**CITATION:** Wahgoshig First Nation v. Her Majesty the Queen in Right of Ontario et al., 2011 ONSC 7708
**COURT FILE NO.:** CV-11-439248
**DATE:** 20120103

**SUPERIOR COURT OF JUSTICE - ONTARIO**

**RE:** Wahgoshig First Nation, Plaintiff

**AND:**

Her Majesty the Queen in Right of Ontario and Solid Gold Resources Corp., Defendant

**BEFORE:** Carole J. Brown J.

**COUNSEL:** Kate Kempton, Michael McClurg and Jesse McCormick, for the Plaintiff

Dennis W. Brown, Q.C., Ria Tzimas and Tom Schreiter, for the Defendant, Her Majesty the Queen in Right of Ontario

Neal J. Smitheman and Tracy A. Pratt, for the Defendant, Solid Gold Resources Corp.

**HEARD:** December 20, 2011

## ENDORSEMENT

[1] The Plaintiff, Wahgoshig First Nation ("WFN" or "Wahgoshig") brings this motion for an interlocutory injunction restraining the defendant, Solid Gold Resources Corp. ("Solid Gold"), from engaging in all activities relating to mineral exploration in the area of Treaty 9 lands, and an order that Her Majesty the Queen in Right of Ontario ("Ontario" or "the Crown" or "the Province") provide an undertaking in damages to Solid Gold or, in the alternative, an order dispensing with the undertaking requirements of R.40.03 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

[2] Solid Gold argues that granting injunctive relief would jeopardize its financial well-being and essentially "shut down" its operations.

[3] Ontario submits that the duty to consult is triggered, and that it delegated the operational aspects of the duty to Solid Gold, which has not fulfilled the duty. It seeks the Court's assistance in fashioning a consultation remedy that promotes reconciliation by fairly balancing the right of WFN to be properly consulted and the right of Solid Gold to carry out its mining activities. It proposes that the Court fashion a remedy that will require consultation between Solid Gold and

WFN and will permit Solid Gold to carry on its test drilling on a staged and managed basis that is informed by the information and input provided by WFN.

***The Parties***

*Wahgoshig First Nation*

[4] Wahgoshig is an Aboriginal people within the meaning of section 35 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 and has the capacity of a band within the meaning of the *Indian Act*, RSC 1985, c 1-5. Wahgoshig forms part of the Lake Abitibi people and is a beneficiary to Treaty 9. The people of Wahgoshig have lived on and relied upon the lands in and around Lake Abitibi since time immemorial. The area around Lake Abitibi is the birthplace of the Wahgoshig people and the lands are considered to be sacred by the people of Wahgoshig.

[5] Wahgoshig holds, asserts, and exercises inherent, Aboriginal and/or treaty rights throughout its traditional territory including, among other things, hunting, fishing, trapping, berry picking, plant and wood harvesting, cultivation of medicinal plants, use of water, practicing of sacred traditional lifestyle and ceremonial activities, the use and preservation of sacred sites, prayer areas, and burial grounds ("Traditional Practices"). Its reserve lands are situated within its traditional territory on the south shore of Lake Abitibi.

[6] Many Wahgoshig families depend on the land for survival, supporting themselves by fishing, hunting, trapping and gathering on the land.

*Solid Gold Resources Corp.*

[7] Solid Gold is a publicly traded junior mining exploration company headquartered in Ontario. Its Legacy Project mining claim covers 103 unpatented mining claims covering approximately 21,790 hectares which lies within Wahgoshig's traditional territory ("the Claims Block").

*Her Majesty the Queen in Right of Ontario*

[8] The duty to consult and accommodate, which is at the heart of this injunction motion resides in the honour of the Crown. While the Crown may delegate operational aspects of the duty to third parties, such as Solid Gold, the Crown bears the ultimate legal responsibility to ensure the duty is fulfilled.

***The Facts***

[9] The WFN seeks an injunction to prevent Solid Gold from conducting further exploration on Treaty 9 Crown lands on which Wahgoshig Community has exercised Aboriginal and treaty rights though its traditional practices without consultation and accommodation with the WFN.

