KEEPING THE LAND

KITCHENUHMAYKOOSIB INNINUWUG, RECONCILIATION AND CANADIAN LAW

Rachel Ariss with John Cutfeet

FOR MY FAMILY

Copyright © 2012 Rachel Ariss, John Cutfeet

All rights reserved. No part of this book may be reproduced or transmitted in any form by any means without permission in writing from the publisher, except by a reviewer, who may quote brief passages in a review.

> Editing: Sarah Michaelson Cover design: John van der Woude Printed and bound in Canada by Hignell Book Printing



Published in Canada by Fernwood Publishing 32 Oceanvista Lane, Black Point, Nova Scotia, BOJ 1BO and 748 Broadway Avenue, Winnipeg, Manitoba, R3G 0X3 www.fernwoodpublishing.ca

Fernwood Publishing Company Limited gratefully acknowledges the financial support of the Government of Canada through the Canada Book Fund and the Canada Council for the Arts, the Nova Scotia Department of Communities, Culture and Heritage, the Manitoba Department of Culture, Heritage and Tourism under the Manitoba Publishers Marketing Assistance Program and the Province of Manitoba, through the Book Publishing Tax Credit, for our publishing program.













Library and Archives Canada Cataloguing in Publication

Ariss, Rachel, 1965-Keeping the land: Kitchenuhmaykoosib Inninuwug, reconciliation and Canadian law / Rachel Ariss.

> Includes bibliographical references. ISBN 978-1-55266-477-3

1. Indians of North America-Land tenure--Ontario, Northern, 2. Indians of North America--Legal status, laws, etc.—Ontario, Northern. 3. Kitchenuhmaykoosib Inninuwug First Nation. 4. Platinum mines and mining--Ontario, Northern. I. Kitchenuhmaykoosib Inninuwug First Nation II. Title.

E98.L3A73 2012

323.1197323

C2011-908402-3

CONTENTS

AC	ACKNOWLEDGMENTS	
ı.	PLATINEX V. KITCHENUHMAYKOOSIB INNINUWUG	7
	Changing Contexts of Aboriginal Rights	9
	Aboriginal Land Rights Since the 1970s	12
	Changing Social Conditions	
	Continuing Aboriginal Protest and Rights Activism	14
2.	LAND AND COMMUNITY, LAW	
	AND MINING IN NORTHERN ONTARIO With co-author John Cutfeet	17
	Land and Community	17
	Treaty Nine	
	Crown Lands, Reserve Lands and the Treaty Land Entitlement Claim	
	The Infringement of Treaty Rights and the Duty to Consult	3 I
	Ontario's Mining Act	37
	Conclusion: Canadian Law on	
	Kitchenuhmaykoosib Inninuwug Traditional Territory	39
3.	THREE LAWS CONVERGE ON THIS PLACE	
	KANAWAYANDAN D'AAKI AND INDIGENOUS LAW	41
	With co-author John Cutfeet	
	Kanawayandan D'aaki	43
	Traditional Territory in Kitchenuhmaykoosib Inninuwug	
	Indigenous Jurisprudence and Canadian Law	
	Conclusion: Kanawayandan D'aaki, Canadian Law and Land	62
4.	RESISTANCE, LAW AND COMMUNITY ORGANIZING	65
	Law, Social Change, Social Control and Social Norms	65
	First Nations Communities' Protection of Traditional Territory	
	Platinex's Recourse to the Courts	
	Platinex v. Kitchenuhmaykoosib Inninuwug, July 2006	
	Ontario's Intervention	77
	Platinex v. Kitchenuhmaykoosib Inninuwug, May 2007	78
	Kitchenuhmaykoosib Inninuwug and the Ardoch Algonquin First Nation	79
	Kitchenuhmaykoosib Inninuwug Continues to Protect the Land	80
	Kitchenuhmaykoosib Inninuwug Leadership Found in Contempt of Court	
	Community Activism – Supporting the KI Six	89
	Platinex v. Kitchenuhmaykoosib Inninuwug, May 2008	9 4
	Conclusion: Law and Social Change	96

5.	LAW, LEGAL PROCESS AND RECONCILIATION IN PLATINEX V. KITCHENUHMAYKOOSIB INNINUWUG100
	Irreparable Harm and KI's Attachment to the Land100
	Consultation Towards Mining103
	Ontario's Intervention and the Scope of the Duty to Consult
	Lifting the Injunction and Imposing an Agreement
	Sentencing the KI Leadership for Contempt of Court
	Freeing Bob Lovelace and the KI Six: The Ontario Court of Appeal
	in Platinex v. Kitchenuhmaykoosib Inninuwug118
6.	RECONCILIATION121
	Canadian Courts: Contributions to Reconciliation
	Court Recognition of Indigenous Legal Traditions124
	Canadian Courts: Detractions from Reconciliation
	Reconciliation and Cultural Difference
	The Duty to Consult and Accommodate and the Honour of the Crown 132
	Guidance for Reconciliation in Treaties
	Indigenous Traditional Law in Reconciliation: Beyond Canadian Law
	Understanding Aboriginal Rights Claims
	Through the Lens of Reconciliation142
	Emergence of Social Reconciliation
	Conclusion: The Role of Indigenous Law in Reconciliation
	Conclusion. The Role of Indigenous Law in Reconcination
7.	IMPASSE AND CHANGE149
	Ending Platinex v. Kl
	Mining Act Amendments
	Current Mining Practice in Northern Ontario: More of the Same
	Reconciliation: Recognition, Imagination and Legal Change
EPI	LOGUE: OCTOBER 2010 162
RF	FERENCES 165

.