COURT FILE NO.: 06-0271
DATE: 2006-07-28

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
	)	
	)	*Neal J. Smitheman* and *Tracy A. Pratt*, for
PLATINEX INC.	)	the Plaintiff
	)	
	)	
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	)	*Kate Kempton* and *Bryce Edwards*, for the Defendants
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	)	*Frances Thatcher* for the Intervenor,
	)	Independent First Nation Alliance
Defendants	)	
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	)	
	)	**HEARD:** June 22 and 23, 2006,
	)	in Thunder Bay, Ontario

Mr. Justice G. P. Smith

Reasons For Judgment

[1] 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. Each party seeks to protect these interests through an order for injunctive relief.

Overview

[2] 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.

[3] Platinex is in the business of exploratory drilling and is not involved in the mining or development of property.

[4] 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*, R.S.C, 1985, c. I-5. The Band occupies a reserve on Big Trout Lake that is approximately 377 miles north of Thunder Bay, Ontario. KI is signatory to the 1929 adhesion to Treaty 9, the James Bay Treaty.

[5] Platinex holds as its main asset an unencumbered 100% interest in a contiguous group of 221 unpatented mining claims and an unencumbered 100% interest in 81 mining leases covering approximately 12,080 acres of the Nemeigusabins Lake Arm of Big Trout Lake.

[6] Platinex acquired the 81 leases adjoining its claims 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 the Ontario Ministry of Northern Development and Mines (the "**MNDM**") provided an extension.

[7] There have been a number of extensions granted to Platinex by the Ontario government since 1999. In February 1999, the 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 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.

[8] Many of these approvals and extensions occurred after Ontario was put on notice of KI's pending Treaty Land Entitlement Claim ("**TLE**") and after the land claim was filed.

[9] This case was argued on June 22 and 23, 2006 and it is assumed, for the purposes this judgment, that further extensions by the Ontario government have been granted to Platinex to extend their claims beyond July 4th of this year.

[10] 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. Accessible only by air in the summer and winter road in the winter, it is a vast tract of undeveloped boreal forest.

[11] The Property 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.

[12] Over the past 7 years, Platinex has engaged in ongoing discussions with members of KI respecting Platinex's claims on the Property and its intended exploration and development of those claims. The drilling component of Platinex's two-phase exploration programme consists of 14 diamond drilling holes. Phase 1 includes a magnetometer survey and a 3 hole drilling programme. Phase 2 consists of 11 drill holes.

[13] Various ministries have determined that the proposed work by Platinex will not impact negatively on the environment. As well, Platinex has agreed that the exact location of any drill holes will be sensitive and subject to cultural input by KI representatives.

[14] The company intended to undertake its Phase 1 exploration drilling in the winter of 2005/2006; however, it abandoned the site in February 2006 after being confronted by representatives of KI who were protesting against any work being performed on the Property.

[15] As early as 1999, Platinex knew that KI was intending to file a TLE Claim. Platinex was advised by KI in February 2001 that KI wanted a moratorium on all development until proper consultation had taken place.

[16] Initially, KI was in favour of Platinex's plans but declared the February 2001 moratorium on further development while negotiations and consultation took place.

[17] 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 Kichenuhmaykoosib 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.

[18] 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 Kichenuhmaykoosib Inninuwug **prior to** and during development activities on KI lands." (highlighting is mine)

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

[20] The KI Development Protocol sets out the following steps required for Platinex to reach an agreement with KI: (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.

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

[22] Although Platinex had several meetings with several members of KI, including the Chief, the Band Council and certain individuals, the KI consultation protocol was not followed nor was

any development agreement signed at any time. Chief Morris states at paragraph 32 of his affidavit that: "At 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."

[23] On August 30, 2005, KI wrote to Platinex stating that: "It was decided that effective immediately, August 30, 2005, all previous Agreements and Letters of Understanding between all affected parties…related to your proposed work around the above mentioned area, both verbal and written, will be null and void."

[24] On October 28, 2005, Platinex made public its Form 2B Listing Application (the "Form 2B") as part of its listing on the TSX Venture Exchange. The purpose of the filing was to provide disclosure of the affairs of the company.