[10] Solid Gold staked its claims in the Claims Block from November 2007 through at least 2010. In July 2009, the Crown advised Solid Gold that Solid Gold should contact WFN to consult regarding its intended mineral exploration and offered to facilitate the process.

[11] No consultation occurred before Solid Gold's drilling began in the Spring of 2011.

[12] Drilling involves clearing 25 sq. metre "pads", clearing forest, bulldozing access routes to the drilling sites, and transportation and storage of fuels and equipment.

[13] The Treaty 9 lands upon which the Claims Block sits were the subject of a preliminary survey done by the Ministry of Natural Resources in 1995 which determined that the Treaty 9 lands are an "area of cultural heritage potential". The study was stated to "serve as a preliminary planning tool to indicate the areas that require field assessment prior to land disturbance though timber harvesting or other development activities".

[14] WFN first discovered drilling activity on Treaty 9 lands in the spring of 2011. The drilling crew would not divulge for whom they were working. After research and enquiry, WFN determined the identity of Solid Gold and attempted to contact it to consult. No meaningful consultation occurred. On November 8, 2011, the Crown advised Solid Gold in writing that consultation must occur, to no avail.

[15] On November 9, 2011, WFN served a Notice of Claim on the defendant, Ontario, pursuant to s. 7 of the *Proceedings against the Crown Act*, R.S.O. 1990 c. P.27. Upon expiry of the 60 day notice period, WFN will serve its Statement of Claim on Solid Gold and Ontario.

[16] Since that time the drilling activities have increased, with a second drill rig brought in.

***The Issues***

[17] The issue to be determined by this Court is whether an injunction should be granted.

[18] The basic tripartite test for granting injective relief is set forth in *RJR – MacDonald Inc. v. Canada (AG)*, [1994] 1 S.C.R. 31, [1994] S.C.J. No. 17, as follows:

(1) There must be a serious issue to be tried;

(2) There must be irreparable harm;

(3) The balance of convenience must favour the applicant.

***The Positions of the Parties***

*WFN*

[19] WFN submits that the Crown land in issue is the known traditional territory of the Lake Abitibi people, surrendered pursuant to Treaty 9. WFN submits that Solid Gold's exploration program has and will continue to cause adverse effects on Wahgoshig's Aboriginal and/or treaty

rights, its values, cultures, cultural heritage and its relationship to the land, which is at the core of its identity as an Aboriginal people. Such rights include its known treaty rights to hunting, trapping and fishing, as well as its asserted rights to the protection of cultural heritage, sacred and burial sites. Unless Solid Gold is enjoined from continuing to drill and/or required to consult and accommodate, such sites including sacred sites could be damaged or destroyed.

[20] WFN's original notice of motion sought to enjoin Solid Gold from mineral exploration activities unless it had WFN's prior consent, but WFN conceded in argument that this was not the law of Canada, and submitted that it seeks to enjoin Solid Gold for failure to consult and accommodate.

[21] WFN submits that Solid Gold came into the Claims Block, located on Treaty 9 lands without any notification or attempt to consult and discuss with WFN, and willfully continued its operations despite knowledge that it was obligated to consult and accommodate.

*Solid Gold*

[22] Solid Gold submits that it has no legal responsibility or duty to consult, and that if there is such a duty, it resides in the Crown.

[23] It submits that the *Mining Act*, R.S.O. 1990, c. M.14 establishes a "free entry" system whereby all Crown lands, including those subject to Aboriginal land claims are open for prospecting and staking, without any consultation or permit required.

[24] It further submits that the Treaty 9 lands in question were surrendered to the Crown and WFN has no veto right over their activity. The issue of a "veto" right or consent to enter upon Treaty lands is not in issue as clearly articulated by Ms. Kempton.

[25] Further, Mr. Smitherman on behalf of Solid Gold, argues that any impact on Aboriginal rights is minimal and only a small portion of the lands is being drilled. He did, however, concede that any impact, damage or destruction has likely already occurred.

*Ontario*

[26] The Province takes no position in this motion. It submits that the duty to consult has been triggered and that the Court's assistance is required to fashion a consultation remedy that promotes reconciliation by fairly balancing the right of WFN to be properly consulted and the right of Solid Gold to carry out early stage mineral exploration projects on its unpatented mining claims.

