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Date: **February 2, 2007** **No. of Pages: 15** (Including this cover page)

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File Name/Reference: ***Platinex Inc. v. Kitchenuhmaykoosib Inninuwug First Nation et al & The Queen***

FROM: **Justice Reception**

Comments:

Please see attached.

As we discussed		*For immediate action*		*For your information*	√
As you requested		*Please call upon receipt*		*Copy to follow via mail*	√

COURT FILE NOS.: 06-0060 & 06-0271
DATE: 2007-02-02

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:	
PLATINEX INC. Plaintiff	*Neal J. Smitheman* and *Tracy A. Pratt*, for the Plaintiff
- and -	
KITCHENUHMAYKOOSIB INNINUWUG FIRST NATION, DONNY MORRIS, JACK MCKAY, CECILIA BEGG, SAMUEL MCKAY, JOHN CUTFEET, EVELYN QUEQUISH, DARRYL SAINNAWAP, ENUS MCKAY, ENO CHAPMAN, RANDY NANOKEESIC, JANE DOE, JOHN DOE and PERSONS UNKNOWN Defendants	*Bryce Edwards* and *Kate Kempton*, for the Defendants other than Jane Doe, John Doe and Persons Unknown
	Frances Thatcher for the Intervenor, Independent First Nation Alliance
AND BY WAY OF COUNTERCLAIM:	**Court File No: 06-0271**
KITCHENUHMAYKOOSIB INNINUWUG FIRST NATION, DONNY MORRIS, JACK MCKAY, CECILIA BEGG, SAMUEL MCKAY, JOHN CUTFEET, EVELYN QUEQUISH, DARRYL SAINNAWAP, ENUS MCKAY, ENO CHAPMAN, and RANDY NANOKEESIC, Plaintiffs by Counterclaim	*Bryce Edwards* and *Kate Kempton*, for the Plaintiffs by Counterclaim other than Jane Doe, John Doe and Persons Unknown
- and -	
PLATINEX INC. Defendant by Counterclaim	*Neal J. Smitheman* and *Tracy A. Pratt*, for the Defendant by Counterclaim
- and -	
HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO, Third Party	*Owen Young, Ria Tzimas* and *Tamara Barclay* for the Third Party
	HEARD: January 26, 2007

Mr. Justice G. P. Smith

Decision On Motion

Background

[1] On July 28, 2006 I issued an interim, interim injunction in favour of Kitchenuhmaaykoosib Inninuwug First Nation ("**KI**") against the Plaintiff, Platinex Inc. ("**Platinex**"). The order was 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.

[2] The return of this matter is scheduled before me on April 2-5, 2007. At that time I will decide whether to extend, rescind or modify my order.

The Matters before the Court Today

[3] All of the matters before the court today relate to the return of the injunction in April. The court is asked to decide how that motion will proceed; what evidence will be relevant and admissible; whether the Minister of Northern Development and Mines (the "**Crown**") will granted leave to be added as a party to the motion and on the motion by the Independent First Nation Alliance on February 8 and, if so, to define the limits of that participation.

The Motion to Add the Crown as a Party to the Motion

[4] The statutory framework for adding a party as an intervenor or for moving to vary an order although not a party named in the order is found in Rules 13.01, 13.02, 37.14 of the *Rules of Civil Procedure* and in s. 109 of the *Courts of Justice Act*.

[5] Rule 13.01:

> **(1)** A person who is not a party to a proceeding may move for leave to intervene as an added party if the person claims,
>
> [6] an interest in the subject matter of the proceeding;
>
> [7] that the person may be adversely affected by a judgment in the proceeding; or
>
> [8] that there exists between the person and one or more of the parties to the proceeding a question of law or fact in common with one or more of the questions in issue in the proceeding.
>
> **(2)** On the motion, the court shall consider whether the intervention will unduly delay or prejudice the determination of the rights of the parties to the proceeding and the court may add the person as a party to the proceeding and may make such order as is just.

[9] Rule 13.02:

> **13.02** Any person may, with leave of a judge or at the invitation of the presiding judge or master, and without becoming a part to the proceeding, intervene as a friend of the court for the purpose of rendering assistance to the court by way of argument.

