"The Tay River watershed is our responsibility": The Ardoch Algonquins and the 2000-2002 Environmental Review Tribunal Hearings

by

Bettina Koschade

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ABSTRACT

Some legal geographers challenge the orthodoxy of law by demonstrating that the legal discourse is actually *constitutive* of social and political worlds. I intend to argue that the legal arena is for that very reason a necessary space to insert the "subversive" voice. The Ardoch Algonquin First Nation and Allies (AAFNA) in southeastern Ontario have used the provincial environmental legal setting to insert their Aboriginal knowledge of the environment and their alternative perspectives on jurisdiction. The specific case study focuses on the 2000-2002 Ontario Environmental Review Tribunal that concerned an appeal to the Ministry of Environment's issuance of a Permit To Take Water from the Tay River near Perth, which is part of the traditional territory of the Algonquin people. AAFNA's act was thwarted from the start by the legal argument in the provincial setting that their claims, "Aboriginal issues," were federal matters and did not have a place in the provincial environmental legislation. Nevertheless, they persisted in their resistance and began the dialogue about alternative interpretations of the meaning of jurisdiction, leading to an examination of the Aboriginal-government relationship. AAFNA's involvement in this Tribunal is an example of using the legal arena as a political space of resistance effectively, even when faced with extreme odds and definitive acts of exclusion based on Canadian law.

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CHAPTER 1/
Competing legal geographies

1.1 Introduction

This thesis investigates the competing geographies of Aboriginal and Euro-Canadian conceptions of jurisdiction over land. In order to unpack the meaning of competing geographies, I will look at both concepts and strategies. The first includes an examination of the ideas of jurisdiction and relationship to land of Aboriginal peoples, on the one hand, and the expression of jurisdiction evident in the Canadian provincial environmental legislation on the other. Secondly, I will examine the strategies Aboriginal peoples use to introduce their perspectives into the Euro-Canadian legal arena of environmental legislation. The core of this study revolves around indigenous knowledge. Aboriginal perspectives, concepts, relationships to land, and actions are all an integral part of what consists of indigenous knowledge. This in turn, underpinning the Aboriginal belief in the responsibility they have towards their lands, fosters their conviction that they have an alternative solution to the problems afflicting Aboriginal and government relations.

Their indigenous knowledge also drives them to acts of resistance in Canadian formal arenas where they are determined to educate non-Aboriginal people about their perspectives, their interpretations of laws, and about alternative visions. One way they accomplish this, is by inserting their voices into everyday environmental appeals and decision-making forums where the issues being decided can detrimentally affect their futures and the survival of all species. This kind of legal intervention is effective in two ways. The issues debated are directly relevant to their own knowledge of the land and survival of their territories, and they also have the potential for opening the door to

examine the larger issue of the relationship between Aboriginal peoples' perspectives and Euro-Canadian contexts that establish the Aboriginal-state relationship.

Yet intervening on the basis of claims to culturally unique knowledge is also highly problematic and politically contested. Indigenous knowledge, or Aboriginal knowledge, is viewed by many non-Aboriginal academics and professionals as something that is fading in Aboriginal communities due to assimilation. It is, more generally, thought to be largely irrelevant in today's modern society. I intend to demonstrate through a case study, that indigenous knowledge can persist, perhaps at varying intensities, in Aboriginal communities that are often perceived by non-Aboriginal people as modernized, "untraditional," and highly assimilated into the settler population. The indigenous knowledge of the Ardoch Algonquin First Nations and Allies (AAFNA) community, a widely dispersed Algonquin nation in eastern Ontario, is intricately linked to their culturally specific relationship to land based on continued traditional practices of hunting, fishing, trapping, gathering, and oral traditions. I also will illustrate the way indigenous knowledge, as a unique and valuable perspective on today's environmental problems, when introduced into the environmental legal decision making process, can provide an evocative alternative to the current contentious relationship between Aboriginal peoples and the Canadian government that is currently based on Canadian jurisdiction and law.

I will be attempting to answer several questions with this case study. In the first part of the analysis of the case study, I will investigate whether there are still culturally specific Aboriginal relationships to land among Aboriginal people who are not living on reserve or in remote areas, but among settler populations, as is the case with the Ardoch Algonquin. I will also be looking at the way Aboriginal knowledge about the land

is structured by their concepts of jurisdiction. In the second part of the analysis of the case study, I will examine how accessible the provincial environmental legislation setting is as a space of resistance for Aboriginal peoples. This will include an exploration of the strategies AAFNA used in the Environmental Review Tribunal, and what resulted when AAFNA tried to introduce their indigenous knowledge, knowledge that is not coming from a Canadian government recognized band about a territory that is not recognized by the government as Aboriginal territory, into such an unconventional arena as an environmental assessment. Following this, I will look at how AAFNA's attempt to insert their concept of jurisdiction into the environmental setting contributed to the beginning of reimagining Canada's multiple jurisdictions. And lastly, I will suggest how this example offers something to the legal geography literature.

Legal geography is an emerging field in human geography. Its main tenet is to challenge the orthodox linkages between law, space and power (Blomley 1994). These linkages assume that both law and space are measurable and objective, and that there is a divide between law, on the one hand, and social and political life on the other. Law is presented as "innocent," a technical act; and space is empty, a backdrop to the legal process. Critical legal geography attempts to demonstrate that the pervasive conflicts in local communities against the formalized legal culture of the judiciary are evidence of the deep connection between social and political life, and law; "'space,' like 'law,' is capable of diverse meanings" (Blomley 1994, xii).

This thesis contributes to legal geography through an analysis of the legal space of the Environmental Review Tribunal, of the Canadian law of the land (the *Constitution*), and of local resistance to the inflexible jurisdiction of the Tribunal and to the authority of the Canadian *Constitution*. The distinct worldview of some members of

AAFNA, motivating their actions based on their relationship with and knowledge of the land, is a challenge to liberal legal culture that assumes the environmental tribunal is itself an objective space. Their perspective on jurisdiction also stimulates the beginning of a dialogue to reimagine an alternative jurisdictional relationship between the Canadian government and Aboriginal peoples. It is a challenge to the authority and efficacy of Canadian law as it is currently inscribed.

The use of space as the basis for challenging legal and epistemological orthodoxy has been given increasing support by a number of legal geographers. Matthew Sparke (1998), in "A Map that Roared and an Original Atlas: Canada, Cartography, and the Narration of Nation," offers a provocative inquiry into what he considers are effective spaces of resistance, such as law and cartography. These "strongly classified spaces" (Sibley 1992, 115) can be important alternative spaces for using strategies of resistance such as introducing the subversive voice into the formal setting.

Sparke (1998) builds on Nicholas Blomley's theory in *Law, Space, and the Geographies of Power* (1994). In his book, Blomley revisits critical legal studies. Legal scholarship presents law as objective, stable, and autonomous. Legal critics express a strong opposition to what they characterize as legal "closure," or the idea of law as separate from the social and political forces that over time and in varied spaces express the cultural order of a given people. They argue that law is in fact relational in important social and political ways, revealing law's contingent and contestable qualities. Critical legal scholars claim that social categories or any differentiation between categories of people, places, and events, are strongly influenced by the legal discourse that teaches

us how to behave (Blomley 1994, 11-14). Blomley's contribution is to add a spatial component to the legal critique.

Blomley's (1994) explains how the critical legal project reveals the "normalizing" force of power relations which can be challenged. These contestations occur not only in terms of class, imperialism, racism, or patriarchy, but they also engage legal language and relations. Localized legal disputes represent struggles over legal, social, and political relations. Blomley's geographic critique emphasizes the spatial aspect of the "time *and* space" in which social and political life occurs, and in which these local legal struggles occur (Blomley 1994, 24-5).

Blomley's (1994) critique demonstrates how legal representations of space are *constituted by* and *constitutive of* social and political life that is complex and antagonistic. At the same time, space is also normatively charged, or prescribed to a typical pattern. Blomley argues that space structures social life. Not only does lawmaking and law applying structure the public world, but also the geographies of space inform the way power is distributed. (Blomley 1994, xi-12). Blomley affirms that the spatial component has not been factored into the legal discourse. Blomley's spatial contribution to the discourse discloses the internal contradictions of the liberal worldview. These contradictions reveal the contingency and politics of law. There are traces of resistance in the spaces he identifies and these spaces can become sites of contestation for political resistance (Blomley 1994, 15). This shift in human geography focuses more on "the space/society dialectic, the locality as a mediating structure, the relation between geography and knowledge, and the links between space and power" (Blomley 1994, 28).

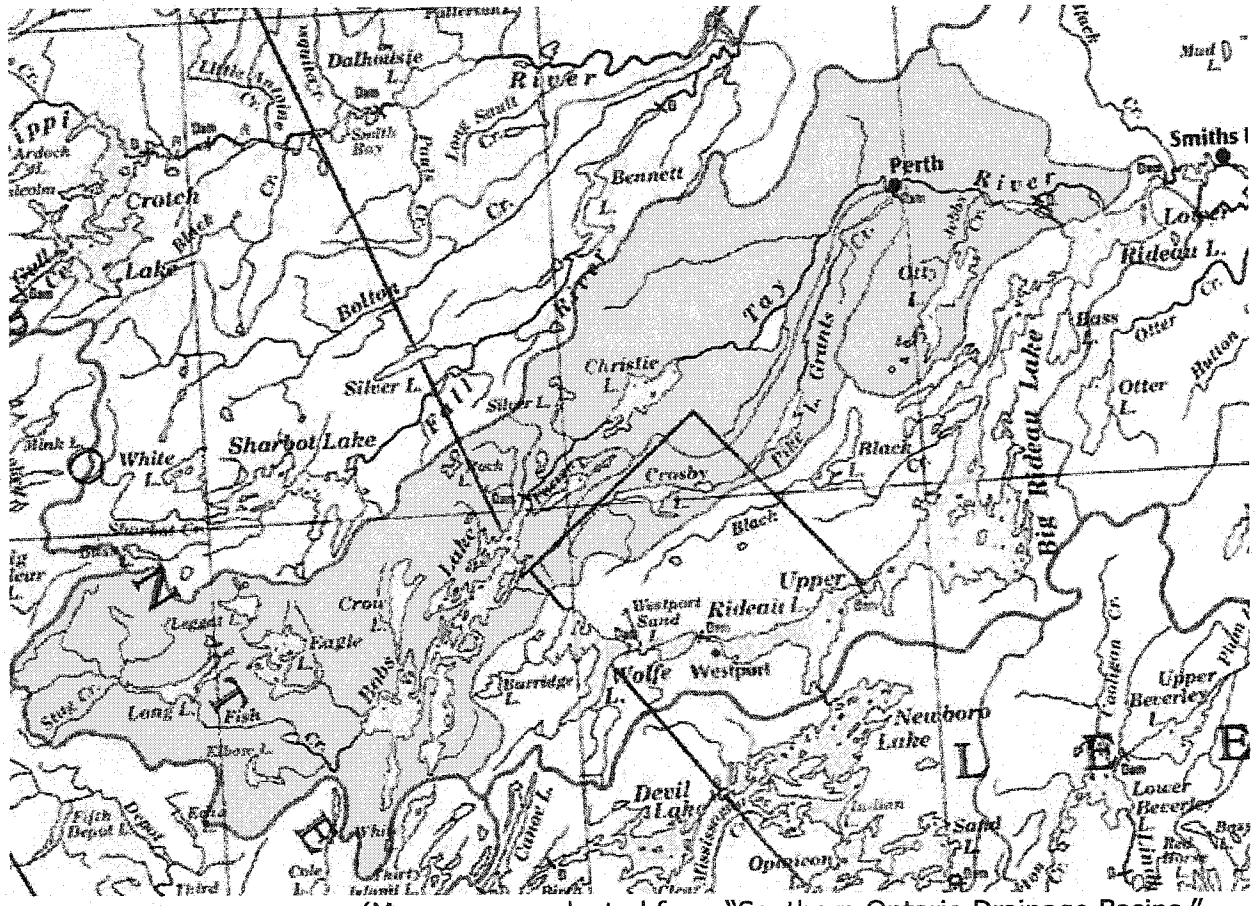
Critical geographers demonstrate that using specific spaces to contest the form and substance of legal relations can also advance the arguments against larger formations such as capitalism (Blomley 1994, 52). I suggest that contesting the formalized legal structure of environmental decision-making can also advance arguments against the current relations between Aboriginal people and the government. Local contestations against local legal decisions demonstrate the diversity of law across space. In other words, we may find that "alternative legalities *can* occupy the same jurisdictional space" (Blomley 1994, 56, emphasis mine). The Canadian government's jurisdictional divisions are not in line with the interpretation of jurisdiction that Aboriginal people such as the Ardoch Algonquins embody.

Both Chouinard (1995) and Smith (1996) indicate that Blomley's analysis, though ingenious and progressive, lacks certain explorations. Some of the case studies presented in his book emphasize the side of the dominant legal discourse, basing it on official and media accounts, while only hastily describing the oppositional geographies of law (Chouinard 1995, 639). Chouinard insists that besides official written accounts of legal struggles, one "must turn to sources like interviews in order to capture 'grassroots' resistance" (Chouinard 1995, 639). The case study presented in this thesis focuses more on the geography of the oppositional group, the Ardoch Algonquin First Nation and Allies, or AAFNA. Within the framework of law, space, geography, and resistance, I introduce the voices of an Algonquin Aboriginal community in southeastern Ontario. This research involves both documentary evidence and interviews with AAFNA individuals to try to capture the way that different legal geographies coexist on the same territory.

The Ardoch Algonquin First Nation and Allies became involved in an Ontario Environmental Review Tribunal (ERT) that took place between 2000 and 2002. The

Tribunal concerned an appeal to a "Permit to Take Water" that was issued by the Ministry of Environment to a multinational corporation to draw water from the Tay River just west of the town of Perth (see Map 1 below). The Tay River watershed covers part of the traditional territory of the Algonquin peoples. Members of AAFNA had Algonquin knowledge, or indigenous knowledge, of the region to contribute to the decision-making process of the Tribunal and, from their perspective, they had jurisdiction over the watershed which required the government to consult with them before making any final decisions. Their resolve to become involved in the Tribunal and subsequently to withdraw prematurely from the proceedings is of particular interest to examining this as an example of a space of resistance.

Map 1: The Tay River Watershed area in Eastern Ontario.



(Map source: adapted from "Southern Ontario Drainage Basins,"

Ministry of the Environment, 1973)

The provincial environmental legal setting can be an important and significant site of resistance for Aboriginal people for several reasons. First, for Aboriginal people to raise constitutional issues of jurisdiction at the provincial level elicits the question of the continuity and appropriateness of federal and provincial jurisdictional divisions in Canada. If Aboriginal people fall under the jurisdiction of the federal government, how are they to participate and claim any legal rights in the decisions being made at the provincial level that directly affect their traditional lands? Second, Aboriginal people's presence in provincial environmental legal settings shows how the governments' jurisdictional divisions negatively affect the roles of Aboriginal peoples in these spaces. Third, introducing indigenous knowledge into environmental decision-making is more than just providing a unique and useful source of environmental knowledge and an alternative way of understanding the human relationship to the environment. Indigenous knowledge is also an effective medium through which to explore and describe the Aboriginal concepts of jurisdiction and responsibility to a non-Aboriginal audience and stimulate the dialogue of reimagining a new vision and relationship between Canadian and Aboriginal jurisdictions.

It is important to note that the study does *not* document traditional ecological knowledge, as many other non-Aboriginal academics have attempted. I also do not attempt to understand the complex dynamics of the identity of the AAFNA community or its individuals. Instead, what I am looking at are the strategic choices some members of AAFNA were forced to make in order to insert their voices and knowledge into the Euro-Canadian environmental appeal court.

1.2 Outline of thesis

This thesis is divided into 8 chapters: 1 – "Competing legal geographies;" 2 – "Competing concepts of indigenous knowledge, relationships to land, and jurisdiction: Aboriginal resistance to the dominant context;" 3 – "Ardoch Algonquin history: A story of occupation and resistance;" 4 – "The Ardoch Algonquin First Nation and Allies and the Ontario Environmental Review Tribunal 2000-02: A case study;" 5 – "The research process: Methodology;" 6 – "Algonquin concepts about knowledge, land, and jurisdiction: An analysis of the case study;" 7 – "Algonquin strategies of inserting their voice: An analysis of the case study," and 8 – "Conclusion." Chapter 2 is a literature review. I examine some of the recent literature on indigenous knowledge, looking at the differences between the way Aboriginal people understand the meaning of indigenous knowledge, and the way non-Aboriginal academics define it. Indigenous knowledge is closely connected to relationship to land. I investigate some of the differences between Aboriginal relationships to land and non-Aboriginal concepts of land and spatial control. Next, I explore the Algonquin concept of jurisdiction and the way an Aboriginal interpretation of the Canadian constitutional Aboriginal rights and title would include the idea of Aboriginal jurisdiction and responsibility. Lastly, I survey some geography literature on resistance and Aboriginal resistance. Included is a Canadian example of one way some Aboriginal people have commanded a measure of respect and recognition in formalized legal arenas, demonstrating the power of inserting their perspective into the dominant framework of understanding.

In chapter 3, I provide an overview of the historical debates about the presence of the Algonquin people in Southeastern Ontario over the centuries since the arrival of

European settlers. I exhibit some of their struggles over the generations for recognition, respect, and survival. Chapter 4 provides the background and chronological account of the case study. The case study is the Ontario Environmental Review Tribunal (ERT) that will be followed, in Chapter 6 and 7, by an analysis of how some Ardoch Algonquin community members negotiated the legal space of the ERT. Chapter 5 describes the methodology I followed throughout my research, such as gathering different sources of data and using a social science methodology called qualitative content analysis to analyze and interpret the data from the case study.

Chapters 6 and 7 contain my analysis of the case study in relation to the academic literature. Chapter 6 explores parts of the Algonquin worldview including knowledge, relationship to land and jurisdiction. The purpose is to provide an explanation of the motivation and basis with which the AAFNA members involved in the Environmental Review Tribunal were making their legal arguments. Chapter 7 investigates the strategies of resistance that the AAFNA members involved in the ERT used to insert their voice into the formal process. They made arguments based on their Algonquin knowledge and responsibility for the land, and on their interpretation of Canadian constitutional laws. Their acts of resistance were cast from their own sense of responsibility and duty to take care of the environment, and this is the space and context from which they made their own legal arguments. The last chapter is the conclusion where I summarize my findings and relate them back to the legal geography literature.

1.3 Terms used in thesis

There are some terms I use throughout this thesis that need to be clarified before I proceed. First of all, I am always referring specifically to the Canadian context unless I specify otherwise. In this context, I will use the terms "Aboriginal peoples" and "Indigenous peoples" interchangeably. Aboriginal peoples in Canada referred to in this thesis include any person who is a self-determined Aboriginal person whether or not member of a band or with Indian status or not. I use the term "Indian"[1] when I refer to the Canadian legal term of "status Indians" or "non-status Indians," or if I am referring to the perspective of the European settlers in Canada. The term "Native people" is one that I have heard time and again during my interview sessions, and I feel that it is not inappropriate here, and is also interchangeable with Aboriginal peoples. When the writing is not general in nature, I will use the names of the communities and bands to try to reinforce their individual characteristics and to avoid unintentional and unfounded generalizations.

It is also important that I clarify the use of the term "Aboriginal perspective." I am aware that there is no *one* Aboriginal perspective. Likewise, communities and nations should not be represented within one view of the world or as agreeing unanimously on their place and purpose in their environment. There is, however, as shown in this particular case, often a marked difference between the way many Aboriginal people view their place in certain events and spaces and the way the Canadian liberal democratic government interprets and expresses the rights and needs of Aboriginal people in laws and legislation. I am aware that in this particular thesis I am

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[1] The term "Indian" has commonly become a more derogatory term when used by non-Aboriginal people, and therefore, I only use this term when it is in legislation or policy documents.

only referring to the comments and perspectives of a few individuals, but with the extensive literature and descriptions of many other Aboriginal people's relationships to land and the environment, it is possible to identify some concrete and unique features of Aboriginal practices, beliefs, and worldviews, or "perspectives" without undermining the diversity and complexity of North American Aboriginal peoples and cultures.

Lastly, I need to explain my use of the terms "Western" science and knowledge, and "Euro-Canadian." "Euro-Canadian" is an adjective that usually describes the mainstream perspective of the European descendants who have established Canadian society over the centuries. It is a combination of European philosophies and interpretations of law that have been adapted to make sense within the Canadian setting. This is not to imply that all Canadians of European descent only have "Euro-Canadian" opinions, or that one cannot develop a position that is strongly in opposition to mainstream perspectives. Nor does it imply that Aboriginal people cannot adapt some Euro-Canadian ideas. However, there is are differences between a non-Aboriginal, Euro-Canadian view on society and law and an "Aboriginal perspective." "Western science" or knowledge is a general term used to represent knowledge created within the scientific academic field which is widely accepted by Euro-Canadian society and which is generally the foundation of Euro-Canadian understanding.

I have chosen to use these terms this way in an effort to show my respect towards the Aboriginal people with whom I have spoken, who have given me their time and advice over the last few years, and to all those whom I have not met. I have made these choices by being selective of the way other academics have used these terms, as well as from the impressions I received from my relations with members of the Ardoch Algonquin First Nations and Allies, the Queen's University Four Directions Aboriginal

Student Center, and other influential Aboriginal people I have met along the way. My position as a white female academic writer does not give me the right to speak for them, but I believe I can speak empathetically on the issues I have researched. I believe it is our Euro-Canadian system of laws and governance that is the root of many of the problems identified in this case study, and I am trying to understand the issues from the perspectives of one Aboriginal community and explain these issues as well as I am capable of understanding them. I apologize and take full responsibility for any misinterpretations I have made, and for any resulting misrepresentations, for that was never my intent.

CHAPTER 2/
Competing concepts of indigenous knowledge, relationships to land, and jurisdiction: Aboriginal resistance to the dominant context

2.1 Introduction

This chapter is an overview of competing Aboriginal and Euro-Canadian perspectives on three key concepts: indigenous knowledge, relationship to land, and jurisdiction. Aboriginal worldviews and contexts provide some alternative possibilities to understanding the current Aboriginal–government relationship. Some Aboriginal scholars, lawyers, and activists have begun to reexamine the relationship from an Aboriginal perspective. Moreover, other Aboriginal people have also engaged in the dialogue by trying to introduce their perspectives into some of the dominant spaces of Canadian governance, such as the legal arena. These acts of resistance by Aboriginal people are motivated by their indigenous knowledge and obligations that are a part of their identity. Their resistance presents the potential of beginning the process of reimagining an alternative relationship between Aboriginal peoples and the Canadian government that includes a diversity of worldviews and knowledge and a new vision of multiple and cooperative jurisdictions.

This chapter has two purposes. The first purpose is to describe the competing concepts of Aboriginal and non-Aboriginal knowledge, land, and jurisdiction. Aboriginal people's knowledge and relationships to land are different from most non-Aboriginal views. In one way, their own sense of knowledge is different from how most non-Aboriginal researchers have thus far attempted to understand and define it. In another way, Aboriginal knowledge systems are distinct from Western knowledge systems. The second purpose is to demonstrate that in order to approach the legal arena from a subversive place there are effective strategies that can be used. The section on

resistance offers some theoretical explanations for this, and an exemplary illustration of Aboriginal people using effective spaces of resistance by inserting their voice into the dominant context.

In this chapter, the first section "Aboriginal knowledge systems" will begin by explaining some of the problems with the labels and definitions non-Aboriginal researchers have applied to indigenous knowledge such as "traditional ecological knowledge." This will be followed by specific descriptions of indigenous knowledge qualities, including the process of observation and experience, the management of resources, and context. There are also issues of power associated with knowledge systems and this includes indigenous knowledge where appropriation of indigenous knowledge has taken control out the hands of Aboriginal peoples. Aboriginal scholars have also expressed the possibility that indigenous knowledge could provide creative answers to the trials of Aboriginal–state relationships. Aboriginal people have a unique connection with their environment that is not commensurable with western ideas of progress, development, and individuality. This is expressly evident in their knowledge systems that are intricately linked to their relationship with the land and environment.

The next section called "concepts of land and relationships to land" describes the intimate relationship Aboriginal people have with the land and their territories. This includes the idea of having responsibility for the land that has been granted by the Creator. It is expressed in their systematic use and occupancy of the territory with unique notions of flexible boundaries that conflict with Euro-Canadian expressions of spatial control based on rigid political boundaries and ownership.

The third section, called "concepts of jurisdiction," describes the contrast between Aboriginal and Canadian legal concepts of jurisdiction over territory. Aboriginal

people understand jurisdiction as a responsibility to care for the land. The Euro-Canadian concept of jurisdiction is principally about control that is manifest in laws establishing different levels of governmental sovereignty over clearly defined territory, and that offer corresponding legal definitions of rights and title for Aboriginal people. Some recent court cases have begun to explore new interpretations of Aboriginal rights and title that might allow for broader definitions of jurisdiction that could include the Aboriginal understanding of responsibility.

The last section, called "Aboriginal resistance," reviews some geography literature on resistance. This includes some of the strategies Aboriginal people have used to insert their voice into the hegemonic spaces of Canadian governance, including, most notably, the singular authority of Canadian law. The voice they introduce into this space represents their perspectives and concepts of knowledge and land that have the potential to influence the interpretations of laws.

2.2 Aboriginal Knowledge Systems

2.2.1 Introduction

The last two decades have seen significant growth in academic research on indigenous knowledge. Some of this has been conducted by both natural and social scientists, often under the name of "traditional ecological knowledge" or TEK. For the most part, this research has been conducted at the behest of co-management boards composed of local indigenous groups and government representatives, seeking to explore the utility of TEK in environmental assessments and even land claims. Introducing indigenous knowledge in the legal setting of the Environmental Review Tribunal, however, presents some special challenges. The environmental legal arena

provides a setting for examining the foundations of Canadian law. The introduction of indigenous knowledge into this legal environmental dialogue can contribute some unique perspectives and alternative visions to the value of indigenous knowledge, if not also to the existing legal order. Aboriginal academics and lawyers are at the forefront of bringing indigenous perspectives to the relationship between Aboriginal worldviews and knowledge systems and Euro-Canadian worldviews and laws. Their voices in the legal arena create the tension necessary to force non-Aboriginal people to also begin rethinking their own conceptions of environmental knowledge, if not the entire Aboriginal–Euro-Canadian relationship.

