

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

PLATINEX INC.

Plaintiff

- and -

**KITCHENUHMAYKOOSIB INNINUWUG FIRST NATION, DONNY MORRIS, JACK
MCKAY, CECILIA BEGG, SAMUEL MCKAY, JOHN CUTFEET, EVELYN
QUEQUISH, DARRYL SAINNAWAP, ENUS MCKAY, ENO CHAPMAN, RANDY
NANOKEESIC, JANE DOE, JOHN DOE and PERSONS UNKNOWN**

Defendants

STATEMENT OF DEFENCE AND COUNTERCLAIM

1. The Defendants represented in this statement of defence and counterclaim are Kitchenuhmaykoosib Inninuwug First Nation (“KI”, which includes its members for the purposes of this statement of defence and counterclaim), and Defendants Donny Morris, Jack McKay, Cecilia Begg, Samuel McKay, John Cutfeet, Evelyn Quequish, Darryl Sainnawap, Enus McKay, Eno Chapman and Randy Nanokeesic (these named individuals being “KI officials”). Together these Defendants are “KI and its officials”.

2. KI and its officials admit the allegations contained in paragraphs 3, 4, 5, 6, 7, 8 and the first sentence of paragraph 9 of the Statement of Claim, to the extent that all these KI officials held the positions as alleged from November 2005 to the present, but some KI officials (Chief Donny Morris, Evelyn Quequish and John Cutfeet) have held their positions for several years.

3. KI and its officials have no knowledge of the allegations contained in paragraphs 2, 11, 13, 14, 20, 21 and 23 of the Statement of Claim. KI and its officials have no knowledge of the

allegations contained in paragraphs 15, but in respect of the allegation of a risk of losing title to certain claims, KI and its officials state that numerous exclusion of time orders or extension orders have been granted to the Plaintiff Platinex Inc. (“Platinex”) already, which continue the “good standing” of claims without the requirement to perform assessment work on them through the extension period.

4. Except as expressly set out in this Statement of Defence, KI and its officials deny the remaining allegations in the Statement of Claim and put Platinex to the strict proof thereof.

5. In May 2000, KI submitted to both the federal and Ontario governments, through Indian and Northern Affairs Canada (“INAC”) and the Ontario Secretariat for Aboriginal Affairs respectively, its Treaty Land Entitlement (“TLE”) claim for additional reserve lands to be set aside out of its traditional territory. The lands referred to in Platinex’s Statement of Claim as the Big Trout Lake Property (hereinafter “Platinex mining claim area”) are within KI’s traditional territory, and are thus within the area in the TLE claim from which KI wishes to select reserve lands.

6. Shortly thereafter, KI issued a moratorium on resource development in its traditional territory, in order to help ensure that parts of these lands would not be put to uses incompatible with its selection as reserve lands through the TLE. The moratorium applied to mineral exploration. The Defendant Donny Morris, Chief of KI, sent a letter to Simon Baker of Platinex on February 7, 2001, informing him of the moratorium and reasons for it. The moratorium has never been lifted, and a press release issued by KI on October 27, 2005, confirmed that it remained in place.

7. When Platinex proceeded with exploration activities anyway (constructing a camp for drilling), beginning in or about February 2006, KI and its officials, exercising their rights to express themselves, engaged in peaceful, lawful protest activities. These included letters calling for the activities to stop, and visits by elders and young women to the campsite, whereupon they were offered tea and treated pleasantly by Platinex's contractors. At no time did KI and its officials act unlawfully. They did not blockade or obstruct the winter access road. They did not interfere with the airstrip , which was part of a frozen lake.

8. After Platinex's contractors vacated the campsite, KI and its officials, for safety reasons (fuel drums left at site posed potential environmental hazard), carefully dismantled the campsite, stored the items, then returned all items in good order to the contractor Cartwright Drilling Inc., but for lumber and the fuel drums which KI continues to safely store because Platinex has failed or refused to retrieve them despite offers by KI to effect their return.

9. KI and its officials deny that Platinex suffered loss or damages, or will suffer loss or damages as alleged, and in the alternative state that such damages are excessive, exaggerated or remote and put Platinex to the strict proof thereof.

