

Kitchenuhmaykoosib Inninuwug First Nation: Mining, Consultation, Reconciliation and Law

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In February of 2006, Platinex Inc., a junior mining company, set up a drilling camp on the traditional territory of Kitchenuhmaykoosib Inninuwug (KI), a remote First Nations community. Community members protested at the campsite as the company did not have their permission to explore. Platinex left, sued KI for \$10 billion, and requested an injunction against the protesters.

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The judge granted the First Nation's counter-claim for an injunction against the mining company. Over the course of several decisions, this injunction was lifted and another granted in favour of the company, and KI community members were found in contempt of court, jailed, and finally released by the Ontario Court of Appeal.

At least three legal systems converge on KI's traditional territory: Canadian constitutional law, Ontario's Mining Act, and KI's own law, Kanawayandan D'aaki. This paper analyzes the first two judicial decisions in the dispute between Platinex and KI for their recognition, or lack thereof, of KI's own law, as well as their contributions towards and away from reconciliation between Aboriginal and non-Aboriginal peoples. We explain how spaces were opened and closed to Aboriginal legal perspectives in these decisions. We argue that closing out Aboriginal legal perspectives is counter to s. 35 jurisprudence, and advocate that First Nations legal perspectives be recognized and applied as one step towards reconciliation.

I Introduction

This paper arises from a flashpoint in the struggle of Aboriginal peoples to have their communities, perspectives, rights and legal orders acknowledged and respected in Canadian law. In February of 2006, Platinex Inc., a junior mining company, set up a drilling camp on the traditional territory of Kitchenuhmaykoosib Inninuwug (KI), a small, remote First Nations community. As the camp had been set up without their consent, community members protested at the campsite. Platinex left, and then sued KI for \$10 billion. The parties appeared in the Ontario Superior Court of Justice in June of 2006, KI seeking an interim injunction against Platinex, to stop exploratory drilling on their traditional lands while waiting for the suit to come to trial. Justice Patrick Smith granted the injunction¹—a remedy very rarely awarded to Aboriginal litigants who object to resource development on their traditional lands—and thus the decision attracted the attention of government, First Nations communities and political organizations, industry, lawyers and academics.

Subsequent developments in the dispute led to a decision that several members of KI were in contempt of court, and they were jailed. This group became known as the KI Six. At the sentence appeal, the case of the KI Six was heard together with the case of Robert Lovelace of the Ardoch Algonquin First Nation (AAFN), who was jailed in a similar dispute over mining on

1 *Platinex Inc. v. Kitchenuhmaykoosib Inninuwug First Nation* 2006 CanLII 26171 (ON S.C.) [*Platinex v. KI* 2006].

the AAFN's traditional territory.² Both disputes were based on the groups' commitments to following their traditional laws. According to Chief Donny Morris of KI, and to Robert Lovelace of the AAFN, testifying in separate hearings, fulfillment of their own legal duties to the land played an important role in their individual decisions to act against court orders.

The Supreme Court of Canada has explained that "one of the fundamental purposes of s. 35(1) is the reconciliation of the pre-existence of distinct Aboriginal societies with the assertion of Canadian sovereignty".³ Reconciliation is partly accomplished through the elaboration of Aboriginal rights. The Supreme Court has stated that the Aboriginal perspective on Aboriginal rights must be applied along with the common-law perspective: "true reconciliation will, equally, place weight on each".⁴

Despite serious and convincing efforts by Aboriginal groups and individuals in legal disputes across Canada, Aboriginal perspectives hover on the margins of Canadian law—sometimes accepted, but not understood; sometimes understood, but not applied. John Borrows explains that "Legal principles derived from communities outside the cultural mainstream often encounter daunting obstacles before they are accepted".⁵ Without more effort towards developing understanding of Aboriginal perspectives on law and of law,⁶ without more willingness by the Canadian courts and governments to understand and apply Aboriginal legal perspectives to concepts of Aboriginal rights as well as to disputes such as that between Platinex and KI, it is unlikely that reconciliation⁷ can begin. This is why the acceptance (or not) by the courts of Aboriginal peoples' perspectives on the requirements of their own laws matters so much.

2 *Frontenac Ventures Corporation v. Ardoch Algonquin First Nation*, 2008 ONCA 534 [*Frontenac v. AAFN, ONCA*].

3 *R. v. Van der Peet* [1996] 2 S.C.R. 507 (CanLII) at ¶ 50 [*Van der Peet*]. This statement was quoted with approval in *Delgamuukw v. British Columbia* [1997] 3 S.C.R. 1010 ¶ 148 [*Delgamuukw*].

4 *Delgamuukw*, *supra* note 3 quoting *Van der Peet*, *supra* note 3 ¶ 41 at ¶ 148.

5 John Borrows, *Recovering Canada: The Resurgence of Indigenous Law*. (Toronto: University of Toronto Press, 2002) at 24.

6 *Ibid*, especially ch. 1, "With or Without You: First Nations Law in Canada."

7 "Reconciliation" is moving beyond the focus on reconciling sovereignty as expressed by the Supreme Court. The Indian Residential Schools Truth and Reconciliation Commission states that "The truth telling and reconciliation process as part of an overall holistic and comprehensive response to the Indian Residential School legacy is a sincere indication and acknowledgement of the injustices and harms experienced by Aboriginal people and the need for continued healing. This is a profound commitment to establishing new relationships embedded in mutual recognition and respect that will forge a brighter future." Online:<<http://www.trc-cvr.ca/overview.html>>. Paulette Regan writes "...reconciliation is not a goal but a place of encounter where all participants gather the courage to face our shared history honestly without minimizing the very real damage that has been done, even as we learn new decolonizing ways of working together that shift power and perceptions" in "An Apology Feast in Hazelton", Law Commission of Canada, ed. *Indigenous Legal Traditions* Vancouver: UBC Press, 2007 at 42.

The goal of this paper is to analyze the judicial decisions in the dispute between Platinex and KI for their recognition, or lack thereof, of KI's own law, as well as their contributions towards and away from reconciliation between Aboriginal and non-Aboriginal peoples. We begin by explaining the convergence of different legal systems—Anishnabe and Euro-Canadian—on KI's traditional territory. We then summarize the litigation. We ask what spaces have been opened and closed to Aboriginal legal perspectives in these decisions, and advocate that First Nations legal perspectives must be recognized, affirmed and applied as one step towards reconciliation.

II Legal Systems Converging on Kitchenuhmaykoosib Inninuwug Territory

At least three legal systems converge on KI territory. In this section, we discuss the intersections and clashes of this convergence. We begin with KI's own duty to protect the land—*Kanawayandan D'aaki*. This duty is both sacred and legal, in that it arises through the Creator's gift of the land as well as being a duty that KI is called to perform and fulfill. Next, we discuss Treaty 9, an historic agreement between equal partners, and s. 35 of the Canadian Constitution. We discuss these as a second legal system because together they offer the possibility of developing new post-colonial relationships between Aboriginal and non-Aboriginal Canadians. Finally, we explain Ontario's *Mining Act*,⁸ which elevates the province and the mining industry, with their modernist economic concerns, to the position of the only authoritative actors in land use decisions on KI's territory. The legal dispute between Platinex and KI manifests itself most clearly in the clash between Aboriginal rights as understood in the treaty and s. 35 jurisprudence, and Ontario's *Mining Act*, as these are most recognizable in Canadian courts. But we believe that it is only with understanding and application of KI's own legal order that a way beyond the dispute can be found.

The dispute was brought before the courts as a response to KI's assertion of its Aboriginal and treaty rights through *Kanawayandan D'aaki*. The community was well aware of the Euro-Canadian laws put in place to protect Aboriginal rights, and utilized them prior to this assertion. In KI's view, Treaty 9 promised that the community would continue to live as they had, gaining their sustenance from the land, and maintaining a relationship with the land that would ensure that sustenance. The KI leadership, over time, made several efforts to work within Canada's legal system of Aboriginal rights to ensure treaty promises were fulfilled. Long before Platinex set up their camp, the Aboriginal peoples of Canada, including KI, raised money to send representatives to Britain as part of the group that lobbied for protection of Aborigi-

8 *Mining Act*, c. M-14, R.S.O. 1990. [*Mining Act 1990*]. This version was in force during the KI-Platinex dispute.

nal rights and treaties before the repatriation of the Canadian Constitution in 1982. This lobby effort was a significant factor in the eventual inclusion of s. 35 in the Constitution, a clause that promised renewed attention to and respect for Aboriginal and treaty rights by federal and provincial governments.

As s. 35 jurisprudence began to develop, KI became aware of the Crown's duty to consult and accommodate. The Ontario government never communicated how a process of consultation and accommodation might be carried out. Thus, KI developed a process for how it wished to be consulted, and how the community would consult internally, in preparation for the Crown's fulfillment of this duty. KI filed a Treaty Land Entitlement Claim in 2000⁹ to push the federal and provincial governments into fulfilling promises made in Treaty 9 in 1929. It was only when Canadian jurisprudence protecting Aboriginal rights was ignored by Ontario, and Platinex's drilling program, with its potential to damage important sustenance, cultural and spiritual sites was underway in February 2006, that KI turned to the sacred law of *Kanawayandan D'aaki* in asking Platinex to leave the territory.

Kanawayandan D'aaki

James Youngblood Henderson explains that "First Nations jurisprudences are best studied in the context of Aboriginal languages, stories, methods of communication, and styles of performance and discourse, all of which encode values and frame understanding".¹⁰ These processes are the way to express and teach law to family and community: "The interwoven method of knowing learned and expressed through the oral and symbolic traditions and teaching provide a distinct consciousness and jurisprudence".¹¹ Aboriginal languages are key to gaining insight into Aboriginal cultures and jurisprudences, which are acknowledged as deeply interwoven. Like studying Euro-Canadian jurisprudence, years of attention and hard work are required.¹²

There are inherent challenges, then, in representing KI's perspectives in English, rather than their own language, *Anishiniimowin* (Oji-Cree). *Kanawayandan D'aaki* is a key concept in understanding KI's legal perspective on the

9 The TLE claim was formally filed on May 23, 2000. Notice of the filing was given in 1999. See Exhibit B to Affidavit of Chief Donald Morris, Motion Record of the Respondents, *Platinex Inc. v. Kitchenuhmaykoosib Inninuwug*, Court File No. 06-0271, Ontario Superior Court of Justice, May 16, 2006 [KI Motion Record, May 16, 2006].

10 James Youngblood Henderson, *First Nations Jurisprudence and Aboriginal Rights: Defining the Just Society* (Saskatoon: Native Law Centre, University of Saskatchewan, 2006) at 127.

11 *Ibid.*

12 See Borrows, *supra* note 5 at 25; also see 23-27. Henderson explains that study is required, but that First Nations jurisprudences are not text. Rather, there are various ways to communicate First Nations jurisprudential messages. Judges and lawyers can be open to these messages "by making a special effort actually or figuratively to listen, look, feel and so on." *Supra* note 10 at 176.

community's connection and duty to the land. John Cutfeet's explanation of *Kanawayandan D'aaki* here, in English, is supplemented by documents submitted by KI to the court for the hearings, including affidavits by community members and materials previously produced by the band council. The use of these affidavits poses another challenge: the particular shaping of perspectives into evidence distorts again the meaning of the words and the concepts, from *Anishiniimowin* to ordinary English, and then from ordinary English into legal forms. Henderson explains that attempts to translate "...First Nations jurisprudences and rights into common-law categories often brings with it a corruption, which favours the hardened prejudices against First Nations' jurisprudence".¹³ Yet the materials placed before the court represent the clearest voice of KI within the legal proceedings. Bringing them forward illustrates what the court did and did not understand, what it categorized as relevant and irrelevant, and opens the possibility of better understanding.

In First Nations' oral traditions, law is not a separate institution: "The diverse jurisprudences found in worldviews, languages, values and teachings are implicit, inherent, dramatic, epistemic and unwritten".¹⁴ This is an important difference between First Nations' and Euro-Canadian legal systems, in which law is idealized as separate from other social institutions, norms and cultural beliefs.