[27] It submits that without the requisite dialogue and information exchange between WFN and Solid Gold, concerns over the potential impacts of the drilling program on harvesting activities, and on traditional and customary practices that embrace burial and sacred sites, are magnified significantly and a climate of mistrust intensifies.

[28] The Province submits that the injunctive relief sought by WFN will have the effect of polarizing the parties and leading to a zero-sum outcome that is entirely contrary to the requirements of s.35 of the *Constitution Act, 1982,* and the expectations of the treaty relationship.



***The Law and Analysis***

*Preliminary Jurisdictional Issue*

[29] Solid Gold argues that this Court does not have the jurisdiction to hear the motion for an interlocutory injunction, because the injunction is not based on any underlying litigation. This motion was brought prior to commencement of the action. WFN served its Notice pursuant to the *Proceedings Against the Crown Act* on November 9, 2011 and will serve the Statement of Claim pursuant to that *Ac*t, following the 60 day notice period.

[30] As I remarked in the course of this hearing, the question of whether I should exercise my discretion to issue an injunction in this pending litigation is properly considered in my determination of the merits of the motion, which I do now.

[31] WFN has explained that it has not served Solid Gold yet, because it is bringing an action against both Solid Gold and the Crown and it is required to wait 60 days after filing its notice of claim on the Crown under section 7 of the *Proceedings Against the Crown Act* before commencing its claim.

[32] WFN's Notice of Motion summarizes its intended claim as against Solid Gold and the Crown as follows:

> (a) Under authority of the *Mining Act*, R.S.O. 1990, c. M. 14, Solid Gold has entered upon certain portions of the traditional territory of the Wahgoshig First Nation and commenced mineral exploration activities there.
>
> (b) Such mineral exploration activities have or will have potential adverse effects on the treaty or Aboriginal rights of WFN.
>
> (c) The treaty or Aboriginal rights of WFN are protected by Section 35 of the *Constitution Act, 1982* ("Section 35") and by the Honour of the Crown. This protection includes the constitutional right to be meaningfully consulted and adequately accommodated where Crown-authorized activities are contemplated that might have an adverse impact on WFN's treaty or Aboriginal rights.
>
> (d) Such consultation and accommodation have not occurred.

> (e) Until such occurs, the defendant Solid Gold has no legal authority to engage in its mineral exploration activities.

[33] WFN has undertaken to issue the Statement of Claim at the expiry of the 60-day notice period.

[34] Rule 40.01 provides that an order for injunctive relief under section 101 or 102 of the *Courts of Justice Act*, R.S.O. 1990, c. C. 43 may be obtained on motion by a party to a pending or intended proceeding. While Mr. Smitherman argued for Solid Gold that this Court has no jurisdiction, in the circumstances of this case, to grant an injunction where there is no claim commenced, and where Solid Gold is not able to clearly understand the intended action against it, I am satisfied, considering the provisions of 40.01 and section 101 of the *Courts of Justice Act*, that this Court has jurisdiction.



*The Tripartite Test for Injunctive Relief*

*1. Serious Question to be Tried*

[35] Ms. Kempton argues for WFN that there are serious issues to be tried regarding the WFN's Constitutional, treaty and asserted rights over its traditional territories, which justify the granting of an injunction in order to preserve such rights. She argues that the constitutionality of the *Mining Act* and its application are in issue.

[36] She argues that the duty to consult and to accommodate the concerns of Aboriginal peoples has been recognized as a legal constitutional requirement which has, in this case, not been fulfilled by either Solid Gold or the Crown.

[37] Mr. Smitherman argues that there is no serious issue to be tried, that the Treaty 9 lands were surrendered long ago, and that there are no asserted rights over those lands that would justify an injunction. He further argues that there is no duty to consult on the part of Solid Gold and that the duty resides in the Crown and is not delegable.

