

## SECTION 3

## Examples and Case Studies of Indigenous Law in Action in EA Processes

Many First Nations have created their own consultation and EA processes.<sup>69</sup> These processes tell governments and proponents how to engage with First Nations when developing in their territories.<sup>70</sup> In this section, we summarize case studies of how First Nations have asserted their Indigenous laws in various contexts. In some cases, this includes First Nations creating their own EA process, or defining how they participate in provincial and federal EA processes and consultation with the Crown. For others, First Nations have asserted their Indigenous laws through direct action on the land.

**69** Leclair, J., Papillon, M., & Forget, H. 2019. Les protocoles de consultation autochtones au Canada : Un modèle de convergence des systèmes juridiques autochtones et étatique ? *Recherches amérindiennes au Québec*, 25 at 26.

**70** Leclair, J., Papillon, M., & Forget, H. 2019. *Les protocoles de consultation autochtones au Canada : Un modèle de convergence des systèmes juridiques autochtones et étatique ? Recherches amérindiennes au Québec*, 25 at 29.

## CASE STUDY

### DESHKAN ZIIBIING DEVELOPS DUTY TO CONSULT PROTOCOL

Deshkan Ziibiing, known as the Chippewas of the Thames (“Chippewas”) are Anishinaabeg people who originally migrated to the Great Lakes area from the north-eastern region of North America. The majority of Southwestern Ontario is their modern traditional territory.<sup>71</sup>

In February 2013, Enbridge filed an application requesting that the National Energy Board (NEB) allow Enbridge to reverse the flow and increase the capacity of an oil pipeline called “Pipeline 9.”<sup>72</sup> Pipeline 9 runs through the Chippewas’ traditional territory.<sup>73</sup>

The Chippewas were opposed to the changes to Pipeline 9 because the pipeline was 40 years old and at risk of breaking. According to then-Chippewas Chief Myeengun Henry, “When a pipeline breaks, it devastates rivers and people and land.”

**71** Deshkan Ziibiing Chippewas of the Thames First Nation. March 2022. *Welcome to Chippewas of the Thames First Nation*. Deshkan Ziibiing Chippewas of the Thames First Nation. <https://www.cottfn.com/>

**72** Canadian Free Press. March 2014. Enbridge Line 9 pipeline reversal approved by energy board. *CBC News* <https://www.cbc.ca/news/canada/montreal/enbridge-line-9-pipeline-reversal-approved-by-energy-board-1.2562169>

**73** CBC News. July 2017. Line 9 Supreme Court ruling will be crucial for Chippewas of the Thames. *CBC News* <https://www.cbc.ca/news/canada/london/chippewas-line9-court-ruling-1.4219737>

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To decide whether to approve the changes to Pipeline 9, the NEB held public hearings. After the hearings, the NEB approved the pipeline changes but imposed three conditions on Enbridge – all of which were aimed at involving First Nations in environmental management of the pipeline.<sup>74</sup>

Unhappy with the NEB's decision to approve the changes to Pipeline 9, the Chippewas took Enbridge to Federal Court, and then to the Federal Court of Appeal. Finally, the case was heard at the Supreme Court of Canada ("SCC"). The SCC found that the NEB had a duty to consult with the Chippewas. However, in this case, the SCC found that the NEB had met its duty to consult.<sup>75</sup>

In November 2016, the Chippewas decided to create their own protocol for consultation called *Wiindmaagewin*. *Wiindmaagewin* outlines the Chippewas' expectations regarding proponent and government consultation within their traditional territory.<sup>76</sup> As made clear in *Wiindmaagewin*, the Chippewas expect proponents and governments to follow the principles of inter-societal governance and communication when consulting with the Chippewas.<sup>77</sup>

*Wiindmaagewin's* purpose is to protect the Chippewas' watersheds, relationships and rights.<sup>78</sup> It also sets out the legal principles that will be used when interpreting *Wiindmaagewin*. These principles are:<sup>79</sup>

1. *Gdinawendimi*: We are all related.
2. *Mlno-bmaadiziwin*: The good life is possible by living in accordance with the Seven Grandfather and Grandmother teachings – *Nbwaakaawin* (wisdom), *Zaagidiwin* (love), *chi* (respect), *akde'ewin* (bravery), *Gwakwaadiziwin* (honesty), *Dbaadendiziwin* (humility) and *Debwewin* (truth). All proponents must demonstrate how the proposed project meets these teachings.
3. *Naaknigewin*, or law. All consultation and discussion must respect the Creator's law.
4. Anishinaabe *dbendizawin*, or Anishinaabe independence and self-determination. The Anishinaabe were created to live as an independent people. All proposals must respect the Creator-given independence of the Anishinaabeg.

**74** CBC News. July 2017. Line 9 Supreme Court ruling will be crucial for Chippewas of the Thames. *CBC News* <https://www.cbc.ca/news/canada/london/chippewas-line9-court-ruling-1.4219737>, at para 24.