I have chosen to use the term "indigenous knowledge" for this thesis for several reasons, even though there is considerable academic writing on "traditional ecological knowledge." It is difficult to find unproblematic language to talk about the knowledge of Aboriginal people. The term "traditional ecological knowledge,"[2] or "TEK," is a term used by many academic researchers. The word "traditional" is one that is a particular difficulty. The dictionary sense of *traditional* means "cultural continuity" which is "derived from historical experience" (Johnson 1992, 4). However, the more mainstream use of the word traditional implies "an inflexible adherence to the past" (Berkes 1999, 5). The use of this term risks creating an image of a static and nonadaptive form of knowledge (Usher 2000, 185-6). Indigenous knowledge is exactly the opposite of static and nonadaptive; it is a knowledge system that appreciates the constant state of

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[2] "TEK" can also stand for "traditional *environmental* knowledge." Stevenson (1996) differentiates between "environmental" and "ecological." He describes specific environmental knowledge as the information sought after by environmental impact assessments (EIAs) and co-management boards. It is specific knowledge related to "various species of wildlife, plants, land-use patterns, seasons, climate hydrology, and geomorphology." On the other hand, ecological knowledge is "knowledge of the interactions and relationships between and among environmental components" (Stevenson 1996, 281). This knowledge is also used in EIAs and renewable resource management by "gaining a useful understanding of how ecological systems generally work, [and] to how many of the key components of the total ecosystem

transformation of nature. Indigenous knowledge is to understand the constant flux of the forces of nature and to experience the changes and develop a harmonious relationship with nature (Henderson 2000d, 262).

I also chose to use the term "indigenous knowledge" so that it cannot be confused with other forms of traditional knowledge that non-Aboriginal people might have due to their own close relationship and experience on the land, such as farmers and fishers. Indigenous knowledge is more than just generations of experience on the land; it is part of a worldview, language, and social order. At the same time, it should not be assumed that all Aboriginal people automatically "have" indigenous knowledge as some kind of birthright. As many Aboriginal academics and other Native activists have stated, their peoples' assimilation into Canadian society has often seen the demise of Aboriginal peoples' personal connection to the land due either to their physical location that is distant from their traditional lands, their changed lifestyle and practices, or from philosophical influences from the "Eurocentric" thought of Euro-Canadian society (Henderson 2000b, 59). This growing disconnection from the land that more and more Aboriginal people are living is often the impetus for many Aboriginal activists to be involved in supporting, promoting and fostering a return to more traditional Aboriginal practices and teachings.

Usher (2000) explains how some academics have suggested that indigenous knowledge is the knowledge claims of those who are "untutored in the conventional scientific paradigm" (Usher 2000, 186). This suggests that Aboriginal people who understand or have learning in conventional science cannot be considered authentic holders of indigenous knowledge. It should not be assumed that conventional science

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interrelate" (Freeman, 9). Both of these definitions are geared towards a kind of incorporation of TEK into western systems of management and assessment.

annuls or "taints" indigenous knowledge because, as explained, the actual knowledge about a specific thing is only one part of the larger Aboriginal worldview.

2.2.2 A Euro-Canadian approach to defining indigenous knowledge

The language used to explain ideas and concepts strongly affects the way those concepts are understood. The Euro-Canadian practice of creating rigid definitions for phenomena is not familiar in Aboriginal thought and language. For example, most Aboriginal languages do not categorize objects such as the sun, natural resources, plants, animals and people (Henderson 2000d, 263). Euro-Canadian definitions of Aboriginal knowledge systems are an English-translated version of a phenomenon that is constantly in flux, that is understood only through experience, and grasped in Aboriginal thought through a natural context and worldview. However, for academic purposes some definitions constructed by non-Aboriginal researchers may be helpful in beginning to understand the general idea of indigenous knowledge, and to fulfill the Euro-Canadian desire to understand something without necessarily experiencing it. Usher (2000), though he uses the term "traditional ecological knowledge," gives a four-part definition intended for environmental assessments and management that attempts to explain the complex connection between people and place. In his definition, TEK consists of:

> Category 1. Factual/rational knowledge about the environment.
> Category 2. Factual knowledge about past and current use of the environment.
> Category 3. Culturally based value statements about how things should be, what is fitting and proper to do, including moral or ethical statements about how to behave.
> Category 4. Culturally based cosmology – the foundation of the knowledge system – by which information derived from observation, experience, and instruction is organized to provide explanations and guidance (Usher 2000, 186).

The categories he determines are distinguishable on epistemological grounds. Category one is derived from empirical observations, that is general experience over a long time, and observations reinforced with shared accounts and oral histories. The second category of knowledge explains traditional social and historical uses of the environment, explaining *why* something is used through personal experience and oral histories. The source of the third category reflects the "culture" of the society. Human behaviour towards the environment is derivative of ethical and moral beliefs. The fourth describes the context of the other three categories of knowledge (Usher 2000, 186), what Henderson (2000) would call the "natural context" which will be described in more detail shortly. All the categories combined attempt to describe an Aboriginal worldview, an understanding of life and a way to conduct life. The division of the knowledge system into four parts, however, is problematic in that it assumes that one part can be extracted from the rest, such as the "factual knowledge," without needing to necessarily entertaining the natural context in which it must be understood.

Usher's definition suggests the idea of being responsible for the land and having the duty to act accordingly. These features of indigenous knowledge play an important role when looking at the larger worldview and context of indigenous knowledge described by Aboriginal scholars. However, Usher's definition is designed for use in environmental assessments. It has a more empirical explanatory tendency that does not discuss the ways that indigenous knowledge offers other insights and explanations for other purposes. It is more than just a tool for assessing the state of the ecology; it is also a guide for understanding the human place in the world and a framework to envision respectful diversity among all living beings and humans.

2.2.3 Comparison of indigenous knowledge and Western knowledge

Western scientific knowledge is a term used to describe the knowledge generated by non-Aboriginal people, often referred to somewhat abstractly as "western science": that is, knowledge created within the scientific academic field that is widely accepted by Euro-Canadian society as the search and source of truthful explanations about life and the world. It is based on a Euro-Canadian worldview and it contrasts with indigenous knowledge in several ways. Agrawal (1995) describes three areas in which indigenous and western knowledge systems differ. He argues that emphasizing the differences between the two knowledge systems creates an irreconcilable dichotomy between the two. He describes these differences as: substantive, in that there are differences in the characteristics of indigenous and western knowledge; methodological and epistemological, in that they employ different methods of investigating the world through different worldviews; and contextual, in that indigenous knowledge is more rooted in context or place than western knowledge (Agrawal 1995, 418). These differences will be explained in more detail in the following themes of indigenous knowledge.

Indigenous knowledge is based on observation, though the observations do not necessarily focus on individual organisms and sub-systems in isolation from the rest of the ecological system as Western scientific research often does. Instead, indigenous knowledge is a systematic accumulation of observations that are then evaluated within an ecological system that is made up of "systemic relationships" that influence each other (Freeman 1992, 9-10). There is no linear analysis of the cause and effect of natural phenomena that is more commonly practiced in Western science. Indigenous knowledge understands that all living beings are within a "system-as-a-whole" that is "constantly reforming multidimensional interacting cycles" (Freeman 1992, 10). In other

words, individual components of nature cannot be separated from each other, and neither can the human component; "all life-forms must be respected as essentially conscious, intrinsically valuable and interdependent" (Corsiglia and Snively 1997, 23). These are some of the fundamental qualities of indigenous epistemology.

Indigenous management of resources, due to the understanding of the interconnectedness of all life, embodies a concept of communal property. It is a management system that is consistent with the concept of the interdependence between humans and the environment. In practice, this means that those who *harvest* the land also *manage* the resources together by consensus. The observations accumulated from each individual's experience are shared by the household and society and are passed down from one generation to the other in the form of stories. Communal management is organized within a paradigm that is part of Aboriginal heritage. Nevertheless, there is a form of leadership and authority, that is based on the one who possesses the greatest knowledge and can demonstrate the ability to use it effectively (Dene Cultural Institute 1991, 5; Sherry and Myers 2002, 10).

Euro-Canadian environmental management, on the other hand, is hierarchical and conducted in a top-down form of control. It exhibits a fundamental divide between the managers and the users of the land (RCAP, Vol2, Ch4, s4.4). This management system is based on an idea of human manipulation of the land, and it does not fully embrace the idea of the interdependence of the environment and human beings. The notion of the separateness between humans and nature continues in the divisions between the many components of the environment as well. It is based on Western science where each component of the environment is compartmentalized and managed separately. For example, wildlife and minerals fall under separate management. The

animals living *on* the land and *in* the waters are managed separately from each other and from the actual land and waters. These differences create difficulties in integrating the concept of the wholeness of nature in indigenous knowledge into a compartmentalized system Euro-Canadian environmental management.

The land, the waters, and all that lives on and in them are an essential part of the foundations of indigenous knowledge, as well as the human experience and practice on the land that gives rise to the knowledge. Knowledge of the land is based on knowing a particular place intimately from living there for generations, since time immemorial. In other words, generations of living on the land, of using the land and resources responsibly, and of being responsible for the land is the core of knowing the land.

Context is another important aspect of indigenous knowledge. It is important in the way the knowledge can be learned and in the way it is communicated to both Aboriginal and non-Aboriginal people. The idea of "context," however, has meant slightly different things for different academics. James (Sákéj) Youngblood Henderson (2000), though he has been criticized for being essentialist in some of his writings, provides a description of a key element of indigenous knowledge, "natural context" or "ecological context," that helps explain how indigenous knowledge emerges. The natural context is where Aboriginal people develop and learn their worldviews, language, knowledge and order. In this context, people can learn about the world and life and learn everything that is possible to learn about that life (Henderson 2000a, 12). To understand indigenous knowledge and the natural context, there has to be a relationship and a balance with the local ecological order. The natural context embodies a respectful and harmonious relationship with all life forms that create the natural forces of nature, and it

is within this respectful relationship that Aboriginal teachings and order are experienced and understood. Henderson (2000) believes indigenous knowledge is the source to understanding the natural organization of life, and this organization is understood by living in balance with ecology (Henderson 2000a, 31). In the natural context, Aboriginal people work with nature to learn from their environment, from the teachings of Creation. From these teachings they adapt and construct things to meet their own human needs. The adaptations are human constructs, but the source of the ideas and practices are related to nature and society. Indigenous knowledge emerges out of language, teachings, and laws that are all tied to the ecology, even in cases where the knowledge may now be passed down in another setting such as a classroom – the knowledge taught is an expression of the land and an expression of that ecological context. This does not assume that all Aboriginal people today think and live in this context, but their language, their indigenous knowledge, their history, and their worldviews are tied to the land, the ecology, and the context from which it all emerged.

Some of the academic work on indigenous knowledge has focused on another version of the "context" of indigenous knowledge, especially that of Richard Kuhn and Frank Duerden (1996) (1998) and Marc Stevenson (1996). Their investigations into context are centered on the questions related to integrating indigenous knowledge into environmental assessments and co-management boards. They describe indigenous knowledge, or TEK, as a "high-context" form of knowledge. In other words, meaning relies on context and place. Their idea of context relates more to the problem of transposing local indigenous knowledge into general or universal statements. Stevenson (1996) argues that indigenous knowledge must be communicated in its original context to even begin to understand its deeper meaning (Stevenson 1996, 287). This is a

virtually impossible task since the original context, or "natural context" that Henderson describes, takes a lifetime of learning, and the local context is often far away and inconvenient for the purpose of environmental assessments; thus some researchers insist that one must at least be *aware* of the scale and context in which this knowledge is being used by non-Aboriginal people in order to try to maintain its integrity (Kuhn and Duerden, 1996; Stevenson, 1996; Duerden and Kuhn, 1998). The chart below demonstrates how the characteristics of the knowledge system change when it has different user groups, when it is used at different scales, and when it is used for different purposes and in foreign contexts (see Figure 1, below).

Figure 1. Characteristics of traditional environmental knowledge.
The diagram depicts several dimensions of the application of traditional environmental knowledge and illustrates that as user groups change, so does the scale at which information is used. Accompanying these changes is increased abstraction of knowledge as it is removed from its original context or transmuted to other frameworks.

	local	**Scale**	*global*
User group	First Nations	First Nations/ governments	Society as a whole
Application	• Local resource decision-making • Cultural survival and enhancement	• Northern land-use planning • Land claims • Development-assessment process • Environmental assessment	• Environmental role models • Environmental ethics • Appraisal of environmental management
Integrity of knowledge	• Experiential and traditional knowledge of environment • TEK in its purest sense	• Translation into scientific/ rational framework • Selective use of TEK	• Adaptation to ideological perspectives • Emphasis on other cultures' attitudes toward land resources
	low	**Abstraction of knowledge**	*high*

(Source: Kuhn and Duerden 1996, 77; Duerden and Kuhn 1998, 35)

As the chart illustrates, the integrity of the knowledge changes when indigenous knowledge is used in the context of, for example, environmental assessments. It tends to get translated into a more scientific format and used more selectively.

This is the description of the current usage of TEK in environmental assessments, though it is not necessarily wholly acceptable to Aboriginal people. The extraction of indigenous knowledge into non-Aboriginal knowledge systems requires a level of compromise from Aboriginal people. In some instances, as we will see later in the case study of this paper, compromising the integrity of the knowledge is not always worth it for Aboriginal peoples. Aboriginal people also have to weigh the consequences of having their knowledge "used" for non-Aboriginal purposes in ways that often undermine the respect and acknowledgement of their own perspectives and processes. The integration of indigenous knowledge into non-Aboriginal systems of knowledge can be seen as an issue of power.

2.2.4 A connection between knowledge and power

The connection between knowledge and power becomes dramatically clear when discussing indigenous knowledge in the context of non-Aboriginal systems and processes, processes such as environmental assessments, environmental decision-making, co-management boards, and other legal settings. Henderson (2000), Nadasdy (1999), and Agrawal (1995) all describe the deep political insights that indigenous knowledge reveals. They believe indigenous knowledge can provide a way of examining the actual relationship between Aboriginal peoples and government bodies. Other academics have also touched on the political significance of indigenous knowledge, such as Berkes (1999). However, he explains the more obvious and direct political significance of indigenous knowledge for Aboriginal peoples in asserting their land rights and regaining control over their culture (Berkes 1999, 24-5). This particular role for indigenous knowledge is reflected in the government's growing attention to TEK that helps reaffirm Aboriginal people's role in managing their affairs and their land, an

essential reinforcement in their struggle to regain control over traditional territories. However, indigenous knowledge is more than a tool to regain land. It is also more than just an approach to creating more sustainable development, because there is always the risk that indigenous knowledge can be appropriated and used in government resource and land management while neglecting the needs and rights of Aboriginal peoples themselves (Kuhn and Duerden 1996, 79).

Whenever indigenous knowledge is used as one of these tools, there are risks in translating indigenous knowledge into the rigid systems of land claims and environmental assessments, as explained above in the discussion on context. In terms of the question of power, Nadasdy (1998) insists that forcing indigenous knowledge to be expressed in a manner that conforms to state institutions takes the control *out* of the hands of Aboriginal people and keeps the power *in* the hands of the government. He also believes that the employment of indigenous knowledge in co-management boards has actually been used as a means of avoiding cross-cultural negotiation rather than engaging in it (Nadasdy 1998, 3). Furthermore, indigenous knowledge has often been used in land claims processes or environmental assessments only to address one specific environmental issue or question. When it is used this way, it is often only treated as a supplementary source of knowledge to Western science, and the opinions and perspectives of the Aboriginal person's worldview are often dismissed (Nadasdy 1998, 7). Used this way, indigenous knowledge has the unfortunate effect of legitimizing a sort of false pluralism: the government takes what it needs, appears to be inclusive, and undermines any more radical jurisdictional claims by appearing to be benevolent and liberal in its cultural generosity.

One way to look at these problems is to reconcile the way the voice of indigenous peoples is inserted into formal processes to avoid losing the integrity of their knowledge or appropriating their voice. However, this would not necessarily require the actual format of the formal processes of environmental decision-making on co-management boards or legal arenas to change. An alternative question would be how to completely restructure the format in which these negotiations and exchanges of information take place.

In terms of the connection between knowledge and power, there is potential for political power in both Western knowledge and indigenous knowledge. Western knowledge is legitimatized by the government and readily accepted as the voice of truth and universal reason in environmental negotiations. The political and powerful potential of indigenous knowledge is in creating a vision of a new Aboriginal relationship with the government. The key power differential between indigenous knowledge and Western science is not the quality, the structure, or the history of the knowledge: it is the political force of knowledge and the connection it has to the state. Western knowledge has a close connection and is the basis of governmental decision making. Indigenous knowledge and worldviews could also provide a basis for governmental decision making. Hence, as Agrawal (1995) puts it:

> It might be more helpful to frame the issue as one requiring modifications in political relationships that govern interactions between indigenous or marginalized populations, and élites or state formations (Agrawal 1995, 431).

Henderson (2000) also argues for the need to examine the Aboriginal–government relationship in order to create a society that respects Aboriginal peoples and their knowledge. He sees indigenous knowledge and the natural context as the means with which all people could learn to understand, envision, and create a better relationship.

Henderson (2000) also believes modern legal thought has the potential to help with the analysis of the Aboriginal–state relationship. A start is to analyze the constitutional reform that occurred in the 1982 *Constitution Act*. While he insists that there are no major problems in the changes made to the *Constitution* in 1982 per se, the current implementation and practical interpretation of the new constitution is more problematic. Henderson argues that Canadian institutions must acknowledge and validate the Aboriginal rights already recognized in the *Constitution* (Henderson 2000c, 252-3). He explains that the Canadian legal profession has to accept "multicultural law" to meet the needs of all Canadians and to provide a new framework of "difference on equal terms" so that an acceptable vision of the Aboriginal–Euro-Canadian relationship can be explored (Henderson 2000d, 252). And then, in return, within a new respectful relationship between Aboriginal peoples and the Canadian government, with the help of Aboriginal worldviews and perspectives, will indigenous knowledge have a chance of being better understood and respected by non-Aboriginal people.

2.2.5 Summary

Indigenous knowledge has more potential for change than most non-Aboriginal academic researchers have accredited it with. Their focus on the utility of indigenous knowledge for environmental assessments and co-management boards has overshadowed the deeper insights of Aboriginal worldviews that could help understand and transform the political relationship between Aboriginal peoples and the government. Many Aboriginal academics and lawyers have begun the quest of revealing these empowering qualities of indigenous worldviews for Aboriginal peoples. They have introduced into the discussion of indigenous knowledge the way the Aboriginal–state relationship affects their people and their knowledge. They see a profound connection

between the Eurocentric context to which indigenous knowledge has been subjected, and the reluctance or inability of non-Aboriginal people to fully understand, appreciate, and acknowledge the value of indigenous worldviews. The natural context that is in tune with an ecological understanding based on the constant state of flux of nature provides the framework for incorporating and respecting a diversity of perspectives. It is a worldview that allows for diversity, change, new ideas, as well as continuity.

2.3 Concepts of land and relationships to land

2.3.1 Introduction

Aboriginal knowledge discussed above encompasses a unique relationship to land. The relationships to land of Aboriginal peoples, like their knowledge systems, can be differentiated from Euro-Canadian concepts of knowledge and relationships to land. This does not imply that there cannot be a harmonious understanding between the two, but that the differences need to be reviewed if there is going to be a chance to understand each other or to find a way to accept the diversity of concepts and worldviews. Aboriginal relationships to land are characterized by the belief that the relationship is a responsibility. This is demonstrated and maintained through responsible use and occupancy of the land rather than through the Euro-Canadian approach of control and ownership based on the concepts of rights and property.

2.3.2 Aboriginal concepts of land

The relationship to land that some Aboriginal people embrace through their indigenous knowledge is based on a unique worldview that conceives of all living beings, including humans, as one entity. Sallenave (1994) calls this a "'holistic' view" of the environment where the components cannot be separated from each other nor from the

human component that comprises social, cultural, spiritual, and economic aspects of the environment (Sallenave 1994, 17). Hunting, fishing, harvesting, and other forms of human survival on the land all embody social, cultural, spiritual and economic features. Using the land for these forms of survival is understood as a privilege endowed by the Creator. The interdependent relationship between humans and the natural world therefore has to be carefully respected (Sherry and Myers 2002, 10).

This relationship entails a profound sense of responsibility. As Monture-Angus (1999) puts it, the Aboriginal notion of land rights "is essentially the right to be responsible" (Monture-Angus 1999, 60); Aboriginal people are wholly responsible for their clans, families, relations, for themselves, and for their future. These obligations are linked to the Aboriginal relationship to land because "land is seen as part of the 'human' family" (Monture-Angus 1999, 60), but the responsibility to the land does not translate into mere "ownership" of the land (Monture-Angus 1999, 36). It is a spiritual and sacred relationship with the land, full of respect and awe.

This holistic view of the land means that Aboriginal people also express their territorial rights to outsiders through systematic use, occupancy, and detailed knowledge of the area (Monture-Angus 1999, 56-7; Sherry and Myers 2002, 12). Neither individuals nor communities "own" the land or the resources they use (Sherry and Myers 2002, 10), but rather understand the land to be part of the ethical community that connects all living things. This contrasts with the Euro-Canadian view of land which revolves around an idea of property rights based on concepts of ownership and control.

2.3.3 Spatial control of land

One of the more conspicuous differences between Aboriginal and government views of the land is evident in spatial control. The difference hinges on the concept of

control itself. The Euro-Canadian concept of land is based on the rationale that land is something to be controlled, dominated, and "improved." An Aboriginal concept of land, while it is about access to resources and control of resources, it is not outright control or domination of the land itself.

These two contrasting concepts of control and use of the land are manifest in different physical features on the land. The government surveys the land and partitions it in a grid formation. Political boundaries, provinces, counties, and townships are formed in roughly rectangular divisions. Also, networks of roads traverse the landscape, fences divide properties, and towns and cities that are originally established to fulfill economic purposes, are spread across the terrain (Young 1992, 259). This geometric system is an "aspatial and individualized modern grid of legal interpretation" that is "imposed upon a traditionally variegated, contextual and deeply local legal map" (Blomley 1994, 53). These divisions are not based on either ecological features or on social features. They are an "abstract space" that is "discontinuous from the lived spaces" of Aboriginal territories (Sparke 1998, 465).

Aboriginal boundaries are based on a combination of cosmography, ecological features, and on interactions between neighbouring communities (Young 1992, 256; Greenwald 2002, 148-9). Aboriginal territories are based on the lived experience of Aboriginal residents. They have a kind of social boundary, where permission to use another's territory has to be sought (Young 1992, 257), yet basic needs for survival can never be denied. More importantly, there are reciprocal obligations between the users of the land and the land itself which means that land and its resources cannot be alienated, sold, destroyed, diminished, or appropriated for private gain (Usher et.al.

1992, 112). The right to territory is not ownership; it is better described as an obligation.

2.3.4 Summary

The government system of land division has had the potential to influence Aboriginal certain kinds of spatial thinking. Many Aboriginal people have had to adopt the concept of private property in order to survive in Euro-Canadian society and law, and they are treated as individual property owners (Greenwald 2002, 149). As a result, their concept of the land has in many ways been submerged within the Euro-Canadian idea of property and its arbitrary divisions. However, the Aboriginal concept of land, boundaries, and their relationships to the land, persist through their traditional practices on the land and the retention of indigenous knowledge (Young 1992, 259-61). This persistence can challenge the Euro-Canadian political and economic divisions of space. The Euro-Canadian concept of ownership and control is based on laws and legal interpretation. Legal interpretation can be challenged and ultimately unpack the Aboriginal–government relationship.

2.4 Concepts of jurisdiction

2.4.1 Introduction

The idea of jurisdiction has many facets and there are competing perspectives of what the term represents for different people. There are at least two contexts for understanding the term jurisdiction. There is an Aboriginal understanding of jurisdiction as a responsibility, and a Euro-Canadian concept of jurisdiction as control as manifest in

the governments' jurisdictional divisions. The Euro-Canadian context for understanding jurisdiction has also been expressed in a specific way bearing on the governments' relations with Aboriginal people. The Canadian government recognizes a certain kind of jurisdiction Aboriginal people have over particular lands and issues that is encompassed in the legal terms of the *Royal Proclamation* and the *Constitution* as Aboriginal "rights" and "title." But these are Euro-Canadian ideas of what Aboriginal people should be allowed by law. These terms do not embrace an Aboriginal context or perspective of what jurisdiction actually means for Aboriginal people, but the words do have the capacity to include a more eclectic definition. The word jurisdiction, since it is used by various groups of people with different practices and perspectives, has many different nuances, but the general idea is about who has the final say about a matter or a place. In the Aboriginal concept of jurisdiction as a responsibility, jurisdiction is about having some control to make decisions and treat their territories in the way they were given the responsibility to do so by the Creator. From the legal Euro-Canadian perspective, jurisdiction means the authority and power to apply the law.

There is an important conjunction between these contrasting perspectives. Canadian laws in the *Royal Proclamation* and the *Constitution* determine both Canadian jurisdiction and affirm Aboriginal peoples' rights and title. The terms "rights" and "title" are not specifically defined or contextualized in the laws, and whether the meaning of "rights" and "title" should be derived from an Aboriginal interpretation or a Euro-Canadian interpretation is not clear to the courts, but there is potential in the *Constitution*'s words to allow for an Aboriginal interpretation of Aboriginal rights that could include the concept of Aboriginal jurisdiction as responsibility. In practice, however, Aboriginal people in the legal system are limited by the court's authority to

interpret the *Constitution*. They are also effectively limited in the legal system by the division of the Canadian governments' federal and provincial jurisdictions; Aboriginal people's issues having to do with rights and title legally fall under federal jurisdiction. So, although in theory Aboriginal people could use some key Canadian laws to explain and demonstrate their case of jurisdiction and responsibility, in practice they repeatedly face juridical barriers.

The term "jurisdiction" is not used in the *Constitution* or the *Royal Proclamation*, but "title" and "rights" are. When Aboriginal people want to talk about their jurisdiction over their traditional territories on a legal level, they must use the word "title" to give their case legal weight. As will be demonstrated in the analysis section of this thesis, AAFNA members interviewed used the word jurisdiction when describing their relationship with their territory in an unofficial interview, but in the legal setting of the Tribunal they mostly used the words "title" and "rights" to explain their meaning.

In the following, I will explain both what is meant by jurisdiction as a responsibility, and how Aboriginal scholars, lawyers, and activists have contributed to the interpretation of Canadian laws from an Aboriginal context. I will also describe how the concepts of Aboriginal "rights" and "title" are used in Canadian law, how these terms are defined from an Euro-Canadian perspective, how the terms are specific to only Aboriginal peoples who are identified by the government as Aboriginal, how these terms have evolved over the last few decades through influential judicial decisions, and how there are solutions being developed for creating a more harmonious understanding between these diverse contexts and perspectives.

2.4.2 Aboriginal concept of jurisdiction as responsibility

For Aboriginal people to use the word jurisdiction to mean responsibility can be seen as strategic in some ways. Jurisdiction in its Euro-Canadian definition of "the territorial range of authority or control" and "the right and power to interpret and apply the law" (*Canadian Dictionary* 1997, 738), is a powerful word that can be understood from a non-Aboriginal perspective as the authority over a territorial area and as a right to interpret the law. Aboriginal responsibility for their territory requires that they have the authority to have a say in how the land is managed and used. Yet they cannot be responsible for their lands while the government makes all the management decisions. Also, since jurisdiction means the right to interpret the law, the use of the expression "Aboriginal jurisdiction" suggests that Aboriginal people may be the ones who should interpret the meaning of "rights" and "title" in the *Constitution* from their perspective to include their idea of Aboriginal responsibility to the land.