[10] Rule 37.14:

37.14 (1) *Motion to set aside or vary* – A party or other person who,

(a) is affected by an order obtained on motion without notice;

(b) fails to appear on a motion through accident, mistake or insufficient notice: or

(c) is affected by an order of a registrar,

may move to set aside or vary the order, by a notice of motion that is served forthwith after the order comes to the person's attention and names the first available hearing date that is at least three days after service of the notice of motion.

(2) On motion under subrule (1), the court may set aside or vary the order on such terms as are just.

[11] Section 109 of the *Courts of Justice Act*:

109(1) *Notice of constitutional question* - Notice of a constitutional question shall be served on the Attorney General of Canada and the Attorney General of Ontario in the following circumstances:

1. The constitutional validity or constitutional applicability of an Act of the Parliament of Canada or the Legislature, of a regulation or by-law made under such an Act or a rule of common law is in question.

2. A remedy is claimed under subsection 24(1) of the *Canadian Charter of Rights and Freedoms* in relation to an act or omission of the Government of Canada or the Government of Ontario.

(4) *Right of Attorneys General to be heard* - Where the Attorney General of Canada or the Attorney General of Ontario is entitled to notice under this section, he or she is entitled to adduce evidence and make submissions to the court in respect of the constitutional question.

(5) *Right of the Attorneys General to appeal* - Where the Attorney General of Canada or the Attorney General of Ontario makes submissions under subsection (4), he or she shall be deemed

to be a party to the proceedings for the purpose of any appeal in respect of the constitutional question.

[12] Neither Platinex nor KI have joined the Crown as a party to the main action either as a party defendant to the main action or as a defendant in KI's counterclaim. KI has added the Crown as a third party and challenges the constitutionality and validity of *Ontario's Mining Act*.

[13] KI opposes the Crown's motion for intervention and submits that all of the motion material for the June hearing was served on the Crown and it is now too late to seek status in that it has failed to move "forthwith" to set aside or vary the July 28th order as required by Rule 37.14 of the *Rules of Civil Procedure*.

[14] I agree with that position and find that the Crown has not moved "forthwith" to set aside or vary the order.

[15] KI' s concern is that allowing the Crown to intervene now would be contrary to the public interest in the finality of litigation and would be unfair to KI by allowing someone who could have sought party status in the first instance to now have a second "kick at the can" after having seen the detail and content of the July 28 order and reasons.

[16] As an alternative argument the Crown argues that it has met the criteria set out in Rule 13.01.

[17] The court has a wide discretion in matters where leave to intervene is requested. Any time a court exercises its discretion there must be a careful balancing of several factors including the maintenance of the overall fairness of a proceeding.

[18] I am satisfied that the Crown has met the tests set out in Rule 13.01. An order shall issue adding the Crown as a party to the February 8 and April 2, 2007 motions. In my reasons delivered on July 28, 2006, I reviewed the nature of the special relationship between the Crown and First Nations and need not repeat those comments here. Clearly, because of that relationship, the Crown has an interest in the subject matters of this proceeding; may be adversely affected by a judgment in the proceeding; and there exists between the Crown and KI a question of law in common with one or more of the questions in issue in these proceedings.

[19] I have considered whether the intervention of the Crown will unduly delay or prejudice the rights of the parties especially those of KI. The Crown will be allowed to deliver affidavit material to respond to the motions and to conduct cross-examinations on any material filed after the June hearing but not before. In other words, the Crown must accept the court record as it exists on June 22 and 23, 2006.

[20] It follows that the rights of KI and Platinex to respond to any material filed by the Crown are not in any way restricted.

The Evidence to be Admitted on and the Nature of the April Hearing

[21] There are a variety of forms of injunctions. Generally, injunctions are often classified according to the time at which they are granted. Each form attempts to balance the applicant's immediate need for protection against the respondent's right to a full hearing on the merits of the case.

[22] Injunctory relief is a remedy intended to avoid or prevent harm before a hearing on the merits. In cases such as this one, where the harm has not occurred, the applicant sues *quia timet* based upon a fear that, unless the injunction is granted, harm will occur.

