NO

THE KITCHENUHMAYKOOSIB INNINUWUG

MEANS

AND THE FIGHT FOR INDIGENOUS RESOURCE SOVEREIGNTY

NO

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No Means No

The Kitchenuhmaykoosib Inninuwug and the Fight for Indigenous Resource Sovereignty

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The $10 Billion Lawsuit

In 2006, the remote Ontario First Nation of Kitchenuhmaykoosib Inninuwug (KI) said no to a mining company, was sued for $10 billion, had its leaders found in contempt of court and jailed but eventually prevailed when, three years later, the Ontario government paid the company $5 million to go away. This is how it happened.

KI, a remote First Nation community of 1200 or more people, is located on the shores of Big Trout Lake, on the margins of the Hudson Bay lowlands, in one of the largest remaining roadless areas in North America. Far from being simply a "wilderness," the lands that the KI depend upon for their cultural and spiritual survival, their sacred and spiritual sites, were being staked and drilled in an extensive Canadian mining boom fueled by recent finds of diamonds and record high prices for gold, platinum, uranium, base metals and nickel (Strauss 2006). The boom threatened to "enclose" a commons that KI have occupied since time out of memory, and it triggered one of a global series of circulating struggles between the state, resource capital and Indigenous peoples in Canada and the global south.

The immediate context for these struggles in Ontario was the free entry regime, a legislative framework where so-called Crown lands are open for mineral exploration entry, unless they are specifically withdrawn. Free entry is a neo-liberal fantasy. There was no legislative requirement under the Mining Act that government consult First Nations or other land users, prior to opening lands for mineral exploration. There was no prior planning to establish which tracts of Crown land are culturally sensitive, or serve as critical habitat for endangered species, or are valued ecosystem components. In the words of lawyer Kate Kempton, "The problem is this is called a free entry system and it allows anybody and their dog basically to go out there and stake a claim to the land, which is often traditional territory of First Nations, without any consideration at all of their rights" (Kempton 2007).

"Consultation" had become the new watchword in government-Aboriginal relations after a trilogy of decisions at the Supreme Court: the Haida Nation and Taku River Tlingit decisions in 2004, and the Mikisew Cree decision in 2005. The Supreme Court outlined a new consultation duty, based that duty on the honour of the Crown, and said that the duty to consult arises when the Crown has real or constructive knowledge of the potential existence of an Aboriginal or Treaty right or interest, and contemplates conduct that might adversely affect it. The duty required consultation with the affected Aboriginal people that went beyond simply talking to substantially addressing Aboriginal concerns by adopting appropriate accommodation measures (Christie 2006). Long-held First Nation grievances about how they had been ignored in the decision-making of government and industry, standing and forced to stand on the sidelines as they watched resources leave their lands to make others rich and leave them poor, now found new legitimacy in the consultation cases.

Empowered by the legal victories of the Haida, Taku and Mikisew, angered by the glacial pace of change in the Ontario government's consultation approach and worried by the rapid influx of mining "intruders" on their lands, five First Nations in Treaty #9 [1929 adhesion[1]], including the KI, declared mining exploration moratoriums affecting 5 million hectares of land in Ontario's Far North. Their October 2005 "No Means No" declaration put the mining industry and the government of Ontario on notice that the First Nation commons would not be easily enclosed by junior mining exploration companies seeking speculative profits in their endless cycles of promotion. The latest round in the First Nation struggle against what David Harvey (2009) calls "accumulation by dispossession" had begun in Ontario.

First Nation moratorium or not, mining exploration company Platinex decided to test the resolve of KI and set up a drilling camp on the community's traditional lands at Nemeigusabins Lake in February 2006 (MNP 2006b).

The Company and KI disagree about what took place when the Platinex drillers and KI community members met in the open air on the land for two weeks in February 2006. Platinex tells a story of conspiracy, threats, violence and sabotage, a story vigorously disputed by KI. KI tells a story of meetings for tea and polite requests to leave. The following facts, however, are undisputed. Chief Donny Morris and Councillor Sam McKay delivered an eviction notice to the drillers and the next day the Company flew in a corporate security consultant, popularly known as "the mercenary," who eventually organized a "truce" and the withdrawal of the drilling crew from the site. No one was injured and no one was arrested. Officers of the Ontario Provincial Police were present and

[1] For histories of Treaty Number 9, see Long, J. (1978). *Treaty No. Nine: The Negotiations, 1901-1928*. Cobalt, ON: Highway Book Shop. And see Long, J. (1995), Who got what at Winisk? Beaver 75(1).