It is important to understand something of the land in order to understand KI's legal perspective. The people of KI see their connection with the land as central to their society, their way of life and to who they are. This connection is central to their law and their understanding of how to live. Kitchenuhmaykoosib Inninuwug territory is located south of the Hudson Bay coast, 600 km. northwest of Thunder Bay, Ontario. The community can only be reached by air. *Kitchenuhmaykoosib* means the big lake where the trout are found. *Inninuwug* means the people—put together it means the peoples of the big lake where the trout are found. The community lies on the northern shores of Big Trout Lake, a very large "headwater" lake covering 660 sq. km. Many small streams flow into the lake from the south, draining the height of land between the Severn and Asheweig Rivers. Big Trout Lake has several arms and islands. Its waters flow into the Fawn Rivers, and eventually into Hudson Bay. The land is a mixture of muskeg and boreal forest. The worn-down ridges of ancient mountains pepper the territory. Big Trout Lake, the smaller streams and rivers that flow into and out of it, the muskeg and wetlands surrounding and often connecting larger bodies of water, are all one system. KI elders have explained that although these waterways, rock ridges, thickly treed areas

13 Henderson, *supra* note 10 at 120.

14 *Ibid* at 121.

and wetlands are different, they are all connected. This interconnection is designed to ensure that the land, as an indivisible whole, remains healthy.

KI is home to approximately fifteen hundred people who live on and continue to utilize the land and the waters in the same way as their ancestors have for centuries. Most of the older people conduct their lives in *Anishiniimowin*. Some speak very little or no English. Many people are bilingual. While younger people are educated in English, some of them continue to speak *Anishiniimowin*. John Cutfeet describes listening to his mother speak *Anishiniimowin* as being led to a specific place while she speaks. Even for those younger people who may not have been out on the land as their elders were, speaking the language, and especially, listening to the elders speak the language, ingrains the land into their lives and identities. The land, the language and the people are intertwined.

The people of KI know that without the land, they would not have survived. It is important to understand the difference between the land as a resource and as a provider. The land provides because of the relationship between the people and the land. The land is not a passive resource from which certain things can be taken. It is not an object to be “managed” by cutting it up into discreet parts: trees, plants, minerals, rocks, water, animals.¹⁵ The land provides because of how it *is*—as a holistic, interconnected system in which every part plays a vital role towards the survival of the people.

As early as John can remember, his late father, Daniel Cutfeet, used his skills as a hunter, fisherman and a trapper to provide sustenance for his family just like his father and his father’s father before that. This land has supported generations of Cutfeet, generations of KI right to the present day. A culture built around hunting, fishing, trapping, gathering and harvesting activities requires intimate knowledge and respect for the very land that ensures the people’s very survival. Even confined to his wheelchair, John’s father guided him on where to set nets during certain times of the year by drawing maps. His knowledge of the fish and animal patterns in the lake and on the land came from exercising these skills he learned from his father and his father before him. This knowledge accumulated over generations, and Daniel Cutfeet understood and respected how this land had sustained countless generations before him. He knew what *Kanawayandan D’aaki* meant, and practiced this meaning. Practice is key to understanding *Kanawayandan D’aaki* as well as other Aboriginal jurisprudences. Henderson explains that Aboriginal jurisprudences, “[r]eflecting a vision of how to live well with the land and with

15 See “Keeping our Land in the way that has been handed on to use from our ancestors” The First Lands Report (2nd ed.) Big Trout Lake First Nation Self-Government Initiative, June 1993. Exhibit A to Affidavit of John Cutfeet, KI Motion Record, May 16, 2006 *supra* note 9.

other peoples, they reveal who First Nations are, what they believe, what their experiences have been and how they act”.¹⁶

Kanawayandan D'aaki is what the elders say when they give the next generation the original instructions to look after the land. Community members believe that being able to live from the land is important knowledge that needs to be shared with the younger generation: “I now live in the village of Kitchenuhmaykoosib Inninuwug, where I am an elder and traditional knowledge-holder. I help the Band with cultural programs. We are trying to show the young people our traditional ways”.¹⁷ A few years ago, several elders approached the band council and advised them to build cabins in a sheltered spot where food was plentiful, so that people had a place to go when and if they needed to hunt and fish. While some community members did not agree with this idea, the cabins are now well-used. The persistence of the community's connection to the land despite the social dislocation of colonialism and its legacies shows the depth of that connection.

Kanawayandan D'aaki means “looking after my land”, but most importantly, it means “keeping my land”. *Kanawayandan D'aaki* means that the people of KI have a sacred responsibility to look after the land, as well as a sacred duty from the Creator to fulfill it. This term represents the passing of the responsibility from generation to generation that ensured the survival of the people. John Cutfeet explains: “Our primary responsibilities as keepers of the land revolve around our spiritual mandate to preserve and protect it”.

As part of KI's internal consultation process about resource development, the band council's Lands and Environment unit surveyed about 1/7 of the community. One of the questions that people were asked was whether they or their family participate in traditional activities. The overwhelming response (199 of 222) was “Yes”. The interviews showed that the people of KI are closely connected to the land through a variety of traditional practices, ranging from hunting and gathering to practicing their traditional beliefs on the land: “People feel that they have a closeness to their living relatives and a stronger connection to people who have passed on to the spirit world when they are on their lands”.¹⁸ This spiritual aspect of the connection to the land is significant to understanding the strength of the duty evoked by *Kanawayandan D'aaki*.

16 Henderson, *supra* note 10 at 122. Henderson explains the structures of First Nations jurisprudences, how they are taught and learned and their centrality to living a good life, at 119-176.

17 Affidavit of Sona Sainnawap, Supplementary Motion Record of the Respondents, *Platinex Inc. v. Kitchenuhmaykoosib Inninuwug*, Court File No. 06-0271, Ontario Superior Court of Justice, May 23, 2006 [KI Supplementary Motion Record, May 23, 2006].

18 Kitchenuhmaykoosib Inninuwug, Lands and Environment Unit, Resource Development Related Activities, Kitchenuhmaykoosib Tasheekawin / Aaki Survey Report, Nov. 2004, at 2-3, attached as Exhibit H to Affidavit of Chief Donald Morris, KI Motion Record, May 16, 2006 *supra* note 9.

Kanawayandan D'aaki revolves around the concept of keeping and protecting the land that was given to the people. It is important to understand the depth of the threat to the land posed by Platinex's mining exploration plans, through understanding the interconnection between the proposed drill area and the Big Trout Lake ecosystem.

Platinex's proposed drilling area was in and around the shores of Nemeigusabins Lake, which lies about 20 km south of Big Trout Lake, and 40 km from the village. Its waters flow into Big Trout Lake through the Nemeigusabins River. This area, where the community fishes and hunts for duck, geese, moose and caribou, is part of KI's traditional territory. A 1985 survey found that between 31% and 60% of local households that engaged in hunting, trapping and fishing used the area around Nemeigusabins Lake.¹⁹

Exploration drilling is often described by prospectors as "low impact".²⁰ This description is only accurate when compared to full-scale mining. Exploration drilling includes cutting a swath through the forest, known as line cutting. It also includes digging trenches, setting up drill pads, transporting fuel and equipment into a site, with the accompanying noise and exhaust of machinery, setting up camp, storing fuel and equipment, and disposing of waste.²¹ Such activity is disturbing to wildlife. Helicopter flights are particularly disturbing to moose and caribou—the hunt was disrupted several years ago when DeBeers flew helicopters over this area.²² Platinex's proposed diamond drilling plan was in two phases, the first consisting of 3 drill-holes (5 cm. in diameter). Phase two consisted of 11 additional drill holes. The first phase would have covered approximately 600 m (total depth) of drilling, with an additional 3100 m of drilling in the second phase, with both phases spreading over 50 sq. km.²³ The KI community is concerned about the risks of this activity—possible fuel spills or leaks, drilling fluid spills or leaks, and improper disposal of waste pose a risk to the water in this area.²⁴

The Chief of the Band Council, Donny Morris, explains that:

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- 19 Kayahna Tribal Council, *Kayahna Region Land Utilization and Occupancy Study* (Kayahna Tribal Council and University of Toronto Press, 1985).
 - 20 Form 2B Listing Application for Platinex Inc., October 28, 2005 at pp. 34-35. Application for listing of Shares of TSX Venture Exchange, Exhibit C to Affidavit of Chief Donald Morris, KI Motion Record, May 16, 2006, *supra* note 9 at p. 38. Also see *Platinex v KI 2006*, *supra* note 1 ¶ 25, for quotation of "low impact" statement.
 - 21 Northwatch and Mining Watch Canada, *The Boreal Below: Mining Issues and Activities in Canada's Boreal Forest* May 2008. Online: <www.miningwatch.ca/sites/miningwatch.ca/files/Boreal_Below_2008_web.pdf> at pp. 13-15.
 - 22 Affidavit of John Cutfeet, KI Motion Record, May 16, 2006, *supra* note 9.
 - 23 Form 2B Listing Application for Platinex Inc., October 28, 2005 at pp. 34-35. Application for listing of Shares of TSX Venture Exchange, Exhibit C to Affidavit of Chief Donald Morris, KI Motion Record, May 16, 2006, *supra* note 9. Also see *Platinex Inc. v. Kitchenuhmaykoosib Inninuwug*, 2007 CanLII 16637 (ON S.C.) at pp. 32-35. [*Platinex v. KI 2007*] ¶ 127-128 for a brief description of the two-phase drilling program.
 - 24 See Northwatch and Mining Watch Canada, *supra* note 20.

The food we get from the land, which includes fish, moose, caribou, geese, ducks and other fowl, provides us with much-needed nutrients and protein. This food from the land also serves a central role in our culture. It is brought to our elders for distribution amongst our people... Anything that may disrupt this fragile system, our sacred relationship with and stewardship of the land, the safety of our drinking water, or our ability to hunt, fish and trap is of great concern to our people, who live in circumstances best described as marginal.²⁵

The relationship of sustenance in the Nemeigusabins Lake area is supported by the spiritual relationship. According to elder Sarah Jane MacKay, there are several burials located near the proposed drill sites. Some of the people died within living memory, others are unknown. These burials likely reflect traditional places for honouring the dead: two ancient skeletons have been found on the northern shores of Big Trout Lake, and several others to the east at Wakapeka Lake.²⁶ Another ancient skeleton was discovered in the fall of 2009.²⁷ Disturbances to the spiritual and cultural values of the area are a significant threat to the KI community's ability to fulfill its duty to keep and protect its land.

But the people of KI not only desire to remain connected to their land, they also have a responsibility to sustain that connection. As Patricia Monture-Angus explains, "The Aboriginal view of land rights encompasses both a notion of time as occupation (past, present and future) and a notion of spiritual occupation or connection....The relationship to land is seen not solely as a right but equally as a responsibility".²⁸ John Cutfeet explains his own developing awareness of what is required to maintain the connection between the community and its territory:

Jemima Morris [an elder]...spoke with me while I was living in the city. She said, "*kuhoshehtoon shakeh, daaki*". I didn't understand or know why she was telling me this, as I've lived away from the community most of my adult life. I had only participated in traditional land activities until I was in my late teens. She was telling me that I had to create or make my land. I came to understand later that I had to create my environment with everything that was around me. What she was telling me was that I had the authority to be able to do that. That is a very empowering statement coming from an Elder.... It is with this knowledge in 1999 when I became part of the leadership under the Chief and Council system that I became responsible for the Lands and Environment portfolio. It is at that time that our community began to look at laws that would help us protect and preserve Kitchenuhmaykoosib lands for future generations.