**75** CBC News. July 2017. Line 9 Supreme Court ruling will be crucial for Chippewas of the Thames. *CBC News* <https://www.cbc.ca/news/canada/london/chippewas-line9-court-ruling-1.4219737>, at paras 5, 46.

**76** *Wiindmaagewin - Consultation Protocol*. 2016. Chippewas of The Thames First Nation.

**77** *Wiindmaagewin - Consultation Protocol*. 2016. Chippewas of The Thames First Nation, at 7.

**78** *Wiindmaagewin - Consultation Protocol*. 2016. Chippewas of The Thames First Nation, at 4.

**79** *Wiindmaagewin - Consultation Protocol*. 2016. Chippewas of The Thames First Nation, at 8.

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## AAMJIWNAANG FIRST NATION'S CONSULTATION PROTOCOL

The Aamjiwnaang First Nation is a First Nations community of about 1,000 Anishinaabek people residing on reserve along the shores of the St. Clair River. The Aamjiwnaang's traditional territory covers much of Southwestern Ontario and the Great Lakes Region, including significant territory in what is now Michigan.<sup>80</sup>

Aamjiwnaang's reserve lands are bordered by industrial and petrochemical developments, and there are concerns about the short- and long-term impacts of these industries. As a result of the industrial projects, the Aamjiwnaang decided to create a consultation protocol called the New Protocol.<sup>81</sup>

The New Protocol replaced a 2011 protocol where proponents had to meet 23 steps for consultation. The Aamjiwnaang wanted a refreshed protocol that would be more efficient and allow them to meet

timelines for recommendations to the province, Canada and developers.<sup>82</sup>

The New Protocol was developed through a community-led process. During community engagement sessions organized by the Aamjiwnaang's Environmental Coordinator, members contributed opinions on how consultation should take place. For instance, the community decided when Chief and Council would participate in consultation, when community members would be informed about projects, and when community members would give opinions about proposals.<sup>83</sup>

The New Protocol requires that when a proponent wants to build something new, install something, change a piece of equipment, or change the current layout of the land within Aamjiwnaang's traditional territory, the proponent must inform the Aamjiwnaang of their plan. For each submission, a project summary is created and then reviewed by the Nation's Environment Committee. The Environment Committee then makes recommendations to Chief and Council regarding the type of engagement needed from the proponent. The proponent must also provide capacity funding to ensure full and meaningful involvement by the Aamjiwnaang.<sup>84</sup>

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- 80** *Consultation protocol – Aamjiwnaang.* 2018. Aamjiwnaang First Nation, at 1. <https://www.aamjiwnaang.ca/wp-content/uploads/2018/07/Aamjiwnaang-Consultation-ProtocolExternal.pdf>
- 81** *Consultation protocol – Aamjiwnaang.* 2018. Aamjiwnaang First Nation, at 1. <https://www.aamjiwnaang.ca/wp-content/uploads/2018/07/Aamjiwnaang-Consultation-ProtocolExternal.pdf>
- 82** Graf, C. February 2018. Aamjiwnaang developing consultation protocol. *Anishinabek News* <http://anishinabeknews.ca/2018/02/23/aamjiwnaang-developing-consultation-protocol/>
- 83** Graf, C. February 2018. Aamjiwnaang developing consultation protocol. *Anishinabek News* <http://anishinabeknews.ca/2018/02/23/aamjiwnaang-developing-consultation-protocol/>
- 84** Aamjiwnaang First Nation. March 2022. Environment projects. Welcome to Aamjiwnaang First Nation. <https://www.aamjiwnaang.ca/environment-projects/>

## CASE STUDY

## STK'EMLUPSEMC TE SECWÉPEMC NATION (SSN)'S ASSESSMENT PROCESS

Stk'emlupsemc te Secwépemc Nation ("SSN") is made up of the Tk'emlúps te Secwépemc and Skeetchestn Indian Band, one of the seven historic divisions of Secwepemc Nation. The Secwepemc people occupy a vast territory in the interior of what is now British Columbia.<sup>85</sup>

The SSN created an assessment process in response to a proposed copper and gold mine within a culturally important place on the SSN's traditional territory.

In 2015, following British Columbia's assessment that SSN had a strong claim to title and rights in the area, SSN made a formal declaration of title to the area where the proposed mine would be located. SNN insisted that they conduct their own project assessment that would respect Aboriginal rights and title, and that would include giving SSN jurisdiction over how the land is to be used.

SSN's assessment process was based in Indigenous laws, customs and knowledge. Its EA process included independent expert reviews, community information sessions, a review hearing, and assessments of tangible and intangible impacts (e.g., impacts of a cultural and spiritual nature).<sup>86</sup> SSN's assessment integrated western and Traditional Knowledge. During SSN's assessment, more than 80 experts and Knowledge Holders shared their findings. In March 2017, after completing its EA, SSN announced it would not consent to the mine because the mine would negatively impact air and water quality, and irreversibly affect SSN's traditional territory.

