

**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N:

PLATINEX INC.

Plaintiff,
Defendant by Counterclaim,
Responding Party

- 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,
Plaintiffs by Counterclaim,
Moving Parties

**FACTUM OF THE MOVING PARTY, KITCHENUHMAYKOOSIB INNINUWUG, ET AL.
ON MOTION FOR INJUNCTION**

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PART I - OVERVIEW

1. Kitchenuhmaykoosib Inninuwug First Nation (“KI”), and the other named Defendants (other than Jane Doe, John Doe and Persons Unknown) (hereinafter all referred to as KI for the purposes of this factum) ask this Court to exercise its equitable jurisdiction to preserve until trial KI’s Aboriginal and treaty rights that are under threat from mining-related activities of Platinex Inc. (“Platinex”).
2. This factum is filed in support of KI’s motion for an interim and interlocutory order enjoining Platinex from proceeding with its 80-hole exploration drilling program as defined in KI’s Amended Notice of Motion, until the trial on the main actions is decided.
3. This factum does not directly address the motion by Platinex for an interim and interlocutory order enjoining KI from, *inter alia*, interfering with Platinex's mining operations at Big Trout Lake. The response by KI to that motion is in the responding party factum from KI. However, KI relies on its responding factum in the herein injunction motion to the extent it is applicable.

PART II - SUMMARY OF THE FACTS

A. KITCHENUHMAYKOOSIB INNINUWUG: THE PEOPLE OF BIG TROUT LAKE

4. The Defendant, Kitchenuhmaykoosib Inninuwug (“KI”), formerly known as Big Trout Lake First Nation, is an indigenous Ojibwa/Cree First Nation, and is a Band under the *Indian Act*, R.S.C, 1985, c. I-5, with a reserve on Big Trout Lake that is approximately 377 miles north of Thunder Bay, Ontario. KI is signatory to the 1929 adhesion to Treaty 9, the James Bay Treaty.

Affidavit of Chief Morris, paras. 1, 3, 10, Exhibit A: “The James Bay Treaty – Treaty No. 9”

5. KI’s reserve is situated within its traditional territory where KI has lived in a special stewardship relationship with the lands, waters, plants and animals since ancient times.

Affidavit of Chief Morris, paras. 4, 9

Affidavit of John Cutfeet, paras. 5-8

6. This interrelationship with and connection to the land is at the core of KI’s identity and culture as a people. But KI is struggling today to maintain this culture and

identity, including through its traditional way of life. Interaction with and imposition of Canadian society, systems, industry and laws, have caused detrimental effects to the lands and to the community.

Affidavit of Chief Morris, paras. 5, 12

Affidavit of John Cutfeet, paras. 5-8, 14, 16-17

Affidavit of Clem Anderson, para. 4

Affidavit of Elsie Fox, paras. 4-5

Affidavit of Allen Hartley, paras. 6-7

Affidavit of Mary Hudson, paras. 4-5

Affidavit of Mary Childforever, paras. 9, 14

Affidavit of Paul Driben, paras. 12-14

7. The KI community, like many Aboriginal communities in Canada, is already under significant pressure and strain from imposed outside influences, and suffering demonstrable effects of these such as high rates of substance abuse, family violence and breakdown, vandalism in the community, physical and mental illness and suicide.

Affidavit of Mary Childforever, paras. 5-6, 13-15, 17-20

Affidavit of Paul Driben, Exhibit B, "*Suicide Among Aboriginal People: Royal Commission Report*", pp. 1-3

Cross-examination of Eno Chapman, p. 24, Q. 119

8. The social and cultural fabric of KI threatens to tear apart with more strain from activities imposed by others on KI. Just as KI struggles to regain control and some meaningful say over what happens to its lands, its people and its way of life (its existence as a people), further actions imposed on KI threaten to push KI back. This will only exacerbate what is already significant accumulated loss of control and powerlessness, which in turn exacerbates hopelessness, despair and social ills that result. It is not change per se that necessarily threatens KI, but the fact that change is imposed – with little or no involvement in decision-making or say by KI.

Affidavit of Mary Childforever, paras. 9, 11-12, 23-24

Affidavit of Dr. Paul Driben, Exhibit B, "*Suicide Among Aboriginal People: Royal Commission Report*", pp. 2-3

9. According to the Royal Commission Report, "Suicide Among Aboriginal People", there are four groups of major risk factors generally associated with suicide: psychological, situational, socio-economic, and culture stress. "Culture Stress" was deemed by the Commission to be particularly significant for Aboriginal people. The term refers to the loss of confidence in the ways of understanding life and living that have been taught within a particular culture. It comes about when the complex of relationships, knowledge, languages, social institutions, beliefs, values, and ethical rules that bind a people and give them a collective sense of who they are and where they belong is subjected to imposed change. For Aboriginal People, including the people of KI, such things as loss of land and control over living conditions, suppression of belief systems and spirituality, weakening of social and political institutions, and racial discrimination have seriously damaged their confidence and thus predisposed them to suicide, self-injury and other self-destructive behaviours.

Affidavit of Dr. Paul Driben, Exhibit B, "*Suicide Among Aboriginal People: Royal Commission Report*", pp. 2-3

10. Platinex drilling activities, imposed on KI (providing little or no meaningful involvement of KI in the decision-making process) are a form of Culture Stress on KI – heaped on top of all the ongoing Culture Stress from which KI is suffering. The drilling would be done on KI traditional lands, but without any meaningful control or participation by KI. It will have an adverse impact on the land and on harvesting activities, which violates the sacred spiritual connection that the KI feel with their lands, and thus suppresses KI's belief systems and spirituality. The activities would be done in the face of clear opposition from community elders and KI Chief and Council, thus weakening KI's social and political institutions. Overall, the Platinex activities, as currently contemplated, risk further social and cultural breakdown in KI, including through attempted and completed suicides.

Affidavit of Dr. Paul Driben, Exhibit B, "*Suicide Among Aboriginal People: Royal Commission Report*", pp. 2-3

Affidavit of Mary Jane Moonias, paras. 12, 14, 18-19

Affidavit of John Cutfeet, paras. 5-8

Affidavit of Chief Morris, paras. 32-36

Affidavit of Elsie Fox, paras. 7-9, 12

Affidavit of Eno Chapman, para. 14, Exhibit B, English translation of statements of KI elders from a community meeting held May 12, 2006

Affidavit of Justina Ray, paras. 23, 33-38, 41-43

Affidavit of Mary Childforever, para. 12

11. The evidence shows that violence in KI is almost exclusively internal – suicides and violence by members against other members. There is nothing on the record to show that there is or has been any external violence – that is, violence perpetrated by KI members against non-KI members. This point was brought out by opposing counsel in cross-examination of Mary Childforever, a KI member and community health worker:

Q. Okay. So if I understand what you're saying is that if the Court, or if Platinex were able to drill on the land, you're not concerned with some members of the Community resorting to force or violence to stop them? That's not a concern of yours?