[23] The focus of the court in any form of injunctory relief is forward looking. It is called upon to predict if harm will occur. In the case of *quia timet* inunctions the problem of predictability is more acute in that the court is without the benefit of having actual evidence that harm has occurred.

[24] In this case an interim, interim conditional order was granted on July 28, 2006 in favour of KI. That order may be seen as a form of a *quia timet* injunction in that it contains a temporal component. In paragraph [139] of my Reasons I stated that the order was expressly limited for a period of five months "after which time the parties shall re-attend before me to discuss the continuation of this order and the issue of costs".

[25] Factual situations are typically fluid. Circumstances evolve and change throughout the course of time. The fluidity of a case can impact upon the court's ability to predict the likelihood of future harm. The court must be satisfied that the evidence before it is sufficiently reliable and static to that it has an enhanced confidence in predicting that harm will occur if injunctory relief is not granted.

[26] This component, for lack of a better description, can be referred to as the crystallization of harm.

[27] In June 2006 when this matter was initially heard it was not possible to assess whether the situation had sufficiently crystallized to predict with sufficient confidence that harm would

occur to the interests of the applicant failing the grant of an injunction. For that reason the order made on July 28, 2006 was made interim, interim and conditional.

[28] An interim, interim order is not the same as the grant of an interlocutory order. Not only is there a fundamental difference with respect to its temporal nature but there is a difference in the degree of judicial scrutiny at the interlocutory stage as opposed to an interim stage. This factor was addressed by Arbour J. as she then was in *Risi Stone Ltd. v. Omni Stone Corp. et al.*[1] when she stated: "However, in moving from the interim to the interlocutory stage on the injunction, the applicant must, in my view, be met with a higher degree of scrutiny with respect to this assertion of irreparable harm and his claim that the balance of convenience favours him".

[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 injuctory 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.

[1] *Risi Stone Ltd. v. Omni Stone Corp. et al.*, (1989) C.P.R. (3d) 559 at p. 562..

[31] The July order is conditional upon KI setting up a consultation committee. My July reasons made reference on several occasions to the reciprocal duty that the Crown and First Nations have to consult.

[32] It is important to re-state KI's position on the development proposed by Platinex. KI is not opposed to development but wishes to be fully consulted so that its interests are considered and protected. In paragraphs 18 and 19 of my judgment I stated:

> [18] Exhibit G to the affidavit of Chief Donny Morris is a copy of the Resource Development Protocol developed by KI. That protocol states that its purpose is "to describe the process for consultation with Kichenuhmaykoosib Inninuwug **prior to** and during development activities on KI lands." (highlighting is mine)
>
> [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.

[33] Consultation is a multi-faceted concept. It serves many purposes including fostering the principle of reconciliation. It also is relevant when a court considers the concepts of irreparable harm and the balance of convenience, two of the essential requirements for the grant of injunctory relief.

[34] In the *Haida Nation* case the Supreme Court of Canada made it clear that the process of consultation involves obligations of good faith on all parties. At pages 50-51 of that judgment the court stated:

> "At all stages, good faith on both sides is required...Sharp dealing is not permitted. However, there is no duty to agree; rather, the commitment is to a meaningful process of consultation. As for Aboriginal claimants, they must not frustrate the Crown's reasonable good faith attempts, nor should they take unreasonable positions to thwart government from making decisions or acting in cases where, despite meaningful consultation, agreement is not reached".[2]

[35] In paragraph 91 of my judgment I wrote:

> [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 consult does not give First Nations a veto-they must also make bona fide efforts to find a resolution to the issues at hand.

[36] In paragraphs 110, 111 and 112 I commented on the relationship between the duty to consult and the balance of convenience test as follows:

> [110] 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.
>
> [111] 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.
>
> [112] Balancing the respective positions of the parties, I find that the balance of convenience favours the granting of an injunction to KI.

[37] Clearly at the time that the initial motion was heard (June 22 and 23, 2006) consultation with the Crown was minimal or non-existent at best. Platinex had unilaterally decided to terminate discussion and to move in its drilling crew.

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[2] *Haida Nation v. British Columbia (Minister of Forests)* (2004), 245 D.L.R. (4th) 33 at pp.5051 (S.C.C.).