Ahenakew (1985), who was the national chief of the Assembly of First Nations, interprets the meaning of rights and title from just such a perspective. He does not use the word responsibility, but explains the right to land and the relationship to land as one of governance, and as something separate from Euro-Canadian jurisdiction. Ahenakew says that the Aboriginal right to govern land and resources "flows from their aboriginal title" (Ahenakew 1985, 25). He defines three classes of Aboriginal rights:

> (1) the rights that flow to a people from aboriginal title to govern and control land and resources; (2) the rights to a people's cultural survival and elements of self-determination, which flow from common identity, language, culture, and values; (3) the right of a people to be exempt from or protected from the application of the laws of another jurisdiction to which it has not agreed to be subjected, and which would have the effect of unreasonably abrogating pre-existing rights or privileges (Ahenakew 1985, 25).

His definition of Aboriginal rights demonstrates how an Aboriginal interpretation of the law could provide a broader and more accepting notion of Aboriginal people's right to be

responsible for themselves and for their lands, unencumbered by the government's interference.

Aboriginal peoples' sense of responsibility to their lands is embedded in their worldview, spirituality, and in their traditions and practices. In traditional Aboriginal societies, the individual is subordinate to the whole, and the whole includes more than just the members of the community: it embodies the interrelatedness of all humans, animals, plants, and objects as part of the land and territory. Individual interests are connected to the survival of the whole. In other words, "the general good and the individual good were virtually identical" (Boldt and Long 1985, 167). From this perspective, rights are not geared towards the individual's self-interest because in

> this encompassing web of social relations the individual is characterized as the repository of responsibilities rather than as a claimant of rights. Rights can exist only in measure to which each person fulfills his responsibilities toward others (Boldt and Long 1985, 166).

The idea of rights then, in Aboriginal society, was defined in terms of the common interest, and was deeply connected to acts of responsibility demonstrated towards the environment and other living beings. Rights from an Aboriginal perspective are not something that can be bestowed to an individual, but responsibilities can be.

It is important to remember though, that words like "rights," "title," and "jurisdiction" are English labels Aboriginal people have to use to describe ideas and concepts that evolved in an Aboriginal society. They have their own language to describe these concepts. The true meanings are embedded in an Aboriginal worldview, context, and language. The word "responsibility" may be a term that more accurately describes the Aboriginal attitude towards their lands, though it does not have the legal weight the other labels have.

2.4.3 Euro-Canadian concepts of Aboriginal rights and title

The concepts of Aboriginal rights and title are prominent in Canadian laws, legal texts, and court cases involving Aboriginal issues. These two concepts are relevant specifically to Aboriginal peoples, and are not concurrent with other general concepts of rights such as basic human rights or with property title. The Canadian concept of Aboriginal rights and title are also specific to the status of the Aboriginal person. "Indian status" is a label granted by the government to Aboriginal people who suit the characteristics of "Indian" as defined in Canadian governmental legislation. Usually, it has been implied that the "Aboriginal" people referred to in "Aboriginal rights and title" are those recognized with "Indian status."

The idea of Indian status and non-status is rooted in a history of Canadian policy towards "getting rid" of the "Indian problem." One of the main incentives was to provide a place for European settlers to farm, and to do so Indian people had to be alienated from their lands. Through a series of acts and policies to "civilize" Indian communities, starting as early as the 1830s, individuals and entire communities were sometimes offered, often forced, to accept enfranchisement into Canadian society. Enfranchisement for Indians meant moving from a dependent protected status into full citizenship to have the same legal status as other non-Aboriginal Canadians citizens (Wilson 1985, 63; RCAP 1996, Vol 1, Ch9, s5). The series of Acts such as the *Gradual Civilization Act* 1857, the *Indian Lands Act* 1860, the *Gradual Enfranchisement Act* 1869, the *Indian Act* 1876, and several other amendments to the *Indian Act* in the 1920s eventually made enfranchisement compulsory for some individuals. These Acts and amendments were not designed to maintain a healthy and plentiful Aboriginal population that would be able to practice their traditional way of life on their traditional territories because it

allowed "protected reserve land to be converted to provincial lands upon the enfranchisement of an Indian" (RCAP 1996, Vol 1, Ch9, s9.1).

The *Indian Act* 1876, however, had the greatest impact on the structure of Aboriginal communities and on the rights and title of Aboriginal people today. Under the *Indian Act*, there are three distinctive legal definitions for Aboriginal peoples. One is the Status Indian who is registered as a member of an Indian band under the Act. The next is the Treaty Indian who is a member of a band that has signed a treaty. Status Indian and Treaty Indian can be the same. And thirdly, there are non-status Indians, which is not a legal category. Non-status Indians are those who think of themselves as Indian and may be regarded so by others, but they are not included on government lists (Morrison and Wilson 1995, 610). The way the *Indian Act* was administered gave some Aboriginal people legal status and did not give this status to others. The discrepancy between the two was not dependant on the individuals' lifestyle or ancestry; it was dependant on legal administration of bands and treaties, on the compilation of government lists, and sometimes, during the periods when enfranchisement was not forced on some Aboriginal people, non-status was a choice individuals made. In effect, the government created two classes of Indian people (Wilson 1985, 64). The non-status Indians were not included in consideration for reserves, for being officially part of bands for band voting, for government funding, or for Aboriginal hunting and fishing rights.

Fortunately, it is becoming more accepted over the last forty years that "non-status Indian claims to aboriginal title represent an aboriginal right" and that "aboriginal rights of all original inhabitants of the land will be negotiated on the basis of the existence of aboriginal title to that land" (Wilson 1985, 65-67). This change in attitude is significant. It demonstrates the rejection of the colonial government's artificial

definitions of Aboriginal people, definitions that did not take into consideration any traditional laws, governance, family structures, social organization or cultural practices. Wilson (1985), a Native activist and lawyer, argues that "aboriginal title and the rights that flow from that title, as well as the exercise of those rights, is the same for non-status Indians as it is for status Indians" (Wilson 1985, 67).

The idea of Aboriginal title has been evolving in the courts and in the public eye since its 1763 inception in the *Royal Proclamation*.[3] It is intricately connected to the idea of Aboriginal rights. Until recently though, "the rights of the Indians to their aboriginal lands – certainly as *legal* rights – were virtually ignored" (*R. v. Sparrow*, in Borrows and Rotman 1998, 341). Even in the late 1960s, Aboriginal claims were still not seen as having any legal status. The government seemed to be unwilling to take a legal position towards Aboriginal land claims, and instead, the claims were dealt with through policy and programs.

The Canadian laws distinguish two parts to Aboriginal title: ownership and jurisdictional aspects. Asch and Zlotkin (1997) argue that upon the arrival of the Europeans, Aboriginal people had both ownership and jurisdiction of their lands. However, the *Constitution Act* 1867[4] specified the legislative jurisdiction of the federal

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[3] The *Royal Proclamation* of 1763 was the Crown's recognition and affirmation of Aboriginal peoples pre-existing right to land (Borrows and Rotman 1998, 28). It did not provide the Crown with a *right* of sovereignty over Native peoples and their land. However, the Crown did imply an *assumption* of sovereignty. The *Proclamation* established the procedure by which only the Crown could negotiate and treat with the Indian nations (Brody 1988, 63; Borrows and Rotman 1998, 28). The treaty-making process requires that the two parties recognize and affirm each other's authority to make a binding commitment in a treaty. In theory, treaties are created to maintain mutually beneficial relationships between the Crown and the Aboriginal peoples (Borrows and Rotman 1998, 105). The *Royal Proclamation* established Aboriginal land title by recognizing the mutually exclusive political systems of the Aboriginal peoples and the settler nations (RCAP 1996, Vol 1, 117). Later, the *Constitution Act* 1867 and the *Indian Act* 1876 assumed federal jurisdiction over Aboriginal lands and people and saw them as wards of state rather than as political communities. However, section 25 of the *Constitution Act*, 1982 reconfirms the Royal Proclamation (see Appendix A for section 25).

[4] The *Constitution Act* 1867 is the manifestation of the European attitude of guardianship fed by stereotypes of Indian people that reinforced the belief that Indian people were too incompetent to look after themselves and needed to become wards of state for their own protection (Fleras 2000, 117). The Crown

and provincial governments while taking no account of Aboriginal peoples' jurisdiction and responsibility to the land. As such, Aboriginal peoples were left with the problem of establishing recognition of their "unspecified jurisdiction against the explicit constitutional recognition of the jurisdiction of the other levels of government" (Asch and Zlotkin 1997, 226-7). Moreover, section 91 and 92 of the 1867 *Constitution* establish that the federal and provincial governments cover all the areas of legislative jurisdiction in Canada. This constitutional assertion conflicts directly with Aboriginal title.

Aboriginal rights and title to land have received a few decades of attention in the courts, including attempts to explain the meaning of "rights and title." In the Supreme Court decision on *Delgamuukw* in 1997, for example, Aboriginal title was defined as "a *right to the land* itself" established by the following criteria: "the land must have been occupied prior to sovereignty," "there must be a continuity between present and pre-sovereignty occupation," and "at sovereignty, occupation must have been exclusive" (*Delgamuukw v. B.C.* in Borrows and Rotman 1998, 79-82, original in italics). Justice Lamer's statements on Aboriginal title in *Delgamuukw* are clearer than any hitherto. He essentially says that "aboriginal title isn't outright 'ownership' of anything, but it is more than the right to continue the traditional practice of, say, hunting moose in a particular territory," and it "may well include considerable rights to the resources of the territory

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also wanted to clear the land of all impediments for settlement and development to create a "civilized form of economy" (Brody 1988, 62). "Indians constituted such an 'obstruction,' and treaties provided a means for their 'removal'" (Brody 1998, 63). Today, the *Constitution* remains a constant basis for disagreement and conflict in the courts. There have been some minor victories in terms of Aboriginal rights in judicial decisions though even these decisions are still unclear or partial due to the varied possible interpretations of the *Constitution* (Persky 1998, 6). Questions of jurisdiction may appear to have been settled in sections 91 and 92 of the 1867 *Constitution*. In *Delgamuukw* 1991, the trial judge stated in the decision that "there was no room" for Aboriginal people to claim jurisdiction since the division of powers was already established in the *Constitution Act* 1867, and that "Aboriginal people became subject to Canadian (and provincial) legislative authority" (Monture-Angus 1999, 116-7). Monture-Angus (1999) argues that these views hinder the court's ability to understand arguments about Aboriginal claims to jurisdiction.

Section 35(1) of the *Constitution Act* 1982 re-addresses Aboriginal rights. It "protects unextinguished aboriginal land rights from future statutory abridgement" (Slattery 1987, 68) (see Appendix

covered by title." He also recognizes that "aboriginal title is a communal form of relationship to the land, and that such lands cannot be used, either by Natives or non-Natives, in such a way as to destroy the way of life of Native people" (Persky 1998, 19). Justice Lamer was interpreting a Euro-Canadian term, "Aboriginal title," but he aimed at a more satisfactory definition that was not derived out of the Euro-Canadian context and that echoed more traditional Aboriginal concepts of land and ownership.

Justice Lamer's commentaries have been viewed as progressive, but not all Native people would agree that these statements are revisionist enough to make amends for past injustices. Patricia Monture-Angus (1999), a Mohawk woman, activist and scholar, for instance, says that although these kind of judicial processes offer us the opportunity "to begin structuring a comprehensive and respectful theory of Aboriginal rights," the responsibility has been evaded every time (Monture-Angus 1999, 84). Asch and Macklem (1991) argue that the judiciary must recognize Aboriginal rights in the context of Native forms of community in order to understand Aboriginal systems of rights and obligations that arise out of their unique relationship with the environment, themselves and other communities. In other words,

> the content of aboriginal rights thus is to be determined not by reference to whether executive or legislative action conferred such a right on the people in question, but rather by reference to that which is essential to or inheres in the unique relations that Native people have with nature, each other, and other communities (Asch and Macklem 1991, 352).

Justice Lamer has only scraped the surface, but if the judiciary could develop notions of Aboriginal rights and title that would correspond to Aboriginal worldviews and contexts, it would fortify Aboriginal identity and social organization, and would confirm on a legal level the value of the unique relationship they have with their environment.

A for section 35(1)), though there has been little judicial determination of the meaning in the 1982 *Constitution*'s reconfirmation of the *Proclamation*.

2.4.4 Summary

What we have are two concepts of jurisdiction: the Euro-Canadian concept of jurisdiction that is manifest in the governmental exclusive divisions of territorial and policy areas based on control and ownership, and an Aboriginal concept of jurisdiction as a responsibility to the land based on Aboriginal knowledge of the land and a unique interdependent relationship between all parts of the environment. Fleras (2000), a scholar on Aboriginal–state relations, proposes an approach to combining the two ideas of jurisdiction into one cooperative relationship through a system of "*multiple yet overlapping jurisdictions*" (Fleras 2000, 109, 113, original emphasis).

Aboriginal jurisdiction defines aboriginality and indigeneity as an autonomous kind of responsibility. The existence of autonomous groups responsible for themselves would diffuse the hierarchical tendencies of Canadian government and would require non-dominating relations between the autonomous bodies. These autonomous bodies would have to engage in relationships of co-operation for co-existence. Jurisdictional issues would not be clear-cut exclusive domains as they have been established in Canadian law where co-sovereign communities have each claimed "intrinsic authority over separate spheres of jurisdiction without relinquishing what they share in common" (Fleras 2000, 108). Rather, a government-to-government partnership can create "innovative patterns of living together with differences" (Fleras 2000, 108). Establishing such a new Aboriginal–government relationship is not an easy or straightforward solution. There are initial barriers to overcome such as revisiting Euro-Canadian preconceived ideas of aboriginality and of jurisdiction, as well as redefining constitutional principles. Fleras (2000) argues that the problems with our Aboriginal–state relations are not going to be solved by contemplating Aboriginal rights or historical grievances; there has to be a new

space created in the exclusive network of federal–provincial jurisdictions to legitimize Aboriginal ideas of jurisdiction pertaining to land, identity and political voice (Fleras 2000, 109). This would then also lead to respectful understanding and exchange of indigenous knowledge and worldviews. Fleras demonstrates that it is important to understand the politics of jurisdiction historically as "a series of contested and evolving sites involving a struggle between competing forces over jurisdictions pertaining to power and possessions" in order to effectively challenge the current relationship between the state and Aboriginal peoples (Fleras 2000, 121).

2.5 Aboriginal resistance

2.5.1 Introduction

There is a commonly misconceived notion that Aboriginal peoples have been passive victims of governmental policy throughout history. In fact, Aboriginal people have been actively, if not always successfully, engaging in resistance to government authority and oppression for centuries. For example, a case study of the Nez Perces and the Jicarilla Apaches by Greenwald (2002) demonstrates the various ways Native Americans were active participants in their own history within a partially thwarted federal domination. Resistance by marginalized peoples, such as most Aboriginal people in Canada, can occur in different kinds of spaces and places, for various reasons, and with various goals in mind. Edward Said (1993) offers some useful explanations of the territory in which resistance occurs and some approaches marginalized people have taken to influence predominant ideas and concepts in Western society. David Sibley (1992) examines the more specific spaces of resistance where the actions actually occur. And Matthew Sparke (1998) exemplifies a Canadian case of an Aboriginal group using

an effective setting to forward their position and educate the Canadian public about their perspectives.

Said (1993) discusses some themes of resistance in his pathbreaking *Culture and Imperialism*. He describes the space in which resistance can occur, how it can be accomplished, and why. One condition of resistance is that it occurs in territories that have been influenced and redesigned by explorers and their culture of empire, such as the Euro-Canadian influence on the land in Canada. Resistance occurs within a place of "overlapping territories" and Aboriginal people have to reimagine their territory "stripped of its imperial past" (Said 1993, 210). The theme of overlapping or multiple geographies that are often conflicting geographies, is an important theme in a discussion of jurisdiction and resistance.

Second, Said describes the ways in which people resist. He says that artistic and academic intervention from the people resisting can have an effective impact not only politically, but by "*successfully* guiding imagination, intellectual and figurative energy [and] reseeing and rethinking the terrain common to whites and non-whites." (Said 1993, 212, original emphasis). There are Aboriginal scholars, lawyers and activists that continually challenge Eurocentric concepts and notions that claim universality. They offer alternative possibilities and new ways of seeing such things as land and territory.

Third, the reason why resistance occurs is because people realize they are prisoners in their own land. They insist that they have "the right to see their community's history whole, coherently, [and] integrally" (Said 1993, 214-5). To replace old histories and foster new visions of themselves requires "new and imaginative reconceptions of society and culture" to avoid repeating old injustices (Said 1993, 214-8).

Aboriginal peoples not only resist in direct response to dominant forces, they also express resistance by occupying, deploying and creating alternative spatialities. Therefore, although there is a distinct history of Aboriginal resistance to the persistent expansion of settler nations, to excessive economic development on their territories, and to the laws and policies the Canadian government has forwarded over the centuries, there is also another kind of resistance that is "'uncoupled' from domination" (Pile 1997, 2). This means that resistance not only happens in response to domination, but that marginalized people can put forward their own positions and pursue their own objectives independent of their condition of marginality. Their resistance does not merely develop out of opposition to the dominant forces, but is already manifest in the marginalized people's own identities, knowledge and societal orders and that is the space from which they resist.

2.5.2 Resistance by inserting voice

When marginalized people decide to put forward their own positions, their acts of resistance may take place in spaces where the dominant forces will hear them. Sibley (1992) describes acts of resistance that occur in "strongly classified spaces" from which people can be physically excluded (Sibley 1992, 115). Strongly classified spaces are closed, homogeneous spaces that have a clear set of rules and boundaries that keep people out who do not fit the classification. I argue that these can include such spaces as institutions or governmental structures that clearly have an internal homogeneity of values. In these spaces an outsider is seen as an intruder who threatens the order of the space. Outsiders are sometimes defined as such by their different worldview that can be seen as threatening to the internal homogeneity. Strongly classified spaces are not open to diversity, to the integration of knowledge, or to the exploration of new

relationships to reorganize between people. The reaction to such an intrusion may be dealt with by muting or expelling those who do not represent the collective value of the space (Sibley 1992, 112-5). A subtle yet powerful form of resistance can be accomplished in these strongly classified spaces with the insertion of the "oppressed" voice. It is not always a response to a direct act of domination by the government, but it can be a decision to start forcefully and openly redefining the meaning and structure of institutionalized spaces. The presence of these voices in these kind of institutional spaces has the power, as Said (1993) has described, to influence change in dominant perspectives and to reimagine the terrain of multiple jurisdictions.

Sparke (1998) offers an example of resistance to the strongly classified space of the Supreme Court in his study of the Gitxsan and Wet'suwuet'en. They sought to begin political negotiations in a legal setting by introducing and educating the court and the Canadian public of their jurisdiction over their territories. With an approach similar to the way Said (1993) describes resistance, it occurred in a territory overwhelmed with the influence of Canadian ideas of jurisdiction. The Gitxsan and Wet'suwuet'en had to resist from a time where they could still imagine their territories – a time before this influence started. Their continued presence, practice, and knowledge of the land made this possible. Second, their approach to telling their oral histories in an artistic rendition stemming from traditional ceremonies and story telling as well as their effective use of descriptive Aboriginal territorial maps also began to guide the imagination of the court and the public to a terrain unknown to non-Aboriginal people. And third, they insisted on illustrating their history and present state as a coherent and complete picture of their own construction and context.

The Gitxsan and Wet'suwuet'en resistance occurred in the highly public legal arena. Sparke (1998) believes that law and cartography are effective spaces for resistance precisely because they are "institutional arenas in which abstract state-space is reproduced and reworked" (Sparke 1998, 466). The Canadian court can be seen as one of Sibley's *strongly classified spaces* (Sibley 1992, 115). Legal space is designed by a set of rules. Entering into such a space in which these First Nations had "no involvement whatsoever with the putting together of" was criticized by some other First Nations as being too compromising a position (Sparke 1998, 470-1). The Gitxsan and Wet'suwet'en were entering into the space on "law's terms" (Blomley 1994, 10) and had to make arguments that would fit into the framework of Canadian law. In effect, "the Gitxsan and Wet'suwet'en were therefore obliged to negotiate with the structuring effects of this normalized abstract space... at a number of different levels" (Sparke 1998, 471).

They were able to subvert the space by inserting their voice and speaking their claims successfully. This included translating and effectively communicating their cultural differences in a way the judge might understand (Sparke 1998, 471-2). Their challenges to the federal and provincial governments also included "a rethinking of the disposition of time and space of sovereignty at the time of the Royal Proclamation" (Sparke 1998, 489). The *Royal Proclamation* of 1763 had declared that colonizers needed the informed consent of Aboriginal inhabitants before British subjects could take any land. The Gitxsan and Wet'suwet'en argued that they had never made any treaties with the government (Sparke 1998, 477). In the end, the Chief Justice still had the power to close the door on them, even after they had effectively "inserted their claims into the terms of the dominant discourse" (Sparke 1998, 479). He interpreted their resistance as

"inaccurate and ungeographical" (Sparke 1998, 489). Nevertheless, these two First Nations used strategies of resistance that allowed them to successfully communicate their territorial jurisdiction in a unique performance and acceptably uncompromised manner to educated the wider Canadian public. They subverted the space by both challenging the norms in this space and by playing by the rules of the space. They used their own approach to tell their story and demonstrate their proof of jurisdiction, and they used the Canadian laws of the land to make their legal arguments.

2.5.3 Summary

Aboriginal people can subvert dominant spaces by introducing their own perspectives and concepts that are not simply formed in opposition to the dominant forces. Their positions have evolved out of their own knowledge, context, and order. Aboriginal resistance occurs in many spaces, and one of these spaces has been the legal arena. The Euro-Canadian judicial system has an impact on the use of the land. The courts are ordered by a set of Canadian laws and the laws determine jurisdictional divisions and control. The presence of Aboriginal voices in such a strongly classified space can influence the interpretation of the laws and the dominant values of the space as well as guiding the Canadian view of their history and knowledge.

2.6 Conclusion

There are distinctive qualities of indigenous knowledge, Aboriginal relationships to land, and Aboriginal concepts of jurisdiction that cannot be fully grasped from the Euro-Canadian worldview and context. Euro-Canadian definitions of indigenous knowledge, embedded in the English language, cater to non-Aboriginal needs and approaches to land management such as environmental assessments and environmental

legislation. Aboriginal interpretations of the meaning of indigenous knowledge and jurisdiction, on the other hand, could contribute to a new way of understanding how dominant Euro-Canadian contexts have been excluding Aboriginal perspectives and denying the diversity of ideas and values. This dialogue has begun, and one of the places where this takes place is in the legal arena.

The legal arena is a challenging space to insert ideas and values such as indigenous knowledge, Aboriginal concepts of jurisdiction and responsibility, and alternative worldviews and relationships to land. The space is bounded by a clear set of rules, or laws, based on Euro-Canadian context and values. However, some Aboriginal people have chosen to use the legal arena as a space of resistance to introduce their knowledge and worldviews in order to begin the dialogue of understanding the differences and moving towards acceptance of diversity. The potential of the dialogue is to widen Euro-Canadian understandings of indigenous knowledge, and to reinterpret the meaning of Canadian laws and their definitions of Aboriginal rights and title. Their voice can also open the doors for alternative visions of Aboriginal–state relationships which in turn would provide new spaces and ultimately multiple cooperative jurisdictions.

The next chapter will provide some historical background of the Aboriginal community involved in the following case study, the Ardoch Algonquin First Nation and Allies. I will illustrate some of the historical debates and written accounts that have compromised Algonquin arguments about occupation and jurisdiction over their traditional territories. This is just one example of the barriers Algonquin people face in Ontario when they are asked in legal cases to "prove" their claims to the land and knowledge of the land. I will also demonstrate how Algonquin resistance is an integral part of their history. Their active role in determining their destiny and forming their

current situation is an important factor in understanding how resistance is not something that only occurs in opposition to dominant forces but is a part of their worldview and responsibility to the land.

CHAPTER 3/
Ardoch Algonquin history: A story of occupation and resistance

3.1 Introduction

The history of the Ardoch Algonquin people illustrates how contested concepts of knowledge, land, and jurisdiction have created a distinct form of resistance taken by the Ardoch in their many struggles over their territories and their recent struggle over land use in the Tay River watershed. Not only did settlement of the region by Euro-Canadians bring different cultural and legal claims to what was traditional Algonquin land, but precisely because many historians wrote the Ardoch out of the area, their ability to advance their particular set of knowledge, land and jurisdictional claims was greatly impeded. The writing of the history of the region, in other words, provides something of the ideological basis by which Euro-Canadian law has been able to displace Ardoch resistance. However, history is itself contested, and if we begin with the premise that the Ardoch have only been expediently silenced by written "history," then we can also begin to understand their counterclaims based on distinct forms of knowledge, unique relationships to the land, and Aboriginal jurisdiction over a space that has become the real and symbolic form of their resistance.

3.2 Historical claims to land

The Algonquins south of Ottawa have suffered over two hundred years of adverse effects from European settlement and unfavourable Indian policy (Sarazin 1989). However, their contact with European newcomers started as early as the beginning of the 17th century. Anecdotal evidence shows that at first contact with Europeans, Algonquin people had control of eastern Ontario and western Quebec, though research on the level of control and the time period in which they had it is

conflicting. They were the gatekeepers of the interior, and newcomers such as Samuel de Champlain, had to make alliances with them before they would be allowed access to cross their territory to go west or north of the Ottawa Valley (Richardson 1993, 89-91; Trigger and Day 1994, 69). Algonquin leaders of today such as Chief Sarazin write about the role their peoples played in the development of trade with the Europeans in Canada. These histories tell of how the Algonquins traveled downstream to Lake of Two Mountains in Lower Canada to meet with the Nipissings and Mohawks and to trade with the French for two months in the summer. The Algonquins would, then, return to their hunting grounds in the valley of the Ottawa River by the end of August until the next year (Sarazin 1989, 171). These claims of Algonquin occupation of the Ottawa Valley region are gradually being supported by ongoing academic research by Marijke Huitema (2000).[5]

The "Algonquin" people should be distinguished from the "Algonquian" cultural and linguistic family which in Quebec also includes Abenaki, Atikamekw, Mi'kmaq, Cree, Innu, Montagnais and Naskapi.[6] The term "Algonquin" is used to refer to the people who occupy the Ottawa Valley and the Abitibi-Témiscamigue region that reside within or outside ten different communities, totaling a population of 7000. On the Ontario side it only includes Golden Lake and the other nine communities are on the Quebec side (Clément 1996, 1-2). Clément (1996), a curator at the Canadian Museum of Civilization and the editor of *The Algonquins*, notes that there has been comparatively little research

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[5] See Marijke Huitema (2000) "Land of which the savages stood in no particular need": Dispossessing the Algonquins of Southeastern Ontario of their lands, 1760-1930, Queen's University, Master's Thesis, unpublished pp. 65-72.

