

Ontario Superior Court of Justice releases decision in *Platinex Inc. v. Kitchenuhmaykoosib Inninuwig First Nation*

Overview

On May 22, 2007, the Ontario Superior Court of Justice released its latest decision on the matter of *Platinex Inc. v. Kitchenuhmaykoosib Inninuwig First Nation (Platinex)*. In its decision, the Court issued three orders imposing a Consultation Protocol, timetable and Memorandum of Understanding upon Platinex, the Government of Ontario and the Kitchenuhmaykoosib Inninuwig First Nation (KI). The parties had been unable to come to agreement on these items prior to a Court imposed deadline of May 15, 2007. The decision is of interest in that the Court: (1) held that appropriate government funding is essential to a fair and balanced consultation process; and (2) continued to exercise jurisdiction to actively supervise and facilitate the consultation process.

Background Facts

In July 2006, KI was granted an “interim, interim order” that prevented Platinex from commencing exploratory drilling operations over territory which KI had claimed in a Treaty Land Entitlement Claim (*Platinex Inc. v. Kitchenuhmaykoosib Inninuwig First Nation*, [2006] 4 C.N.L.R. 152). This injunction was granted on the condition that KI develop a consultation committee to engage in negotiations with Platinex and the Government of Ontario, with the objective of making arrangements that would satisfy the Crown’s duty to consult and would allow Platinex to begin exploratory operations.

On May 1, 2007, in *Platinex Inc. v. Kitchenuhmaykoosib Inninuwig First Nation*, [2007], O.J. No. 1841, the Court decided that the order should not be continued on the basis that the balance of convenience favoured the lifting of the injunction, as Platinex otherwise faced bankruptcy. The Court also made an interim declaratory order which affirmed KI’s right to ongoing consultation in respect to the exploration and ordered the parties to implement a Consultation Protocol, timetable, and Memorandum of Understanding prior to May 15, 2007. The order also reserved the right of the Court to make whatever further orders it deemed necessary to effect an appropriate consultation process and to continue to supervise all aspects of that process.

Following this decision, parties resumed negotiation of the Consultation Protocol, timetable and Memorandum of Understanding. An agreement was reached between Platinex and Ontario; however, no agreement was reached which included KI, seemingly due to disagreement about clauses regarding funding for the consultation process and other compensatory terms. Shortly after the passing of the deadline, submissions were made by all three parties to the Court for its further review.

Ontario Superior Court of Justice's Analysis

In his decision, Mr. Justice G.P. Smith remarked that the underlying purpose of the May 1, 2007 order was “to encourage the parties to continue in a dialogue, with the hope that this would enhance mutual understanding and serve the principle of reconciliation” and that the parties had all made “good faith efforts to appreciate and accommodate the interests” of the other parties (at paras. 4 and 5). He further emphasized that, in adjudicating this matter, there are much broader issues at stake than whether, and to what extent, exploration might occur, and that any decision must be informed by the larger context of Aboriginal and Treaty rights.

The Court ultimately held that the agreements reached between Platinex and Ontario should serve as a guide to the ongoing relationship between all parties and made three orders imposing a Consultation Protocol, timetable and Memorandum of Understanding upon all parties, attached as appendices to the decision.

The Consultation Protocol establishes the nature and scope of the consultation process, including obligations to agree on timetables and obligations to share information relevant to the consultation. The Memorandum of Understanding provides a framework for KI, Platinex and Ontario to engage in an ongoing consultation process, with accommodation as necessary, during the exploratory project. It also sets out details of immediate accommodation measures, including the protection of archaeological sites, mitigation measures regarding environmental impacts and the engagement of KI members in the operation of the project. Finally, the timetable sets out a series of meetings that must be held at certain points in the consultation process and mandates that consultations continue beyond the completion of the exploratory operation.

Funding for Consultation

Of particular interest to those currently engaged in the process of consultation and accommodation are the Court's comments regarding the provincial government's responsibility for funding those processes.

In this case, Ontario had offered to fund KI's reasonable costs for consultations, however, they had set a target of CAD 150,000 and had proposed that costs be based upon timetables and work plans agreed to by the parties and ultimately governed by a contribution agreement to be entered into between KI and Ontario. KI rejected this proposal, proposed an initial payment of CAD 600,000, and sought assurance that Ontario would cover all of KI's consultation and litigation costs. KI's position was that the “serious imbalance between the financial position of the parties renders the consultation process unfair” (at para. 26).

In reviewing this issue, Mr. Justice G.P. Smith commented that “the issue of appropriate funding is essential to a fair and balanced consultation process, to ensure a ‘level playing field,’” but that there was insufficient material before the Court to make an informed decision about what level of funding would be appropriate. The Court held that if a contribution agreement could not be negotiated prior to June 15, 2007, that further submissions might be made towards a judicial determination of this issue. This comment, while not substantively articulating a duty to *fund* consultation as inherent to the duty to consult, seems to indicate that the Court will consider the availability of resources when assessing the adequacy of the consultation process.

As it currently stands, both the Consultation Protocol and the memorandum of understanding imposed upon the parties, establishes that Ontario will cover KI's reasonable costs in respect to the consultation. Costs which are eligible to be covered under the contribution agreement are detailed in the appendix to the Consultation Protocol and include:

- Administrative costs for the operation of the KI Consultation Committee;
- Honoraria for KI members and Elders to participate;
- Fees for technical and professional assistance;
- Fees and disbursements for legal services;
- Travel and accommodation expenses for the KI Consultation Committee; and
- Expenses incurred for tripartite and internal community consultations.

Notably, litigation costs do not seem to be explicitly covered by this arrangement.

Court Supervision of the Consultation Process

Also of interest is the Court's use of the interim declaratory order to continue to supervise and facilitate an ongoing consultation process. The decision indicates that the "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" (at para. 6). Additionally, the Court has imposed a deadline of June 15, 2007, for agreements to be reached with respect to funding between Ontario and KI. Failure to meet this deadline will likely result in further judicial intervention in the consultation process. Finally, Mr. Justice G.P. Smith withheld judgment on a number of issues, such as legal costs and the establishment of a community benefit fund, with the provision that submissions on those matters will be heard in the future, as the consultation process continues.

For further information on the implications of this case, please contact:

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