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For General Release

Media Briefing on the injunction decision in *Platinex v. Kitchenuhmaykoosib Inninuwug et al*

KEY POINTS IN THE RULING

- Land is at the core of Aboriginal identity, spirituality, laws, traditions, culture and rights. It is "the very essence of their being. ...No amount of money can compensate for its loss." Interference with the Aboriginal relationship with the land is an irreparable harm. This can be difficult to understand from a non-Aboriginal perspective. The Aboriginal perspective must be considered by the courts.
- If an injunction is not granted to the Kitchenuhmaykoosib Inninuwug, they may lose a valuable tract of land for their Treaty Land Entitlement claim. This is an irreparable harm.
- The Crown must make good faith efforts to negotiate with First Nations, and be committed to the principle of reconciliation with First Nations. "Despite repeated judicial messages delivered over the course of 16 years, the 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." It is in the public interest to ensure that Ontario meets its constitutional obligations to First Nations.
- "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."
- Ontario has tried to delegate its responsibility to the resource development company. If a company is negotiating directly with a First Nation, the Crown must maintain a "strong supervisory presence", which it did not do.
- Giving Platinex an injunction would make the Crown's duties meaningless, and would encourage resource development companies to ignore Aboriginal concerns, which is not in the public interest.

- A company is entitled to do business as it chooses, but self-created financial pressures are not enough to entitle the company to an injunction. (From our perspective, the court has held that one can't put a hole in the bottom of one's boat, and then sue for an injunction for assistance with the bailing.)

DETAILED SUMMARY OF THE DECISION

Platinex is a junior exploration company. KI is an Ojibwa/Cree First Nation in Northern Ontario, and signatory to Treaty 9. In 2001 KI put a moratorium in place against mineral development, because of a Treaty Land Entitlement claim (TLE Claim) to additional reserve land. The Platinex claims are in KI's traditional territories. Over the last seven years, Platinex and KI have had discussions regarding mineral development, but no written agreement was ever signed. Ultimately, KI decisions about development on KI lands must be made by the community, not solely the Chief and Council. In August and November of 2005, KI leadership sent letters to Platinex indicating that KI strongly opposed any development. Platinex did not tell the investing public about these letters, and instead claimed that KI had consented to exploration. In January 2006, Platinex cancelled a meeting with KI because Platinex did not think it could change KI's mind about exploration. In February 2006, Platinex deployed a drill team without consent from KI. After encountering protesters from KI, the drill team left. KI claims the protest was peaceful, Platinex claims that it was hostile and destructive. Each side seeks an interlocutory injunction against the other.

Held, the KI motion should be granted. Platinex is ordered to cease exploration activities for five months, provided that KI (i) returns the Platinex property and (ii) sets up a consultation committee to meet with Platinex and Ontario. After five months, the parties shall re-appear before the court to discuss continuation of the order.

Injunctive relief is often not suited to situations involving Aboriginal issues. Lower courts have been reluctant to issue injunctions in favour of First Nations. Courts should find creative solutions.

Platinex is the author of its own misfortune. The financial pressures Platinex faces are self-created and based on unreasonable beliefs. Platinex chose to enter high-pressure financial arrangements without telling the investing public about KI's opposition. Platinex then tried to steamroll the KI community. Cancelling the January 2006 meeting and sending in a drill team was disrespectful and insulting. Platinex had the choice to continue consultation and negotiation with KI. In the circumstances, it would be inequitable to grant an injunction to Platinex.

KI will suffer irreparable harm if an injunction is not granted. KI will lose a valuable tract of land for TLE purposes. In addition, KI may lose land that is important from a cultural and spiritual perspective. Aboriginal identity, spirituality, laws, traditions, culture and rights are connected to and arise from the relationship to the land. Loss of land would be an enormous harm, for which no amount of money could compensate. This can be difficult to understand from a non-aboriginal perspective. The Aboriginal perspective must be considered.

The Crown owes a non-delegable duty to consult. The evidence shows Ontario has abdicated its responsibility, despite repeated judicial messages over 16 years. When there is a failure of the duty to consult, the ultimate remedy is a declaration that the action in question is unconstitutional.

The court must consider the public interest in the balance of convenience test. Granting an injunction to Platinex would make the duties owed by the Crown meaningless, and encourage other resource development companies to ignore Aboriginal concerns. Granting an injunction to KI enhances the public interest by making the consultation process meaningful and compelling the Crown to act honourably. The balance of convenience favours granting an injunction to KI.

KI is relieved of the requirement of an undertaking to pay damages. If an undertaking is always required, corporations issuing lawsuits for millions of dollars could disentitle First Nations from qualifying for injunctive relief, which would not be equitable.

KI did not act improperly or illegally during the protest. Members of KI believed they had no other option but to confront Platinex at the drill site. Platinex failed to respect KI's moratorium, ignored KI's letters and notices, cancelled a meeting with the community and decided to drill despite being clearly told KI was opposed. Through this, the federal and provincial Crowns sat idly by.

The duty to consult is reciprocal, and the Aboriginal party must show ongoing good faith efforts to reach consensus. Reconciliation will be achieved through communication and honest and open dialogue. There is still the possibility the parties will reach a negotiated settlement.