Chief Donny Morris

much to the Company's dismay; no criminal charges against the KI protectors of the land were laid. (See Platinex Inc. v. Kitchenuhmaykoosib Inninuwug First Nation 2006).

In short order, Platinex filed an injunction to seek a permanent court order preventing any KI interference with the drilling program as well as $10 billion in money damages (MNP 2006b). The "10 billion claim is reported to be the highest in Canadian legal history and rivals the damages in the big tobacco lawsuits in the U.S. The $10 billion figure was not idly chosen: it was designed to intimidate and silence the KI community as a type of SLAPP (Strategic Lawsuit Against Public Participation) suit, commonly brought by corporations against environmental protesters.

After careful deliberation, the community decided to fight the Platinex injunction and retained Aboriginal law specialists, Olthuis, Kleer, Townsend to represent them. The "what" and "why" logic of a legal defense and a political campaign often diverge. For the KI First Nation, their right to say no, a right they believed the Creator, their own Indigenous laws and the Treaty gave them, was at the core of their struggle. The KI legal defense team made a strategic decision to translate KI's legal, moral and ethical opposition to Platinex into a legal defense built around an outstanding land claim, the project's threats to KI's lands, culture and spirituality, and the failure of Ontario to meet its constitutional duty to consult KI prior to Platinex's proceeding with the drilling project. Platinex, on the other hand, told the court a story of dire consequences, with a small company facing imminent bankruptcy by a novel form of claim jumping by land claim and warned that if KI were successful, all mining claims north of the 51st parallel could be rendered worthless or put in jeapardy. But even Platinex acknowledged that Ontario had failed to consult with KI (Harries 2006).

On July 27, 2006, KI won what the judge described as an "interim, interim injunction" and Platinex lost its bid to immediately begin the drilling project. In the most famous sentence in the decision, Justice Smith wrote, "This case highlights the clash of two very different perspectives and cultures in a struggle over one of Canada's last remaining frontiers. On the one hand, there is the desire for the economic development of the rich resources located on a vast tract of pristine land in a remote portion of Northwestern Ontario. Resisting this development is an Aboriginal community fighting to safeguard and preserve its traditional land, culture, way of life and core beliefs" (Christie 2006). Justice Smith ordered Platinex to suspend drilling or exploration for five months while consultation with KI and Ontario took place.

Ontario Intervenes

The five-month pause created by the court's interim order was taken up with complex legal maneuvering around negotiating the terms and funding of a community consultation process with Ontario and Platinex. During that time, the KI dispute faded from the public eye, and the community point of engagement with the negotiations was largely teleconferences between KI's elected leadership and their Toronto-based legal team.

The consultation talks dragged on into December 2006 with no resolution in sight. No agreement had been reached on a set of rules to guide the consultation or on even what the consultation's goals would be. In an effort to break the stalemate, Ontario filed an application to join the legal proceedings as a party to the injunction motion. After a lengthy hearing in late January 2007, the judge agreed to add Ontario as a party to the injunction (CNW 2007). From this point forward, it would be two against one in the court fight. What was already a complex case became even more complex. And with complexity came increasing costs for KI as they were now forced to respond to the motions and arguments of both Platinex and Ontario.

Back in KI, under the pressure of mounting legal costs, the rejection of their land claim by Ontario, and Ontario's position that consultation must lead to drilling, the KI leadership began to consider how or whether to exit the litigation. Consultation was a duty that fell on both Ontario and KI. A First Nations participation or non-participation in a consultation process was all evidence about whether and how the duty to consult had been met. Leaving the court process likely meant KI being found in contempt and a confrontation on the land with criminal charges.

At an April 2007 hearing, Justice Smith rejected the KI argument for a full interlocutory injunction and gave the parties two weeks to come to an agreement on a consultation protocol and a memorandum of understanding with Platinex (Platinex Inc. v. Kitchenuhmaykoosib Inninuwug First Nation, 2007). The three-party talks went nowhere, and Platinex and Ontario decided to agree between themselves on the terms of the consultation protocol and memorandum of understanding. In a reprise of the original treaty negotiations, in May, Justice Smith unilaterally imposed the consultation protocol and memorandum of understanding agreements on KI and ordered that Platinex could access their "property" beginning on June 1, 2007 (Platinex Inc. v. Kitchenuhmaykoosib Inninuwug First Nation, 2007).

