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The Crown Duty to Consult – Industry versus Constitutional Consultation Rights

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Can private industry proceed with court injunctions in order to accomplish their private objectives regardless of Crown consultation having been completed?

Two companion cases heard by the Ontario Courts in 2008 involving appeals by the Chief and Council of two First Nations who had been imprisoned for blockading mining companies from entering into their traditional territories prior to the resolution of the Nations' land claims and the exercise of their constitutional right to consultation with the Crown.

On July 7, 2008 the Ontario Court of Appeal overturned the convictions against the Chief and Council of the Ardoch Algonquin First Nation for their blockading of Frontenac Ventures Corporation from entering Ardoch traditional territory, in the face of a prior court-ordered injunction permitting Frontenac to access and develop those lands according to provincial licences and mining permits. In the Court of Appeal's decision in Frontenac Ventures Corporation v. Ardoch Alonguin First Nation, the Court found that the injunction should not have been ordered in the first place because to do so would have been in contravention of the constitutional rights of consultation of the Ardoch Algonquin.

According to the Court of Appeal:

"One of the stated reasons for the protest was a purported failure on the part of Ontario to consult with the AAFN and the Shabot about Frontenac's exploration plan and the renewal of its mining lease. The appellants assert that Frontenac is not legally entitled to conduct mineral exploration within the subject property until the Crown discharges its constitutional duty to consult with the affected First Nations about the impact of mining activity on the environment, wildlife harvesting and sacred, archaeological, historical and culturally significant sites on the property."

Frustrated by 16 years of negotiations of their land claims and no consultation being done by the Ontario provincial Crown, the Ardoch blockaded the road leading into their traditional territory to prevent Frontenac from having access. The Ardoch determined not to participate in the injunction proceedings brought by Frontenac, part of its $77 million lawsuit against the Ardoch, and on August 27, 2007 an injunction was ordered against the Ardoch.

In finding that the jail sentences were inappropriate, the Court held that the private remedy of an injunction should not have been ordered until the rights of the First Nation to be consulted had been considered, arising from 17 years of Supreme Court of Canada decisions from R. v. Sparrow in 1990 to Haida Nation v. British Columbia in 2007. The Court observed:

"Having regard to the clear line of Supreme Court jurisprudence, from *Sparrow* to *Mikisew*, where constitutionally protected aboriginal rights are asserted, injunctions sought by private parties to protect their interests 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. Such is the case even if the affected aboriginal communities choose not to fully participate in the injunction proceedings".

The Court held that prior to ordering an injunction against a First Nation, the Courts should determine whether the Crown consultation duties have been fully exhausted when Aboriginal and Treaty rights are at stake, that good faith has been undertaken on both sides, and that all attempts to achieve a negotiated or legislated solution have been tried.

These reasons are echoed in the earlier decision of Justice Smith of the Ontario Superior Court of Justice in the companion case of Platinex v. Kitchenuhmaykoosib Inninuwug ("KI") First Nation, in which the same issues were being considered. The Court had ordered the parties to engage in negotiation and to develop a consultation protocol, and affirmed the constitutional nature of the issues. The Court noted:

"In my July 2006 reasons, I commented that the sovereignty and special status of First Nations were enshrined in the *Proclamation Act* of 1763, and later in sections 25 and 35 of the *Constitution Act, 1982*. These principles are also acknowledged in all the numbered treaties. Treaty 9, which forms a backdrop to this consultation process, is not merely another commercial contract; it is a special form of agreement between sovereign states."

The Chief and Council of the KI were sentenced in February 2008 to six months in jail as a result of, according to the Ontario Court Superior Court of Justice, their "flagrant" and "defiant" behaviour. The case had revolved around the Platinex injunction ordered October 25, 2007 to preserve their access to their "asset" which was 221 unpatented mining claims and 81 mining leases covering 12,080 acres over 19 square kilometres in the 23,000 square kilometre traditional territory of the Kitchenuhmaykoosib Inninuwug ("KI") First Nation.

Chief Morris stated in Court:

"I stand by the fact that the land I'm in, on now is our land. I believe God put us there. God gave us a language, the animals to live off and we just don't want to see development on that area...As a treaty partner I expect to be treated as a partner, not, not where one is superior than us."

As a result a test has been provided to all parties that private negotiations, and Crown duties of consultation with respect to constitutionally protected Aboriginal and Treaty rights arising from the Treaties and the Honour of the Crown, must infuse the entire process prior to the issuance of a Court injunction to create a "protest-free zone" enforcing private mining licences and permits. Those efforts must be exhausted to resolve the public consultation right of First Nations prior to any Court ordering a resolution of privately held rights of mining (and other) companies.

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newsletter without seeking specific legal advice with respect to their unique circumstances.