[38] He argues for Solid Gold that the *Mining Act* clearly establishes a "free entry" mining system which entitles Solid Gold to proceed with their exploration. He relies on *Frontenac Ventures Corp. v. Ardoch Algonquin First Nation* (2008), 91 O.R. (3d) 1, 2008 ONCA 534 in this regard. I note, however, that *Frontenac* was not a *Constitutional* challenge to the *Mining Act.*

[39] Further, in *Frontenac* the Ontario Court of Appeal pointed to a potential conflict between the *Mining Act* and s. 35 of the *Constitution Act, 1982*, which led it to reduce the sentences of aboriginal individuals who were in contempt of court orders. This bolsters the *prima facie* merits of WFN's intended *Charter* challenge to that legislation. The Court held at para. 62:

> The intersection of these two background circumstances creates an obvious problem, indeed the problem that lies at the heart of this case. What Frontenac wants to do on Crown land - staking and exploration - is legal under the *Mining Act*. However, the

> appellants' response, although in contempt of two court orders, is grounded, at a minimum, in a respectable interpretation of s. 35 of the *Constitution Act, 1982* and several recent decisions of the Supreme Court of Canada.

[40] In fact, since *Frontenac,* the Ontario government has amended the legislation effective October 28, 2009 to include the following purpose section:

> 2. The purpose of this Act is to encourage prospecting, staking and exploration for the development of mineral resources, in a manner consistent with the recognition and affirmation of existing Aboriginal and treaty rights in section 35 of the *Constitution Act, 1982*, including the duty to consult, and to minimize the impact of these activities on public health and safety and the environment.

[41] Moreover, Canadian jurisprudence has recognized that the duty to consult and accommodate is not constrained by legislation and that the duty "lies upstream" of any legislative or statutory regime: *Carrier Sekani Tribal Council v. British Columbia (Utilities Commission)*, 2010 SCC 43, [2010] 12 S.C.R. 650; *West Moberly First Nations v. British Columbia (Chief Inspector of Mines)*, 2011 BCCA 247; *Ross River Dena Council v. Government of Yukon*, 2011 YKSC 84; *Huu-Ay-Aht First Nation v. British Columbia (Minister of Forests)*, 2005 BCSC 697; *Ka'a'Gee Tu First Nation v. Canada (Attorney General)*, 2007 FC 763; *Yellowknives Dene First Nation v. Canada*, 2010 FC 1139.

[42] The threshold for the serious question test is low. It is a preliminary assessment of the merits. The claim must not be frivolous or vexatious. I am satisfied that the intended claim, as summarized in the Notice of Motion, raises serious issues that merit a fulsome hearing at trial.

[43] I am further satisfied, based on the caselaw before me, that while the ultimate legal responsibility for fulfillment of the duty to consult resides in the Crown, its operational aspects can be, and often are, delegated to those third parties directly involved in the day-to-day resource development projects, such as Solid Gold.

*2. Irreparable Harm*

[44] WFN submits that Solid Gold's mineral exploration activities threaten to cause, and may have already caused, irreparable harm to sites of cultural and spiritual significance to WFN. It submits that Solid Gold's activities threaten sacred sites including burial sites, and threaten areas of significant cultural importance to Wahgoshig. Mineral exploration drilling includes surface and subsurface activities and thus threatens such sites on the ground and historical archaeological sites on and below the ground. It further submits that it has lost its opportunity to consult with Solid Gold to determine what impact on its Aboriginal and treaty rights might be occasioned by Solid Gold's project and how such impact can be avoided or mitigated.

[45] It submits that, given the lands at issue, which include its sacred and burial sites as well as the lands on which it depends for survival, there is significant likelihood of irreparable harm.

[46] Solid Gold takes the position that there is no demonstrated irreparable harm. It argues that WFN cannot establish proof of irreparable harm, and that evidence of irreparable harm must be clear and not speculative. It argues that, in this case, WFN has not produced evidence of any sacred, burial or other culturally sensitive sites, nor evidence that the drill holes are even close to lands used to exercise WFN's treaty rights. It argues that the plaintiff cannot demonstrate that any harm occasioned by WFN cannot be compensated by damages.

[47] I note that, in argument, Solid Gold conceded that if any sites are threatened, damage may already have occurred.