25 Affidavit of Chief Donald Morris, KI Motion Record, May 16, 2006, *supra* note 9.

26 Scott Hamilton and El Molto, "A 5,000 year old burial at Kitchenuhmaykoosib Inninuwig. Big Trout Lake, n. Ontario" [poster] BTL posterCAAfinal.pdf online: <www.anthropology.lakeheadu.ca/projects/bigtroutlake/docs/global/>.

27 Scott Hamilton, pers. comm. October, 2009.

28 Patricia Monture-Angus, *Journeying Forward: Dreaming First Nations' Independence* (Halifax: Fernwood Press, 1999) at 57.

Kanawayandan D'aaki—looking after my land, keeping my land—is what is legally required of KI, if the sacred connection between the land and the people is to be maintained. The KI community has to do what it can to protect the land, because the land *is* the community. That is what the invocation of *Kanawayandan Daak'i* means.

Treaty 9 and Section 35 of the Canadian Constitution

Kitchenuhmaykoosib is the site where the adhesion to Treaty 9 was signed on July 5, 1929. The treaty adhesion became a mechanism through which KI would engage with the newcomers to this land. In 1982, section 35 (1), “The existing aboriginal and treaty rights of the aboriginal people of Canada are hereby recognized and affirmed”, became part of the new Canadian Constitution.

Treaty 9 and section 35 jointly present opportunities for re-visioning Canada through constructing its laws in a way that recognizes and includes First Nations jurisprudence. Treaties are sacred documents to those First Nations communities who are signatories to them.²⁹ The Royal Commission on Aboriginal Peoples explains that honouring historical treaties, as well as willingness to negotiate new treaties, is part of reconciliation between Aboriginal and non-Aboriginal peoples in Canada.³⁰ Treaty 9 is a foundational document for KI’s relationship with Canada and Ontario, and it carries on the tradition of treaty-making between nations which was established long before and continued after the arrival of Europeans. Section 35 promises to recognize and affirm the treaties, and opens up an understanding of Aboriginal rights that exist outside of the treaties.

While the court was not called upon to interpret Treaty 9, the Treaty shapes KI’s perspectives on the proper relationship between the community, the Canadian and Ontario governments and others in the province. John Cutfeet’s grandmother Marion Anderson, an Order of Ontario recipient, then 16, and her best friend, Jemima Morris, then 12, were present at the signing of the treaty adhesion in Kitchenuhmaykoosib. John explains that his grandmother

...understood the rights that came from the treaty promises had to be respected; they were sacred.

What made them sacred was the language—using God’s creation to symbolize how long the treaty commitments would last. To get Kitchenuhmaykoosib Inninuwig support, the Treaty Commission said that these commitments would remain for “as long as the sun shines, the rivers flow, and the grass grows”. Kitchenuhmaykoosib Inninuwig recognizing the supremacy of God, who created

29 Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples: Restructuring the Relationship (Vol. 2)*, 1996, Part One, Chapter 2, “Treaties” at 4-5 and 10.

30 *Ibid.*

the sun, water, moon and stars in the heavens, the earth and all creatures including man, understood this to mean that these promises would last forever. Marion Anderson heard these words but you do not see this commitment reflected in the treaty document.

The use of spiritual language, reflecting the consistency of the natural world, made the treaty significant and worthy of respect for KI. The terms in which the commissioners spoke showed some awareness of the relationships between KI, the land and their own law. But the Treaty Commission arrived with the papers already completed, minus the signatures—and the paper written in English only. Although the document was not translated at the signing, the words spoken at the time were translated and that is what KI understood to be the content of these documents. The oral agreement is the basis for sharing the land and “all that it possesses”. Across northern Ontario, the Treaty Commissioners were not permitted to change any of the wording in the document, even if their oral explanations of the treaty were not actually supported by its text.³¹

There was another pressing reason why KI’s forefathers signed the Treaty 9 adhesion. They wanted to stop the harassment of KI hunters, trappers and fishermen by the then Department of Lands and Forest. This harassment, as well as the encroachment of early miners and loggers, put KI’s capability to sustain itself at risk. Sampson Beardy wrote from Big Trout Lake in the spring of 1928 asking to be included in the treaty. Provincial constables had been enforcing “Game Laws” that restricted the people from selling furs trapped “out of season”. Sampson Beardy explained that “since these laws have been laid upon our people their circumstances have become worse, until now it seems some will hardly survive the winter”.³² It is clear in the written and oral historical record that Aboriginal peoples across northern Ontario signed Treaty 9 to preserve their way of life, and get some protection from the constables, miners, loggers and settlers.³³

Most Aboriginal groups approached to sign Treaty 9 were concerned as to whether they could continue to hunt, trap and fish as they had, on signing. The Treaty Commissioners made oral promises, in both 1905 and 1929, that adhering to the Treaty would not restrict the people from earning their living as before.³⁴ Commissioner Duncan Campbell Scott made such a promise to Chief Missabay at Osnaburgh in 1905-06 in response to Missabay’s concern

31 Shin Imai, “Treaty Lands and Crown Obligations: The ‘Tracts Taken Up’ Provision” (2001) 27 *Queen’s L.J.* 1-49 at ¶ 1 QL.

32 As quoted in James Morrison, *Treaty Research Report, Treaty No. 9 (1905-06)*, Treaties and Historical Research Centre, INAC, 1986. online: <www.ainc-inac.gc.ca/al/hts/tgu/pubs/t9/tre9-eng.pdf> at p. 52.

33 *Ibid* at 36; also see Imai, *supra* note 31 at ¶ 22.

34 Imai *supra* note 31 at ¶ 4, 23.

that signing Treaty 9 would force his people to live on the reserve and restrict their hunting.³⁵ Scott said, “their fears in regard to both these matters were groundless”.³⁶ Moses Fiddler recalled that in 1929, “When the representatives came to our village in Big Trout Lake to sign the Treaty with our leaders, we were promised that our traditional activities would be protected”.³⁷

The reassurances given by the Commissioner communicated the idea that the First Nations would live as they had before the settlers came. These were in contrast to the bold textual assertions that the Aboriginal groups signing the treaty did “cede, release, surrender and yield up to the government of the Dominion of Canada...for ever, all their rights titles and privileges whatsoever, to the lands included within the following limits” and agreed that hunting and livelihood rights may be limited in “...such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes”.³⁸ The text itself remains silent on several issues—among them, the rights of First Nations to continue to govern themselves. The KI community did not give up the right to govern themselves according to their own laws, in signing the treaty. Similar contrasts surround many of the historical Treaties.

Section 35 was first interpreted by the Supreme Court in 1990.³⁹ *R. v. Sparrow* explains that Parliament cannot have extinguished any Aboriginal right through regulation unless its intention was clear, and focuses on how the Crown can justify legislative infringement of Aboriginal rights under section 35. One sentence in the decision, which suggests that one of the factors that may show justification of an infringement is “whether the Aboriginal group in question has been consulted with respect to the conservation measures [ie: legislative infringement] being implemented”,⁴⁰ has given rise to a new doctrine known as the duty to consult and accommodate.

Attempts to apply and avoid this duty played a key role in the dispute between Platinex and KI, particularly after Ontario was added as an intervenor. We believe that there is further to go than espousing the duty to consult and accommodate, legally, politically and practically, in constructing a relationship between First Nations and Canadian governments that might truly

35 *Ibid* at ¶ 4.

36 As quoted in Morrison, *supra* note 32 at 33.

37 As quoted in Jacqueline Hookimaw-Witt, *Keenebonanoh Keemoshominook Kaeshe Peemishikhik Odaskiwakh (We Stand on the Graves of Our Ancestors): Native Interpretations of Treaty #9 with Attawapiskat Elders* (MA Thesis, Trent University 1998) [unpublished] at 63 (Interview conducted by Nishnabe-Aski Nation in 1974).

38 “James Bay Treaty-Treaty No. 9-Articles”, The James Bay Treaty-Treaty no. 9 (Made 1905 and 1906) and Adhesions made 1929 and 1930, Indian And Northern Affairs Canada, online: <www.ainc-inac.gc.ca/al/hts/tgu/pubs/t9/trty9-eng.asp#chp5>.

39 *R. v. Sparrow*, [1990] 1 S.C.R. 1075 1990 (CanLII) [*Sparrow*]. For commentary on *Sparrow*, see Monture-Angus, *supra* note 28 ch. 4 “The Supreme Court Speaks to Aboriginal Rights: Colonial Reminders.”

40 *Sparrow*, *supra* note 39 at 46.

recognize and affirm Aboriginal rights. An explanation of the doctrine of the duty to consult and accommodate, however, helps to understand the shape the dispute took once it was in court.

The Supreme Court decision in *Delgamuukw* focused the comment in *Sparrow* towards honourable, good faith negotiations between the Crown and Aboriginal peoples as the path to reconciliation.⁴¹ Recently, the BCCA decision in *Halfway River*,⁴² and the Supreme Court of Canada decisions in *Haida Nation*,⁴³ *Taku River Tlingit*⁴⁴ and *Mikisew Cree*⁴⁵ have elaborated on aspects of the duty to consult with Aboriginal peoples, and accommodate the exercise of their rights, with a goal of minimal impact on those rights. These duties are based in the honour of the Crown and built on the constitutional promises of s. 35 to recognize and affirm existing 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 title⁴⁶ or treaty right⁴⁷ and “contemplates conduct that might adversely affect it”.⁴⁸ Binnie J., in *Mikisew*, approved of the trial judge’s comments that “it is not consistent with the honour of the Crown, in its capacity as fiduciary, for it to fail to consult with a First Nation *prior* to making a decision that infringes on constitutionally protected treaty rights”.⁴⁹ In *Taku River*, the court emphasized that the honour of the Crown requires it to consult with Aboriginal Peoples *before* making decisions, and that “This in turn may lead to a duty to change government plans or policy to accommodate Aboriginal concerns. Responsiveness is a key requirement of both consultation and accommodation”.⁵⁰

Justice McLachlin describes the duty to consult as a spectrum in *Haida Nation*—ranging from giving notice, disclosing information and discussing to “deep consultation, aimed at finding a satisfactory interim solution”.⁵¹ Importantly, Justice McLachlin makes these comments following her discussion of the statement in *Delgamuukw* that only rare cases required the minimum standard, while most cases would require something “significantly deeper than mere consultation”, and that some “...may even require the full consent of an aboriginal nation, particularly when provinces enact hunting and fishing

41 *Delgamuukw*, *supra* note 3, especially at ¶ 186.

42 *Halfway River First Nation v. British Columbia*, 1999 BCCA 470 (CanLII) [*Halfway River*].

43 *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511 (CanLII).

44 *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] 3 S.C.R. 550 (CanLII) [*Taku River*].

45 *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)* [2005] 3 S.C.R. 388 (CanLII).

46 *Haida Nation*, *supra* note 43 at ¶ 35, also see *Halfway River*, *supra* note 39.

47 *Mikisew Cree*, *supra* note 45 at ¶ 34.

48 *Haida Nation*, *supra* note 43 at ¶ 35.

49 *Ibid* at ¶ 67-68. Justice Binnie’s emphasis.

50 *Taku River*, *supra* note 44 at ¶ 25.

51 *Haida Nation*, *supra* note 43 at ¶ 44.

regulations in relation to aboriginal lands”.⁵² Justice McLachlin is, however, like most judges dealing with section 35, careful to state that “Aboriginal groups do not have a veto over what can be done with land pending final proof of the claim”⁵³ reflecting *Delgamuukw*’s statement that “section 35 rights are not absolute”.⁵⁴ The conflict between these two statements in *Delgamuukw* (“full consent” and “not absolute”) may arise from the narrowing of s. 35’s protection of Aboriginal rights as they moved from *Sparrow*, where the right dealt with was fishing for ceremonial and food purposes, to *Gladstone*,⁵⁵ where the right dealt with was the right to fish commercially, and affirmation of Aboriginal rights was seen to pose a real threat to non-Aboriginal use of resources.⁵⁶ Others have commented that the range of consultation expressed in *Delgamuukw*, from “mere consultation” to “full consent”, reflect the range “of possible fair procedures under the doctrine of procedural fairness” where ‘consent’ is meant to equal the full judicial hearing of procedural fairness.⁵⁷

An example of insufficient consultation is found in *Mikisew Cree*. Public notice of an open house to discuss a road planned by Parks Canada through *Mikisew* traditional territory was insufficient.⁵⁸ In *Taku River*, however, Tlingit participation in the project review committee under the B.C. *Environmental Assessment Act*, including deciding on project review process,⁵⁹ several information exchange meetings with the mining company,⁶⁰ and a traditional land use study,⁶¹ was seen as fulfilling the Crown’s duty to consult and accommodate. This was because this *Act* had specific provisions for consulting with Aboriginal peoples.