A. Because I know it's not going to happen that way. We're not starting a war or anything or violence.

Q. You're not going to have violence?

A. No, we're not doing that.

Q. No. You're just going to commit suicide?

A. That's one of the major factors in our Community.

MR. SMITHEMAN: Oh, I see.

Cross-examination of Mary Childforever, p. 51, Q. 236-238

Affidavit of Mary Childforever, paras. 6, 13, 17-20

12. Mary Childforever's evidence in respect of the above is based on her six years of working directly with people in KI in crisis situations, as a mental health worker, a child and family services worker, and a band councillor, and on her lifetime spent as a member of KI living in the KI community.

Affidavit of Mary Childforever, paras. 1-3

13. The appropriateness of hearing from community health workers about factors leading to suicide in Aboriginal communities is established in Exhibit B to the affidavit of Dr. Paul Driben (the Royal Commission Report, "Suicide Among Aboriginal People"). In this Report, the opinions of community health providers are reported and taken into consideration. Ms. Childforever's evidence is also supported by her exhibits, including articles by Chandler and Lalonde, who point out the importance of knowledge forms drawn from indigenous communities:

Talk of "knowledge transfer" and the "exchange of best practices" has become, of late, very much the talk of the town. When you hear it, take special note of who is ordinarily imagined to be on the giving and receiving ends of whatever exchange or transfer is had in mind. Almost invariably, the persons imagined to be taking up a position at either end of this knowledge conduit are both social scientists or health professionals, and the flow of information is almost always "down-hill", from positions of higher to lower professional status.... What we typically have ... is a top-down insular arrangement that illegitimizes and disqualifies the knowledge forms sedimented within indigenous communities – an arrangement that has little to recommend it. It... is inherently hostile to, and serves to confirm the positional inferiority of, Aboriginal culture.

Affidavit of Dr. Paul Driben, Exhibit B, "Suicide Among Aboriginal People: Royal Commission Report", p. 2

Affidavit of Mary Childforever, Exhibit B, Article, "*Transferring Whose Knowledge? Exchanging Whose Best Practices? On Knowing About Indigenous Knowledge and Aboriginal Suicide*" by Michael J. Chandler and Christopher E. Lalonde, pp. 4-5

Cross-examination of Mary Childforever, p. 13, Q. 61-62, p. 17, Q. 84-85, p. 20, Q. 102-103. pp. 25-26, Q. 121-125, 127-131

14. KI relies on the land for its food, which to the extent it is available, is shared among the community. It includes fish, moose, caribou, geese, ducks and other fowl. Hunting, fishing and trapping comprise key elements of KI's society and economy. Further, these are rights guaranteed by Treaty.

Affidavit of Chief Morris, paras. 1, 3, 10, Exhibit A: "The James Bay Treaty – Treaty No. 9"

Affidavit of Chief Morris, paras. 6-9, 26

Affidavit of John Cutfeet, paras. 17-20

15. The importance of harvesting activities such as hunting to the identity of the people of KI cannot be overstated. As put by Dr. Paul Driben,

Now Ojibwa man is quite different. They have far less latitude. I could be a scholar in any field, to be accorded a high status in my culture. But for Ojibwa man, it's a very narrow window and that window is hunting. That's what they have to do. They have to hunt to realize themselves as Ojibwa. To be Ojibwa, that's the essence of their identity. No matter what else they do, they have to do that thing because they're taught that that is what a man does. A man kills animals and a man distributes that wealth. And that's what an Ojibwa man is. He is a hunter. He is a person who is going to kill moose, who is going to give moose away, who is going to teach other people how to do it, especially his kin. He is going to be out there on the land and enjoy everything there is to be seen and to be felt and to be heard and to understand about living off the land.

Cross-examination of Dr. Paul Driben, p. 18, lines 12-30

16. Being on the land is part and parcel of what it is to be Oji-Cree and live an Oji-Cree life. Camping out on the same land as their ancestors, taking the same birds (and other animals) as their ancestors, performing the same rituals as their ancestors before, during and after the hunt, and sharing the products of the hunt in the same fashion as their ancestors – all these things transform Oji-Cree hunters into a link in a cultural chain which stretches into the remote past and hopefully will endure forever.

Cross-examination of Dr. Paul Driben, p. 26, lines 18-30, p. 27, lines 1-3, p. 28, lines 13-30, p. 29, lines 1-3

17. Participating in harvesting activities affects the self-image and cultural identity of the people, especially the males of the community. Harvesting is the essence of identity for Ojibwa men. Sharing food from the land is the time-honoured way to establish social status. Traditional harvesting is important for father/son and father-in-law/son-in-law relationships, is tied to spirituality, and is important for social integration and cultural continuity. It is of tremendous economic importance as well: incomes are low, and the extra resources gained from living off the land allow KI members to live just above the poverty line. Simply put, living off the land has the broadest possible social significance in KI culture. Anything that interferes with traditional harvesting will have adverse impacts on the KI community.

Cross-examination of Dr. Paul Driben, p. 18, lines 12-30, p. 19, lines 25-30, p. 20, lines 1, 28-29, p. 21, lines 11-14 and 18-25, p. 29, lines 4-20, p. 30, lines 28-30, p.31, lines 1-22, p. 32, lines 1-7

Affidavit of John Cutfeet, para. 17

18. KI is embedded with the land, through a spiritual stewardship relationship, understood by KI as the Law of the Creator. KI was given its traditional lands by the Creator to protect for this and future generations. All of these are viewed by KI as core elements of its identity and culture. These deeply-held spiritual beliefs were an important motivating factor in KI's protest actions against Platinex.

Affidavit of John Cutfeet, paras. 5-9, 14-15, 17

Affidavit of Eno Chapman, para. 14

Affidavit of Allen Hartley, paras. 4-5

Affidavit of Chief Morris, paras. 8, 52, 61-64

Affidavit of Evelyn Quequish, para. 10

19. As part of this identity, KI as an Oji-Cree Nation has a system of law in relation to the harvesting of wildlife, which governs how and when animals can be killed.

Cross-examination of Dr. Paul Driben, p. 33, lines 18-30, p. 34 lines 1-30, p. 35 lines 12

20. Many KI members and families continue to pursue traditional activities on the land, and follow their spiritual beliefs and laws. They impart all of these things to the new generation of children and youth in KI.