From left to right, Bruce Sakakeep, Darryl Sainnawap, Donny Morris, Sam McKay and Jack McKay at the Thunder Bay Correctional Centre. Cecilia Begg (not present) was held at the Thunder Bay District Jail.

The court decisions left KI with only three options: 1) accept the court ordered consultation protocol and memorandum of understanding and let Platinex on the land to drill; 2) appeal the decision, or; 3) withdraw from the process and defend their land. The KI leadership returned to their community and began a door-to-door canvass to seek direction from the membership. From this point forward, the KI community would have to look to each other rather than the law to find the solutions to their struggle with Ontario and Platinex.

The Jailing of the KI6

On August 29, 2007, KI advised Ontario that they were pulling out of the consultation talks. But Platinex would not be deterred. On September 24, 2007, Platinex CEO Trusler and his archaeological consultants ignored KI's letters and notices saying that they were not welcome and instead flew into the community. They were met at the gravel airstrip by more than one hundred KI community members who told them to go home or face trespassing charges if they set foot on the reserve. The impasse continued for seven hours and was finally resolved when two Ontario Provincial Police officers flew in to KI and requested Platinex to leave. Platinex immediately wrote to Justice Smith and requested an opportunity to be heard on an urgent motion to compel KI to allow the Company access to the land to prepare for drilling. The Platinex motion quoted KI Chief Donny Morris as stating that Platinex would never drill in his lifetime (MNP 2007).

The October 25, 2007 court appearance would be the last for KI legal counsel, Olthuis, Kleer, Townsend. KI, according to their spokesperson John Cutfeet, had spent almost $700,000 on their battle with Platinex and Ontario, and they were out of money and in serious debt to their lawyers. From KI's perspective, the community was a victim of a legal strategy adopted by the Company in collaboration with the government of Ontario that had effectively bankrupted an already impoverished community.

Three days before the October court appearance, KI had written to the Premier, the Ministers of Aboriginal Affairs and Mining, and the lawyers for Platinex and Ontario, telling them that they would be releasing their lawyers and proceeding as unrepresented litigants unless financial assistance was provided by Ontario to continue the talks. The community also warned that "we will address the Platinex situation ourselves, on the ground" and reminded the government that, "the moratorium on exploration and development within KI traditional homelands of 2001 is still in effect as mandated by the people to Chief and Council through various meetings and by way of a community referendum." (Chief Morris 2007) The letter received no reply.

After reading a brief statement to the court reiterating the points they had made in their letter to the Premier, KI representatives left the courtroom and the hearing continued in their absence. Justice Smith now ordered that the drilling project commence forthwith and enjoined KI members from blocking the project. Platinex lawyers were to draft a communiqué explaining all this in English and Oji-Cree and to fax it into the community. The expectation was that KI would willingly provide the needed information to assist Platinex in pre-screening the drill project for any burials, sensitive sites or hunting conflicts, as well as provide no interference or "destruction" to the Company.

On November 1, 2007, Platinex faxed a drilling timetable to KI. KI responded the next day stating that KI and its members, "want no such activity other than the traditional customary practices to be permitted on these lands." On the issue of Platinex's access to the land, the community stated: "As for your proposed arrival in the community on November 6, 2007, please be advised that the membership of Kitchenuhmaykoosib Inninuwug are reaffirming that your admittance into the community IS NOT allowed and this has been demonstrated to you once before." (Chief Morris 2007)

For Platinex, the KI letter provided all the evidence needed to proceed with a contempt of court hearing against KI. KI decided it would not defend against the contempt and advised the court that KI would not obey the October 25th order and would not engage in any further negotiations with Platinex. With no defense put forward, KI and the individual defendants were found in contempt of the October 25th court order. With respect to penalties for contempt of court, KI lawyer Reid told the court that none of the individual defendants could afford to pay any fines or costs awards and would prefer to be jailed.

The case had become simpler and more dramatic. Governments relate to First Nations through treaties. Accordingly, the government was now the sole focus of KI. The KI struggle was about the community's right to say no and the limits of a fatally flawed Mining Act that had yet to incorporate the new law of Aboriginal consultation, let alone sovereignty and the right to free, prior and informed consent. The KI position reduced to three No's: no drilling or exploration on KI's territory, no negotiations with Platinex and no compliance with the October 25 court order.