[25] The form included the statement that "[t]he Band has verbally consented to low impact exploration" and made no mention of the letter it had received from KI on August 30.

[26] On November 2, 2005, Chief Donny Morris wrote to Platinex stating that KI did not consent to any exploration, and attached a press release in which he is quoted as saying, "[w]e have said it before and we will say it again. No exploration means no exploration."

[27] On November 17, 2005, Platinex issued its Financial Statements for the quarter that ended September 30, 2005. In the Management Discussion and Analysis section, under the heading "Indigenous Peoples Concerns", Platinex reported that the people of KI opposed further

exploration, but "have indicated however that the Company may proceed without opposition provided that continued consultations are held during the work program and that local employment needs and care for the environment be considered."

[28] In December 2005, Platinex concluded a series of private placements, resulting in large shareholdings of flow-through common shares by Frontier Alt Resource 2005 Flow-Through LP, MineralFields 2005 III Super Flow-Through LP, and Northern Precious Metals 2005 LP (collectively, the "December 2005 Investors"). These placements raised nearly one million dollars in "flow-through funds" for Platinex.

[29] In January 2006, Platinex asked for another meeting. KI agreed to the meeting with the entire community 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, and Platinex cancelled the meeting.

[30] By letter dated February 8, 2006, KI's Chief, Deputy Chief and several members of the Band Council wrote to Platinex to prohibit Platinex from conducting any exploratory drilling on the Property and from transporting exploration equipment on the winter road.

[31] On February 10, 2006, Chief Morris and Deputy Chief McKay sent the following notice to Platinex:

> Therefore as every member of this community and as Chief and Council we are committed to take **ALL** measures and means **TO STOP** you from entering anywhere in Kitchenuhmaykoosib Inninuwug Aaki or to conduct any activity therin whatsoever.

[32] 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.

[33] On February 19, 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.

[34] 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.

[35] Platinex and its representatives state that Chief Morris confronted them in a hostile and threatening fashion stating that the road was blockaded. Further, they state that the runway for the airstrip was purposely ploughed 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, thereby preventing anyone from leaving the area by plane.

[36] 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, the entire drilling crew flew out of the area and abandoned the drilling site.

[37] In contrast, at paragraph 56 of its Factum, KI describes the protest as follows:

> KI protested peacefully. There were 15 or 20 people there. The KI members were resolute that they would stop the drill from getting to the site. They intended to stand on the road, at a sharp

> corner, where the truck carrying the drill would be moving slowly, and refuse to let the truck pass. There was no intention to use tires or equipment to block the road, nor was there any contingency plan in case the truck did not stop.

[38] KI's view of the confrontation was that it involved mostly children and elderly members of the community. At paragraph 64 of its Factum, KI states:

> KI ploughed unused portions of the lake only. The airstrip remained intact. The ploughing was an expressive act. This act did not imperil anyone's safety. The OPP were present throughout, and had specifically stated that they would investigate any damage to property and submit the report for prosecution. The OPP took no action whatsoever about the ploughing.

[39] Members of the OPP were present throughout the confrontation; however, the OPP took the position that, without a court order or injunction, they would not remove any blockade or prevent the ploughing of the airstrip.

[40] After leaving the site, Platinex states that its buildings were torn down and that its drilling equipment disappeared. KI states that it carefully decommissioned the camp and offered to return the equipment to Platinex, but that Platinex has never responded to this offer.

[41] In March of this year, over 400 members of KI signed a petition strongly opposing further exploration by Platinex.

The E3 Prospectors Standards

[42] The Prospectors and Developers of Canada's Best Practices Exploration Environmental Excellence Standards (the "**E3 Standards**") sets out a best practices guide for the the exploration industry.

[43] The E3 Standards promote discussion and sensitivity to aboriginal concerns requiring companies to demonstrate "Recognition and respect for native rights". The standards state that First Nations "believe that they have had to (unnecessarily) fight to retain rights that have long been theirs to enjoy. You should avoid actions or statements that are perceived as impinging on or threatening those rights, as you will find that they are particularly sensitive to this."