The duty to consult and accommodate is a positive duty on the Crown.⁶² Consultation is spoken of as a process that may give rise to accommodation in stages: “When the consultation process suggests amendment of Crown policy,

52 *Ibid* ¶ 40, quoting *Delgamuukw*, *supra* note 3 ¶ 186.

53 *Haida Nation*, *supra* note 43 ¶ 48.

54 *Delgamuukw*, *supra* note 3 ¶ 160.

55 *R v. Gladstone*, [1996] 2 S.C.R. 723.

56 Gordon Christie, “Judicial Justification of Recent Developments in Aboriginal Law” (2002) 17 *CJLS* 41-71, especially at 52- 61.

57 Isaac and Knox suggest that where Aboriginal groups and the Crown cannot reach agreement following consultation, a full hearing before court on the adequacy of the governments’ consultative process and actual accommodations is what was meant by the reference to “full consent” in *Delgamuukw*. This argument is grounded in the idea that the duty of consultation arises from the historical courts of equity. Thomas Isaac and Anthony Knox, “The Crown’s Duty to Consult Aboriginal People” (2003) 41 *Alta. L. Rev.*, 49-77 at ¶ 40-44 (QL). But in *Halfway River*, *supra* note 42 consultation is seen as a substantive requirement under the justification for infringement test, ¶ 159.

58 *Mikisew Cree*, *supra* note 45 ¶ 68.

59 *Taku River*, *supra* note 44 ¶ 34.

60 *Ibid* ¶ 35.

61 *Ibid* ¶ 37.

62 *Halfway River*, *supra* note 42 ¶ 160.

we arrive at the stage of accommodation. Thus the effect of good faith consultation may be to reveal a duty to accommodate”.⁶³ We think this is a procedural separation rather than a conceptual separation of consultation and accommodation as separate duties. The concept of a spectrum supports understanding consultation and accommodation as intertwined. Even at the low end of the spectrum, “Meaningful consultation may oblige the Crown to make changes to its proposed action based on information obtained through consultations”.⁶⁴ Justice Binnie approves of this interconnection in *Mikisew Cree*:

The Crown’s duty to consult imposes on it a positive obligation to reasonably ensure that aboriginal peoples are provided with all necessary information in a timely way so that they have an opportunity to express their interests and concerns, *and to ensure that their representations are seriously considered and, wherever possible, demonstrably integrated into the proposed plan of action*.⁶⁵

All of the Supreme Court decisions state that for the Crown to consult without any intention of accommodating would render the consultation process meaningless, and would not uphold the honour of the Crown. The honour of the Crown is “the controlling question”⁶⁶ in fulfillment of the duty. The honour of the Crown requires that the goal of consultation and accommodation is always reconciliation. Evidence of the Crown’s practical and good faith application of the duties to consult and accommodate, towards reconciliation, however, is elusive.⁶⁷ This is partly due to the challenge of establishing *how* to consult and accommodate.

As explained above, the KI leadership became aware of the government’s duty to consult and accommodate if treaty rights were going to be impacted through Crown activities. At the time, there was no protocol in place outlining how the community wanted to be consulted. KI saw the duty to consult as a possible mechanism through which they could exercise choice over potential development on their territory, in a way that reflected their spiritual duties to the land. The band council decided to use the consultation and accommodation ideals expressed by the Supreme Court, and developed its own Consultation Protocol, setting out a step-by-step process to understand community views and build community consensus on development projects. KI wanted any consultation process to be meaningful to the community, and to reflect its role in its relationship with the land.

63 *Haida Nation*, *supra* note 43 ¶ 47.

64 *Ibid* at ¶ 42.

65 *Mikisew Cree*, *supra* note 45 ¶ 64, citing *Halfway River*; *supra* note 42 ¶ 159-160 [Justice Binnie’s emphasis].

66 *Haida Nation*, *supra* note 43 ¶ 45.

67 “...governments have attempted to limit the applications of their consultation guidelines to particular instances and to limit the resources spent on consultation generally”. Issac and Knox, *supra* note 57 ¶ 78.

Before explaining the steps, the document describes KI's philosophy of connection with the natural and spiritual world. It also sets out a key community responsibility regarding economic development on the land: "...to ensure that the future generations can look back at us and say that our decisions today have not caused harm to them in the future".⁶⁸ This reflects a perspective common to many First Nations, that their community is deeply connected with the land and cannot exist without it, thus, they are responsible to future generations for what is done with the land. This understanding is echoed in *Delgamuukw*'s explanation of the "inherent" limit on Aboriginal title: "...Aboriginal title encompasses the right to choose to what uses land can be put, subject to the ultimate limit that those uses cannot destroy the ability of the land to sustain future generations of aboriginal peoples".⁶⁹

KI sees the Crown and development companies as closely linked, thus, the community consultation protocol applies to "all external parties".⁷⁰ The Crown is expected to properly discharge its obligations under s. 35 prior to handing out authorizations to any developers wishing to enter KI's traditional territory. The Crown is expected to remain continuously engaged in consultation, accommodation and negotiation throughout. Negotiation, in good faith, is an important aspect of KI's approach to consultation and accommodation, and the importance of negotiation to reconcile Aboriginal rights, private interests and Crown property rights has been recently emphasized by the Ontario Court of Appeal in *Frontenac Ventures v. Ardoch Algonquin First Nation*.⁷¹ Developers have a specific responsibility: "Kitchenuhmaykoosib Inninuwug teachings and customary laws must be recognized by non-Aboriginal partners to address environmental problems in order to achieve harmony and balance in Kitchenuhmaykoosib's natural environment".⁷² The six steps of the community decision-making process are detailed; a summary follows.

The proponents (Crown and developer) must initially contact the Chief and Council in writing, and depending on the nature of the proposal and its impact on the community, the development company may have to provide more information. The second step is for all proponents to hold a public presentation of their work program and work sites in sufficient detail "to allow community members to identify any activities that may be of concern to their traditional activities".⁷³ In step three, if any specific individuals or family

68 "Kitchenuhmaykoosib Inninuwug Consultation Protocol" Exhibit G to Affidavit of Chief Donald Morris, KI Motion Record, May 16, 2006, *supra* note 9, at 106.

69 *Delgamuukw*, *supra* note 3 ¶ 166, at 102.

70 "Kitchenuhmaykoosib Inninuwug Consultation Protocol", Exhibit G to Affidavit of Chief Donald Morris, KI Motion Record, May 16, 2006, *supra* note 9, at 106.

71 *Frontenac v. AAFN, ONCA* *supra* note 2 at paras 44-48.

72 "Kitchenuhmaykoosib Inninuwug Consultation Protocol", KI Motion Record, May 16, 2006 *supra* note 9 at 107.

73 *Ibid* at 108.

group is especially concerned (e.g., a proposal affects a family trapline) then the proponent has to consult with that group. Step four is a community discussion to clarify issues, and discuss what mitigation of development activities, or accommodation of traditional activities, and compensation are acceptable to the community. Step five is a referendum in the community as to whether the project should go ahead. Finally, step six is communication of community approval. There are also sections in the protocol addressing requirements of projects over time, partnership and development agreements, and proponents' provision of reports on their activities as well as monitoring of the effects of their work program. The consultation protocol is not meant to relieve the Crown of any of its legal duties to the community—rather it is meant to ensure community voice is part of any proposed development plan or activity on its territory—it includes, as stated in step five, community responsibility for decision-making over development projects.

KI's consultation protocol is a proactive response to and development of consultation, accommodation and negotiation as part of reconciliation as expressed by the Supreme Court.⁷⁴ This was reiterated by the Ontario Court of Appeal in the decision releasing the KI Six. The extent to which KI was willing to work with the duty to consult and accommodate, to see if it could mesh with their own understanding of both their rights under Treaty 9 and their responsibilities towards their territory, is in striking contrast to the Ontario government's avoidance of fulfilling the honour of the Crown in the regulation of mining.

The Ontario Mining Act

The interests on which Platinex decided to sue KI, and seek an injunction, arose from the operation of Ontario's *Mining Act*. In this section, we are discussing the *Act* as it stood through the dispute between Platinex and KI, before any of the changes made in the fall of 2009. While these changes represent some reform of the *Mining Act*, towards consultation with Aboriginal communities at specific stages in the mining sequence, (discussed *infra*) they do not affect the basic "free entry" structure of the *Act*, which created the legally recognized third-party interest on which basis Platinex sued KI. The continuation of "free entry" before consultation is the initial step that suggests that prospectors have a recognized interest over their staked claims. Every time a

74 KI held a referendum on July 5, 2011, and passed a set of protocols including a new community consultation protocol and watershed protection declaration. The new protocols set out procedures for engagement with the Ontario government and developers for decisions on future land protection and land use. The protocols are grounded in KI's spiritual duty to protect the land for future generations and the consultation protocol retains the six steps for community consultation and decision-making. See www.kitchenuhmaykoosib.com/landsandenvironment/.

claim is staked on traditional territory prior to consultation and accommodation, a potential conflict with the relevant First Nation arises.

The *Mining Act* opens up all Crown land for staking. Prospecting and exploration is encouraged through a “free entry” system.⁷⁵ This means that a prospector does not have to own a piece of land in order to stake a claim on the potential minerals beneath. According to s. 27 of the *Mining Act* a prospecting company can stake a claim anywhere on surveyed or unsurveyed Crown land. There are certain exceptions to this, such as land reserved for town sites or railway rights of way, or land that is part of an Indian reserve, among others.⁷⁶

Staking gives a prospector exclusive rights to explore the claim and, eventually, the right to decide whether to lease the claim. The land remains Crown land, and any normal use of Crown land, such as the exercise of treaty rights, although these are not mentioned in the previous version of the Act, may continue. Once a claim has been staked, the prospector must have the claim recorded and then follow up with required assessment work, which is measured in dollars spent, annually. This work could include exploratory drilling to assess the mineral content. Once the assessment work has been completed, a claim-holder may apply for a mining lease.⁷⁷ The purpose of mining leases is to eventually put land into mineral production, to ensure that a “lease” goes beyond exploratory drilling. Section 81(8), for example, allows the Minister to refuse renewal if not enough work has been done to get the lease into production. Once a lease is granted, there is a regulatory push to work the land towards production, and there is no built-in space in the law to address concerns such as Aboriginal rights or environmental sensitivity. While a mining lease must be approved by the Ministry, mining claims are simply recorded, as long as they comply with the forms and process of filing claims under the Act.

The Crown’s role under the *Act* at the time of the dispute was simply to facilitate mining development. The *Act* establishes a bureaucracy and procedure to ensure that claimstaking, exploration and development is fair between prospectors. It contains provisions to settle disputes between prospectors, and between holders of surface and mining rights. There are provisions for environmental rehabilitation after a mine is closed.

Not surprisingly, then, no part of the Supreme Court’s expression of the duty to consult and accommodate was reflected in Ontario’s *Mining Act*, nor

75 An excellent discussion of the “free entry” structures, its current manifestations and history can be found in Karen Campbell, *Undermining Our Future: How Mining’s Privileged Access to Land Harms People and the Environment*. January 2004, West Coast Environmental Law. Online: <wcel.org/sites/default/files/publications/Undermining%20Our%20Future%20-%20A%20Discussion%20Paper%20on%20the%20Need%20to%20Reform%20Mineral%20Tenure%20Law%20in%20Canada.pdf>.