Affidavit of Mary Jane Moonias, paras. 3, 5-6, 9-13, 16-17

Affidavit of Sona Sainnawap, para. 4

Affidavit of Chief Morris, para. 26

Cross-examination of Mary Jane Moonias, p. 11, Q. 61

Cross-examination of Chief Morris, pp. 6-7, Q. 29

Cross-examination of Sona Sainnawap, pp. 5-6, Q. 18

21. Though Nemeigusabins Lake (the area of the proposed drilling) is on the Nanokeesic Family trapline, many other members of KI use the area for traditional activities as well. Many KI members grew up on that lake, and have an unbroken bond with it

that goes back to time immemorial. It is where they, their ancestors, and their ancestors' ancestors have fished, hunted, trapped, lived, died and been buried.

Affidavit of Mary Jane Moonias, paras. 4, 9

Affidavit of John Cutfeet, para. 25

Affidavit of Sarah Jane Mckay sworn 1 May 2006, paras. 3-4

Affidavit of Sarah Jane Mckay sworn 10 May 2006, para. 4

Affidavit of Martine Hartley, paras. 5, 10

Affidavit of Katy Mckay, para. 3

22. The drinking water source for KI is Big Trout Lake, into which Nemeigusabins Lake drains. Nemeigusabins Lake is where Platinex is proposing to conduct its activities, and there is great concern about contamination of this water supply. Such concerns compromise KI's food security.

Affidavit of Mary Jane Moonias, paras. 12, 14

Affidavit of John Cutfeet para. 20

Affidavit of Chief Morris, para. 7

Affidavit of Clem Anderson para. 4

Affidavit of Mary Hudson, paras. 5-6

Cross-examination of Sona Sainnawap, p. 3, Q. 9

23. Helicopter flights and drilling activity, including the noise from these, will scare off wildlife and disrupt KI's traditional way of life. Planes flying overhead now, to and from KI's airport, already disrupt hunting and trapping pursuits of KI to some extent. Platinex's activities will result in increased noise, disturbed area and overall activity. For long stretches, Platinex's activities would involve at least two hours of helicopter flights each day. Such activity would be right in the bush where such traditional pursuits are carried out.

Affidavit of Mary Jane Moonias, paras. 5, 14, 19

Affidavit of John Cutfeet, paras. 16, 18-19

Affidavit of Justina Ray, paras. 23, 33-38, 41-45

Supplementary Affidavit of James Trusler, paras. 18-19, 35-37, 39-40

Cross-examination of Mary Jane Moonias, pp. 14-15, Q. 80

24. There is no dispute that Platinex's activities will have an impact on harvesting activities, though the extent of the impact is in dispute. Platinex has, in the past, made several payments in regard to disruption of traditional harvesting activities.

Cross-examination of Simon Baker, p. 33, lines 15-30, p. 34, lines 1-6

25. When such activity scares off the wildlife, it is no longer possible for KI members such as Mary Jane and Mike Moonias, her niece Cindy Albany and Cindy's husband Levius, and all their children, to live off the land. Money is no substitute for living off the land. If Mary Jane and her kin's ability to live off the land is compromised for a season, or a year, or two years, no amount of money would properly compensate them for this loss of culture, of identity, of self.

Affidavit of Mary Jane Moonias, paras. 5, 9, 14-17

Affidavit of Clem Anderson, para. 5

Affidavit of John Cutfeet, paras. 17, 19

26. Environmental harms are harms to KI's way of life, culture and society. Any such harms from Platinex's exploration program would be added to cumulative effects the KI community and traditional territory have already suffered, such as PCB and DDT poisoning, and fuel spills in Big Trout Lake. With such a fragile boreal environment, and a fragile community strained to the limit, there is an intolerable risk that one more harm heaped on top of all those with which KI is currently burdened, would push KI and its social and cultural structure past the brink.

Affidavit of Mary Childforever, paras. 14, 23-24

Affidavit of Eno Chapman, para. 4

Affidavit of Justina Ray, paras. 10-11

27. *Apprehension* of harm, alone, brought about by knowledge of such risks to environment, is enough to disrupt KI's relationship with and trust of the lands. In a northern, remote hunting culture, a higher degree of apprehension, or caution, is prudent when one's survival in a harsh environment is at stake. The approach of caution is based on experience of KI people over millennia, and is entitled to respect

as an aspect of KI's own Aboriginal law. But apprehension has also grown as a result of a history of government and industrial imposition and betrayal. Many KI people have seen the effects of mining, exploration, and other industrial and related operations from which KI and its territory have suffered. Often these operations and their effects have simply been imposed with little or no involvement by KI in the decision-making process, leading KI to believe its interests and rights have been ignored and neglected and that it has been betrayed. Apprehension or significant caution is also prudent in the face of such a history.

Affidavit of John Cutfeet, paras. 9-10, 13, 20

Affidavit of Mary Hudson, paras. 4-6

Affidavit of Clem Anderson, paras. 3-4, 6

Affidavit of Allen Hartley, paras. 6-7

Affidavit of Sona Sainnawap, paras. 7-8

Affidavit of Chief Morris, paras. 11-12

28. In May 2000, KI submitted a Treaty Land Entitlement claim ("TLE" or "land claim") which has progressed through Ontario's historical review stage, with its legal review stage expected to be completed by April 2007. KI first put Canada and Ontario on notice of this claim through a letter dated January 13, 1999.

Affidavit of Chief Morris, paras. 15, 17, 19

29. KI is asserting through the land claim, entitlement to about 200 square miles of additional reserve lands under the treaty, based on the Crown's failure to allocate sufficient reserve lands when these were first set apart in 1976, and based on KI's current population. These additional lands have not yet been specifically demarcated but would be (and from KI's perspective, must be) within KI's traditional territory. The proposed exploration activities by Platinex are within KI's traditional territory, and therefore within the scope of the land claim.

Affidavit of Chief Morris, para. 17, Exhibit D, Information pamphlet regarding the KI treaty land entitlement claim, p. 81 ("Kitchenuhmaykoosib Inninuwug: Land Base and Claim"), p. 85 (Map: Kitchenuhmaykoosib Aaki)

30. The structure of KI governance or decision-making is as follows: for issues where there are potential negative impacts on KI as a whole, the community (meaning a consensus of the people) is the ultimate decision-maker, after considering advice from the elders. Chief and Council must abide by and act on the direction set by the community. KI staff in turn must implement the specific instructions of Chief and Council.

Affidavit of Chief Morris, paras. 24, 32-33, 35, Exhibit G, “KI Consultation Protocol”

Affidavit of John Cutfeet, paras. 21, 25

Cross-Examination of Eno Chapman, pp. 79-80, Q. 436

31. In February 2001, KI sought to preserve its rights and interests pending resolution of the land claim by issuing a moratorium on resource development activities, including drilling exploration, within KI’s traditional territory. The moratorium was put in place by the community as a whole.

