

Court Finds Funding Required for Consultation

On May 1, 2007, Justice Smith of the Ontario Superior Court set aside an interim injunction prohibiting any drilling within the traditional territory of the KI First Nation who were signatories to Treaty 9 (*Platinex Inc. v. Kitchenuhmaykoosib Inninuwug First Nation*, (1 May 2007) 06-0271/06-0271A, (Ont. S.C.) Justice Smith had granted this interim injunction on July 28, 2006.

However, this decision is of tremendous significance for other Aboriginal nations involved in consultation with respect to resources on their traditional lands. The court stated:

This court accepts that, as an Aboriginal community, KI has a unique cultural and spiritual relationship to the land, and a need to carefully and responsibly carry out the Aboriginal imperative to act as stewards of the land. (Par.155)

The court found that on the issue of the balance of convenience because the company would go bankrupt if it was not allowed to do the exploratory drilling, that the balance of convenience favored setting aside of the injunction. However, the court was extremely concerned that it not simply dismiss the application for the continuance of the injunction. The court granted an interim declaratory order and stated:

The grant of an interim declaratory order allows this court to stay involved as development progresses, to allow the parties to return to court and seek whatever order(s) may be necessary whenever agreement and accommodation cannot be reached. In this way, **KI will know that their concerns and fears are being heard and respected, with the hope that ultimately development will be for the mutual benefit of all parties, and not just Platinex.** (Par. 185, emphasis added)

In the declaratory order, the court directed:

...

2. KI shall have the right to ongoing consultation with respect to all aspects of the impact that Platinex's drilling project may have on its treaty harvesting rights and asserted Treaty Land Entitlement claim:

3. By no later than May 15th, the parties shall implement a consultation protocol, timetable, and Memorandum of Understanding. Failing this, after hearing further submissions from the parties, this court shall make whatever orders it deems appropriate. The consultation protocol shall address, but is not limited to, the following terms:

- Potential burial sites in the vicinity of the Platinex claim;
- Environmental impact of the proposed drilling;
- Impact on hunting and trapping;
- **Participation in decision-making;**
- The use of KI supplies and services/employment; and
- **Compensation and funding.**

...
 7. Subject to whatever agreements are made by the parties, this court reserves the right to make whatever further orders it deems just including the right to make an order that no further drilling take place. (Par. 188, emphasis added)

For Aboriginal nations in British Columbia, there are a number of terms which are significant including the “participation in decision-making” and “compensation and funding”.

With respect to the application for funding, the court referred earlier in its analysis to the argument made by KI:

Further, KI argues that there was no meaningful consultation with the Crown, since the supreme Court’s direction in *R. v. Sparrow* requires funding to allow an Aboriginal community to be engage in a fair and meaningful way in the consultation process . KI, like many Aboriginal communities, is impoverished and cannot afford to hire the expertise that is needed to particular fully in the process.

A fundamental concern of KI’s is the question of whether the duty to consult consists simply of the requirement of intent, with no requirement to effect the intent. If this is so, it argues that the concept of the honour of the Crown is meaningless, and Aboriginal rights are only afforded second class status and treatment.

By requiring as a term of any consultation protocol compensation and funding, the court recognized that consultation, to be “meaningful” as reflected in *Sparrow* and other decisions of the Supreme Court of Canada, should hold of, necessity that it is appropriate that funding be provided for consultation.