[44] The E3 Standards also require that in all cases, before major physical work including drilling commences on land subject to an aboriginal claim, a memorandum of understanding must be signed between the exploration company and the aboriginal entity in question.

KI's Treaty Land Entitlement Claim and Treaty 9

[45] The James Bay Treaty, also known as Treaty 9, was signed by KI on July 5, 1929. The Treaty covers most of northern Ontario north of the height of land to James and Hudson's Bays, to the boundary of Quebec to the east, and is bordered on the west by Manitoba.

[46] The Treaty provides for the surrender of title to the Crown in return for certain reserve land. The size of the KI reserve was measured to be 85 square miles and 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 200 additional square miles.

[47] 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…

[48] As early as January 13, 1999, KI had indicated its intention to both Platinex and the Federal and Ontario Governments to proceed with its TLE Claim.

[49] In May 2000, KI filed its claim, which has progressed through Ontario's historical review stage; it is expected that the legal review stage will be completed by April 2007.

[50] The 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 levels of government.

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

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

[53] While Platinex asserts that KI has put its TLE Claim in issue in these proceedings to gain political and/or legal leverage in obtaining an injunction, KI argues that its land claim is not in issue, but asks for injunctive relief to protect the basis of this claim, which will be decided at a later date. KI's concern is that, if exploration were allowed to proceed, it could have a negative impact on its claim in the event that either level of government removed the area of land being developed from consideration.

The Principles of Injunctive Relief

[54] Rule 40 of the *Rules of Civil Procedure* 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 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.

[55] The principles for 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.[1]

[56] 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.

[57] As noted by Allan Donovan and Mariana Storoni,

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

> 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.[2]

[58] Similarly, in *Haida Nation v. British Columbia (Minister of Forests)*,[3] 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.[4]

[59] As Professor Kent Roach notes, "Aboriginal rights cannot be truly justiciable rights unless courts become comfortable with remedies for their violation."[5] Roach goes on to discuss the use of interlocutory injunctions in the context of Aboriginal rights claims:

> Interlocutory injunctions have typically been sought to stop large development projects that threaten Aboriginal communities. They are designed to provide speedy but temporary relief before a full

[2] Allan Donovan and Mariana Storoni, "The Protection of Aboriginal Rights and Title through Injunction and Judicial Review," October 2004, online: http://www.aboriginal-law.com/articles/protection-of-rights.htm.
[3] [2004] 3 S.C.R. 511.
[4] *Ibid*. at para. 14.
[5] Kent Roach, "Aboriginal Peoples and the Law: Remedies for Violations of Aboriginal Rights," (1992) 21 Man. L.J. 498 at para. 2.

> trial of legal and factual issues is available. Interlocutory relief is especially important given both the time and money it takes to get a full trial in Aboriginal rights litigation and the nature of Aboriginal rights in relation to land and resources. Aboriginal rights can often be quickly and irreparably damaged by development such as logging, mining and hydro-electric development.[6]

[60] Professor Roach also asserts that the value of granting interlocutory injunctions is not merely in the temporary relief provided by that injunction, but also results from the fact that "interlocutory injunctions can encourage the parties to return to negotiations, restrain the use of power to frustrate the negotiation process and provide incentives for the parties to reach a settlement that respects Aboriginal rights."[7]

[61] Sonia Lawrence and Patrick Macklem have more recently observed that, "despite a number of early high profile successes in obtaining interlocutory injunctions, lower courts have become increasingly reluctant to order this form of interim relief in cases involving an assertion of Aboriginal or treaty rights or an alleged failure of the Crown to fulfill its duty to consult."[8]

[62] John J.L. Hunter outlines three general factors that may explain the courts' apparent reluctance to issue injunctions to prevent land and resource-based activities from proceeding in areas where aboriginal rights and/or title have been asserted:

- the realization that injunctions issued in aboriginal rights cases are likely to be in place for a very long time due to the lengthy trials required to resolve aboriginal claims on their merits;
- the increasing consideration of the public interest in assessing the balance of convenience; and

[6] *Ibid*. at para. 8.
[7] *Ibid*. at par. 5.
[8] Sonia Lawrence and Patrick Macklem, "From Consultation to Reconciliation: Aboriginal Rights and the Crown's Duty to Consult," (2000) 79 Can. Bar Rev. 253.