Affidavit of Chief Morris, para. 20, Exhibit F, Correspondence from Chief Donald Morris to Simon Baker dated February 7, 2006

Cross-examination of Eno Chapman, p. 33-34, Q. 169

32. The moratorium may be recalled by the KI community as a whole when the community deems it appropriate to do so, based on information it receives, its role in decision-making about proposed activities, and other considerations. KI is seeking strategic level planning with Ontario and Canada in respect of KI’s traditional territory, including where its additional reserve lands will be located and possible allocation of areas of such territory for preservation or development to best ensure KI’s special relationship with its lands is respected.

Affidavit of Evelyn Quequish, para. 9

Affidavit of Chief Morris, paras. 14, 17, 20

Cross-examination of John Cutfeet, p. 18, Q. 66, p. 21, Q. 87, 89-91

Cross-examination of Chief Morris, p. 43, Q. 221

Cross-Examination of Eno Chapman, pp. 79-80, Q. 436

B. OVERVIEW OF THE *MINING ACT* AND AUTHORIZATIONS GRANTED TO PLATINEX

33. Platinex was incorporated in August 1998. It currently holds 221 unpatented and contiguous mining claims and 81 mining leases in what it calls the Big Trout Lake Property, in KI's traditional territory.

Affidavit of James Trusler sworn 14 April 2006, paras. 4-5

34. The *Mining Act* provides for essentially an automatic approval or recording of staked claims, by Ontario, on payment of a fee and the meeting of other minor criteria. However, discretion under the *Mining Act* is to be exercised in deciding whether to grant exclusion of time or extension orders, and whether to grant the transfer or sale of mining leases from one holder to another.

Mining Act, R.S.O. 1990, c. M.14., s. 41(5), 44(1), 44(1.1), 46(1) and 73(1)

35. Platinex acquired its 81 mining leases from Inco Ltd. on February 10, 2006. In addition, numerous extension orders have been granted to Platinex. In February 1999 the Ontario Ministry of Northern Development and Mines (MNDM) granted an Exclusion of Time Order on all of the 221 Platinex claims, providing relief from the requirement to submit assessment work, allowing the claims to remain in good standing until July 17, 2000. On March 30 a second Exclusion of Time Order was granted by MNDM. On July 11, 2001 a third Exclusion of Time Order was granted by MNDM, which kept 63 of the claims in good standing until July 17, 2002. A fourth Exclusion of Time Order was granted July 17, 2003.

Affidavit of James Trusler sworn 14 April 2006, para. 5

Affidavit of Chief Morris, paras. 16, 18, Exhibit C, Form 2B Listing Application for Platinex Inc. dated October 28, 2005, p. 18

C. DEALINGS WITH THE PROVINCE: NO NOTICE, NO CONSULTATION

36. All of these orders and approvals occurred after Ontario was put on notice of the pending land claim; many occurred after the land claim was filed; and all of these and other types of authorizations occurred without any meaningful consultation with KI in respect of impacts on its undisputed treaty rights such as traditional harvesting, or its right to additional reserve lands asserted in the TLE claim.

Affidavit of Chief Morris, paras. 13-15, 17

37. There have also been no strategic planning level consultations between Ontario and KI regarding the interaction of harvesting rights and Mining Activities, or land use, within KI's traditional territory.

Affidavit of Evelyn Quequish, para. 3

Affidavit of Chief Morris, para. 14

Affidavit of Sona Sainnawap, para. 8

D. KI'S COMMUNITY CONSENSUS: NO TO PLATINEX'S PROPOSED ACTIVITIES NOW

38. KI considers the moratorium it passed against development in its traditional territory an expression of its own law and governance. Its law is based, at least in part, on the Law of the Creator, which requires KI to act prudently to protect and sustain the lands which the Creator granted to KI for this and future generations.

Cross-examination of Chief Morris, p. 90, Q. 525 (Re-exam)

39. KI is not opposed to all economic development within its territory. Whether any proposal for development would 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.

Chief Morris, para. 21

Cross-examination of Allen Hartley, p. 4, Q. 17

40. KI leadership participated with good faith in discussions with Platinex with a view to considering Platinex's proposal on the basis above. However, for reasons including lack of consultation with Ontario, KI determined under its own law that Platinex's proposed exploration drilling could not proceed.

Affidavit of Chief Morris, paras. 13-14, 22, 64

Affidavit of Evelyn Quequish, para. 9

Affidavit of Clem Anderson, paras. 5-6

Affidavit of Elsie Fox, paras. 7-11

Affidavit of Mary Hudson, paras. 4-6

41. The KI Community as a whole is, under KI's own governance and laws, the decision-maker in these instances where KI's rights and interests are at stake. The Kitchenuhmaykoosib Inninuwug Consultation Protocol makes this clear:

Kitchenuhmaykoosib Inninuwug arrive at decisions based on consensus of the community...

Decision making processes which affect the health and well-being of Kitchenuhmaykoosib Inninuwug must involve the community in every step of the process. We want the consultation process to lead to decisions that are complementary to our values and processes, and recognize the cultural and traditional practices of our people.

Affidavit of Chief Morris, para. 24, Exhibit G, "KI Consultation Protocol", (Section 1.1.3 "Community Decision Making Processes")

42. Further, the Kitchenuhmaykoosib Inninuwug Resource Development Protocol makes it clear that activities such as staking and drilling will only be agreed to by KI following negotiations with and a written agreement between the community (as a whole) and the proponent. (In this same protocol, fly-through airborne geophysical surveys are permitted without such community-wide consultation.)

Affidavit of Chief Morris, Exhibit I, "KI Resource Development Protocol", (Section 1.2.2. "Prospecting and Claim staking")

E. PLATINEX PROCEEDING DESPITE MORATORIUM

43. In January 2006, at the direction of the community and thereafter Chief and Council, the KI Lands and Environment Unit organized a community meeting between KI members and Platinex officials. Community members had made it clear to Chief and Council that this was a meeting in which the community as a whole should participate, in accordance with KI governance. Platinex cancelled the meeting at the last minute. According to Simon Baker of Platinex, the fact that KI members intended to voice opposition to Platinex's project meant that the meeting was not being held in good faith. Moreover, according to Mr. Baker, there had already been a community meeting six years earlier, and nothing, in his opinion, had fundamentally changed since that time.

Affidavit of Eno Chapman, paras. 9-14

Cross-examination of Simon Baker, p. 70, lines 11-18, 28-30, p. 71, lines 1-8

44. On or about February 16, 2006, it came to the attention of KI that Platinex was proceeding to establish a camp on Nemeigusabins Lake within their traditional territory.