[48] "Irreparable harm" refers to the nature of the harm suffered by the Applicant rather than its magnitude; it must be such that damages will not suffice.

[49] Absolute certainty of irreparable harm is not always required. Indeed, Canadian courts have recognized that absolute certainty of irreparable harm may not be possible where the duty to consult and accommodate have not been met as there is often a lack of precise knowledge about the impact of a project on culture, rights, values and how these can be avoided or mitigated. As stated by the British Columbia Supreme Court in *Homalco Indian Band v. B.C.*, 2004 BCSC 1764, at para. 45 [*Homalco*]:

> I am satisfied that the test at this point of the consideration must be whether or not there is a likelihood or probability or reasonable possibility of harm. It need not be an absolute certainty.

[50] In *MacMillan Bloedel Ltd. v. Mullin et al.*, [1985] 2 C.N.L.R. 58 [*MacMillan Bloedel*], the British Columbia Court of Appeal held at paras. 54-55 and 73, adopting the words of Muirhead J. in *Foster v. Mountford and Rigby Ltd.* (1976), 14 A.L.R. 71 at 75:

> The Indians wish to retain their culture on Meares Island as well as in urban museums. … These people have come to the law for relief and protection… [M]onetary damages cannot alleviate any wrong to the plaintiffs that may be established and perhaps, there can be no greater threat to any of us than a threat to one's family and social structure.

[51] The Canadian Courts have been called upon many times to determine conflicts arising from the interaction between resource companies' development activities on Crown lands and the effects on Aboriginal and treaty rights. A significant body of jurisprudence has developed, which has recognized that negative effects on Aboriginal and treaty rights and restrictions on the ability to exercise such rights in preferred places constitutes irreparable harm. Such cases have considered effects of development on Aboriginal hunting, fishing, trapping, harvesting rights and on the less tangible rights and values of identity and cultural and spiritual relationships with the land. As recognized by Smith J. in *Platinex Inc. v. Kitchenuhmaykoosib Inninuwug First Nation* (2007), 272 D.L.R. (4th) 727, [2006] O.J. No. 3140 (S.C.J.) [*Platinex*], at paras. 79-80:

> Irreparable harm may be caused to KI … 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.

> 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.

[52] Irreparable harm to Aboriginal peoples has further been judicially recognized when activities such as logging (*MacMillan Bloedel*; *Hunt v. Halcan Log Services Ltd.*, 1986 BCSC 863; *Lax Kw'alaams Indian Band v. British Columbia (Minister of Forests)*, 2004 BCCA 306 [*Lax Kw'alaams*]), excavation (*Touchwood File Hiles Qu'Appelle District Chief Counsel Inc., v. Davis*, [1985] S.J. No. 514 (Sask. Q.B.)) and other development activities would interfere with or damage culturally significant sites and artifacts such as burial sites and sacred sites.

[53] Moreover, Canadian jurisprudence has recognized that the lost opportunity to be meaningfully consulted and obtain accommodation for impacts on treaty and Aboriginal rights constitutes irreparable harm. In *Platinex*, it was held at paras. 79 and 89 that "For consultation to have any meaning, it must take place "before any activity begins and not afterwards or at a stage where it is rendered meaningless" and that harm from such a result cannot be compensated for by way of damages. See also: *Relentless Energy Corporation v. Davis*, [2005] 1 C.N.L.R. 325 at paras. 16-17, 23; *Homalco*, paras. 62-65; *Ta'an Kwach'an Council v. Yukon*, [2008] 4 C.N.L.R. 222 (Y.K.S.C.); *Musqueam Indian Band v. Canada (Governor in Council)*, [2004] 4 F.C.R. 391 (F.C.), [2004] F.C.J. No. 1130 (F.C.A.) at para. 52; *First Nation of Betsiamites v. Canada (A.G.)*, [2005] Q.J. No. 8173 (Q.S.C.), reversed, [2006] Q.J. No. 3931.