- the increasing understanding of the nature and scope of aboriginal rights.[9]

[63] These factors encourage courts to find creative solutions to these problems, such as those employed by McLachlin C.J.S.C. in *McLeod Lake Indian Band v. British Columbia*.[10]

The Merits Test

[64] The merits or threshold test requires a consideration of the merits of a case to ensure that it is serious and not frivolous. The threshold has been held to be a low one so that, unless the case is clearly frivolous and without merit, the court will proceed to the second and third principles.

[65] Both parties are able to meet this test. Neither party has alleged that the claim of the other does not raise a serious issue to be tried.

[66] More contentious are the second and third elements of the test, as well as the issue of whether this court should exercise its discretion to relieve KI from the requirement to provide an undertaking for damages.

Irreparable Harm

[67] The second test for the granting of an injunction is the requirement of irreparable harm. If the harm that is anticipated by the nature of the activity complained of is capable of being compensated for by monetary damages, an injunction will generally be viewed as unnecessary.

[9] John J.L. Hunter, "Advancing Aboriginal Title Claims after *Delgamuukw*: The Role of the Injunction" (Paper presented to the Continuing Legal Education Conference on Litigating Aboriginal Title, June 2000) at 11.
[10] [1988] B.C.J. No. 2560 (B.C.S.C.).

The Position of Platinex

[68] For the following reasons, I find that Platinex has not proven on a balance of probabilities that, without the grant of an injunction, it will suffer irreparable harm.

[69] After being listed on the stock exchange and raising funds by the issue of flow through shares, Platinex was under pressure to commence drilling in order to satisfy the financial obligations it owed to its investors and the narrow time frames in which those obligations had to be met.

[70] Since 2001, Platinex has received several letters and notices that KI was not consenting to further exploration. It is inconceivable that Platinex did not know that KI was strongly opposing any further drilling on the property.

[71] Platinex decided to gamble that KI would not try to stop them and essentially decided to try to steamroll over the KI community by moving in a drilling crew without notice.

[72] While I accept the evidence of Platinex that it will face insolvency if it cannot complete its drilling by the end of this year or shortly thereafter, Platinex is, to a large degree, the author of its own misfortune.

[73] At the time that Platinex became listed on the stock exchange and issued a prospectus to raise funds, it knew that access to the land was a serious and real issue.

[74] It was at Platinex's request that a meeting with the KI community was scheduled for January 2006. When it became obvious to Platinex that the meeting would not change the

position of KI, Platinex cancelled the meeting at the last moment and then, without any notice to KI, proceeded to send in a drilling team when it knew or ought to have known that this action would be strongly opposed by KI.

[75] These unilateral actions of Platinex were disrespectful of KI's interests and were interpreted as an insult by the KI community. They can only be viewed as being motivated by the severe financial pressure that it had created and placed itself under.

[76] For Platinex to now say that it will suffer irreparable harm if an injunction is not granted flies in the face of the equitable basis upon which injunctive relief is premised. The circumstances giving rise to the economic harm that will be potentially suffered by Platinex relate directly to decisions and choices that it made after KI had said that further exploration would be resisted. In making those choices, including the choice to raise funds by means of flow-through shares, and in understating its problems of access to the property, it ignored or was willfully blind to the concerns and position of the KI community. The financial and time pressures Platinex is now experiencing are self-created and are based on an unreasonable belief that KI would not defend its interests when push came to shove. Platinex had the choice to continue with the process of consultation and negotiation with KI and the Crown and chose not to do so.

The Position of KI

[77] For years KI had been declaring its interest in developing the resources that lay within the boundaries of its traditional land, subject to the right to be fully consulted and without prejudice to its TLE Claim.

[78] KI's primary concern is that development and exploration on land that is potentially within the scope of its land claim may have a negative results and cause irreparable harm.

[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.

[81] I find that KI has satisfied this aspect of the test for an injunction.