76 *Mining Act 1990*, *supra* note 8, see ss. 29, 30, 31 and 32.

77 *Ibid*, s.81.

its regulations, at the time of Platinex's suit against KI. There was not even a provision for notice of claims to First Nations communities. There was no mention of the interaction between Aboriginal treaty rights and mining exploration and development in the *Act*. The Supreme Court has given clear direction since 1996 that where the exercise of ministerial discretion could impact Aboriginal and treaty rights, the legislative authority for the exercise of that discretion must require consideration of such impact.⁷⁸ Despite this direction, there was no room for consultation under the *Mining Act* as it stood in 2006.

III *Platinex Inc. v. Kitchenuhmaykoosib Inninuwug*

The paper now moves directly to the decisions made in this legal dispute. Our analytic focus is on the first two substantive decisions,⁷⁹ as the first decision made an opening for KI's perspective on the dispute, and the second decision closed that opening. Once the opening was closed, later court decisions quickly funneled the KI leadership towards incarceration.

In July of 2006, KI was granted an interim interim injunction against Platinex Inc, to stop exploratory drilling on their traditional lands. Platinex has held several mining leases and mining claims on KI's traditional lands since its incorporation in 1998. The injunction followed a chain of events which included KI's assertion of a Treaty Land Entitlement (TLE) claim in 1999 and declaration of a moratorium on mineral activities in 2001, Platinex's unilateral action to begin drilling in February 2006, KI's peaceful protest of this action, Platinex's suit for damages of \$10,000,000,000 and an injunction, and KI's counterclaim for an injunction and a third party claim against Ontario, stating that the Mining Act is unconstitutional.

The interim interim injunction was granted for five months on the condition that KI meet with Platinex and Ontario in order to develop 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".⁸⁰ 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. The balance of convenience favoured KI because there was a public interest in encouraging the Crown to fulfill its duty to consult and accommodate Aboriginal peoples when impacting their rights.

In February 2007, the Ontario Ministry of Northern Development and Mines, and the Independent First Nations Alliance (whose members also tra-

78 Isaac and Knox, *supra* note 57 ¶ 64.

79 *Platinex v. KI 2006*, *supra* note 1 ¶ 140; *Platinex v. KI 2007*, *supra* note 23.

80 *Platinex v. KI 2006*, *ibid*.

ditionally use the land where Platinex was to drill) were granted intervenor status for the April hearing, and the injunction was extended until then.⁸¹

Justice Smith dismissed KI's motion for an interlocutory injunction on May 1, 2007.⁸² Briefly, the judge saw the issue before him as the scope of the duty to consult and whether the Crown, and therefore Platinex, had fulfilled this duty.⁸³ The judge found that the consultation process between July 2006 and April 2007 had been helpful,⁸⁴ that Platinex's last proposed Memorandum of Understanding (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".⁸⁵ Although the judge continued to recognize KI's perspective on their connection to the land and their broader view of the duty to consult and accommodate, he was unable to connect this perspective to "a recognizable legal right requiring protection".⁸⁶

The dismissal of the injunction included several declaratory orders, stating that KI had a right to continued consultation, directing the parties to reach an MOU under court supervision if necessary, allowing drilling to begin on June 1, 2007 and reserving the court's powers to supervise the drill program, expressly including stopping it.⁸⁷ As the parties were unable to reach agreement, on May 22, 2007, Justice Smith imposed a consultation protocol and an MOU—the same documents that Platinex presented to the court prior to the May 1st decision.⁸⁸ The consultation protocol set out the scope of consultation as including consultation and accommodation towards Phase One and further phases of Platinex's drilling program, taking into consideration potential burial sites, the environmental, harvesting and other treaty rights impacts of drilling, participation in decision-making, employment and use of KI services, compensation and funding for the process. It also included identifying KI's preferred lands for the TLE claim, if it were to be established, and developing a "subsequent protocol among KI, Ontario and other interested or affected First nations for broader discussions concerning mineral exploration and mining development in traditional land use areas".⁸⁹ The court asked for more particulars on the potential negative impact of drilling on KI's "spiritual

81 *Platinex Inc. v. Kitchenuhmaykoosib Inninuwig*, Feb. 2, 2007, Ct File Nos. 06-0060 and 06-0271, (ON S.C.) [*Platinex v. KI, Intervenors*].

82 *Platinex v. KI 2007*, *supra* note 23.

83 *Ibid* ¶ 72.

84 *Ibid* ¶ 152.

85 *Ibid* ¶ 160.

86 *Ibid* ¶ 113.

87 *Ibid* ¶ 188.

88 *Platinex Inc. v. Kitchenuhmaykoosib Inninuwig*, May 22, 2007, Ct File Nos. 06-0271 and 06-0271A, (ON S.C.).

89 *Ibid*, "Appendix 'A' Consultation Protocol", article 2(d).

practices”,⁹⁰ and reserved decisions on appropriate funding for consultation for KI, legal costs and the community benefit fund.⁹¹

Platinex flew to the community on September 24, 2007 to begin its archeological pre-screening. Members of the community and band council met them at the airport, and served them with a notice of trespass under the Band’s *Indian Act* powers. Following a lengthy discussion, the company representatives left.⁹²

Platinex then requested a court order enjoining the KI community from preventing its archeological surveying work, which was heard on Oct 25, 2007. KI explained that costs must be dealt with first. When Justice Smith decided to hear Platinex’s motion, several members of the community stood with their spokesperson, John Cutfeet, while he read a letter to the court stating that the community could “no longer afford the justice system”. Afterwards, KI community members and their lawyer left the courtroom. In their absence, Justice Smith continued the hearing and granted Platinex an order, enjoining KI from “impeding, obstructing or interfering with...access to the Exploration Property” and directing the police to remove any person from that property.⁹³

On December 7, 2007, several members of KI, including Chief Donny Morris and some band councillors, including John Cutfeet were found in contempt of court.⁹⁴ While Chief Morris and some others accepted the finding of contempt, John decided to appeal, as he did not believe that the finding was a correct application of the law. A sentencing hearing for Chief Morris and others was held on January 25, 2008. On both December 7, 2007 and January 25, 2008, Chief Morris gave evidence that his duty to take care of and protect the land gave him no choice but to disobey the court order, while Platinex argued that the community’s “open and notorious defiance” of the law meant that they should receive “no sympathy” from the court.⁹⁵ Ontario’s position was that jail was not necessary, but the community should be fined an amount “that hurt”.⁹⁶

On March 17, 2008, Justice Smith sentenced Chief Donny Morris, Sam MacKay, Jack MacKay, Cecilia Begg, Darryl Sainnawap and Bruce Sakakeep to six months in jail. The judgment centered the contributions of the rule of

90 *Platinex Inc. v. Kitchenuhmaykoosib Inninuwug*, May 22, 2007, *supra* note 88 at ¶ 19.

91 *Ibid* ¶ 28.

92 “KI and Platinex back to court Oct. 25” *Wawatay News* (18 October 2007) *Wawatay News* online: < www.wawataynews.ca/node/12223>.

93 *Platinex Inc. v. Kitchenuhmaykoosib Inninuwug*, October 25, 2007, Ct. File # 06-0271, Order, (ON S.C.) Smith, J.

94 *Platinex Inc. v. Kitchenuhmaykoosib Inninuwug*, December 14, 2007, Court File CV-06-0271 and CV-06-0271A, Endorsement, (ON S.C.) Smith J.

95 Rachel Ariss, courtroom notes, Jan. 25, 2008, quoting Neal Smitherman, representing Platinex.

96 Rachel Ariss, courtroom notes, Jan. 25, 2008, quoting Owen Young, representing MNDM.

law to an orderly society, stating that “no one is above the law”.⁹⁷ Further, Smith J. wrote: “If two systems of law are allowed to exist—one for the aboriginals and one for the non-aboriginals, the rule of law will disappear and be replaced by chaos. The public will lose respect for, and confidence in, our courts and judicial system”.⁹⁸ Those sentenced were immediately taken to jail.

The Court of Appeal allowed the sentence appeal on May 28, 2008, and the KI Six were freed.⁹⁹ The Court stated that the sentence imposed was “too harsh”¹⁰⁰ and that any sentencing of aboriginal people must take into account “the unique systemic or background factors at play”.¹⁰¹ The intersection of the asserted Aboriginal rights and the “remarkably sweeping”¹⁰² provisions of the *Mining Act* made up one such factor.

The finding of contempt against John Cutfeet was set aside in the spring of 2008, prior to the release of the Court of Appeal’s decision. The Crown was ordered to pay the costs of the set-aside hearing. The next step in this approach was to apply for upfront costs for a constitutional challenge to the finding of contempt, as the court had not fully considered the context, including Aboriginal rights and the public interest appropriate to the contempt hearing. This application was filed, but after a number of delays by Ontario in John’s examination and hearing dates, his legal counsel informed him that the Crown was losing interest in the case. It appeared that as Ontario had been ordered to pay costs for the set-aside hearing, there was a risk they would be ordered to pay upfront costs for the constitutional challenge as well. On advice from friends, and having no visible support or resources, John decided that this part of the struggle ended here, and that there remained a strong possibility it would arise again in a different form.

Our questions in this analysis are: where are the openings and closures towards KI’s own law, based on KI’s own relationship with the land, in these two decisions? We begin with the July 2006 decision, and then move into the May 2007 decision. The first decision expands the broad principles of

97 *Platinex Inc. v. Kitchenuhmaykoosib Inninuwug* [2008] OJ No. 1014 (On S.C.) ¶ 38.

98 *Ibid* ¶ 44.

99 *Frontenac v. AAFN, ONCA*, *supra* note 2 at ¶ 62. The sentence appeals in *Frontenac* and *Platinex* were heard together. *Frontenac* involved a very similar dispute, wherein Frontenac Ventures sued the Ardoch Algonquin First Nation (AAFN) for blocking access to its mining claims on the AAFN’s traditional territory while the AAFN was negotiating a land claim with the federal government. The Ardoch Algonquin had not been consulted, and Robert (Bob) Lovelace was jailed in February 2008 for contempt of court, for a six-month sentence. Bob Lovelace testified that he was following his people’s traditional law in blockading Frontenac’s access to the site. *Platinex Inc. v. Kitchenuhmaykoosib Inninuwug*, 2008 ONCA 534 stated that Platinex advised the court at the hearing that it would not oppose KI’s appeal, and that “The principles that would have been applied to this appeal are set out in the reasons in the companion appeal, *Frontenac v. Ardoch Algonquin First Nation*” at ¶ 6. The KI Six and Lovelace were all released under this decision.

100 *Frontenac v. AAFN, ONCA*, *supra* note 2 at ¶ 62.

101 *Ibid* ¶ 59.

102 *Ibid* ¶ 61.

injunctive relief: a serious issue to be tried, irreparable harm, and the balance of convenience,¹⁰³ to include KI's perspective. The second decision redefines the issue as "the scope of the duty to consult". This narrows the application of principles for injunctive relief, losing almost all recognition of KI's perspective and finding that an exercise of the duty to consult and accommodate by the Crown and the company can be imposed on the community, somehow repairing the original finding of a risk of substantive irreparable harm. This decision has two key theoretical constructions that work together to detach KI's position from any "recognizable legal right": the construction of the duty to consult as a response to a risk of irreparable harm; and the conflation of treaty rights with the "right to be consulted". The court's *obiter* comments on Treaty 9 show the theoretical underpinnings of the shift between the two decisions.

