and spiritual concerns, as being paramount.

[15] On December 7, 2007 Chief Morris summarized his position and that of several other contemnors when he stated in court: "I stand by the fact that the land I'm in, on now is our land.

I believe God put us there. God have us a language, the animals to live off and we just don't want to see development on that area…As a treaty partner I expect to be treated as a partner, not, not where one is superior than us".[1]

The Statutory Framework Regarding Contempt Motions

[16] Rule 60.11 of the *Rules of Civil Procedure* sets out the sanctions that maybe imposed when a finding of contempt has been made.

[17] Rule 60.11(5) states:

> In dispensing of a motion under subrule (1), the judge may make such order as is just, and where a finding of contempt is made, the judge may order that the person in contempt,
>
> (a) be imprisoned for such period and on such terms as are just;
> (b) be imprisoned if he or she fails to comply with a term of the order;
> (c) pay a fine;
> (d) do or refrain from doing an act;
> (e) pay such costs as are just; and
> (f) comply with any other order that the judge considers necessary,
> and may grant leave to issue a write of sequestration under rule 60.09 against the person's property.

[18] Rule 60.12 provides:

> Where a party fails to comply with an interlocutory order, the court may, in addition to any other sanction provided by these rules,
> (a) stay the party's proceeding;
> (b) dismiss the party's proceeding or strike out the party's defence; or
> (c) make such other order as is just.

General Principles of Contempt

[1] Transcript of Court Proceedings, December 7, 2007, at p. 73-74.

[19] Contempt of court is the mechanism by which the law protects the authority of the court from improper interference. It is part of a court's inherent jurisdiction having developed over the decades with imprecise definition. It is a power that should be exercised with scrupulous care.

[20] An oft quoted definition is found in the case of *R. v. Gray*[2] where Lord Russell of Killowen described contempt as:

> "… any act done or writing published calculated to obstruct or interfere with the due course of justice or the lawful process of the Court is a contempt of Court."

[21] Contempt of court may be civil or criminal in nature. The distinction between the two has been referred to as "a distinction without a difference" and is generally only apparent through the severity of the punishment.[3]

[22] Civil contempt is a private injury that results from a breach of a judgment, order, or other court process which is usually remedied by an order forcing compliance with the breached order. The sanction is generally coercive in nature, not punitive.[4]

[23] Criminal contempt is the punishment of behaviour that results in a public injury or offence. Where the public defiance of a civil order brings the administration of justice into ridicule, the offence becomes criminal contempt. This could include the conduct of any individual who disobeys a court order or assists others to do so, or who publicly interferes with

[2] *R. v. Gray*, [1900] 2 Q.B. 36 at p. 40.
[3] Justice John deP. Wright, "Contempt Not Within the Knowledge of the Court".
[4] *Poje v. Attorney General (B.C.),* [1953] S.C.R. 516.

the due course of justice.[5] Regarding the concept of "publicly interfering with the due course of Justice" McLachlin J. wrote in *United Nurses of Alberta v. Alberta (Attorney General)*[6] that:

> "While publicity is required for the offence, a civil contempt is not converted to a criminal contempt merely because it attracts publicity, … rather because it constitutes a public act of defiance of the court in circumstances where the accused knew, intended or was reckless as to the fact that the act would publicly bring the court into contempt."

[24] Contempt can arise in many ways but generally falls into four main legal categories:

1. interference with judicial proceedings;

2. improper criticism of a court or judge that interferes with proceedings;

3. disobedience of orders or judgments; and

4. a residual category relating to obstruction of a court or its officers.

[25] The essential characteristic common in any of the above categories is the hindrance of the course of justice or the showing of disrespect for the authority of the court. Contempt is not a personal matter. It is a sanction intended to serve the administration of justice in the public interest.[7]

[26] Courts of justice exist for the benefit of the citizens of this country. For this reason the authority of the court must be protected from unauthorized interference. The law of contempt is the mechanism whereby this objective is secured. This important principle has been described in the following manner:

[5] *United Nurses of Alberta v. Alberta (Attorney General)*, [1992] 1 S.C.R. 901.
[6] *United Nurses of Alberta v. Alberta (Attorney General),supra* at p. 398.
[7] *McKeown v. The Queen* (1971), 16 D.L.R. (3d) 390 (S.C.C.), at p. 398.

> "For the essential character of a superior court of law necessarily involves that it should be invested with a power to maintain its authority and to prevent its process being obstructed and abused. Such a power is intrinsic in a superior court. Without such a power, the court would have form but would lack substances. The jurisdiction which is inherent in a superior court of law is that which enable it to fulfill the judicial function of administering justice according to law in a regular, orderly and effective manner".[8]

[27] Although the *Rules of Civil Procedure* describe the remedies available when a finding of contempt is made, the law of contempt has evolved from the common law developing case by case within the inherent jurisdiction of a Superior Court.