On January 25, 2008, as supporters drummed outside the courthouse, Justice Smith heard submissions from Platinex, Ontario and KI on sentencing. The lawsuit had now become a constituency-building action for KI. In a dramatic and decisive gesture, the leadership of KI were presenting themselves to

the court, acknowledging their contempt and requesting that they be jailed, as they could not afford to pay fines. Even KI lawyer Reid had to admit that this was the first time he had represented clients asking to be jailed.

While Justice Smith considered his sentencing decision, Ardoch Algonquin leader Robert Lovelace was sentenced to six months in jail for contempt of court on a similar set of facts arising from a dispute between the Ardoch and a mining exploration company in southern Ontario (Frontenac Ventures Corp. v. Ardoch Algonquin First Nation 2008).

On March 17, 2008, KI Chief Donny Morris, Deputy Chief Jack McKay, Councillors Sam McKay, Darryl Sainnawap, Cecilia Begg and staffer Bruce Sakakeep were sentenced to six months in jail for contempt of court. No fines were levied. "KI has repeatedly and publicly stated its defiance of the order of this court and has stated that it will continue to disobey any court orders allowing Platinex or its representatives to enter onto the property," Smith said in his reasons for sentencing (Platinex Inc. v. Kitchenuhmaykoosib Inninuwug First Nation 2008, p. 10). "To allow a breach of an order of this court to occur with impunity by one sector of society will inevitably lead to a breach by others or to the belief that the law is unjustly partial to those who have the audacity or persistence to flout it." (Platinex Inc. v. Kitchenuhmaykoosib Inninuwug First Nation 2008, p. 12).

Echoing the reasons of Justice Cunningham in the Lovelace sentencing, Smith concluded, "If two systems of law are allowed to exist – one for the 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." (Platinex Inc. v. Kitchenuhmaykoosib Inninuwug First Nation 2008, p. 12)

Platinex and Ontario appeared to have won but they won in such a loathsome way that they eroded the public confidence in the justice of the case. The harsh sentences shocked the defendants and angered their hundreds of supporters in the courtroom who expected suspended sentences and moderate fines. Supporters stood on the courthouse hill and solemnly witnessed the transport of the leaders to jail and held signs saying, "Too Little Justice," "Too Many Mining Companies," "Stop the War on KI" and "McGuinty Has Blood on His Hands"(Curry 2008).

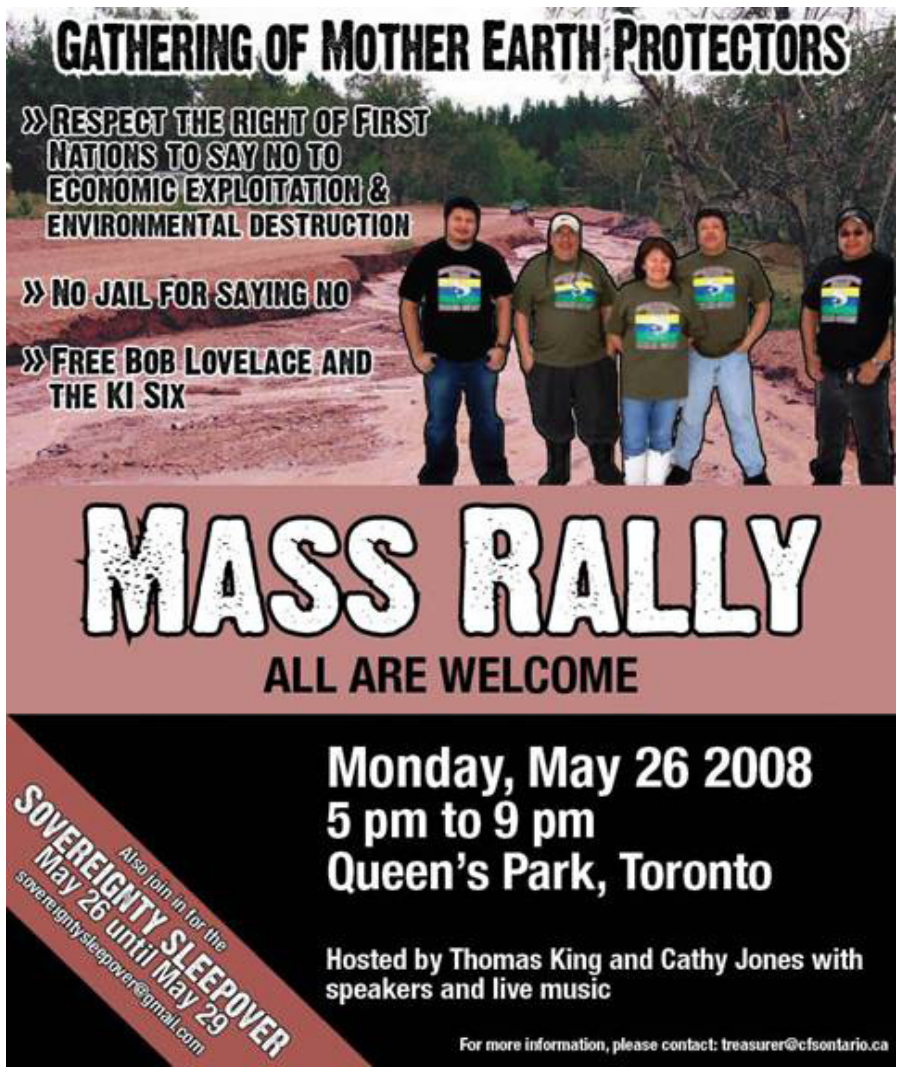
The Sovereignty Sleepover and the Court of Appeal