Within two months of SSN's announcement, more than 30 organizations across Canada signed a declaration supporting SSN's assessment process and decision.<sup>87</sup>

The information provided through the SSN assessment process was embedded and considered in both the federal and provincial EA. It informed the federal EA decision maker's decision that the project was likely to cause significant adverse environmental effects and cumulative effects to Indigenous heritage as well as the current use of lands and resources. Canada ultimately decided that the environmental effects could not be justified, and the project was not approved.<sup>88</sup>

**85** Tk'emlúps te Secwépemc. March 2022. Our land. <https://tkemlups.ca/profile/history/our-land/>

**86** Stk'emlupsemc te Secwépemc Nation. 2015. *SSN project assessment process: Proposed Ajax project*. Stk'emlupsemc te Secwépemc Nation. [https://miningwatch.ca/sites/default/files/ssn\\_project\\_review\\_process\\_1page\\_0.pdf](https://miningwatch.ca/sites/default/files/ssn_project_review_process_1page_0.pdf)

**87** Mining Watch Canada & Stk'emlupsemc te Secwépemc Nation. December 2017. *Help protect Pípsell*. <http://protectpipsell.ca/>

**88** Mascher, S. June 2019. Aligning Canadian impact assessment processes with the principles of UNDRIP. *CIGI*. <https://www.cigionline.org/articles/aligning-canadian-impact-assessment-processes-principles-undrip/>

## CASE STUDY

## TSLEIL-WAUTUTH NATION (TWN)'S INDEPENDENT ASSESSMENT OF KINDER MORGAN'S TRANS MOUNTAIN EXPANSION PROJECT

The Tseil-Waututh Nation (“TWN”) are a Coast Salish nation whose territory includes Burrard Inlet.<sup>89</sup>

In 2009, TWN adopted a Stewardship Policy, which is an expression of Tseil-Waututh jurisdiction and law. The Stewardship Policy mandates that TWN review any proposed development inside TWN’s Consultation Area. The Consultation Area encompasses the waters and lands traditionally used by TWN.<sup>90</sup>

Under the authority of the Stewardship Policy, TWN created an EA process.<sup>91</sup>

In May 2015, TWN applied their EA process to Kinder Morgan’s Trans Mountain Expansion Project (TMEX). The project proposed to expand the Trans Mountain pipeline system, and would result in a seven-fold increase of tanker traffic through Burrard Inlet. The facilities and the last 28 kilometres of the pipeline are in the heart of TWN territory.<sup>92</sup>

TWN’s EA was grounded in TWN Law (*snəwayəł*) and backed by scientific and anthropological expert evidence.<sup>93</sup> TWN’s EA concluded that the TMEX proposal had the potential to deprive past, current and future generations of control and benefit of the water, land, air and resources in their territory. The EA recommended that Chief and Council withhold TWN’s support for the TMEX proposal. Based on the recommendations, Chief and Council passed a resolution banning the project.<sup>94</sup>

In May 2016, following the TWN EA, the NEB issued a report recommending that the federal government approve TMEX. The federal government followed the NEB’s recommendation. In August 2018, a Federal Court of Appeal quashed the federal government’s approval of TMEX.<sup>95</sup> However, in June 2019, the federal government re-approved the project. And in February 2020, the Federal Court of Appeal dismissed an appeal regarding the re-approval. The SCC declined to hear an appeal of the Federal Court decision.

As of the time of publication of the Toolkit, pipeline construction has continued as planned.<sup>96</sup>

- <sup>89</sup> Clogg, J., Askew, H., Kung E., & Smith, G. 2016. Indigenous legal traditions and the future of environmental governance in Canada. 29:1 *Env L & Prac*, 227 at 246.
- <sup>90</sup> Clogg, J., Askew, H., Kung E., & Smith, G. 2016. Indigenous legal traditions and the future of environmental governance in Canada. 29:1 *Env L & Prac*, 227 at 246.
- <sup>91</sup> Clogg, J., Askew, H., Kung E., & Smith, G. 2016. Indigenous legal traditions and the future of environmental governance in Canada. 29:1 *Env L & Prac*, 227 at 247.
- <sup>92</sup> Clogg, J., Askew, H., Kung E., & Smith, G. 2016. Indigenous legal traditions and the future of environmental governance in Canada. 29:1 *Env L & Prac*, 227 at 247.
- <sup>93</sup> Clogg, J., Askew, H., Kung E., & Smith, G. 2016. Indigenous legal traditions and the future of environmental governance in Canada. 29:1 *Env L & Prac*, 227, at 248.
- <sup>94</sup> Clogg, J., Askew, H., Kung E., & Smith, G. 2016. Indigenous legal traditions and the future of environmental governance in Canada. 29:1 *Env L & Prac*, 227, at 249-50.
- <sup>95</sup> Canada Energy Regulator. September 2020. Project background. Canada Energy Regulator. <https://www.cer-rec.gc.ca/en/applications-hearings/view-applications-projects/trans-mountain-expansion/project-background.html#wb-cont>
- <sup>96</sup> Rader, J. May 2020. Stop Trans Mountain: The First Nations’ movement against the Trans Mountain Expansion Project. Washington Environmental Council. <https://waconservationaction.org/stop-transmountain-the-first-nations-movement-against-the-trans-mountain-expansion-project/>