[6] Sometimes the spelling "Algonkin" has been used instead of "Algonquin." However, the spelling "Algonquin" will be the one used in this paper to avoid confusion, since "Algonkin" is also an Ojibway language that is a branch of the Algonquian language family (Wilson and Urion 1995, 29).

done on the Algonquin peoples, who are "considered as one of the most unknown Native groups in the literature" (Clément 1996, 4).

3.2.1 Written out of history

Clément's (1996) observation of the lack of research on Algonquin people rings true in most of the Aboriginal histories written about this region of Canada. For example, in the Morrison and Wilson (1995) edited volume called *Native Peoples: The Canadian Experience*, there is no section on the Algonquin Nation. Instead, according to the maps provided in the text, they are caught somewhere within the descriptions of the Northern Algonquian cultural area in the Eastern Subarctic and the Eastern Woodland cultural area (Morrison and Wilson 1995).

Another edited volume, Rollason's (1982) *County of a Thousand Lakes*, that provides a detailed local history from 1673-1973 of the county of Frontenac, an area that covers a good portion of what Algonquin people claim as their territory in southeastern Ontario, there is not one mention of the Algonquin Nation. There is, in all, very little mention of the Aboriginal inhabitants in general throughout the book, with a conspicuous avoidance of the term "Algonquin." In one section, some Indian family names are mentioned (Stewart 1982, 153). Further, in another reference to Native people, we find the only mention of "Algonquian" in: "Indians in the area claim to be of Algonkian origin," where the names Mitchell, Perry, Buckshot, Beaver and Whiteduck[7] are listed (Armstrong 1982, 330-1). Both of these passages, though it is not mentioned as such, are about Algonquin people, and the family names mentioned are specifically Ardoch Algonquin family names. There are a few other references to Native people in the county throughout the edited volume, such as the Iroquois, the Mohawk, the Huron,

[7] These are the same Native family names mentioned in Huitema's (2000) historical account of the Algonquins of southeastern Ontario from 1760-1930.

and the Mississauga. It is difficult to explain the avoidance or neglect to depict the Algonquin people as a part of this region.

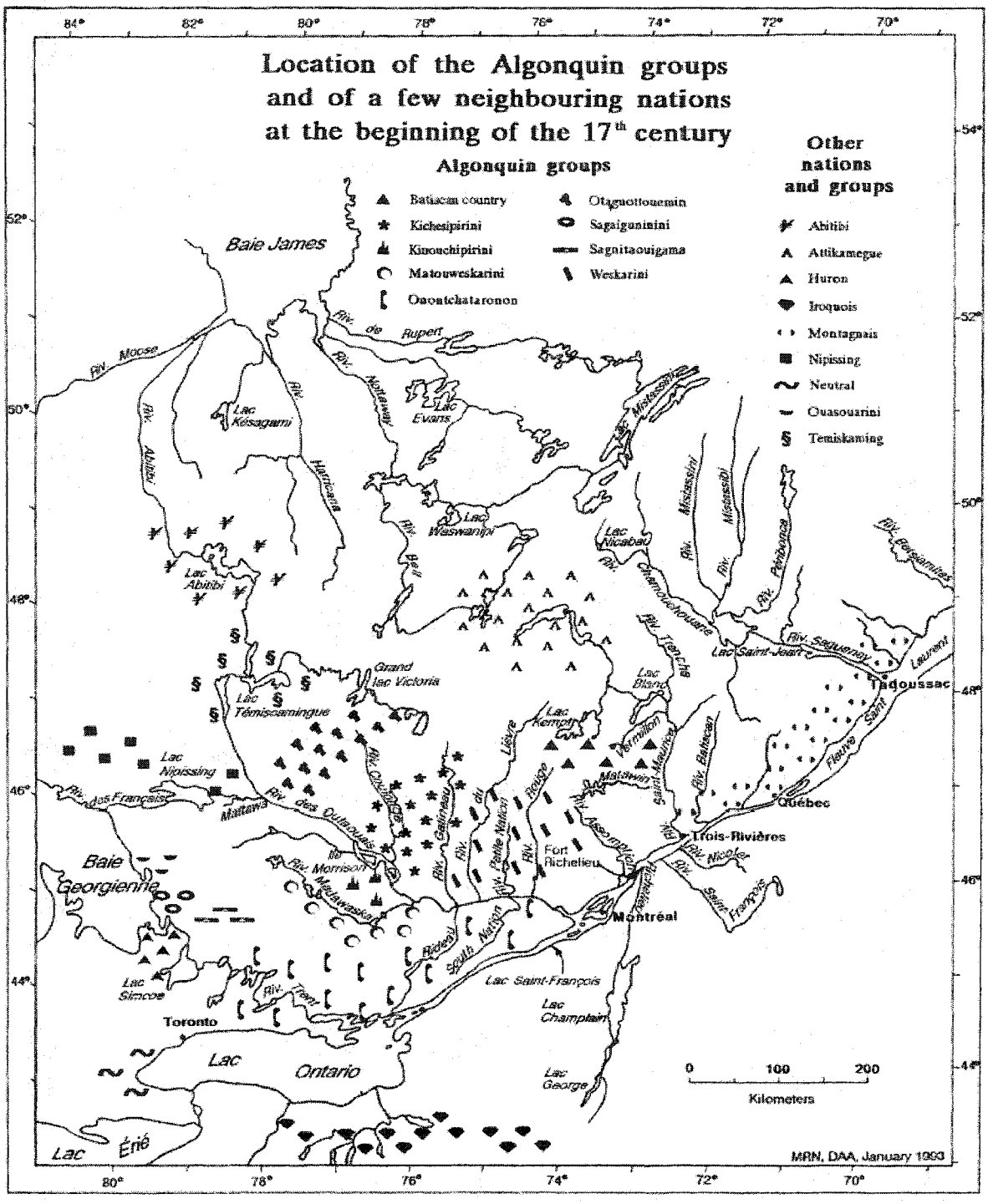
The "writing out" of certain portions of history by historians can have detrimental effects on the people excluded. Marijke Huitema (2000) would concur that local histories seldom mention the Algonquin people, while she proceeds to gather a combination of land registry records, Clarendon Township municipality records, parish records and census records to provide extensive documentation of Algonquin occupation in the area at least since 1833 (Huitema 2000, 10). Contested histories, especially for Aboriginal peoples, is not uncommon, and Huitema's work will become an invaluable resource for Ardoch Algonquin people when they are forced to concede to Euro-Canadian demands to "prove" their occupation of the territory in legal cases.

3.2.2 Early contact period

Most of the early contact recorded history about the Algonquin peoples comes from their contact with the French newcomers. Ratelle (1996) says it is difficult to do anything but vaguely define Algonquin territory. The French encountered Algonquin people as far east as Tadoussac in 1603, where sources say that they came from either west of St-Maurice or the Ottawa Valley, some from south of the Ottawa River (Ratelle 1996, 46). Champlain called the Ottawa River, the "Algonquin River" after the Algonquin people encountered in that area (Ratelle 1996, 62). In the early 1600s, Montreal and Huronia were probably the extreme points of Onontchataronon Algonquin[8] territorial presence (Ratelle 1996, 56), while other hunting territories south of the Ottawa valley may have reached as far as Toronto (Ratelle 1996, 50). According to Ratelle (1996), the six Algonquin nations identified by Champlain, were reduced and rearranged by the end

[8] The Onontchataronon Algonquins are one of the nine Algonquin groups identified in the early 17th century. Their territories cover the region of the Tay River watershed. See Map 2.

Map 2: Algonquins in Ontario in the early 17th century



(Map source: Clément 1996, p.44)

of the French regime into two groups: the ones from Trois-Rivières using the hunting grounds of Lower St-Maurice, and the others at Lake of Two Mountains who frequented the hunting grounds in the Ottawa valley (Ratelle 1996, 63). The villages at Lake of Two Mountains would be deserted but for two months in the summer when they would congregated for religious observance, trade, socializing and political councils. But by the end of August, the people would return to their hunting grounds (Sarazin 1989, 171).

In the first half of the 17th century, Algonquin people met with European visitors at different points along the St. Lawrence River, but few Algonquin people settled near the Christian missions there. Their populations fluctuated greatly over the decades from wars and epidemics. The Algonquins were under threat during the Iroquois wars from the 1630s to 1660s. In 1641, a large Algonquin group fled back to the Ottawa valley to avoid the threat of the Iroquois. It is reported that they were nevertheless massacred in their own homeland upon returning (Ratelle 1996, 49). It appears that others were forced to abandon the Ottawa valley due to recurring Iroquois attacks (Ratelle 1996, 62). Others still, had camps on the tributaries to the Ottawa River where they would form small hunting parties in wintertime, and assemble in bands in the summer at a lake or river for fishing and corn (Trigger and Day 1994, 65-6). Even with the efforts of missions to settle the Native people along the St. Lawrence at Québec, Trois-Rivières, and Montréal, the Algonquin people tried to avoid epidemics through their steadfast nomadic hunting culture. Not until the 19th century did some Algonquins begin to settle along the St. Lawrence River (Ratelle 1996, 63).

Trigger and Day (1994) believe that the Algonquins had abandoned the Ottawa valley between 1650 and 1675. They claim it was due to Mohawk raids during the wars between the Iroquois and Algonquin, due to Algonquins seeking refuge among the

missions and the consequent conversions and growing dependency on the French, and due to their deteriorating relations with the Montagnais, Nipissing, and other groups who had not come to their aid. Trigger and Day state that the Iroquois "maintained a tenuous hold over this land," southern Ontario, and that the Algonquian-speaking people were either prisoners of war or in exile northeast and northwest of the Ottawa valley (Trigger and Day 1994, 70-2). As a result, it is believed that any favourable position as the centre of European trade movement that the Algonquins had at the turn of the 17th century changed when they became dependent on Huron allies to the west for protection against the Iroquois. They had to let the French through to trade directly with the Hurons while the Hurons became "the great traders of the Upper Great Lakes" and bought furs from the Algonquins (Trigger and Day 1994, 68-9). Trigger and Day's claims that the Algonquins were not in the Ottawa valley after the 1650s are not strong. The new trade arrangement with the Hurons does not prove that they were not present on their traditional hunting grounds, or even where they were procuring their furs from. One source claims that the Algonquins of Lake of Two Mountains hunted in the Ottawa valley, and they were still trading with the Hurons to the west. Moreover, sources also claim that Algonquin people did not even begin to settle with any French missions to the east until the 19th century (Ratelle 1996, 63).

In 1761, Euro-Canadian traders encountered Indians all along the Ottawa River who identified as Algonquin (Huitema 2000, 68). In 1772, the Algonquins made their first official assertion of Aboriginal title in the area between Long Sault Rapids and Lake Nipissing (Huitema 2000, 72). Between then and 1881, they advanced their land claims through 28 distinct petitions, speeches, appeals and resolutions.[9] Chiefs and authorities

[9] For a more in-depth examination of the specific petitions presented by the Ardoch Algonquin, see Chapters 3 and 4 in Marijke E. Huitema (2000), "Land of which the savages stood in no particular need":

asked for compensation for their hunting grounds in the lower Ottawa valley that were being taken over by traders and European settlers. The Algonquin people learned to use European systems of communication out of necessity, but not because they necessarily agreed with the system (Huitema 2000, 20).

3.2.3 The beginnings of Algonquin resistance

One of the issues the Algonquins raised in opposition to certain government decisions and declarations in the early 19th century was that Aboriginal nations had been given permission by the government to hunt on any ungranted or Crown Lands. Conflicts about trespassing between the Aboriginal groups grew and the government failed to get involved to settle the disputes (Huitema 2000, 86-7).

Besides internal conflicts between neighbouring Aboriginal groups induced by government legislation, the Algonquin people also had to deal with other destructive development. By 1827, settlement in the Ottawa valley was extensive and construction of the Rideau Canal had started (Hutchison 1982, 123). There were settlers brought to Perth, that lies on the Tay River, a tributary to the Rideau River, to live along the proposed Rideau Canal and in other parts of southern Ontario in preparation for economic growth along new important waterways (Surtees 1983, 68-9). The combination of the influx of settlers and the losses from wars and epidemics brought the ratio of settlers to Native people to ten to one (Surtees 1983, 80). Even more detrimental to the Algonquin way of life was their altered geographic locations due to encroaching development such as logging on their traditional hunting territories. The white pine forests of the valley were the prize of lumbermen for masts for the British Navy and by 1830 the lumber industry was well established. These incursions on the

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Dispossessing the Algonquins of Southeastern Ontario of their lands, 1760-1930, Queen's University, Master's Thesis, unpublished.

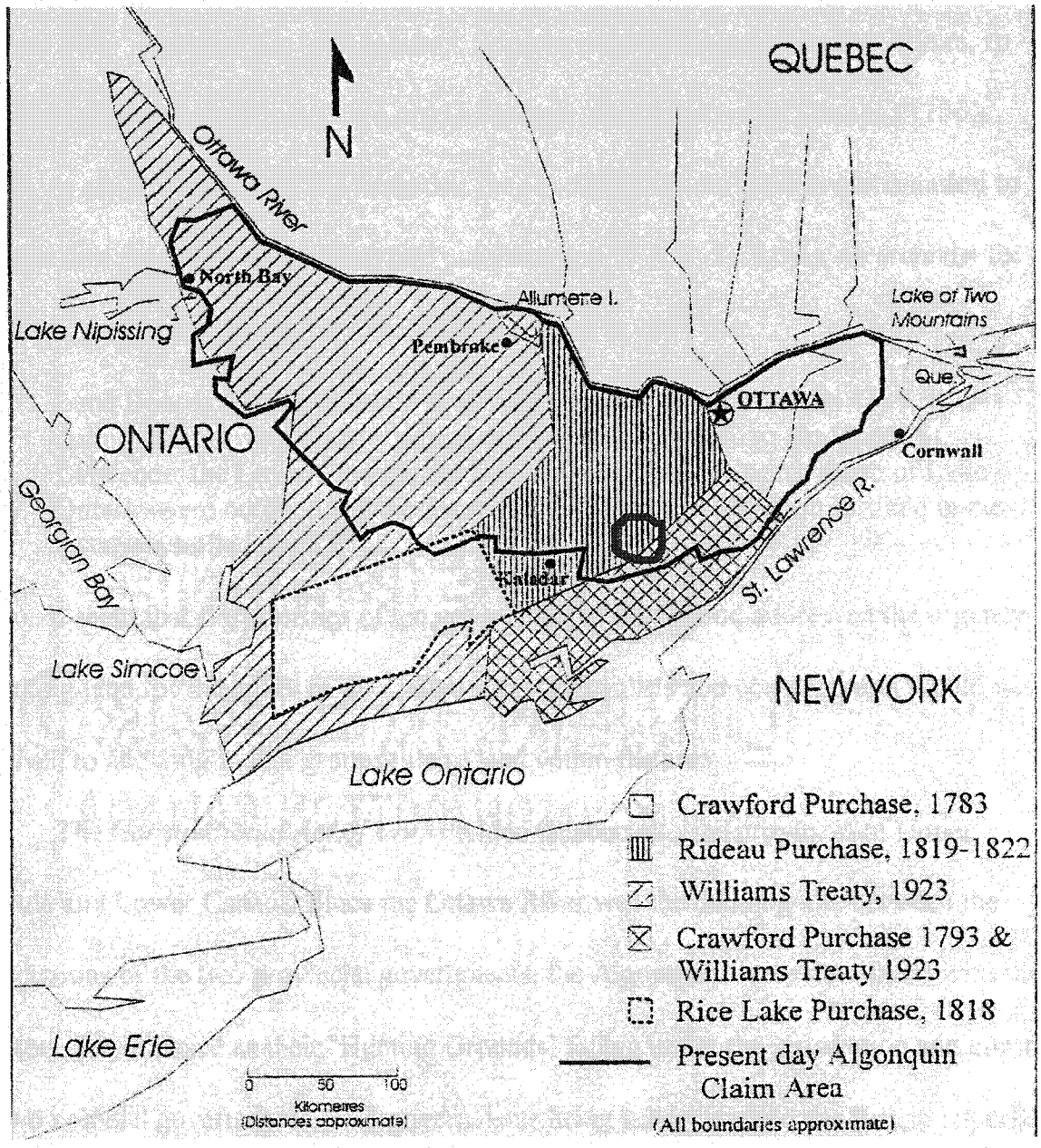
land by settlers and developers forced the game and the hunters to scatter north and inland (Huitema 2000, 91, 101; Sarazin 1989, 177). They were being pushed farther into the interior to get away from white settlement near the lakes. The Algonquins continued to petition for protection of their homeland and traditional hunting territories, promising not to use violence against the white people. The only assurances the governor gave in return was that they would not be molested by lumbermen or squatters, but that if the Algonquins tried to protect their homestead, they would be prosecuted (Sarazin 1989, 177).

By 1836, the government, finally responding to the Algonquins petitions, claimed that full compensation had been paid to the Mississauga: "His Excellency has come to the conclusion that the claims of the present petitioners were fully settled and adjusted at the respective times when the lands were surrendered by those tribes to the Government" (quoted in Sarazin 1989, 178; Huitema 2000, 88). Huitema (2000) notes that this statement must have come as a surprise to the Algonquins for the suggestion that either the land in question was not theirs, or that they had already ceded the lands in question (Huitema 2000, 88). It appeared that they were not going to receive any land claim recognition or protection from the government.

The 1783 *Crawford Purchase*, the 1819-1822 *Rideau Purchase*, and the 1923 *Williams Treaty* were land cessions the Mississauga made with the colonial government. These cessions covered much of southeastern Ontario (see Map 3), but the exact boundaries were not always clear. For example, the *Crawford Purchase* included a southern portion of Algonquin territory, but there is no deed or map to confirm the negotiations made (Huitema 2000, 73-4). The *Rideau Purchase* made in 1819 with the Mississauga, and ratified in 1822, ceded the watersheds of the Madawaska and

Mississippi Rivers, areas that the Algonquins and Nipissing claimed as their hunting grounds (Huitema 2000, 80). The *Williams Treaty* in 1923 was preceded by years of

Map 3: Past land cessions in current Algonquin land claim area



(Map source: adapted from Huitema 2000, p. 75)

Approximate area of Tay River watershed

negotiation with the Mississauga about the land north of the 45th parallel. A report produced by law clerks at the time of the *Williams Treaty* negotiations in 1899 recommended that the Mississauga claim be dropped, stating that the land in question "appears to have been used as a hunting ground generally by the Algonquins"[10] (Huitema 2000, 213). However, much of the documentation was not available from the archives when the treaty was made. As a result, certain watersheds of the tributaries of the Ottawa River included in the *Rideau Purchase* and the *Williams Treaty* have been continually under claim by the Algonquins of Golden Lake as well as by other Algonquin groups (Huitema 2000, 214). These and other claims of the Algonquins beginning with negotiations from the late 1700s continue to this day.

3.2.4 Changing the Algonquin way of life

These purchases over the two centuries gave the government the power to legislate issues about land and property in the area. A lot of the legislation determined the way land ownership could be attained and the way it had to be maintained (Huitema 2000, 19). Policies and legislation effectively ignore the existence of Aboriginal people as "owners" of the land (Huitema 2000, 132). Some policies at the time encouraged the Aboriginal people to take up farming on small reserves that were set aside on land the government did not find profitable. There was some acknowledgement of the possibility that Algonquin hunting territories "may have" covered the whole region of the Ottawa valley, but the government only set a "a sufficient tract of land" aside for them, out of range of Townships and assistance, to encourage a more settled way of life of farming (Sarazin 1989, 179-80). By the mid 19th century, with the Algonquin hunting grounds

[10] This source comes from a variety of primary sources gathered in Huitema (2000).

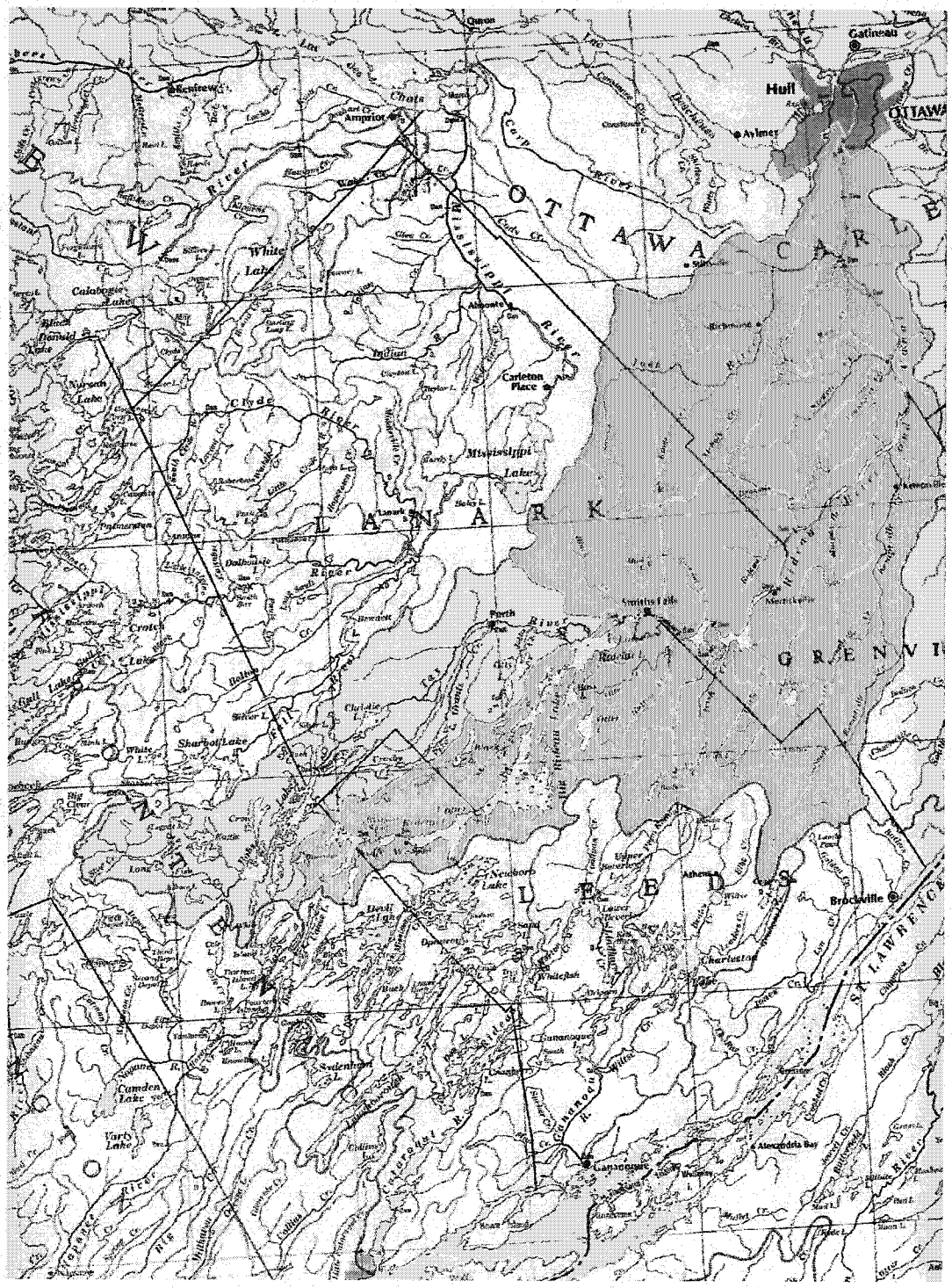
radically transformed through development and settlement, Algonquins were forced to become tillers of the land or starve.

By 1840, many small Algonquin settlements were established away from Lake of Two Mountains, closer to their hunting grounds (Sarazin 1989, 184). Their persistent petitioning to the government led to two tracts of land to be set aside for Algonquins at Temiscaming and River Desert (Maniwaki) in 1851 in Québec. But not all Algonquin families were willing to move north of the Ottawa river where the land was foreign to them (Huitema 2000, 96). By 1864, the Golden Lake reserve was established for only five Algonquin families in Ontario. Needless to say, there were other Algonquin families living outside of these three reserves and they continued to petition for their own land grants. The government continued to restrict their rights and tell them to go to one of the already established reserves (Sarazin 1989, 186; Huitema 2000, 100).

Those living on Golden Lake reserve eventually were granted "status" from the government and those living off the reserve became "non-status Indians" by default. By the turn of the century, Algonquin people were frequently being convicted, given warnings, or sentenced to jail for hunting off season. They needed to support their families with food, deer meat, and as Sarazin (1989) puts it: "what we called making a living, the newcomers called 'poaching'" (Sarazin 1989, 190). They had to hunt with discretion to avoid being caught or be called an "Indian poacher" on their own traditional territories. Sarazin sums it up:

> Thus had our proud people – hunters, traders, great travellers (sic), masters of a huge wilderness – been reduced by bureaucratic and political duplicity to 'mere stragglers' in our own land (Sarazin 1989, 189).

Map 4: Tay and Rideau River Watersheds in Eastern Ontario.



Tay watershed and Rideau watershed

(Map source: adapted from "Southern Ontario Drainage Basins," Ministry of Environment, 1973)

3.3 Conclusion

The marginalized Algonquin people, who did not live on the Golden Lake reserve in Ontario, lived in geographically scattered family groups in the watersheds of the Mattawa River, the Petawawa River, the Bonnechere River, the Madawaska River, the Mississippi River and the Rideau River (Huitema 2000, 101). The Tay River watershed is the area where the following case study takes place. The Tay River watershed is part of the larger Rideau watershed (see Map 4). It is important to understand that the Tay watershed area is included in the *Rideau Purchase* of 1822 (see Map 3) and that the *Rideau Purchase* was conducted between the Crown and the Mississauga. The Mississauga were moved to their own reserve on Grape Island in the Bay of Quite though there were pockets of Mississauga people that remained in the Bedford region, the south end of the Tay watershed (Ripmeester 1995, 164). There is limited documentation about Mississauga and Algonquin presence in the back country on Crown lands though evidence shows that they did frequent these same areas, interact, and even intermarry (Huitema 2000, 118-24). There was a petition filed by Algonquin families in 1842 specifically relating to the Tay River watershed, at a part of Bob's Lake. In this case they were given a Licence of Occupation by the Chief Superintendent of Indian Affairs in response to their petition (Huitema 2000, 123).

Official documented evidence of occupation and agreements is not easy to find, partly due to provincial jurisdictional divisions between Upper and Lower Canada that did not recognize in both provinces Indians whose hunting and trading territories crossed governmental borders. Official registry of a nation on one side of the border, such as the Algonquins' summer meeting place at Lake of Two Mountains, relegated their homeland to that side of the border in the eyes of the government. Some of this

shortsighted view by the government was caused by the inability of the settler nation to understand or appreciate the Aboriginal nomadic economic way of life.