Affidavit of Chief Morris, paras. 40-41

Affidavit of Eno Chapman, para. 15

45. KI expected Platinex and others to honour its moratorium, and thus its law. When Platinex failed to do so, by unilaterally hiring a drilling company to set up camp and proceed with drilling in KI's traditional territory without agreement in writing from KI, KI engaged in a lawful action of peaceful protest to demonstrate to Platinex its continued desire that Platinex honour KI's law and wishes.

Affidavit of Chief Morris, paras. 41-63, 66-70

Affidavit of Eno Chapman, paras. 18-23

Affidavit of Evelyn Quequish, paras. 5-9, 11-14

Affidavit of Sarah Jane Mckay, paras. 4-5

Affidavit of Mary Hudson, paras. 7-8

Cross-examination of Chief Morris, p. 90, Q. 525 (Re-exam)

46. KI took no action in Canada's legal system until it was served with Platinex's claim, which asserted a claim to more than \$10 billion in damages. At that point, KI made the strategic decision that it had to defend this claim and bring other legal action before the Canadian courts.

Cross-examination of Chief Morris, p. 54-55, Q. 295-296

47. Running through all this is KI's knowledge that Ontario had never adequately consulted with KI in respect of all the various authorizations that Ontario had issued to Platinex for pursuit of Platinex's activities in KI's traditional territory, and that strategic-level planning with Ontario and Canada, including in respect of selection of additional reserve lands, has yet to take place.

Affidavit of Chief Morris, paras. 13-14, 20

Affidavit of Evelyn Quequish, paras. 3, 9

Affidavit of John Cutfeet, para. 3

48. On March 24, 2006, Platinex issued a press release in reaction to the Province publishing consultation guidelines for the mineral extraction sector. In that release, Platinex stated that it was aware that consultation *by the government* has never occurred.

Affidavit of Chief Morris, Exhibit N, Platinex Press Release dated March 24, 2006

49. It is KI's belief that Ontario has allowed Platinex to proceed as it has, in contravention of KI's rights and interests.

Affidavit of Evelyn Quequish, para. 9

Affidavit of Chief Morris, para. 64

Affidavit of Eno Chapman, para 14, Exhibit B, English translation of statements of KI elders from a community meeting held May 12, 2006, p.2

PART III - ISSUES AND THE LAW

Issues

50. The issues are as follows:
- (a) Whether there is a serious issue to be tried.
 - (b) Whether failure to grant the injunction sought would cause irreparable harm to KI.
 - (c) Whether the balance of convenience favours granting the injunction to KI.
 - (d) Whether the requirement for an undertaking as to damages should be waived in this case.

Law

51. The three-pronged test for granting an injunction was affirmed by the Supreme Court in *RJR MacDonald v. Canada (Attorney General)* as follows:

Metropolitan Stores adopted a three-stage test for courts to apply when considering an application for either a stay or an interlocutory injunction. First, a preliminary assessment must be made of the merits of the case to ensure that there is a serious

question to be tried. Secondly, it must be determined whether the applicant would suffer irreparable harm if the application were refused. Finally, an assessment must be made as to which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits.

RJR MacDonald Inc. v. Canada (Attorney General), [1994] 1 S.C.R. 311, para. 43

52. The final analysis, however, must be driven by what is “just and equitable in all the circumstances of the case”.

British Columbia (Attorney General) v. Gitanmaax Band (B.C.C.A.), [1986] B.C.J. No. 1395, para. 51

A. SERIOUS ISSUE TO BE TRIED

53. The serious issue to be tried was described in *RJR MacDonald* as a low threshold; it is a preliminary assessment of the merits of the case such that the motions judge is satisfied that the application is neither vexatious nor frivolous. This standard has been generally adopted by Canadian courts with some modification from the English case *American Cyanamid*.

RJR MacDonald Inc. v. Canada (Attorney General), [1994] 1 S.C.R. 311, para. 49

American Cyanamid Co. v. Ethicon Ltd. [1975] A.C. 396 (H.L.), p. 510

1. The *Mining Act* as a Whole is Unconstitutional

54. A legal proposition KI puts forward in the main action is that Aboriginal and treaty rights are to receive priority over other interests that do not have constitutional status, and that the *Mining Act* regime fails to do this and is thus unconstitutional. The *Mining Act* regime permits a free-entry mining system which allows prospecting, claim staking, exploration, and mine development all without consideration of and according priority to Aboriginal and treaty rights. Further, the *Mining Act* regime provides far too much discretion to decision-makers under the Act, without any guidance as to how such discretion, in respect of impacts on Aboriginal and treaty rights, is to be exercised. The statutory regime is similar to that which was the subject of *R. v. Adams*:

In light of the Crown's unique fiduciary obligations towards Aboriginal peoples, Parliament may not simply adopt an unstructured discretionary administrative regime which risks

infringing Aboriginal rights in a substantial number of applications in the absence of some explicit guidance. If a statute confers an administrative discretion which may carry significant consequences for the exercise of an Aboriginal right, the statute or its delegate regulations must outline specific criteria for the granting or refusal of that discretion which seek to accommodate the existence of Aboriginal rights. In the absence of such specific guidance, the statute will fail to provide representatives of the Crown with sufficient directives to fulfil their fiduciary duties, and the statute will be found to represent an infringement of Aboriginal rights under the *Sparrow* test.

R. v. Adams, [1996] 3 S.C.R. 101, para. 54

See also:

R. v. Sparrow, [1990] 1 S.C.R. 1075, paras. 64, 77-79, 81

R. v. Van der Peet, [1996] 2 SCR 507 at paras. 242, 303, 307, 318, 319: Aboriginal rights are to be accorded priority, second only to conservation.

55. Therefore, any specific or implied authorization of Platinex's activities pursuant to the *Mining Act* is unconstitutional.

Constitution Act, 1982, s. 52(1)

2. Failure to Consult and Accommodate

56. A second legal proposition is that KI had and has the right to meaningful consultation with and accommodation by Ontario in respect of the various authorizations issued to Platinex under the *Mining Act* regime (in respect of claims, leases, exclusion of time and extension orders, etc.), and that Ontario has failed to date to meet its duty in this regard. Platinex's activities are in, and would adversely affect KI's traditional territory, and its harvesting rights, spiritual relationship with the land, and its culture. The duty to consult was recognized as a legal requirement, pursuant to s. 35 of the Constitution, as early as 1990, and has been affirmed by the Supreme Court of Canada in several cases since.