## CASE STUDY

## GITANYOW HEREDITARY CHIEFS DEVELOP ASSESSMENT PROCESS

The GWSAP requires all actors (e.g., companies, governments) to follow Gitanyow strategic direction, such as the *Gitanyow Lax'yip Land Use Plan*. The GWSAP also prohibits projects from accessing the *Lax'yip* without consent of the impacted *Wilp* (House). Everything in the GWSAP is Gitanyow-led to uphold *Ayookxw* and ensure *Wilp* sustainability.<sup>98</sup>

The *Lax'yip* (territories) of the Gitanyow peoples are in the middle-Nass Watershed and upper Skeena Watershed, located along the western coast of what is now British Columbia.

In Gitanyow *Ayookxw* (law), Gitanyow hereditary Chiefs have the right and responsibility to possess, manage, protect and pass on the land and water of their territories sustainably from generation to generation.<sup>97</sup>

At the start of 2021, the Gitanyow released their *Gitanyow Wilp Sustainability Assessment Process (GWSAP)*. The GWSAP sets out requirements for assessing proposed projects in Gitanyow *Lax'yip*.

The GWSAP follows Gitanyow *Ayookxw*. The GWSAP sets out the Gitanyow's own process for assessing new projects, and provides for Gitanyow monitoring, assessment and response for past and ongoing impacts on the *Lax'yip*.

**97** West Coast Environmental Law. 2022. Environmental assessment. West Coast Environmental Law. <https://www.wcel.org/program/sharing-stories/environmental-assessment>

**98** Marsden/Naxginkw, T., & Smith, G. April 2021. Indigenous law in action: Gitanyow launches its ground-breaking *Wilp Sustainability Assessment Process*. West Coast Environmental Law. <https://www.wcel.org/blog/indigenous-law-in-action-gitanyow-launches-its-groundbreaking-wilp-sustainability-assessment>

## CASE STUDY

## MOHAWK COUNCIL OF AKWESASNE'S EA PROCESS

The Mohawk Nation at Akwesasne straddles the United States and Canadian borders on both banks of the St. Lawrence River.<sup>99</sup> The Mohawk Council of Akwesasne (“MCA”), the Canadian arm, includes members from Kana:takon (Saint Regis, Quebec), Kawehno:ke (Cornwall Island, Ontario) and Tsi:Snaihne (Snye, Quebec).<sup>100</sup> On the American side, Akwesasne is represented by the Saint Regis Mohawk Tribe (“SRMT”).<sup>101</sup>

The MCA conducts its own EAs for projects on its lands. It has Mohawk EA officers and conducts around 30 EAs each year.<sup>102</sup> MCA’s EA process is based on traditional teachings. The EA process uses the *Ohen:ton Karihwater:kwen* (The Words That Come Before All Else) as its environmental framework, and *Sken:nen* (Peace), *Kasatstensera* (Power) and *Ka’nikonriio* (Good Mind) as its guiding principles.<sup>103</sup>

Similarly, the SRMT conducts its own EAs. The SRMT EA process is based on looking ahead seven generations; being aware that there are limited resources available and ensuring that all resources are taken into account when considering a project.<sup>104</sup> The SRMT EA process incorporates the Thanksgiving Address and considers all things that Mohawk people are thankful for.<sup>105</sup> The theme of the Thanksgiving Address – “Now our minds are one” – is central to the EA process. SRMT believes that if that theme is considered in the EA process, all people will benefit, including proponents.<sup>106</sup>

Sections of the Thanksgiving Address are quoted throughout the EA documents and guide the information that SRMT collects from proponents. For example, for the section on animals, the EA form quotes from the Thanksgiving Address: *“We give thanks and greetings to the animal life. They are still living in the forests and other places. They provide us with food and this gives us peace of mind knowing that they are still carrying out their instructions as given by the Creator. We therefore give greetings and thanks to our animal brothers. Now our minds are one.”* Applicants are then required to provide detailed information on animals observed at the site area, the habitat and forage at the site, and whether calving or birthing grounds are present.

<sup>99</sup> Quebec, Public Inquiry Commission on Relations Between Indigenous Peoples and Certain Public Services in Quebec. 2019. *Final report*. Ottawa: Library and Archives Canada, at 107.

<sup>100</sup> Akwesasronon, Mohawk Council of Akwesasne. 2018. *Annual Report: 2017-2018*. Akwesasronon: Mohawk Council of Akwesasne, at 6.