The early contact period evidence of Algonquin presence from French traders and the repeated Algonquin petitions for territorial recognition sent to the Crown throughout the 18th and 19th century show the ongoing effort of generation after generation by Algonquin people to protect their lands and to continue their traditional way of life. Further, Huitema (2000) offers ample evidence of the close interaction between the Algonquin and Mississauga families who refused to be moved to reserves. Her documentation of certain governmental responses to Algonquin petitions about the region that includes the Tay River watershed demonstrates that Algonquin people were present in this region for generations and up to the end of the 19th century. There are many more examples of resistance and the occupation of Algonquin people in southeastern Ontario in the mid and late 20th century such as the Mud Lake wild rice confrontation of 1979-82,[11] hunting and fishing rights court cases, other Supreme Court cases, and provincial cases that AAFNA was involved in recent years,[12] and AAFNA's participation in the Environmental Review Tribunal in 2000 of which the following case study is about. The Algonquin people have followed their own way of life, worldview,

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[11] For a detailed discussion see Susan Delisle (2001), Coming out of the Shadows: Asserting Identity and Authority in a Layered Homeland: The 1979-82 Mud Lake Wild Rice Confrontation, Queen's University, Master's Thesis, unpublished.

[12] For some examples of cases members of AAFNA were involved in, in recent years, see *Lovelace v. Ontario* [2000] 1 S.C.R. 950; *Palmerston, North and South Canonto (Township) Zoning By-law No. 9-94* (Re) [1999] O.M.B.D. No. 796; *Ardoch Algonquin First Nation v. Ontario* [1997] S.C.C.A No 429; *Ardoch Algonquin First Nation v. Ontario* [1997] Ontario Court of Appeal Re Perry et al. and The Queen in right of Ontario, Métis Nation of Ontario et al., friends of the court, Re Perry et al. and The Queen in right of Ontario, Whiteduck et al., friends of the Court; *Buckshot Lake Cottagers' Assn. v. Clarendon and Miller (Township)* [1997] O.M.B.D. No. 810; *Buckshot Lake Cottagers' Assn. v. Clarendon (Township)* [1997] O.M.B.D. No. 740; *Buckshot Lake Cottagers' Assn. v. Clarendon and Miller (Township)* [1997] O.M.B.D. No. 507; *Buckshot Lake Cottagers' Assn. Inc. v. Clarendon and Miller (Township)* [1997] O.M.B.D. No. 155; *Palmerston, North and South Canonto (Townships) Zoning By-law 9-94* (Re) [1995] O.M.B.D. No. 291; *Norcan Lake Partnership v. Palmerston, North and South Canonto (Townships)* [1994] O.M.B.D. No. 1459; and more.

and knowledge that continues to guide them through the generations to protect their lands and their responsibility for their territory.

CHAPTER 4/
The Ardoch Algonquin First Nation and Allies and the Ontario Environmental Review Tribunal 2000-2002: A Case Study

4.1 Introduction

The case study revolves around an Ontario Environmental Review Tribunal that took place from November 2000 to February 2002, initiated by an Application To Take Water from the Tay River, filed by the company OMYA (Canada) Inc.[13] in February of 2000. The part of this environmental appeal I am focusing on is the involvement of some members of a local Aboriginal community called the Ardoch Algonquin First Nation and Allies (AAFN or AAFNA) and their contributions to this Tribunal.

The involvement of AAFNA members in the Environmental Review Tribunal should not be understood as representing the entire AAFNA community. AAFNA has often been described as a "non-status community." This term is inaccurate and can be misleading. Within the circa 490 members, there are individuals who have registered themselves or entire families under the *Indian Act*, making them "status Indians" under Canadian law. Many members qualify for registration under the *Indian Act* requirements of marriage and ancestry but the final decision to register rests on the individual Aboriginal person. Many refuse to partake in this legal definition, feeling that it could limit their future options and compromise their land claims and treaty-making processes. Therefore, it must be made clear that the sometimes-used term "non-status community" is more indicative of the fact that they have yet to sign a treaty or comprehensive land agreement with the Canadian government and that they are not located on a reserve.

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[13] OMYA is not an acronym, it is the name of a company. OMYA (Canada) Inc. is the Canadian branch of a Swiss-based multinational corporation, the largest calcium carbonate producer in the world that operates 130 processing plants in 30 different countries (Rogers 2002a, np).

AAFNA, as represented in this case study of this particular Environmental Review Tribunal, only represents a number of Ardoch Algonquin individuals who have seen it as their responsibility to make their voices heard in a legal process that they believe has potential to deeply affect the environmental sustainability of a part of their traditional territory, the Tay River watershed. These individuals have personal connections to this watershed as either a place of residence, a place used for hunting, fishing, trapping and other traditional practices, and/or as a place about which they possess traditional Algonquin knowledge. In addition, this watershed is also a part of the territory included in an ongoing Algonquin comprehensive land claim.[14] Some members expressed the view that they saw it as their role to become involved so that the doors are kept open for future generations, who they believe will still be struggling to protect their lands. However, they never assumed to be representing the entire AAFNA community, even if it is worded that way in some of the official Environmental Review Tribunal documents.

4.2 Timeline of Events

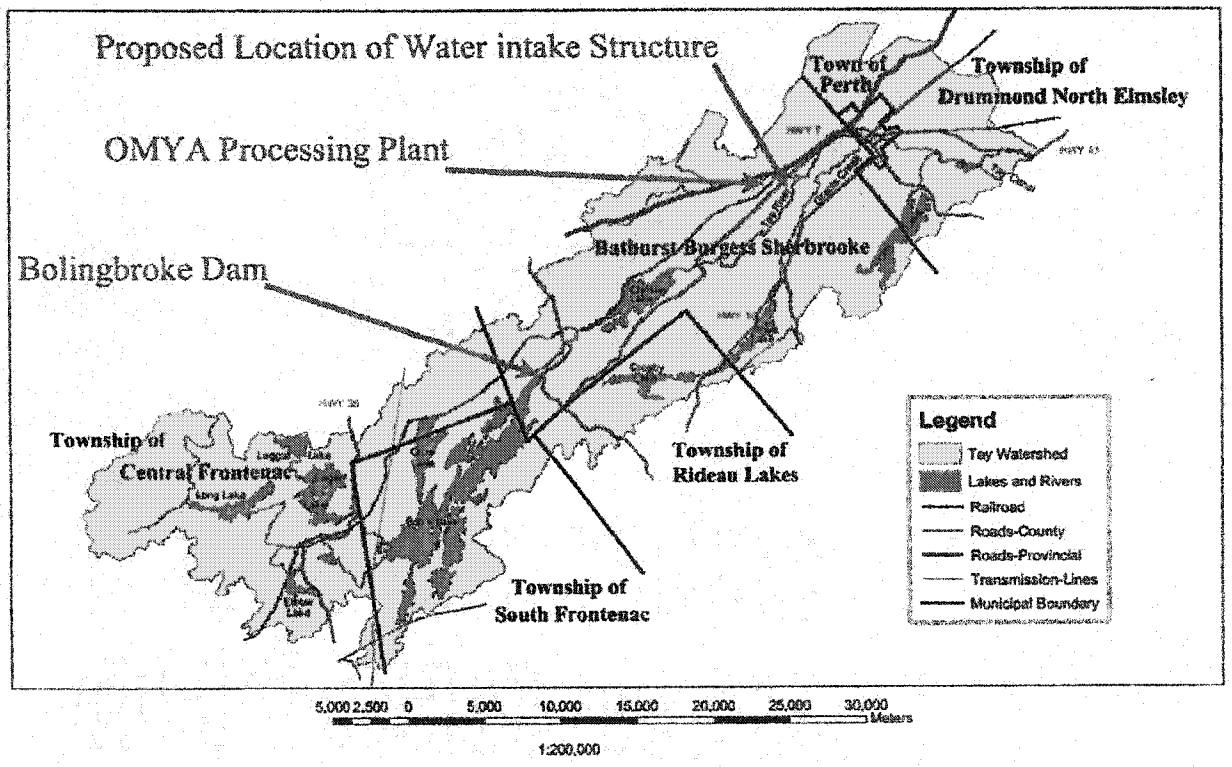
The specifics of this case study, including the events surrounding the Permit To Take Water from the Tay River and the ensuing Environmental Review Tribunal, took place as follows.

On the 29th of February, 2000, the company OMYA (Canada) Inc. submitted an Application To Take Water to the Ministry of Environment for a permit to withdraw 4500m^3/day (3125L/min) of water from the Tay River just upstream from the Town of Perth (see Map 5). OMYA (Canada) Inc. "OMYA" is a calcium carbonate processing facility five kilometres west of the Perth. The calcite comes from a mine owned by OMYA

[14] The Algonquin land claims negotiations are taking place under the Algonquin Nation Negotiations Interim Directorate (ANNID) established in 1999 that includes representatives from Algonquin communities in

near Tatlock, 30-40km north of the plant. The processing facility requires water and OMYA already had a Permit to Take Water (PTTW) for 872m^3/day in total, from nine wells located on their premises (ERT 2002, 3-4).

Map 5: The Tay River Watershed and OMYA's Permit To Take Water, 2000.



(Map source: ERT 2002, Appendix F)

There were 283 submissions written by concerned local citizens and environmentalists, during the 30 day public comment period required by the provincial *Environmental Bill of Rights, 1993* (*EBR*). Included in the submissions was one by the Chief of AAFNA. He wrote a letter on the 9th of April, 2000, to the Supervisor of Water Resources Unit, Ministry of the Environment (MOE), stating that the OMYA plant is located on unceded Algonquin Territory, that Algonquin Aboriginal title has not been extinguished, and that AAFNA had not been consulted nor had they consented to the

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Ontario.

plan (Crawford 2000, np). The Ministry did not respond to their letter. The Director for Ministry of the Environment (MOE) is not obligated to respond to each letter; he or she is only required to consider these kind of letters and submissions from the public and to explain what impact they have on the Director's decision to issue a permit or not.

On the 24th of August, 2000, the MOE issued a "phased" Permit To Take Water (PTTW) to OMYA specifying, among other conditions, that the rate of taking should not exceed 1,020 litres/minute for a maximum of 1,483m^3/day prior to the 1st of January, 2004 or 3,125 litres/minute for a maximum of 4,500m^3/day on or after the 1st of January, 2004 (ERT 2002, 6). On the same day, the MOE also wrote a letter to AAFNA informing them that the PTTW had been issued (Kaye 2000, np).

A varied group of local citizens and environmentalists of the region appealed to the Environmental Review Tribunal to review the decision made by the Director of the MOE. On the 6th of November, 2000, the appellants Dillon et. al.[15] were granted a Leave to Appeal the Permit To Take Water that had been issued by the Director in its entirety (ERT 2002, 2). At this point, AAFNA were not among the appellants nor were they a party to the appeal.[16]

During the preliminary hearings in February, 2001, the Dillon et al. appellants made a joint List of Issues made up of their Notices of Appeal to clarify the issues before the Tribunal. This included issue #8 that stated that "the Director failed to consult with, and otherwise have regard to the interests of First Nations in exercising his authority under the Act" (ERT 2001a, np; ERT 2001b, 2). There are some inconsistencies in the documents about when this issue was first raised by the appellants. One affidavit states that the appellants wished to add it as a ground of appeal at the preliminary hearings.

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[15] See Appendix B "List of Abbreviations and Who's Who" for list of appellants included in Dillon et al.

Conversely, the Counsel for the Director, MOE, responded that concerning "the alleged deficiency in consultation with unnamed First Nations" this issue was "not raised at all in the Notices of Appeal or leave applications" (Watters 2001a, np). Nevertheless, the Director, MOE, responded to the issue on the 2nd of March, 2001, taking the position that "leave should not be granted to add this issue, and that it was beyond the Board's jurisdiction" because "there is no obligation to consult separate and apart from what may be required of the Director under the *OWRA* [*Ontario Water Resources Act*] and *EBR* [*Environmental Bill of Rights*] in the absence of a specified claim by someone else entitled to make it in proceedings..." (Watters 2001c, 2).

On the 5th of March, 2001, during the preliminary motions, Robert Lovelace, the Chief of AAFNA, orally requested to become a party to the appeal. The Director, MOE, requested to the Tribunal that Robert Lovelace should make a written submission for party status. Though the Tribunal declined to demand it of them, AAFNA submitted a written request for party status on the 30th of March, 2001 (Lovelace 2001a, np). However, before the written submission came about, the Director, MOE, had already responded in writing on the 12th of March to AAFNA's oral submission, declaring the reasons why he believed AAFNA should not be granted party status (Watters 2001c, np).

On the 3rd of April, 2001, Pauline Browes, the Vice-Chair of the Tribunal requested that Robert Lovelace forward to her information or articles pertaining to a description of "traditional ecological knowledge." Two articles describing traditional ecological knowledge (TEK) were forwarded to her by the 10th of April, one describing TEK in a general sense and the other explaining local applications of TEK (Lovelace 2001b, np).

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[16] See in this thesis, chapter 7.2 "The setting of the Environmental Review Tribunal" for a detailed explanation of the role of a party, a participant, and a presenter in the ERT.

On the 2nd of May, the Vice-Chair of the Tribunal, who issues the orders and decisions, declared the appeal a new hearing or a "hearing de novo" (ERT 2001b, 12). In other words, all the issues included in the Dillon et al. appellants' original appeal applications would form the basis of the issues to be considered at the Tribunal. These original issues did not include the issue about the failure of the Director "to consult with, and otherwise have regard to the interests of First Nations in exercising his authority under the Act" (ERT 2001b, 19). This issue had only been added afterwards in the joint List of Issues. Therefore, Pauline Browes would not allow this issue to be raised in the Tribunal.

At the same time, Pauline Browes granted Robert Lovelace party status. This position came with several conditions. First, she stated that "issues concerning treaties, *Royal Proclamation*, 1763 and the *Canadian Constitution Act*, 1982 will not form part of this hearing as I believe it is beyond the Tribunal's scope in this application of PTTW." Secondly, Robert Lovelace "is granted party status under the proviso that only the issues in Appendix "B" of this Order will form the basis of his submissions" (ERT 2001b, 22). The revised list of issues in Appendix B related to considerations from the *Environmental Bill of Rights*, the *Ontario Water Resources Act*, Regulation 285/99, the MOE's Statement of Environmental Values, the Canada Wide Accord Concerning Bulk Water Removals, the Great Lakes Charter, obligations under the North American Free Trade Agreement and the World Trade Organization, as well as other issues about procedures and processes that the Director based his decision on (ERT 2001b, 27). None of these Acts or issues relate to Aboriginal issues, rights, or title such as consultation or indigenous knowledge, and neither do they include consideration of the *Royal Proclamation* or the *Constitution.* The last condition placed on Robert Lovelace's status

was that "it is expected that Mr. Lovelace will coordinate his efforts with the other parties for an efficient presentation of the evidence" (ERT 2001b, 22). These three conditions under which Robert Lovelace was granted party status decidedly quashed many of the arguments he had raised in his own application for party status.

The documents produced by the ERT are not consistent in the way they represent the party status of Robert Lovelace. On the 2nd of May when he was granted party status, Mr. Lovelace is listed as an "appellant" under the "list of parties." (ERT 2001b, 26). Then, on the 3rd and 31st of May, the Ardoch Algonquin First Nation is listed as a "party" under the "list of parties," and Robert Lovelace is not listed as an appellant, but as an "agent for Ardoch Algonquin First Nation (sic)" (ERT 2001c, 10; ERT 2001d, 4).

As stated in the Tribunal's Procedural Orders, it was required that all documents and witness statements of all parties opposing the Director's decision to issue the PTTW were due 10 days before witness statements from the parties of OMYA and the Director were due, on the 8th and 18th of June respectively (ERT 2001d, 2). By the 20th of June, 2001, AAFNA withdrew as a party. They explained their reasons for withdrawal in writing[17] (Lovelace 2001c, np).

On the 25th of June, 2001, the hearing of evidence began and was adjourned on the 11th of July, to be continued in October, 2001. A public evening session was held in Perth on the 26th of June, 2001 with an attendance of over 400 persons from the local community (ERT 2002, 11).

Though AAFNA withdrew from the Tribunal as a *party*, Robert Lovelace gave a presentation on behalf of the Ardoch Algonquin First Nation and Allies during the regular

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[17] AAFNA's reasons for withdrawing from the Tribunal will form the basis of the analysis in Chapter 6 and 7 of this thesis.

hearings[18] (Lovelace, 2001d, np). In an ERT there are three kinds of members: party, participant, and presenter,[19] as well as other people who are called upon by a party to come forward to provide evidence as a witness. Robert Lovelace was not listed in the final ERT document as being either a witness nor a presenter.

Finally, on the 19th of February, 2002, the Tribunal's final decision was issued, stating that: "The appeals have, in part, been allowed. By this Decision approval is given to OMYA (Canada) Inc. for a Permit to Take Water with revised and additional conditions" (ERT 2002, 55). The conditions included that the maximum amount of water to be taken under authority of this Permit shall not exceed 1483 cubic metres per day (compared to the appealed permit which had allowed 4500 cubic metres per day), that this permit is only valid until the 1st of January, 2008, and that many other conditions must be followed concerning how the water may be taken and how it must be controlled and reported (ERT 2002, Appendix A, 4-9).

Unfortunately, the Tribunal's decision has not been the final word about this permit. Recent stories in the media explain that OMYA has appealed to the Minister of the Environment to overturn the Tribunal's decision. Appeals of Tribunal decisions are rare. OMYA sees the ERT's decision as an "obstacle" and an "uncertainty" that it hopes "will soon be cleared up" (OMYA 2002, np). The president of OMYA (Canada) Inc. has also "informed Premier Ernie Eves that he will warn international investors about the 'red tape and regulatory burden' in Ontario if the company doesn't get its 4.5 million litres of water a day" (Rogers 2002a, np; Rogers 2002b, np). OMYA had to present its

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[18] The presentation given by Robert Lovelace, stating all the reasons why these members of AAFNA were interested in this water-taking permit, why they withdrew, and how their knowledge of the region would and should contribute to the decision, will form a main part of the Analysis chapters of this paper.

[19] A party can be an applicant, appellants, persons entitled by law to be a party, or other persons who request party status and are granted status by the Tribunal. A participant is named by the Tribunal to participate in all or parts of the proceedings, but a participant, unlike a party, cannot call witnesses or cross-

appeal case by the 30th of September, 2002 and the Canadian Environmental Law Association that represents residents and cottagers had to present their counter argument by the 28th of October, 2002. From the newspapers, it appears that the current Minister of the Environment, Chris Stockwell, is going against the counsel of his legal advisor, Doug Watters, and is considering bypassing the courts and making a decision on whether OMYA should be allowed to withdraw 4.5 million litres of water a day from the Tay River. This kind of decision made outside of the courts will mean that the company will not have to report to the public about the condition of the river (Rogers 2002b, np).

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examine witnesses, bring motions, claim costs, or appeal the Tribunal's decision. A presenter, also named by the Tribunal, only presents relevant evidence. For more details see Chapter 7 in this thesis.

CHAPTER 5/
The research process: methodology

5.1 Introduction

It is important to explain the methodology used to analyze this case study in context of the relevant literature and geography theory because there are different methods available to human geographers from the social sciences. The methodology chosen guides the researcher through the process of the collection of data, the analysis of the data, and the application of theories. The methodology I chose to use for this thesis is called qualitative content analysis, a method used by human geographers that is becoming more common, especially when dealing with interview data and documents because it allows for more analysis of emotions, motivations, and opinions of the research subject than quantitative analysis. The following will describe the methodology in detail from the collection of data to the final analysis of the data.

5.2 Sources of information

The analysis portion of this thesis is based on information collected from documents, legislation and interviews. The documents analyzed include all the official documents produced by the Environmental Review Tribunal (ERT) concerning the Dillon et al. v. Director, Ministry of the Environment Case No.: 00-119 to 00-126, comprising of summaries by the ERT, Lists of Issues, Maps, Letters, Supplementary Witness Statements, Oral Submissions, Procedural Orders, Reasons for Decision, and Submissions by different parties, participants and presenters, such as the company OMYA (Canada), the Director of the Ministry of the Environment, and the various appellants such as the Ardoch Algonquin First Nation and Allies (AAFNA). Special

attention was made to include all material that directly related to the involvement of AAFNA or Aboriginal people in general.

The legislation reviewed in the analysis includes Ontario's Environmental Legislation, comprised of the Environmental Assessment Act, the Environmental Bill of Rights, the Environmental Protection Act, the Ontario Water Resources Act, and special attention was paid to the Rules of Practice and the Practice Directions, Guidelines and Forms for the Environmental Assessment Board and the Environmental Appeal Board.[20]

In addition, I conducted interviews with the members of the AAFNA community that participated in this Environmental Review Tribunal. The interviews were conducted in the months of June and July of 2002. I interviewed six members of the Ardoch Algonquin First Nations and Allies community. As was described in the case study, not all AAFNA members were involved in, or even aware of, this Tribunal. I have interviewed the three main members who were directly involved in the hearings, and three others who were either present at the hearings, who helped with the writing of some statements, or who were consulted on certain matters by the participating AAFNA members. As such, the interviewee list is short, and there is one member with whom I was not able to establish a convenient date for an interview.

The Algonquin members interviewed included three women and three men. One of them was recognized as an Elder in the community. All six of them are AAFNA members who live close to the land and who consider themselves to still be very connected to the land and to their heritage, though at least four of them currently have jobs and careers that are indirectly connected to the governments and Canadian society. All of them have spent a good portion, if not all, of their lives in the regions of the

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[20] The Rules of Practice for the Environmental Appeal Board includes what is now called the Environmental Review Tribunal. The Environmental Appeal Board became the Environmental Review Tribunal in 2000.

Algonquin territory in question, and I would consider them all leaders in promoting Algonquin knowledge and traditional practices for their own community members and educating non-Aboriginal people about their heritage and history on this land.

Before starting this project, I received permission from Robert Lovelace, the chief of AAFNA, to conduct this research with AAFNA. I also had permission from the Queen's Research and Ethics Board to pursue this academic research before starting. I reviewed the questions with Robert Lovelace before starting the interviews, and the final draft of the thesis has been reviewed by the AAFNA family heads' council. The semi-structured interviews were conducted one on one, in person. I prepared open-ended questions and themes that I wanted to make sure would be covered, but the interview was more conversational in style. Semi-structured interviews require questions that do not lead the interviewee's answers and that cannot be answered by short yes or no answers. In other words, questions that engage the interviewee in a conversation start with phrases such as "tell me about..." or "how would you describe..." (Valentine 1997, 118-20). These more general theme questions can be followed up by ideas about details, emotions, or opinions. The themes covered in my interviews related to indigenous knowledge, relationship to land, jurisdiction, identity and finding out the details about AAFNA's involvement in the Tribunal (see Appendix C for the complete list of questions). Naturally, every interviewee responded differently, so sometimes I did not need to ask all my questions to retrieve the information I was looking for, while other interviews required a more formal process of question and answer.

As required by the Queen's University General Research and Ethics Board, I asked each interviewee to read an information sheet about the research I was conducting and then sign a consent form. This was to ensure that each participant was

aware of the voluntary and confidential nature of their participation. They all agreed to have the interview tape-recorded and to have their names revealed, though this will not be necessary for the strength of my argument. Following the interview, I transcribed each of the six interviews. This amounted to 75 pages of interview transcripts. In order to feel confident that the material I was working with was accurate and that I had not misunderstood what was being said in the interview, I sent each interviewee two copies of the transcript of our interview, one to keep, and one to send back to me with any comments, corrections or omissions. I received one in return with corrections and clarifications, and acknowledgements from the others that they were satisfied with their transcript.

The purpose of the interviews was threefold. First, I wanted to clarify and gain a deeper understanding of some of the terms and issues that were raised during the Tribunal proceedings in AAFNA's presentations and letters. This is where the questions about traditional ecological knowledge, indigenous knowledge, and Algonquin knowledge, and the questions of jurisdiction derive. Second, I wanted to understand the underlying reasons and triggers for their choice to become involved and subsequently to withdraw from the proceedings. Thirdly, I had developed an expectation out of the Aboriginal rights and Aboriginal law literature that influenced my questions about identity, as in the tension between their own identity and the external identity imposed by the Canadian law of status and non-status Indians and how this may have played a role in their level of participation in these kinds of provincial legal proceedings.

5.3 Research methodology

5.3.1 Qualitative content analysis

The system I used to organize and analyze the data is called qualitative content analysis. Qualitative content analysis is loosely based on grounded theory (Crang 2001, 215). Grounded theory was developed by the sociologists, Glaser and Strauss in 1967, and has since evolved and is used in various social science fields. This method is often referred to as the "*constant comparative method*" because the main procedure requires the continuous interplay between data and analysis (Strauss and Corbin 1994, 273, original emphasis). It is a "general methodology, a *way of thinking about and conceptualizing data*" (Strauss and Corbin 1994, 275, original emphasis).

Grounded theory, therefore, also applies to some of the processes of qualitative content analysis such as the constant comparison of data and categories and the interplay between data collection and data analysis. Qualitative content analysis does not, however, go as far as grounded theory in trying to develop a theoretical framework that can explain a social or political phenomenon. In grounded theory, the collection of data is guided to lead to a substantive theory (Bryman 2001, 392-3). Qualitative content analysis provides the researcher with a process of extracting themes out of the data and organizing them into categories to create an accountable analysis and interpretation of the data materials (Bryman 2001, 381). Some themes come from the literature and others emerge out of the data. Qualitative content analysis emphasizes the importance of understanding meaning in context of the item being analyzed (Bryman 2001, 180).

5.3.2 How the research proceeded

The strategies used for collecting, coding, categorising, analyzing, and presenting the data are key to the qualitative content analysis methodology. The

collection of data can be accomplished through an iterative process. This means that the analysis starts after some of the data have been collected and can guide the next phase of data collection (Bryman 2001, 389). This is how my research proceeded. I started with the collection of documents and texts that explained the events of the Environmental Review Tribunal as they were recorded. Those led me to more texts comprising of Ontario's environmental legislation. I began to analyze the events at this point, extracting themes and coding some of the data. From there, I needed to get a deeper understanding of the perspectives of AAFNA; I needed to speak to those who had been involved in the Tribunal. The interview questions were formed out of the unanswered questions I had developed from the text data. This is the process of analytic induction.

When the subsequent data is no longer consistent with the original research question, one must either redefine or reformulate the question. Further data collection may be necessary, but reformulation of the research question should not be regarded as the "soft option" (Bryman 2001, 389). It is a rigorous method of analysis. The specific categories and themes I used and that changed during the research are explained further below.

The data must then be coded according to categories and themes. The codes must also relate to each other in a way to create links between the various themes and to the main research question. There must be a constant verification of the research question and the assessment of the relationships between the codes and concepts. The risk in coding is that the social or historical context can be lost, as well as the narrative flow of the respondents (Bryman 2001, 401). Interpreting, theorizing, and categorizing the work may contaminate the authenticity of the respondents answers, although it is

not enough to simply be a mouthpiece for the respondents; there has to be a balance between the value and significance of the analysis to the intellectual community and to the subjects (Bryman 2001, 402).

