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Ontario Court Halts Exploration After Mining Company Refused to Consult First Nation

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The Wahgoshig First Nation ("WFN") in Northern Ontario has obtained an injunction to temporarily stop Solid Gold Resources Corp. ("Solid Gold"), a junior mining company, from drilling on their First Nation Treaty lands. In a decision released last week (2011 ONSC 7708 (CanLII)), Justice Brown of the Ontario Superior Court halted all exploration activities for at least 120 days after finding that Solid Gold had repeatedly failed to respond to consultation requests from both WFN and the Ontario Government.

While this decision should not come as a surprise to knowledgeable observers, it is important for three reasons:

1) It confirms that as yet there is no Aboriginal veto over mining exploration activities;

2) It highlights problems with the Crown's practice of delegating the consultation to proponents and

3) It reiterates that the "free entry" mining system in Ontario is limited by Aboriginal consultation.

Companies that are not mindful of Aboriginal concerns will see their business plans delayed or cancelled.

Background

When Solid Gold, a publicly traded junior mining company, staked its mining claims from 2007 through 2010, it was advised by the Crown that its claims were within WFN's Treaty 9 lands and that consultation should occur regarding any

exploration activities. Solid Gold did not contact WFN and began drilling in the spring of 2011. The Court found that no meaningful consultation occurred and in November 2011 the Crown reiterated to Solid Gold in writing that consultation was required. WFN issued a notice of claim against Solid Gold and Ontario. Solid Gold brought in a second drilling rig to increase exploration and WFN filed for an injunction to halt all mineral exploration activities.

The Decision

In granting the 120 day injunction, Justice Brown found that not only did Solid Gold fail to consult with WFN but that "the evidence indicates that it made a concerted, wilful effort not to consult…"[1] It failed to meet the industry standards for exploration as set out by the Prospectors and Developers Association of Canada and demonstrated no respect for WFN's recognized Aboriginal and Treaty rights.

On this basis, the court had no difficulty in finding that the potential irreparable harm to sites of cultural significance (which Solid Gold conceded may have already occurred) outweighed the risk that Solid Gold could be put out of business. Justice Brown ordered Solid Gold and the Crown to begin consultations regarding any future activity on Solid Gold's mining claims. If meaningful consultation and accommodation does not occur over this period, WFN is entitled to seek an extension to the injunction.

While the decision is not surprising on the facts, it is important for the three reasons listed below.

1) No Aboriginal Veto Over Mineral Exploration

WFN's original notice of motion sought to prevent Solid Gold from engaging in any mineral exploration activities without WFN's prior consent. WFN initially asserted at the motion that they had an Aboriginal veto over any activities on their Treaty lands but, under pressure from the court, eventually conceded that this was not the law of Canada. No decision was rendered on this issue and further demands for an Aboriginal veto are expected in future cases.

2) Problems with the Crown's Delegation of the Consultation to Project Proponents

While the Crown bears ultimate legal responsibility for the consultation and accommodation of impacted Aboriginal peoples, the Crown may delegate the procedural aspects of consultation to mining project proponents.[2] In practice, however, the Crown likes to push the boundaries of what can be defined as "procedural," though this limited role for the Crown has been implicitly upheld by Canadian courts.[3]

While this hands-off approach is convenient for the Crown, it can create problems for Aboriginal communities and project proponents. Without having the Crown at the table from the start, it is not always clear who is responsible for each project component leading to greater uncertainty and increasing the potential for conflict. This is especially true in cases like Solid Gold, where the project proponent does not wish to consult with Aboriginal peoples. The Crown was aware that Solid Gold had staked claims starting in 2007 on WFN's Treaty lands but did not take steps to notify WFN of the mining claims. The Crown simply told Solid Gold that it should consult with WFN and offered to facilitate the process, but then did nothing further. WFN only realised they were impacted when they discovered drilling activity on their Treaty lands. A more hands-on

[1] *Wahgoshig First Nation v. Her Majesty the Queen in Right of Ontario et al.*, 2011 ONSC 7708 at para. 58.

[2] *Haida Nation v. British Columbia (Minister of Forests),* [2004] 3 S.C.R. 511 at para. 53.

[3] *Platinex Inc. v. Kitchenuhmaykoosib Inninuwug First Nation,* [2006] 4 C.N.L.R. 152, (Ont. Sup. Ct), and [2007] 3 C.N.L.R. 221 (Ont. Sup. Ct.) where the court found that the duty to consult had been discharged despite virtually no participation by the Crown.

approach by the Crown from the start could have avoided this situation that has created distrust between Aboriginal peoples and the mining community.

3) The "Free Entry" Mining System in Ontario is Limited by Aboriginal Consultation

Regulations proposed for April 2012 may limit these situations in the future. These regulations are expected to include detailed consultation requirements for mining exploration. First Nation and Métis communities will be notified when mining claims are recorded within their traditional use areas and sites of cultural significance will be withdrawn from claim staking. Plans will be required before any prospecting begins and higher impact activities will require exploration permits. All plans and permits will be shared with potentially impacted Aboriginal communities prior to the start of any work.

These new licensing requirements coupled with Canadian court decisions on Aboriginal rights have effectively ended the "free entry" mining system in Ontario. In rejecting Solid Gold's argument that Ontario's "free entry" system trumped any Aboriginal consultation requirements, Justice Brown noted that the duty to consult was based on s. 35 of the *Constitution Act, 1982*[4] and thus overruled any legislative regime.

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For further information, please contact Nalin Sahni or David Hunter or a member of our National Environmental Law or Aboriginal Law Groups.

[4] Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11