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15.210

Not only may litigation of duty to consult cases produce no tangible or permanent remedies, but Aboriginal people may find themselves subject to injunctions to restrain their own attempts to enforce Aboriginal rights through protests and self-help. One case is particularly instructive in this regard and involved mining on lands claimed by a First Nation. The case started with litigation over the duty to consult and the First Nation was able to obtain an injunction temporarily to stop mining. That injunction was dissolved in part because the judge found that the First Nation had not acted reasonably in consultation and because of concerns that the mining company might go out of business if it was not allowed to mine. The court wanted consultation to continue, but the First Nation was concerned about its unequal bargaining power and was unable to obtain a funding order. Leaders of the First Nation took matters into their own hands and tried to restrain the mining themselves. The mining company obtained an injunction against Aboriginal protests and First Nation leaders were jailed for violating the injunction before being freed to allow negotiations to continue. In this case, the courts did not respond to the power imbalances between the First Nation and the combined forces of governments and corporations and they augmented the power of the latter by enjoining Aboriginal protests.[25] The result was not particularly conducive to advancing the honour of the Crown or achieving a just reconciliation. What started as an attempt to require the Crown to consult before mining was conducted on land claimed by the First Nation ended up with injunctions against Aboriginal protests and self-help remedies. If matters degenerate to such a stage, the Ontario Court of Appeal has warned that the police and judges should not take a simplistic approach that only focuses on law enforcement, but that they should consider Aboriginal experiences, perspectives and rights before granting such injunctions and when enforcing them.[26]....

Injunctions Against Aboriginal Protests

15.700

Injunctions against Aboriginal protests should be carefully considered and crafted because they may arise from contexts of historical injustice, past grievances and a failure of the Crown to implement a duty to consult. The Ontario Court of Appeal has in a number of important cases stressed the need to approach such injunctions in a careful and contextual manner. In a case arising from Aboriginal occupation of lands in Caledonia, the Court of Appeal held that a motions court judge had erred by "focusing on vindicating the court's authority through the use of the contempt power" as the only part of the rule of law. The rule of law also included "respect for minority rights, reconciliation of Aboriginal and non-Aboriginal interests through negotiations, fair procedural safeguards for those subject to criminal proceedings, respect for Crown and police discretion, respect for the separation of the executive, legislative and judicial branches of government and respect for Crown property rights".[119] In particular, the Court of Appeal stressed the important role of police and prosecutorial discretion in enforcing the injunction. The Ontario Court of Appeal has subsequently elaborated that:

> Where a requested injunction is intended to create "a protest-free zone" for contentious private activity that affects asserted aboriginal or treaty rights, the court must be very careful to ensure that, in the context of the dispute before it, the Crown has fully and faithfully discharged its duty to consult with the affected First Nations: see Julia E. Lawn, "The John Doe Injunction in Mass Protest Cases" (1998), 56 U.T. Fac. L. Rev. 101. The court must further be satisfied that every effort has been exhausted to obtain a negotiated or legislated solution to the dispute before it. Good faith on both sides is required in this process: *Haida Nation*, p. 532 S.C.R.[120]

This decision underlines how considerations of how the Crown has discharged or failed to discharge its duty to consult are inextricably tied up with decisions to grant injunctions against Aboriginal protests. There are examples of judges conducting this type of evaluation and still issuing injunctions.[121] At the same time, there are also examples of judges refusing to grant injunctions against Aboriginal protests after such considerations.[122] The Newfoundland Court of Appeal overturned a perpetual injunction against an Aboriginal blockade on cause of action grounds but only after indicating that the duty to consult did not

alter the principles that should be applied in such a context because violation of the duty to consult could always be alleged contrary to the idea that the duty does not provide a veto to Aboriginal peoples.[122a] In my view, proven violations of the duty of consult as opposed to mere allegations may be relevant to deciding whether to grant an injunction against Aboriginal protest.

