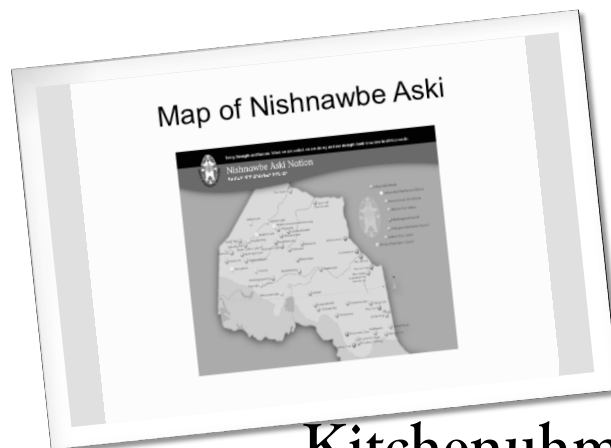


The Law in the Making and Unmaking of the Kitchenuhmaykoosib Inninuwig Struggle for the Right to Say No

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Kitchenuhmaykoosib Inninuwig (KI)

is an Ojibwa/Cree First Nation in Northern
Ontario, and signatory to Treaty No. 9.[map]

Background

- Platinex is an Aurora based junior mining exploration company holding Ontario issued mining claims and leases within the territory of the Kitchenuhmaykoosib Inninuwug.
- In May 2000, KI filed a Treaty Land Entitlement Claim with Ontario and Canada.
- The Platinex mining claims and leases fall within the area at issue in the KI land claim. The mining claims are in a pristine boreal forest on a significant travel-way that is used for community activities and where there are a number of culturally and spiritually significant sites.

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Chronology of the Struggle

- In August and November of 2005, KI leadership sent letters to Platinex indicating that KI strongly opposed any development.
- Platinex did not tell the investing public about these letters, and instead claimed that KI had consented to exploration.
- In February 2006, Platinex mobilized a drill team without consent from KI. After encountering peaceful protesters from KI, Platinex flew in a private corporate security consultant who organized the withdrawal of the drill team.

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Chronology of the Struggle-2

- In April 2006, Platinex went to court and sought a permanent order preventing KI from interfering with exploration activities, as well as \$10 Billion in money damages.
- KI counter-sued Platinex for damages, and sued Ontario for a declaration that the Mining Act is unconstitutional. KI claims that the Mining Act is unconstitutional because it does not recognize, prioritize and respect Aboriginal and Treaty rights, and does not provide for adequate consultation with First Nations peoples.

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The Three Laws

- Three legal systems converge on Kitchenuhmaykoosib Inninuwig territory. KI's own law; constitutional law, as reflected in Treaty 9, s. 35 and the duty to consult and accommodate; and finally, Ontario's Mining Act.

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1st Law - KI's Traditional Law

- The first, and most central, is KI's law which arises out of the community's relationship with the land.
- The concept of *Kanawayandan D'aaki* - to protect and to keep the land - this is understood as a sacred duty, and fulfilling this duty is part of community responsibility and identity.
- Law is not an institution, it is not separate from spirituality or daily life or a people's land.

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2nd Law - Aboriginal and Treaty Rights

- The duty to consult and accommodate arises when the Crown has some knowledge of the existence of an aboriginal right to title and “contemplates conduct that might adversely affect it”
- Accommodation is effected when concerns are demonstrably integrated into the proposed plan of action.
- The Crown is not able show such integration after it acts - it must be before the action.
- The honour of the Crown may requires it to consult with Aboriginal Peoples prior to making decisions

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The Crown's Duties

- The duty to consult as a spectrum
- The Crown's duty to consult and accommodate is one duty
- The honour of the Crown is the controlling question" in fulfillment of the duty.
- The honour of the Crown requires that the goal of consultation and accommodation is always reconciliation - every aspect of the duty is focused towards reconciliation

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3rd Law - Ontario's Mining Act

- "The purpose of this Act is to encourage prospecting, staking and exploration for the development of mineral resources and to minimize the impact of these activities on public health and safety and the environment through rehabilitation of mining lands in Ontario."
- A "free entry" system whereby all Crown lands, including those subject to aboriginal land claims, are open for prospecting and staking, without any consultation or permitting required.
- The Crown's role under the Act is simply to facilitate mining development.

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Three Laws Converge

- KI became aware of the Crown's duty to consult as arising out of its treaty relationship with Canada, its agreement to share the land, while Platinex was attempting to get agreement to its drilling plan.
- KI developed its own community consultation protocol, a process that reflects a consensus-based approach to community issues, as well as their rights under Treaty 9.

