The Canadian Constitutional Duty to Consult Aboriginal Peoples:  
Platinex Inc. v. Kitchenuhmaykoosib Inninuwug First Nation

Introduction

This case narrative examines a series of decisions (the "KI decisions") arising from an action between the Kitchenuhmaykoosib Inninuwug, a First Nation community located in northwest Ontario, 580 km north of Thunder Bay, Ontario, Platinex Inc., a junior mining exploration company, and the Ontario government, specifically the Ministry of Northern Development and Mines. The decisions highlight the ongoing tension and complexity of First Nations – Crown relations, particularly those involving the interests of private parties.

You will look at the Crown’s constitutional duty to consult with Aboriginal peoples and consider what impacts this duty might have on legislation that does not explicitly provide for consultation, such as Ontario’s Mining Act,¹ which plays an important role in these decisions. You will also examine the role of injunctions in litigation involving Aboriginal and treaty rights. As you consider these legal issues, keep the larger questions in the back of your mind: what can Canadian law tell us about the future of Aboriginal and environmental issues, and where should it go from here?

Background

Kitchenuhmaykoosib Inninuwug First Nation ("KI") has a population of around 1,200 members,² 915 of whom live on the Big Trout Lake reserve in northwestern Ontario.³ On the reserve, unemployment is 11.9% (compared to 6.4% in all of Ontario), and the median income is around $15,600 ($27,300 for Ontario as a whole).⁴ The total area of the land traditionally used by KI before and around the time of contact with European settlers, its "traditional lands", is 23,000 km².

Under the James Bay Treaty (also known as Treaty 9), KI has different rights to its traditional lands, which we describe in more detail below.⁵ Briefly, 320 km² of the traditional lands form the current reserve on the shores of Big Trout Lake. KI also claims that it is entitled to an additional 510 km² of reserve land under the terms of Treaty 9. Pursuant to Treaty 9, KI’s rights over the rest of its traditional territory are limited to the right to "pursue their usual vocations of hunting, trapping and fishing," subject to government regulation and the right of the Crown to "take up" lands for "settlement, mining, lumbering, trading or other purposes."

⁴ Ibid.
⁵ James Bay Treaty, 1905-06, Treaty No. 9 [hereinafter Treaty 9].

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Platinex Inc. ("Platinex") is a junior mining company that incorporated in August 1998. As a junior company, it is involved only in the exploration and analysis of mining resources. It does not extract the minerals itself, although under Ontario’s Mining Act, it has the legal capacity to do so. Pursuant to the Mining Act, Ontario’s Ministry of Northern Development and Mines ("MNDM") has granted mining claims and leases to Platinex. Of relevance to this case narrative, Platinex acquired mining interests 19 km$^2$ of KI traditional lands located across the lake from the reserve (the "Property"). The mining interests consist of 221 contiguous claims and 81 mining leases adjoining the claims. Platinex staked its claims under the "free entry" system of the provincial Mining Act and acquired its mining leases from the Canadian Nickel Company (also pursuant to the Mining Act), which established mining claims in the area in 1969 (see discussion below under Mining Act). The MNDM approved the transfer of the mining leases.

Platinex plans to drill 14 exploratory holes in two phases to search for platinum group metals on the Property and then analyze the results. If Platinex discovers an economically viable spot for mining, it likely will transfer its rights under the Mining Act to an entity interested in extracting the minerals.

Mining is an important industry in Ontario. Ontario is Canada’s leading province for mineral production, valued at $10.7 billion in 2007. With respect to platinum group metals, Platinex’s specialty, Ontario was responsible for 84% ($455 million) of Canada’s total production in 2007.

MNDM’s decision to grant legally enforceable rights to the Property to Platinex gives rise to the two underlying legal problems in the KI decisions. First, it is evident that there are now two conflicting interests in the Property. On the one hand, Platinex holds legally enforceable rights to the Property that flow from its mining claims and mining leases under the Mining Act. On the other hand, under Treaty 9, KI has rights to the Property as part of its traditional lands. KI also has an interest in the Property in the sense that it could be part of future reserve additions.

Second, and more fundamentally, the Crown has a constitutional duty to consult Aboriginal communities in matters that may adversely affect their rights and interests. In this case, MNDM dealt with the Property with almost no consultation (at least initially) with KI. What happens if the Crown fails to adequately consult Aboriginal rights claimants depends largely on the facts of the case. One possibility is that the court could quash the government’s mining approvals if the Crown’s process of consultation is fundamentally flawed. It is therefore possible that if MNDM’s failure to consult with KI about the Property amounted to a fundamentally flawed process, the legal basis for Platinex’s rights to the Property could be in doubt.

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7 Ibid.

8 Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage), 2005 SCC 69 at paras. 57 and 68, [2005] 3 S.C.R. 388 [hereinafter Mikisew].
Although the MNDM’s actions specifically relevant to the KI decisions did not begin until 1999, the legal context of the cases reaches back much further, to the time before the Crown asserted sovereignty, when, as today, KI occupied its traditional lands. Two particularly relevant moments were KI’s adherence to Treaty 9 in 1929 and the creation of the Mining Act in 1868.

**Treaty 9**

Typical of the "number treaties," the Treaty No. 9 is broadly worded. It was designed in 1905-1906 to open up land in Ontario for settlement and development through a simple mechanism. According to the terms of Treaty 9, First Nation signatories agreed to surrender all rights to their traditional territories (i.e., Aboriginal rights, including title). In exchange, they received reserve lands and the rights to hunt, fish and trap on their traditional territory, (as well as other rights, which are not relevant to this case). These became their treaty rights. Section 35(1) of the Constitution Act, 1982 protects treaty rights. Only subsequent surrender by the First Nation or a further constitutional amendment can extinguish them.

KI’s rights under Treaty 9 are not absolute. Rather, they are:

> [S]ubject to such regulations as may from time to time be made by the government of the country, acting under the authority of His Majesty, and saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes.

Courts commonly call a condition like this, which allows government to take up lands for certain purposes in the future, a "taking up" clause. Appendix C contains a larger excerpt of Treaty 9.

If the goal of Treaty 9 was to acquire a large amount of land for the Crown, it was incredibly effective. In 1905 and 1906, First Nations who signed on to Treaty 9 ceded 336,700 km\(^2\) of traditional lands in exchange for reserves totalling 1,100 square km. First Nations continued to join Treaty 9 through 1930. The overall effect of Treaty 9 was to transfer an area about two-thirds the size of what is now northern Ontario to the Crown.

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9 Many Aboriginal communities do not agree that they ever surrendered their rights. See note 11, infra.
11 Many Aboriginal communities maintain that due to cultural differences, misinterpretation, and discrepancies between the oral promises and the written terms, the treaty is either void or contains other terms that do not appear in the written text. Under the argument that the treaty is void, some communities assert that their Aboriginal rights, including title, remain intact. At least some KI members, such as band councillor Samuel McKay, assert that this is the case with respect to KI and Treaty 9 (Samuel McKay, "Criminalization of Indigenous Human Rights and Environmental Activists," Panel discussion to The Shock Doctrine: Indigenous Peoples’ Experience in Canada: Symposium of Indigenous Human Rights and Environmental Activists, 19 June 2008) [unpublished, McKay, 2008]). Courts currently presume against fraud, which means that unless and until KI proves otherwise in court, the courts will treat Treaty 9 as valid. To date, KI has not formally challenged the validity of Treaty 9, citing lack of funds as a barrier to its claim (McKay, 2008). We will not deal further with the issues of treaty validity in this case study, but you should be aware that the issue has not been definitively settled.
12 Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11, s. 35(1).
13 See Treaty 9 for the geographic boundaries of the ceded lands.
In 1929, KI was part of the Big Trout Lake First Nation, which signed Treaty 9 in that year. By adhering to Treaty 9, KI surrendered the majority of its traditional lands (23,000 km$^2$) in return for rights and a reserve that is now 320 km$^2$.

**Treaty Land Entitlement Claim**

In January 1999, KI gave notice to both Ontario and Platinex of its intention to file a Treaty Land Entitlement ("TLE") claim. In May 2000, KI filed its TLE claim, through which it claims that it is entitled to a reserve 510 km$^2$ larger than the current reserve. Ontario disagrees with KI’s assertion and, instead, considers that it fulfilled its reserve obligations at the latest by the 1970s, when it transferred additional land to the former Big Trout Lake First Nation (including KI).

If KI were ultimately successful in its TLE claim, it would then negotiate with the government to determine the location of new reserve lands, which could involve any of KI’s traditional lands, including the Property. This is where Platinex’s activity becomes relevant. KI does not have the power to unilaterally decide which lands would be included, and the government might be less likely to agree to lands subject to third party interests.\(^{15}\)

**Mining Act**

Ontario created the *Mining Act* (the "Act") in 1868 to encourage prospecting and mineral extraction. The scheme and purpose of the Act has remained mostly unchanged since then (see s. 2 of the Act). Given the purpose of the Act and the fact that it was ratified during the gold rush, it is perhaps not surprising that the Act has drawn harsh criticism from environmental and Aboriginal rights advocates. This section summarizes some of the most controversial parts of the Act, but please also see excerpts of the full text in Appendix D. Section references below refer to the *Mining Act*.

The Act creates a system by which the MNDM regulates all stages of mining, from licensing and staking claims to extraction and reclamation. The first stages of the regulatory process are often characterized as a "free entry" system. Free entry refers to the ability of licensed prospectors ("licensees"), such as Platinex, to prospect and stake a claim on any land – public or private – that is not subject to other mining claims or otherwise excluded by virtue of regulations or exemptions (see ss. 27 & 28). For instance, a licensee cannot stake claims in parks, towns, or First Nations reserves (see ss. 29-32). The Minister also reserves the right to protect any additional lands from claims (see s. 35(1)). However, the MNDM does not have the discretion to otherwise deny a particular mining claim. Section 46(1) mandates that the provincial mining recorder "shall" record any valid mining claim. As noted above, Platinex holds 221 validly recorded mining claims on KI traditional lands.

The holder of a mining claim does not acquire surface rights with that claim. However, under the *Mining Act*, the claim holder does acquire various rights and responsibilities, including the right to "enter upon, use and occupy such part or parts [of the claim]… as are necessary for the purpose of prospecting and the efficient exploration, development and operation of the mines,\(^{15}\) *KI 2, infra* note 72 at para. 162.
minerals and mining rights (of the claim)” (s. 50). The Act requires a claim holder to perform a certain amount of “assessment work” per year on the land (see s. 65(1)), subject to MNDM discretion to extend the timeline for performance or exclude certain time periods from counting against the timeline. The MNDM has extended Platinex’s timeline on at least six different occasions from 1999 through 2008. Claim holders have the right to transfer their mining claims to other licensees at will, as well as the right to enter the lands claimed (with 24 hour notice) to conduct approved exploration activities.

Importantly, a mining claim does not include the right to begin extraction. For this, the holder needs a mining lease. However, a mining lease is not difficult to obtain. Section 81(1) gives the holder of a mining claim a right to a mining lease, providing they meet the formal requirements for the application (see s. 81(2)). Mining leases last for 21 years, and grant the right to mine. Unlike mining claims, lease transfers require permission from the MNDM. In 2006, the MNDM approved the transfer of 81 mining leases to Platinex.

The Mining Act provides few opportunities for public commentary, consultation, and administrative investigations to stay or review the mining process arise prior to the mineral extraction stage. Further, the mining recorder must register all mining claims and mining leases that otherwise comply with the Act.

Of particular relevance to these decisions is that the Act does not require either the Minister of the MNDM or the claim holder to consider or accommodate Aboriginal interests. Of course, the silence of the Act does not mean the Crown can avoid its constitutional duty to consult with affected First Nations. However, it does mean that the MNDM could grant legally enforceable mining rights in total compliance with the terms of the Mining Act, while at the same time completely breaching its duty to consult with Aboriginal peoples.

The government is well aware of the problematic nature of the Act. On July 11, 2008, Ontario Premier McGuinty announced Ontario’s intention to modernize it.

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16 Each year, the assessment work must typically satisfy a minimum cumulative value of the work per unit area (O. Reg. 6/96, s. 2 [hereinafter Assessment Work Regulation]). Many expenses count toward this cumulative value, including labour, supplies, transportation, food and lodging, and chemical analyses (Assessment Work Regulation, s. 3(1)). Pursuant to s. 2 of this regulation, assessment work must meet, at minimum, the following:

<table>
<thead>
<tr>
<th>Column 1</th>
<th>Column 2</th>
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<tbody>
<tr>
<td>Number of assessment years after the recording of the claim</td>
<td>Cumulative value of assessment work for each unit of 16 hectares or other size claim unit required by Ontario Regulation 7/96 (Claim Staking)</td>
</tr>
<tr>
<td>1</td>
<td>$0</td>
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<tr>
<td>2</td>
<td>400</td>
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<td>3</td>
<td>800</td>
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<td>4</td>
<td>1,200</td>
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<td>5</td>
<td>1,600</td>
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<td>6 and subsequent years</td>
<td>An additional $400 per year</td>
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17 Mining Act, supra note 1 at s. 67(5).

**A Brief History**

The history leading up to the *KI* decisions is complex. Here, we summarize the most important points. Appendix A contains a timeline setting out these and other events.

From 1999 until the hearing and decision of the first *KI* case ("*KI 1*") in 2006,\(^{19}\) the MNDM displayed few attempts to consult with KI about the MNDM’s series of approvals, exemptions, and other actions regarding the Property. KI’s initial stance toward Platinex’s activity on the Property generally seemed to be favourable. Over time, however, KI became increasingly opposed to the continued exploration activities.\(^{20}\) In February 2001, KI issued what it called a "moratorium" on all mining activities on its traditional lands until consultation and negotiations had taken place,\(^ {21}\) and outlined a protocol for reaching an agreement with Platinex.\(^ {22}\)

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1. **Mineral tenure system and security of investment**
   Potential adjustments to the mineral tenure system, including free entry, to assure investment security while taking into account other interests, including Aboriginal community concerns and private landowners’ issues.

2. **Aboriginal rights and interests related to mining development**
   Potential approaches to consultation and accommodation related to the broad range of mineral sector activities as they affect Aboriginal and treaty rights.

3. **Regulatory processes for exploration activities on Crown Land**
   Potential approaches to regulating exploration activities, including consultation and accommodation with Aboriginal communities.

4. **Land use planning in Ontario’s Far North**
   Potential approaches to the requirement that new mines in the Far North would need community land use plans supported by local First Nations.

5. **Private rights and interests relating to mining development (mineral rights/surface rights issues)**
   Potential approaches to address mineral rights and surface rights issues.

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20 The reason or reasons for KI’s change in positions are unknown. Some resistance might have emerged as KI members became more knowledgeable about the *Mining Act* and the effects of mining operations on other Aboriginal communities and the environment. KI also filed its Treaty Land Entitlement ("TLE") claim in 2000. KI may have recognized that allowing further Platinex activity could adversely affect its future ability to add the Property to any new reserve lands (see *KI 1*, *ibid.* at para. 17, citing a letter from Chief Donny Morris to one of Platinex’s principals: "The reasons for this moratorium [suspending all mineral activities in and around KI’s traditional territories] are that… Kitchenuhmaykoosib Inninuwug has submitted a Treaty Land Entitlement claim… and that the area of land under which your company has been conducting mineral exploration activities is covered by the land claim."). KI also may have intended to use its resistance to Platinex as leverage to push the government toward negotiating with respect to the TLE Claim.

21 *KI 1*, *supra* note 19 at paras. 15-16.

22 *Ibid.* at para. 20. The KI Development Protocol requires the following steps:
   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;
   6. approval in writing.
process was never fulfilled to the satisfaction of KI Chief Donny Morris and no agreement was reached with the Province. In August 2005, KI withdrew "all previous Agreements and Letters of Understanding" between itself and Platinex.

Despite its deteriorating relationship with KI, Platinex continued to conduct exploration activities and seek investment. It became a publicly traded company in November 2005, following its statement that "[KI] had verbally consented to low impact exploration," which also omitted mention of the above-referred communications.23

On February 8, 2006, KI wrote to Platinex prohibiting exploratory drilling and the transportation of all exploration equipment to and from the Property; this letter showed a clear assertion by KI that the community had the jurisdiction and right to make land use decisions regarding its traditional lands. Upon receiving information that Platinex intended to continue its activities, KI repeated its prohibition in another letter less than two weeks later. KI and Platinex dispute what happened next. What seems clear is that protesters from KI blockaded the access road and demonstrated at the airport. Platinex crews eventually decided to leave the site. The parties dispute the extent to which KI subsequently damaged or interfered with Platinex’s equipment. In the KI decisions Justice Smith made no factual findings regarding the equipment.

In response to KI’s conduct, Platinex initiated a lawsuit seeking $10 billion and an injunction to prevent further KI interference with what Platinex considered to be its legal right to continue exploration activities on the Property. The KI decisions are a series of decisions to determine temporary rights and responsibilities of KI, Platinex, and the Crown until the court renders a decision on Platinex’s initial claim.

Although the immediate conflict in the KI decisions was between KI and Platinex, there is no doubt that MNDM’s duty to consult with KI and its initial failure to do so from 1999 until July 2006 has been the proximate cause of the conflict. Justice Smith spends 20 paragraphs addressing the MNDM’s failure to consult in the first judgment (KI 1), where it plays a role in his decision to grant the interim interim injunction in favour of KI, enjoining Platinex from furthering its drilling activities on the Property.24 The MNDM’s subsequent efforts to consult also inform Justice Smith’s conclusions in the second and third KI decisions (KI 225 and KI 326), in which he denied KI’s request for a continuation of the interim injunction against Platinex (KI 2). He also imposed a number of legally binding documents on the parties (KI 3), and explicitly gave Platinex permission to continue its exploration activities (KI 3).

23 Ibid. at paras. 24-25.
24 Ibid. at paras. 107-112, "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".  
The issue of the Crown’s duty to consult might have been a fertile ground for appeal, had KI chosen to do so.\textsuperscript{27} It is for these reasons that before we get into the laws governing interim injunctions, a description of the law of consultation is necessary.