Irreparable Harm and The Failure to Consult

[82] Although I have found that KI has satisfied that requirement that it must show irreparable harm in order to obtain injunctive relief, the Crown's duty to consult has been addressed in much detail by both parties and hence the following comments are required.

[83] It is well established that the Crown must consult with a First Nation when it seeks to interfere with rights associated with Aboriginal interests.[11] Consultation requirements must be proportional to the nature and extent of the Aboriginal interest and the severity of the proposed Crown action.[12]

[84] In *Haida Nation,*[13] McLachlin C.J., writing for the Court, held that "the government's duty to consult with Aboriginal peoples and accommodate their interests is grounded in the honour of the Crown."[14]

[85] Because the Crown's duty to consult engages the honour of the Crown and flows from its fiduciary relationship with First Nations peoples, McLachlin C.J. affirmed that it cannot be delegated to third parties.[15]

[86] McLachlin C.J. went on to define the effect of this duty as follows:

> The historical roots of the principle of the honour of the Crown suggest that it must be understood generously in order to reflect the underlying realities from which it stems. In all its dealings with Aboriginal peoples, from the assertion of sovereignty to the resolution of claims and the implementation of treaties, the Crown must act honourably.
>
> The honour of the Crown gives rise to different duties in different circumstances. Where the Crown has assumed discretionary control over specific Aboriginal interests, the honour of the Crown gives rise to a fiduciary duty…. However, the duty's fulfillment requires that the Crown act with reference to the Aboriginal

[11] *R. v. Sparrow* [1990] 1 S.C.R. 1075; *Delgamuukw v. British Coliumbia*, [1997] 3 S.C.R. 1010; *R. v. Van der Peet*, [1996] 2 S.C.R. 507; *Relentless Energy Corporation v. Davis et al*., 2004 BCSC 1492 (CanLII) 23; *Homalco Indian Band v. British Columbia (Minister of Agriculture),* [2005] 2 C.N.L.R. 63.
[12] *Delgamuukw, ibid.; Haida Nation,* supra note 3.
[13] *Haida Nation, ibid*.
[14] *Ibid*. at para. 16.
[15] *Ibid*.

> group's best interest in exercising discretionary control over the specific Aboriginal interest at stake.[16]

[87] In applying the principle of the honour of the Crown to the facts in *Haida Nation*, McLachlin C.J. held that:

> The Crown, acting honourably, cannot cavalierly run roughshod over Aboriginal interests where claims affecting these interests are being seriously pursued in the process of treaty negotiation and proof. It must respect these potential, but yet unproven, interests. … *To unilaterally exploit a claimed resource during the process of proving and resolving the Aboriginal claim to that resource, may be to deprive the Aboriginal claimants of some or all of the benefit of the resource. That is not honourable.*[17]

[88] McLachlin C.J. then went on to explain what triggers the Crown's duty to consult:

> The foundation of the duty in the Crown's honour and the goal of reconciliation suggest that *the duty arises when the Crown has knowledge, real or constructive, of the potential existence* of the Aboriginal right or title and contemplates conduct that might adversely affect it.[18]

[89] The objective of the consultation process is to foster negotiated settlements and avoid litigation. For this process to have any real meaning it must occur before any activity begins and not afterwards or at a stage where it is rendered meaningless.

[90] In this regard, I endorse the comments of the trial judge and the B.C. Court of Appeal in *Halfway River First Nation v. British Columbia (Minister of Forests).*[19] The Crown must first provide the First Nation with notice of and full information on the proposed activity; it must fully

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[16] *Ibid*. at paras. 17-18.
[17] *Ibid*. at para. 27 [emphasis added].
[18] *Ibid*. at para. 35 [emphasis added].

inform itself of the practices and views of the First Nation; and it must undertake meaningful and reasonable consultation with the First Nation.

[91] The duty to consult, however, goes beyond giving notice and gathering and sharing information. To be meaningful, the Crown must make good faith efforts to negotiate an agreement. The duty to negotiate does not mean a duty to agree, but rather requires the Crown to possess a *bona fide* commitment to the principle of reconciliation over litigation. The duty to negotiate does not give First Nations a veto; they must also make *bona fide* efforts to find a resolution to the issues at hand.