15.710

One judge has distinguished the above cases decided by the Ontario Court of Appeal in cases dealing with "Idle No More" protests. Brown J. reasoned that the protests did not involve Aboriginal land claims, but only protests against federal government policy on Aboriginal issues.[123] In my view, it is difficult to make such clear distinctions. The injunctions in these cases were granted ex parte and is difficult to know the exact nature of the grievances that motivated the protesters. To the extent that the grievances were wide ranging, it is likely that concerns about land were involved. In any event, the Ontario Court of Appeal had indicated the need to consider not only Aboriginal land claims, but larger issues involving "respect for minority rights, reconciliation of Aboriginal and non-Aboriginal interests through negotiations"[124] when granting and enforcing injunctions against Aboriginal protests. It is also relevant that the Crown's duty to consult is triggered by a wide range of Aboriginal claims and is also not limited to land claims.

15.711

The Supreme Court has held that it was an abuse of process by Indigenous protesters to raise claims of violation of Aboriginal rights and breaches of the duty to consult as a defence to a tort action against their protests. The court in that case also held that the protesters did not have standing to raise a breach of the duty to consult because their actions had not been authorized by the relevant First Nation.[124a] Other courts have held even in cases where the standing of the protesters to raise s. 35 claims was not questioned and the First Nation had raised other legal challenges to the proposed action that it was an abuse of process to claim Aboriginal rights as a defence against an injunction to enjoin Aboriginal protests.[124b] This approach reflects the common law's hostility to self-help but may ignore the difficulties that Indigenous persons find themselves in fighting battles on multiple fronts as well

as their own law and practices, which may emphasize the duty of Indigenous people to protect sacred lands and the environment.

Footnotes

25 In one case, a First Nation at first obtained an injunction restraining mine drilling for five months. See *Platinex Inc. v. Kitchenuhmaykoosib Inninuwug First Nation* (2006), 2006 CarswellOnt 4758, 272 D.L.R. (4th) 727, [2006] 4 C.N.L.R. 152 (Ont. S.C.J.). That injunction, however, was not continued with the judge finding no irreparable harm to the First Nation and that the balance of convenience did not favour the continuation of the injunction. The judge also found that the First Nation had not acted reasonably in discharging its end of the duty to consult. At the same time, the judge issued an interim declaration outlining a duty to consult the First Nation under the supervision of the court. See *Platinex Inc. v. Kitchenuhmaykoosib Inninuwug First Nation* (2007), 2007 CarswellOnt 2995, 29 C.E.L.R. (3d) 116, [2007] 3 C.N.L.R. 181 (Ont. S.C.J.), additional reasons (2007), 2007 CarswellOnt 3553, 29 C.E.L.R. (3d) 191, [2007] 3 C.N.L.R. 221. The First Nation raised concerns that consultations could not take place on an equal footing because of its inability to pay costs, but did not obtain a funding order at that time, but instead judicial encouragement that the parties "continue to engage in meaningful, good faith discussions with a view to gaining an appreciation of the perspective of the other and achieving a long-term relationship based upon trust, respect, and understanding": *Platinex Inc. v. Kitchenuhmaykoosib Inninuwug First Nation* (2007), 2007 CarswellOnt 3553, 29 C.E.L.R. (3d) 191, *supra*, at para. 34. Six leaders of the First Nation were subsequently found and sentenced to six months' imprisonment for contempt of court for violating a court order that they not stop the mining: *Platinex Inc. v. Kitchenuhmaykoosib Inninuwug First Nation*, 2008 CarswellOnt 1421, [2008] 2 C.N.L.R. 301 (S.C.J.), varied 2008 CarswellOnt 3876, [2008] 3 C.N.L.R. 302, 91 O.R. (3d) 18 (C.A.), additional reasons 2008 CarswellOnt 5247, 2008 ONCA 620, [2008] O.J. No. 3481. The Ontario Court of Appeal released the protesters after counsel for the mining company informed the court that it would not be opposing the appeal because "the appellants have spent enough time in jail, the matter will ultimately be settled only through negotiation, and no good purpose would be served by keeping the appellants in jail any longer": *Platinex Inc. v. Kitchenuhmaykoosib Inninuwug First Nation*, 2008 CarswellOnt 3876, [2008] 3 C.N.L.R. 302, *supra*, at para. 3. See generally Rachel Ariss

and John Cutfeet, "Kitchenuhmaykoosib Inninuwug First Nation: Mining, Consultation, Reconciliation and Law" (2011), 10 Indigenous L.J. 1.