The Rationale for the Contempt Powers of the Court

[28] In *Canada (Human Rights Commission) v. Taylor*[9], McLachlin J. stated:

> "If people are free to ignore court orders because they believe that their foundation is unconstitutional, anarchy cannot be far behind. The citizens' safeguard is in seeking to have illegal orders set aside through the legal process, not in disobeying them.

[29] In *United Nurses of Alberta v. Alberta (Attorney General)*[10] Justice McLachlin also stated:

> The rule of law is at the heart of our society; without it there can be neither peace, nor order nor good government. The rule of law is directly dependent upon the ability of the courts to enforce their process and maintain their dignity and respect To maintain that process and respect, courts since the twelfth century have exercised the power to punish for contempt of court."

[8] Sir Jack Jacobs, *The Inherent Jurisdiction of the Court,* (1970), 23 Current Legal Problems at p. 27-28.
[9] *Canadian (Human Rights Commission) v. Taylor,* [1990] 3 S.C.R. 892 at p. 974.
[10] *United Nurses of Alberta v. Alberta (Attorney General),* [1992] 1 S.C.R. 901 at p. 931.

[30] In *Apotex Fermentation Inc. v, Novopharm Ltd*[11] Oliphant A.C.J.Q.B., commented:

> "Respect for the rule of law is essential if we are to have the benefit of living in an orderly, peaceful society. That is why it is so important that the terms imposed by an order of the court be obeyed. If citizens cannot be confident that they can rely upon the protection afforded by an order of the court, the court becomes irrelevant as the vehicle by which disputes between citizens, corporate or otherwise, are resolved in a peaceful manner."

The Issue of Sanctions

[31] The purpose of sentencing in contempt matters is to "repair the depreciation of the authority of the court".[12]

[32] Traditionally, punishment in Canada for contempt of court has been moderate reflecting the view that a conviction for contempt and a modest fine is sufficient to assert the courts' authority to protect the dignity of the judiciary and ensure compliance with court orders. It has been observed that "it is extraordinary to order the incarceration of a participant in a civil proceeding because of his or her contempt".[13]

[33] In most cases, the contemnor has apologized and purged his or her contempt which substantially mitigates against imposing a term of incarceration.

[34] However, there are numerous precedents where courts have imposed significant terms of incarceration for civil contempt. (See: *Sussex Group Ltd v. Fangeat, supra.* (6 months); *777829 Ontario Ltd v. McNally* (1991), 9 C.P.C. (3d) 257(12 months); *Milligan v. Lech,* [2004] O.J. No.

[11] *Apotex Fermentation Inc. v. Novopharm Ltd.*, [1977] M.J. No. 466.
[12] *International Forest Products v. Kern,* [2001] B.C.J. No. 135 (B.C.C.A.).

3168 (S.C.J.) (8 months)). Recently, Cunningham A.C.J. in Frontenac Ventures Corporation v. Ardoch Algonquin First Nation et al, in circumstances somewhat similar to the case at bar, imposed a sentence of 6 months along with fines (sentencing reasons unreported).

[35] Where the contempt has not been purged and is serious or, if there has been a deliberate disobedience of a court order or conduct involving an element of contumelious and ongoing contempt, imprisonment or heavy fines become more likely.

[36] For cases involving failure to obey an injunction, the following factors and sentencing principles have been considered as relevant[14]:

> 1. deterrence both general and specific, as well as denunciation;
>
> 2. the impact that the contemptuous act has had on the general public. Here there is no evidence that this has occurred;
>
> 3. the level of defiance of the court order and not the illegality of any actions which led to the granting of the court order in the first place. KI has repeatedly and publicly stated its defiance of the order of this court and has stated that it will continue to disobey any court orders allowing Platinex or its representatives to enter onto the property;
>
> 4. whether there have been repeated acts of defiance and disobedience. KI has publicized the fact that it will continue to disobey the court order and prevent Platinex from entering onto the land. To the knowledge of the court, none of the contemnors have any prior history of disobeying court orders. The court acknowledges this as a significant mitigating factor;
>
> 5. whether the acts of disobedience have a public nature. KI has been broadcasting its disobedience and called upon other aboriginal communities for support;

[13] *Sussex Group Ltd. v. Fangeat*, [2003] O.J. No. 3348.
[14] *Health Care Corp. of St. John's v. Nfld. and Labrador Assn. of Public and Private Employees*, [2001] N.J. No. 17 9Nfld. S.C.T.D.).

6. where a fine is to be imposed, the level of the fine may be appropriately graduated to reflect the degree of seriousness of the failure to comply with the court order.