<sup>101</sup> Saint Regis Mohawk Tribe. March 2022. *History of tribal government*. Saint Regis Mohawk Tribe. <https://www.srmt-nsn.gov/about/history-of-tribal-government>

<sup>102</sup> Mohawk Council of Akwesasne Environment Program. <http://www.akwesasne.ca/environment/>

<sup>103</sup> Mohawk Council of Akwesasne Environment Program. <http://www.akwesasne.ca/environment/>

<sup>104</sup> Saint Regis Mohawk Tribe Environmental Assessment Form. <https://dvc479a3d0ke3.cloudfront.net/uploads/environment/Environmental-Assessment-Form.pdf>

<sup>105</sup> Saint Regis Mohawk Tribe Environmental Assessment Form. <https://dvc479a3d0ke3.cloudfront.net/uploads/environment/Environmental-Assessment-Form.pdf>

<sup>106</sup> Saint Regis Mohawk Tribe Environmental Assessment Form. <https://dvc479a3d0ke3.cloudfront.net/uploads/environment/Environmental-Assessment-Form.pdf>

## CASE STUDY

DOKIS FIRST NATION  
DEVELOPS LAND CODE

The traditional territory of the Dokis First Nation (“Dokis”) is roughly 40,000 acres between what are now the Districts of Sudbury, Parry Sound and Nipissing.<sup>107</sup> Today, the Dokis reserve lands cover approximately 155 square kilometres of land southwest of Lake Nipissing on the French River. The reserve lands are composed of two large islands, with the main settlement located on the northern island called *Okikendawt* Island. The second island is a large Southern Peninsula that is generally used by the Dokis for hunting, fishing, camping and hiking.<sup>108</sup>

In 2003, the Dokis signed on to the *Framework Agreement on First Nation Land Management*<sup>109</sup> and in 2013, the Dokis passed the *Dokis First Nation Land Management Code* (“Land Management Code”).<sup>110</sup> Because the Dokis opted into the First Nations Land Management Act, and subsequently adopted its Land Manage-

ment Code, their reserve lands are no longer managed pursuant to the *Indian Act*.

The Land Management Code allows the Dokis to protect and respect the land and the gifts from the Creator, and states that the Dokis First Nation has the right to govern itself and has jurisdiction for Dokis land and resources.<sup>111</sup>

Under the Land Management Code, the Dokis have the jurisdiction to conduct EAs for projects proposed on Dokis First Nation reserve lands. For example, recently, the Dokis assessed the environmental impact of expanding hydro services to new homes on reserve. The Dokis determined that the project would have negligible environmental impacts.<sup>112</sup>

**107** Blacklaws, K. 2014. *Integrating the eagles: Members of Dokis First Nation reflect on public education in Ontario, 1960-1980*. North Bay: Nipissing University, at 7.

**108** Dokis First Nation. March 2022. About Dokis F.N. Dokis First Nation <https://www.dokis.ca/history-of-treaties/>

**109** Indigenous Services Canada. February 2022. *First Nations lands management*. Government of Canada. <https://www.sac-isc.gc.ca/eng/1327090675492/1611953585165>

**110** Indigenous Services Canada. February 2022. *First Nations lands management*. Government of Canada. <https://www.sac-isc.gc.ca/eng/1327090675492/1611953585165>

**111** Dokis First Nation. March 2022. *Dokis First Nation Land Management Code*. Dokis First Nation. <https://labrc.com/resource/land-codes/>

**112** Impact Assessment Agency of Canada. November 2019. Dokis First Nation hydro line servicing. Government of Canada. <https://iaac-aeic.gc.ca/050/evaluations/proj/80259>

## CASE STUDY

## KITCHENUHMAYKOOSIB INNINUWUG FIRST NATION ISSUES MINING MORATORIUM

Kitchenuhmaykoosib Inninuwig First Nation (KI) is a remote First Nation on the shores of Big Trout Lake, 500 kilometres northwest of what is now Thunder Bay. Big Trout Lake is a headwater lake that flows north into Hudson's Bay. KI's traditional territory encompasses much of this watershed.<sup>113</sup>

KI's relationship to the land is grounded in Kanawayandan D'aaki (keeping the land). According to KI spokesperson John Cutfeet, Kanawayandan D'aaki means protecting the land by respecting relationships with the land and animals.<sup>114</sup>

KI has developed a resource development protocol. The protocol indicates that KI is not opposed to development on its traditional lands but wishes to be a full partner in any development.<sup>115</sup>

When Platinex, a mining company, acquired mining claims on KI's traditional territory, Platinex had several meetings

with KI members, including the Chief, the Band Council and certain individuals. However, during these meetings, the KI consultation protocol was not followed.<sup>116</sup>

Per KI's protocol, development decisions require community agreement.<sup>117</sup> As such, in 2004 and again in 2005, KI refused to sign an agreement with Platinex because KI's ongoing consensus was that exploratory drilling should not be permitted.<sup>118</sup>