\textbf{Law}

\textbf{The Duty to Consult}

The Crown’s duty to consult and, where appropriate, accommodate, Aboriginal interests flows from the concept of the honour of the Crown and "the need to reconcile prior Aboriginal occupation of the land with the reality of Crown sovereignty."\textsuperscript{28} The honour of the Crown and the need for reconciliation in turn flow from section 35(1) of the \textit{Constitution Act, 1982} and the historical relationship between First Nations and the Crown. It is the Crown’s assertion of sovereignty over Canada that gives rise to its duty to act honourably in all dealings with Aboriginal peoples.\textsuperscript{29}

To fulfill its duty to consult Aboriginal peoples about a proposed action, the Crown must engage in good faith consultation. Good faith consultation requires the Crown to inform Aboriginal peoples of the action’s potential impact on Aboriginal and treaty rights, and to approach the consultation table with "the intention of substantially addressing [Aboriginal] concerns."\textsuperscript{30} The duty to consult applies to established as well as asserted rights that have not yet been proved in a Canadian court.\textsuperscript{31} Regarding unproven rights, McLachlin C.J.C., explained in \textit{Haida Nation v. British Columbia (Minister of Forests)}, 2004 SCC 73 at para. 26, [2004] 3 S.C.R. 511 [hereinafter \textit{Haida}].

Aboriginal groups have a reciprocal duty to engage in good faith consultation.\textsuperscript{32} This includes an obligation to clearly outline any asserted rights to facilitate consultation processes.\textsuperscript{33} The process of consultation also does not give Aboriginal groups a veto power over decisions relating to their interests.\textsuperscript{34}

The duty to consult only arises in certain situations. When an Aboriginal party challenges the Crown’s actions because of a failure to adequately meet its duty to consult, Canadian courts apply the following test:

\begin{itemize}
  \item \textsuperscript{27} KI withdrew from the court process because its legal costs incurred thus far threatened to bankrupt the community.
  \item \textsuperscript{28} \textit{Haida Nation v. British Columbia (Minister of Forests)}, 2004 SCC 73 at para. 26, [2004] 3 S.C.R. 511 [hereinafter \textit{Haida}].
  \item \textsuperscript{29} \textit{Ibid.} at para. 32.
  \item \textsuperscript{31} In this section on consultation, "Aboriginal rights" is used in its larger sense, including the Aboriginal title.
  \item \textsuperscript{32} \textit{Haida, supra} note 29 at para. 27.
  \item \textsuperscript{33} \textit{Ibid.} at para. 42.
  \item \textsuperscript{34} \textit{Ibid.} at para. 36. Also see note 53, \textit{infra}, and associated paragraph.
  \item \textsuperscript{35} \textit{Ibid.} at para. 48.
\end{itemize}
1. Has the Crown’s conduct triggered a duty to consult?
2. If so, what is the scope and content of the duty?
3. Was the duty fulfilled?36

Along with the summary below, we have provided a graphical representation of the test and the most important factors in Appendix B.

1) Is there a duty to consult?

The Crown’s duty to consult Aboriginal peoples is triggered "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."37 Whether or not a duty exists in a particular situation is a question of law, to be judged on a standard of correctness.38 The threshold for triggering the Crown’s duty to consult is very low. For instance, note that adverse effects need only be a possibility, not a certainty. Also note that the language of the test, referring to the potential existence of Aboriginal rights, means that the Crown’s duty to consult will be triggered whether the right is an established right or merely an asserted one.

The same test applies to treaty rights.39 In these cases, courts will presume Crown knowledge of the relevant rights because the Crown was a signatory to the treaty.40 Courts usually answer this question in the affirmative and move on to the second question.

2) What is the scope and content of the duty?

Courts consider two factors to determine the appropriate level of consultation: the strength of the claim and the seriousness of the potential effect of the Crown action on the rights in question. Where the right involves a treaty, the court will also consider the specificity of the treaty promise.

The strength of the claim is important to cases involving asserted but still unproven claims. A strong prima facie case for Aboriginal or treaty rights will push consultation toward the higher end of the spectrum, while a weaker claim will reduce the duty to consult.41 In the past, courts have looked to surrounding circumstances that indicate a stronger or weaker claim, such as whether the government has entered into land settlement negotiations with the First Nation based on its land claim. As the KI decisions show, a court may revisit the strength of the claim as new evidence becomes available.42

The second factor that courts consider is the seriousness of the impact of the contemplated government action on the asserted rights. Context is also important regarding the seriousness of the potential effect on the Aboriginal or treaty rights. Courts may examine the duration, area,

36 Haida, supra note 29.
37 Ibid. at para. 35.
38 Ibid. at para. 63.
39 Mikisew, supra note 8 at paras. 51-58.
40 Ibid. at para. 34.
41 Haida, supra note 29 at paras. 39, 43-45.
42 See KI 1 and KI 2, supra notes 19 and 26, respectively. See also infra note 75 and accompanying text.
and general severity of the impact, which can indicate either lower\textsuperscript{43} or higher level of consultation.\textsuperscript{44}

Regarding the specificity of the treaty promise, the Supreme Court of Canada has found that there is an inverse relationship between the specificity of the promise and the scope of the duty to consult. On subjects where the treaty is very specific, the level of consultation required will be low, whereas a broadly worded treaty indicates a higher level of consultation.\textsuperscript{45} Treaties created in the late 19\textsuperscript{th} and early 20\textsuperscript{th} centuries, such as Treaty 9, are typically vague in their language. In contrast, modern land settlements and treaties, such the ones in B.C., are often quite specific. It is possible that future courts could consider the specificity of these modern treaties in determining the Crown’s duty to consult.

Courts weigh both or all three factors in concert to determine the appropriate scope and content of consultation. In \textit{Haida}, the Supreme Court described the levels of consultation as falling along a spectrum:\textsuperscript{46}

\begin{quote}
[43] […] At one end of the spectrum lie cases where the claim to title is weak, the Aboriginal right limited, or the potential infringement minor. In such cases, the only duty on the Crown may be to give notice, disclose information, and discuss any issues raised in response to the notice. […]

[44] At the other end of the spectrum lie cases where a strong prima facie case for the claim is established, the right and potential infringement is of high significance to the Aboriginal peoples, and the risk of non-compensable damage is high. In such cases, deep consultation, aimed at finding a satisfactory interim solution, may be required. […]
\end{quote}

Many cases likely will lie somewhere between the two extremes. The court determines the appropriate level of consultation on a case-by-case basis, and then evaluates the Crown’s conduct on a standard of reasonableness (in contrast to the standard of correctness at step 1, see above). In the end, the level of consultation must be sufficient "to maintain the honour of the Crown and to effect reconciliation."\textsuperscript{47}

\textsuperscript{43} See, e.g., \textit{Mikisew}, supra note 8 at para. 64: "[G]iven that the Crown is proposing to build a fairly minor winter road on surrendered lands where the Mikisew hunting, fishing and trapping rights are expressly subject to the "taking up" limitation, I believe the Crown’s duty lies at the lower end of the spectrum."

\textsuperscript{44} See, e.g., \textit{Ka’agee Tu First Nation v. Canada (Minister of Indian and Northern Affairs), 2007 FC 764, 311 F.T.R. 260 (F.C.)} [hereinafter \textit{Ka’agee Tu}]. The court distinguished the conclusion in \textit{Mikisew} on the basis of the seriousness of the potential impact and the fact that the First Nation claimed Aboriginal title (at paras. 113-114). Blanchard J. concluded: "In my view, the contextual factors in this case, particularly the seriousness of the impact on the Aboriginal people…militate in favour of a more important role of consultation. The duty must in these circumstances involve formal participation in the decision-making process" (at para. 117).

\textsuperscript{45} \textit{Mikisew}, supra note 8 at para. 63.

\textsuperscript{46} \textit{Haida}, supra note 29 at paras. 43-44.

\textsuperscript{47} \textit{Ibid.} at para. 45.
3) Was the duty fulfilled?

Although the Crown cannot fulfil its duty to consult through a "fundamentally flawed" process, it only has to show it made "reasonable efforts to inform and consult" at the appropriate level. An isolated failure to consult may or may not tip the scales in favour of the Aboriginal claimant, depending on the facts. Because courts evaluate the reasonableness of the Crown’s conduct on a case-by-case basis, it is not clear how far government may stray from the required level of consultation before it breaches the duty to consult. The Supreme Court of Canada has offered some guidance: in *Haida* for example, the court determined that consultation must begin early, at the strategic planning stages of the proposed Crown action, and not at a later operational level. This is of particular relevance to the *KI* decisions since it appears that Justice Smith failed to follow these guidelines or at the very least, omitted to address them, in his decision in *KI 2*.

Because Aboriginal peoples have a reciprocal duty to consult, courts also ask whether the Aboriginal group has acted unreasonably. In *R. v. Douglas*, the British Columbia Court of Appeal noted that a First Nation’s failure to engage in its reciprocal duty to consult would have "direct implications on the assertion [that] the consultation efforts of government are flawed."  

**Interim Injunction and Common Law Remedies**

In consultation cases, the main challenge for the court can be to provide a remedy that will facilitate meaningful consultation and support ongoing reconciliation. Larger government policy questions unique to the Aboriginal context compound the difficulty of the courts. Ordering a halt to further activities until adequate consultation has occurred can have serious economic and political impacts on parties that are heavily invested in the proposed activities.

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48 *Mikisew*, *supra* note 8 at paras. 57 and 68. The Crown engaged in no consultation with Mikisew Cree First Nation aside from including them in the process for members of the general public. The Supreme Court of Canada quashed the Minister’s approval for constructing a road running through land that bordered the reserve and that was subject to hunting and trapping treaty rights on the grounds that the Crown had breached its duty to consult, and that its measures to mitigate the harm to Aboriginal interest "were adopted through a process that was 'fundamentally flawed’" (at para. 68).

49 *Haida*, *supra* note 29 at para. 62.

50 See, e.g., *Ka’a’gee Tu*, *supra* note 45. The Crown failed to adequately consult at the last stage of the process, even though it had sufficiently discharged its duty up until that point. The overall duty to consult was not met. See, e.g., *Ahousaht First Nation v. Canada (Fisheries and Oceans)*, 2008 FCA 212 [hereinafter *Ahousaht*] in which the court allowed the Crown’s imperfect consultation efforts. The court felt overwhelmed by consideration for the circumstances of the case such as: (1) a sense of urgency regarding the protection of endangered and at risk fish surrounding the government action; (2) the multitude of First Nations involved and their lack of unanimity and; (3) the perception that the Aboriginal group was engaged in something less than full good faith participation (discussed below).

51 *Haida*, *supra* note 29 at para. 76.

52 See, e.g., *R. v. Douglas et al.*, 2007 BCCA 265, 278 D.L.R. (4th) 653 [hereinafter *Douglas*], *Ahousaht* (extensively citing *Douglas*), *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 S.C.R. 550 (in which the SCC mentions the Crown’s sensitivity to Aboriginal concerns and also two instances where the First Nation opted out of the opportunity to participate; ultimately, the Court concluded that the government fulfilled its duty to consult), and *KI 1*, *supra* note 19 (KI’s willingness to participate and engage government consultation is noted to its credit).

53 *Douglas*, *supra* note 53 at para. 45 (citing the decision of the trial judge).

54 *Haida*, *supra* note 29 at para. 76.
(such as Platinex). However, while the courts might find it economically or politically sensible to attempt to protect third party interests, such an approach can be legally problematic.

Under the Constitution Act, 1982, the Crown has a procedural duty to consult Aboriginal peoples regarding their interests. It is important to remember that in most cases, this does not mean the Crown must acquire the consent of the Aboriginal group over the proposed action (i.e., the Aboriginal group does not have a veto). The question of whether or not the presence and content of third party interests should diminish the scope of this constitutional duty, as it pertains to the process of consultation, is still unsettled.

If a court finds that the Crown has breached its duty to consult, it must decide what remedy is most appropriate in the circumstances. An interim injunction is only one of a variety of remedies that courts have employed, but it is the one most relevant to the KI decisions. An interim injunction is similar to an interlocutory injunction except it expires after a specific amount of time unless continued by a further order. A court will grant an interim injunction if the applicant satisfies on a balance of probabilities:

1. **Merit.** The claim raises a serious, not frivolous, question as to:
   a. the existence of a right and
   b. an actual or reasonably apprehended breach, of that alleged right.
2. **Irreparable Harm.** Without an injunction, irreparable and non-compensable harm will probably occur.
3. **Balance of Convenience.** The probable harm of withholding the injunction is greater than the probable harm of granting it.\(^{55}\)

The merit stage has a low threshold. In many cases, such as the KI series, the applicant can easily show a serious question as to the existence of the alleged right and an actual or reasonable apprehension of breach.

On the question of irreparable harm, the applicant must show there is a reasonable causal link between the respondent’s actions and the irreparable harm. Regarding the non-compensability factor, it is unlikely that a court will find that the harm is irreparable if the applicant could be adequately compensated for the harm.\(^{56}\) In KI 1, Smith J. looked to the Aboriginal perspective to determine what type of harm was compensable.\(^{57}\)


\(^{56}\) KI 1, supra note 19 at para. 67. See also RJR – MacDonald, supra note 55

"Irreparable" refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other. Examples of the former include instances where one party will be put out of business by the court's decision (R.L. Crain Inc. v. Hendry (1988), 48 D.L.R. (4th) 228 (Sask. Q.B.)); where one party will suffer permanent market loss or irrevocable damage to its business reputation (American Cyanamid, supra); or where a permanent loss of natural resources will be the result when a challenged activity is not enjoined (MacMillan Bloedel Ltd. v. Mullin, [1985] 3 W.W.R. 577 (B.C.C.A.)). 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.)).

\(^{57}\) See, e.g., KI 1, supra note 19 at para. 80.
The third stage, balance of convenience,\(^58\) compares the harm of withholding an interim injunction with the harm of granting one. The court considers the potential harm to the litigating parties as well as the harm to others and society as a whole.\(^59\) One striking feature of the \textit{KII} decisions is the variety of factors considered relevant at this stage.

An additional challenge is that common law prohibitory remedies, such as injunctions, may be poorly suited to addressing the special nature of the duty to consult. The duty to consult is a positive duty requiring action on the Crown’s part as well as on the First Nations. By their nature, prohibitory remedies can only stop activities or prevent their occurrence. They cannot force meaningful consultation to occur without additional court orders.\(^60\) Further, as the court noted in \textit{Haida}, common law remedies usually create winners and losers, and often require the court to pit Aboriginal interests against other public or private third party interests.\(^61\) Both results run contrary to the ultimate goal of reconciliation.

Common law remedies are obviously imperfect. Some commentators have noted that a judiciary uncomfortable with ordering sufficiently strong remedies undermines the justiciability of Aboriginal and treaty rights and the protection afforded them under the Canadian Constitution.\(^62\) How to achieve appropriate consultation and reach true reconciliation presents no easy answers.

**The Law as Applied to the KI Decisions**

We examine the series of Platinex – KI decisions in chronological order: (1) \textit{KI 1} (granting an interim, interim injunction against Platinex); (2) \textit{KI 2} (denying a further injunction against Platinex, ordering consultation and granting conditional permission for Platinex to continue exploration); and (3) \textit{KI 3} (imposing a consultation protocol, a memorandum of understanding, and a timetable on all parties). Appendices E-G contain relevant excerpts of the cases. The timeline in Appendix A sets out the major events concerning the cases.

**KI 1 (July 28, 2006)**

As noted above, in response to a KI blockade, Platinex initiated an action against KI for $10 billion in damages, seeking an injunction enjoining KI from further interfering with what Platinex considers as its legal right to explore the Property for minerals. \textit{KI 1} was an interlocutory request from KI for an interim injunction in order to prevent Platinex from continuing its exploration on the Property until the court had resolved Platinex’s initial action. Platinex cross-appealed for an interim injunction against KI.

\(^{58}\) In \textit{RJR – MacDonald, supra} note 55, the Supreme Court of Canada called this stage “the balance of inconvenience.” Other decisions show the use of either phrase.

\(^{59}\) \textit{RJR – MacDonald, supra} note 55: the decision requires courts to consider public interest in all constitutional injunction cases. The court in \textit{KI 1} at paras. 107-112 explained that the rule in \textit{RJR - MacDonald} extends to all cases generally.

\(^{60}\) \textit{Ibid.} at para. 14; \textit{KI 1, supra} note 19 at para. 56.

\(^{61}\) \textit{Haida} at para. 14.

Justice Smith of the Ontario Superior Court granted an interim interim injunction in favour of KI, intending to revisit the question of the interim injunction later. The order was conditional upon KI returning any equipment belonging to Platinex and KI establishing a consultation committee "with the objective of developing an agreement to allow Platinex to conduct its two-phase drilling project…." In light of Justice Smith’s further judgments in KI 2 and KI 3 a few aspects of his reasons merit special consideration.

After determining that both Platinex and KI had passed the "merits" stage of the injunction test, Smith J. found that while KI had satisfied the "irreparable harm" stage, Platinex had not. With respect to KI, Smith J. found two factors particularly important in establishing irreparable harm. First, Platinex’s developing interest in the Property represented an increasing prejudice against including the Property in any future TLE claim negotiations. Second, the cultural and spiritual significance of the Property to KI indicated that KI could not be adequately compensated for any harm to or loss of the Property.

In contrast, Smith J. found that Platinex had failed to establish potential irreparable harm to itself. He did acknowledge Platinex’s arguments that Ontario had granted Platinex a legally enforceable right to conduct exploration activities on the property, and that Platinex might experience insolvency if KI continued to interfere with Platinex’s activities on the Property. However, Smith J. felt this was less important than the fact that, by choosing to proceed with its activities and to seek out and solicit investors despite increasing opposition from KI, Platinex became "to a large degree, the author of its own misfortune." Platinex therefore failed meet the requirement of irreparable harm, and Smith J. refused its request for an interim injunction against KI and, instead, granted the interim interim injunction to KI.

Importantly, under the heading "Irreparable Harm and The Failure to Consult," Smith J. followed his determination of irreparable harm with extensive comments regarding the constitutional duty to adequately consult KI, Ontario’s failure to do so, and its general abdication of that duty and effective delegation of it to Platinex. He notes, "[a] breach of the duty to consult can also be grounds for granting an injunction against the Crown," appearing to accept the opinion of legal scholars that:

)[w]ith 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."  