7. because the symbolism of continuance of collective defiance is significant in encouraging contempt by other, those with special visible positions of leadership may be regarded as committing a more serious contempt and may receive a greater penalty. All contemnors are community leaders and/or members of the Band administration;

8. whether the contemnor has admitted the breach. All contemnors, other than John Cutfeet, have admitted their contempt;

9. whether the contemnor has demonstrated a full acceptance of the paramountcy of the rule of law, by tendering a formal apology to the court. Chief Morris addressed the court on December 6th, and expressed a view adopted by all contemnors that they will continue to prevented Platinex from drilling and will continue to defy any orders of this Court. None of the contemnors have acknowledged the paramountcy of the court nor offered an apology for their behaviour;

10. the ability of the contemnor to pay. In this case, the contemnors have indicated that, because they are impecunious, a fine is not a viable option.

[37] Where a court is able to repair the depreciation done to the reputation of the court by imposing a sanction that does not involve incarceration it should attempt to do so. Incarceration should be a sanction of last resort. All other possible sanctions including the imposition of a fine, or a suspended or conditional sentence should be considered.

The Rule of Law

[38] The rule of law in its most basic form is the principle that no one is above the law. It is an ancient principle that has been recognized for centuries as a fundamental concept required for an orderly and peaceful society.

[39] Plato contrasted the rule of men to the rule of law in his treatise Statesman and Laws. Aristotle referred to the principle is his writings where he described the importance of the rule of law in providing balance against autocratic rulers and magistrates. In England, the Magna Cart is a prime example of the rule of law.

[40] The rule of law is the glue that binds our society together; it is the social contract by which we agree to live and work together.

[41] Our legal system is an integral part of the rule of law. An effective legal system depends upon a number of common understandings or social contracts that are not part of the law itself. One such understanding has been described as the culture of civil obedience. If civil disobedience is allowed to occur the confidence that the public has in the administration of justice will erode and ultimately undermine the social contract and culture of obedience by which our society operates.

[42] To allow a breach of an order of this court to occur with impunity by one sector of society will inevitably lead to a breach by others or to the belief that the law is unjustly partial to those who have the audacity or persistence to flout it.

[43] In this regard, the issues involved in this sentencing hearing have a much broader degree of relevance than just to the community of KI or for the individual contemnors.

[44] If two systems of law are allowed to exist – one for the aboriginals and one for the non-aboriginals, the rule of law will disappear and be replaced by chaos. The public will lose respect for, and confidence in, our courts and judicial system.

[45] The importance of the rule of law to an orderly society "…presupposes that laws will usually be obeyed, that breaches of the law will usually meet with enforcement, that government will be limited in its powers, and that the courts and the legal profession will be independent of government and of powerful private interests. In countries with these characteristics, individual liberty is protected and economic development can take place".[15]

[46] Without the acceptance of the rule of law by all of the citizens of this country there can be neither peace, order, nor good governance.

Discussion

[47] Given the remote nature of the KI community and lack of financial or other resources to pay a fine or enforce a suspended or conditional sentence, these sentencing options are not realistic.

[48] The most significant aggravating factor to be considered in the cases before the court is the public and open declaration by the contemnors that the order of this court or of any court will not be respected or obeyed if it allows exploration or drilling on its traditional land. All have adopted the position of Chief Morris and all have stated that they will continue to defy the orders of this court.

[49] It is this public and open defiance of the rule of law and order of this court that is the most disturbing aspect of this case and which comes perilously close to criminal contempt.

[15] Peter Hogg and Cara Zwibel, "The Rule of Law in the Supreme Court of Canada" (2005) 55 University of Toronto L.J. 715.

[50] I find that incarceration is the only appropriate sanction. All contemnors lack the ability to pay a fine.

[51] Because the conduct of all contemnors is flagrant and defiant and will be repeated. This is not a case where a short term of imprisonment is warranted.

[52] No option, other than a significant term of incarceration would properly reflect the principles of denunciation and general and specific deterrence.

[53] While I understand the principles and beliefs that the Respondents hold, the sanctity of the system of justice and of the rule of law are paramount and must be protected at all costs. Simply put, there is a clear line in the sand that no segment of society can be allowed to cross.

Disposition

PLEASE STAND:

[54] Chief Donny Morris, Jack McKay, Bruce Sakakeep, Darryl Sainnawap, Cecilia Begg, Samuel McKay, Enus McKay and Evelyn Quequish you are hereby each sentenced to 6 months in jail.

[55] In addition, pursuant to Rule 60 of the Rules of Civil Procedure, an order shall issue against Kitchenuhmaykoosib Inninuwug First Nation and the above contemnors, staying any proceedings in this action in which they are involved until further order of this court.

[56] My decision regarding costs is reserved.

[57] Should these Respondents decided to purge their contempt by undertaking on a permanent basis to comply with the order of this Court, I may be spoken to by way of a motion to vary or discharge the custodial order.

"original signed by"
The Hon. Mr. Justice G. P. Smith

Released: March 17, 2008

COURT FILE NOS.: 06-0271
DATE: 2008-03-17

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

REASONS ON SENTENCING

Patrick Smith S.C.J.

Released: March 17, 2008