R. v. Sparrow, [1990] 1 S.C.R. 1075, para. 82

Delgamuukw v. British Columbia, [1997] 3 SCR 1010, para. 168.

Haida Nation v. BC (Minister of Forests), [2004] 3 SCR 511, paras. 16-25

Taku River Tlingit First Nation v BC (Project Assessment Director), [2004] 3 SCR 550, para 25

57. Further, Platinex's activities and the Crown's authorizations for these, could have adverse effects on KI's asserted right of additional reserve lands in its TLE land claim. The Supreme Court of Canada has held that the Crown has a duty to consult Aboriginal parties in respect of the latter's asserted claims.

Haida Nation v. BC (Minister of Forests), [2004] 3 SCR 511, paras. 26-27, 31-35, 44-46, 57-59

Taku River Tlingit First Nation v BC (Project Assessment Director), [2004] 3 SCR 550 , paras. 24, 30

58. Therefore, authorizations issued to Platinex for which the Crown breached its constitutional duty to consult with and accommodate KI, are void.

Musqueam Indian Band v. British Columbia (Minister of Sustainable Resource Management), [2005] 2 C.N.L.R. 212; [2005] B.C.J. No. 444 (BC CA), paras. 66-67 (court suspended sale of land authorized by Crown due to inadequate consultation with band)

3. Platinex's Infringement of KI's Treaty and Aboriginal Rights

59. A third legal proposition is that Platinex has itself infringed KI's Aboriginal and treaty rights, and would (absent an injunction granted to KI) further infringe KI's rights, in that its activities in KI's traditional territory adversely affect KI's harvesting rights, spiritual relationship with the land, and its culture. Platinex's activities will also intolerably disrupt KI's traditional way of life, and KI's efforts to preserve and resist further diminishment of its culture and identity.

Affidavit of Chief Morris, paras. 1, 3, 10, Exhibit A: "The James Bay Treaty – Treaty No. 9"

R. v. Sparrow, [1990] 1 S.C.R. 1075, paras. 56, 62-64, 70, 82

R. v. Badger, [1996] 1 SCR 771, paras. 13-14, 37, 73-77, 96-98 (in respect of treaty rights and infringements of same)

Hunt v. Halcan Log Services Ltd; Halcan Log Services Ltd v. Kwakiutl Indian Band, (1987) 34 D.L.R. (4th) 504, (BC SC), pp. 515-516

60. Platinex's mining-related activities infringe KI's spiritual practices and spiritual connection with the land, and thus violate KI's law and ethos in respect of same.

Lebel J. in *R. v. Marshall; R. v. Bernard*, 2005 SCC 43 at para. 130, citing Borrows, John, "Creating an Indigenous Legal Community" (2005) 50 McGill L.J. 153, in respect of the Aboriginal perspective constituting Aboriginal law.

See above paras. 18-20, 28, 40-43

B. IRREPARABLE HARM

1. General Test

61. The court is normally justified in granting an injunction where the plaintiff is likely to suffer irreparable harm in the absence of the order. In order to qualify as "irreparable", the nature of the harm must be such that damages will not suffice.

RJR MacDonald Inc. v. Canada (Attorney General), [1994] 1 S.C.R. 311, paras. 58 and 59

2. Irreparable Harm: Violations of or Effects on Treaty Harvesting Rights and KI's Relationship with the Land and its Identity

62. Courts have recognized negative effects on Aboriginal and treaty rights, or the ability to exercise such rights in the preferred way, as irreparable harm.

Relentless Energy Corporation v. Davis et al., 2004 BCSC 1492 (CanLII), para 23

MacMillan Bloedel Ltd. v. Mullin, [1985] B.C.J. No. 2355 (BC CA), paras. 49-57

63. To allow Platinex to proceed would infringe KI's harvesting rights, and its special relationship with the lands and thus its cultural rights. Hunting, trapping and fishing are not simply practices that non-Aboriginal people might regard as recreation. Harvesting, being on the land, living off the land, and spiritual beliefs and laws that govern the relationship with the land – are all at the very core of KI's identity. To infringe such rights is to strike at the every essence of who KI is as a people, and to deny KI its existence and survival. No amount of money can compensate for a loss and abuse of this magnitude.

R. v. Sparrow, [1990] 1 SCR 1075, para 82

Cross-examination of Dr. Paul Driben, p. 18, lines 12-30; p. 26, lines 18-30; p. 19, lines 25-30; p. 20, lines 1, 28-29; p. 21, lines 11-14 and 18-25; p. 27, lines 1-3; p. 28, lines 13-30; p. 29, lines 1-20; p. 30, lines 28-30; p.31, lines 1-22; p. 32, lines 1-7

64. Further, the impacts of Platinex's activities will be experienced by KI on the level of cumulative effects. The cumulative impacts analysis appreciates that the environmental impacts of a single project cannot be fully understood unless the broader context is also considered:

It is not illogical to think that the accumulation of a series of insignificant effects might at some point result in significant effects. I do not say that is the case here. I only observe that a finding of insignificant effects of the scoped projects is sufficient to open the possibility of cumulative significant environmental effects when other projects are taken into account.

Quoting Rothstein J. in *Friends of the West Country Assn. v. Canada (Minister of Fisheries and Oceans)* [1999] F.C.J. No. 1515 at para. 39, *Bow Valley Naturalists Society v. Canada (Minister of Canadian Heritage)* [2001] F.C.J. No. 18 at para. 48.

65. The opening words of Binnie J. in the landmark case of *Mikisew Cree First Nation* are applicable here:

The fundamental objective of the modern law of Aboriginal and treaty rights is the reconciliation of Aboriginal peoples and non-Aboriginal peoples and their respective claims, interests and ambitions. The management of these relationships takes place in the shadow of a long history of grievances and misunderstanding. The multitude of smaller grievances created by the indifference of some government officials to Aboriginal people's concerns, and the lack of respect inherent in that indifference has been as destructive of the process of reconciliation as some of the larger and more explosive controversies. And so it is in this case.

Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage), [2005] 3 S.C.R. 388 at para. 1

3. Irreparable Harm: Violation of KI's Aboriginal Law and Ethos

66. It is established constitutional law that the Aboriginal perspective must be considered alongside the common law perspective when deciding on issues pertaining to Aboriginal rights. But Aboriginal perspectives are not merely points of view, they are Aboriginal law. As such, they have become part of the constitutional law of Canada.