[92] The Ontario government was not present during these proceedings, and the evidentiary record indicates that it has been almost entirely absent from the consultation process with KI and has abdicated its responsibility and delegated its duty to consult to Platinex. Yet, at the same time, the Ontario government made several decisions about the environmental impact of Platinex's exploration programmes, the granting of mining leases and lease extensions, both before and after receiving notice of KI's TLE Claim.

[93] In the several years that discussions between Platinex and KI have been ongoing, the Crown has been involved in perhaps three meetings. There is no evidence that the Crown has maintained a strong supervisory presence in the negotiations, despite Platinex having expressed its concerns to Ontario it on a number of occasions.

18. (1999), 64 B.C.L.R. (3d) 206 (C.A.).

[94] In 1990, in *R v. Sparrow*,[20] the Supreme Court of Canada first stated that the Crown had a duty to consult Aboriginal people. For the past 16 years, courts in Ontario and throughout Canada, have applied and expanded upon this principle, sending consistent and clear messages to the federal and provincial Crowns that their position as fiduciaries compels them to address this duty in all Crown decisions that affect the rights of Aboriginal peoples.

[95] Despite repeated judicial messages delivered over the course of 16 years, the evidentiary record available in this case sadly reveals that the provincial Crown has not heard or comprehended this message and has failed in fulfilling this obligation.

[96] One of the unfortunate aspects of the Crown's failure to understand and comply with its obligations is that it promotes industrial uncertainty to those companies, like Platinex, interested in exploring and developing the rich resources located on Aboriginal traditional land.

[97] In circumstances where the Crown fails to consult, the question arises as to what remedy is available.

[98] Sonia Lawrence and Patrick Macklem assert that, "the overall purpose of a remedy in the context of a breach of a duty to consult ought to be to facilitate outcomes determined by the parties themselves, without the need for subsequent litigation."[21] They discuss several remedial options available to aggrieved parties.

[99] According to Lawrence and Macklem, if the Crown breaches the duty to consult, the ultimate remedy is a declaration that the action in question is unconstitutional. Alternatively, in

[20] *Sparrow*, *supra* note 11.

cases involving compliance with statutory provisions, courts have ordered the Crown to take positive steps towards ensuring compliance.

[100] The court can also order the Crown to engage in consultations. For example, in *Cheslatta Carrier Nation v. British Columbia (Environmental Assessment Act, Project Assessment Director),*[22] the court ordered the creation of a new consultative committee.

[101] A breach of the duty to consult can also be grounds for granting an injunction against the Crown. As Lawrence and Macklem note, "with respect to cases involving a breach of the Crown's duty to consult, however, judicial reluctance to grant interlocutory injunctions creates a perverse incentive on the Crown to engage in ineffective consultations with a First Nation."[23]

Balance of Convenience

[102] Once an applicant has convinced a court that irreparable harm will result unless an injunction is granted, it becomes necessary to consider the balance of convenience. This test is essentially the weighing of all of the circumstances of the particular case to determine the effect on the applicant if the injunction is not granted.

[103] This is not a case where the ability or right of exploration and resource development companies to pursue their economic interests when they occur on traditional Aboriginal lands is in issue.

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[21] *Supra* note 8 at 274.
[22] [1998] B.C.J. No. 178 (B.C.S.C.).
[23] *Supra* note 8 at 275.

[104] This case has two very unique aspects:

1. the fact that the exploration and development may take place on lands subject to an ongoing treaty land claim; and

2. the fact that the Crown (Ontario) and the company (Platinex) have chosen to ignore and/or terminate the consultative process and the concerns and ignore perspective of the First Nations Band in question.

[105] I accept that, without an injunction, Platinex will face serious financial hardship including possibly bankruptcy or insolvency.

[106] On the other hand, it is conceivable that, if exploration continues, KI's TLE Claim may be adversely affected and the development will negatively impact the social and spiritual heart of the community.