Principles of Injunctive Relief:

Irreparable Harm and the Balance of Convenience

The strongest opening for an understanding of KI's own law is found in the judge's interpretation of irreparable harm and the balance of convenience in his original decision granting the interim injunction to KI. Justice Smith explained:

Irreparable harm may be caused to KI not only because it may lose a valuable tract of land in the resolution of its TLE claim, but also, *and more importantly*, because it may lose land that is important from a cultural and spiritual perspective. No award of damages could possibly compensate KI for this loss.¹⁰⁴

This statement values and legitimates the community's spiritual and cultural connection to the land, showing understanding of non-economic harms. While the judge found that Platinex would suffer economic harm from not being able to work its mining claims, he also found that Platinex brought that risk upon itself. When listing on the TSX Venture Exchange in 2005 in order to raise money, Platinex stated that "The Band has verbally consented to low impact exploration",¹⁰⁵ despite its receipt of KI's moratorium on mineral activity, and Chief Morris' refusal to sign various MOUs with the company during 2004 and 2005.¹⁰⁶

The judge then elaborates on his understanding of the risk of irreparable harm faced by KI:

It is critical to consider the nature of the potential loss from an Aboriginal perspective. From that perspective, the relationship that Aboriginal peoples have

103 These principles are set out in *Platinex v. KI 2006*, *supra* note 1 at ¶ 55, referring to *RJR MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311.

104 *Platinex v. KI 2006*, *supra* note 1 ¶ 79 [emphasis added].

105 *Ibid* ¶ 25.

106 *Ibid* ¶ 22.

with the land cannot be understated...Aboriginal identity, spirituality, laws, traditions, culture *and rights* are connected to and arise from this relationship to the land.¹⁰⁷

Here, two specific connections between KI's perspectives and Canadian law are recognized. Firstly, the Aboriginal perspective on community connection to the land is recognized. The judge brought KI's perspective to the possible severance of this connection to define it as an irreparable harm, and saw the court as able to prevent it. Significantly, this potential severance alone was sufficient for the judge to award the injunction.¹⁰⁸

Secondly, the judge recognizes that Aboriginal rights, which are *sui generis*, of their own origin, arise from KI's relationship to the land. All of KI's traditions, legal and spiritual, come from this relationship. Here, the judge went to the root of Aboriginal rights, reflecting KI's own perspective on their attachment to and duties to the land, as required in *Van der Peet*.¹⁰⁹ Canadian constructions of Aboriginal rights (in common-law and under section 35) recognize their basis in Aboriginal peoples' connections to the land, and that this connection must be understood, at least in part, from Aboriginal peoples' understanding of this relationship.¹¹⁰ We think that Justice Smith's willingness in the first decision to go to this root begins to reflect this idea of "responsibilities" to land, and shows some understanding of the basis of *Kanawayandan D'aaki*. Here, Justice Smith was able to begin to do "cross-cultural justice", in that he grasped the relationship with the land as a "fact" which had to be seen from KI's perspective.¹¹¹

After finding irreparable harm, the judge assessed the balance of convenience. This test requires that the court take into account all the circumstances around the case to determine the effect on the applicant if the injunction is or is not granted. The court may also consider the public interest. In deciding the balance of convenience, the judge focused on two unique aspects of the dispute: that the exploration would take place on land subject to a TLE claim, and that Ontario and Platinex had both decided to ignore or end consultation, and ignore KI's perspective and concerns. Here, the judge gives equal empha-

107 *Ibid* ¶ 80 [emphasis added].

108 *Ibid* ¶s 81-82.

109 Kent McNeil, "Aboriginal Title and Aboriginal Rights: What's the Connection?" (1997) 36 *Alta. Law Rev.* 117 [QL] ¶ 12-13.

110 *Delgamuukw*, *supra* note 3 ¶s 151, 176; also see *Borrows*, *supra* note 5, especially at 3-12. McNeil, *supra* note 109 argues that both Aboriginal rights and Aboriginal title in Canadian law are based in common-law recognition of Aboriginal peoples' connections to the land, focusing on *R. v. Van der Peet*, *supra* note 2; *R v. Adams* [1996] 4 C.N.L.R. 1; and *R. v. Côté* [1996] 4 C.N.L.R. 26. McNeil explains that Aboriginal title is a subset of Aboriginal rights, which may exist without dependence on title. He discusses the degrees or types of connection to the land can support Aboriginal title and other rights.

111 See David Howes, "Introduction: Culture in the Domains of Law" (2005) *C.J.L.S.* 20: 9 at 20.

sis to the TLE claim and the community's connection to the land: "KI's TLE Claim may be adversely affected and the development will negatively impact the heart of the community".¹¹² But the unique aspects of the case also supported the judge's explanation of the benefit to the public interest in granting an injunction. Such an injunction "enhances the public interest by making the consultation process meaningful and by compelling the Crown to accept its fiduciary obligations and to act honourably".¹¹³ This is where the lack of consultation became important in the first decision—in deciding the balance of convenience *after* a finding of irreparable harm. The public has an interest in the "integrity of the consultation process itself".¹¹⁴

This understanding of public interest is important because it contrasts the message in *Haida Nation* that part of the duty of Crown in consultation and accommodation is to balance "competing" societal and Aboriginal interests.¹¹⁵ It has long been assumed that, for the most part, Aboriginal interests in maintaining spiritual and cultural connections to the land, partially through the exercise of treaty rights, are in contrast to broader societal interests.¹¹⁶ Societal interests are most often seen in law as primarily economic and as the same as the interests of those who would extract and exploit natural resources, such as minerals and forests, according to the norms of those industries.¹¹⁷

Justice Smith's inclusion of the public interest, as something beyond economic, reflects the idea that there may be a broader societal interest in reconciliation between Aboriginal and Euro-Canadian perspectives on and plans for the land—even where it proceeds slowly, even where it means that exploration has to wait—than in supporting one small company's for-profit drilling program.

The inclusion of the integrity of the consultation process itself as part of the public interest reflects the promise of s. 35—that Canadian society has a public interest in the ability of Aboriginal peoples to fully exercise their rights and could be willing to move past a colonial focus on getting as much wealth

112 *Platinex v. KI 2006*, *supra* note 1 ¶ 106.

113 *Ibid* ¶ 111.

114 *Ibid* ¶ 109. A Yukon court has held that the "public interest in upholding the duty of procedural fairness grounded in the honour of the Crown" in its dealing with the Ta'an Kwach'an Council outweighed the public interest in ending the tender process for a disputed piece of land, where good faith discussions regarding options other than selling the land had not been held. See *Ta'an Kwach'an Council v. Government of Yukon*, 2008 YKSC 54 (CanLII), ¶ 54.

115 *Haida Nation*, *supra* note 43 ¶s 14 and 45.

116 *Siska Indian Band v. B.C. Minister of Forests*, 1999 B.C.S.C. 2736 (CanLII) especially ¶ 47. This line of argument follows *James Bay Development Corporation v. Kanatewat*, (1973) 8 C.N.L.C. 414 (Que. C.A.). Also see Kent Roach, "Aboriginal Peoples and the Law: Remedies for the Violations of Aboriginal Rights" (1992) 21 Man. L. J. 488-543 [QL].

117 Allan Donovan and Mariana Storoni, "The Protection of Aboriginal Rights and Title through Injunction and Judicial Review" prepared for Continuing Legal Education Society of B.C., October 2004 (on file with Rachel Ariss).

out of the land as possible while ignoring the first inhabitants of that land. A willingness to move beyond that colonial focus, argues Patricia Monture-Angus, is necessary before there is any hope of a “renewed relationship” between the Crown and Aboriginal peoples.¹¹⁸

This first decision took KI’s perspective on its connection to the land and the willingness of the Crown to ignore unilateral corporate action on traditional lands seriously. The Court did not hesitate to award an injunction to stop Platinex from pushing its way onto KI traditional territory, disrespecting the community’s rights. After some initial success using injunctions to halt development, while Aboriginal title claims were being pursued in B.C., “lower courts have become increasingly reluctant to order this form of interim relief”.¹¹⁹ Here, Justice Smith went against the trend and applied a strong, fair and protective remedy to a serious infringement of Aboriginal rights—an important change in the judicial approach to disputes over natural resources on First Nations’ traditional territories.

Remedying Irreparable Harm: The Duty to Consult

In May, 2007, Justice Smith lifted the injunction. Key to this decision was the re-framing of 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”.¹²⁰ The first decision focused on each party’s plea for injunctive relief to protect their interests. The reframing of the issue as about the scope of the duty to consult was introduced by Ontario, in its arguments as intervenor in the April 2007 proceedings. This reframing might be appropriate if the judge had decided the previous July that the source of the irreparable harm was the failure to consult—but, as explained above, he did not.

In his July 2006 decision, the judge commented on the relationship between irreparable harm and the Crown’s duty to consult and accommodate. The judge explained the duty to consult, quoting from *Haida Nation* that “To unilaterally exploit a claimed resource during the process of proving and resolving the Aboriginal claim to that resource, may be to deprive the Aboriginal claimants of some or all of the benefit of that resource. That is not honourable”.¹²¹ The judge noted that “For the process to have any real meaning it must occur before any activity begins and not afterwards or at a stage where

118 Monture-Angus, *supra* note 28 at 43.

119 *Platinex v. KI 2006*, *supra* note 1 ¶ 61, citing Sonia Lawrence and Patrick Macklem, “From Consultation to Reconciliation: Aboriginal Rights and the Crown’s Duty to Consult,” (2000) 79 Can. Bar Rev. 253.

120 *Platinex v. KI 2007*, *supra* note 23 ¶ 72.

121 *Platinex v. KI 2006*, *supra* note 1 ¶ 87, citing *Haida Nation*, *supra* note 43 ¶ 27.

it is rendered meaningless".¹²² Further, in a critique of Crown behaviour: "the evidentiary record indicates that [the Crown] has been almost entirely absent from the consultation process with KI and has abdicated its responsibility and delegated its duty to consult to Platinex"¹²³ regarding the impact of drilling on KI's TLE claim and its treaty rights. Relying on scholarly articles discussing the reluctance of courts to award injunctions to Aboriginal groups, the court explained that if injunctions are not granted, this allows the Crown to avoid thorough consultation and accommodation and just do what they planned to do anyway. Justice Smith concluded "A breach of the duty to consult can also be grounds for granting an injunction against the Crown".¹²⁴ It is very important to remember, however, that lack of consultation is a *hypothetical* basis for granting an injunction. The irreparable harm found in the 2006 decision was the risk of severance of the community from the land.

The conditions assigned to the interim interim injunction cannot be forgotten: that KI set up a consultation committee to meet with both Platinex and the 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".¹²⁵ The comments on the duty to consult, and this remedy, together set the judge on the path that saw consultation as the answer to irreparable harm to the connection to the land. The principle of taking the Aboriginal perspective seriously enough to grant an injunction against Platinex, was weakened by the pre-ordained objective of arriving at a drilling agreement. In granting this specific remedy the judge failed to imagine that the result of gathering information, consultation and accommodation might be that the damage to Aboriginal and treaty rights could only be mitigated by stopping mining exploration in that area.

In defining consultation as the remedy to irreparable harm, Justice Smith quotes his decision of February 2, 2007, which allowed Ontario to act as intervenor in the case. Given his order to consult in the first decision, "the question arises as to whether the risk of harm and balance of convenience that existed in June 2006 has changed"¹²⁶ and stated that if there are reasonable ways to avoid or mitigate the harm, then an interlocutory injunction may not be granted. Justice Smith reviewed evidence of meetings between the parties and exchanges of MOUs. KI had concentrated on trying to establish a consultation protocol. Platinex wanted to discuss only the conditions under

122 *Platinex v. KI 2006*, *supra* note 1 ¶ 89.

123 *Ibid* ¶ 92.

124 *Ibid* ¶ 101.

125 *Ibid* ¶ 139.

126 *Platinex v. KI 2007*, *supra* note 23 at ¶ 84, quoting *Platinex v. KI, Intervenors*, *supra* note 81 at ¶ 38.

which the drilling program could go ahead. Despite these differing approaches by the parties, the court found that consultation had taken place since July 2006. While no agreement was reached, information had been exchanged and “significant accommodations have been made”¹²⁷ in the proposed MOU that Platinex placed before the court.