[38] In view of my direction that consultation take place the question arises as to whether the risk of harm and balance of convenience that existed in June 2006 has changed. An applicant may be refused an interlocutory injunction if there are reasonable steps that could be taken to avoid the harm or to ensure that the harm is not irreparable.[3]

[39] The intent of my July 28 order was to temporarily preserve the status quo; to address Platinex's property concerns and; to promote further consultation between the parties and the Crown in the hope that the concerns and interests of the respective parties including Platinex could be reconciled by discussion and not by litigation.

[40] The duty to consult does not end upon the grant of an *ex parte*, interim or interlocutory order. It is an ongoing duty and, for that reason, evidence as to nature and scope of what consultation has taken place since July 28 is relevant to whether my interim, interim order will be extended, modified or varied.

[41] The court will require the parties to fully report on the extent to which the conditions of my order have been satisfied. Compliance with and discussions concerning either condition imposed in the July order were not intended to be privileged. As well, the evidence before me does not indicate that, at any time during the consultation process, it was made clear by any party that communications were intended to be privileged.

[3] *Syntex Inc. v. Novopharm Ltd.* (1991), 36 C.P.R. (3d) 129 (F.C.A.); leave to appeal to the S.C.C. refused 39 C.P.R. (3d) v, 137 N.R. 391.

Summary

[42] The court will hear and allow any and all evidence in April that is relevant to the issue of whether an interlocutory injunction should be granted. The parties may file affidavit evidence addressing this issue and conduct examinations on those affidavits if they so desire.

[43] The parties to the motion will be allowed to provide evidence of the consultation process. For that reason the affidavits of James Morelli as well as any other similar evidence will be admitted on the return of KI's motion.

[44] The motion by KI granting leave to admit evidence regarding Platinex's finances and operation from June 22 to present and for an order that James Trusler produce that evidence and re-attend for cross-examination is denied. This evidence is not relevant to the issues before the court in April and in view of my dismissal of Platinex's motion.

[45] Regarding the motion by Platinex to strike the affidavit of Philip Rouse who is a law clerk with the firm representing the Plaintiff, this motion is adjourned to April 2, 2007 for further argument.

[46] The Plaintiff has asked for an order admitting evidence "relevant to substantiating KI's request for full or substantial indemnity costs" on the June 2006 motions.

[47] Dispositions with respect to costs for all attendances including those in June will be scheduled by the court following the April hearing.

[48] In view of the urgency to preserve the April motion dates, counsel are directed to forthwith develop a timetable for the delivery of pleadings and examinations. In the event that

counsel are unable to agree on a timetable they shall arrange to speak to me by teleconference to address this issue and the court will make whatever orders are necessary.

The Hon. Mr. Justice G. P. Smith

Released: February 2, 2007

COURT FILE NOS.: 06-0060 & 06-0271
DATE: 2007-02-02

ONTARIO
SUPERIOR COURT OF JUSTICE
B E T W E E N:

PLATINEX INC.

Plaintiff

- and –

KITCHENUHMAYKOOSIB INNINUWUG FIRST NATION, DONNY MORRIS, JACK MCKAY, CECILIA BEGG, SAMUEL MCKAY, JOHN CUTFEET, EVELYN QUEQUISH, DARRYL SAINNAWAP, ENUS MCKAY, ENO CHAPMAN, RANDY NANOKEESIC, JANE DOE, JOHN DOE and PERSONS UNKNOWN,

Defendants

AND BY WAY OF COUNTERCLAIM:
Court File No: 06-0271

KITCHENUHMAYKOOSIB INNINUWUG FIRST NATION, DONNY MORRIS. JACK MCKAY, CECILIA BEGG, SAMUEL MCKAY. JOHN CUTFEET, EVELYN QUEQUISH, DARRYL SAINNAWAP, ENUS MCKAY, ENO CHAPMAN, RANDY NANOKEESIC,

Plaintiffs by Counterclaim

- and –

PLATINEX INC.

Defendants by Counterclaim

- and –

HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO,

Third Party

DECISION ON MOTION

Patrick Smith

Released: February 2, 2007