It is important to remember that this is interpretive work and the researcher must accept responsibility for the interpretations. However, "interpretations *must* include the perspectives and voices of the people whom we study" (Strauss and Corbin 1994, 274). We have an obligation not only to contribute to our respective disciplines, but to the actors we study. While sorting through the multiple perspectives received during the research that provided multiple "voices," we also have to give clear indications of how and why we interpreted the material conceptually the way we have (Strauss and Corbin 1994, 280-1; Crang 2001, 229).

The categories I created out of the data are what help shape the writing process. They are themes codified into subthemes and organized in relation to each other until every relevant piece of data had a place in the analysis. I based the process of coding, categorizing, and interpreting on Kitchin and Tate (2000) and Mike Crang (2001). These two sources offer detailed though flexible explanations of how to actually go about organizing qualitative data into categories.

Finally, the interpretation stemming from the data is a result of events in this particular case study. This case study is in one way an "intrinsic case study" as well as an "instrumental case study" (Stake 1994, 236). In other words, the case study was chosen because it was of particular interest and was not originally chosen to understand a generic phenomenon. At the same time, it provides insight into a general issue though it is not necessarily typical of other cases. Generalizations need not always be

emphasized (Stake 1994, 239). Rather, the qualitative method helps to unravel how participants make sense of a particular situation.

5.3.3 Forming categories from the data

The categories I worked with at the beginning of the analysis derived from the legal geography literature and what I initially knew of the case study. The legal geography literature looks at the linkages between law, space, and power. Therefore, it was necessary that I examine the environmental legislation and laws that govern the Tribunal. The legal geography concepts of space and place required an understanding of the Aboriginal relationship to land and their view of their traditional territory. Aboriginal knowledge became a key category because it was one of AAFNA's main reasons for becoming involved in the Tribunal and legal geography also looks at the relation between geography and knowledge. The category of jurisdiction comes from the arguments the members of AAFNA were making in the Tribunal as well as from the legal geography literature. Legal geography analyzes the idea that people are only seen as having a legitimate claim to rights in certain places, such as Aboriginal people having hunting and fishing rights only in places designated as historically theirs. It also looks at the concept of jurisdiction as a feature of state power and as a way of understanding the social world. Lastly, the questions I posed in the interviews that shaped the categories about consultation and inserting voice came from the idea in legal geography that law can be site for political struggle and empowerment. When AAFNA members described their reasons for becoming involved and then withdrawing from the Tribunal, their choices were driven by the belief that they deserved to be recognized and consulted by the Ministry and the Tribunal, and becoming involved in the Tribunal was one way of making that happen.

Categories also emerged out of the gathered data, especially the interviews. The ideas I imposed on the structure of the interviews evolved throughout the research. For example, rather than creating a main category in the analysis about identity, it has instead become a sub-theme that is relevant within certain sections of the analysis. Moreover, the questions posed about identity during the interviews revealed the expressions and sentiments of resistance from the respondents. The feelings of resistance that emerged during the interviews were a dominant feature in the data. They required a separate analysis about strategies of resistance. Hence, the chapter on Algonquin strategies is a category that comes straight from the data and has become a key element in this AAFNA case study. I look at the reasons and triggers for the strategies AAFNA members used at the Tribunal. They also have a particular approach to inserting their voice into the Canadian legal system. These are all categories that emerged out of the data. The themes and categories are quite porous and are often raised in more than one section of the analysis, demonstrating their overlap and their interconnectedness.

Since I had only six interview transcripts to work with, I decided not to rank the themes in relation to each other, nor to record the number of mentions of the themes or the number of participants who mentioned them. This may be criticized for failing to address representativeness (Baxter, et al. 1999, 509), but these respondents were not chosen to provide representativeness of the AAFNA community. It is fair to say that the structure of these interviews assured that each interviewee mentioned something in terms of each of the larger themes. Their answers were then sorted accordingly into one of the subthemes, whether their comments were positive, negative, or indifferent to the question being asked. Quotations used in the analysis that are linked to the theoretical

constructs in the interpretation are taken from discreet units of text (DUTs)[21] from each particular theme and are representative of the opinions of the interviewees. The interview data as well as the data gathered from the documents from the Tribunal became DUTs and made up the theme groupings. The process of collecting data, analyzing, and writing interchangeably helped me to decide when I had reached a "saturation" limit to collecting the documentary data (Hoggart et. al. 2002, 137). The saturation limit was determined when all the documents relevant to AAFNA from that particular Tribunal case had been read, key DUTs had been extracted, when all the interviews had been analyzed, and each DUT had been placed into a category. The data that came from the environmental legislation was not coded and categorized with the qualitative content analysis method. It was the basis of the legal context in which the case study took place.

5.4 Conclusion

This methodology is popular in human geography research. I chose to use it for my project because it provided me with flexibility. The perspectives and worldviews of the AAFNA community I was working with are valuable and can be a source of learning for a large audience. A methodology that is too structured could downplay the way people make sense of their own lives. Qualitative content analysis, on the other hand, has the potential of representing the worldviews of the respondents (Crang 1997, 190). Although my interview data was divided into DUTs and reorganized into categories, I was able to include many quotes and direct explanations from the respondents rather than paraphrasing their opinions. Naturally, the order of questions in the interview and

[21] DUTs or discreet units of text can also be called databits or something similar. They are pieces of text from the interviews and documents that have been removed from their original context, coded, and

the themes applied to the interview data are not authentic to the respondents' own thoughts and opinions. However, separating their explanations and quotes from my own analysis, which was based on the literature review, was done with the intention of giving the reader a sense of their voices and perspectives, as unadulterated as possible from my interpretations.

Also, this methodology allowed me to develop my ideas and categories throughout my research and writing process. Before starting, it was not clear exactly what the main themes would be until I had heard from the respondents themselves. Of course, this method is only as reliable as my gathering and analyzing abilities are, but the methodology became the core work of the analysis. In the end, I hope the conclusions are a close representation of the ideas of the people I worked with, as well as having a fully accountable analysis.

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organized into sorted categories and subthemes (Kitchin and Tate 2000, 245).

CHAPTER 6/
Algonquin concepts about knowledge, land, and jurisdiction: An analysis of the case study

6.1 Introduction

The analysis of the Environmental Review Tribunal case study has been divided into two chapters. This chapter is about concepts of indigenous knowledge, and Algonquin knowledge specifically; jurisdiction; and relationships to land. The next chapter is about the strategies of resistance used by the AAFNA members involved in the Environmental Review Tribunal. Their strategies were driven by their worldviews and beliefs described in this chapter. It is important to understand the context from which the AAFNA members are working to better understand the choices they made about their involvement at the Tribunal. They have a knowledge base and worldview that guides them and compels them to become involved in some Canadian legal processes to protect their traditional lands. They assert a distinct Algonquin knowledge that is the basis of their existence as a people, and it encompasses the interrelated concepts of land, relationship to land, responsibility to land, and Algonquin jurisdiction over their territories.

As described in the methodology chapter, the themes are porous. The concepts of knowledge, jurisdiction and relationship to land are deeply interconnected and there are sub-themes that run through the entire analysis. They provide links between the groups of data, indicating that the issues are not in any way one dimensional, regardless of how sweepingly I may present complex concepts and perspectives. Some undercurrent themes include ideas of identity, culture, rights, language, and assimilation. These sub-themes repeatedly came up in the data, though they were not the main focus in the discussions on indigenous knowledge and jurisdiction. They also

play an important role in indigenous resistance literature, although in this case study, the data on resistance centered mainly around the themes of Aboriginal jurisdiction and Aboriginal knowledge.

6.2 Introduction to Algonquin concepts

The literature on indigenous knowledge by non-Aboriginal academics has been criticized by Aboriginal people for being problematic due to rigid definitions, due to problems in translating Aboriginal worldviews and phenomena into English terms, due to the misinterpretation by non-Aboriginal people of the meaning and context of indigenous knowledge for Aboriginal people, and due to appropriation. The indigenous knowledge literature has also been criticized for avoiding addressing the deeper problems of the relationship between Aboriginal people and the state by only superficially acknowledging indigenous knowledge in formal processes. The Ardoch Algonquin people also identified these same problems in their own situation, and especially in the event of the Environmental Review Tribunal. The AAFNA members interviewed expressed concern with the definitions given to indigenous knowledge, with the Tribunal's misunderstanding of the significance of responsibility linked to Algonquin knowledge, and with the unwillingness of state representatives to listen and acknowledge their knowledge, perspectives, and rights as Aboriginal people. Their explanations and descriptions of Algonquin knowledge, of their relationship to land, and of their concept of jurisdiction are limited in part by the fact that they are trying to interpret Algonquin meanings in English terms for a Euro-Canadian audience. As a result, there are instances when the concept of jurisdiction from an Algonquin perspective, for example, is difficult to reconcile with the term jurisdiction used in Euro-

Canadian context. The Ardoch Algonquin people interviewed demonstrate that their view of knowledge is deeply linked to their relationship to the land and to their responsibility towards their territories. In the legal arena, they expressed this responsibility in the word "jurisdiction."

In this chapter, I will begin with the reaction I received when asking the interviewees of their opinions of the terms "traditional ecological knowledge," "indigenous knowledge," and "Algonquin knowledge." They were not fond of creating set, rigid definitions for something that is so deeply integrated into their way of thinking and seeing the world. They had their own way of trying to explain to me what Algonquin knowledge means for them. Next, I will look at the way they explained their concept of jurisdiction, and its connection to their knowledge and to the idea of their responsibility towards their lands. Their sense of responsibility is closely linked to their respect for their land and environment as well as being connected to their understanding of the reciprocal relationship humans have with all other living beings. I will discuss different aspects of their relationship to their lands such as their respect for land, their reciprocal relationship with all living beings on the land, their way of life on the land, their ability to heal themselves on the land, and the process of learning that comes from being close to the land.

6.2.1 Problematic labels and definitions

To start with, the knowledge that the Algonquin people are referring to has to be qualified, since creating definitions and labels is not an Algonquin approach to explaining their perspective. As one respondent said to me, it is a Western practice to always have to "define" everything we talk about. The terms traditional ecological knowledge (TEK),

indigenous knowledge (IK), and Algonquin knowledge were all used in the presentation[22] AAFNA gave at the Tribunal. None of these terms are easy to define or separate, but there is a reason AAFNA used all three terms in their presentation, as they explained to me during the interviews.

In general, the question about what they understood of the terms indigenous knowledge, traditional ecological knowledge, and Algonquin knowledge was answered by each respondent although the differences between the three terms were not always specifically addressed unless I prompted the respondent. The sense of indigenous knowledge was described by the respondents as "a practical way of doing things," "the knowledge received from my ancestors," and "what Elders know about how the land works and how we use it." Knowledge is freely passed down, and it was explained in their presentation that, "while we have a broad knowledge of the world it is not in our nature to desire others to be like us or to create other places in our image" (Lovelace, 2001d). One of the main problems most of the respondents noted was the use of the formal terminology that distorted the basic concept and natural instinct of their knowledge. One respondent explained as follows:

> *We have traditional ways of doing things and I think AAFNA evolves off traditional ways of doing* (sic)*, our voting and anything to that effect is all done by heads of family, and it's done through a traditional way of running a group or a band.*
> *Traditional knowledge means that we know the fauna of the river system, we know what lives there and we understand it, and that we know. But just the terminology may be a little above a lot of people.*

There were problems with the idea of defining indigenous knowledge and with labels like "TEK," although this did not prevent them from using these terms and labels in the Tribunal to make their argument to a non-Aboriginal audience. Language barriers

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[22] For the rest of the analysis, when I refer to "the presentation," I am referring to the presentation given by AAFNA at the ERT hearings after they had formally withdrawn from the appeals. Their presentation was

were a recurrent theme for the respondents, and the labels applied to their knowledge and their way of life were described by two respondents as "restrictive" and "not very definitive." The term traditional ecological knowledge (TEK) was one problem for the respondents. They explained that it is not a term that makes sense to many of the Elders, and two respondents admitted that they themselves had not heard the term before this Tribunal began. The main reason they used this term in the Tribunal hearing was for the legal weight it already carried. One of the respondents explained that it is an academic term, and that for AAFNA to use it at the legal level was useful because the term seemed to have "more of an upper hand" because it would be seen as "valid knowledge." It was a term that the AAFNA members thought the Tribunal chairperson would understand because, as one respondent explained, "it's within her [the chairperson's] frame of reference."

Secondly, another one of the respondents explained that they used the term "TEK" during the Tribunal to represent the negative way indigenous knowledge is often exploited when it is taken from Native communities, with nothing given in return to the communities, and then it is plugged into an already existing Western framework of knowledge. "TEK" was a term used in the AAFNA presentation in reference to how it is viewed in Western science and the way it is often inserted into a Western scientific frame of reference. Placing TEK within a Western interpretation of knowledge forces it, as one respondent articulated, into "the scientific end of things... trying to make perhaps traditional knowledge into something that it might not exactly be." This demonstrates some of their unease with interpreting Aboriginal concepts into English Euro-Canadian

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about their knowledge of the Tay River watershed and their jurisdiction over their territories.

words and ideas where the meaning seems to be transformed or misrepresented. Another respondent joked about the way the acronym TEK sounds like "tech."

Another aspect that one of the respondents raised was with the word "traditional." It was stated as an issue of ownership. Since the term TEK does not automatically point towards any specific Aboriginal group or even to indigenous people in general, the term seems to belong more to non-Aboriginal people. The respondent explained that "with traditional ecological knowledge... the adjective traditional doesn't give a sense of ownership of anyone except maybe the people who own the term, but you're not indigenous people."

In comparison to TEK, the term "indigenous knowledge" was seen by two of the respondents as being "a better term" or "more familiar" term. However, there were implications of appropriation and limitations associated with this term that were sounded in AAFNA's presentation. Even though it was a preferable term to most respondents, the problem with it was still that the term does not point to any specific Aboriginal group and that it is often used in a very general sense in reference to the knowledge of indigenous peoples anywhere in the world. Two of the respondents explained that "its failing is that you can refer to indigenous knowledge in a global sense" and that the term is often used by non-Aboriginal people in "a political context internationally." Therefore, it seems that using the term indigenous knowledge for their local situation could bring with it all the unwanted baggage that comes with the international dialogue about indigenous knowledge. Nevertheless, these minor drawbacks with the term were outweighed by the view, as one respondent explains, that it can

> *include more general indigenous views cause there's a lot of similarities in all indigenous knowledge in terms of relationship to the land and the ways in which that knowledge comes out of Creation and forms your relationship with other people and your views about how that area should be treated with respect and*

> *all those kind of things, which is very similar no matter which indigenous community you're talking about.*

Moreover, another noted that indigenous knowledge does in fact encompass the ideas of "indigeneity and place, and a form of thinking around a particular place, so that the knowledge is rooted in a particular location." Their term "Algonquin knowledge," as a kind of indigenous knowledge, more specifically illustrates these important connections to place and people.

6.2.2 Algonquin knowledge

The most important aspect of Algonquin knowledge was the association with a particular place and the ownership quality of the term. One respondent explained this quality as follows:

> *When you talk about Algonquin knowledge, then you really talk about the Algonquin knowledge of Algonquin people, in a place that is Algonquin... then the knowledge becomes somewhat transportable outside of the place but it's still identified with a particular place...*

The importance of making that connection to place when talking about indigenous knowledge is obvious. The same respondent expanded, "the knowledge is based on preservation of yourself, and of your family, and of your community."

Three of the respondents did specify which term they prefer. Two said that Algonquin knowledge was the term that belongs to them, that there was "more of a sense of ownership with the term Algonquin knowledge" and the third thought indigenous knowledge and Algonquin knowledge "can almost be mirror to each other to some degree." The three who did not specify their preferences between the three terms were by no means indifferent to the meaning of their knowledge or to its value. One of these respondents explained that when discussing this kind of knowledge, it could be

referred to as "what my ancestors would have done" and that this would enable it to be traced back down an ancestral connection.

In summary, it is fair to say that there is a problem with trying to explain Algonquin ideas in words and in a different language than their own. English words and labels, especially those that are commonly used by non-Aboriginal people in other contexts, can create misleading associations for Algonquin people trying to describe their own form of knowledge. The term Algonquin knowledge reflects the content-specific nature of their knowledge while indigenous knowledge reflects that it has some similarities in structure on connectedness to the knowledge of other indigenous people.

6.2.3 Algonquin relationship to land and responsibility

The most prominent feature of Algonquin knowledge that all the respondents discussed was the sense of responsibility that comes with being Algonquin and having Algonquin knowledge. Responsibility is a heavy word, and it was something that the respondents discussed earnestly and urgently. Responsibility describes the behaviour derivative of having Algonquin knowledge over an area. Two respondents described this phenomenon:

> *We can't have knowledge over something that we don't have responsibility over. The only reason to have knowledge about something is because you have a responsibility to take care of that, I don't know if you want to look at it like a stewardship or something like that* [...] *it's impossible for us to talk about TEK or traditional ecological, Algonquin knowledge actually, without talking about our responsibility over that land base...*
>
> *I guess it has to do with knowledge, it has to do with rights, it has to do with your responsibility, right? It's all, you can't separate* [sic], *you cannot define one without the other. It's all there together. And the farther you rope them together, the better it is...*

The responsibility they feel for their land comes from the knowledge they have of the area, but to take responsibility requires that they have the ability and freedom to make

responsible decisions about the land and that this is recognized by all others who are using the land. In essence, they see their responsibility as a sense of duty. Four respondents described their own sense of duty and responsibility to do something about the water-taking permit issued to OMYA for the Tay River:

> *I don't like the term mythological, but on a mythological level, OMYA represents the Windigo. OMYA is the Windigo. And as an Algonquin you have no choice but to try to defeat the Windigo.*
>
> *The Native community has a responsibility not to allow certain things, like the Tay situation, to evolve without some kind of responsibility back to the land itself, because if it's our land, we have a responsibility to make sure that it's looked after, and to the land's better interest, that it's done a certain way. So, we have responsibility to make sure that we're a part of it.*
>
> *...that we didn't just let OMYA take the water without fighting to stop it* (sic).
>
> *If you do something that's not right and you know it, then you're going to suffer, and I think that comes down to responsibility. Responsibility always has choices, that always has consequences... Sometimes I tend to be a little radical, I would definitely stick my neck out for what I think feels right and what feels good, and what's for the benefit of all, not just for the some.*

The quality of indigenous knowledge described as responsibility is something that comes from the Algonquin way of understanding the interdependent relationship between themselves and all parts of nature. What goes around comes around, and the interacting cycle and interdependence between all living beings includes the human component. The feeling of responsibility towards their territory extends to their attitude towards all other human beings as well, the relationship between various human players are interdependent, as they expressed in their presentation at the Tribunal:

> *We regard all of the creatures that share this land with us as our closest relatives. This relationship includes yourselves – the descendants of newcomers who arrived here only two hundred years ago from far away* (Lovelace, 2001d).

Like the interdependent relationship between the various users of the land, there is the interdependence of all living beings in the ecosystem. This responsible relationship

with the land must be one of respect and reciprocity. For example, the relationship between human beings, as well as the relationship between humans and the other parts of Creation, must be reciprocal. The basis of understanding this reciprocal and responsible relationship comes from Creation story passed down through the generations from the Elders. The stories provide them with a worldview that places them in relation to every other part of Creation, as explained at the Tribunal:

> *They [the Elders] tell us that we do not have the right as human beings to sacrifice the health and well being* (sic) *of all the other beings in the Tay River Watershed and beyond for the benefit of human beings. Whether they are the largest animals such as the bear or the smallest larva in a marsh on Bob's Lake, those species were created here to carry out particular and specific responsibilities, and we can not (sic) interfere with them (Lovelace, 2001d).*

This teaching was also expressed during my interviews by two respondents:

> *Since we were created in this place, and we exist in this place, we were created with original instructions, which we were supposed to carry out and do, as part of our creation here [...] In terms of understanding what your place in the universe is, as human beings, we don't have the right... to make any kind of decision that's going to detrimentally impact other species on the earth. We don't have that right as human beings...*
>
> *Creation is not necessarily created for them, for human beings, but human beings are part of that whole thing of Creation and that they have a place* (sic).

Understanding this reciprocal relationship is to understand one's place and role in the environment. One respondent explained how this concept is practiced in terms of AAFNA's relationship with the manomin (wild rice):

> *Take for example the wild rice and what it means to the community. It's time for family, it brings peace and harmony among the people and it nurtures the people, you know, it takes care of the people and the people take care of the rice... but I think that's the general feeling among the people, you know, we respect and the respect comes back, and it's the law of nature.*[23]

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[23] For more discussion on the role of manomin for the AAFNA community, see Susan Delisle (2001).

This reciprocal relationship illustrates the way humans are dependent *and* interdependent on the production of nature. Another respondent explained the reciprocal relationships that exist between individuals:

> *Personal knowledge... for instance the knowledge of a story, that person may not tell that story unless they have a good relationship with the person, the listener, unless they have a relationship of reciprocity, and that's the other thing, is that reciprocity is a process that's built in, but there are sort of rules and regulations around that.*

Again, the idea of reciprocity is also not an intangible phenomenon, it is an established cultural practice that is expected and describable. In general, it is a worldview that is based on a goal of survival and sustainability. Thus, understanding the interdependent, reciprocal, and respectful relationship of the entire ecosystem is the knowledge that will yield subsistence and afford survival. Another respondent described their worldview as follows:

> *The way that Algonquins, we view the world is that we have a relationship with these things, and that relationship has to do with reciprocity and justice, real justice, and with, you know, responsibility* [...] *it's based on continuing the productive cycles of nature, and being in tune with those productive cycles, so that the world can, creation continues to provide for you and your family and your community.*

Each player in the ecosystem also has a role of responsibility. Therefore, in the Tribunal setting where AAFNA participates, the responsibility extends to *all* the people involved. They seem to be trying to teach others, including the people at the Tribunal, non-Aboriginal people, and other Aboriginal people about their worldview, to contribute Aboriginal concepts to the decisions being made about their lands. The following was also part of their presentation to the Tribunal, directed toward the Tribunal decision-maker:

> *The responsibility which rests with the Vice-Chair of this Tribunal is a formidable one. However, it is not only her responsibility alone, for like all other things we are connected in an interdependent circle* (Lovelace, 2001d).

Responsibility is about understanding the consequences of one's actions. In the Tribunal presentation, AAFNA tried to explain the concept of interdependence and reciprocity in terms of the consequences one needs to consider when making environmental decisions:

> *Common sense requires actually thinking about how an action you might make as an individual, group, or corporation might affect the ecosystem in which you depend on to support not only your life, but also those of all your descendants* (Lovelace, 2001d).

During the interviews, two respondents spoke directly to the consequences of taking water from the Tay River and about the reciprocal cycle of nature:

> *You know, there's a lot to, the fish, and then you get into the turtles, and then you get into the ecosystem, and you get into all the fauna system, and it snowballs, because we've got a perfect set up going here, and you start throwing a bunch of wrenches into the fine mechanical engineered machine, it's gonna crash.*
>
> *If we suck too much water out of the rivers... how many moose won't be born next year, we don't know, eh? If that water drops three inches, how much marsh land is going to be lost? Which will prevent animals from living there. It's that chain, eh?*

All the respondents spoke about nature and their environment with respect. The appreciation of this interdependent cycle comes with respect for each part of Creation. As explained in the presentation, that respect comes from learning:

> *Water is not "renewable", we can not make water that does not exist. Water must be connected to a replenishing cycle and must be respected as a living creature with a soul.*
> *We know about this sickness that comes when respect for the land is lost. This sickness comes when the environment is incrementally deteriorated* (Lovelace, 2001d).

In summary, it seems that these members of AAFNA take any chance they get to teach others and to continue the process of learning about the human responsibility to take care of the sacred lands we live on. They describe their relationship to land as

something that is a lifelong process of experiencing, learning, and relearning. Their own sense of responsibility comes from the knowledge of and respect for the interdependent and reciprocal relationship humans have with the environment. The Algonquin relationship to land is more than a "concept of land," it is a relationship, a belief, a worldview. The Ardoch Algonquin members I interviewed were asked about their relationship to land, and their responses provided an insight into the way they saw their role and their place in the ecosystem. As human beings, their role translated into responsibility. This responsibility is something that can be learned, and throughout their presentation at the Tribunal and during the interviews, every time they described or explained these Algonquin concepts, they were also teaching and continuing the practice of learning.

6.2.4 Algonquin jurisdiction and responsibility

During the Tribunal, when AAFNA members were describing their position on responsibility, they often related it to the Euro-Canadian concept of jurisdiction. They used the word jurisdiction in "Algonquin jurisdiction" to mean Algonquin responsibility to care for the lands and to have a part in making decisions about the management of their lands. However, the term jurisdiction is a concept in English that already has a lot of connotations and legal meaning. As one respondent said, "in as much as the concept jurisdiction can be Algonquin...," it is not an Algonquin word, but I think there were some benefits for them using in this term. One benefit was that non-Aboriginal people might be able to grasp more readily what Algonquin jurisdiction would mean for Algonquin people in practice in formal and legal terms, although the deeper Algonquin sense of responsibility might not come out as clearly. I asked the respondents about their use of this term and what they meant by Algonquin jurisdiction. Four of the

respondents explicitly expressed their discomfort with the term jurisdiction, saying that it was "not wholly satisfactory," and the other two respondents also seemed uncomfortable with the term when interviewed. It is a term AAFNA used in their formal presentation at the Tribunal, and in the documents sent to the ERT. Here are four of the respondents' views on using the term "jurisdiction" to represent an Algonquin concept:

> *Jurisdiction is a legal word...*
>
> *The term jurisdiction is a Western concept of having ownership over the land and that's not a traditional Algonquin term for sure.*
>
> *It wouldn't mean nothing to me* (sic). *The word territory would mean something to me.*
>
> *It's totally inflexible... I don't know, jurisdiction, it's a funny word to me... I really don't like that word... it's very harsh.*

However, one noted,

> *It's probably a better word than anything, particularly when you couple it with original jurisdiction.*

When asked what the idea of Algonquin jurisdiction meant, each respondent had a slightly different way of describing their interpretation of the word. Four respondents described it below:

> *It's a reasonable and responsible relationship with the world around you... it's a sense of responsible relationship between yourself and humans, all of your kinship, and the other parts of Creation.*
>
> *We look at that more as having responsibility over that territory that we were created in.*
>
> *From my point of view, jurisdiction means that your ownership of the land was never surrendered... jurisdiction, I think, in that particular case means our right to be there and our right to have a say in what's going on, and a right to have a big say.*
>
> *Jurisdiction for AAFNA is something that's a little more flexible... in the sense of Indian people are sharing land, sharing resources... in the sense of having consensus among the people and living peacefully, it's important that there be some sort of boundary, but it's also important that that boundary be flexible.*

Another respondent expressed exactly what he believed jurisdiction means for the Ardoch Algonquin people in relation to the jurisdictional responsibilities of the Canadian government:

> *We believe that we have our own jurisdiction, we have our own codes of conduct and ethics that have to be followed, in which we do have laid out in our own constitution* (sic) *that has to be followed. So jurisdiction is not a word that should be used lightly by the government, because really they don't have any over us. They can govern the non-Native communities but they really don't have it, especially when they acknowledge that the land isn't theirs and they're willing to go to a land claim.*

Algonquin jurisdiction is a clearly established code of conduct that Algonquin people must follow, and it does not fall under a category of the Canadian government's jurisdiction.