[54] The right to consultation and accommodation is now well established at law. It arises from s. 35 of the *Constitution Act*, 1982, and helps to ensure that the Aboriginal peoples are consulted with respect to development projects on lands over which they have Aboriginal and Treaty rights and that their concerns can be meaningfully addressed. The duty to consult arises when the Crown has knowledge of a potential Aboriginal right that may be affected: *Haida Nation v B.C.*, [2004] 3 S.C.R. 511 [*Haida Nation*]; *Rio Tinto Alcan Inc. v Carrier Sekani Tribal Council*, [2010] 2 S.C.R. 650 [*Rio Tinto*]. Consultation after the fact does not satisfy the duty, it must occur prior to exploration activities taking place on a staked claim: *Ross River Dena Council v. Government of Yukon*, 2011 YKSA 84.

[55] The duty to consult also applies to surrendered land. Justice Binnie observed in *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] 3 S.C.R. 388 that a "*this is surrendered land and we can do with it what we like"* approach is the "antithesis of reconciliation and mutual respect." Thus, if the Crown exercises its right to "take up" surrendered land under a treaty, it is still responsible, by virtue of the honour of the Crown, to meet its duty to consult.

[56] Canadian jurisprudence has recognized that industry proponents such as Solid Gold may be liable for their failure to consult*: Platinex; Taseko Mines Ltd. v. Phillips*, 2011 BCSC 1675, [2011] B.C.J. No. 2350 [*Taseko Mines*].

*Failure of Solid Gold to Consult*

[57] Solid Gold staked its claims to the subject territory as early as November 2007 through at least 2010. The Crown advised Solid Gold in July 2009 that Solid Gold should contact WFN to consult regarding its intended mineral exploration and offered to facilitate the process. Solid Gold failed to engage in any consultation with WFN prior to commencing its exploratory drilling in or about March of 2011. Indeed, the evidence indicates that it chose to complete the IPO "before any contact with Aboriginals". Moreover, it chose to raise money through flow-through shares, which monies had to be expended before year-end 2011, despite its knowledge that the consultations with WFN were inadequate and drilling should be suspended until it occurred.

[58] Not only did Solid Gold, as delegatee of the operational, on-the-ground aspects of the duty to consult regarding its mining exploration activities, fail to consult with WFN; the evidence indicates that it made a concerted, willful effort not to consult, at least until after its flow-through share monies for 2011 had been exhausted. There is no indication that it intended in good faith to consult regarding the Legacy Project or any future projects, although it appears from the evidence that there are plans for further exploration in and on the subject lands in 2012.

[59] Based on the evidence before me, it further appears that Solid Gold has failed to meet industry standards for responsible exploration as set forth by the Prospectors and Developers Association of Canada with respect to First Nations engagement.

[60] I am satisfied based on all of the evidence that, without meaningful consultation and accommodation regarding the exploratory mining operations of Solid Gold, involving *bona fide* dialogue and information sharing between WFN and Solid Gold, facilitated by the presence of the Crown, there is a significant possibility of harm to WFN's Aboriginal and Treaty rights. There has to date been no demonstrated respect for those recognized rights.

[61] I am further satisfied that damages would and could not suffice as compensation, given the rights in issue.

*3. Balance of Convenience*

[62] The balance of convenience test requires a determination of which party will suffer the greater harm from granting or refusal of injunctive relief. In constitutional cases, the public interest is a special factor to be considered.

[63] WFN submits that the balance of convenience test in this case has, on one side, harms to Wahgoshig, including its constitutionally-protected treaty and Aboriginal rights of meaningful consultation and accommodation, its spiritual and cultural relationship with the land, its sacred and cultural sites and its cultural survival and identity. These harms cannot be compensated with

damages. On the other side are potential economic harms to Solid Gold. It submits that the balance of convenience favours granting an injunction.

[64] It submits that granting an injunction in this case is in the public interest, that reconciliation, which requires honour, respect and genuine efforts to address concerns and disputes, is at the core of the relationship between the Crown and First Nations and that, if the *Constitution* with its enshrined recognition of Aboriginal and treaty rights, is to be meaningful, an injunction should be granted.

[65] It submits that Solid Gold's approach has been entirely inconsistent with the object of reconciliation and that once irreparable injuries occur, it will be too late to repair the damage not only to the WFN but also to the relationship between the WFN and the Crown.

