IN FACT AND IN LAW

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LACK OF CONSULTATION WITH ABORIGINAL COMMUNITIES MEANS NO EXPLORATORY WORK : THE ONTARIO SUPERIOR COURT HALTS EXPLORATORY WORK BY A MINING COMPANY AND ORDERS TRIPARTITE CONSULTATION WITH THE FIRST NATION AND THE PROVINCE

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ON JANUARY 3, 2012, THE ONTARIO SUPERIOR COURT ORDERED THAT SOLID GOLD RESOURCES CORP. ("SOLID GOLD"), A JUNIOR MINING EXPLORATION COMPANY, BE ENJOINED FROM CARRYING ON ANY FURTHER MINERAL EXPLORATION ACTIVITY FOR 120 DAYS ON A PARCEL OF LAND CLAIMED BY THE WAHGOSHIG FIRST NATION ("WAHGOSHIG") AS ITS TRADITIONAL TERRITORY.[1]

THE COURT ALSO ORDERED THAT DURING THIS PERIOD SOLID GOLD, WAHGOSHIG AND THE PROVINCE OF ONTARIO ("ONTARIO") WERE TO ENTER INTO A PROCESS OF *BONA FIDE*, MEANINGFUL CONSULTATION AND ACCOMMODATION REGARDING ANY FUTURE ACTIVITY ON THE LAND. FURTHERMORE, THE COURT RESERVED THE RIGHT OF WAHGOSHIG TO SEEK AN EXTENSION OF THE INJUNCTION IN THE EVENT THAT THE CONSULTATION PROCESS IS NOT PRODUCTIVE.

THE FACTS

Wahgoshig is an Anishanaabe (Algonquin and Ojibwa) and Cree First Nation that forms part of the Lake Abitibi people. Wahgoshig is a beneficiary of Treaty 9[2]. Wahgoshig claims that the area around Lake Abitibi is the birthplace of the Wahgoshig people on which they have lived and relied, and which they hold to be sacred, since time immemorial.

Solid Gold is a publicly traded junior mining exploration company with its headquarters in Ontario that holds mining claims situated on Treaty 9 lands. The evidence before the Court established that Ontario had delegated the procedural aspects of its duty to consult to Solid Gold and advised the company that it was obliged to consult Wahgoshig before undertaking its mineral exploration activities. Ontario also offered to facilitate the process between Solid Gold and Wahgoshig.

Solid Gold did not consult with Wahgoshig and commenced drilling. Wahgoshig discovered the drilling and approached the workers but the drilling crew would not divulge for whom they were working. A few months later, Ontario again notified Solid Gold that it was obliged to consult with Wahgoshig, but to no avail. In fact, Solid Gold actually increased its drilling activities despite the lack of any consultation with Wahgoshig. Wahgoshig brought a motion for an interlocutory injunction in order to restrain Solid Gold from engaging in all activities relating to mineral exploration in the area of Treaty 9 lands.

THE COURT'S RULING

The Court identified the main issue in the case to be whether an interlocutory injunction should be granted. The Court applied the test for the granting of an interlocutory injunction, which states that there must be a serious issue to be tried, an irreparable harm, and that the balance of convenience must favour the applicant. The Court easily reached the conclusion that the underlying claim[3] against Ontario and

[1] *Wahgoshig First Nation v. Her Majesty the Queen in Right of Ontario et al.*, 2011 ONSC 7708 (CanLII).

[2] Treaty 9 is a historical treaty between the Cree and Ojibwa people of northern Ontario and the federal government that was concluded in 1905-1906. It is also known as the James Bay Treaty and covers almost two-thirds of the area that is northern Ontario. In return for surrendering land the beneficiaries received reserve land and were ensured harvesting rights throughout the surrendered tract of land, including hunting, fishing, and trapping, which are now protected by s.35 of the *Constitution Act, 1982*.

[3] Wahgoshig had not yet filed its Statement of Claim when the motion for an interlocutory injunction in question was heard.

Solid Gold alleging adverse effects on Wahgoshig's treaty and Aboriginal rights and the failure to consult met the threshold for a serious issue. On the question of irreparable harm, the Court reminds us that the critical issue is the nature of the harm, which must be such that it cannot be compensated by way of damages, and not its magnitude. Furthermore, absolute certainty of irreparable harm is not required.

The Court found that without the injunction Wahgoshig would continue to suffer irreparable harm to its Aboriginal and treaty rights including a lost opportunity to be consulted, all of which could not be compensated by way of damages. Lastly, the Court concluded based on the facts of the case and the relevant jurisprudence that the balance of convenience favoured the granting of an injunction.

COMMENTS

With a few notable exceptions, it has not been common for Aboriginal groups to succeed in obtaining interlocutory injunctions with regard to land and resource development projects. Very often, though a Court may conclude there is a serious issue to be tried and irreparable harm to the Aboriginal group's rights, the balance of convenience will be held to favour the project and economic interests rather than the Aboriginal group's rights. This is all the more true where, as in this case, the project is still in the exploratory rather than operational phase. What seems to have made the difference in this case was, firstly, the lack of any contact or attempt at consultation by Solid Gold and, secondly, the public interest in ensuring that constitutionally protected Aboriginal rights are honoured and respected. This judgment may foreshadow a trend in favour of giving more bite to the duty to consult and Aboriginal rights.

An interesting aspect of this decision is the Court's reference to industry standards in its discussion of Solid Gold's actions. The Court noted that Solid Gold even failed to meet the voluntary, non-binding industry standards established by the Prospectors and Developers Association of Canada ("PDAC") regarding First Nations engagement. It is not the first time that this Court has made reference to these industry standards. In the *Platinex*[4] case, the Court referenced PDAC's *Best Practices Exploration Environmental Excellence Standards* and went so far as to incorporate them in the court-ordered Consultation Protocol[5] that resulted from that decision. These decisions tend to demonstrate that although respecting such industry standards may not provide absolute assurance that the duty to consult has been fulfilled, they seem to be a minimum threshold that, if not met, will lead to a determination that the duty has not been fulfilled.

Lastly, this judgment is another reminder that although the duty to consult lies squarely with the Crown and not the promoter of a project, it is ultimately the latter that suffers the greatest effects of an injunction or other remedy issued further to a successful challenge by an Aboriginal group.

Solid Gold has appealed the judgment and has also, in what appears to be a first, served a Notice of Claim against Ontario alleging that it is liable for the losses it suffered as a result of the judgment.[6] We will continue to update you on this evolving situation as developments occur.

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[4] *Platinex Inc. v. Kitchenuhmaykoosib Inninuwug First Nation*, 2006 CanLII 26171 (ON SC) paragraphs 42 to 46.

[5] *Platinex Inc. v. Kitchenuhmaykoosib Inninuwug First Nation*, 2007 CanLII 20790 (ON SC), see APPENDIX "B".

[6] http://www.solidgoldcorp.com/s/News_Releases.asp?ReportID=503764&_Type=News-Releases&_Title=Notice-of-Claim-on-the-Crown consulted on May 11, 2012.

YOU CAN CONTACT THE FOLLOWING MEMBERS OF THE ABORIGINAL LAW GROUP FOR ANY QUESTIONS PERTAINING TO YOUR RELATIONSHIP WITH ANY ABORIGINAL GROUP IN QUEBEC.

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