10. If Platinex suffered, or will suffer, damages as alleged, which is not admitted but specifically denied, the same were caused by the negligent or wrongful actions and omissions of Platinex which include:

- (a) Filing of false or incomplete information with the Ontario Securities Commission, including in respect of the position of and communications with KI and its officials.

- (b) Providing false or incomplete information to Platinex's investors, contractors, agents, and the Ontario government ("Ontario") and the federal government, including in respect of the position of and communications with KI and its officials.
- (c) Improper or negligent use of Platinex's funding or financing designated for exploration activity.
- (d) Failing to adequately consult with KI, to listen to and learn about its concerns, culture, way of life and rights, so as to be able to understand how these might be accommodated.
- (e) Failing to undertake the necessary archaeological studies or research to determine whether there are potential or actual impacts from exploration on archaeological sites or artefacts.
- (f) Failing to undertake the necessary environmental studies or research to determine whether and to what extent there would be impacts from exploration on the lands, waters, air, plants, animals, persons, and peoples including KI in the area.
- (g) Failing to exercise due care or reasonable business judgment, including failure to secure financing in such a manner so as to be able to undertake consultation and the necessary studies and research and to enable postponement of exploration until these steps had been completed.
- (h) Intimidating and provoking KI and its officials into believing that all or many of their rights and interests in respect of the Platinex mining claim area, were being or would be violated, abrogated, or denied by the activities of Platinex.

- (i) Abandoning its exploration camp and leaving various buildings and items scattered on the land, within the traditional territory of KI, without any just cause or legal right to do so.
- (j) Failing to exercise due diligence in respect of the Defendants' rights and interests, and any encumbrance or limitation on Platinex's purported interests as a result.

11. Platinex has failed to mitigate its damages including through securing agreements with investors, financing, and permission from Ontario to enable exploration and drilling to be undertaken at a later time if Platinex is otherwise legally entitled to do so.

12. KI and its officials have constitutionally-protected treaty and aboriginal rights, including harvesting rights and rights to a traditional way of life, in respect of the lands in the Platinex mining claim area.

13. The Platinex mining claim area is within the lands from which KI, in its TLE claim, wishes to select additional reserve lands for exclusive use and occupation.

14. KI and its officials plead and rely on section 35 of the *Constitution Act, 1982*, and state that the claims and extension orders in respect of these claims, leases and other forms of permission granted by Ontario to Platinex are invalid, as the *Mining Act*, R.S.O. 1990, c. M.14 and regulations thereunder ("*Mining Act* regime") is unconstitutional for failure to provide priority to the exercise of aboriginal and treaty rights by subjugating such rights to the unilateral actions of private parties, or for failure to provide – at virtually all stages of the mining process -- for consultation with aboriginal parties and accommodation of their rights and interests.

15. KI and its officials plead and rely on section 35 of the *Constitution Act, 1982*, and on law in respect of the Honour of the Crown, and state that the claims and extension orders in respect

of these claims, leases and other forms of permission granted by Ontario to Platinex, are invalid, due to the failure of Ontario to consult with or accommodate KI and its officials in respect of same.

16. KI and its officials deny the causes of action alleged and pleaded by Platinex, and deny the underlying allegations, as follows:

- (a) Negligence: KI and its officials do not owe a duty of care to Platinex (in fact, Platinex owes a duty of care to KI and its officials in respect of their harvesting and other rights in the lands at issue); in the alternative, KI and its officials deny the allegations purporting to comprise the breach, and deny that damages resulted from same.
- (b) Nuisance: KI and its officials deny that Platinex has any interest in the lands at issue so as to be able to plead private nuisance; KI and its officials deny any obstruction, including a substantial and unreasonable obstruction, of the winter access road and airstrip on the frozen lake, deny that these were public roads or rights of way, and deny that Platinex suffered any damages, let alone special or particular damages, as a result of any actions of KI and its officials in respect of the access road and airstrip, so as to be able to plead public nuisance; in the alternative, KI and its officials deny the allegations purporting to comprise nuisance.
- (c) Intimidation and Conspiracy: KI and its officials deny any behaviour intended to be intimidating or to result in economic loss, deny any economic loss as a result of their conduct, deny that their conduct was unlawful or that there was any

agreement among them to act unlawfully, and state that their actions are consistent with exercising their constitutionally-protected rights in respect of the lands at issue, including accessing and monitoring lands to enable the exercise of harvesting and other rights thereon, and consistent with their constitutionally-protected right to freedom of expression.