[66] WFN submits that if Solid Gold suffers harm as the result of an injunction it was the author of its own misfortune, as it knew from 2009 of its obligations to consult and failed to do so. Rather it raised monies using flow-through shares and proceeded with its project. Had Solid Gold engaged in consultation at the beginning, it would not be in this position today.

[67] Solid Gold submits that if it is not permitted to proceed with its drilling, it will be placed in serious financial jeopardy which could put it out of business. It has raised its exploration funds through flow-through shares, which funds must be used by December 31, 2011, failing which significant penalties will be imposed.

[68] It argues that its harm is real and substantial, while WFN's harm involves "speculative assertions of possible harms to vaguely defined interests".

[69] The Crown submits that an injunction will cause greater tension and conflict and that a consultation remedy, which requires consultation while enabling Solid Gold to continue its activities, will serve to foster reconciliation through a constructive working relationship while protecting their respective rights.

[70] I have taken into account the cases cited by both WFN and Solid Gold, including *Lax Kw'alaams* and *Platinex.*

[71] I am mindful of the importance of reconciliation and the derivative concepts of consultation and accommodation as they have developed in Canadian jurisprudence. I am further mindful of the Crown's position that an injunction would not foster relations, but would exacerbate tensions. While a facilitation of the duty to consult is preferable, it is not always possible.

[72] I am also mindful of WFN's position that to refuse to enjoin Solid Gold from its drilling, in the circumstances of this case, will send a message that Aboriginal and treaty rights, including the rights to consultation and accommodation can be ignored by exploration companies, rendering the First Nations constitutionally–recognized rights meaningless. This would not be in the public interest. It is in the public interest to ensure that the *Constitution* is honoured and respected.

[73] I find, based on the evidence, submissions and relevant jurisprudence, that the balance of convenience favours the granting of an injunction, with terms and conditions imposed.

*Undertaking for Damages*

[74] WFN seeks an order requiring that the Crown provide an undertaking as to damages pursuant to R. 40.03 in the circumstances of this case. In the alternative, it seeks an order dispensing with the requirement for an undertaking. In submissions, WFN stated that in the further alternative, it would provide the normal undertaking.

[75] The Crown acknowledges that it has a duty to consult that was not met; that it made attempts to urge Solid Gold to consult with WFN and that, in the circumstances of this case, it is not appropriate to impose the undertaking on it. The Crown submits that no Court order requiring a government to provide such an undertaking has ever been made by any court in Canada or England.

[76] I have not been referred to any jurisprudence in which the Crown was required to provide an undertaking under Rule 40.03, in which a First Nation moved against a third party industry proponent.

[77] There is judicial precedent for granting an injunction to an Aboriginal moving party while dispensing with the requirement of an undertaking to pay damages in the public interest. The determination of whether to waive the undertaking is part of the assessment of irreparable harm and the balance of convenience. Courts have waived the requirement in circumstances of financial challenge or impecuniousness of the first nation (*Platinex, Taseko Mines),* egregious behavior of the respondent (*Homalco*), or in the public interest. I find it appropriate in the circumstances of this case that the requirement of an undertaking under Rule 40.03 be waived.

***Order***

[78] I order that:

(1) Solid Gold be enjoined from carrying on any further exploratory activity on the Claims Block for 120 days from the release of this decision;

(2) during the injunctive period, Solid Gold, WFN and the Province enter into a process of *bona fide*, meaningful consultation and accommodation regarding any future activity on the Claims Block;

(3) in the event that the consultation process need be facilitated by an independent third party, the costs of such are to be shared equally by Solid Gold and the Province;

(4) in the event that the consultation and accommodation process is not productive, WFN is entitled to seek an extension of the injunction;

(5) the requirement for an undertaking for damages is dispensed with.

***Costs***

[79] I would urge the parties to agree upon costs, failing which I would invite the parties to provide any costs submissions in writing, to be limited to three pages, including the costs outline. The submissions may be forwarded to my attention, through Judges' Administration at 361 University Avenue, within thirty days of the release of this Endorsement.

Carole J. Brown J.

**Date:** January 3, 2012