

## A judicial magic key opens land use talks

Judge plays referee to a junior miner and first nations group at loggerheads over mineral exploration

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When a crew of mining drillers drove down an icy stretch of road in a northern corner of Ontario last February, hopes were running high that they might prove a major platinum discovery for their employer, **Platinex Inc.**

Instead, the crew never made it to their small base camp.

Blocking their way was an angry group of the Kitchenuhmaykoosib Inninuwig (KI) First Nation who ordered the workers off land near their reservation at Big Trout Lake. Outnumbered, the crew retreated. Their base camp and airstrip were destroyed and a volley of lawsuits was unleashed, including a \$10-billion claim for damages from Platinex.

At first it looked as if Platinex was destined for the kind of legal purgatory that has paralyzed for years the progress of pipelines, mining and oil and gas explorations that venture into regions protected by first nation treaties. Even though junior companies such as Platinex carry government-issued mineral claims entitling them to explore treaty lands, they typically face years of legal skirmishes and negotiations to settle on terms for exploring, developing and sharing any profits with first nations groups.

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Adding to the tensions are frayed relations between governments and first nations groups who argue that their rights and claims are often ignored and overlooked by provinces and the federal government when they grant businesses rights to their lands.

Platinex and the KI, however, were able to fast-track their complaints thanks to what can only be called a legal miracle. Waving the magic wand was Mr. Justice George Smith of the northwest region of the Superior Court of Ontario.

In May, Judge Smith handed down an order that essentially gave the court a unique role as a kind of referee overseeing a consultation protocol that set conditions for Platinex, the KI and even the Ontario government to allow limited exploration to proceed almost immediately.

"This is a unique and creative order," said Neal Smitheman, an aboriginal law specialist at Fasken Martineau DuMoulin LLP, which represents Platinex. "The court magically found a way to deal with what could have been a lengthy standoff."

Sandra Gogal, an aboriginal law expert with Miller Thomson LLP, said the Platinex order helps clarify the rights of companies and first nations in land use disputes. Land use clashes are on the rise, she said, because demand for resources is pushing companies into more remote regions at a time when recent Supreme Court decisions are reinforcing the rights of first nations to be consulted about the terms and scope of exploration.

"Businesses have to change their attitudes. The courts are telling us that first nations have a right to be consulted and businesses and governments have to recognize that these rights have to be resolved up front," Ms. Gogal said.

As Platinex executives tell it, the company struggled in vain to negotiate exploration terms with the estimated 2,000 KI residents that live near Big Trout Lake. According to court documents, Platinex offered to hire an archaeologist to assure no burial or other historic sites were damaged by drills. It also offered to respect trap lines, hire community workers and share the drilling results and a percentage of future revenue from the project.

The offers, however, were rejected by the KI, its lawyer Kate Kempton said, because of an "atmosphere of frustration and mistrust" that overshadowed the talks. "The KI came to the table very wary of Platinex's intentions."

Fuelling KI's frustration was what she described as the Ontario government's unwillingness or indifference to fulfill their treaty obligation to consult with the aboriginals about development on their land.

Arguing that the KI lacks the experience, expertise and financial resources to properly assess the impact of mining exploration, the aboriginals asked the court to order Ontario to give it \$600,000 to fund studies and assessments of the drilling impact. The province, however, told the court it would only fund \$150,000 of the costs.

Underlining the tensions was the harsh reality that neither the junior mining company nor the small aboriginal group could afford a prolonged legal battle.

Like a parent wading into a sibling fight, Judge Smith ordered the two sides in early May to attempt reconciliation and reserved for the court the right to supervise or direct the talks. The order, Judge Smith said in his decision, "was to encourage the parties to continue a dialogue, with the hope that this would enhance mutual understanding."

His strategy worked. By May 18 the two sides were close enough for the judge to order that Platinex could proceed with the first phase of its drilling. The company could drill, he ordered, provided it honoured the terms of a protocol and memorandum of understanding that called for it to consult with the KI about its activities and commit to such terms as the hiring of an archeologist.

By giving Platinex the green light, Judge Smith eliminated an effective veto right first nations have held over exploration projects until all their demands are met.

In place of a veto, Judge Smith set a timetable to resolve a number of remaining issues such as the amount of money Ontario should be ordered to pay the KI for assessments and who should be on the hook for legal expenses.

While Judge Smith's creative solution found a shortcut around the legal roadblock, it is still unclear whether it was achieved in time for Platinex. The company had plans in February to raise money for drilling in Big Trout Lake through a private placement. The stock sale, however, was shelved after the KI roadblock and its lawyer Mr. Smitheman said the company is actively looking to raise money to pay for drilling that the court has allowed.

"It's a vicious circle," Mr. Smitheman said. "Platinex couldn't raise funds to drill until it resolved the aboriginal dispute and now that it is resolved it's looking for money to start the drilling."

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