Having suggested that performance of consultation could remedy the harm, Justice Smith remarks:

The assessment of the issue of whether irreparable harm will occur, and the balance of convenience between the parties, must be conducted in relation to what right or interest it is entitled to protection. It is trite to observe that, for a court to order injunctive relief, the applicant must demonstrate that it has a recognizable legal right requiring protection.¹²⁸

It is this statement that shows the significance of the judge’s *obiter* remarks on Treaty 9.

No Recognizable Legal Right

How does Justice Smith reconceive the potential severance of KI’s connection to the land, moving it from an irreparable harm to something the court cannot recognize?

Interspersed through the decision of May 1, 2007 is a narrow interpretive framework of Aboriginal and treaty rights, within which Justice Smith decides the scope of the duty to consult and the application of injunctive principles. Simultaneously, the decision centres KI’s TLE claim, using its “weakness”¹²⁹ as a yet-unproven claim to unsettle substantive treaty rights. Treaty 9 itself was not before the judge, therefore his comments should be treated as *obiter*. However, the understanding of treaty rights suggested here reveals how the application of the duty to consult as a process towards a specific outcome (drilling), was made to address irreparable harm.

The theory of Aboriginal rights behind Justice Smith’s reasoning begins early in the case: “Understanding KI’s position requires an understanding of its TLE claim and of Treaty 9”.¹³⁰ The court then sums up Treaty 9:

In return for a surrender of all rights and title to the land, the Crown promised to lay aside reserves. Any unfulfilled promise for land can give rise to a treaty land entitlement claim, or TLE.

Treaty 9 also promises that the signatories have the right to pursue traditional harvesting rights throughout the surrendered tract of land, including hunting, fishing, and trapping. This right is “subject to such regulations as may from time

127 *Platinex v. KI 2007*, *supra*, note 23 ¶ 88-89.

128 *Ibid* ¶ 113.

129 *Ibid* ¶ 162.

130 *Ibid* ¶ 142.

to time be made by the government of the country, acting under the authority of His Majesty”, and subject to land that “may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes”.¹³¹

The judge can only understand KI’s perspective through the lens of a Canadian legal process, the TLE process, developed to remedy unfulfilled treaty promises. KI’s position then, cannot be known to the court without these lenses, and if KI expresses its position any other way, the court cannot hear it. KI’s perspective, based in KI’s own law, becomes something outside the court’s ability to understand. This, however, was not inevitable, as the Court’s previous decision shows.

The judge explains that the Ontario Secretariat of Aboriginal Affairs rejected KI’s TLE claim by letter dated March 15, 2007.¹³² In the eyes of the court, this rejection narrows the scope of consultation—the strength of the right being claimed is an important consideration in defining the scope of consultation.

Consultation is then elevated as a right, more recognizable than any substantive treaty right: “KI has the right to be consulted when any of its rights protected by s. 35 of the Constitution Act, 1982, are likely to be affected by proposed government action”.¹³³ Justice Smith reviewed the evidence before him of irreparable harm to KI’s connection to the land, and summarized these as “fears”.

The dismissal of KI’s concerns regarding mining exploration, and the acceptance of Platinex’s position that there is no scientific evidence that harm will result is a failure to consider KI’s perspective on what would be harm. The classification of Platinex’s drilling program as “low impact” reflects a western scientific paradigm which assumes that activities are harmless, until they are shown to cause specific and measurable harm. The KI community, as a people of the boreal forest, is aware of the delicate balance in this eco-

131 *Ibid* ¶s 47-48.

132 *Ibid* ¶ 55. The KI community first heard of OSAA’s rejection of their TLE claim when the MNMD presented this letter in court during the hearing of April 2-4, 2007. KI’s lawyers argued in court that the “convenient” timing of the rejection appeared to be “sharp dealing”. Rachel Ariss, courtroom notes, April 2—5, 2007. The Crown lawyer, representing the MNMD had previously called the TLE claim “tenuous” and “without merit” in the intervenor hearing, Rachel Ariss, courtroom notes, January 26, 2007. The Report of the Ipperwash Inquiry notes the slow progress of TLE claims—only 11 of the 116 claims filed between 1973 and 2004 have been settled. Reviews include a “policy” review, in which OSAA takes into account other interests in the claimed area. The Report comments on how such a policy review means that even a claim with valid legal and historical antecedents could be rejected for “policy” reasons. See *Report of the Ipperwash Inquiry*, Vol. 2, Policy Analysis, online: <www.attorneygeneral.jus.gov.on.ca/inquiries/ipperwash/report/vol_2/pdf/E_Vol_2_CH04.pdf> at 78, 83. To publication, the federal government has not decided this TLE.

133 *Platinex v. KI 2007 supra* note 23 at ¶ 70.

system. Their approach is one of caution, avoiding activities that might disturb this balance, as a healthy ecosystem already provides for the people.

In determining the scope of consultation the court explains: “the wording of the treaty is relevant to determining the scope of the duty to consult”.¹³⁴ Later, the judge returns to Treaty 9 and states that he understands:

...in view of the Aboriginal relationship to land, why KI wishes to proceed cautiously and to have a consultation protocol in place before any drilling begins the fact remains that the drilling is to take place on Crown land unfettered and unencumbered by Aboriginal title. The consultation process cannot be used in an attempt to claw back rights that were surrendered when Treaty 9 was signed.

From reading the many affidavits filed by KI band members, it appears that those affiants, including Chief Donny Morris, may not fully appreciate the fundamental fact that all Aboriginal title and interest in the land was surrendered when Treaty 9 was signed. The right that remains is the right for KI to be consulted when there is a taking up of land that may have a harmful impact on the traditional harvesting rights, as described in the treaty.¹³⁵

Justice Smith has, in these two short paragraphs, violated almost all the principles of treaty interpretation set out by the Supreme Court.¹³⁶ These principles require that courts acknowledge and reflect the Aboriginal treaty partners’ points of view. As summarized in *R v. Marshall No. 1*, treaty interpretation has expanded away from technical readings of texts authored, in many of the numbered treaties, by the Canadian government alone. Treaty interpretation now includes a recognition that ignoring the oral histories of treaties and relying on the written record alone is unfair;¹³⁷ that extrinsic evidence of the historical and [cultural] context of treaty signing is helpful in interpretation in various circumstances;¹³⁸ that strict or technical interpretations are

134 *Platinex v. KI 2007 supra* note 23 at ¶ 102.

135 *Ibid* ¶ 147-148.

136 Here, we set out well-known principles of treaty interpretation only to show that none of these principles were taken into account in this decision. For Aboriginal viewpoints on treaties and recommendations to use treaty-making as a foundation for developing new relationships between Aboriginal Peoples and Canada see RCAP, “Treaties” *supra* note 29. For a discussion of the shifting approach of the judiciary to treaty interpretation and arguments in favour of understanding treaties as constitutional accords, see Patrick Macklem, *Indigenous Difference and the Constitution of Canada* (Toronto: University of Toronto Press, 2001) chs. 5 and 9. For an argument that the judiciary continues to see Aboriginal treaties as surrenders of land, and how this underlies newer principles of treaty interpretation see Gordon Christie, “Justifying Principles of Treaty Interpretation” (2000) 26 *Queen’s Law Journal* 143-224.

137 *Guerin v. The Queen*, [1984] 2 S.C.R. 335 as cited in *R. v. Marshall (No. 1)*, [1999] 3 S.C.R. 456 ¶ 12.

138 *R. v. Taylor and William* (1981) 62 CCC (2d) 227 (Ont. CA), as cited in *R. v. Marshall (No. 1)*, *supra* note 137 ¶ 11.

not acceptable;¹³⁹ that interpretations must be flexible,¹⁴⁰ and made in a sense that reflects the honour of the Crown.¹⁴¹ Recently, Laforme J.A. explained that "...the promises in the treaty must be placed in their historical, political and cultural contexts to clarify the common intentions of the parties and the interests they intended to reconcile at the time".¹⁴² Treaty rights should not be interpreted as frozen in time, but understood in such a way that there can be a continuing manifestation of the agreement as Canadian society changes over time.¹⁴³ Aboriginal peoples have always adapted to changing environments, and will continue to do so. Treaty rights, then, must be interpreted within the contexts of contemporary society. Despite the histories of deception on the part of the Crown in treaty negotiations across Canada,¹⁴⁴ the documents as they now stand must be interpreted and applied as if the Crown meant to fulfill its promises.

In contrast to these principles, Justice Smith focused on the technical wording of the treaty, rendering "surrender" and "cede" unassailable facts. He characterizes the evidence given by community members on the treaty as a misunderstanding of the "facts". He asks no questions of the oral or written historical record of the time of treaty-making before making these comments. Finally, he reduces treaty rights, and the effect of s. 35, to "the right for KI to be consulted", without provision of resources for consultation and to be conducted any which way the Crown might choose. This approach suggests that KI's understanding of the treaty has no place in court.

Although the court was not addressing the treaty, its interpretation becomes the theoretical tool through which a legally recognizable connection to the land is completely severed. The understandings of a treaty as an ongoing process to structure relationships, as a document of sharing, and as a constitutional accord are sideswiped.

Following this extraordinary and uninformed comment on treaty rights, Justice Smith asserts:

139 *R. v. Badger*, [1996] 1 S.C.R. 77 as cited in *R v. Marshall (No. 1)*, *supra* note 137 ¶ 14. *Badger* is applied in *Marshall* as follows: "the surviving substance of the treaty is not the literal promise of a truckhouse, but a treaty right to continue to obtain necessities through hunting and fishing by trading the products of those traditional activities..." ¶ 56.

140 *R. v. Sundown*, [1999] 1 S.C.R. 393, and *Simon v. The Queen*, [1985] 2 S.C.R. 387, as cited in *R v. Marshall (No. 1)*, *supra* note 137 ¶ 53.

141 *R. v. Sundown*, *supra* note 140, as cited in *R v. Marshall (No. 1)*, *supra* note 137 ¶.

142 *R. v. Meshake*, 2007 ONCA 337 (CanLII) ¶ 29. The approach of finding the common intention of the parties and reconciling their interests in the social context of the time arises in *R v. Sioui* [1990] 1 S.C.R. 1025.

143 *R. v. Sundown*, *supra* note 140 and *Simon v. The Queen*, *supra* note 140 as cited in *R v. Marshall (No. 1)*, *supra* note 137 ¶ 53. Binnie J., in *Marshall*, equates the treaty term "necessaries" with today's expectation of a "moderate livelihood" rather than "bare necessities", ¶ 59.

144 Borrows, *supra* note 5 at 113.

This court accepts that, as an Aboriginal community, KI has a unique cultural and spiritual relationship to the land, and a need to carefully and responsibly carry out the Aboriginal imperative to act as stewards of the land.... I find that the evidence of harm to the land, harvesting rights, and KI community and culture fails to meet the relatively high standard of probability required for the grant of injunctive relief. Much of this evidence was based upon assumptions and fear of what may transpire, and is not causally connected to Platinex's proposed drilling program.¹⁴⁵

The risk of irreparable harm to KI's connection to the land does not meet the high standards of probability which must be met to grant the "extraordinary" remedy of an injunction, because the connection to the land is legally "severed" through Justice Smith's dated style of understanding treaties.

The consultation that followed the first decision, then, is seen as addressing the possibility of irreparable harm to hunting, trapping, water quality, way of life and connection to the land faced by KI through adjustments to drilling schedules, minimal no-drill zones around burials, application of environmental standards and money. The court understands this to begin to "fix" the harm to KI's right to be consulted, which, despite Supreme Court jurisprudence on Aboriginal rights and treaty interpretation, is the only "recognizable legal right" to which the judge is able to tie the principles of injunctive relief.

The court then applied the balance of convenience test, finding that the likely harm of bankruptcy faced by Platinex outweighed the risk of harm to KI. The public interest in the integrity of the duty to consult and the honour of the Crown is not mentioned.