26 *Henco Industries Ltd. v. Haudenosaunee Six Nations Confederacy Council* (2006), 2006 CarswellOnt 7812, 277 D.L.R. (4th) 274, 36 C.P.C. (6th) 199, at paras. 141-143(Ont. C.A.); *Frontenac Ventures Corp. v. Ardoch Algonquin First Nation* (2008), 2008 CarswellOnt 3877, 295 D.L.R. (4th) 108, [2008] 3 C.N.L.R. 119 (Ont. C.A.) at para. 48, additional reasons 2008 CarswellOnt 5248, 2008 ONCA

119 *Henco Industries Ltd. v. Haudenosaunee Six Nations Confederacy Council* (2006), 2006 CarswellOnt 7812, 277 D.L.R. (4th) 274, 36 C.P.C. (6th) 199 (Ont. C.A.) at paras. 141-43

120 *Frontenac Ventures Corp. v. Ardoch Algonquin First Nation* (2008), 2008 CarswellOnt 3877, 295 D.L.R. (4th) 108, [2008] 3 C.N.L.R. 119 (Ont. C.A.) at para. 48, additional reasons 2008 CarswellOnt 5248, 2008 ONCA 621, leave to appeal to S.C.C. refused (2008), 2008 CarswellOnt 7322, 257 O.A.C. 400 (note). The Court of Appeal elaborated: "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": *supra*, at para. 46.

121 *Brantford (City) v. Montour* (2010), 2010 CarswellOnt 8805, 78 M.P.L.R. (4th) 230, 104 O.R. (3d) 429 (S.C.J.); *Nalcor Energy v. NunatuKavut Community Council Inc.*, 2012 CarswellNfld 431, 2012 NLTD(G) 175, 35 C.P.C. (7th) 388(Nfld. & Lab. S.C.).

122 *Canadian Forest Products Ltd. v. Sam* (2011), 2011 CarswellBC 1261, 6 C.P.C. (7th) 318, 2011 BCSC 676, reversed in part 2013 CarswellBC 329, 2013 BCCA 58, leave to appeal refused [2013] S.C.C.A. 146 (S.C.C.).

123 *Canadian National Railway v. Chippewa of Sarnia First Nation Band*, 2012 ONSC 7356, 2012 CarswellOnt 16519; *Canadian National Railway v. John Doe*, 2013 CarswellOnt 346, 2013 ONSC 113.

124 *Henco Industries Ltd. v. Haudenosaunee Six Nations Confederacy Council* (2006), 2006 CarswellOnt 7812, 277 D.L.R. (4th) 274, 36 C.P.C. (6th) 199 (Ont. C.A.) at paras. 141-43

124a The court concluded: "To allow the Behns to raise their defence based on treaty rights and on a breach of the duty to consult at this point would be tantamount to condoning self-help remedies and would bring the administration of justice into disrepute. It would also amount to a repudiation of the duty of mutual good faith that animates the discharge of the Crown's constitutional duty to consult First Nations. The doctrine of abuse of process applies, and the appellants cannot raise a breach of their treaty rights and of the duty to consult as a defence": *Behn v. Moulton Contracting Ltd.*, 2013 CarswellBC 1158, [2013] 2 S.C.R. 227, 2013 SCC 26 at para. 42.

124b *D.N.T. Contracting Ltd. v. Abraham*, 2016 CarswellBC 2906, 2016 BCSC 1917. Courts have also held that individual protesters do not have standing to raise Aboriginal rights as collective rights in their defence: *Canadian National Railway v. Brant*, 2009 CarswellOnt 3720, [2009] 4 C.N.L.R. 47 at 50, 96 O.R. (3d) 734 (Ont. S.C.J.), additional reasons 2009 CarswellOnt 5106; *9646035 Canada Limited v. Kristine Jill Hill*, 2017 CarswellOnt 14757, 2017 ONSC 5453 (Ont. S.C.J.) at 75.