Finally, it is worth noting that, at the "balance of convenience" stage of the test, Smith J. focused on the public interest. He observed that meaningful consultation and the protection of asserted and established Aboriginal and treaty rights was in the public interest. Therefore, granting an

63 Ibid. at para. 139.
64 Ibid. at paras. 79-80.
65 Ibid. at para 72. See also para. 76.
injunction would "enhance the public interest" by forcing the government and perhaps Platinex into meaningful consultation with KI. 67

KI 2 (May 01, 2007)

Between KI 1 and KI 2, Ontario Secretariat of Aboriginal Affairs (the "OSAA") rejected the KI TLE claim. When Justice Smith decided KI 2, he noted that it was still possible that Ontario could change its position or that KI could seek a judicial review of the decision or sue the Crown. 68

KI applied to the Ontario Superior Court for a continuation of the interim interim injunction against Platinex. However, this time, Smith J. denied KI’s request and granted Platinex conditional permission to begin drilling, pending fulfillment of an order that all parties establish a consultation protocol, timetable, and Memorandum of Understanding ("MOU").

There were a few apparent inconsistencies between Justice Smith’s reasons in KI 1 and KI 2, at least one of which is potentially problematic. First, in contrast to KI 1, Smith J. found that KI had failed to establish that irreparable harm would occur on a balance of probabilities. This conclusion can be explained largely on the factual differences between KI 1 and KI 2. Smith J. emphasized OSAA’s denial of KI’s TLE claim as evidence that weakened the prima facie strength of the claim. He then considered affidavits from KI members that detailed concerns regarding the potential harm to the land, harvesting rights, and KI community and culture, but in the end found that the affidavit evidence was "based upon assumptions and fear of what may transpire, and [was] not causally connected to Platinex’s proposed drilling program." 69

Despite this finding, his reasoning potentially begs the question: Is Platinex’s proposed exploratory drilling program an isolated event, to be considered separately from the harm that would be causally connected to mineral extraction? Recall that the Mining Act sets into motion a process by which a person or other entity can acquire first a legally enforceable license, then a mining claim, and finally a mining lease with virtually no provisions for consultation, accommodation, or review and little or no discretion on the part of the government to refuse the claim or lease. It is unknown whether KI explicitly raised concerns about the inevitability of this process; Smith J. certainly did not address this particular point. 70

67 Ibid. at paras. 107-112 (quote at para. 111).
68 KI 2, supra note 26 at para. 138.
69 Ibid. at para. 157.
70 At para. 67, Smith J. acknowledges KI’s claim that the Mining Act, by failing to provide for adequate consultation, violates s. 35(1) of the Constitution Act, 1982. However, he made no comment about the more general potential for inevitability in the process. Ultimately, KI protesters continued to oppose Platinex and were jailed for contempt of court. The Court of Appeal for Ontario subsequently ordered their release (Platinex Inc. v. Kitchenuhmaykoosib Inninuwug First Nation, 2008 ONCA 533). Although, neither party put forward arguments, the Court of Appeal noted that it would have applied the principles it articulated in a companion case (Frontenac Ventures Corporation v. Ardoch Algonquin First Nation, 2008 ONCA 534), in which the court noted the inevitability of the Mining Act process and the potential for conflict with the constitution (at paras. 61-62).
Smith J. also made an apparent about-face from *KI 1* regarding the harm to Platinex. In *KI 2*, he found the potential insolvency of Platinex showed irreparable harm.\(^{71}\) He did not address his determination in *KI 1* that Platinex was the author of its own misfortune, which seems to weigh so heavily against its argument that it would suffer irreparable harm. Nor did he discuss, as he did in *KI 1*, how the public interest would be affected by denying the injunction. That Smith J. failed to deal with two considerations that proved to be determinative in his decision in *KI 1* could provide grounds for appeal.

From a legal perspective, potentially the most problematic part of the judgment is in regard to the duty to consult. Smith J. found that some consultation had occurred since *KI 1*. He found that the "reasonable and responsible" efforts of MNDM and Platinex to create a MOU were "sufficient to discharge the Crown’s duty to consult."\(^{72}\) By doing so, he implicitly forgave eight years of the government’s failure to consult with KI, which seemed to have some importance in his decision in *KI 1*, where he stated:

> For [the process of consultation] to have any real meaning it must occur before any activity begins and not afterwards or at a stage where it is rendered meaningless.\(^{73}\)

Not only does this judgment appear to be irreconcilable with his comments in *KI 1*, it also seems to conflict with the Supreme Court of Canada’s conclusion in *Haida*, where it found that consultation must begin at early strategic planning stages and not at a later operational level.\(^ {74}\) The *Haida* conclusion suggests that consultation should occur at or before the time of claim staking, especially considering the virtual inevitability of rights acquisition once claims have been staked.

Following *KI 2*, KI, Platinex and MNDM were unable to negotiate a mutually agreeable MOU, consultation protocol and timeline. Platinex and MNDM reached an agreement between themselves, but KI rejected their version of the MOU and submitted its own version, which stipulated that Ontario would cover KI’s legal fees to date and that Platinex would withdraw its $10 billion claim for damages. Upon failing to reach an agreement, all parties returned to the Ontario Superior Court within the month for further guidance.

**KI 3 (May 22, 2007)**

In *KI 3*, Justice Smith considered the submissions of all parties and concluded that the MOU, consultation protocol, and timeline that Platinex and MNDM drafted were "appropriate to guide the ongoing relationship between the parties."\(^{75}\) In an unusual move, he imposed upon all parties the MNDM-Platinex version of all three documents.\(^ {76}\) He also expressly permitted Platinex to continue with Phase One of the drilling program, consisting of 24 test holes on the Property.\(^ {77}\)

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\(^{71}\) *KI 2*, *supra* note 26 at para. 169.


\(^{73}\) *Ibid.* at para. 89.

\(^{74}\) *Haida*, *supra* note 29 at para. 76.

\(^{75}\) *KI 3*, *supra* note 27 at para. 15.

\(^{76}\) *Ibid.* at para. 16.

KI argued that an inequity of resources between the parties was creating an unfair playing field for consultation. It asked that Ontario commit to cover all its consultation and legal costs, and to pay KI $600,000 up front. Even excluding legal fees, funding had been an implicit issue in the KI decisions since *KI 1*, when Smith J. ordered KI to form a consultation committee. Here, Smith J. explicitly mentioned funding, but declined to decide the issue with any certainty, except to say that Ontario will be responsible for paying KI a "reasonable" level of funding, to be decided at a later date. The court-imposed MOU also commits Ontario to covering KI’s "reasonable" consultation costs. However, it is silent regarding the costs of litigation.

Unfortunately, *KI 3* did not resolve the Platinex-KI conflict. Soon afterwards, Platinex obtained an injunction against KI from interfering with its exploration activities on the Property, but it did not dissuade KI protesters. Justice Smith eventually sentenced six members of the KI band, including Chief Donny Morris and other community leaders (the "KI 6") to six month’s imprisonment for contempt in disobeying the injunction. The Ontario Court of Appeal released the KI 6 on appeal.

**What now?**

Several years and easily over $1 million since litigation began, it is questionable whether any party to the KI decisions would agree the legal process had resolved any of the main issues. KI remains unwilling and unable to initiate or continue legal action against Platinex and Ontario, and continues to pursue a solution through the media and politics. Ontario has initiated hearings about reforming the *Mining Act*. Platinex is currently able to exercise and has been exercising its *Mining Act* rights to drill on the Property, but remains entangled in litigation. In February 2008, pending the sentencing of the KI 6, Platinex announced it was reducing its claim for damages against KI (from $10 billion to $10 million), though still pursuing the claim. In a press release, Platinex stated that it hoped to establish "a positive and mutually respectful working relationship with the KI community." On May 22, 2008, Platinex also commenced a lawsuit against

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78 Ibid. at paras. 27-28 (Smith J. also cited a lack of evidence for his consideration).
79 Ibid. Schedule B, at s. 2.
80 Platinex Inc. v. Kitchenuhmayoosib Inninuwug First Nation, 2008 CanLII 11049 (ON S.C.) [*KI 4*]; see supra, note 73. See also Frontenac Ventures Corporation v. Ardoch Algonquin First Nation, 2008 ONCA 534 (companion case) [*AAFN*]. AAFN may have changed the law relating to injunction orders and contempt proceedings as they relate to Aboriginal parties. In AAFN, MacPherson J.A., for the OCA, addressed a comment made by the motions judge that "[t]here can only be one law, and that is the law of Canada, expressed through this court," in response to a defendant’s argument that his "contemptuous" actions were his attempt to comply with Algonquin law. Adopting *Henco Industries Ltd.* v. *Haudenosaunee Six Nations Confederacy Council* (2006), 82 O.R. (3d) 721 at paras. 140-142 [*Henco*], MacPherson J.A. found that a "comprehensive and nuanced description of the rule of law" going beyond mere compliance with court orders, must be considered (para. 43). Such considerations need not apply at sentencing, but where Aboriginal and treaty rights are concerned, "injunctions sought by private parties to protect their interest should only be granted where every effort has been made by the court to encourage consultation, negotiation, accommodation and reconciliation among the competing rights and interests" (para. 46).
MacPherson J.A. also found that the sentencing principles for criminal contempt for Aboriginal offenders, as described in *R. v. Gladue* (1999), 133 C.C.C. (3d) 385, applied equally to civil contempt sanctions, and sentencing judges must consider "[t]he unique systemic or background factors" of Aboriginal offenders (at para. 55).
Ontario, for $70 million damages resulting from Ontario’s failure to adequately consult with KI.\textsuperscript{83}

Is the legal system capable of creating meaningful change in cases like those involving the KI? Are courts the appropriate forum? Courts continue to sidestep practical issues that they should address, such as how impoverished First Nations are to meaningfully participate in the consultation and litigation process. It is also possible that disagreement will continue as to what the "real" legal questions are before the court. By suing Ontario for damages, Platinex implies that the real problem stems from and ends at the government’s failure to fulfill its duty to consult with First Nations.

According to MacPhearson J. in \textit{AAFN},\textsuperscript{84} Ontario’s Premier McGuinty,\textsuperscript{85} and some international organizations,\textsuperscript{86} the major problem is the antiquated \textit{Mining Act}. If so, perhaps part of the solution lies in reform. Still others, such as KI First Nation, maintain that the problem cannot be solved merely by reforming the \textit{Mining Act} because the real issue begins by recognizing and protecting Aboriginal and treaty rights, pursuant to s. 35(1) of the \textit{Constitution Act, 1982}. It seems impossible that the courts can hope to achieve the ultimate goal of reconciliation until they attempt to explicitly identify and address some of the larger and more fundamental legal issues behind cases like those involving the KI.

**Discussion Questions**

1. You are the Supreme Court of Canada clerk for Chief Justice McLachlin. KI has appealed the decision of Smith J. in \textit{KI2} to deny KI’s request for an interlocutory injunction and to allow Platinex to continue exploration. You have been asked to draft an opinion for the court instead of going on the hike you planned for this weekend. In writing your draft, you may find it helpful to specifically address the following issues:

   a. Was the duty to consult triggered? If so, when?
   b. Have KI and Ontario (including delegated Platinex assistance) engaged in meaningful consultation in good faith?
   c. Were the efforts of Ontario and Platinex to consult KI sufficient to discharge the Crown’s duty to consult?


\textsuperscript{84} \textit{AAFN}, supra note 84 at para. 62.

\textsuperscript{85} McGuinty Backgrounder, supra note 18.

\textsuperscript{86} MiningWatch Canada, "Groups Call For Comprehensive Reform of Ontario’s Outdated Mining Laws: Courts Being Used to Punish People Who Peacefully Oppose Mining Projects" (March 17, 2008), online: MiningWatch webpage <http://www.miningwatch.ca/index.php?/frontenac/open_ltr_to_mcguinty> (date accessed: 19 January 2009). The article and the letter submitted by the organizations link the \textit{Mining Act} to the KI decisions and state: "With the Ontario legislature resuming sitting this week, over 30 groups and organizations are urging the government to overhaul its outdated mining laws and policies".

d. Did KI prove the probability of irreparable harm? Did Platinex? What types of harm do you find to be inevitable or probable? How does the notion of fault affect your analysis?

e. On which side does balance of convenience lie? What factors should be relevant, and how did you balance them?

f. The remedy. Should the Supreme Court of Canada uphold, overturn or modify the Superior Court decision?

Remember to address any arguments that any dissenting Justices will likely raise.

2. On August 11, 2008, consistent with Ontario Premier McGuinty’s promise to initiate earlier consultation with First Nations, the Ontario government initiated consultation with stakeholders and the public to "modernize" the Mining Act. Michael Gravelle, Minister of MNDM, wants to know how the new Mining Act should reflect the Crown’s duty to consult, if at all.

3. Is the Mining Act the appropriate place to address the duty to consult? If so, what stages of the process would you change, and how? If you do not feel the Mining Act is the right place, where, if anywhere, should Ontario deal with consultation issues arising from the Mining Act? If you are suggesting changes, explain how you think your changes will affect what happens on land subject to Aboriginal and treaty rights and interests.

4. Determining which government entity is responsible for consultation with Aboriginal groups is not always simple. In some cases a project that adversely affects rights protected under s. 35 involves multiple ministries and each one denies it has the obligation or the ability to engage in consultation. Some critics have suggested creating a central agency in charge of meeting all consultation duties for all ministries, while others see this as the responsibility of each separate ministry.

Analyze the advantages and disadvantages for both sides. Remember to consider the Aboriginal perspective.

5. An estimated 1,200 Aboriginal communities lie within 200 km of lands subject to mining or exploration activity in Canada. Whenever government contemplates an action that might affect the asserted or proven Aboriginal or treaty rights of a community, the duty to consult crystallizes and must be met. Practical barriers of time and money, as well as the Crown’s perspective on the content and scope of asserted Aboriginal and treaty rights, may limit the Crown’s capability of and interest in fulfilling its duty to consult. In Haida, the SCC recognized that although the Crown alone, and not third parties, is under the duty, the Crown remains free to delegate the "procedural aspects of consultation" to others, including private entities.

What are the advantages of delegating aspects of consultation to third parties, such as

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87 MNDM News Release, supra note 1.
Platinex? What are the limitations of doing so? How do you think such delegations will affect the consultation process as a whole? What can you suggest to improve the process?

6. In 1996, the Royal Commission on Aboriginal Peoples published its findings regarding Aboriginal peoples in Canada in a three-volume report. In the context of Aboriginal title, the Royal Commission commented on the process for claiming Aboriginal title and treaty lands:

One of the most significant weaknesses of comprehensive land claims policy is the lack of any provision for interim measures before submission of a comprehensive claim and during negotiations. Governments are free to create new third-party interests on the traditional lands of Aboriginal claimants up until the moment a claims agreement is signed.

… It should not be necessary for Aboriginal people to mount blockades to obtain interim measures while their assertions of title are being dealt with.

Do you agree? Is the Crown’s duty to consult sufficient to address these concerns? If not, what solution seems more equitable to you?

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Appendix A
Timeline

1868: Ontario enacts *Mining Act* with "free entry" system.

1905: *Treaty No. 9*.

1929: Big Trout Lake First Nation (KI included) adheres to Treaty 9.

1969: Canadian Nickel Company establishes mining claims in the area in 1969.

1975-76: Ontario and Canada orders-in-council transfers to Big Trout Lake First Nation collectively 129 mi$^2$ (which Ontario considered to be required under Treaty 9), plus 204.87 mi$^2$ (which Ontario considered to be a "gift" to address Aboriginal needs at the time).

1976: Big Trout Lake First Nation becomes 8 distinct First Nations (including KI).

1998 - 2006: Platinex applies for and receives 221 mining claims over the Property. MNDM engages in almost no consultation with KI concerning the Property.

1999: Platinex engaged in discussion with members of KI respecting Platinex’s claims to the Property and its intended exploration and development of those claims. Initially, KI seemed to support Platinex’s plans.

January 13, 1999: KI gives notice to Platinex and Ontario about its intention to file a Treaty Land Entitlement (TLE) claim.

1999: Ontario (MNDM) grants first "exemption" to Platinex for all 221 mining claims. Platinex does not need to conduct assessment work to keep its claims in good standing for one year.

May 2000: KI formally files its TLE claim for 197 mi$^2$ of additional reserve land pursuant to Treaty 9.

July 02, 2001: KI declares a moratorium against Platinex’s further activities on the Property until negotiations and consultation occur pursuant to the "KI Development Protocol".

March 30, 2001: MNDM grants second exemption to Platinex’s mining claims.

July 11, 2001: MNDM grants third exemption to Platinex’s mining claims.

July 17, 2003: MNDM grants fourth exemption to Platinex’s mining claims.

2004 - 2005: KI Chief Donny Morris refuses to sign Platinex’s Memorandum of Understanding (MOU) because Platinex did not follow the "KI Development Protocol".

August 30, 2005: KI declares all previous agreements between itself and Platinex to be null and void.

October 28, 2005 and November 17, 2005: Platinex apparently under- and mis-represents the conflict with KI in its disclosure to the public and its financial statement.

November 02, 2005: KI reminds Platinex that they oppose all exploration activity.

November 2005: Platinex becomes a publicly traded company.

December 2005: Platinex raises nearly $1 million in investments.

January 2006: Platinex offers to consult with the KI community, and then cancels when it becomes obvious Platinex cannot change the community’s mind.

February 8, 2006: KI letter prohibits Platinex from continuing its activities on the Property.
February 10, 2006: MNDM approves the transfer of 81 mining leases from Canadian Nickel Company (CANICO) to Platinex on the Property without consulting KI.

February 16, 2006: KI discovers Platinex’s plans to transport drilling equipment.

February 19, 2006: KI letter repeats its demand that Platinex cease its activities. KI protests begin.


May 01, 2006: Platinex files a claim against KI for $10 billion in general damages, $1 million in special damages, and $500,000 in punitive damages. Platinex also files for an interim injunction against KI’s further interference with Platinex’s activities on the Property.