Finally in 2005, on two separate occasions, KI informed Platinex that KI did not consent to any exploration on its traditional territory.<sup>119</sup> Again in 2006, KI wrote to Platinex prohibiting them from conducting any exploratory drilling on KI territory.<sup>120</sup>

In February 2006, KI became aware that their moratorium had not been respected and that Platinex had sent a drilling team to Nemeigusabins Lake.<sup>121</sup>

In response, the Chief and Deputy Chief hand-delivered a letter to Platinex's drilling crew demanding that Platinex cease all exploratory activities.<sup>122</sup> After the Chief and KI members made radio announcements, crowds of KI members arrived at the camp.<sup>123</sup> Frightened by the KI presence, Platinex's drilling crew abandoned the site.<sup>124</sup> KI then decommissioned all of Platinex's drilling equipment.<sup>125</sup>

- 113** Ariss, R. 2017. *Platinex v Kitchenuhmaykoosib Inninuwig: Extraction and the role of law in KI's struggle for self-determination*. 7:1 *Contours*, at 2.
- 114** Ariss, R. 2017. *Platinex v Kitchenuhmaykoosib Inninuwig: Extraction and the role of law in KI's struggle for self-determination*. 7:1 *Contours*, at 2.
- 115** *Platinex Inc. v. Kitchenuhmaykoosib Inninuwig First Nation*, 2006 CanLII 26171 (ON SC), <https://canlii.ca/t/1p1sj> at para 19. eng/1327090675492/1611953585165
- 116** *Platinex Inc. v. Kitchenuhmaykoosib Inninuwig First Nation*, 2006 CanLII 26171 (ON SC), <https://canlii.ca/t/1p1sj> at para 22. eng/1327090675492/1611953585165
- 117** *Platinex Inc. v. Kitchenuhmaykoosib Inninuwig First Nation*, 2006 CanLII 26171 (ON SC), <https://canlii.ca/t/1p1sj> at para 21.
- 118** *Platinex Inc. v. Kitchenuhmaykoosib Inninuwig First Nation*, 2006 CanLII 26171 (ON SC), <https://canlii.ca/t/1p1sj> at para 22.
- 119** *Platinex Inc. v. Kitchenuhmaykoosib Inninuwig First Nation*, 2006 CanLII 26171 (ON SC), <https://canlii.ca/t/1p1sj> at paras 23 and 25.
- 120** *Platinex Inc. v. Kitchenuhmaykoosib Inninuwig First Nation*, 2006 CanLII 26171 (ON SC), <https://canlii.ca/t/1p1sj> at para 30.
- 121** *Platinex Inc. v. Kitchenuhmaykoosib Inninuwig First Nation*, 2006 CanLII 26171 (ON SC), <https://canlii.ca/t/1p1sj> at para 32.
- 122** *Platinex Inc. v. Kitchenuhmaykoosib Inninuwig First Nation*, 2006 CanLII 26171 (ON SC), <https://canlii.ca/t/1p1sj> at para 33.
- 123** *Platinex Inc. v. Kitchenuhmaykoosib Inninuwig First Nation*, 2006 CanLII 26171 (ON SC), <https://canlii.ca/t/1p1sj> at para 34.
- 124** *Platinex Inc. v. Kitchenuhmaykoosib Inninuwig First Nation*, 2006 CanLII 26171 (ON SC), <https://canlii.ca/t/1p1sj> at para 37.
- 125** *Platinex Inc. v. Kitchenuhmaykoosib Inninuwig First Nation*, 2006 CanLII 26171 (ON SC), <https://canlii.ca/t/1p1sj> at para 40.

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Platinex sued KI for \$10 billion in damages and gained an injunction to remove KI from the exploration site.<sup>126</sup> KI responded, seeking an injunction against Platinex – meaning that they asked the court to order that Platinex stop all exploration and mining activities on their lands because those activities stood to cause irreparable harm to KI, harm that could not be compensated through money or damages. At the injunction hearing, the judge sided with KI and ordered Platinex to halt all activities until consultation was undertaken.<sup>127</sup> The judge found that Platinex’s drilling activities would have an irreparable harm on KI’s existing treaty land entitlement claim.<sup>128</sup>

However, in October 2007, a judge ordered that KI allow Platinex onto the land for specific drilling.<sup>129</sup> KI publicly stated that they would not allow Platinex onto their land.<sup>130</sup>

Platinex then asked the court to allow it to start drilling and to order that KI not prevent the drilling. The judge made the order as requested.<sup>131</sup>

KI then made public statements that it would not allow Platinex onto their territory. In response to the statements, Platinex brought KI to court again. The court found the Chief and five Councillors in contempt of court. The Chief explained that he did not mean to disrespect the court, but that KI had to follow their own law. In March 2008, the

judge sentenced the Chief and Councillors to six months in jail.<sup>132</sup>

KI held a rally along with Ardoch Algonquin First Nation and Grassy Narrows First Nation (who were fighting similar encroachments). The Court of Appeal overturned the Chief and Councillors’ sentence on the basis that the sentences were too harsh for a few reasons, including that the protests had been peaceful and for a limited purpose.<sup>133</sup>