R. v. Van der Peet, [1996] 2 SCR 507 at paras. 42, 43, 49, 50, 145, 153, 171, 179 and 232.

Lebel J. in *R. v. Marshall; R. v. Bernard*, 2005 SCC 43 at para. 130, citing Borrows, John, "Creating an Indigenous Legal Community" (2005) 50 McGill L.J. 153:

The Aboriginal perspective shapes the very concept of Aboriginal title [and other rights]. "Aboriginal law should not just be received as evidence that Aboriginal peoples did something in the past on a piece of land. It is more than evidence: it is actually law. And so, there should be some

way to bring to the decision-making process those laws that arise from the indigenous people before the court (Borrows, at p. 173).

67. Since the “Aboriginal perspective” must be considered by the court when considering effects of decisions and actions on Aboriginal and treaty rights, the court must consider this perspective, and this law, when calculating harm to such rights in an injunction motion.
68. From KI’s perspective, its moratorium is a manifestation of KI’s own law, deriving from the Law of the Creator, which includes making decisions that ensure protection of KI’s traditional territory for this and future generations. KI cannot make such decisions without meaningful consultation, including at the strategic planning level. To defy the moratorium through permitting Platinex activities to proceed in this context, is, to KI, to defy the Law of the Creator. This is irreparable harm.
69. From KI’s “Aboriginal perspective” and under its own laws, money cannot compensate for disrespect and violations of its own identity, laws, traditions, relationship with the land, culture, and rights. Money cannot compensate for denial of its very existence and survival as a people, which to KI the most extreme form of irreparable harm.

4. Irreparable Harm: Threats to Social and Cultural Survival

70. Courts have been responsive to Aboriginal plaintiffs seeking injunctions to protect cultural and social survival:

These people have come to the law for relief and protection...[M]onetary damages cannot alleviate any wrong to the plaintiffs that may be established and perhaps, there can be no greater threat to any of us than a threat to one's family and social structure.

Muirhead, J. addressing the need for protection of Aboriginal secrets in *Foster v. Mountford and Rigby Ltd.* (1976) 14 A.L.R. 71, at p. 75, quoted in *MacMillan Bloedel Ltd. v. Mullin*, [1985] B.C.J. No. 2355 (BC CA), para. 73

71. The impacts of Platinex’s activities on KI’s traditional territory, its community, its relationship with the land, and its social and cultural fabric, will not be isolated in a vacuum. They will be added to cumulative effects KI and its traditional territory are already suffering.

72. While there are likely many factors contributing to the raft of serious social ills from which KI suffers (alcohol and drug abuse, suicide, family violence and breakdown, mental and physical illness), from KI's perspective, a major underlying cause of all of these is lack of control over the First Nation's fate and future, including in regard to uses of and harms to its traditional lands. This Culture Stress, including lack of control or voice (decision-making power) leads to feelings of powerlessness, which in turn can lead to hopelessness and despair and its manifestations in the form of many social ills, including suicide.

See above paras. 7-13

73. The stand taken by the community can become a symbol of a larger issue:

The Indians wish to retain their culture on Meares Island as well as in urban museums. The Indians have pressed their land claims in various ways for generations. The claims have not been dealt with and found invalid. They have not been dealt with at all. Meanwhile, the logger continues his steady march and the Indians see themselves retreating into a smaller and smaller area. They too have drawn the line at Meares Island. The Island has become a symbol of their claim to rights in the land.

MacMillan Bloedel Ltd. v. Mullin, [1985] B.C.J. No. 2355 (BC CA), paras. 54-55

74. The KI community has been galvanized by the issues around Platinex's exploratory activities. If at this point, exploration were to take place, they would compound the feelings of powerlessness and increase the level of culture stress.

5. Irreparable Harm: Violations of Rights to Consultation, Accommodation and Negotiation

75. The right to meaningful consultation, and any accommodation of the Aboriginal party's rights and interests flowing from this, when a proposed decision or activity would or could cause an adverse effect on Aboriginal or treaty rights, is well established law. Consultation and accommodation are not merely vacant procedural rights; this is not about chatting across a table. They are rights that, when respected, help ensure the Aboriginal voice is heard, the Aboriginal perspective and law is understood, that a meaningful role in decision-making and governance in respect of the Aboriginal party's own fate and future are honoured. The right to consultation, accommodation and negotiation about one's own existence and survival are recognition of the Aboriginal party's dignity. That is why the Supreme Court of

Canada has held that such rights derive from the need for reconciliation and respect for sovereignty – reconciling the assertion of British sovereignty with pre-existing Aboriginal sovereignty. Sovereignty is protection of the very identity and existence of a people, and control over one’s survival.

Put simply, Canada’s Aboriginal peoples were here when Europeans came, and were never conquered. Many bands reconciled their claims with the sovereignty of the Crown through negotiated treaties. Others...have yet to do so. The potential rights embedded in these claims are protected by s. 35 of the Constitution Act, 1982.

The honour of the Crown is *always* at stake in its dealings with Aboriginal peoples.... In *all* its dealings with Aboriginal peoples, from the assertion of sovereignty to the resolution of claims and the implementation of treaties, the Crown must act honourably. *Nothing less is required* if we are to achieve “the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown”. [emphasis added]

Haida Nation v. British Columbia (Minister of Forests), [2004] 3 SCR 511 at paras. 25, 16 and 17, citing *Delgamuukw v. British Columbia*, [1997] 3 SCR 1010, para. 186 and *R. v. Van der Peet*, [1996] 2 SCR 507, para. 31

76. Both the federal and provincial governments must consult the Aboriginal groups who would be adversely affected by their decisions or actions. They must consult when a right has already been proved through court or recognized by the Crown (through treaty, land claim agreement or similar instrument), as is the case with KI’s known treaty rights.

R. v. Van der Peet, [1996] 2 SCR 507 at paras. 42, 43, 49, 50, 145, 153, 171, 179 and 232

Huu-Ay-Aht First Nation et al. v. The Minister of Forests et al., 2005 BCSC 697, paras. 119-120

77. Governments must also consult when a claim has been asserted but not yet proved or recognized. Acceptance into a treaty negotiation process is sufficient to establish a prima facie claim to Aboriginal rights or title. The duty to consult in the case of asserted rights is grounded in the “honour of the Crown”, which is to be understood to reconcile the assertion of Crown sovereignty with self-governing Aboriginal societies.

Haida Nation v. BC (Minister of Forests), [2004] 3 SCR 511, paras. 16, 17, 25.

Taku River Tlingit First Nation v BC (Project Assessment Director), [2004] 3 SCR 550, para 24-25, 30

Huu-Ay-Aht First Nation et al. v. The Minister of Forests et al., 2005 BCSC 697 (BC SC), paras. 118-120

78. While there is a spectrum of consultation measures that the Crown might have to take – depending on whether the right is proved or asserted (and if asserted, depending on the strength of the claim), and on the seriousness of the harm or adverse effect on the right -- at all levels of consultation, the government's consultation measures have to be undertaken in good faith, with the intention of substantially addressing the Aboriginal party's concerns.