May 31, 2006: KI counter-claims for an interim injunction against Platinex’s continued activities on the Property.

July 2006: MNDM grants fifth exemption to Platinex’s mining claims.

July 28, 2006: Justice Smith grants interim injunction in favour of KI, conditional upon KI returning any drilling equipment of Platinex’s, and upon setting up consultation committee, "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."

September 2006: The only time KI meets with MNDM and Platinex between KI 1 and KI 2. The parties only discuss protocol and process.

March 15, 2007: Ontario Secretariat for Aboriginal Affairs (OSAA) denies KI’s TLE claim.

May 01, 2007: Smith J. denies KI’s request for a further interim injunction. Issues interim declaratory order:

- Parties shall implement consultation protocol (CP), timetable, and MOU.
- Conditional permission for Platinex to continue activities, upon signing MOU, CP, and timetable.

May 8, 2007: Platinex, KI and Ontario meet to draft MOU’s and CP’s. Platinex and Ontario eventually reach an agreement. KI does not.

May 18, 2007: Smith J. imposes Platinex’s and Ontario’s version of an MOU, CP and timeline upon all parties and gives Platinex explicit permission to continue its activities.

October 25, 2007: KI abandons legal fight, citing effective bankruptcy. Smith J. orders KI and others with notice not to interfere with Platinex’s permission to drill.

November 06, 2007: KI community, including KI 6, protest at airport, blocking Platinex’s access to Property. Platinex leaves community.

December 14, 2007: Smith J. finds KI 6 guilty of contempt. KI 6 do not contest charges.

March 17, 2008: Sentencing. Ontario seeks fines. Platinex press release says it does not seek jail time, but KI asserts that Platinex’s hearing transcript and submissions indicate otherwise. KI 6 makes no submissions. Smith J. sentences each member of the KI 6 to six months imprisonment.

May 23, 2008: Ontario Court of Appeal (Lang J.A.) allows appeal from sentence, releasing KI 6.

• When a private party requests an injunction against a First Nation, courts must adopt a "comprehensive and nuanced description" of the rule of law that considers reconciliation and respects Aboriginal and Treaty rights. Courts should only grant an injunction when every good faith effort to consult, negotiate, accommodate, and achieve reconciliation has failed.

• Sanctions, if appropriate, must be adjusted considering the "circumstances of aboriginal offenders."
Appendix B

Has the Crown Breached its Duty to Consult?

1) Does the Crown Have a Duty to Consult?
   \(\text{Standard: Correctness}\)
   - Yes
   - No (No duty to consult)

2) What is the Appropriate Scope of Consultation?
   \(\text{Standard: Reasonableness}\)
   - 1) Seriousness of the potential effect?
   - 2) Prima facie strength of the claim?
   - 3) Specificity of terms (treaties only)?

3) Was the Duty to Consult Reasonably Fulfilled?
   \(\text{Standard: Reasonableness}\)
   - Yes (Duty Fulfilled)
   - No
     - a) Faced with a sense of urgency?
     - b) Confronted with balancing many First Nations’ interests with little unanimity?

4) What is the Appropriate Remedy in this Situation?
   - Injunction, court order, etc.
   - Consultation including funding
   - Other solutions?
Appendix C
JAMES BAY TREATY or TREATY No. 9

OTTAWA, November 6, 1905.
The Honourable Superintendent General of Indian Affairs, Ottawa.

SIR, ---

Increasing settlement, activity in mining and railway construction in that large section of the province of Ontario … rendered it advisable to extinguish the Indian title.

…. Cession was taken of the tract described in the treaty, comprising about 90,000 square miles, and, in addition, by the adhesion of certain Indians whose hunting grounds lie in a northerly direction from the Albany river … comprising about 40,000 square miles. Gratuity was paid altogether to 1,617 Indians, representing a total population, when all the absentees are paid and allowance made for names not on the list, of 2,500 approximately. 90 [….] The treatment of the reserve question, which in this treaty was most important, will, it is hoped, meet with approval. For the most part the reserves were selected by the commissioners after conference with the Indians. They have been selected in situations which are especially advantageous to their owners, and where they will not in any way interfere with railway development or the future commercial interests of the country. While it is doubtful whether the Indians will ever engage in agriculture, these reserves, being of a reasonable size, will give a secure and permanent interest in the land which the indeterminate possession of a large tract could never carry. No valuable water-powers are included within the allotments. The area set apart is, approximately, 374 square miles in the Northwest Territories and 150 square miles in the province of Ontario. When the vast quantity of waste and, at present, unproductive land, surrendered is considered, these allotments must, we think, be pronounced most reasonable.

…. We have the honour to be, sir,
Your obedient servants,
DUNCAN C. SCOTT,
SAMUEL STEWART,
 DANIEL G. MACMARTIN,
Treaty Commissioners.

ARTICLES OF A TREATY made and concluded at the several dates mentioned therein, in the year of Our Lord one thousand and nine hundred and five, between His Most Gracious Majesty the King …; and the Ojibeway, Cree and other Indians, inhabitants of the territory within the limits hereinafter defined and described…: --

[W]hereas, the said Indians have been notified and informed by His Majesty’s said commission that it is His desire to open for settlement, immigration, trade, travel, mining, lumbering, and such other purposes as to His Majesty may seem meet, a tract of country, bounded and described as hereinafter mentioned, and to obtain the consent thereto of His Indian subjects inhabiting the

90 Later, additional bands adhered to Treaty 9, including the Big Trout Lake First Nation (of which KI was a member).
said tract, and to make a treaty and arrange with them, so that there may be peace and good-will between them and His Majesty’s other subjects, and that His Indian people may know and be assured of what allowances they are to count upon and receive from His Majesty’s bounty and benevolence.

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 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.

To have and to hold the same to His Majesty the King and His successors for ever.

And His Majesty the King hereby agrees with the said Indians that they shall have the right to pursue their usual vocations of hunting, trapping and fishing throughout the tract surrendered as heretofore described, subject to such regulations as may from time to time be made by the government of the country, acting under the authority of His Majesty, and saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes.

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; and the location of the said reserves having been arranged between His Majesty’s commissioners and the chiefs and headmen, as described in the schedule of reserves hereto attached, the boundaries thereof to be hereafter surveyed and defined, the said reserves when confirmed shall be held and administered by His Majesty for the benefit of the Indians free of all claims, liens, or trusts by Ontario.

Provided, however, that His Majesty reserves the right to deal with any settlers within the bounds of any lands reserved for any band as He may see fit; and also that the aforesaid reserves of land, or any interest therein, may be sold or otherwise disposed of by His Majesty’s government for the use and benefit of the said Indians entitled thereto, with their consent first had and obtained; but in no wise shall the said Indians, or any of them, be entitled to sell or otherwise alienate any of the lands allotted to them as reserves.

It is further agreed between His said Majesty and His Indian subjects that such portions of the reserves and lands above indicated as may at any time be required for public works, buildings, railways, or roads of whatsoever nature may be appropriated for that purpose by His Majesty’s government of the Dominion of Canada, due compensation being made to the Indians for the value of improvements thereon, and an equivalent in land, money or other consideration for the area of the reserve so appropriated.
And with a view to show the satisfaction of His Majesty with the behaviour and good conduct of His Indians, and in extinguishment of all their past claims, He hereby, through His commissioners, agrees to make each Indian a present of eight dollars in cash.

His Majesty also agrees that next year, and annually afterwards for ever, He will cause to be paid to the said Indians in cash, at suitable places and dates, of which the said Indians shall be duly notified, four dollars, the same, unless there be some exceptional reason, to be paid only to the heads of families for those belonging thereto.

Further, His Majesty agrees that each chief, after signing the treaty, shall receive a suitable flag and a copy of this treaty to be for the use of his band.

Further, His Majesty agrees to pay such salaries of teachers to instruct the children of said Indians, and also to provide such school buildings and educational equipment as may seem advisable to His Majesty’s government of Canada.

And the undersigned Ojibeway, Cree and other chiefs and headmen, on their own behalf and on behalf of all the Indians whom they represent, do hereby solemnly promise and engage to strictly observe this treaty, and also to conduct and behave themselves as good and loyal subjects of His Majesty the King.

They promise and engage that they will, in all respects, obey and abide by the law; that they will maintain peace between each other and between themselves and other tribes of Indians, and between themselves and others of His Majesty’s subjects....

Signed at Osnaburg on the twelfth day of July, 1905, by His Majesty’s commissioners and the chiefs and headmen in the presence of the undersigned witnesses, after having been first interpreted and explained.

Witnesses:
THOMAS CLOUSTON RAE, C.T., Hudsons Bay Co.
ALEX. GEORGE MEINDL, M.D.
JABEZ WILLIAMS, Commis, H. B. Co.
DUNCAN CAMPBELL SCOTT.
SAMUEL STEWART.
DANIEL GEORGE MACMARTIN.
MISSABAY, his x mark.
THOMAS his x mark MISSABAY.
GEORGE his x mark WAHWAASHKUNG.
KWIASH, his x mark.
NAHOKESIC, his x mark.
OOMBASH, his x mark.
DAVID his x mark SKUNK.
JOHN his x mark SKUNK.
THOMAS his x mark PANACHEESE.
Interpretation
1(1). In this Act,
"licensee" means a person holding a prospector’s licence issued under this Act or a renewal thereof;
"mining claim" means a parcel of land, including land under water, that has been staked and recorded in accordance with this Act and the regulations;
"mining rights" means the right to minerals on, in or under any land;
"Minister" means the Minister of Northern Development and Mines…;
"prospecting" means the investigating of, or searching for, minerals;
"unpatented," when referring to land or mining rights, means land or mining rights for which a patent, lease, licence of occupation or any other form of… [government] grant is not in effect;

Purpose
2. The purpose of this Act is to encourage prospecting, staking and exploration for the development of mineral resources and to minimize the impact of these activities on public health and safety and the environment through rehabilitation of mining lands in Ontario.

PART I
ADMINISTRATION

Administrative matters

Licence required
18(1). No person shall prospect on Crown lands or stake out, record or apply to record the staking of a mining claim unless the person is the holder of a prospector’s licence issued under this Act.

Prospector’s licences
19(1). Any natural person who is of the age of eighteen years or over is entitled to obtain a prospector’s licence upon application made in the prescribed form and upon payment of the required fee.

Renewal of licence
21(1). A licensee is entitled to a renewal of the licence if the licensee applies for the renewal in the form established by the Minister and pays the required fee within 60 days before the expiry of the licence.
PART II
MINING CLAIMS

Lands Open

Where licensee may prospect for minerals
27. Except where otherwise provided, the holder of a prospector’s licence may prospect for minerals and stake out a mining claim on any,

(a) Crown lands, surveyed or unsurveyed;
(b) lands, the mines, minerals or mining rights whereof have been reserved by the Crown in the location, sale, patent or lease of such lands where they have been located, sold, patented or leased after the 6th day of May, 1913, not at the time,
(c) on record as a mining claim that has not lapsed or been abandoned, cancelled or forfeited; or
(d) withdrawn by any Act, order in council, or other competent authority from prospecting, location or sale, or declared by any such authority to be not open to prospecting, staking out or sale as mining claims.

Claim may be staked
28(1). A licensee may stake out a mining claim on any land open for prospecting and, subject to the other provisions of this Act, may work such claim and transfer his or her interest therein to another person, but, where the surface rights in the land have been granted, sold, leased or located by the Crown, compensation must be made as provided by section 79.

Lands Not Open

Land not open for prospecting without consent
29. No mining claim shall be staked out or recorded upon any land transferred to or vested in the Ontario Northland Transportation Commission without the consent of the Commission nor, except with the consent of the Minister,

(a) upon any land reserved or set apart as a town site by the Crown;
(b) upon any land laid out into residential lots on a registered plan of subdivision; or
(c) upon any land forming the station grounds, switching grounds, yard or right of way of a railway.

Lands upon which claim may not be staked out
30(1). No mining claim shall be staked out or recorded on any land,

(a) that, without reservation of the minerals, has been sold, located, leased or included in a licence of occupation; or
(b) for which an application brought in good faith is pending in the Ministry of Natural Resources under the Public Lands Act or any other Act, and in which the applicant may acquire the minerals that are included in the application; or
(c) where the surface rights have been subdivided, surveyed, sold or otherwise disposed of by the Ministry of Natural Resources for summer resort purposes, except where the Minister certifies in writing that in his or her opinion discovery of valuable mineral in place has been made; or

(d) where the Minister or the Minister of Transportation certifies that land is required for the development of water power or for a highway or for some other purpose in the public interest and the Minister is satisfied that a discovery of mineral in place has not been made thereon; or

(e) in an Indian reserve, except as provided by The Indian Lands Act, 1924; or

(f) while proceedings in respect thereto are pending before the Commissioner or a recorder or until those proceedings are finally determined; or

(g) until the proceeding has been finally determined, in the case of a proceeding that the Commissioner certifies is pending in a court in respect of the land.

Provincial parks

31. On and after the day subsection 16 (1) of the Provincial Parks and Conservation Reserves Act, 2006 is proclaimed in force, prospecting or the staking out of mining claims or the development of mineral interests or the working of mines in provincial parks and conservation reserves is prohibited.

Lands used or occupied as gardens, etc.

32(1). Although the mines or minerals therein have been reserved to the Crown, no person shall prospect for minerals or stake out a mining claim upon the part of a lot that is used as a garden, orchard, vineyard, nursery, plantation or pleasure ground, or upon which crops that may be damaged by such prospecting are growing, or on the part of a lot upon which is situated a spring, artificial reservoir, dam or waterworks, or a dwelling house, outhouse, manufactory, public building, church or cemetery, except with the consent of the owner, lessee, purchaser or locatee of the surface rights, or by order of the recorder or the Commissioner, and upon such terms as to the Commissioner seem just.

Withdrawal and reopening of lands

35(1). The Minister may, by order signed by him or her,

(a) withdraw from prospecting, staking out, sale or lease, or any combination of them, any lands, mining rights or surface rights that are the property of the Crown; and

(b) reopen for prospecting, staking out, sale or lease, or any combination of them, any lands, mining rights or surface rights that have been withdrawn under this Act.

Applications to Record

Recording a mining claim

46(1). If, in the recorder’s opinion, an application to record a mining claim complies with all the requirements for staking and recording the claim, the recorder shall record the claim and file it, along with the sketch or plan and certificate.
Rights of Licensee

Rights in claim
50(1). The staking out or the filing of an application for or the recording of a mining claim, or the acquisition of any right or interest in a mining claim by any person or all or any of such acts, does not confer upon that person,

(a) any right, title, interest or claim in or to the mining claim other than the right to proceed as is in this Act provided to perform the prescribed assessment work or to obtain a lease from the Crown and, prior to the performance, filing and approval of the first prescribed unit of assessment work, the person is merely a licensee of the Crown and after that period and until he or she obtains a lease the person is a tenant at will of the Crown in respect of the mining claim; or

(b) any right to take, remove or otherwise dispose of any minerals found in, upon or under the mining claim.

Surface rights
(2). The holder of a mining claim does not have any right, title or claim to the surface rights of the claim other than the right to enter upon, use and occupy such part or parts thereof as are necessary for the purpose of prospecting and the efficient exploration, development and operation of the mines, minerals and mining rights therein.

Assessment Work

Assessment work
65(1). The holder of a mining claim shall, following the recording of the claim, perform or cause to be performed such annual units of assessment work as are prescribed.

Work on mining lands
66(3). Exploration work performed on mining lands may be allocated as assessment work to contiguous unpatented mining claims in the prescribed manner.

Decision
(4). The Minister shall determine the amount of assessment work credits.

Special circumstances
67(5). Despite anything in this Act, if the Minister is of the opinion that special circumstances exist, the Minister may, by order,

(a) exclude the time or extend the time within which work on a mining claim must be performed or reported, or both, or within which application and payment for lease may be made; and

(b) fix the anniversary date or dates by which the next or any subsequent periods of work must be performed or reported, or both, or by which application and payment for lease may be made.
Surface Rights Compensation

Notice of intention to perform assessment work
78(1). A holder of a mining claim who first proposes to do ground assessment work on all or part of the land comprising a mining claim shall give notice of that intention in the prescribed form to the owner, if any, of the surface rights of the part of the land to be affected by the work.

Entry on land to perform work
(2). A person who has given notice under this section may enter on the land and perform the work at any time immediately following the day the notice is given.

Surface rights compensation
Definition
79(1). In this section and in section 78, "owner of the surface rights" means a person to whom the surface rights of land have been granted, sold, leased or located. R.S.O. 1990, c. M.14, s. 79 (1).

Right to compensation
(2). Where there is an owner of surface rights of land or where land is occupied by a person who has made improvements thereon that, in the opinion of the Minister, entitles that person to compensation, a person who,
(a) prospects, stakes out or causes to be staked out a mining claim or an area of land for a boring permit;
(b) formerly held a mining claim or an area of land for a boring permit that has been cancelled, abandoned or forfeited;
(c) is the holder of a mining claim or an area of land for a boring permit and who performs assessment work;
or
(d) is the lessee or owner of mining lands and who carries on mining operations, on such land, shall compensate the owner of the surface rights or the occupant of the lands, as the case may be, for damages sustained to the surface rights by such prospecting, staking out, assessment work or operations. R.S.O. 1990, c. M.14, s. 79 (2).

Right of holder of mining claim, etc., to compensation
(3). Every person who damages mineral exploration workings or claim posts, line posts, tags or surveyed boundary markers delineating mining lands shall compensate the holder of the mining claim or the owner or lessee of the mining lands, as the case may be, for damages sustained. R.S.O. 1990, c. M.14, s. 79 (3).

Determination of compensation by Commissioner
(4). In default of agreement and upon application made in the prescribed form by either party, the amount and the time and manner of payment of compensation under subsection (2) or (3) shall be determined by the Commissioner after a hearing and, subject to appeal to the Divisional Court where the amount claimed exceeds $1,000, the Commissioner’s order is final. R.S.O. 1990, c. M.14, s. 79 (4).
Prohibiting work pending settlement
(5). The Commissioner may order the giving of security for payment of the compensation and may prohibit, pending the determination of the proceeding or until the compensation is paid or secured, further prospecting, staking out or working by any person. R.S.O. 1990, c. M.14, s. 79 (5).