Following the Court of Appeal decision, Platinex tried to access their mining claims once more. People from KI went out to Nemeigusabins Lake and circled in boats and canoes, preventing the floatplane from landing. Platinex then sued Ontario for damages, eventually settling for a \$5 million payout and a guarantee of future royalties if a mine was ever built. Finally, Ontario withdrew the area of Platinex’s former claims, so it is not available for mining.<sup>134</sup>

- 126** Ariss, R. 2017. *Platinex v Kitchenuhmaykoosib Inninuwug: Extraction and the role of law in KI’s struggle for self-determination*. 7:1 *Contours*, at 3.
- 127** *Platinex Inc. v. Kitchenuhmaykoosib Inninuwug First Nation*, 2006 CanLII 26171 (ON SC), <https://canlii.ca/t/1p1sj> at paras 138-39.
- 128** *Platinex Inc. v. Kitchenuhmaykoosib Inninuwug First Nation*, 2006 CanLII 26171 (ON SC), <https://canlii.ca/t/1p1sj> at paras 79.
- 129** Bigué, A. & Hudon, M-A. 2008. *Aboriginal protest against mining exploration: The paramountcy of the rule of law*. 3:2 *Bus L Quarterly*, at 29.
- 130** Ariss, R. 2017. *Platinex v Kitchenuhmaykoosib Inninuwug: Extraction and the role of law in KI’s struggle for self-determination*. 7:1 *Contours*, at 4.
- 131** Ariss, R. 2017. *Platinex v Kitchenuhmaykoosib Inninuwug: Extraction and the role of law in KI’s struggle for self-determination*. 7:1 *Contours*, at 4.
- 132** *Platinex Inc. v. Kitchenuhmaykoosib Inninuwug First Nation*, 2008 ONCA 533 (CanLII), <https://canlii.ca/t/1z9q0> at para 1.
- 133** *Frontenac Ventures Corporation v. Ardoch Algonquin First Nation*, 2008 ONCA 534 (CanLII), <https://canlii.ca/t/1z9q1> at para 69.
- 134** Ariss, R. 2017. *Platinex v Kitchenuhmaykoosib Inninuwug: Extraction and the role of law in KI’s struggle for self-determination*. 7:1 *Contours*, at 6.

## CASE STUDY

## MI'KMAQ AND ALTON GAS

Nova Scotia conducted an EA of the project. As part of the EA, a Mi'kmaq Ecological Knowledge Study (“MEKS”) was conducted in December 2006. The MEKS strongly recommended that Alton Gas and Nova Scotia meet with Mi'kmaq leadership because “the likelihood of infringements on Mi'kmaq use activities is highly possible.”<sup>139</sup> Despite the MEKS, in 2007, the Nova Scotia Minister responsible for the EA issued an EA approval with conditions related to a monitoring program for fish and fish habitat.<sup>140</sup>

Between 2007 and 2014, Nova Scotia undertook to consult with SFN through the Assembly of Nova Scotia Mi'kmaq Chiefs' negotiating body – Kwilmu'kw Maw-klu-suaqn Negotiation Office (“KMKNO”).<sup>141</sup> In 2013, SFN left KMKNO and began negotiating with Nova Scotia directly.<sup>142</sup>

In 2014, the Nova Scotia Department of Environment wrote to SFN informing them that project construction would begin after the project received the remaining regulatory approvals.<sup>143</sup> SFN responded that “the Band has never been properly and adequately engaged in meaningful consultations with these matters, nor has any consent, informed, or otherwise, as to the operation of these projects been given.”<sup>144</sup>

Then the construction started. A wave of protests erupted in response.

Since time immemorial, Mi'kmaq communities have known the Sipekne'katik River as their expressway, as a source of food and medicines, and as a significant part of the Mi'kmaq cultural identity. Sipekne'katik First Nation (“SFN”) is one Indian Act band formed from the Mi'kmaq people.<sup>135</sup>

Alton Gas, a Calgary-based company, wanted to undertake a project on SFN's traditional territory. The project would create two underground salt caverns, each the size of an office building, to store natural gas.<sup>136</sup> Flushing the caverns would create an enormous amount of salt brine wastewater, which Alton Gas would dump into the Sipekne'katik River.<sup>137</sup> Dumping salt brine wastewater would place the ecosystem at risk, which would impact the inherent and treaty rights of Mi'kmaq peoples to access and use the river for food, livelihood and ceremony.<sup>138</sup>

**135** *Sipekne'katik v. Alton Natural Gas Storage LP*, 2020 NSSC 111 (CanLII), <https://canlii.ca/t/j60jl> at para 18.

**136** *Sipekne'katik v. Alton Natural Gas Storage LP*, 2020 NSSC 111 (CanLII), <https://canlii.ca/t/j60jl> at para 10.

**137** *Sipekne'katik v. Alton Natural Gas Storage LP*, 2020 NSSC 111 (CanLII), <https://canlii.ca/t/j60jl> at para 13.

**138** *Sipekne'katik v. Alton Natural Gas Storage LP*, 2020 NSSC 111 (CanLII), <https://canlii.ca/t/j60jl> at para 95. Inninuwig First Nation, 2006 CanLII 26171 (ON SC), <https://canlii.ca/t/1p1sj> at para 40.