Delgamuukw v. BC, [1997] 3 SCR 1010 at para. 168.

79. To be meaningful (in the context of a land claim not yet resolved), consultation must take place at the level of strategic resource use planning.

Haida Nation v. BC (Minister of Forests), [2004] 3 SCR 511 at paras. 76.

80. Courts have held that the failure to be meaningfully consulted and obtain accommodation for treaty and Aboriginal rights qualifies as irreparable harm.

Relentless Energy Corporation v. Davis et al., 2004 BCSC 1492 (CanLII) at paras.16-17, 23

Homalco Indian Band v. British Columbia (Minister of Agriculture), [2005] 2 C.N.L.R. 63 (BC SC) at paras. 62-65,

81. The denial of an opportunity to negotiate the terms of mineral exploration is irreparable harm.

Musqueam Indian Band v. Canada (Governor in Council) [2004] 4 F.C.R. 391 (F.C.) (aff'd *Musqueam Indian Band v. Canada (Governor in Council)*, [2004] F.C.J. No. 1130 (F.C.)) at para. 52.

82. If Platinex is permitted to commence drilling now, then KI will lose for all time opportunities to: (1) be meaningfully consulted prior to mineral exploration, (2) negotiate the terms on which industrial activity may proceed and (3) be accommodated in terms of preservation (no despoliation) of the lands from which it

claims to be able to select additional reserve lands. These losses constitute irreparable harm.

6. Irreparable Harm: Threats to KI's Rights in its Land Claim

83. The final legal proposition put forward by KI in the main action is that Platinex's activities prejudice KI's rights and interests in the TLE land claim by effectively reducing KI's options as to which lands may be demarcated as the additional reserve lands.

84. The proposed exploration activities by Platinex are within KI's traditional territory, and therefore within the scope of the land claim. It is possible if not likely that any further working of these claims by Platinex would increase its private interests in such lands, with the result that Canada and Ontario will require that these lands be taken off the table (as lands from which KI can select additional reserve lands) in the land claim process.

“Private property is not on the table during the negotiations of specific claims. When a settlement agreement is negotiated, any land purchased as a result of a settlement is on a willing-seller/willing-buyer basis.”

Indian and Northern Affairs Canada, “Claims and Indian Government Sector: Specific Claims Branch”, available at <www.ainc-inac.gc.ca/ps/clm/scb_e.html> updated 2006-06-09, last visited 2006-06-19

C. BALANCE OF CONVENIENCE

85. Where both parties successfully argue that they will suffer irreparable harm (the moving party if the injunction is not granted and the responding party if the injunction is granted), the court may engage in a “determination of which of the two parties will suffer the greater harm from the granting or refusal of an interlocutory injunction, pending a decision on the merits.”

RJR MacDonald Inc. v. Canada (Attorney General), [1994] 1 S.C.R. 311, paras. 62, citing Beetz J. in *Metropolitan Stores* at p.129.

86. The balance of convenience test in this case has, on one side, harms to KI including: its constitutionally-protected treaty and Aboriginal rights, its own laws and ethos, its fight for cultural survival, its rights to consultation, negotiation and accommodation

as a form of protection of and respect for its governance and survival, and its asserted land claim rights. On the other side are potential economic harms to Platinex.

87. The balance of convenience favours granting an injunction enjoining Platinex since constitutionally-guaranteed Aboriginal and treaty rights should prevail over economic harm.

Relentless Energy Corporation v. Davis et al., 2004 BCSC 1492 (CanLII), para. 23

MacMillan Bloedel Ltd. v. Mullin, [1985] B.C.J. No. 2355 (BC CA, paras. 73-74

D. UNDERTAKING AS TO DAMAGES

88. Normally the Moving Party in an application for injunctive relief must make an undertaking as to damages in the event it is not successful at trial. Rule 40.03 states:

On a motion for an interlocutory injunction or mandatory order, the moving party shall, unless the court orders otherwise, undertake to abide by any order concerning damages that the court may make if it ultimately appears that the granting of the order has caused damage to the responding party for which the moving party ought to compensate the responding party.

Courts of Justice Act, Rules of Civil Procedure, R.R.O. 1990, Regulation 194 (Amended to O. Reg. 77/06), Rule 40.03

89. However, there is no inflexible rule that makes the undertaking a necessary element of a successful application for equitable relief.

Sharpe, Robert J., Injunctions and Specific Performance (Aurora, Ontario: Canada Law Book, Inc.) (looseleaf) November 2005, para. 2.500

90. Courts have granted injunctions to Aboriginal plaintiffs while not requiring that the plaintiff make an undertaking as to damages.

Pasco v. Canadian National Railway Co., [1985] B.C.J. No. 2818 (BC SC), para 42

MacMillan Bloedel Ltd. v. Mullin, [1985] B.C.J. No. 2355 (BC CA, para. 82

Homalco Indian Band v. British Columbia (Minister of Agriculture), [2005] 2 C.N.L.R. 63 (BC SC), paras. 75-76

91. KI cannot allocate any substantial funds towards a damage award. The Band already lacks sufficient funds for programs and housing. In fiscal 2004-2005, KI had a deficit of approximately \$700,000.

Affidavit of Levius Morris, para s. 5, 6, 10-15

92. KI requests that court exercise its discretion to grant the injunction against Platinex despite KI's inability to provide a substantial undertaking as to damages because to do otherwise would deny access to justice to KI on the basis of its lack of resources.

PART IV - RELIEF SOUGHT

KI seeks:

- (a) An interlocutory injunction enjoining the Plaintiff and its directors, officers, employees, contractors and agents, from engaging in its contemplated exploration program as described in paragraphs 23 to 25 of the Affidavit of James Trusler in the Plaintiff's Motion Record dated April 18, 2006, and in paragraphs 4, 13 to 27, 35 to 41 and related paragraphs in the Responding Affidavit of James Trusler sworn June 1, 2006, and any other activities preceding, incident or related thereto, on what the Plaintiff describes in paragraph 5 of his original Affidavit as the "Big Trout Lake Property" (all of which is the "proposed exploration").
- (b) Costs on a substantial indemnity basis.
- (c) Such further and other relief as this Honourable Court deems just.

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PLATINEX INC. and **KITCHENUHMAYKOOSIB**
Plaintiff **INNINUWUG et al.**
Defendant

Court File No: 06-0271

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced at Kenora under file 06-060, and transferred to Thunder Bay

**FACTUM OF KITCHENUHMAYKOOSIB
INNINUWUG, ET AL. ON PLATINEX
MOTION FOR INJUNCTION**

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