Lien for compensation
(6). The compensation is a special lien upon any mining claim or mining lands, as the case may be, and no further prospecting, staking out or performing of work, except by leave of the Commissioner, shall be done by any person after the time fixed for the payment or securing of the compensation, unless the compensation has been paid or secured as directed. R.S.O. 1990, c. M.14, s. 79 (6).

Power of Commissioner to vary, etc., order
(7). The Commissioner, on notice to all interested parties and for good cause shown, on such terms as seem just, may by subsequent order or award at any time change, supplement, alter, vary or rescind any order made under this section. R.S.O. 1990, c. M.14, s. 79 (7).

Priorities
(8). In a hearing under subsection (4), the Commissioner shall take into account which of the rights was applied for first and, except where injustice would result, shall give the holder of those rights due priority in the consideration of the dispute between the parties. R.S.O. 1990, c. M.14, s. 79 (8).

Filing of agreement or order in office of recorder
(9). Where unpatented mining claims are affected by an agreement entered into in respect of the compensation referred to in subsection (2), or by an order made under subsection (4), the agreement or a certified copy of the order, as the case may be, may be filed by the person to whom the compensation is payable in the office of the recorder upon payment of the required fee. R.S.O. 1990, c. M.14, s. 79 (9); 1997, c. 40, s. 7.

Registration of order or agreement
(10). Where an unpatented mining claim is subsequently leased, the Minister shall cause any agreement or order filed in the recorder’s office under subsection (9) that affects the leased lands to be registered against the lands in the proper land registry office and the person to whom the compensation is payable is entitled to enforce the terms of the agreement or order against the lessee and, subject to the Registry Act and the Land Titles Act, against any subsequent lessee of the land. R.S.O. 1990, c. M.14, s. 79 (10).

Reduction in area of claim
80(1). The Commissioner or the recorder may reduce the area of a mining claim staked out where the surface rights have been granted, sold, leased or located, if in his or her opinion an area less than the prescribed area is sufficient for working the mines and minerals therein.
Exclusion of part of surface rights
(2). The Commissioner or the recorder may exclude from any mining claim such part of the surface rights as may be necessary for the occupation and utilization of buildings or improvements erected or made thereon prior to the time the claim was staked out.

Issue of Patent or Lease for Mining Claim

Right to lease of claim
81(1). Upon compliance with this Act and the regulations and upon payment of the rent for the first year, the holder of a mining claim is entitled to a lease of the claim.

Application for lease
(2). The application and payment for a lease may be made to the recorder at any time after the first prescribed unit of assessment work on a mining claim is performed, filed and, if necessary, approved, and the application shall be accompanied by,
   (a) [Repealed].
   (b) if a survey is required under section 95 or 96, a plan of survey approved by the Surveyor General;
   (c) an agreement or an order of the Commissioner indicating that surface rights compensation, if any, has been paid, secured or settled; and
   (d) the required fee.

Term of lease
(3). A lease under this section shall be for a term of twenty-one years at the prescribed rental, payable in advance, for the first year and at the prescribed rate for each subsequent year.

Refusal to renew lease
(8). The Minister shall refuse to renew a lease unless,
   (a) the production of minerals has occurred continuously for more than one year since the issuance or last renewal of the lease; or
   (b) the lessee has demonstrated to the satisfaction of the Minister a reasonable effort to bring the property into production.

Restriction on transfer etc.
(14). A lease, a renewal of lease or the term or terms that a lease creates shall not be transferred, mortgaged, charged, sublet or made subject to a debenture without the written consent of the Minister or an officer duly authorized by the Minister.

Reservations, etc., in leases
86(1). Every lease issued under this Act shall contain the following reservations or provisions:
   Reservation for roads
1. Provided that nothing whatsoever herein contained shall prevent or interfere with the free user of any public or travelled road or highway crossing the hereinbefore described premises.

Reservation for power, petroleum, etc.

2. Reserving unto Us, Our Heirs and Successors such use of the land hereby demised for all such works as may be necessary for the development of water power and the development, transmission and distribution of electrical power, natural gas, petroleum and petroleum products … without any liability by Us to the Lessee.

Reservation for railways

3. Reserving the right to grant without compensation to any person or corporation the right-of-way necessary for the construction and operation of one or more railways … where such railway or railways shall not manifestly or materially interfere with the mining operations carried on upon the said premises.

Reservation for navigable waters

4. Saving, Excepting and Reserving unto Us, Our Heirs and Successors the free use, passage and enjoyment of, in, over and upon all navigable waters … and reserving also right of access to the shores of all rivers, streams and lakes for all vessels, boats and persons, together with the right to use so much of the banks thereof not exceeding one chain in depth from the highwater mark as may be necessary for fishery or public purposes.

Provided that, should the premises herein described or any part thereof be covered by navigable waters, this lease shall be subject to the provisions of the Navigable Waters Protection Act (Canada), the Beds of Navigable Waters Act and the Lakes and Rivers Improvement Act.

Reservation for fishing

5. Provided that nothing herein contained shall in any manner restrict fishing or fishing rights in any navigable waters covering the premises hereby demised and that the Lessee shall not do any act resulting in damage to fishing or the fishing industry in the waters or to nets or other appliances used in fishing in the waters.

Reservation for land under navigable waters

6. Provided that these presents shall not vest in the Lessee any right, claim or title to the land under navigable waters which may be included within the limits of the herein described premises, but the Lessee shall have the exclusive right to extract the minerals therefrom during the term of these presents.

Other reservations

(3). The Minister may direct the inclusion of other reservations or provisions provided for in this Act or not inconsistent with the intent of this Act.

Omission of reservations, etc.

(4). The Minister may omit reservations or provisions contained in subsection (1) from a lease issued under section 84 where such reservations or provisions are contrary to the purpose of the lease.
Reservation for roads
87(1). Every patent or lease issued under this Act shall contain a reservation for road purposes of 10 per cent of the surface rights of the land granted or leased, as the case may be, and the Crown or its officers or agents may lay out and construct roads where considered proper on the lands so granted or leased.

Reservation of surface rights
(2). Every patent or lease issued under this Act shall contain a reservation of the surface rights on and over any public or colonization road or any highway crossing the land granted or leased at the date of issue of the patent or lease.

Reservation of trees and right of entry
92(1). Every patent or lease of Crown lands issued under this Act shall contain a reservation to the Crown of all timber and trees standing, being or hereafter found growing upon the lands thereby granted or leased, and of the right to enter upon such lands to carry on forestry, to cut and remove any timber or trees thereon, and to make necessary roads for such purposes.
Appendix E – *KI I*

**Platinex Inc. v. Kitchenuhmaykoosib Inninuwug First Nation ["KI I"]**

28 July 2006
Ontario Superior Court of Justice

**MR. JUSTICE G. P. SMITH**

[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**


[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] 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.

[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.

[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."


[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.
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.

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.

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.

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

KI’s Treaty Land Entitlement Claim and Treaty 9

[Treaty 9] 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.

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.

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.

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.

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

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

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.\(^{91}\)

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.

In *Haida Nation v. British Columbia (Minister of Forests)*,\(^ {92}\) 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.\(^ {93}\)

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\(^{92}\) 2004 SCC 73 (CanLII), [2004] 3 S.C.R. 511 [*Haida Nation*].

\(^{93}\) Ibid. at para. 14.
As Professor Kent Roach notes, "Aboriginal rights cannot be truly justiciable rights unless courts become comfortable with remedies for their violation." Roach goes on to discuss the use of interlocutory injunctions in the context of Aboriginal rights claims:

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.

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."

[i] The Merits Test
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.

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.

[ii] Irreparable Harm
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.

The Position of Platinex
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.

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.

95 Ibid. at para. 8.
96 Ibid. at para. 5.
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.

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.

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.

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.

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.

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.

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.

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.

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.

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. Consultation requirements must be proportional to the nature and extent of the Aboriginal interest and the severity of the proposed Crown action.

[84] In *Haida Nation*, 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.”

[85] The Crown’s duty to consult engages the honour of the Crown and flows from its fiduciary relationship with First Nations peoples.

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

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.

[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.\textsuperscript{101}

[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.\textsuperscript{102}

[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] The Crown must first provide the First Nation with notice of and full information on the proposed activity; it must fully 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.

[94] In 1990, in \textit{R v. Sparrow}, 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.

\textsuperscript{101} Ibid. at para. 27.
\textsuperscript{102} Ibid. at para. 35.
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.

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.

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

... The court [can] order the Crown to engage in consultations.

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."103

[iii] Balance of Convenience

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.

... 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.

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

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.

In considering the balance of convenience, a court may also assess the public interest in addition to the interests of the parties.\(^{104}\)

In *Siska No. 1*\(^{105}\) and *Tlowitsis*,\(^{106}\) 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.

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.

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.

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.

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*

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.

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.

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.\(^{107}\)

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

\(^{104}\) *Wiigyet (Morrison) et al v. District Manager, Kispiox Forest District et al.*, (BCSC), (1991) 51 B.C.L.R. (2d) 73.

\(^{105}\) *Siska Indian Band v. British Columbia (Minister of Forests) (No. 1)* (BCSC), (1998), 62 B.C.L.R. (3d) 133.


[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. …

[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**

[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] [T]he possibility still exists that the parties may be capable of reaching of a negotiated settlement.

[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.
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.
Appendix F – *KI 2*

2007 CarswellOnt 2995

Platinex Inc. v. Kitchenuhmaykoosib Inninuwug First Nation

... 
Ontario Superior Court of Justice
G.P. Smith J.
Heard: April 2-4, 2007
Judgment: May 1, 2007[FN*]
Docket: 06-0271, 06-0271A

... 

MOTION by First Nation for interlocutory injunction to prevent mineral exploration company from carrying out test drilling on traditional First Nation lands.

**G.P. Smith J.:**

**Overview**

1. The motion before the court is for an interlocutory injunction to prevent a mineral exploration company from carrying out test drilling on the traditional lands claimed by an Aboriginal First Nation community.

2. The land is encompassed by the James Bay Treaty (Treaty 9), of which the First Nation is a signatory. The terms of Treaty 9 surrendered the land to the Provincial Crown in return for the grant of reserve land.

3. At issue before me are the competing interests and rights of the parties. On a larger scale, the broader question is the scope of the duties and rights of the Crown, third parties, and First Nations communities when development is proposed on traditional Aboriginal land that has been surrendered pursuant to the terms of a treaty.

4. Viewed from an historical perspective this case is yet another battle in a larger ongoing conflict between two very different cultures. On one side of the battlefield is the non-aboriginal desire to develop the rich resources of the land. On the other side is the Aboriginal perspective that views the land as a sacred legacy given to them by the Creator to manage and protect.

**The Nature of the Proceedings to Date**

5. On July 28, 2006, I made the following order:

[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.

6 On January 26 of this year, a motion was heard to determine what evidence could be heard when deciding whether to make the injunction permanent until trial. At paragraphs 29 and 30 of my Reasons on that motion, released February 2, 2007, I commented:

[29] The wording of my July order was purposely designed to afford appropriate protection at the time that the order was issued. As mentioned above, given the fluid nature of most situations, the degree of remedial protection and the predictability of future harm may vary depending upon the point in time that the case comes before the court. In other words there are times when the court must adopt a flexible and perhaps a creative approach commensurate with the situation at hand.

[30] To put this concept in the language of injunctory relief, the balancing of the risks to the applicant and respondent and the assessment of irreparable harm and the balance of convenience may vary depending upon the time at which the matter is heard.

7 That order also extended the interim, interim injunction until this hearing, and granted the provincial Crown (the "Crown"), as represented by the Minister of Northern Development and Mines ("MNDM"), leave to intervene in the April proceedings.

...  

10 The Independent First Nations Alliance ("IFNA") is an organization of four First Nations in northwestern Ontario (Kitchenuhmaykoosib Inninuwug, Muskrat Dam, Pikangikum, and Whitesand First Nations), whose members have treaty rights under the 1929-30 Adhesion to the James Bay Treaty/Treaty No. 9, Treaty No. 5, and the Lake Superior Robinson-Superior Treaty of 1850. IFNA was added as an intervenor in the motion before the court by order dated March 2, 2007.

...
KI’s Treaty Land Entitlement Claim and Treaty 9

42 Understanding KI’s position requires an understanding of its TLE claim and of Treaty 9.

43 The James Bay Treaty, also known as Treaty 9, was negotiated and signed in 1905 and 1906. KI’s predecessor, the Trout Lake Band, adhered to the treaty on July 5, 1929. The land covered by the Treaty includes most of northern Ontario north of the height of land; to James and Hudson Bays in the north; to the boundary of Quebec to the east; and is bordered on the west by Manitoba.

44 The Treaty provides for the surrender to the Crown of Aboriginal title to approximately 90,000 square miles of land, in exchange for certain reserve lands. The surrender of the land extinguished "all rights, titles and privileges", so that KI’s rights became treaty rights, and the land became provincial Crown land.

45 The size of the KI reserve was measured to be 85 square miles, which 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 197 additional square miles.

46 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...

47 In return for a surrender of all rights and title to the land by the Band, the Crown promised to lay aside reserves. Any unfulfilled promise for land can give rise to a treaty land entitlement claim, or TLE.
48 Treaty 9 also promises that the signatories have the right to pursue traditional harvesting rights throughout the surrendered tract of land, including hunting, fishing, and trapping. This right is "subject to such regulations as may from time to time be made by the government of the country, acting under the authority of His Majesty", and subject to land that "may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes."

49 As early as January 13, 1999, KI had indicated its intention to proceed with its TLE claim to both Platinex and the federal and Ontario governments. The claim is based upon the assertion that it was entitled to a reserve based upon its current population, rather than on the population of its predecessor band in 1929. If successful, this will add approximately 197 square miles to KI’s reserve.

50 In June 1967, the Trout Lake Band passed a resolution that divided it into five separate bands. That decision was later amended to create 8 bands, of which KI is one.

51 Both the federal and provincial Crown initially took the position that the entire Trout Lake Band, including the 8 bands more recently created, was entitled to a total land grant of 129 square miles. Notwithstanding this position, both the federal and provincial Crown agreed to grant a further 204.87 square miles for the reserves of the 8 new communities, resulting in a total land grant of 330.87 square miles.

52 By a 1975 Order-in-Council, Ontario formally transferred these reserve lands to the Trout Lake Band. In 1976, the government of Canada issued an Order-in-Council setting aside those same lands as reserves for the band. Both Orders-in-Council specified that two distinct types of land were being transferred: first, 126 square miles was transferred specifically as entitlement land pursuant to Treaty 9; and second, approximately 204.8 square miles was transferred as land in excess of any treaty land entitlement, to meet the economic and social needs of the band. Ontario concedes that KI has an arguable case that the original Trout Lake Band may have had an entitlement to additional reserve land of between 3.4 and 7.2 square miles over and above the 126 square miles originally allotted to it. This possible entitlement, it submits, has already been addressed by the grant of an additional 204.87 square miles of land.

53 Ontario’s position is that the extra 204 square miles was a gift and, although it was not to be considered as treaty entitlement land, it satisfies any outstanding treaty land entitlement. As a result, Ontario views KI’s TLE claim as being very weak or non-existent.

54 KI has expressed outrage over this position, viewing it as sharp dealing and an outrageous breach of the integrity, promises, and honour of the Crown. Without honour it argues, there is no possibility of achieving reconciliation through consultation in the absence of good faith. In short, KI asserts that Ontario’s rejection of its TLE is proof that an injunction is necessary since Ontario cannot protect that which it denies exists.

55 KI formally filed its TLE claim in May 2000. By letter dated March 15, 2007, the Ontario Secretariat for Aboriginal Affairs ("OSAA") declined the claim, on the basis that KI’s entitlement to land under Treaty 9 had been satisfied. The federal government has not yet taken any position on the claim, and to date KI has not commenced an application for judicial review of the OSAA
decision.

... 

The Mining Act and the Mining Sequence

60 The Mining Act provides prospectors with the right to enter upon Crown lands to prospect for minerals, and to stake and work claims, without first having to purchase the land.

61 Staking a claim is an initial step that takes place before the exploratory stage, and typically includes the staking process as well as walking the land and gathering rock and soil samples. The holder of a staked claim has the exclusive right to explore for minerals and the right to lease the claim, but no rights or interest in the claim or any right to remove minerals.

62 Section 50 of the Mining Act requires that a claim holder perform assessment work in the amount of $400.00 per year to maintain the claim in good standing, failing which the claim is forfeited to the Crown.

63 Land that is subject to a mining claim remains unpatented Crown land. All other uses commonly associated with Crown land continue, including any traditional harvesting rights described in Treaty 9.

64 Mineral production cannot take place on a mining claim. For this to occur, a mining lease must be obtained from the Crown. This is granted upon fulfillment of the requirements set out in the Mining Act.

65 The process of searching for a mine and bringing it to production is referred to as the "mining sequence", and may unfold over a period of several years. The sequence may include the following stages:

- Regional survey
- Land acquisition
- Early exploration
- Intermediate exploration
- Advanced exploration
- Development/production
- Closure/rehabilitation

66 Currently, MNDM views Platinex as being in the early to intermediate stages of exploration. KI points to the lack of Crown oversight and protection in the early stages of the mining sequence and a seemingly uninterested view of any harm that may occur to Aboriginal
interests.

67 KI’s third party claim challenges the constitutionality of the Mining Act, stating that, without consultation with the particular affected Aboriginal party or knowing what is happening on the ground with exploration work, the Crown does not and cannot comprehend the nature and extent of the impact of exploration activities on Aboriginal land, rights, ways of life, and culture.

New Evidence since the June 2006 Hearing

68 In addition to the evidence that was available in June 2006, the evidence before the court includes new evidence, such as:

• the evidence of the consultation process;

• the affidavit of Roger Townshend dated along with attached exhibits including the report of Dr. Janet Armstrong;

• the transcript of the cross-examination of Roger Townshend (March 15, 2007);

• the letter dated March 17, 2007 from OSAA to KI Chief Donny Morris rejecting KI’s TLE claim;

• the affidavit of Christine Kaszycki, Assistant Deputy Minister, MNDM; and

• the transcript of the examination of Christine Kaszycki (March 16, 2007).