The questions remain about how Algonquin jurisdiction is understood and recognized by the federal and provincial governments, and how it works in relation to the established Canadian jurisdictional divisions. The same respondent as above further expanded on these competing ideas of jurisdiction:

> *What jurisdiction means really, is who has the ultimate say to dictate who does what, under what set of rules* [...] *who has the right to tell us that we're not allowed in negotiations in relation to a piece of land that runs through the core of our land, that the government has accepted that is ours and have acknowledged on paper that is ours, and that they have to settle a land claim with us because they realize that they don't have any right to it. You know, jurisdiction lies again back to power, and power dictates who sets the jurisdictional lines.*

This is an expression of the frustration with the lack of recognition by the government during negotiations that are crucial to the environmental management of the territory. This respondent is illustrating that it is not enough just to acknowledge that the lands are Algonquin lands, but that there have to be actions taken by the government to include them and consult with them in processes that affect their lands.

Another respondent tried to describe how Canadian jurisdictional responsibilities would be viewed from an Algonquin perspective and interpretation of jurisdiction. The federal and provincial governments should be exhibiting a kind of responsible relationship as described in the concepts of Algonquin jurisdiction and responsibility. This next respondent is clearly not talking about the kind of provincial and federal ownership and control that is granted through Canadian laws. Rather, he describes a kind of joint responsibility between Aboriginal people and the state who are both using the land. The respondent says:

> *That's, I think, at the heart of it when you divide up federal and provincial jurisdiction, you're giving responsibility from these things* (sic)*, along with the use is supposed to come a responsibility.*

The responsibility that this respondent is talking about for the Canadian governments demonstrates that the responsibility to care for Algonquin lands is not the sole duty of Algonquin people, but as other governments are given jurisdiction each player should be just as responsible as the other. In other words, the Canadian governments should realize their jurisdictional responsibilities as more than just the authority to do anything they chose. The kind of joint responsibility suggested here cannot happen if one player's responsibility or jurisdiction is not recognized by the others. Therefore, if AAFNA's jurisdiction is not recognized by other users of the land, such as the provincial government, then AAFNA cannot fulfill its responsibility to care for the land. One respondent described this dilemma:

> *We looked at it as being, "we have a responsibility here, and you're making it so that we can't do what our responsibility is supposed to be, like how can we atone for our actions if we can't stop this from happening?"*

Another respondent further explained how the AAFNA members had to decide how they would negotiate their predicament in this particular case. If their jurisdiction was not

going to be recognized by other users of the land, then the responsibility seemed to shift to those assuming the authority to make all the decisions. This is the point when they decided that they had to withdraw from the ERT proceedings:

> *But we're no part of it. So, whatever they do, we will be no part of it. The responsibility's on them now.*

This decision to withdraw is examined more closely in the next chapter that discusses AAFNA's strategies used in the Tribunal.

What maybe has not come across yet is how Algonquin jurisdiction is established or where it comes from. The relationship between Algonquin jurisdiction and Algonquin knowledge is that they are mutually dependent of the existence of the other. As some respondents explained in the section on "Algonquin relationship to land and responsibility," the two are tied to each other in that one cannot talk about one without the other. Jurisdiction is a responsibility that is given to them in their original instructions from the Creator and those teachings give them the knowledge to fulfill their duty to care for their lands. Algonquin knowledge of the land comes from the experience and survival of the generations and the personal connection that each individual makes to place. In other words, Algonquin jurisdiction is the manifestation of that knowledge which is the responsibility to continue the practices of the Algonquin people in relation to their environment, to fulfill the duty given to them by the Creator to care for all the other living beings in nature. From the explanations offered by the respondents in this case study of the descriptions of Algonquin jurisdiction and of what jurisdiction should also mean for the Canadian governments two features can be identified. First, jurisdiction means having the duty to act responsibility; and second, jurisdiction is something that the Algonquin people have. Algonquin jurisdiction means it is *their* responsibility and duty to make sure their territory is taken care of responsibly.

Fortunately, there is a lot of flexibility in the way Ardoch Algonquin people are willing to negotiate an approach to living peacefully and harmoniously by sharing resources as well as sharing the responsibility.

6.2.5 A non-Aboriginal expression of jurisdiction

The jurisdiction of the Environmental Review Tribunal was repeatedly addressed during this case. The word was being used by the Tribunal board as a legal duty to act in accordance with the Canadian laws. It was being interpreted within the Euro-Canadian context of laws, tribunals, and provincial and federal divisions. Both the Director for the Ministry of the Environment and the OMYA defendants repeatedly claimed that the issues concerning Aboriginal or treaty rights were beyond the jurisdiction of the Tribunal. Their jurisdictional arguments remained within the confines of Euro-Canadian interpretations and would not allow for any divergence from this context. When AAFNA was first seeking party status, OMYA relied on this jurisdictional argument to claim that AAFNA should not be granted party status. They argued that:

> *It is OMYA's submission that any concerns of AAFN with respect to alleged infringements of its Aboriginal and Treaty Rights are beyond the jurisdiction of the Tribunal.*
> *The AAFN does not attorn* (sic) *to the jurisdiction of this Tribunal in the matter of its Aboriginal and Treaty Rights* (Bryant, 2001a).

Relying on statutes, OMYA also stated that:

> *The Ontario Municipal Board has recognised the need to limit the scope of its inquiry according to its enabling statute in litigation involving the AAFN* (Bryant, 2001a).

Similarly, the MOE Director shifted the responsibility of consulting with First Nations to the federal level, stating that:

> *The AAFN is one of a group of Algonquin claimants who are engaged in a comprehensive land title negotiation and these matter of claim to title are being and are best raised there* (Watters, 2001c).

> *The Tribunal has no ability to make any determination as to the duty to consult in relation to matters such as those raised by AAFN. Such duties may arise in the context of negotiation or litigation concerning such claims to title where it has been established that such a claim is well-founded and may have been infringed...* (Watters, 2001c).

Besides transferring the responsibility to the federal level, he was also suggesting that their claims belonged in the judicial court, and not in an environmental appeal. By making the argument that legislation is delegated and separated between federal and provincial authority, the Director also argued that:

> *Neither the Tribunal not the Director has jurisdiction in this matter over decisions under the Planning Act, the Environmental Assessment Act, federal law or any other law, or about matters governed under such law, for example, ... aboriginal and treaty rights, ...* (Watters, 2001c).

The sense of jurisdiction referred to here does not resemble any similarities to the Algonquin concept of jurisdiction that is based on responsibility to the environment and the lands. The Tribunal's and Director's jurisdiction is something completely determined by the rules of the Tribunal and the laws that the Ministry is supposed to follow. The Tribunal only has to decide whether or not the water-taking permit should be suspended or revoked, and there is little leeway in the legislation and no incentive for the Tribunal to look at broader issues of the integrity of the legislation.

In defending the Ministry's decision to issue the water-taking permit, the Director also made his argument based on the view that laws take precedence over other agreements. The agreements he refers to below are not divided by federal and provincial jurisdictions, they are all provincial level statements. However, it is the regulation of the water-taking permit, that falls under the Ontario Water Resources Act, that has the upper hand in this case:

> *The language before Part VI of the MOE SEV* [Ministry of the Environment Statement of Environmental Values]*, including that dealing with the Statement of*

> *Political Relationship,*[24] *is not a set of independent obligations which supersede or override the directions and law under which a water-taking permit is to be assessed...* (Watters, 2001c).

The statements of environmental values and political relationships that would provide some flexibility into the interpretation of the relationship between the Canadian governments and Aboriginal people, and which could potentially require the governments to act in a manner more harmonious with some of the ideas of responsibility expressed by the Algonquin people, are not considered to have any legal weight at the provincial level. This is an example of some of the incompatibility that exists between the Algonquin interpretation and the Euro-Canadian interpretation of the basis, meaning, and duty related to jurisdiction.

6.2.6 Algonquin territory and boundaries

One of the central issues of Algonquin knowledge and Algonquin jurisdiction is territory, or the *space* concerned. Both are place specific. They are not concepts that can be transferred to other "non-Algonquin" places. Algonquin jurisdiction from a spatial perspective, although a seemingly abstract concept of responsibility, takes place in a relatively specific area on the land. This area is not bounded or separated from the rest of the lands, nor is it unrelated or unaffected by other areas, but it *is* a definable place. I want to illustrate the Algonquin concept of boundaries and territory. The respondents described the boundaries of the Algonquin territory throughout the interviews even though it was not something I had specifically asked about.

The Algonquin territory was recounted in terms of land use patterns of past and current generations, and is delineated physically by a series of watersheds. Four of the

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[24] The *Statement of Political Relationship* is an agreement signed in 1991 between First Nations represented by the Chiefs-in-Assembly and the Government of Ontario that reaffirms the *Constitution Act* 1982 in context of a government to government relationship between First Nations and Ontario (*Statement of Political Relationship*, 1991).

respondents characterized parts of the territory, knowledge, and histories that cover the Tay River watershed:

> *That knowledge that we have of the Tay River, and of those areas come from generations of people who have lived in that area, who have taught us that stuff.*
>
> *Well, the Mississaugas, the Algonquins were here, to the best of my knowledge, they were here first, they were originally the people here. The Mississaugas married into the Algonquins. They came down from Rice Lake, so they married into the families here, so that's how come they were here.* [...] *The rice came from Rice Lake. I presume that since they were all married together here and since they were a family, that they brought the rice down, and I always like to think of it as being a joint operation here, and to me that makes sense, you know.*
>
> *The historical record is also geographical knowledge. This is where my father drowned, you know, and all of Richard Perry's knowledge and memories would be centered in that place, as well as his cabin, as well as, you know, the cabin at the Beavers where he used to go up and spend a lot of time, and those things, they're within the environment, they're along the river, adjacent to hunting grounds, they're integrated with the reality of Creation.*
>
> *The Tay River falls within that boundaries* (sic)*... if you look at the idea of where Algonquin people traditionally were and still are, cause they're still spread out, all the areas that are traditionally thought to be Algonquin, there are Algonquin peoples who all live there today.*

The watersheds were also delineated during the presentation at Tribunal by the AAFNA members:

> *The territory of the Ardoch Algonquin First Nation Families is described by the watersheds of the Madawaska, Mississippi, Tay and Rideau rivers. We are members of the greater Algonquin Nation (Omamiwinini) and our rights and title extend through the entire watershed of the Kije Zibe (Ottawa River)* (Lovelace, 2001d).

There is clearly no question as to which areas they include as their traditional territories.

One respondent explained the many layers of territory that exist for each person. It starts with the property that the house stands on, that is the most personal piece of land. Next is the community, and then the lake that the house is nearest, which is part of the area to care for. Then, as the respondent explained,

> *if I can continue with a little goodness there in my environment, I can step out a little farther which would be getting closer to the territory, the Algonquin Ardoch* (sic) *territory.*

The respondent explained that the exact limits to the territory depend on which member you ask. Lastly, the fourth layer includes:

> *all of when you look at a map of Ontario and Quebec, and you would say, this is Algonquin... Where the Algonquin people lived, and they didn't go outside that, and if they did they were pushing it cause you would be invading other people's areas.*

These layers explained by this one respondent describe a concept of space and territory that is both a personal responsibility and a part of the community's identity.

The boundaries of Algonquin territory are not borders around a piece of land that is "owned." Algonquin territory is more complex than that. Another respondent alludes to this idea, saying,

> *you can't lay claim to it... it belongs to everybody.*

This concept gets more complicated in practice. The same respondent expanded with an example:

> *It's a difficult thing because it creates conflict, within ourselves, you know, do we say this is our land, this is our territory? I mean, we're the original people on the land, we were here first, but does that make us any better to say you guys can't have the water? Does there come a point where you don't offer your guests any water?*

The territory, though it is not "owned" by Algonquin people, is Algonquin territory. From their perspective, any others there are guests. This does not mean that guests are without any responsibility to the land, because "it belongs to everybody." The concept of sharing the territory is an Algonquin perspective that provides some potential for how Aboriginal people and Canadian governments should be negotiating their joint responsibilities. The ideas of sharing responsibility is also consistent with the Algonquin understanding that everything is interdependent.

In summary, Algonquin territory and their relationship and knowledge of this land are the foundations of Algonquin jurisdiction. However, the knowledge of the territory's range, its features, history, occupancy, and uses, and the relationship to the territory that constitutes the Algonquin worldview is not consistent with the Euro-Canadian notions of ownership or property. Nevertheless, individual AAFNA members now individually have their own property, in the legal ownership sense of the word, on which their houses are built. Although they have adopted this necessary concept of property in order to lead their lives with their family in a house as a member of Canadian society, they do not adopt these concepts of property or ownership into their position about their traditional territories and their Algonquin jurisdiction over their territories. They are talking about their jurisdiction over their territory as a responsibility to take care of the health of the land, as a resource that they share with all the others who use and occupy the land. And they maintain their jurisdiction by continuing their use and occupancy on the land and by continuing the Algonquin knowledge of the land through the generations.

When AAFNA discussed the concept of Algonquin jurisdiction during the interviews, they were not referring to any legal rights by Canadian law; they were talking about an Algonquin concept. They also were not making arguments as "property owners" that would be negatively affected from the environmental damage of taking water from the Tay river because this idea would not explain their Algonquin position. However, at the Tribunal, when they talked about Algonquin jurisdiction, they also included legal rights that they believed were ensconced in Canadian law which, if interpreted from an Algonquin perspective, could include the legal support of such an

idea as Algonquin jurisdiction. This aspect will be the focus of the next chapter where the legal arguments and the strategies AAFNA used in the Tribunal are investigated.

6.3 Conclusion

Throughout the interviews I conducted, and the documentation of AAFNA's contributions to the ERT, there was a resounding persistence by these members of AAFNA to put forward their own interpretations of terms and ideas. Even during the relatively passive process of the interviews, they resisted any generalizations about Algonquin knowledge. Included in this patient form of resistance was a perceptible dissatisfaction with English words representing their deeply rooted Algonquin ideas, particularly "jurisdiction." Throughout their explanations, Algonquin responsibility to the land was the key feature on which all their perspectives and motivations were based. As we will see in the next chapter, the expression of Algonquin jurisdiction was manifest in their decision to occupy an Algonquin space in the ERT. They engaged the ERT audience with a clear depiction of how they interpret the Ministry's environmental decision. Their understanding of Canadian laws brought forward in their arguments are, as we will see in the next chapter, an extension of the Algonquin worldview I illustrated in this chapter. Entering into Euro-Canadian legal space was a decision based on a desire to contrast Algonquin knowledge with the dominant social organization of space provided by Canadian law. The ERT's claims to environmental jurisdiction could only be met publicly by a refutation of the epistemological foundations upon which Canadian ideas about land were juridically expressed. By that same token, the ERT's insistence on final sovereign authority over the Tay's environment meant that the Algonquins could not

recognize the Tribunal's definition of jurisdiction, even as they used it as a forum to explain their way of relating to the land in dispute.

CHAPTER 7 / Algonquin strategies of inserting their voice: An analysis of the case study

7.1 Introduction

In this chapter, I examine the approach AAFNA took to getting involved in the Environmental Review Tribunal (ERT) about the Tay River in 2000. They used specific strategies to create an uncompromised yet effective Algonquin role in the legal setting. The AAFNA members who became involved in the ERT decided that in order to follow their own path and duty, and to be able to continue their own practices and beliefs, it was necessary that they expressed themselves at this time in this particular Canadian legal arena of environmental legislation and decision-making. Their participation in the Tribunal was not a response to a force that was directed at oppressing them. Their involvement was motivated by their Algonquin duty to protect, respect, and act responsibly towards their environment. These actions were based on an Algonquin knowledge that forms both their identity and the space from which they presented their arguments to a non-Aboriginal audience. Although they were engaged in a formal Canadian legal process, their position was still an Algonquin one, and there was a limit to how much they were willing to compromise their position for the Tribunal.

The members of AAFNA who decided to get involved in this Tribunal did so for two reasons: they had a right to be there, and a reason for being there. They viewed their right to be there as part of their Algonquin duty given to them by the Creator to be responsible for their territory. They also believed they had the right to be there as Aboriginal people based on Canadian laws. They supported these two arguments at the Tribunal with their claim of Algonquin jurisdiction and with Canadian constitutional arguments. Secondly, they expressed many reasons why they believed they needed to

be present at this Tribunal. One of the main reasons for being involved was to educate the Tribunal and public about the detrimental effects of the decision to take more water from the Tay river. This included educating of the public not simply about the ecological consequences of drawing inordinate amounts of water from the Tay, but about their perspective on the issues derived from their specific concepts of Algonquin knowledge, relationship to land, and jurisdiction as responsibility. They had, of course, a genuine concern about the stability of their land for their own use and, indeed, for the benefit of all people. Lastly, they believed that their presence at the Tribunal in any capacity would benefit their community by inserting their voice into the process, thus leaving a paper trail of their presence in the region for the future.

I will first look at the setting of the ERT into which the AAFNA members had to engage in long negotiations just to be recognized as voices with standing. The ERT has a clear set of rules and regulations to maintain the consistency and homogeneity of the space over which it claims authority. These rules of the space first had to be learned by the Algonquin participants. Then they had to find ways in which these rules could become useful for their own needs in order to effectively assert their legal and ontological presence in the space. I follow this with some examples of the arguments made by the AAFNA members present at the Tribunal hearing. Their arguments were based on a combination of their own perspectives and Canadian legal arguments interpreted within an Algonquin framework. Lastly, based on my interviews with them, I will explain some of AAFNA's reasons for making their arguments.

7.2 The setting of the Environmental Review Tribunal

The ERT is designed to debate and analyze environmental appeals about matters such as environmental assessments and environmental decisions made by governing bodies such as the Ministry of the Environment. Tribunals exist as the primary legal mechanism by which citizens of a given "jurisdiction" may make claims on environmental issues. But citizenship is more than simply political residency: although many Canadians do not tend to think of it this way, it also entails possessing a shared commitment to the criteria governing knowledge itself. Within this context, integrating indigenous knowledge requires that it fit into a process governed by legal and scientific structures of knowledge derived from the specific traditions of Euro-Canadian culture. Moreover, as the chart that Kuhn and Duerden (1996) provide concerning the application, context, and scale of indigenous knowledge suggests,[25] the integrity of the knowledge changes depending on the scale and context in which it is being used. The Tribunal is a provincial setting. Once Algonquin knowledge becomes part of Tribunal evidence, the users are both First Nations and the provincial government. The application is environmental decision-making, and Kuhn and Duerden (1996) suggest that in such cases, the knowledge becomes selective and translated into a narrow scientific/rational framework (Kuhn and Duerden 1996, 77). As I will demonstrate in this chapter, the integrity of the indigenous knowledge can also remain in the hands of the Aboriginal people depending on how they present it in the setting of the ERT.

The Environmental Review Tribunal is an appeal process that has established a fairly strict set of guidelines and rules of practice. All participants, including appellants and defendants (or respondents) must follow these rules to make their case heard. First,

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[25] See Figure 1 in Chapter 2, this thesis.

evidence and knowledge are brought to legal cases in formalized ways with a clear set of rules. In such tribunals, the evidence presented about the case has to adhere to specific requirements. Evidence may consist of oral statements, objects, or documents. The ERT provides guidelines explaining *what* kind of evidence is allowable, *how* it must be gathered and presented, and *who* may present either technical and scientific evidence, or opinion evidence.

Board members may only allow facts and opinions considered to be "material," "relevant," and "reliable" to be presented. Relevant material must have a logical connection with the points in issue. Reliability in most cases requires that the person who makes the statement or observation recorded in a document must be called as a witness. The two rules to ensure reliability are personal knowledge and personal attendance at the Tribunal (Estrin and Swaigen 1993, 81). Personal knowledge should be what a person has observed with his or her own five sense with a few exceptions; evidence about what someone else observed is considered hearsay. One of the exceptions to the hearsay rule is if the person has since died (Estrin and Swaigen 1993, 82-5). This detail could be important in allowing oral histories of indigenous knowledge that are observations and knowledge of past generations passed down to the current generation.

Opinion evidence can be given by either expert witnesses or by ordinary citizens. Generally, evidence of an opinion must be given by an expert witness, a person who has authority on a subject because of their education or experience in a field. However, ordinary citizens can also offer their opinions within the range of everyday experience. Sometimes, when the opinions between the expert and the ordinary person conflict, the court may be inclined to "accept the common-sense testimony of the ordinary citizen

over the tortured attempts of the expert to twist the facts to suit the needs of his or her client" (Estrin and Swaigen 1993, 86). The questions remain as to whether indigenous knowledge coming from Aboriginal people is considered the testimony of an expert witness or of an ordinary citizen, and how this distinction affects the way it is received by the Tribunal and the weight it has in the Tribunal chairperson's decisions.

Finally, unlike a judge in a court that must make a decision based on a *moral* certainty, a tribunal must only be satisfied with the standard of proof of the evidence to the extent that "it is more likely than not that the defendant or respondent did the act complained of... or that a licence should be refused, suspended, or revoked" (Estrin and Swaigen, 79). In other words, evidence presented at the Tribunal is the sole basis of the decision that the chairperson and board members of the Tribunal have to make.

Another point is that the decision-makers themselves are not the knowledge holders. They understand the laws and the scope of their jurisdiction, and in some cases they may have a limited ability to interpret laws and jurisdictional issues, but there is a division between the "experts" and the decision-makers. There is also little, if any, negotiation between the various "experts" to come to a consensus on what the best course for a decision may be. The process is in this sense can become competitive between the various witnesses. Moreover, the depth with which the chairperson can understand all of what is presented at the Tribunal is limited. As a result, the only recourse for the chairperson is to fully rely on the Canadian laws and legislation to determine a "fair" decision.

Second, the rules of the ERT require a strict observance to the deadlines, forms, and documentation required. These are costly endeavours that both OMYA and the Ministry accomplished with the help of lawyers. Unfortunately, these conditions mean

that one party may be able to gain leverage over another party merely due to their financial freedom to fulfill their ERT duties. Another party that may have a legitimate claim, but may be lacking the financial ability or have time constraints, could be perceived as having a weaker case by not being able to fulfil all the procedural requirements. Strict environmental legislation and procedures that are costly create power imbalances due to financial and resource differences.

Thirdly, the ERT Rules of Practice specify in what capacity any constituent to an appeal may participate. Before becoming involved in the ERT, a potential constituent has to decide what level of involvement is desired. One can either be a party, a participant, or a presenter in a Tribunal. *Parties* include the applicant and the applicant's counsel (in this case this means the one who applied for the Permit to Take Water, OMYA), the appellants (in this case those who appealed the Minister's decision to issue the permit), persons who are entitled by law to be parties, and other persons who request party status and who are so named by the Board. Party status is determined by the Board, who considers whether

> (a) a person's interests may be directly and substantially affected by the Hearing or its results; (b) a person has a genuine interest in the subject matter of the proceeding; [or] (c) a person is likely to make a useful and distinct contribution to the Board's understanding of the issues in the proceeding ("Rules of Practice" 2000, 669).

The Board also has the power to decide exactly what role a party will have, depending on the interests and resources of the party. These various roles include to:

> (a) bring motions; (b) be a witness at the Hearing; (c) be questioned by the Board and the parties; (d) call witnesses at the Hearing; (e) cross-examine other parties' and Board witnesses; (f) make submissions to the Board, including final argument; (g) receive copies of all documents exchanged or filed by the parties; (h) attend site visits; (i) claim costs or be liable to pay costs where permitted by law; and (j) appeal the Board's decision where permitted by law ("Rules of Practice" 2000, 670).

A *participant* to the proceedings is not a party. The Board may name a person to be a participant in either all or parts of the proceedings, as the Board considers appropriate. The role of a participant in a Hearing may:

> (a) be a witness at the hearing; (b) be questioned by the Board and the parties; (c) make oral and written submissions to the Board at the commencement and at the end of the Hearing; (d) upon request, receive a copy of documents exchanged by the parties that are relevant to the participant's interests; (e) attend site visits ("Rules of Practice" 2000, 670).

A participant, however, may not: "(a) call witnesses; (b) cross-examine witnesses; (c) bring motions; (d) claim costs or be liable for costs; (e) appeal the Board's decision" ("Rules of Practice" 2000, 670).

A *presenter* to the proceedings may also be named by the Board to be presenters in either all or parts of the proceedings as the Board deems appropriate. A presenter is neither a party nor a participant. The presenter's role at the Hearing requires that he or she:

> shall present his or her relevant evidence at a pre-arranged time, either during a Hearing's regular day-time witness sessions or at a special evening session; (b) may provide the Board with a written statement as a supplement to oral testimony; (c) may be questioned by the Board and the parties ("Rules of Practice" 2000, 670-1).

But the presenter has the same restrictions as the participants as well as not being allowed to: "make oral and written submissions to the Board at the commencement and at the end of the Hearing" or "receive a copy of the documents exchanged by the parties that are relevant to the presenter's interests" ("Rules of Practice" 2000, 670-1). The Board also has the power to decide whether only one person should represent several persons that the Boards believes have similar interests.

There are benefits and disadvantages to each role. A party has the largest impact on the Tribunal by being allowed to appeal, make final statements, and call

witnesses. However, a party is also more bound by the strict format of the role. For AAFNA to be a party meant they could call Elders as witnesses to indigenous knowledge. A presenter, on the other hand, cannot call witnesses, but once accepted by the Board to give a presentation, may present their oral testimony, which AAFNA did to explain their dissatisfaction with the proceedings and restrictions.

In the end, the Board has the final say on which persons will be designated in which role. The Board decides which persons "have a genuine interest" in the subject matter, as well as deciding, before a person can present their relevant understanding of the issues, whether a person "is likely to make a useful and distinct contribution" ("Rules of Practice" 2000, 669). The overseeing power that the Board holds is manifest in a hierarchical, top-down, form of control.

In summary, the relationship between power and knowledge in this setting is significant. The Board that has the power to make the final decision, also has the power to include or exclude certain kinds of information, knowledge, and persons. With this power that is legislated in the ERT's Rules of Practice, the Board can exclude outsiders who threaten the order of the space. The Board can exclude people who by the rules are not "likely to make a distinct and useful contribution" in their opinion. The rules allow the Board with a lot of discretion that leads towards a typical and comfortable pattern of process. This pattern would be disrupted if there was suddenly a diversity of perspectives and views all legally authorized to present evidence and opinions. However, this does not mean that those voices do not appear in this kind of setting from time to time, influencing and disrupting the oppressive order of the space.