[107] In considering the balance of convenience, a court may also assess the public interest in addition to the interests of the parties.[24]

[108] In *Siska No. 1*[25] and *Tlowitsis,*[26] the public interest influenced the courts to deny the injunction because the work stoppages would have resulted in the loss of employment for a large number of citizens of the province. Clearly, this is not the situation in the case at bar.

[24] *Wiigyet (Morrison) et al v. District Manager, Kispiox Forest District et al* (1991) 51 B.C.L.R. (2d) 73.
[25] *Siska Indian Band v. British Columbia (Minister of Forests) (No. 1)* (1998), 62 B.C.L.R. (3d) 133.
[26] *Tlowitsis-Mumtaglia Band v. MacMillan Bloedel Ltd.* (1990), 53 B.C.L.R. (2d) 69 (CA).

[109] In the instant case, considerations in assessing the public interest include the failure of the Crown to consult with KI and the integrity of the consultation process itself.

[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.

Undertaking to Pay Damages

[113] Unless a Court exercises its discretion, an applicant must provide an undertaking to pay damages to allow the respondent to recover damages in the event that it was wrongfully enjoined.

[114] Robert Sharpe summarizes the law pertaining to the requirement for a plaintiff to give an undertaking as follows:

> Thus there is no inflexible rule which inevitably requires that an undertaking be given or which states that the decision turns on the means of the plaintiff to provide a secure undertaking. However, an undertaking is the usual requirement and it would appear that the plaintiff's case will be very much weaker if he or she is of insufficient substance to ensure its worth. One commentator argues

> that, while an impecunious plaintiff should not be denied relief on account of inability to give a meaningful undertaking, the undertaking should be required "as a reminder to the applicant that he might have to shoulder some of the defendant's losses, in however small a proportion.[27]

[115] Similarly, in an article published in the Cambridge Law Journal, Professor Zuckerman examined the courts' use of its discretion to dispense with the undertaking in damages where the plaintiff is financially unable to make the undertaking. He argued that this fact is relevant, but rather than being considered on its own, it should make up one aspect of the balance of convenience test:

> When the impecuniosity of an applicant is considered in relation to the question of whether the injunction should be granted, the need to protect the respondent's rights play a significant part in the decision… The insufficiency of the plaintiff's resources to compensate the defendant is a factor that counts in the balance of convenience. Where the plaintiff's resources fall short of the defendant's potential loss, the defendant's interests are not ignored. Rather they give way to the plaintiff's greater claim to the court's protection.[28]

[116] In *RJR-Macdonald*, the Supreme Court acknowledged that

> The fact that one party may be impecunious does not automatically determine the application in favour of the other party who will not ultimately be able to collect damages, although it may be a relevant consideration (*Hubbard v. Pitt*, [1976] Q.B. 142 (C.A.)).[29]

[27] Robert J. Sharpe, *Injunctions and Specific Performance* (Aurora, Ont.: Canada Law Book, 2006) at 2.500.
[28] Zuckerman, "The Undertaking in Damages – Substantive and Procedural Dimensions" (1994) 53 Camb. L.J. 546 at 569.
[29] *Supra* note 1 at para. 59.

[117] As Professor Kent Roach notes: "the decision that the harm of defendants will not be compensated is crucial because it forces the issue of whether to grant the interlocutory injunction on to where the balance of convenience lies."[30]

[118] In its statement of claim, Platinex has claimed general damages in the amount of $10,000,000,000; special damages in the amount of $1,000,000; and punitive damages of $500,000.

[119] There is no question that KI lacks the financial ability to undertake to pay damages of this magnitude should it not be successful when the case comes to trial.