69 MNDM and IFNA also filed comprehensive motion records and factums, and participated fully in the motion.

The Duty to Consult

70 KI has the right to be consulted when any of its rights protected by s. 35 of the Constitution Act, 1982, are likely to be affected by a proposed government action.[FN3]

71 The mining claims and leases granted by the Crown to Platinex, and that company’s interest in drilling on land within the Treaty 9 boundary, gives rise to a potential adverse impact to KI. It is this potential adverse impact that has triggered the Crown’s duty to consult with KI.

72 The scope of the duty to consult and the consideration of whether the Crown and by implication Platinex have fulfilled this duty is the question that more than any other lies at the heart of this case.

73 When considering the scope of the duty to consult and the potential impact or harm of an activity on Aboriginal rights, it is important to differentiate between established rights and asserted rights.
In this case, KI’s harvesting rights are established by Treaty 9, whereas the TLE claim is an asserted right. Neither gives KI a proprietary interest in the tract of land in question, which is owned by the Crown under s. 109 of the Constitution Act, and which is unencumbered by Aboriginal title.

Both MNDM and Platinex submit that the potential harm to the land, and to KI’s treaty harvesting rights, is minimal. The harm is capable of mitigation, especially when balanced against the Crown’s right to take up land for mining and other purposes.

Second, they maintain that KI’s TLE is weak or non-existent and should not preclude Platinex’s exploratory drilling, for a variety of reasons:

1. it has been rejected by Ontario/OSAA;
2. the leases and claims in question pre-date the filing of the TLE claim in 2000;
3. the exploratory drilling is transient, and could not possibly compromise KI’s TLE claim;
4. even if KI is entitled to more reserve land, it has no right to unilaterally select this land, especially land that is subject to pre-existing third party rights; and
5. in the event that KI is entitled to more land, any such entitlement has already been satisfied.

KI does not agree that the harm proposed by the drilling is minimal, categorizing this position as an assumption unsupported by any evidence. Citing the Mikisew case, KI argues that minimal impact can be, and is, very serious from the Aboriginal perspective, especially when it infringes on hunting, fishing, or trapping.

Chief Donny Morris expressed KI’s fear of harm regarding its TLE, when he stated that shortly after the TLE claim was submitted, KI issued a moratorium on resource development on our traditional land. Until the TLE is settled and our Treaty rights are honoured, we are not willing to have parts of our traditional territory taken off the table by activities that create incompatible interests, such as mineral exploration.

The Consultation Process

Since July 28, 2006, there have been ongoing discussions between KI and representatives of Platinex and the Crown. I do not propose to recite in detail the extent of the consultation process, save and except for a general review of the process and of the positions of the respective parties.
In my reasons of July 28, 2006, I commented at para. 139 on the failure of both the Crown and Platinex to consult with KI, and ordered KI to "immediately set up a consultation committee charged with the responsibility of meeting with representatives of Platinex and the Provincial Crown".

Consultations have taken place since July and, although not successful in reaching an agreement, have been beneficial in identifying KI’s fears and concerns, and in exchanging information.

The evidentiary record indicates that all parties have attempted to understand and address each other’s concerns, and that significant accommodations have been made.

Both MNDM and Platinex take the position that KI has unreasonably and effectively stalled the consultation process. In support of their position, they state that by the end of March, 2007, KI’s consultation committee had been made available to meet only once with the Crown and Platinex. That single meeting was in September 2006, at Big Trout Lake, for the purpose of discussing the protocol and process. Further, they submit that

in the eight months since the court granted KI a conditional interim, interim injunction, the committee has not met once with the Crown and Platinex to consult on matters of substance with respect to the potential impact of Platinex’s proposed drilling campaign on the KI community and its s.35 rights, or to attempt to ... [develop] an agreement to allow Platinex to conduct its two-phase drilling project at Big Trout Lake.

Platinex summarized the difficulties that it has experienced in attempting to consult with KI in paragraph 49 of its factum:

(a) funding required by KI to engage in substantive consultations has not been provided;

(b) the scope of information sharing by Ontario has been limited;

(c) the appropriate signatories to the protocol are unclear;

(d) the scope of subsequent strategic land use consultations (separate and apart from the Platinex drill program) is undefined; and

(e) the linking of a KI community health study to the commencement of the Platinex project has resulted in delay.

Platinex also alleges that part of the problem has been KI’s refusal to allow Platinex and/or MNDM to meet directly with the KI community, and the insistence that all discussion take place with KI’s litigation counsel. Another issue has been KI’s insistence that a consultation protocol be executed by Chief Morris, Minister Bartolucci, Minister Ramsey, and James Trusler, before substantive discussions take place.
According to Platinex, it was willing on October 5, 2006, to proceed with draft #6 or #7 of the protocol, and it also agreed to execute draft #10 on October 31, 2006.

KI maintains that neither MNDM nor Platinex has any serious intent of effecting reconciliation with KI in respect of the Platinex project or otherwise, and that MNDM and Platinex believe that mining interests trump Aboriginal and treaty rights.

Further, KI submits that MNDM and Platinex’s pre-determined position that KI’s TLE claim is without merit, and that mining interests take up or remove such lands from selection by KI if the TLE is ultimately accepted, necessitate an injunction to protect KI’s land claim and treaty rights until trial, as opposed to further consultation.

KI also argues that to require it to agree, at the outset, to allow the drilling project to proceed effectively means that the Aboriginal party is disentitled in all such cases to seek and obtain an injunction, which is contrary to the finding in the *Haida* case that Aboriginal parties are entitled to injunctive relief.

KI’s consultation needs are summarized in paragraph 157 of their factum, as follows:

- the need for consultation protocol;
- the need for sufficient time;
- the need for funding;
- the need for land use study;
- the desire for a subsequent strategic-planning level consultations (not as part of the Platinex consultations); and
- the need for more information and analysis now as a "catch-up" (to understand what has already happened to the land, due to failure of Crown to consult in the past).

With respect to the funding issue, KI referred to the PDAC e3 standards, which Platinex had agreed to uphold, which state that "...you, as the proponent, will often be required to supply financial support to the First Nations with which you are in dialogue in order to allow them to develop comfort with the engagement process". Further, KI argues that there was no meaningful consultation with the Crown, since the Supreme Court’s direction in *R. v. Sparrow* [1990 CarswellBC 105 (S.C.C.)] 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 participate 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.

The Issue of the Scope of the Consultation Process

99 The scope of the duty to consult varies with the circumstances of each case, the strength of the claim, the nature of the right that is affected, and the anticipated degree of impact of the activity.

100 Both MNDM and Platinex submit that the Crown’s duty to consult with respect to KI’s established or asserted rights is at the lower end of the spectrum described in the *Haida* and *Mikisew* cases.

101 The scope and content of the duty to consult may also change over time, as the potential impact of the activity evolves and changes. The shifting nature of this duty was addressed in *Haida* as follows:

In this respect, the concept of a spectrum may be helpful, not to suggest watertight legal compartments but rather to indicate what the honour of the Crown may require in particular circumstances. At one end of the spectrum lie cases where the claim to title is weak, the Aboriginal right limited, or the potential for infringement minor. In such cases, the only duty on the Crown may be to give notice, disclose information, and discuss any issues raised in response to the notice ...

At the other end of the spectrum lie cases where a strong *prima facie* case for the claim is established, the right and potential infringement is of high significance to the Aboriginal peoples, and the risk of non-compensable damage is high. In such cases deep consultation, aimed at finding a satisfactory interim solution, may be required. While precise requirements will vary with the circumstances, the consultation required at this stage may entail the opportunity to make submissions for consideration, formal participation in the decision-making process, and provision of written reasons to show that Aboriginal concerns were considered and to reveal the impact they had on the decision. This list is neither exhaustive, nor mandatory for every case. ...

Between these two extremes of the spectrum just described, will lie other situations. Every case must be approached individually. Each must also be approached flexibly, since the level of consultation required may change as the process goes on and new information comes to light. The controlling question in all situations is what is required to maintain the honour of the Crown and to effect reconciliation between the Crown and the Aboriginal peoples with respect to the interests at stake. Pending settlement, the Crown is bound by its honour to balance societal and Aboriginal interests in making decisions that may affect Aboriginal claims. The Crown may be required to make decisions in the face of disagreement as to the adequacy of its response to Aboriginal concerns. Balance and compromise will then be necessary.[FN10]

102 Whenever the rights of parties and the nature of the relationship are contained and described in a treaty, the wording of the treaty is relevant to determining the scope of the duty to
consult. Treaty 9 provides the Crown with unencumbered title to the land in question, and with a limited right to displace traditional harvesting rights by taking up land to provide for a variety of activities, including mining. The treaty foresaw that the Crown might take up land at some point of time in the future, and that this would affect Aboriginal harvesting rights.

103 The Supreme Court has recognized in *Mikisew* that the duty to consult will vary depending upon the extent of the impact of the taking up of land on traditional harvesting rights:

The Crown has a treaty right to "take up" surrendered lands for regional transportation purposes, but the Crown is nevertheless under an obligation to inform itself of the impact its project will have on the exercise by the Mikisew of their hunting and trapping rights, and to communicate its findings to the Mikisew. The Crown must then attempt to deal with the Mikisew "in good faith, and with the intention of substantially addressing" Mikisew concerns (Delgamuukw, at para. 168). This does not mean that whenever a government proposes to do anything in the Treaty 8 surrendered lands it must consult with all signatory First Nations, no matter how remote or unsubstantial the impact. The duty to consult is, as stated in *Haida Nation*, triggered at a low threshold, but adverse impact is a matter of degree, as is the extent of the Crown’s duty. Here the impacts were clear, established and demonstrably adverse to the continued exercise of the Mikisew hunting and trapping rights over the lands in question.[FN11]

104 The focus of the consultation in the case before me appears to have been on process rather than on substantive issues, with the major difference between the positions of the parties being one of scope.

105 KI views exploratory drilling as the thin edge of the wedge that can only lead to further activity on the land that is increasingly more invasive. This difference of perspective was clearly articulated during the cross-examination of MNDM Assistant Deputy Minister Christine Kaszycki, when she said:

I think the challenge with respect to the development of the [consultation] protocol has centred principally on the issue of scope in the agreement around what should be a reasonable scope of consultations associated with the order as directed by Justice Smith on July 28th. Ontario has taken a position that we would undertake discussions and consultation on issues related to mineral exploration and mine development, the spectrum of activities from a broader strategic perspective in addition to those which would focus principally on the Platinex undertaking. And the community has positioned themselves to request broader base strategic land use planning in general and has not supported the narrowing of scope to mineral exploration and mine development.

So the challenges there are really with respect to scope. You know, at one end of the spectrum being focused specifically on the Platinex activities. At the other end of the spectrum, being focused on broad base land use planning. And Ontario, I guess, in the middle being focused on willing to expand scope in future discussions but limiting it and narrowing it to mineral exploration and mine development.
And associated with the scope issue are the issues of funding, et cetera. I mean, they are all inter-related to one another. So I think that has principally been the challenge, just defining what this consultation reasonably should be about given the nature of the Platinex activity and also the view of Ontario that we are willing to enter into discussions with the community on a broader base of activities related to mineral exploration and mine development. [FN12]

106 KI submits that Platinex and MNDM’s view of the scope of consultations is directly related to their view of the impact of development as being minimal and inconsequential. That perspective, KI argues, is narrow and insensitive, since even a "minimal impact can be very serious from the Aboriginal perspective, if it includes the claimants’ hunting ground or trap line." [FN13]

107 Platinex and MNDM believe that consultations have stalled because of KI’s unrealistic view of the scope of the duty, and its attempt to expand this duty well beyond the boundaries that have to date been recognized in Canadian law. This position, they argue, translates into a veto of any activities on Crown land whenever Aboriginal consent is not obtained.

...  

Irreparable Harm  
...
115 The new evidence that has been adduced since June 2006 has altered my finding of irreparable harm as it relates to both KI’s TLE and its connection to the land at this point in time.

The Evidence of Harm to KI’s Connection to the Land

116 KI’s treaty rights are enshrined in Treaty 9, and are protected by Section 35 of the Constitution Act, 1982. These rights include traditional harvesting rights (hunting, fishing and trapping), subject to the rights of the Crown, which are also described in the treaty and which include the right to take up land for mining and other purposes.

117 The evidence presented to this court in June 2006, and also in April 2007, included affidavits from a number of KI band members, describing the impact that the drilling activity proposed by Platinex would have on their use of and connection to the land.

...  

120 In paragraph 9 of his affidavit, sworn June 5, 2006, Chief Donny Morris described the KI community’s fear that exploration will have a negative impact on his people’s connection with the land:

9. Anything that may disrupt this fragile system, or sacred relationship with and stewardship of the land, the safety of our drinking water, or our ability to hunt, fish and trap, is of great concern to our people, who live in circumstances best described as marginal.

121 After conducting a survey to measure community response to mineral development,
Chief Morris stated that the community was divided in its opinion; that slightly more KI people at the time were opposed to resource extraction. Reasons for opposition included lack of consultation, endangerment of waterways, destruction of the land, desecration of the land, and interference with traditional activities.[FN16]

122 Both the affidavit of Chief Morris and the KI Consultation Protocol make it clear that the community is not opposed to economic development,

...provided that such development is done in a way that respects our sacred connection with the land, and our duty to the Creator to protect and preserve the land. This, I am willing to discuss the possibility of exploration on our traditional territories, without prejudice to our right as KI people to act to protect the land, if necessary.[FN17]

123 The KI Consultation Protocol indicates that KI is interested in "...developing successful partnerships and working relationships with companies interested in development opportunities on KI lands."[FN18] Further, it goes on to state:

Decision making processes which effect the health and well-being of Kitchenuhmaykoosib Inninuwug must involve the community in every step of the process. We want the consultation process to lead to decisions that are complementary to our values and processes, and recognize the cultural and traditional practices of our people.[FN19]

124 Several affidavits were filed by KI Band members, describing their fear of the impact that development would have on the health and cultural, societal, and spiritual fabric of the community. In her affidavit, sworn June 7, 2006, Mary Childforever described the connection between the loss of self-determination and control over the land, and the alarming suicide rates, health problems, crime, substance addiction, and family breakdown within the community.

125 In her affidavit, sworn June 5, 2006, Mary Jane Moonias expressed her fears that development would have a negative impact on traditional ways of life, including hunting, trapping, and fishing; and her fear that it could threaten the quality of drinking water on Nemeigusabins Lake.

126 Ms. Moonias stated that she believed that drilling would interfere with her family’s hunting of beaver, geese, moose, and other traditional foods, because the noise and pollution would scare away animals. She concluded by stating: "I do not want money. I want what the land can give me. I want to live in peace and according to our traditional ways, in the lands that have been my home for my whole life, and my ancestors’ home before that."

127 The drilling activity proposed by Platinex is restricted to 24-80 drill holes, measuring 2 inches in diameter, in an area of approximately 50 square kilometres. Platinex submits that the evidence demonstrates that its drilling program will have a minimal impact on the land; that any impact will be temporary; that proper environmental safeguards are in place; and that the evidence of harm is speculative and lacks crediblility.
128 Platinex submits that there is no expert scientific evidence to dispute this conclusion. Both Platinex and MNDM argue that without reliable evidence that the land on which the drilling is to be done is off the table in the context of the TLE claim how can there be any finding of irreparable harm. As well, both submit that as long as there is the opportunity to consult the possibility exists that any harm can be repaired and addressed by accommodation.

129 Because KI does not have the right to select land but only to participate in an discussion about which land will be selected, Platinex and MNDM argue that without proof of a right there can be no finding or irreparable harm.

130 Platinex hired AMEC Earth & Environmental ("AMEC") to assess the environmental impact of its proposed drilling program. AMEC’s report is attached to the affidavit of James Marrelli, sworn March 14, 2007. That report states that the proposed program will have "minimal, if any negative impacts" and that "any negative impact will be low and temporary in nature."

132 MNDM supports Platinex’s approach and direction as contained in the proposed MOU [between KI, Platinex and the Crown – set out in para. 131; see also Appendix F], maintaining that the scope of accommodation must be directed, not at the details of a consultation protocol, but rather at how the drilling project is to proceed and how it should be managed, including the participation of the parties.

133 KI rejected the proposal in its entirety, stating that the position of MNDM and Platinex was unreasonable, and that the proposal represented a breach of the Crown’s duty to consult in a bona fide and meaningful fashion. In view of KI’s lack of trust, it believed that the first step was to reach an agreement on a consultation protocol.

134 With respect to how it has conducted the consultations, KI views the position that it has taken as being reasonable and accommodating,

which taken as a whole shows KI engaging with Platinex and Ontario, trying to make its concerns known, addressing Ontario and Platinex’s concerns, and offering over and over again ways to make the consultations process work. [FN21]

135 KI views the insistence by Platinex (supported by MNDM) that it agree in advance to the drilling project, before any substantive consultations could be held and become enshrined in a consultation protocol, as patently unreasonable.

**The Evidence of the Harm to KI’s Treaty Land Entitlement Claim**

136 It is not the purpose or task of this court to comment on or decide whether KI’s TLE claim is valid, except to assess the strength of the claim as part of the balancing of the risks of the proposed activity in the context of whether injunctive relief should be granted.
137 The concern that Chief Morris has expressed, on behalf of KI, is that mining activity could take the land on which it is conducted off the table for selection purposes, assuming the claim is successful.

138 As mentioned above, KI’s TLE claim was filed in 2000 and rejected by OSAA in March of this year, on the basis that KI’s entitlement to land under Treaty 9 had already been met. Although this is a factor for this court to consider when assessing the strength of the claim, this does not mean that the claim has been finally adjudicated. KI may still pursue judicial review of the decision, persuade Ontario to change its position, or bring a lawsuit against the Crown. Additionally, the federal government has not yet indicated its position on the claim; if they decide it is meritorious, it is possible they may lobby Ontario to change their position.