**139** *Sipekne'katik v. Alton Natural Gas Storage LP*, 2020 NSSC 111 (CanLII), <https://canlii.ca/t/j60jl> at paras 15-18.

**140** *Sipekne'katik v. Alton Natural Gas Storage LP*, 2020 NSSC 111 (CanLII), <https://canlii.ca/t/j60jl> at para 21.

**141** *Sipekne'katik v. Alton Natural Gas Storage LP*, 2020 NSSC 111 (CanLII), <https://canlii.ca/t/j60jl> at para 19.

**142** *Sipekne'katik v. Alton Natural Gas Storage LP*, 2020 NSSC 111 (CanLII), <https://canlii.ca/t/j60jl>.

**143** *Sipekne'katik v. Alton Natural Gas Storage LP*, 2020 NSSC 111 (CanLII), <https://canlii.ca/t/j60jl> at para 24.

**144** *Sipekne'katik v. Alton Natural Gas Storage LP*, 2020 NSSC 111 (CanLII), <https://canlii.ca/t/j60jl> at para 25.

- 145** Vandervoorde, A. 2019. *Changing culture, changing world: A gramscian approach to ontologies in radical environmental movements*. Vienna: Universitat Wien, at 27.
- 146** Withers, P. October 2014. \$100 million Alton gas project delayed over Mi'kmaq concerns. *CBC News*. <https://www.cbc.ca/news/canada/nova-scotia/100-million-alton-gas-project-delayed-over-mi-kmaq-concerns-1.2817335>
- 147** *Sipekne'katik v. Alton Natural Gas Storage LP*, 2020 NSSC 111 (CanLII), <https://canlii.ca/t/j60jl> at para 46.
- 148** *Sipekne'katik v. Alton Natural Gas Storage LP*, 2020 NSSC 111 (CanLII), <https://canlii.ca/t/j60jl> at para 47.
- 149** *Sipekne'katik v. Alton Natural Gas Storage LP*, 2020 NSSC 111 (CanLII), <https://canlii.ca/t/j60jl> at para 48.
- 150** *Sipekne'katik v. Alton Natural Gas Storage LP*, 2020 NSSC 111 (CanLII), <https://canlii.ca/t/j60jl> at para 49.
- 151** Waldron, I.R. 2018. Women on the frontlines – Grassroots movements against environmental violence in Indigenous and Black communities in Canada. 5:2 *Kalfou*, at 261.
- 152** Waldron, I.R. 2018. Women on the frontlines – Grassroots movements against environmental violence in Indigenous and Black communities in Canada. 5:2 *Kalfou*, at 260.
- 153** Waldron, I.R. 2018. Women on the frontlines – Grassroots movements against environmental violence in Indigenous and Black communities in Canada. 5:2 *Kalfou*, at 164.
- 154** Alta Gas. October 2021. Alton Natural Gas storage project update. Alton Gas. <https://altonnaturalgasstorage.ca/>

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The Mi'kmaq slowed traffic near a major highway calling attention to the river's cultural and political value. Non-Indigenous allies added their voices to the Mi'kmaq. For example, the Shubenacadie River Commercial Association, the Striped Bass Association, East Hants Fracking Opposition Group, Ecology Action Centre, Council of Canadians, Amnesty International and many others all spoke out in support of SFN.<sup>145</sup>

Due to the outrage, the Nova Scotia government halted part of the construction work until Alton Gas carried out further consultation with SFN.<sup>146</sup>

Then, in 2016, the Nova Scotia Department of Environment issued final approvals to Alton Gas.<sup>147</sup> SFN appealed the decision,<sup>148</sup> but the Minister rejected the appeal.<sup>149</sup> So SFN appealed to the Nova Scotia courts.<sup>150</sup>

While SFN was appealing the decision, SFN members held a demonstration against the project in front of the Nova Scotia Legislature.<sup>151</sup> Joined by non-Indigenous allies, SFN also organized highway blockades, a development site encampment and educational events about the project.<sup>152</sup> The Supreme Court of Nova Scotia reversed Nova Scotia's decision that the project could go ahead and ordered that the Crown conduct more consultation with SFN.<sup>153</sup>

In 2021, Alton Gas announced that it would not continue development and that it plans to decommission the project in consultation with the Mi'kmaq. Alton Gas stated that “the project has received mixed support, challenges and experienced delay.”<sup>154</sup>

## REFERENCES

See the References & Resources Module for a full list of references to this section.