Ontario appeal court clamps down on free entry mining exploration...

By Kate Kempton

No pure "free entry" mining regime remains in Ontario; and there is a more fleshed-out law on the duty of the Crown to consult with and accommodate Aboriginal parties, based on two recent decisions of the Ontario Superior Court.

In *Platinex Inc. v. Kitchenuhmaykoosib Inninuwug First Nation*, [2007] O.J. No. 1841, Platinex – a mining exploration company – wanted to explore the traditional territory of the affected First Nation – Kitchenuhmaykoosib Inninuwug (KI).

Platinex sent a drill crew to explore in KI's territory in February of 2006. KI opposed this. It had placed a moratorium on resource development in the area until its land claim – to select additional reserve lands – was resolved. KI also felt that Ontario had failed to consult it about this proposed exploration project. When KI protested, Platinex sent its crew home and then sued KI for $10 billion and brought an injunction motion against the First Nation. KI responded with its own injunction motion against the exploration, and also brought a third-party claim against Ontario to have the *Mining Act* regime struck as unconstitutional for failure to prioritize Aboriginal and treaty rights.

In July of 2006, KI won an interim interim injunction against Platinex. The court found that Ontario had completely failed in its duty to consult KI and thus there was a risk of irreparable harm to KI – to its connection to the lands which was at the core of its identity as an Aboriginal people. This risk could not be determined without full consultation. Justice Smith effectively ordered consultations and maintained a supervisory role.

For the next several months, the parties tried to reach agreement on a consultation protocol – the rules of engagement for the process and content of consultations. KI, as with many First Nations, required such rules to be in place as greater assurance that its rights and interests would be respected. But the parties could not reach agreement.

In April, the parties went back to court (Ontario had been granted party intervenor status). KI again sought a full interlocutory injunction. The court did not grant this. Instead, Justice Smith created a new legal regime for mining exploration outside and parallel to the *Mining Act*.

Justice Smith held that First Nations must be consulted and accommodated before any exploration could begin. Prior to this, under Ontario's free entry mining system, anyone with a prospector's licence could stake mining claims just about anywhere in the province. They could undertake progressively more invasive levels of exploration on these claims, all without having to notify, let alone consult with, affected First Nations (and others who held rights or interests in respect of such lands). There is little to no government regulation of such exploration – not until advanced stages. As a result of Justice Smith's May 1 decision, it would appear that this free entry system no longer exists.

Justice Smith did not stop there. He went on to list the requirements of consultation, which are to address a number of matters including potential burial sites in the area; environmental impacts; impacts on hunting and trapping; First Nation participation in project decision-making; use of the First Nation's services and supplies, and employment of its members; and compensation and funding (the latter for the First Nation's participation in the consultation process). He included a consultation protocol to address these issues.

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Justice Smith then required accommodation for KI by including the Memorandum of Understanding (MOU) proposed by Platinex in his May 22 decision. This MOU provides protections and compensation, including for the above issues. Many First Nations are considering the terms of this MOU to be the new minimum requirements for accommodation in circumstances where any form of activity (not just in the mining sector) would create impacts of a level similar to those facing KI. This is accommodation for a 24-drill-hole exploration program, and arguably when more invasive levels of activity are proposed, more accommodation would be required.

Finally, Justice Smith held that: "[t]he issue of appropriate funding [for a First Nation's participation in consultation] is essential to a fair and balanced consultation process to ensure a 'level playing field'".

In the appended consultation protocol, a list of eligible costs was attached, which included legal and expert costs and community consultation costs. The court noted that Ontario had offered $150,000 to cover such costs. KI sought more, citing the fact that the costs of being forced into the court system to defend and protect its rights, which Ontario and Platinex had beforehand failed to respect, had created a significant financial burden on KI. The quantum of funding for KI's costs remains to be determined.

For the first time in Canada, a court appears to be declaring that the Crown must provide sufficient funding for a First Nation to participate in a meaningful and informed way in consultations.

Platinex was given permission to begin its first phase of drilling. Justice Smith reserves the right to monitor further developments and if necessary to order that no further drilling take place.

The Platinex-KI decisions have resulted in some significant clarification and advances in the law on the duty to consult and accommodate First Nations. They have resulted in what appears to be an end to the free entry mining regime in Ontario.

Where the law evolves from here remains to be seen. Many First Nations hope for recognition of an equal voice in decision-making about matters that are fundamental to their identity, culture and survival as peoples.

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