Discussion

Irreparable Harm

143 While all parties share the belief that established and asserted rights trigger the obligation of the Crown to consult with Aboriginal groups when a Crown-sanctioned activity threatens Aboriginal rights held by those groups, it is readily apparent that the parties have very divergent views of the scope of this duty.

144 It is also apparent that these different viewpoints stem from a fundamental disagreement surrounding the legal rights that each party seeks to protect. The degree of harm that the taking up imposes is directly related to the question of whether all that is required of the Crown is consultation or whether the harm is so great that only injunctive relief will protect the right being infringed upon.

145 KI takes a broad and expansive view of the scope of the duty to consult; a view that justified the declaration of a moratorium on development until agreement was reached on a comprehensive protocol, along with appropriate levels of funding.

146 Platinex and MNDM agree that KI’s established and asserted Aboriginal rights, protected by s. 35, trigger a duty to consult. However, they state that the duty is limited and has been adequately met, so that there is no legal rationale to prohibit the drilling project from continuing.

147 While it is completely understandable, in view of the Aboriginal relationship to land, why KI wishes to proceed cautiously and to have a consultation protocol in place before any drilling begins, the fact remains that the drilling is to take place on Crown land unfettered or unencumbered by Aboriginal title. The consultation process cannot be used in an attempt to claw back rights that were surrendered when Treaty 9 was signed.

148 From reading the many affidavits filed by KI band members, it appears that those affiants, including Chief Donny Morris, may not fully appreciate the fundamental fact that all Aboriginal title and interest in the land was surrendered when Treaty 9 was signed. The right that remains is the right for KI to be consulted when there is a taking up of land that may have a
harmful impact on the traditional harvesting rights, as described in the treaty.

149 When this court granted an interim, interim order in July 2006, it made the order conditional upon KI setting up a consultation committee to develop an agreement to allow Platinex to conduct its drilling project. (emphasis added) At that point in time, consultation had been minimal, and there was an incomplete and inadequate understanding of the interests, needs, and positions of the parties and of the potential harm that drilling could present.

150 My review of what has transpired since the release of my decision on July 28, 2006, is that all parties have made bona fide efforts to consult and accommodate. However, because of the fundamental differences regarding the scope of the duty to consult and the parties’ legal rights, no agreement has been forthcoming and no consideration has been given to the possibility of Platinex proceeding with its drilling project.

151 The respective positions of the parties are understandable and reasonable when viewed from their perspectives.

152 The consultation process has been helpful, in that it has fleshed out the positions of the parties. This is evidenced by the fact that 13 drafts of a consultation protocol have been exchanged.

153 The record of the consultation process indicates that there were discussions and agreement on a number of issues, including some level of funding for KI.

154 It is apparent from reading the affidavits of the band members that the KI community wishes to have its integrity and honour respected. Community members want to be treated as full partners, and not as second class citizens. They want to have their fears and concerns heard and appreciated.

155 This court understands, respects, and acknowledges this perspective. 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. In 1854 Chief Norah Seattle [Sealth] in a memorable speech explained the Aboriginal dilemma inherent in the urge to develop the land and their spiritual and cultural perspective: If all the beast were gone, we would ide from a great loneliness of spirit, for whatever happens to the beast, happens to us. All things are connected. Whatever befalls the earth befalls the children of the earth…

156 The grant of an injunction is an extraordinary remedy, in that it prevents a party from pursuing a course of action before a trial has been held on the merits. A court is called upon to predict that, without an order, harm will occur. Any prediction of risk must be based upon evidence that is reliable and relevant. Speculation, assumption, and fear cannot provide the foundation for such an order. The evidence must establish a probability that irreparable harm will occur.[FN23]

157 I find that the evidence of harm to the land, harvesting rights, and KI community and
culture fails to meet the relatively high standard of probability required for the grant of injunctive relief. Much of this evidence was based upon assumptions and fear of what may transpire, and is not causally connected to Platinex’s proposed drilling program.

158 The fear of cultural, environmental, and spiritual harm as described by Mary Childforever cannot reliably be linked to Platinex’s proposed development.

159 There can be no doubt that many Aboriginal communities, including KI, have suffered, and continue to suffer, on many levels. Poverty, substance abuse, suicide, and depression are widespread. Aboriginal youth feel isolated and cutoff from their traditions, culture, and language. These problems are real, serious, and tragic, but there is insufficient evidence to satisfy me that the drilling project contemplated by Platinex will exacerbate these problems.

160 Platinex has agreed to proceed cautiously, in stages, with constant consultation and attention to community concerns, and under the supervision of this court. I find that the proposed MOU that Platinex and MNDM are prepared to sign represents, generally speaking, a reasonable and responsible beginning of accommodating KI’s interests and, at this point in time, is sufficient to discharge the Crown’s duty to consult.

161 Treaty 9 contemplates and foreshadows that there would be a taking up of land for mineral development, and that there would be consultation with First Nations. This is exactly what is now happening.…

162 The strength of KI’s asserted TLE claim is also a concern. There is no reliable evidence that the exploration project will adversely affect it. Even if the TLE is successful, there is insufficient evidence that the activities proposed by Platinex will compromise KI’s ability to select land to satisfy any entitlement. The treaty does not give First Nations the right to select land unilaterally, nor does it provide KI with a veto.

163 The presence of third party interests may limit the land that is available for selection should KI succeed with its claim. Platinex, for example, staked its claims and received mining leases with the exclusive right to work the claim prior to the filing of KI’s TLE claim.

164 Ontario has an arguable case that KI has received lands in excess of what could be the most generous assessment of its entitlements under Treaty 9.

165 Ontario also has an arguable case that a band’s treaty land entitlement must be calculated based on the population of the band at the date of the treaty, not on the basis of the present day population as proposed by KI.

The Balance of Convenience

166 The new evidence that has been adduced since June of last year, has changed my view of where the balance of convenience lies.

167 Assessing the balance of convenience involves balancing the harm that each party will
suffer and whether that harm can be compensated for in damages. [FN25]

168 In my July 28, 2006, reasons I found that the balance of convenience at that point in time favoured KI, and that the financial harm to Platinex was outweighed by the harm to KI’s spiritual and cultural connection to the land and to its ability to select lands in its TLE claim.

169 The harm that Platinex will likely suffer if it cannot conduct its proposed drilling operation is that it will go out of business, since the Trout Lake claims and leases are its major asset. It has managed to survive until now, but I am satisfied that there is a very strong probability that it could not survive until trial if an injunction were granted, even with an order expediting trial. Being put out of business is irreparable harm that cannot be readily compensated for in damages.[FN26]

170 The harm that KI will suffer as a result of damage to the land itself will relate to a maximum of 80 drill holes, of approximately 2 inches in diameter, in 12,080 square acres of wilderness. I have already commented that the evidence of harm to treaty harvesting rights, culture, Aboriginal tradition, and the community is inconclusive.

171 Aboriginal rights deserve the full respect of Canadian society and judicial system. Those rights do not, however, automatically trump competing rights, whether they be government, corporate, or private in nature.[FN27]

172 After balancing the respective interests of the parties in relation to the harm that each would suffer, I find that the evidence supports a finding that the balance of convenience favours Platinex.

Disposition

173 For the reasons stated above, KI’s motion for an interlocutory injunction is dismissed. …

181 Should this court simply dismiss the motion by KI for interlocutory relief, this could exacerbate the conflict that already exists between the parties. Additional conflict could potentially create a situation where self-help remedies, civil disobedience, and confrontation occur. Respect for the rule of law may suffer.

182 In the proper case the grant of an injunction can be appropriate to protect Aboriginal rights that are at risk of harm. This case however, is not one of them. An injunction is an all or nothing remedy. The nature of the competing rights of the parties in this case do not fit into such a framework. Instead, those interests must be judiciously balanced on an ongoing basis with careful attention paid to the concerns and perspective of each party. Only in this way will reconciliation and a fair and just accommodation be achieved.

183 It is not in the interests of the parties or the judicial process to allow an environment of conflict and distrust to prevail. Such an atmosphere does not, and cannot, promote the fundamental principle of reconciliation that is at the very heart of balancing Aboriginal interests.
and rights with those of others. Once again the comments made by Lamer C.J.C. in *Delgamuukw* are important to repeat and remember:

...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.[FN35]

184 I am not convinced that Platinex should be given a *carte blanche* to proceed with its entire exploration drilling project at this time. Development should proceed slowly, with Ontario, Platinex, and KI fully engaged in the consultation process each step of the way, and with each prepared to make accommodations as the need arises.

185 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.

186 Ongoing supervision will serve to promote a more precise balancing of the rights of the parties, with the ultimate goal of with achieving fairness.

... 

188 In the interests of protecting the rights of the parties, respect for the rule of law, and the administration of justice, this court will exercise its discretion and issue the following interim declaratory order:

1. The motion brought by KI is dismissed;

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

4. Subject to this court being satisfied that a pro per protocol is in place, either by way of agreement or by court order, Platinex shall be permitted to undertake Phase One of its exploration drilling program. Phase One shall commence on June 1, 2007, and shall consist of the drilling of 24 test drill holes;

5. The supervision of the court shall include, but is not limited to, a review of a proposed drilling timetable, the scope and content of a consultation protocol, all aspects of the Phase One exploratory drilling program, and provisions for compensation and funding;

6. In order to provide speedy access to the court, taking into account the fact that most counsel are resident in Toronto and not in northwestern Ontario, the parties shall forthwith consult with the Trial Co-coordinator to fix a timetable for no less than three teleconferences. The first teleconference shall take place before the drilling project commences, and the last shall take place after the completion of Phase One. If the parties require additional time to address any issues, they may make further arrangements with the Trial-coordinator.

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.

The issue of costs is reserved to a date to be set by the court. 

Motion dismissed.


FN4. The affidavit of Chief Donny Morris, sworn May 16, 2006, at para. 20

FN10. Haida Nation, supra note 4, at paras. 43,44, and 45

FN11. Mikisew Cree First Nation, supra note 4, at para. 55


FN13. Mikisew Cree First Nation, supra note 4, at para. 47
FN18. The KI Consultation Protocol, para. 1.2.8.
FN19. The KI Consultation Protocol, Para. 1.1.3.
...
FN21. Paragraph 110 of the Factum of KI.
...
...
...
FN35. Delgamuukw, supra note 112, at paras. 1123-24
...
Appendix G – *KI 3*

2007 CarswellOnt 3553

Platinex Inc. v. Kitchenuhmaykoosib Inninuwug First Nation

...  
Ontario Superior Court of Justice  
G.P. Smith J.  
Heard: May 18, 2007  
Judgment: May 22, 2007  
Docket: 06-0271, 06-0271A

...  


...  

ADDITIONAL REASONS to judgment reported at *Platinex Inc. v. Kitchenuhmaykoosib Inninuwug First Nation (2007)*, 2007 CarswellOnt 3553 (Ont. S.C.J.), dismissing motion for injunction to prevent drilling on land subject to First Nations claim.

*G.P. Smith J.*:

1 In paragraph 188 of my reasons released May 1, 2007, I ordered the parties to continue the process of consultation and negotiation to allow them the opportunity to implement a consultation protocol, timetable, and Memorandum of Understanding. My reasons expressly reserved for this Court the right to make whatever order(s) were required in the event that the parties could not come to an agreement.

2 The parties were unable to reach an agreement, and requested the opportunity make submissions to the Court.

3 On May 18, 2007, a teleconference took place, during which I heard further submissions from each of the parties. I also received written submissions from the parties.

**General Remarks**

4 The underlying purpose of my May 1, 2007, order was to encourage the parties to continue a dialogue, with the hope that this would enhance mutual understanding and serve the principle of reconciliation.

5 The recent submissions made to this court indicate that the parties have made good faith efforts to appreciate and accommodate the interests of the other. As I commented on May 18th, consultation and accommodation are ongoing processes, and may take several months.

6 This Court will remain engaged to provide supervision and direction/orders whenever
required, subject to the recognition that it is ultimately the responsibility of the parties to attempt to reach their own agreement. In other words, success of the process ultimately rests with the parties themselves.

... 

The Memorandum of Understanding ("MOU") and Consultation Protocol ("CP")

13 Platinex circulated a draft MOU and CP prior to the meeting of the parties that took place on May 8, 2007, at Big Trout Lake.

14 KI responded by sending a revised CP and a draft Memorandum of Agreement, in which it introduced new concepts, including a clause that requires Platinex to provide compensation; a clause that obliges Ontario to reimburse KI for all of its legal/consultation costs to date; and a clause requiring Platinex to abandon the damage portion of its lawsuit against KI.

15 Various other draft MOUs were then exchanged between Ontario and Platinex, resulting in an agreement between these parties. I have considered the submissions of all parties, and have read the MOU, CP, and timetable negotiated between Ontario and Platinex. I accept these as appropriate to guide the ongoing relationship between the parties.

16 Subject to the following comments the following declaratory orders shall issue:

1. an order imposing a Consultation Protocol in accordance with Appendix "A" attached hereto;

2. an order imposing a Memorandum of Understanding in accordance with Appendix "B" attached hereto; and

3. an order imposing a Timetable in accordance with Appendix "C" attached hereto.

17 Platinex is expressly given permission to begin Phase One of its drilling program on June 1, 2007.

18 As set out in paragraphs 1(a)-(f) of Appendix "A", Platinex shall retain an archaeologist to consult with the KI community to identify burial or other archaeologically significant sites within the proposed drilling area. Such sites are to be identified as areas of no disturbance, with reasonable buffer zones around these sites. In the event that KI is not satisfied with either the designation of a site or the size or location of a buffer zone, it may make further submissions to this Court by way of teleconference.

19 In its draft CP, KI expressed concern that Platinex’s proposed activity on the land could have a negative impact on the KI community’s "spiritual practices". The Court requires further and better particulars of these concerns in order to address them, and reserves the right to make amendments to the orders issued herein once those submissions are received. Submissions may be made in writing within 14 days of the release of these reasons. Platinex, IFNA, and Ontario shall have the right of written reply within 14 days thereafter.
Near or at the end of the completion of Phase One of the drilling program, and prior to an Extended Program and/or any further drilling being undertaken, the parties shall make further submissions to this Court. Counsel should speak to the Trial Coordinator as soon as possible to secure a date for these submissions.

**Funding**

My May 1st reasons also reserved the right to make further declaratory orders regarding the issue of funding.

Attached as an Appendix to the Consultation Protocol is a Schedule of Eligible Costs. This schedule sets out general principle and guidelines that "relate to KI’s reasonable cost of consultation among KI, Ontario and Platinex Inc."

Ontario has offered to fund KI’s reasonable costs for consultations respecting Phase One, and any for further consultations if drilling is extended. Ontario has set a target for funding consultation costs at $150,000, and proposes that costs be based upon the timetables and workplan(s) as agreed to by the parties. The quantum of funding and the timing of the payments are to be set out in a Contribution Agreement, to be entered into between KI and Ontario.

KI has rejected Ontario’s funding proposal as being seriously inadequate in view of the financial impoverishment of the community. KI proposes payment of an up front sum of $600,000, and seeks assurance from Ontario that it will cover all of KI’s consultation and litigation costs.

KIs submit that the serious imbalance between the financial positions of the parties renders the consultation process unfair.

The issue of appropriate funding is essential to a fair and balanced consultation process, to ensure a "level playing field". There is insufficient material before the court at present for it to make an informed decision as to what level of funding would be reasonable.

I recognize that there may not have been sufficient time since May 1, 2007, in which to address the funding issue and implement a Contribution Agreement. For that reason, additional time in which to develop a funding agreement is granted. In the event that agreement is not reached by June 15, 2007, further submissions on this issue alone may be made by written argument, followed by oral argument via teleconference. The parties are advised to secure a date for the oral portion of those submissions now.

Order accordingly.
Appendix A

Form of Consultation Protocol

(Schedule "A" to the Order of May 22, 2007)

Consultation Protocol

BETWEEN:
Kitchenuhmaykoosib Inninuwug First Nation ("KI")
-and-
Platinex Inc. ("Platinex")
-and-
Her Majesty the Queen in Right of Ontario as represented by the Minister of Northern Development and Mines ("Ontario")

The Parties are entering into this Consultation Protocol in order to effect a cooperative and mutually respectful relationship and to describe the process and scope of consultation to implement the order of Justice G.P. Smith of the Superior Court of Justice made May 1, 2007 in litigation between Platinex and KI in which the Minister and IFNA were granted leave to intervene.

THE PARTIES AGREE to the following Consultation Protocol:

1. The Parties agree to consult with the objective of coming to agreement in respect of the subjects or matters described in this Protocol, including the manner by which Platinex may conduct its test drilling program in the vicinity of Big Trout Lake as contemplated by the decision of Justice G.P. Smith of the Superior Court of Justice made May 1, 2007 with Phase One, consisting of 24 test holes, to commence on and after June 1, 2007.

Nature and scope of consultation

2. The Parties have identified the scope of consultation addressed by this Protocol to be:
(a) consultation and, where appropriate, accommodation with respect to Phase One of the Platinex Drilling Program (test holes 1 to 24);
(b) consultation and, where appropriate, accommodation with respect to the proposed further Phase or Phases of the Platinex Drilling Program (test holes 25 to 80),
with consultation in respect of (a) and (b), above, to include the following particular subjects:
i. potential burial sites in the vicinity of the Platinex claims and leased sites
ii. environmental impact of the proposed drilling
iii. impact on the harvesting and other treaty rights of the people of KI
iv. participation in decision making
v. the use of KI supplies and services
vi. employment of people of the KI community
vii. compensation and, if appropriate, other methods or means of accommodation, and
viii. funding;
(c) the identification of lands that KI, from its perspective, would prefer to have designated as reserve lands should its Treaty Land Entitlement ("TLE") claim be established; and
(d) the development of a subsequent protocol among KI, Ontario and other interested or affected First Nations for broader discussions concerning mineral exploration and mining development in traditional land use areas.