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The KI Consultation Protocol

- Aboriginal rights and law in Canada can be defined and have been defined not only through the British common-law and Canadian law, but also through First Nations jurisprudences.
- Informed primarily by their own fundamental principle of maintaining their sacred connection to the land, it still reflects a process grounded in the treaty, and a willingness to work with consultation and accommodation as explained by the courts.

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Conflict makes First Nations Law Visible

- When potentially useful guides to living together, such as concepts of aboriginal law as 'sui generis' as well as s. 35's recognition and affirmation of aboriginal rights, are interpreted through fights framed in narrow confines of private law and in terms of economic damages and contempt of court, these guides become limited, unable to live up to their invitational, inclusive promise.
- Despite its acknowledgment by the judge in the first decision, KI's consultation protocol was given no place in Canadian law.

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KI Decision July 2006

- This decision was based on the finding that KI may suffer irreparable harm due to its loss of culturally and spiritually significant land, and of its connection to the land, and limitation of which land might fulfill a possibly favourable ruling on its TLE claim. The judge here expressed an understanding of the importance of the connection to the land for KI.
- The judge found a public interest in encouraging the Crown to fulfill its duty to consult and accommodate Aboriginal Peoples when impacting their rights.
- The injunction was granted, however, on the following condition: "KI immediately shall set up a consultation committee charged with the responsibility of meeting with representatives of Platinex and the Provincial Crown with the objective of developing an agreement to allow Platinex to conduct its two-phase drilling project at Big Trout Lake but not necessarily on land that may form part of KI's Treaty Land Entitlement claim"

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KI Decision May 2007

- Judge defined the issue as “The scope of the duty to consult and the consideration of whether the Crown and by implication Platinex have fulfilled this duty is the question that more than any other lies at the heart of this case”
- The judge found that the consultation process between July 2006 and April 2007 had been helpful (para 152), and that Platinex’s last proposed MOU was “a reasonable and responsible beginning of accommodating KI’s interests and, at this point in time, is sufficient to discharge the Crown’s duty to consult.”
- Although the judge continued to recognize the aboriginal perspective on their connection to the land and the scope of the duty to consult and accommodate, he was unable to connect this perspective to “a recognizable legal right requiring protection”

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KI Decision October 2007

- In Oct 2007, Platinex sought a court order stating that Platinex could commence its drilling operation and ordering the KI community to do nothing to obstruct or prevent Platinex from drilling.
- In December, Platinex brought KI to court again for contempt of court.
- KI did not contest this finding – Chief Donny Morris explained that it did not mean to disrespect the court, but had to follow their own law as well as their understanding of what their rights were under Treaty 9.
- "I stand by the fact that the land I'm in, on now is our land. I believe God put us there. God have us a language, the animals to live off and we just don't want to see development on that area...As a treaty partner I expect to be treated as a partner, not, not where one is superior than us".

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KI6 Jailed March 2008

- On March 17, 2008, Justice Smith sentenced Chief Donny Morris, 4 members of the KI Council and a KI staffer to jail.
- The judge emphasized the rule of law as expressed in court orders - disobedience of court orders, public defiance, especially of court orders cannot go unpunished. The rule of law meant that the court had to uphold Canadian law. If there were 2 laws - one for aboriginal and one for non-aboriginals - the administration of justice would fall into disrepute, and there would be chaos.
- The courts cannot deliver justice for aboriginal peoples, because to do so would require them to question Canada's and thus their own jurisdiction.

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KI6 Freed May 2008

- The Court of Appeal ruling, recasts the dispute between KI and Platinex as a conflict of laws between s. 35 and the Mining Act.
- The rule of law is more than following court orders - there were other understandings of the rule of law that had to be taken into account.
- The Court of Appeal then, centres the conflict at the heart of the dispute as not one of disobedience to the rule of law; nor of conflict between First Nations traditional or cultural laws or perspectives with Canadian law, but of conflict between the mining act and the Crown's duty to consult, the Crown's obligation to respect s. 35.

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Limits and Lessons

- Not KI's choice to move to courts - SLAPP - shifted terrain of expressive protest, aboriginal rights on KI territory under the treaty to private notions of injunction and damages.
- KI were obliged to remind Crown of its duties; and more importantly, to enforce its own laws - laws that the government continues to ignore and misinterpret.
- References to legal obligations to consultation simultaneously explain and fail to explain the KI protest.
- A specific loss at court may still result in change - in KI's case, change to the Mining Act.