[120] The exercise of the Court's discretion to relieve against the requirement to provide an undertaking as to damages in Aboriginal cases is not uncommon, given that many First Nations are impoverished.[31]

[121] No undertaking was required in *MacMillan Bloedel Ltd. v. Mullin; Martin v. B.C.*,[32] *Ominayak v. Norcan Energy Resources Ltd.*,[33] *Hunt v. Halcan Log Services Ltd.*,[34] or in *Coalition to Save Northern Flood v. Canada*.[35]

[122] Unfortunately, this issue highlights the difficulty in meeting the strict requirements of injunctive relief in cases involving Aboriginal issues. Large wealthy corporations issuing law suits for many millions of dollars could disentitle First Nations from

[30] *Supra* note 5 at para. 20.
[31] *Snuneymuxw First Nation v. British Columbia* (2004), 26 B.C.L.R. (4th) 360.
[32] [1985] 2 C.N.L.R. 58 (B.C.C.A.).
[33] (1983) [1984] 4 C.N.L.R. 27.
[34] (1986), 34 D.L.R. (4th) 504 (S.C.).
[35] (1995), 106 Man R. (2d) 28 (Q.B.).

qualifying from the right to claim injunctive relief. This result cannot be deemed to be in accordance with the principles of equity.

[123] To disentitle KI to a grant of an injunction in these circumstances cannot be fair or just.

[124] Accordingly, this Court will exercise its discretion and waive the need for KI to provide an undertaking as to damages.

Does KI have Unclean Hands?

[125] I do not accept the argument that KI acted improperly or illegally and, as a result, has unclean hands. KI has repeatedly requested that it be consulted. It was Platinex that decided to terminate the consultative process and send in its drilling crew.

[126] It is understandable why the members of KI believed that they had no other viable option but to confront Platinex in order to stop the drilling. Platinex's decision to send a drilling crew into the site despite KI's position failed when KI decided to make a last ditch stand.

[127] Platinex failed to respect KI's moratorium, ignored its letters and notices, cancelled a meeting with the community and decided it was going to drill despite being clearly told that KI was not agreeing to any further activity on the land. In the background, while all of this was going on, the federal and provincial Crowns were standing on the sidelines as passive observers.

[128] Although no violence erupted when KI confronted Platinex's drilling crew, it is clear that the members of that crew had a reasonable apprehension for their safety if they stayed in the area and commenced their drilling operation.

[129] There was however, no independent evidence provided to this court of wrongdoing or criminal behaviour by KI or members of the community, despite the fact that the OPP were present for the duration of the confrontation.

[130] With respect to the alleged damage to Platinex's buildings and property, the evidence of Platinex and KI directly contradicts each other. KI asserts that Platinex's property has been safeguarded and is available to be released to it immediately.

[131] If the evidence had established that KI was not making good faith efforts to consult and simply aborting the process of attempting to find a way to reconcile their differences with Platinex, the argument that they had unclean hands would have had much more weight.

Conclusion and Disposition

[132] The duty of the Crown to consult should not be interpreted as a veto in favour of First Nations people.

[133] The duty to consult is a reciprocal duty and the Crown as well as the Aboriginal party involved must approach this duty by showing ongoing good faith efforts to reach a consensus.

[134] There have been many judicial pronouncements on the special nature of cases involving Aboriginal rights. There have been repeated calls for First Nations and the Crown to reach negotiated settlements and avoid lengthy and expensive litigation. Perhaps the most well-known comments were made by Lamer C.J.C. in *Delgamuukw* when he noted that "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."[36]

[135] Litigation of cases where Aboriginal issues are involved, whether by means of judicial review or by way of injunctive relief, does not and will not promote reconciliation.

[136] Reconciliation will only be achieved by communication and honest and open dialogue. The parties initially engaged in consultation with each other, but it did not continue. It must begin again. The parties must continue to seek their own resolution of their issues and concerns.

[137] KI is claiming entitlement to an additional 200 square kilometers of reserve land. Platinex's mining leases cover an area of approximately 19 square kilometers or about 1/10 of the land claimed by KI. KI has expressed a desire to be a full partner in the development of the resources on its traditional land, but does not want to negatively affect its TLE Claim or lose control of how the development occurs. In view of these comments, the possibility still exists that the parties may be capable of reaching of a negotiated settlement.

[36] *Delgamuukw, supra* note 11 at para 1123-24.

[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.

The Hon. Mr. Justice G. P. Smith

Released: July 28, 2006

COURT FILE NO.: 06-0271
DATE: 2006-07-28

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

REASONS FOR JUDGMENT

Patrick Smith

Released: July 28, 2006

/mls