The harsh jail sentences catapulted the Kitchenuhmaykoosib Inninuwug struggle and the names of Chief Donny Morris, Deputy Chief Jack McKay, Councillors Cecilia Begg, Sam McKay, Darrell Sainnawap and staffer Bruce Sakakeep – the KI Six – into national and international headlines, prompting a firestorm of condemnation of the Ontario government and of the mining industry from across Canada and increasingly around the world (Gillespie 2008b).

The sentences were condemned by the Archbishop of the Anglican Church, Amnesty International, environmental organizations, trade unions and members of the general public. The campaign engaged a broad coalition in Canadian civil society united against the unjust jailing of Chief Morris and his council (Valpy 2008). But it is important to recognize that almost all of KI's non-Aboriginal supporters continued to frame the issue as one of consultation and accommodation, which ignored or elided the fact that the issue for KI went beyond consultation and accommodation to community consent and the right to say no. The language of consultation, however, allowed many non-Aboriginal allies with varying politics to speak on the same issue without fighting over each other's principles. But consultation did not necessarily mean the same thing to all allies: each ally interpreted "consultation" to fit with their own objective.

Two weeks after the jailing of the KI leadership (March 15, 2008), a notice of appeal was filed. The issue on appeal, which joined the KI and Ardoch cases, would simply be the severity of the sentences.

By early April, the Grassy Narrows First Nation, a community that had been fighting a battle against uncontrolled clear-cut logging, joined the KI—Ardoch Algonquin Alliance. Together with their supporters, the three communities began to plan for a convergence at Queen's Park. The "sovereignty sleepover"



KI Rally Poster

opened up an opportunity for the religious, human rights, trade union, student environmental, youth and community people who had been supporting the KI, Ardoch Algonquin and Grassy Narrows struggles to make connections among groups with similar claims, as well as further connections between local and national organizations. Veterans of past struggles around indigenous, environmental, peace, immigrant rights, labour and student issues, such as the Christian Peacemaker Teams, Rainforest Action Network, No One is Illegal Toronto, and Canadian Federation of Students, reconnected with the other allies of Kitchenuhmaykoosib Inninuwug (KI), Ardoch Algonquin First Nation, Asubpeeschoseewagong Netum Anishinabek (Grassy Narrows First Nation). On May 26, hundreds converged at a gathering of mother earth protectors for "four days of ceremony, speakers, workshops, music, and a three night sovereignty sleep-over," (CNW 2008) in an unprecedented tent-in directly on the front lawn of the legislature at Queen's Park.

On May 22, in a little noticed but critical event, six days before the appeal was heard, Platinex launched a lawsuit against the Government of Ontario for $70 million in damages resulting from Ontario's failure to adequately consult with KI (Canadian Press 2008). The alliance between Platinex and Ontario had ended.

May 28, 2008 was an unusual day at the Ontario Court of Appeal. At the last instant, Platinex put forward the position that, "the appellants have spent enough time in jail, the matter will ultimately be settled only through negotiation, and no good purpose would be served by keeping the appellants in jail any longer," (Platinex Inc. v. Kitchenuhmaykoosib Inninuwug First Nation 2008b) and KI was released on consent. The companion appeal of Ardoch Algonquin leader, Robert Lovelace, proceeded to argument.