As stated earlier, the KI leadership was eventually incarcerated for contempt of court. The criminalization of Aboriginal people for exercising their rights and acting on their own laws and spiritual beliefs, in this case, continued as it has since colonial times. Following the release of the court's reasons on the sentencing appeal of KI and Bob Lovelace, on July 7, 2007, the Ontario government announced it would reform the *Mining Act*. After discussions with various First Nations communities and organizations, as well as mining companies and the Prospectors' Association, the Ontario government tabled proposed changes to the *Mining Act*, which were eventually assented to as the *Mining Amendment Act 2009* on October 28, 2009. The *Amendment Act* preserves the concept of free entry, the source of the conflict between KI and Platinex, for establishing mining claims. Aboriginal consultation will be required, and any arrangements made between mining companies and First Nations communities must be considered before permits to conduct certain exploration activities will be granted by the government.¹⁴⁶ The specifics of Aboriginal consultation and which activities require such consultation are yet

145 *Platinex v. KI, 2007, supra* note 23 ¶ 155 and 157.

146 See s. 40, *Mining Amendment Act, 2009*. c.21, S.O. 2009.

to be set out in regulations. Additionally, through land use planning in the Far North, First Nations communities may be able to ensure that especially sacred lands or lands important to hunting and fishing (breeding areas or migratory paths) are not disturbed by claimstaking or exploration. Not surprisingly, however, where claims, leases or mines are already established, they cannot be abrogated by a new land use plan.¹⁴⁷

In December 2009, Platinex was compensated with \$5 million to give up its claims in the Big Trout Lake area and drop a lawsuit against Ontario. Ontario withdrew Platinex's former claims from staking, but may unilaterally re-open those lands. If another company develops a mine there, Platinex will get a 2.5% royalty.¹⁴⁸ While there is a partial victory, in that the lands around Nemeguisabins Lake will not be explored or mined in the near future, KI is left maintaining the same misunderstood treaty rights over its traditional territory that were originally ignored by both Ontario and Platinex.

IV Reconciliation: First Nations' Law and Aboriginal Rights

The community of KI sacrificed three years and hundreds of thousands of dollars to defend itself from the operation of a *Mining Act* that clearly failed to recognize let alone affirm Aboriginal rights. The leadership sacrificed personal security and liberty. It is clear that without the first rebuke from Justice Smith about the Crown's absence from the dispute, and the Court of Appeal's later comments critiquing the extensiveness of the *Mining Act*, the Ontario government would not have engaged in mining law reform.

It remains to be seen whether the changes to the *Mining Act* will effect real change in how mining companies and the Crown approach First Nations communities in northern Ontario. These amendments still do not reflect the basis of the Treaty, a real and equal sharing of the land and its benefits. These sharing principles should also be applied to policies developed to apply to communities that signed treaties. "Policy" has had a tendency to undermine Aboriginal rights. Thus, we doubt that there will be real inclusion of First Nations communities in those benefits, beyond a few jobs. We do not see this process as contributing to reconciliation between Aboriginal peoples and the Crown.¹⁴⁹

147 See s. 100, *ibid.*

148 Bryan Meadows, "Platinex gives up claims for \$5 million" *Thunder Bay Chronicle Journal* (15 December 2009) online: <www.chroniclejournal.com/stories_local.php?id=230664>.

149 The First Nations communities of Webiquie and Martens Falls blockaded airstrips for two months due to concerns about lack of consultation and accommodation in the winter and early spring of 2010, and lifted them only when assured they would be given a greater voice in development in their territories. See Tanya Talaga, "Natives lift Ring of Fire blockade" *The Toronto Star* (20 March 2010) at 12. This blockade shows that mineral exploration companies and the Crown hold the same attitudes towards Aboriginal and treaty rights in the Ring of Fire that sparked KI's

Reconciliation begins with an ability to understand the Treaty from the perspectives of both First Nations communities and the government. Reconciliation needs to come from a place of openness, a willingness to go forward and develop a new relationship, based on the ideas of sharing expressed in the Treaty. The sharing agreed to in the Treaty was sharing between equal partners, where this sharing allowed both sides to follow their own paths, without pre-determined expectations, in respect of one another. The willingness to develop a new relationship was nowhere visible in the arguments presented by the Minister of Northern Development and Mines, through the twists and turns of the dispute between Platinex and KI. The expression of such willingness in the new *Mining Act* is unclear. We believe that waiting to define ‘Aboriginal consultation’ in the regulations means that the government not only has greater control over that definition, but that there will be less public scrutiny of it.¹⁵⁰ The KI community is still waiting to see signs of the “sharing” concept, which influenced their decision to sign Treaty 9, adopted by the Crown.

Section 35 “recognizes and affirms existing Aboriginal and treaty rights”. Monture-Angus explains that: “The words, recognize and affirm, are not intended to be the equivalent of granting rights. ‘Recognize’ means to acknowl-

original protest. Also see Rick Garrick, “Constance Lake Going to Mediation” *Wawatay News Online* (20 May 2011) online: <wawataynews.ca/archive/all/2011/5/20/constance-lake-going-mediation_21463>. Constance Lake First Nation sought and received an injunction against Zenyatta Ventures Ltd., to limit its drilling until the community’s concerns regarding respect for their treaty rights were met.

150 Regulations regarding paper staking in southern Ontario and the ability of northern Ontario landowners to withdraw their land from staking came into force April 1, 2011, the same entry date as the newly amended *Mining Act*. See *Mining Act*, and see *Mining Act*, O. Regs. 43/11, 44/11 and 45/11 on the Ontario government’s e-laws website <www.e-laws.gov.on.ca>. Workshops on Aboriginal consultation were held in some northern locations (Kenora, Thunder Bay, Sioux Lookout, Timmins) between September 28 and November 3, 2010. Regulations about Aboriginal consultation are expected to come into force sometime in 2012. See “Ontario’s Mining Act: Modernizing Ontario’s Mining Act”, Ministry of Northern Development and Mines at <mndmf.gov.on.ca/mines/mining_act_e.asp>. While this is some Aboriginal and public consultation, regulations tend not to receive the same public scrutiny as a statute which must be read, and is subject to questions, before it is passed in the provincial legislature. Further, the lack of notice, short time period for consultation, lack of access by community members to the consultation due to distance, costs of flight and lack of translation, limits its usefulness to the communities in developing a full understanding and thus, providing informed feedback and/or informed consent. There is no support from the Crown to build capacity in the communities to deal with mining issues in a meaningful way. This avoidance of public involvement in matters relating to natural resource extraction is found elsewhere. The Ontario Environmental Commissioner critiqued a tendency towards reducing public consultation on the part of the MNR, when it was in charge of forestry, though the use of “interpretation notes” to guide application of policy in 2005-06. Environmental Commissioner of Ontario. 2005-2006. *Neglecting Our Obligations: Annual Report 2005-2006*. Toronto: The Queen’s Printer for Ontario at pp. 174-175. Online: <eco.on.ca/eng/uploads/eng_pdfs/ar2005_en_report_01.pdf>.

edge something that already exists. 'Affirm' means to embrace the rights which are now being recognized".¹⁵¹

Several Aboriginal and non-Aboriginal legal scholars have argued that First Nations jurisprudences, and traditional legal perspectives and customs, must be included in defining s. 35, if Canada and First Nations are to reconcile, allowing all the peoples of this land to move towards a truly post-colonial state. Monture-Angus argues that First Nations have not yet consented to the application of Canadian law, nor to their position in Canadian governance. Yet she writes that section 35 holds out promise for a new relationship: "The way has been cleared to do Canada differently, to do Canada in a way that also includes Aboriginal people".¹⁵² Brian Slattery's model of an organic constitution resonates with Monture-Angus' understanding of the possibility of new relationships built on section 35. In this organic model, Canada's constitution is understood as developing within a Canadian context that recognizes the contributions and effects, past, present and future of First Nations jurisprudence towards that development.¹⁵³

Henderson explains that judicial interpretation of Aboriginal rights has often arisen through charges of regulatory offenses (hunting and fishing laws) against Aboriginal individuals, despite treaty recognition of continuing harvesting rights. This has created "a pointillistic jurisprudence".¹⁵⁴ Monture-Angus calls for development of a theory of Aboriginal rights. As land relationships are central to both Aboriginal jurisprudence and intellectual traditions, those understandings of land cannot be ignored:

We must recognize that the competition of worldviews results in the failure to legally construct a compelling and complete theory of Aboriginal rights....to locate a theory of Aboriginal rights on a borrowed [Euro-Canadian] construction of land rights is overly narrow, limiting, unfairly constraining and lacks vision.¹⁵⁵

Henderson provides a convincing argument (which we cannot discuss fully here) that what is missing in Canadian jurisprudence on section 35 so far is understanding, respect and eventual application of First Nations jurisprudences, which cannot only provide a more complete basis for understanding and developing Aboriginal rights, but also can lead to a post-colonial constitutional order for all of Canadian society.¹⁵⁶

151 Monture-Angus, *supra* note 28 at 47.

152 *Ibid* at 48.

153 Brian Slattery, "The Organic Constitution: Aboriginal Peoples and the Evolution of Canada" (1996) 34 *Osgoode Hall Law Journal* 101-112.

154 Henderson, *supra* note 10 at 51.

155 Monture-Angus, *supra* note 28 at 58.

156 A compelling discussion of how Aboriginal and Canadian legal traditions could participate in an inclusive approach to dispute resolution in the environmental context is found in Borrows, *supra* note 5 ch. 2 "Living Between Water and Rocks: The Environment, First Nations and Democracy".

KI's own law reflects their spiritual and cultural norms and perspectives. Courts are required to take these into account. Thus, KI's legal connection to the land, and their understanding of treaty and Aboriginal rights, is found, at least in part in that spiritual connection. A more complete understanding of the centrality of KI's spiritual and cultural connections to land; as well as the cultural centrality and substance of *Kanawayandan Daak'i* could have provided Justice Smith with the "recognizeable legal right" which the harm of severance from the land could be attached to. Instead, Justice Smith separated KI's cultural and spiritual perspective from legal rights as narrowly defined in Euro-Canadian terms. This outcome is the risk of seeing Aboriginal rights as only reflecting "distinct cultures", of a narrow definition of "culture", and an even narrower definition of what counts in determining Aboriginal rights.¹⁵⁷

In its dismissal of KI's perspective on how mining causes irreparable harm specifically to cultural and spiritual connections to land, and having forgotten that KI's connection to the land is a source of Aboriginal and treaty rights, the court detached that connection from a right which could be protected in law. The court was able to *hear* an Aboriginal perspective in the first decision, but unable to *recognize* that perspective as legal in his second decision. In the May 1st 2007 decision, the judge reverts to a colonial understanding of Aboriginal connections to land—that those connections do not have a place in Canadian law.

There is little more to be said. Reconciliation is a process that requires acceptance and change from both sides, but mostly, it requires acceptance and change by the larger society. The Crown has acted in the interests of the larger society, most often excluding Aboriginal peoples or taking decisions out of their hands, for years, and the balance must be reset. The July 2006 decision in the dispute between KI and Platinex offers a glimpse of how Aboriginal rights in Canada could develop in a truly 'sui generis' way, informed by European and Aboriginal jurisprudences and traditions. The May 2007 decision shows how easy it is for the courts to unhook Aboriginal connections to the land from the constitutional rights designed to preserve them, and reduce Aboriginal rights to "a right to be consulted". A way forward, out of the colonial past, can only be found in recognizing and respectfully building on the convergence of substantive Aboriginal and Euro-Canadian laws on this land.

157 See Macklem, *supra* note 136, pp. 47-56, on why centralizing protection of Aboriginal peoples' "cultural difference" does not fully reflect the constitutional promise of section 35. See Henderson for a critique of the "integral to the distinctive culture of the Aboriginal group" test in *Van der Peet*, *supra* note 10 at 97-115.