7.3 AAFNA arguments made at the Tribunal

The Tribunal finally did award Robert Lovelace as an agent for AAFNA with party status. His status came with certain conditions outlined by the chairperson.[26] The conditions prohibited any mention of the *Constitution*, the *Royal Proclamation*, which in turn annulled their argument for consultation. These conditions created limitations for the kind of arguments Robert Lovelace would be allowed to form. In effect, they denied him the ability to make a strong legal argument. Also, not being able to rely on the argument of consultation compromised the way he would be allowed to present and describe his Algonquin knowledge and the knowledge of other AAFNA members and Elders as evidence. As we will see below, use of the *Royal Proclamation* and the *Constitution* was necessary to demonstrate the AAFNA legal claim to jurisdiction over their territory which they have not yet ceded. The limitations on the legal argument would affect the approach they could take to describing the Algonquin concept of jurisdiction which is an integral part of having knowledge of the land, and to explaining their Algonquin knowledge of the land.

7.3.1 The Algonquin *right* to be there

There were several phases to AAFNA's involvement in this ERT case. At each encounter, they explained their legal right to be a part of the Tribunal hearings. During the period of public comment at the time of the initial application to take water, Robert Crawford, the Chief of AAFNA at the time, wrote a letter announcing their opposition on the issuance of the permit. He also reminded the Ministry that AAFNA had not yet been consulted on the matter. The same issue of consultation was also raised in AAFNA's application for party status, then again in their withdrawal from party status, as well as

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[26] For details about the conditions of Robert Lovelace's party status, see Chapter 4, this thesis, p. 67.

in their presentation during the Hearing after they had withdrawn. They presented their position on consultation as a part of the rights and title of the Algonquin people over lands and resources, supported by both the *Royal Proclamation* and the *Constitution* based on the fact that they have never signed their territory over to the government or ceded their lands.

They asserted repeatedly that the *Royal Proclamation* establishes a relationship between the Crown and Native people that respects Aboriginal jurisdiction of their traditional territories:

> *The Proclamation clearly expresses the intent that Indian title remains intact and sets down the conditions where by it may be acquired by the Crown* (Lovelace, 2001d).
>
> *Implied in the Royal Proclamation of 1763 is that when the Crown has not obtained collective consent and compensated the original inhabitants that original jurisdiction can not be compromised* (Lovelace 2001c).

Moreover, AAFNA emphasized that the *Constitution Act* 1982 reaffirms the *Proclamation*'s statement of tenure to lands and resources under section 25 of the *Constitution Act* of 1982.[27]

AAFNA used arguments based on the laws and legislation of the Canadian and Ontario governments to support their argument that their rights had not been respected when the Ministry failed to consult with the AAFNA community before making his decision. The Tribunal and the Director responded by saying that interpreting issues pertaining to the *Proclamation* and the *Constitution* were beyond the scope of the Tribunal. Interestingly, the Tribunal was prepared to consider issues relating to the *Canadian Constitution Act* 1982 with one of the other appellants, the Council for Canadians. Robert Lovelace argued that in doing so, "there is a double standard being

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[27] See Appendix A, this thesis, for details on the *Constitution Act*, 1982.

applied when AAFNA is denied an opportunity to rely on the Canadian Constitution and the Royal Proclamation of 1763" (Lovelace 2001c). Furthermore, AAFNA argued, that when the Director issues a Permit To Take Water from the Tay River and when the Tribunal agrees to hold a hearing regarding this permit, the Province of Ontario is asserting their jurisdiction which "is substantiated by the Canadian Constitution and the British North America Act" (Lovelace 2001c). In other words, "while Ontario can assert its jurisdiction, which flows from the Constitution of Canada; Algonquins can not (sic)" (Lovelace 2001c).

During my interviews, one of the respondents explained the reason for using the *Proclamation* to argue their position:

> *I use the Royal Proclamation of 1763 because the Royal Proclamation of 1763 wasn't extending rights to anyone, it was acknowledging jurisdiction... what he said* [the King of England] *in his rhetoric was that these were inviolable, not rights, but this is an inviolable jurisdiction which cannot be surrendered unless it's surrendered by treaty. You know, rights can be wiped away by laws and legislation, jurisdiction can't.*

Using the *Royal Proclamation* in their legal argument at the Tribunal was AAFNA's attempt to demonstrate what an Algonquin interpretation of the *Proclamation* would mean. This interpretation allows for a definition of Algonquin jurisdiction that is not dependent on Crown recognition. The same respondent expanded:

> *Arguing the constitutional issue allows you to discuss substantively the jurisdictional issue. Without relying upon Canadian law, the fundamentals of Canadian law, it's really hard to even approach the issue of jurisdiction.*

Interestingly, the Euro-Canadian interpretation of laws created two barriers for AAFNA. First, the Euro-Canadian interpretation of the Constitution is inflexible. It does not open the door to an Aboriginal interpretation of laws, nor for an Algonquin version of jurisdiction. And the second barrier created by Canadian laws came from the divisions between provincial and federal jurisdictions. This barrier did not allow AAFNA to make

any arguments based on laws that fell under anything other than provincial jurisdiction. Another respondent explained the barrier AAFNA faced due to the different levels of Canadian government:

> *Because that was a provincial Tribunal, they could not allow questions of jurisdiction that would bring them into a constitutional question.*

Because there is no explicit mention of Aboriginal peoples in provincial legislation, their only legal retreat is to the federal level of laws where the rights and title of Aboriginal people are expressly stated. However, that

> *would be to place Algonquins and other Aboriginal people in a position where they would not have access to adjudication under the Environmental Bill of Rights and force them to climb the high ladders of Supreme Court litigation each and every time they attempt to assert legal rights* (Lovelace 2001a).

In the end, AAFNA decided to withdraw from the ERT proceedings as a party. Four of the respondents explained how they came to the decision to withdraw:

> *Every time we tried to do anything, they wouldn't let us do it... because we weren't getting anything, we figured we needed to make a political statement and withdraw. We can't talk about jurisdiction over that area, or responsibility, I prefer the term responsibility, we just thought we had to withdraw and make a political stance about that.*
>
> *At least by separating ourselves from it, we're not a token, at least some of the responsibility goes back to those people, and they've been told that we should be there. They won't accept us, so we're not going to be a token just to be there.*
>
> *Well, they wouldn't recognize our jurisdiction. So, it puts you in the position then, where you become one party out of a dozen... so it becomes a pointless task to try to make your statements count... you become one of many and no more say that what they* (sic), *and that's not recognizing our jurisdiction, so by making a statement like that, that they wouldn't recognize our jurisdiction... it shows that they're not serious about dealing with Aboriginal issues.*
>
> *I think, how is it that we entangle ourselves so much into these processes that we can't disentangle ourselves, to benefit ourselves. It's got to be some way* (sic) *of figuring things out that everybody will be feeling good about it.*

With all the restrictions placed on the arguments AAFNA would have been allowed to make as a *party* to the Tribunal proceedings, the compromise to the integrity of the Algonquin position was too great to accept. During the Tribunal hearing, where they made a presentation as *presenters*, the AAFNA members explained what they had originally planned on contributing to the Tribunal, and why they could not proceed to do so under those circumstances:

> *It was also our intention to call Elders and others who possess Traditional Ecological Knowledge of the Tay River Watershed to further an understanding of the ecosystem. We withdrew as a Party to this Appeal because we were limited only to presenting evidence related to Traditional Ecological Knowledge. This was not a possibility, as we cannot separate jurisdiction and knowledge and if we did our position would be undoubtably* (sic) *compromised* (Lovelace 2001d).

They explained further on:

> *When we participate, we are met with the expectation that our Aboriginal rights and title should be irrelevant or at best set aside. We are subjected to the crudest of stereotypes and a gross ignorance of our history and cultural identity* (Lovelace 2001d).

Clearly, from the Algonquin perspective, the cost of getting involved in legal fights are high and they are always forced to weigh the balance of return. Even though they had to withdraw from the Tribunal as a party in the end, initially there were enough reasons and a sense of duty and responsibility to their environment to get involved in the process. The barriers that they knew would be there did not deter them, and from the start they had a list of reasons why they believed it was worth getting involved and what the benefits of doing so would be.

7.3.2 Algonquin *reasons* for being involved

There were two main reasons for getting involved in this particular Environmental Review Tribunal about the Tay River. The first and foremost reason for getting involved in the Tribunal was triggered by the intense concern these members of

AAFNA had for the health and survival of their territory. Second, they had the commitment to make their voices heard and to insert their perspectives into this formal setting to influence and educate the public, and to have their perspectives and presence officially recorded.

First, they had knowledge and intimacy with the land to know that this decision to withdraw more water from the Tay River would detrimentally affect the health of the environment for all living beings. They believed that incremental development would destroy the environment. AAFNA stated in their submission to become a party:

> *AAFNA had concerns centering on the environmental impact which the taking of water from the Tay River under this permit would have on people, vegetation and wildlife* (Lovelace 2001a).

During my interviews with them, the respondents explained their assiduous disapproval of taking more water from the Tay River, regardless of who is taking it. Two respondents said:

> *What we're saying is it's time to reduce, because ... more than enough of the river is taken already.*
>
> *I don't think the river can handle it, much more stress than that.*

Their perspective does not come from a self-centered position; their uneasiness comes from the burden they believe that all people and other species will experience, as well as all generations to come. One respondent explained where this concern came from:

> *Our Elders have told us that the consequences of this application to take water will have profound consequences on our lives and those of our children and grandchildren.*

And in their withdrawal, they explained:

> *When AAFNA presented its proposal for Party status, it was done so in deep regard for the people of Perth and surrounding area and in regard to a profound desire to protect what is left to us of our homeland. Our concerns remain* (Lovelace 2001c).

Two respondents predicted the impacts people would feel from the negative environmental affects of changing the Tay River so drastically:

> *It's going to affect a lot of people, and eventually down the road, they're going to wind up down there with very little water, they're going to find out with the way things are going there that you go down to paddle one of these years, and you're not going to have anything to paddle in.*
>
> *I think there's a point where you can use it, there is plenty for everybody, but it also has to be restored, it has to be taken care of, it has to be shared...*

Two other respondent also described how it is the smaller species that will feel the greatest negative impacts:

> *Traditional hunting and fishing grounds, and trapping grounds, like, you can't take, you showed me pictures of a muskrat house, if you drop that water in the middle of winter, those muskrats will freeze out. So they come back to their muskrat house, they go out to eat, they come back, it's twenty below zero and they can't get into their house, so they drown, or they go up onto dry ground and they run around at twenty below, and they don't last very long... that's taking something out of the food chain completely...*
>
> *The Tay River watershed has like 20 lakes in it. There's so many marshy and swampy areas, that those are the areas that are really the important areas for preserving, the wildlife, and the beaver dams, and all of those things that are there are really important, and there's even endangered species in there, loggerheads, shrikes, and there's eagles... there's a lot of amphibians that are really sensitive, or some of them are really considered to be going extinct... not to mention our rice beds, which could be affected too...*

And in their presentation at the Hearing, they described the way taking water is connected to the very smallest of organisms:

> *There has been much said about how Omya* (sic) *(Canada Ltd) water taking will only reduce the surface level of Bob's Lake by only $^1/_2$ inch. This amount seems insignificant when we conceptualise the surface area of a lake as big as Bob's Lake. But, the important factor is where that half-inch comes from. When it is measured at the centre in deep water it is insignificant indeed. However when it comes from the margins where micro-organisms have only days to complete a life cycle it is paramount* (Lovelace 2001d).

These are the kinds of environmental concerns the Algonquin people had about the permit to take water, one of the main considerations was the effects local community

members would feel. Moreover, the fact was that besides the few local employees of OMYA, the company would one day up and leave, and the environmental repercussions would be felt locally for generations.

The second main reason for getting involved in the Tribunal was to insert their voice into the formal process. Five of the respondents expressly mentioned that one of the most important benefits of participating in these kinds of formal processes is to have their voices heard, and officially recorded. These recordings will provide a paper trail of their actions and interest in the land and their effort to make a difference. Two respondents explained:

> *I think it was a necessary thing, where you have to create a voice, and let them know we're here, you know? The necessity to create a paper trail of objecting* (sic) *for future generation claims... so just going in and making that statement itself was probably worth the effort. You may not notice it much now, but down the road that's going to count.*

> *Fifty years from now when it falls flat on its face, they can't say you know what, you were there, and you got a chance, and you didn't say nothing. We can say, well we wanted to be there and you wouldn't let us.*

Moreover, when members of AAFNA have inserted their voice into legal arenas in the past, such as at the Supreme Court level, some cases have produced some positive, if indirect, results. It gave the community a recognized name in the region, one respondent said:

> *And not to mention that AAFNA has won a lot of hunting and fishing rights in the courts. They know about us as being a community because of the hunting and fishing stuff, and the community has always been there.*

Other times, when the actual case did not provide instant direct results, there had been a positive ripple effect of as another respondent explained:

> *One thing about bringing Indian cases to the Supreme Court is that it doesn't matter whether you win or lose, if you can get to the Supreme Court with the question chances are you'll lose because the court's unable to make a political*

> *decision... I've come to the conclusion that just getting there is the important thing, and raising the question.*

Inserting their voice into such a public though formal setting is also a warning to others of the fragile nature of the watershed environment. AAFNA thought that at least they were being listened to by the Tribunal and they hoped their presentation at the Hearing had an impact on the chairperson. They were sending out a warning to all people about the detrimental effects of taking water on the ecosystem. Inserting their voice into such a public arena is a form of education for the general public, for the local community, for the court, and even for other Aboriginal people. One respondent pointed out how important it is to do this, even for the benefit of other Aboriginal people:

> *I think the one way of dealing with this is to bring people back to looking at it, who we were as people, and how we still exist that way. We can use those traditional principles to strengthen our communities.*

Some of the AAFNA people today still maintain their traditional practices, and this is often only possible by challenging the Canadian government's legislation on hunting, fishing, trapping, and harvesting. They brought about change by continuing to carry out their activities, and when effectively hindered from continuing their way of life, they have sometimes been forced to challenge the barriers at a legal level.

The positive consequence of these incidents that the respondents pointed out is that AAFNA has made a name for itself. One respondent explained that "the Ontario government and the federal government have acknowledged that we're a community" regardless of whether they are "status" or "non-status Indians." Though this government recognition does not create their own sense of identity, it is important to them; it is the first step to getting acknowledgement of their original jurisdiction.

7.4 Conclusion

The ERT is an ordered space with an explicit set of rules and regulations. The final decisions of the Tribunal are made by the Board and chairperson after having heard all the evidence allowed. There is significance in the particular responsibility assumed by the decision-makers of this legal process. The responsibility held by the individual Board members is not congruous to the kind of personal duty that Algonquin people describe in their concept of Algonquin jurisdiction and responsibility. For the governments, responsibility is something that can be shifted and delegated. An individual person responsible for administering the responsibility is also not permanently or personally engaged in that role. It is a job requirement for a brief term. This contrasts significantly with the Aboriginal idea that the responsibility of the individual is a lifelong, personal sense of responsibility that cannot be taken away or wished away.

The ERT is at the provincial level, and within this setting, there was an attempt by the Board to exclude any discussions about the federal matters associated with Aboriginal people. However, the strategic manoeuvre of the AAFNA "party" to status as "presenter" allowed them to continue with their goal of displaying their discontent with the jurisdictional discontinuity of Canadian law. They had begun their involvement with the intention of providing the ERT with valuable contributions of Algonquin knowledge of the Tay River. But when they were prohibited from presenting their knowledge and history in an integral manner, they were all but forced to address their issues from a more marginal side of the proceedings. It is from this peripheral position as a presenter that they were admitted to address any issues they considered relevant. At this point, it was their exclusion from the core of the Tribunal that became their central piece of contention. Therefore, besides presenting their Algonquin perspective of the

environmental deterioration, they also chose to address the inconsistency and inadequacy of Euro-Canadian interpretations of law and jurisdiction that were excluding them.

CHAPTER 8/ Conclusion

I have demonstrated that some Ardoch Algonquin people have a unique relationship with their territories. Their extensive explanations of Algonquin knowledge, at the Tribunal and during my interviews, established that their understanding encompasses the qualities of indigenous knowledge described in the literature, such as factual observations, moral statements, and worldviews. The interviewees described the Tay River, their experiences on the land, their relationship to the land, their teachings from the environment, and their responsibility and duty to care for the land and act accordingly. Their insights into the environmental effects of taking more water out of the river were not based on scientific findings but on deep observations, past experiences, oral histories, and from living close to the land for many generations.

Further, their concept of Algonquin jurisdiction is also derived from their knowledge of the land and their teachings. Jurisdiction for them is their duty to be responsible for the welfare of their lands. These are concepts that have been passed down through generations from time immemorial. They tried to explain these concepts in the setting of the Tribunal, and even in such a foreign setting and in the English language, their knowledge and worldviews were still tied to the ecological context from which the knowledge emerged.

Algonquin jurisdiction is a duty to act respectfully and responsibly towards the land. Through my interviews with AAFNA members, they explained that they no longer see this responsibility as solely theirs. From their perspective, all users of the land have the responsibility to care for the resources. In other words, there is a joint responsibility between the Algonquin people and the Canadian government to fulfill the duty to care for the land. They also point out that to accomplish this, the jurisdiction of each user of

the land has to be recognized by all other users. This kind of mutual recognition and respect is what the AAFNA members insisted on in the Tribunal. They demanded consultation and to be part of the decision making. These AAFNA demands for joint reciprocal respect were an expression of their view that they see their own lives and cultural survival as something intertwined with all others living on Algonquin territories.

Their involvement in this Tribunal began with a written request for consultation. The Ministry of Environment's disregard of their demand pushed them to insert their voice right into the formal proceedings of the environmental appeal process. It ended with their resistance to the compromise they were asked to make by the Tribunal. The product of their efforts was a vision of the kind of relationship they deemed necessary for Aboriginal people and the Canadian government to develop in order that not only Algonquin people survive, but that all living beings may share life on the land. The mutual respect and joint responsibility they requested is a vision of multiple jurisdictions.

AAFNA faced many barriers in their involvement in the Environmental Review Tribunal. Besides the obvious differences in worldviews, approaches to knowledge and concepts of the land, there was also the evidently insurmountable barrier of the provincial jurisdiction of the Tribunal they had to overcome to insert their voice in the proceedings in the first place. The Tribunal is a space built on specific concepts of authority and control in a Euro-Canadian context. The introduction of their Algonquin concept of jurisdiction was a challenge to this space. Their acts had the potential to generate a reinterpretation of the inflexible divisions of jurisdiction that the Canadian *Constitution* has established. However, it is precisely the wall that they were trying to knock down that, by definition, kept them out. The limitations placed on the kind of arguments they wanted to make were too much of a compromise for the AAFNA

members to accept, a comprise that would, in effect, have undermined the integrity of their entire argument. Not only would the ERT's restrictions have prejudiced the way they would have been able to present their knowledge of the Tay River watershed, but the restrictions completely excluded even the beginnings of a dialogue about jurisdiction. It was not within "the scope of the Tribunal," as their opponents kept pointing out. Nevertheless, their presence and their voice was significant by bringing attention to the fissures in Algonquin people's relationship with the government, and for making the court and the local public more aware of an Algonquin vision of an alternative Aboriginal-state relationship.

By inserting their voice this way, AAFNA's resistance is symbolic of the power that lies in indigenous knowledge. This is evident with a look at the importance of context. Kuhn and Duerden (1996) discuss the scale and context of indigenous knowledge, claiming that when it is used in environmental assessments by First Nations and governmental bodies, the knowledge still gets reduced to scientific terms. However, as we have seen in this case, resistance by Aboriginal people to this decontextualization of their knowledge is possible. The Tay experience demonstrates that Aboriginal people can find ways to present their knowledge and educate people about it without completely losing its integrity and context. On the other hand, this case also demonstrates that there is a limit to the extent to which Aboriginal resistance will be permitted in the legal process. It means that Aboriginal people may be forced to make choices about the level of compromise they will accept in their freedom to express themselves as they deem necessary. These acts of resistance, involving the introduction of indigenous knowledge in formal legal settings that challenge the current Aboriginal-state relationship, are an example of two things. One, indigenous knowledge has more

to offer than is explained in most indigenous knowledge definitions created for use in environmental assessments and land claims. Two, indigenous knowledge in its ecological context is the source from which Aboriginal people can create their vision of an alternative Aboriginal-state relationship and a system of multiple jurisdictions.

Finally, this case shows that the legal setting has potential to be an effective space of resistance. It is, as Sparke (1998) and Blomley (1994) explain, a space that is constitutively interlinked to law and power. However, the law that constitutes the space also has the power to exclude. The provincial setting of environmental legislation has the leverage to exclude certain voices through its highly regulated and ordered space. In this kind of setting, Aboriginal people have to assume a position that will address the power structures that constitute it. In other words, law and power are engaged in the formalization of the space which, by their very nature, exclude certain other ways in which the space might be conceived and organized. Therefore, in order to change the laws and power relations that preclude these (silenced) differences, those voices have to be heard within the space that embodies the authoritative relationship.

In the end, as the members of AAFNA now accept, the act of inserting their voices into the ERT in any capacity was one step in the right direction toward creating a new dialogue between themselves and the government. Educating other Aboriginal people and non-Aboriginal people, the court, and the wider public, was also worth the effort, time, money, and even compromise. Moreover, putting their perspectives into the provincial legal context was constructive in both promoting their recognition within the province, and in demonstrating how the Canadian divisions of federal and provincial jurisdictions need to be reviewed and reconstituted in radically different ways.

Sparke (1998) had described the sound of this resistance in his case study of the Gitxsan and Wet'suwet'en:

> If there was a contrapuntal aspect to the trial, it was a very strange and strained kind of music, the record of which was marked by resistant roars in the midst of the solemn sounds of legal proceduralism (Sparke, 489).

He recognizes that the roars from one space of resistance have the power to influence other spaces of resistance (Sparke, 490). These tangent influences are all part of the beginnings of the effort to change the face of power relations between Aboriginal peoples and the government. By the same token, the sound and sense of the voices of Algonquin people in the ERT will be heard and referred to in future formal associations with the government, just as their similar efforts in the past have also often come around to some positive results, if only for their own community. The spectre of historic Aboriginal suffering is not made less severe by these positive moments, these sometimes all too quiet articulations of a different worldview. But they provide the very real foundations of both the continuance of a viable Algonquin community and the emergence of a genuinely pluralistic understanding of society and its relationship to the land. The case of the Ardoch Algonquin fighting for the water of the Tay embodies more than just the isolated fate of an eastern Ontario river; it speaks to the possibility of a radically new social order.

Appendix A

CONSTITUTION ACT, 1982

PART I

CANADIAN CHARTER OF RIGHTS AND FREEDOMS

...

General

25. The guarantee in this Charter of certain rights and freedoms shall no be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including

(*a*) any rights of freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and
(*b*) any rights or freedoms that now exist by way of land claims agreements or may be so acquired.

...

PART II

RIGHTS OF THE ABORIGINAL PEOPLES OF CANADA

35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

(2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.

(3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.

(4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

35.1 The government of Canada and the provincial governments are committed to the principal that, before any amendment is made to Class 24 of section 91 of the "Constitution Act, 1867", to section 25 of this Act or to this Part,

(a) a constitutional conference that includes in its agenda an item relating to the proposed amendment, composed of the Prime Minister of Canada and the first ministers of the

provinces, will be convened by the Prime Minister of Canada; and

(b) the Prime Minister of Canada will invite representatives of the aboriginal peoples of Canada to participate in the discussions on that item.

(Source*: A Consolidation of the Constitution Acts 1867 to 1982*. Department of Justice, Canada: Minister of Supply and Services Canada, 1989, pp. 64-7.)

Appendix B

List of Abbreviations and Who's Who

Abbreviations:

AAFNA or **AAFN** – Ardoch Algonquin First Nation and Allies
AK – Algonquin knowledge
CEPA – *Canadian Environmental Protection Act*
EBR – *Environmental Bill of Rights*, 1993
EPA – *Ontario Environmental Protection Act*
ERT – Ontario Environmental Review Tribunal (formerly the Environmental Appeal Board)
IK – Indigenous knowledge
MOE – Ontario Ministry of the Environment
OWRA – *Ontario Water Resources Act*
PTTW – Permit To Take Water
SEV – Statement of Environmental Values
TEK – Traditional ecological knowledge

Who's who:

Bryant, Alan W. – Counsel for OMYA (Canada Inc.)
Crawford, Robert – former Chief of the Ardoch Algonquin First Nation and Allies
Dillon et al. – the appellants of the Environmental Review Tribunal case study including: Carol and Melvyn Dillon, Michael and Maureen Cassidy, Eileen Naboznak, Kathleen Corrigan, Ann German, Ken McRae, and the Council for Canadians.
Director – Director for the Ministry of the Environment
Kaye, Brian – Supervisor of the Water Resources Unit in the Eastern Regional Office of Ontario Ministry of the Environment
Lovelace, Robert– Chief of the Ardoch Algonquin First Nations and Allies
Ministry or **MOE**– the Ontario Ministry of the Environment
OMYA – OMYA (Canada) Inc., a calcium carbonate processing facility near the Town of Perth, (note: OMYA is not an acronym)
Party – an individual or group who are appellants an Environmental Review Tribunal
Tribunal – the Ontario Environmental Review Tribunal, usually referring to the Dillon et al. v. Director, Ministry of the Environment case.
Watters, Doug – Counsel for the Director, Legal Services Branch, Ministry of the Environment

Appendix C

Interview Questions

Can you tell me about.../ Could you explain/describe...?

Relating to indigenous knowledge:
- Individual's understanding/perspective of terms "indigenous knowledge," "traditional ecological knowledge," and "Algonquin knowledge."
- Describe individual's relationship to the environment.
- Describe Algonquin relationship to the environment

Relating to jurisdiction:
- What jurisdiction means for AAFNA.
- Relationship between jurisdiction and Algonquin knowledge.
- Meaning of responsibility.

Relating to the Environmental Review Tribunal:
- Individual's knowledge of and reaction to the Omya (Canada) permit to take water.
- AAFNA's interest in permit and Tay River watershed.
- AAFNA's decision to become party in ERT
- Individual's role/involvement/support in ERT.
- AAFNA's decision to withdraw from ERT.
- Since withdrawal of AAFNA, individual's involvement/interest.

Relating to identity:
- Effects of AAFNA's non-status in ERT and/or other legal proceedings.
- Effects of AAFNA's non-status in environmental impact assessments (consultations).
- Effects of AAFNA's non-status on relationship with MOE.
- Effects of AAFNA's current land claims with ANNID in ERT.
- Relationship between status (non-status) and rights (Aboriginal, inherent).

Other:
- Other things to add or explain.

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