Those fortunate enough to have seats in the postage stamp-sized courtroom witnessed what was described by legal observers as a "complete meltdown" of Ontario's senior legal counsel in the proceedings at the Court of Appeal. In a telling exchange with the judicial panel of three judges, the Crown was unable to explain to the Court's satisfaction how fines that hurt could be part of reconciliation with Aboriginal peoples (Blatchford 2008b). The key issues put before the court by the KI and Ardoch lawyers and the interveners were: the Aboriginality of the offenders in the context of a sentence of incarceration; the question of alternative remedies to jail; the role of the Crown in discharging its public interest mandate as opposed to defending mining legislation, and; the public abhorrence of jail sentences for First Nation leadership that ran against

the public interest.

Chris Reid for KI and Ardoch, and lawyers Julian Falconer for NAN and Mary Eberts for the Native Women's Association of Canada were ultimately persuasive, winning on all points. The KI Six and Ardoch's Robert Lovelace were released on the spot from the courtroom and joined their supporters and community members in celebration at Queen's Park (Blatchford 2008a). But the victory in appealing the sentences had not addressed the underlying issue of how to resolve disputes between First Nation(s) with Aboriginal or treaty rights and mining companies who stake claims and begin drilling in the First Nation's territory without prior consent. The Platinex claims and leases remained on KI lands and the Mining Act was as yet unchanged.

In written reasons released in July of 2008, panel chair Justice Rosenberg was pointed in his comments on the limits of the current Mining Act. He described the legislation as "a remarkably sweeping law" that allows prospectors to stake claims on any Crown land without community involvement, and put the legislation "at the heart of this case." The Court noted that both KI and the Ardoch had consistently asked the Premier and the Government of Ontario to engage them in direct negotiations to resolve their disputes rather than to supporting mining companies in their "efforts to obtain injunctions and convictions." Where a requested injunction is intended to create "a protest-free zone" for contentious private activity that affects asserted Aboriginal or treaty rights, the court must be very careful to ensure that, in the context of the dispute before it, the Crown has fully and faithfully discharged its duty to consult with the affected First Nations. The Court also reinforced the importance of good faith negotiations and argued that every effort must be expended to obtain a negotiated or legislated solution (CNW 2008).

One of roles of the court of appeal is to check the power of judges. In its written reasons, the Court of Appeal made it clear that jailing First Nations leadership would be the last option when Aboriginal and treaty rights and mining rights come into conflict, stating: "The court must further be satisfied that every effort has been exhausted to obtain a negotiated or legislated solution to the dispute before it." The decision, in effect, set out a new standard for imposing injunctions that "might have an adverse impact on asserted Aboriginal and treaty rights." There was comfort in the fact that jail would be the last bridge crossed when First Nations, the government and mining companies met on the land (Platinex Inc. v. Kitchenuhmaykoosib Inninuwug First Nation 2008a).

Seven days later, the McGuinty government made a dramatic announcement that would ultimately drive a wedge between the environmental allies of KI and the First Nations of Treaty Number 9. On July 14, 2008, the Ontario government announced that it would "protect" 50 percent of Ontario's Far North, 225,000 square kilometers of land and reform the Mining Act. First Nations would have a "much greater say" on their traditional lands through a planning process that would require their agreement and that "exploration and mine development should only take place following early consultation and accommodation of Aboriginal communities." However, First Nations wanted more than simply a greater say in planning and consultation. They wanted to create their own process with their own targets and timetables, revenue sharing and, most importantly, all with their free, prior and informed consent (Gillespie 2008a). For environmentalists, "protection" meant parks, traditionally defined as wilderness without people or communities, while Treaty Number 9 First Nations were challenging the idea that their homelands were "wilderness" and questioning whether the western conception of parks was culturally appropriate. [2]

Aftermath

In August 2009, Chief Donny Morris was driving his boat for fishing at Nemeigusabins Lake. But he was not alone. On the shore was an audience of Ontario Provincial Police officers and members of the KI community. Elders were singing church hymns and a new cabin was under construction. And overhead was a floatplane trying to land. The plane had been chartered by Platinex (White 2009).

