

Mining Company Ordered by the Court to Stop Drilling

In the recent decision of the Ontario Superior Court of Justice, *Wahgoshig First Nation v. Ontario*, 2011 ONSC 7708, Solid Gold Resources Corp. (Solid Gold), a junior mining company, was ordered to stop its operations on affected First Nations territory. Justice Brown granted the Wahgoshig First Nation (Wahgoshig) an interlocutory injunction effectively halting any mining activity on lands affected by Wahgoshig treaties for 120 days from the date of the judgment, with an ability to extend the time period should Solid Gold and the Province of Ontario fail to consult and accommodate with Wahgoshig regarding future mining activity on the lands in a meaningful way within that time frame.

Background:

Solid Gold is a publicly traded mining exploration company with 103 unpatented mining claims that cover approximately 21,790 hectares (the Mining Claims). The Mining Claims were acquired by Solid Gold between 2007 and 2010 and lie within the territory in which Wahgoshig maintain Aboriginal and/or treaty rights. In 2009, the Crown advised Solid Gold that they should contact Wahgoshig to consult with them regarding the proposed mineral exploration on the Mining Claims. However, no consultation occurred and Solid Gold began drilling operations on the Mining Claims in the spring of 2011. The Crown again advised Solid Gold in November of 2011 that consultation must occur, but no such consultation took place.

The Decision:

Wahgoshig brought a motion to stop Solid Gold from mineral exploration on the Mining Claims. They argued that Solid Gold wilfully continued its operations despite the knowledge it was obligated to consult with, and accommodate the Wahgoshig. Solid Gold maintained that the *Mining Act* of Ontario establishes a free entry system whereby all Crown lands, including those subject to Aboriginal land claims, are open for prospecting and staking without any required consultation.

In assessing the motion, Justice Brown applied the three-part test for injunctive relief:

Is there a serious issue to be tried?

Solid Gold contended that the *Mining Act* establishes a free entry system and that any affected lands were surrendered by Wahgoshig and as such, there are no asserted rights on those lands justifying an injunction. Additionally, Solid Gold maintained that any duty to consult is the Crown's only and is not delegable. Wahgoshig argued that there are serious issues to be tried regarding their Constitutional, treaty and asserted rights over their traditional territories and Justice Brown agreed that these issues merit a hearing at trial. Additionally, Justice Brown held that although the ultimate legal responsibility to consult and accommodate lies with the Crown, this responsibility is delegable to third parties such as Solid Gold.

Irreparable Harm

Wahgoshig submitted that the mining activities threaten to, and may have already caused irreparable harm to sites of cultural and spiritual significance to them. Solid Gold took the position that there was no demonstrated irreparable harm and that evidence of such must be clear and not speculative. Justice Brown held that absolute certainty of irreparable harm is not always required and that the jurisprudence suggests that negative effects on Aboriginal and treaty rights and the ability to exercise such rights constitutes irreparable harm.

Additionally, the lost opportunity of Wahgoshig to be meaningfully consulted and obtain accommodation also satisfies the definition of irreparable harm. The jurisprudence demonstrates that the right to consultation and accommodation is well established at law, applies equally to surrendered lands, and industry proponents such as Solid Gold may be liable for their failure to do so. Since the evidence suggested that Solid Gold made a concerted, wilful effort not to consult, Justice Brown found that Solid Gold failed to meet industry standards for responsible exploration, did not demonstrate respect for Wahgoshig's rights and that damages would not suffice in this case as compensation.

Balance of Convenience

This aspect of the test requires a determination of which party will suffer the greater harm from the granting or refusal of injunctive relief. Wahgoshig submitted that the harms suffered by them cannot be compensated with damages. They contended that their right to meaningful consultation and accommodation, their spiritual and cultural relationship with the land and the survival of cultural sites favour the granting of the injunction. Additionally, Wahgoshig argued that this is a public interest case, since Aboriginal rights are enshrined in the Constitution and as such must be protected.

Solid Gold submitted that should the injunction be granted, they would be in serious financial jeopardy and that this harm is real and substantial compared with Wahgoshig's speculative assertions of harm. However, Justice Brown ruled in favour of Wahgoshig and found that it is in the public interest to ensure the Constitution and such rights afforded under it, including Aboriginal rights, are honoured and respected and found that the balance of convenience favours the granting of an injunction in this situation.

The Effect of the Decision:

This decision demonstrates that the free entry mining system of Ontario is limited by any Aboriginal consultation and accommodation requirements. In holding that Wahgoshig's rights to consultation are enshrined in the *Constitution Act, 1982* of Canada, Justice Brown overruled any legislative regime. Therefore, it is imperative that mining companies such as Solid Gold are vigilant in satisfying the requirements to consult and accommodate any affected First Nations groups. Indeed, this decision establishes that although the ultimate legal responsibility to ensure consultation and accommodation has occurred is the Crown's, the procedural aspect may be delegated to mining companies who can then be sanctioned for a failure to do so.