3. The Parties contemplate that agreements with respect to the nature and scope of consultation and, where appropriate, accommodation will be recorded and provided for in:
(a) this Consultation Protocol;
(b) a Memorandum of Understanding as described in the Superior Court decision of May 1, 2007 and executed together with this Protocol;
(c) such timetables and work plans as may be developed, expanded or modified from time to time as consultation progresses;
(d) a Contribution Agreement between KI and Ontario as described below; and
(e) such further or final minutes, memoranda, agreements or instruments as the parties may choose to reflect and record any interim, final or comprehensive understandings they may reach as a result of their consultation.

Timetables

4. The Parties agree that the first priority of consultation will be to work co-operatively to finalize a timetable for meetings and continued consultation that will permit Platinex to undertake Phase One of its exploratory drilling program, consisting of the drilling of 24 test holes, commencing on and after June 1, 2007.

5. As part of this Protocol, the parties agree to a preliminary timetable for teleconference meetings to be held no later than during the week of May 29, 2007 to consult and reach agreement with respect to proposed locations for Phase One drilling and to negotiate terms of reference for experts and associated funding considerations.

Information sharing

6. To facilitate consultation and, where appropriate, accommodation and to promote open communication, the Parties agree to exchange information as described below even though to do so may, in some respects, go beyond the scope of what is required to fulfill the Crown’s duty to consult in respect of the Platinex Drilling Program:
(a) Information sharing by KI
KI will provide Platinex and Ontario with:
• A provisional description of its traditional territory;
• Information relating to the concerns of the community with respect to the Platinex Drilling Project
• Information relating to the community’s perspective with respect to its treaty rights;
• Relevant information in KPs possession pertaining to:
  • approximate location of trap lines, burial sites or any other cultural features, including camps, cabins, paths and trails, winter roads, roads and planned roads, if known
  • the nature and timing of trapping and hunting activities of KI members, if known

(b) Information sharing by Ontario
Subject to applicable privacy laws, Ontario will provide KI and Platinex with:
• Relevant information with respect to development activities permitted by Ontario within the area described by KI as its traditional land use area, and
• Relevant information with respect to the anticipated impact of the Platinex Drilling Program on KI’s treaty rights and on the environment, and any relevant information relating to the cumulative impact or effects of the Platinex Drilling Program and other projects or activities that have been or will be carried out on the land and of which Ontario is aware.

(c) Information sharing by Platinex
Platinex will provide KI and Ontario with:
• Relevant information in its possession pertaining to its proposed Drilling Program, and other exploration activity planned by Platinex on the Big Trout Lake property, including:
  • to the extent possible, approximate location of drill holes and description of drilling and related activity at drill hole sites;
  • approximate location and composition of camps and activity in and around camps;
  • if known, routes and flight times of any helicopters and other air transport in respect of the Drilling Program;
  • if known, routes and transport times of any land transport in respect of Drilling Program;
  • all information that allows an assessment of the anticipated environmental impacts pertaining to the Drilling Program including impacts to air (including noise), land, water, plants, animals, humans, ecosystems and all feasible mitigation measures that could be taken to prevent or minimize such impacts (description of these, including costs and effects);
  • information pertaining to viability of ore deposits and related matters, subject to a confidentiality agreement;
  • copies of any press releases and public filings, which Platinex may issue from time to time with respect to its exploration activity.

7. Platinex and Ontario have provided to KI with information pursuant to clause 6(b) and (c) above. To the extent that there is additional relevant information in their possession, Platinex and Ontario will provide it as fully and expeditiously as possible subject to necessary and applicable privacy protection requirements. KI will provide information in clause 6(a) to Platinex and Ontario as fully and expeditiously as possible subject to
necessary and applicable privacy protection requirements. KI’s Consultation Committee may enter into a separate confidentiality agreement if that is deemed appropriate or necessary.

**Contribution Agreement**

8. Ontario will cover KI’s reasonable costs in respect of the herein consultation, which reasonable costs shall be based upon the timetables and work plan or plans as agreed to by the parties and the schedule of eligible costs approved by Ontario as set out in the Appendix to this Protocol or as otherwise agreed to by KI and Ontario. The amounts to be paid and the timing of the payments shall be in accordance with a Contribution Agreement to be entered into between KI and Ontario or as otherwise ordered by the court.

**Meetings**

9. Meetings under this Protocol may be held in person, by teleconference, or in such other manner as the Parties may from time to time agree.

10. Meetings under this Protocol that are held in person will take place at KI unless otherwise agreed.

11. Chairing of meetings under this Protocol will rotate amongst each of the three Parties. Whoever chairs a meeting shall ensure that draft minutes of the meeting are recorded and distributed to the other members, and the other members shall either approve the minutes or comment on them with revisions. All members shall retain all minutes, including comments and revisions, of every meeting.

**Facilitator or Mediator**

12. The Parties agree that if they are not making meaningful progress in the consultation process, or if they agree that it would be otherwise beneficial, they will retain the services of a facilitator or mediator, with the reasonable costs of the facilitator or mediator to be paid by Ontario.

**Court supervision**

13. Nothing in this Protocol prevents any Party from seeking the assistance of the Superior Court as contemplated by the May 1, 2007 decision of Justice G.P. Smith.

**Non-derogation**

14. This Consultation Protocol is not to be interpreted as altering the nature or content of the Crown’s duty to consult.

15. Nothing in this Consultation Protocol, nor any consultation or negotiation thereto,
shall be construed so as to abrogate or derogate from:

(a) the protection provided by any treaty or aboriginal rights of KI under Section 35 of the *Constitution Act, 1982*, or

(b) any legal rights of Platinex under the laws of the Province of Ontario and of Canada, or

(c) any rights or powers of Ontario including, to the extent permitted by law, any ability of the Province to act on rights under Treaty No. 9 or to infringe Section 35 rights.

**Role of IFNA**

16. The Independent First Nations Alliance ("IFNA") is not a signatory to this Protocol but, having been invited by the Parties to do so, may participate in the herein consultation on the understanding that the nature and scope of its role will come to be defined by agreement amongst the participants as the consultation process unfolds.

**Representation**

17. KI has selected a Consultation Committee for the purposes of the herein consultation. It is currently composed of the following KI members: David Sainnawap, Gordon McKay, Mark Anderson, Eleazor Anderson, Dorothy Mackay and Kevin Sainnawap. Members may change from time to time. KI agrees that the KI Consultation Committee is acting with the authority and guidance of the First Nation’s Chief and Council as elected by the community.

…

**Appendix A -- 1 to Consultation Protocol**

**Schedule of Eligible Costs (as referred to in Clause 7 of this Protocol)**

**Eligible Costs**

Eligible costs are limited to those that relate to KI’s reasonable costs of consultation among KI, Ontario and Platinex Inc. with respect to said consultation, and that fall within the following cost categories and are subject to the applicable maximum amounts payable out of the MNDM contribution set out below:

**Administration** includes: salary and benefits for a Community Liaison worker to organize meetings, handle logistics and provide administrative support for KI Consultation Committee (KICC) members; office space, office supplies, telephone and fax charges and photocopies.

**Honoraria** will be paid to KICC members and Elders to provide guidance and participate in the Consultation. KICC members will be eligible for honoraria at a maximum rate of
$500/day/member.* Elders will be eligible to claim a maximum of $200/day/member.*

**Technical expertise / Professional services** include fees and travel expenses, if required.

**Legal Services** includes fees and disbursements, including travel expenses, if any, of lawyers retained to provide legal support to KI in the Consultation.

**Travel Expenses** are those expenses incurred by KI’s Consultation team to prepare for or attend Consultation sessions outside their home communities, including travel, meals and accommodation (not to exceed the prevailing provincial rates set out in Ontario’s *Travel, Meal and Hospitality Expenses Directive*).

**Tripartite Meetings and Internal Community Consultations** -- include the costs for facility rentals, catering, minute taking, transportation and outreach (website, radio).

**Other Expenses** -- other expenses may be eligible; however, they must be submitted to Ontario for pre-approval prior to incurring the expense.

Rates provided by KI.

**Appendix B**

**Schedule "B" to the Order of Mr. Justice Smith dated May 22, 2007**

**Memorandum of Understanding**

BEETWEEN:

KITCHENUHMAYKOOSIB INNINUWUG ("KI")

-- and --

PLATINEX INC. ("Platinex")

-- and --

HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO AS REPRESENTED BY THE MINISTER OF NORTHERN DEVELOPMENT AND MINES ("Ontario")

KI, Platinex and Ontario are entering into this Memorandum of Understanding ("MOU") and a Consultation Protocol ("CP") to promote a cooperative and mutually respectful relationship concerning Platinex’s exploration drilling program. Phase 1 of the Platinex drilling program will consist of 24 test holes (the "Phase 1"). The MOU and CP provide a framework for KI, Platinex and Ontario to engage fully in an on-going consultation process, with accommodation as necessary, during Platinex’s exploration drilling program.

1. Platinex agrees that in conducting Phase 1 and the Extended Program it will adhere to the recommendations set out in the report of AMEC Earth & Environmental dated June 1, 2006 (the "AMEC Report") and further agrees, specifically, as follows:

A.
(a) The burial site(s) identified by KI will be marked as an area for no disturbance and a buffer of 100 metres kept around the site(s);
(b) Platinex will retain an archaeologist for the purpose of Phase 1 and the Extended Program;
(c) The archaeologist will pre-screen any proposed holes;
(d) The archaeologist’s findings will be shared with KI;
(e) Subject to discussions and agreement otherwise with KI, Platinex will follow the recommendations of the archaeologist; and
(f) Platinex will continue to seek KI local and traditional knowledge about potential burial or other archaeological-significant sites. The parties will agree upon a process by which such local and traditional knowledge may be shared.

B.

(a) Platinex will implement the AMEC -- recommended or equivalent mitigation measures as set out in table 1 of the AMEC Report;
(b) Platinex will obtain any necessary governmental permission or approvals for the Phase 1 Program and, if it proceeds, the Extended Program;
(c) Platinex will comply with its environmental policy;
(d) Subject to B(a) above, Platinex will comply with the E3 environmental standards; and
(e) Platinex is willing to retain from KI, or elsewhere, a qualified environmental monitor during the exploratory drilling. Platinex and KI will agree upon the monitor, and the cost for the monitor’s services.

C.

(a) Platinex will seek input from the KI community respecting the goose and moose hunts when determining the timing of the drilling and the routing of helicopter activity. KI, Platinex and Ontario will agree upon a process by which input will be provided by KI;
(b) Platinex will seek input from Jacob Nanokeesic (who holds the only MNR-registered trapline on the lands of the Platinex mining claims and leases) respecting his trapping activities;
(c) Platinex will implement the proposed mitigation measures respecting wildlife suggested by AMEC in the AMEC Report; and
(d) Platinex will seek input from, and attempt to address the reasonable concerns raised by, other identified section 35 rights holders concerning hunting/trapping activities on the lands covered by the Platinex mining claims and leases. KI, Platinex and Ontario will agree upon a process by which input will be provided.

D.

(a) To the extent that they are available and cost competitive, Platinex will use the services and supplies from the KI community during the proposed exploratory drilling;
(b) Although employment opportunities are minimal at the early exploratory stage, where appropriate, Platinex will employ KI community members for transportation, food, catering and other similar requirements; and
(c) There is a possibility that Platinex will request to establish a field office in the community during the exploration.

E.
(a) Subject to the execution of confidentiality agreements, Platinex will share the results of its exploratory drilling with KI; and
(b) KI, Platinex and Ontario are committed to on-going consultation and necessary accommodation concerning the Extended Program.

F.
(a) Platinex will provide reasonable compensation to KI families and individuals for proven loss of revenue resulting directly from a disruption of trapping activities. KI, Platinex and Ontario will agree upon a process for determining what families/individuals are entitled to compensation and the quantum of that compensation.

2. PAYMENT OF FUNDING TO KI

Except as otherwise expressly provided in the CP or in this MOU, Ontario will cover KI’s reasonable costs for the consultations respecting Phase 1 and the Extended Program (if it proceeds). KI’s reasonable costs shall be based upon the timetables and workplan(s) as agreed to by the parties and the schedule of eligible costs approved by Ontario as set out in the Appendix to the CP or as otherwise agreed upon by KI and Ontario. The amounts to be paid and the timing of the payments shall be in accordance with a Contribution Agreement to be entered into between KI and Ontario or as otherwise ordered by this court.

3. KI TECHNICAL EXPERTS

KI will retain the appropriate technical expert to review the information produced by Ontario and Platinex during the consultations that have been completed with respect to Phase 1, including the AMEC Report, and to conduct a peer review or provide other appropriate advice respecting potential cumulative environmental impacts. This review also may include advice respecting ecological issues (not duplicative of the report of Justina Ray). As stipulated in the CP and clause 2 above, Ontario will fund KI’s reasonable costs of the technical expert(s). The review by, and report of, KI’s technical expert(s) will be completed concurrently with the conduct of Phase 1. The reports are to be circulated to all parties. Chief Morris and Council will, together with Mr. James Trusler and a representative of the Ministry of Northern Development and Mines, meet with the KI community in Big Trout Lake to discuss the reports of the independent technical expert(s) described in this Section within fifteen (15) days after receipt of the reports.

4. KI INTERNAL REVIEW

KI will conduct a review, the scope and method of which are to be agreed upon, to
identify any other (currently unknown) KI member who may be affected directly by Phase 1 and, if it proceeds, the Extended Program. Ontario will fund the reasonable costs of this review. Platinex will contribute a reasonable sum. This review will be completed on an ongoing basis concurrently with the conduct of Phase 1.

5. **FUTURE CONSULTATIONS AND BENEFITS AGREEMENTS**

Platinex agrees that additional consultations will take place with KI in the event of any further exploration of the Platinex mining claims and leases beyond Phase 1 and the Extended Program. In such event, the parties will enter into good faith negotiations to conclude, in a timely manner, a renewed or extended MOU. If a favourable feasibility report is received with respect to the Platinex mining claims and leases and Platinex elects to proceed with mine construction and development, KI and Platinex will discuss and negotiate the execution of appropriate benefits agreements having regard to the scope, duration and estimated profitability of the mine and commensurate with similar agreements entered into in other parts of Canada between mining proponents and affected aboriginal communities.

6. **KI ASSISTANCE WITH OTHER AFFECTED PARTIES**

As between KI and Platinex, KI agrees that it will assist with, and facilitate, a resolution of any issues that may arise between Platinex and any other aboriginal group directly affected by the Platinex exploratory drilling in order to ensure that Phase 1 and, if it proceeds the Extended Program, will be unimpeded.

7. **KI PARTICIPATION IN PLATINEX**

Platinex agrees to have KI participate in the company by:

(i) subject to shareholder and regulatory approval, investment in the company through the issuance of warrants (up to 500,000 warrants having an expiry date of two (2) years after the date of issuance and providing for a strike price of .40¢ per common share); and/or

(ii) appointing one nominee to the Platinex board of directors.

The parties acknowledge that the provisions of Section 7(i) shall be implemented during Phase 1 and will not apply to the Extended Program.

8. **KI BENEFIT FUND**

Platinex will establish a fund to benefit the KI community. Platinex will contribute to the fund on a semi-annual basis 2% of all monies spent by Platinex in connection with Phase 1 during the previous six months. This contribution also will apply in respect of the Extended Program, if it proceeds.

9. **COMMENCEMENT OF PHASE 1**
KI agrees that Platinex can access the Big Trout Lake property upon which the mining claims and leases are located freely and without any interference and can conduct Phase 1 commencing on and after June 1, 2007.

10. **EACH PARTY TO BEAR OWN LEGAL COSTS**

As between KI and Platinex only, Platinex and KI agree that each will bear its own legal costs and expenses relating to the legal proceedings to date, including the June 2006, January 2007 and April 2007 motions and the May appearance before Mr. Justice Smith and will not seek reimbursements of any such costs from the other.

11. **MEDIATOR**

If the parties choose to retain a mediator to effect a final agreement or otherwise, Ontario agrees to pay the mediator’s reasonable fees and disbursements. Any mediator will be agreed upon by KI, Platinex and Ontario.

...  

**Appendix Appendix C**

**Timetable for Substantive Consultations Between Kitchenuhmaykoosib Inninuwug (KI), Platinex Inc. (P) and Ontario (ON) for Exploratory Drill Program Phase 1**

[FN1]

<table>
<thead>
<tr>
<th>STAGE</th>
<th>AGENDA</th>
<th>TIMELINE</th>
</tr>
</thead>
<tbody>
<tr>
<td>Meeting One:</td>
<td>P information sharing presentation, 24-hole exploration program ON information sharing presentation KI information sharing presentation respecting hunting seasons/trapping and burial sites in the area of the Platinex claims and leases</td>
<td>No later than May 31, 2007</td>
</tr>
<tr>
<td>O-P-KI</td>
<td>Post-meeting Determine terms of reference for technical expert review, experts to be retained and funding for experts. Determine scope and process of KI internal review.</td>
<td>No later than June 8, 2007</td>
</tr>
<tr>
<td>Meeting Two:</td>
<td>P information sharing, details of timing of drilling and timing and routing of helicopter activity O information sharing presentation Discussion concerning the process by which local and traditional knowledge will be shared with P and O</td>
<td>The later of June 15, 2007 and 3 weeks prior to mobilization.</td>
</tr>
<tr>
<td>O-P-KI</td>
<td>Pre-Meeting Delivery of results of internal review to P and O. Delivery of results of technical expert review to P and O. Internal community meetings and evaluation by KI of information</td>
<td>TBD</td>
</tr>
<tr>
<td>Meeting Three:</td>
<td>Discussion of review results</td>
<td>TBD</td>
</tr>
<tr>
<td>O-P-KI</td>
<td></td>
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<tr>
<td>Meeting Four: O-KI</td>
<td>Discussions concerning TLE claim</td>
<td>TBD</td>
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<tr>
<td>Pre-Meeting</td>
<td>Delivery of results of drilling to KI and O.</td>
<td>TBD</td>
</tr>
<tr>
<td>Meeting Five: O-KI-P</td>
<td>Discussion of drilling results and timing of extended program (if applicable)</td>
<td>TBD</td>
</tr>
</tbody>
</table>

FN1. It is contemplated that IFNA will be invited to participate on the understanding that the nature and scope of its role will be defined by agreement amongst the participants as the consultation process unfolds.