Platinex failed to make a landing that day but the scene they created would be their last act in their exploration play at KI. Ontario and Platinex entered mediation to resolve Platinex's $70 million lawsuit against Ontario (MNP 2009). True to the principle that it would only negotiate with Ontario, KI was not willing to participate in mediation and, on December 13, 2009, the parties settled. Ontario agreed to pay Platinex $5 million and a potential future royalty interest should the claims be developed in the next 25 years. Platinex surrendered their claims and leases, and Ontario withdrew their claims and leases from staking and mineral exploration. KI received nothing but an end to Platinex's litigation and the promise of 25 years of peace at Nemeigusabins Lake (Canadian Corporate Newswire 2009).

In August 2008, Ontario began a public consultation on "modernizing" the Mining Act and the new act passed into law in October 2009. The province promoted the new legislation as the solution to controversies with First Nations. But, the new act failed to address fundamental issues on First Nation jurisdiction, failed to include requirements for the free prior and informed consent of First Nations, and did nothing to change the free entry system. By 2010, a Treaty 9 First Nation, Constance Lake, was in court challenging the consultation provisions of the new legislation and a junior mining company, God's Lake Resources, was exploring on the KI homeland without KI's consent.

In July 2011, KI held a community referendum and, in a Canadian first, passed into law a declaration that in effect "nationalized" all the resources on their homelands and protected all the waters flowing in and out of Big Trout Lake watershed, in the core of their homeland. Jail had done little to temper the demands of KI.

Lessons

The Kitchenuhmaykoosib Inninuwug campaign for "the right to say no" was arguably the first public and significant test of the issue of free, prior and informed consent in Canada: the first connection of a specific local struggle to the global and universalizing claims of the UN Declaration on the Rights of Indigenous Peoples. Certainly, the KI struggle was a catalyst in Ontario's reform of the Mining Act, which was announced in July 2008; just seven days after the written reasons of the Court of Appeal called the existing mining legislation "archaic." But "the right to say no" and the right to free, prior and informed consent go beyond the law of consultation in Canada. First Nation consultation has become a way to regulate Aboriginal resistance. Communities that start out trying to stop logging, mining projects or even the creation of protected areas on their territory by using legal arguments, are often drawn by the limits of consultation law into negotiating and administering agreements or "accommodations" with resource developers and the government – a sophisticated policy of incorporation.

The driving force in this accommodation regime, a kind of new boreal Fordism, if you will, was First Nation militancy, unity and struggle – People Power. The Canadian law of consultation was a shield against the uncontrolled access to First Nation territories by resource developers or the arbitrary decisions of government, but it was not a sword to gain a First Nation veto over resource development or recognition of their own Indigenous laws or the right to the economic benefits of the minerals in their homelands. Consultation gave the First Nation a "collective agreement" with a mining company, but it did not give the First Nation "the right to say no" and community control of lands and resources and the economic benefits that would flow from the resources.

Years of First Nation blockades and litigation have forced an economic accommodation between resource companies and First Nations that has led to a proliferation of increasingly sophisticated Impact and Benefit Agreements or resource development agreements that deliver jobs, training and revenues to First Nations in return for peace on the land. Often an agreement is what First Nations want, but sometimes a community's demands go beyond bread and butter issues to questions of sovereignty and ultimately to First Nation ownership and control of natural resources in their homelands. And that is the unique audacity of the KI struggle: they wanted "the right to say no."

The KI struggle is a prefigurative struggle. The seeds of the new society in which First Nations are, in fact and in their own laws, the keepers and developers of their land, are found in their struggle to say no. KI, a marginal place in many dimensions, has the advantage and disadvantage of largely being removed from mainstream institutions. In the free space that is their customary

[2] See Dowie, Mark (2009). *Conservation Refugees: The Hundred year conflict between global conservation and native peoples*. Boston, MA: MIT Press.

homeland, they have a community based on mutual aid that has a way of life, a lived counter-hegemony that is in opposition to much of what we outsiders might call the late capitalism of the global economy. The story of how KI tested the legal limits of consultation, finding that it did not give them "the right to say no" but only the right to make an agreement with the mining company, shows us that their way of life cannot be reconciled with what we might call neo-liberalism and the capitalist development of natural resources in First Nation homelands.

While others talk of co-management or even co-governance, in the wake of KI's struggle, in the wake of their jailing, KI's imagination of the good life returns to the law of Kanawayandan D'aaki – the duty and sacred responsibility to look after their land. It is their land, not shared land. The Kitchenuhmaykoosib Inninuwug are turning away from the idea of First Nations as communities with legal rights, defined under the constitution of a colonial state and in non-Aboriginal courts, towards a struggle to bring a different and independent Indigenous world into existence.

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