- (d) Trespass to Chattels, Conversion, Detinue: KI and its officials deny the elements of this cause of action, including possession of chattel (at Platinex's camp) by Platinex, dispossession, detention, conversion, and damage to chattel; KI and its officials state that Platinex is responsible for any change in circumstances of chattels at its camp, through its own negligent or intentional conduct, including in abandoning its camp without just cause or legal right.
- (e) Misfeasance in Public Office: KI and its officials deny that the KI Chief and Band Council exercise a public office to which this tort applies or over which this Court has jurisdiction, deny that their conduct was unlawful and specifically plead that they were acting lawfully and with proper authority at all times consistent with exercising their constitutionally-protected rights in respect of the lands at issue and their right to freedom of expression, and deny that they had intent to injure Platinex or that Platinex was injured as a result of their conduct.
- (f) Unlawful Interference with Economic Interests: KI and its officials deny any intention to injure Platinex as alleged, deny any economic loss suffered by Platinex as a result of conduct of KI and its officials, and deny any unlawful conduct of KI and its officials; KI and its officials were acting lawfully at all

times, with the sole intent of protecting their rights in respect of the lands at issue and expressing their thoughts and beliefs.

17. The whole of the Statement of Claim is inflammatory, and is designed to or has the effect of further intimidating and denigrating KI and its officials, and its members, on top of the ongoing denigration, abuse and oppression they and their lands have suffered for many decades.

18. KI and its officials state that Platinex's claim should be dismissed with costs.

COUNTERCLAIM

19. KI and its officials counterclaim against Platinex for:

- (a) General damages in the amount of \$10,000,000.
- (b) Special damages the amount of which is not yet known but which will be made available at or before trial.
- (c) An interlocutory injunction enjoining Platinex (including its directors, officers, servants, agents and contractors) from proceeding with its current plans for exploration, drilling, mining or related activity on or in respect of the Platinex mining claim area, or any other part what the Defendant KI defines as its traditional territory as illustrated in Figure 1 attached, without the express written consent of the Defendant KI.
- (d) A permanent injunction enjoining the Platinex (including its directors, officers, servants, agents and contractors) and any person who has notice of the order, from proceeding with any exploration, drilling, mining or related activity on or in respect of the Platinex mining claim area or any other part what the Defendant KI

defines as its traditional territory as illustrated in Figure 1 attached, without the express written consent of the Defendant KI.

- (e) An order transferring this matter from the dispute resolution process within the *Mining Act*, R.S.O. 1990, c. M.14, including before the Commissioner therein, to the jurisdiction of this Court, if necessary.
- (f) Costs of defending the action and bringing this counterclaim on a substantial indemnity basis, including GST.
- (g) Such further and other relief as this Honourable Court deems just.

20. Platinex has breached or intends to or would breach, through its exploration, drilling and mining activity, the aboriginal and treaty rights of KI and its officials, including harvesting rights, and rights to a traditional way of life.

21. Platinex has breached or intends to or would breach, through its exploration, drilling and mining activity, the rights of KI and its officials to select lands comprising the Platinex mining claim area, to be reserve lands in KI's TLE claim.

22. KI and its officials rely on the allegations contained in paragraphs 1 to 18 of their Statement of Defence.

23. KI and its officials seek the relief set out in paragraph 19 herein.

Date: May 23, 2006

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Plaintiff Defendant

Court File No: 06-0271

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced at [Kenora under file 06-060](#), and transferred to [Thunder Bay](#)

**STATEMENT OF DEFENCE
AND COUNTERCLAIM**

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