OVERLAPS - SOME ISSUES AND SITUATIONS.

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1. Overview.

The Algonquin Nation Secretariat is a tribal council which represents the rights and interests of three Algonquin First Nation communities - Barriere Lake, Wolf Lake and Timiskaming - whose territories lie in northwestern Quebec and northeastern Ontario (see map), and are included within the lands reserved by the Royal Proclamation of 1763. We possess Aboriginal title to our traditional territories; we have never signed any land cession treaties surrendering Aboriginal title; nor has our title been extinguished by any other lawful means.

This short paper will review some of the issues and situations which the Secretariat's members have faced regarding overlaps and related matters. It isn't a comprehensive review, but it will provide some idea of the policy and research questions raised.

2. The Algonquins.

The Algonquin nation (which includes groups known historically as Nipissings) is most closely related to the Ojibway, Odawa and Potawatomi Nations, with whom Algonquins share a common language (*anishnabemowin*) and many usages and customs.

Today, there are ten Algonquin First Nation communities in Ontario and Quebec who are recognized by the Department of Indian Affairs. Timiskaming, Wolf Lake, Barriere Lake, Long Point (Winneway), Eagle Village (Kipawa), Abitibiwinni (Pikogan), Lac Simon, Grand Lac Victoria (Kitcisakik), Kitigan Zibi (Maniwaki) are located in Quebec; the Algonquins of Golden Lake First Nation are located in Ontario. Together, their population of registered members numbered 8,705 in 1994.[1]

On the western side of the territory, related Anishnabe communities are located at Nipissing, Temagami, Wagoshig (Abitibi) and Matachewan, all in Ontario.

Traditionally, Algonquin nation territory stretched from Trois Rivieres in the east, to Lake Nipissing in the west, south to the Adirondak mountains in New York State and north above Lake Abitibi. Around the fringes there were areas of common use with other nations. Over the past 200 years, however, the most common description of Algonquin territory has been the lands and waters on both sides of the Ottawa River watershed, from the present day Township of Hawkesbury in the east, to Lake Nipissing in the

[1] Canada, *Indian Register Population by Sex and Residence, 1994* (DIAND, Ottawa, 1994).

west.

Each Algonquin community has its own examples of the kinds of situations we will be describing here. However, for the purposes of this paper, we will for the most part focus on the experiences of Wolf Lake, Timiskaming, and Barriere Lake, the members of the Secretariat.

3. Overlaps.

Overlap issues often come up in the claims process, and they raise particular problems in terms of research and resolution. Since federal policy to date has not been able to respond effectively to the issues which overlaps raise, it is most often the responsibility of the First Nations themselves to resolve these matters internally.

There are a variety of different circumstances in which overlaps emerge. In this paper, we will describe our experience and some of our research findings in relation to the following:

-traditional territories - between nations, communities, and families
-provincial boundaries (Ontario/Quebec)
-treaty boundaries - Pre-Confederation Mississauga treaties; the 1850 Robinson Huron Treaty; and Treaty #9 (1905-08)
-current use territories - between nations, communities, and families

Each of these types of overlap require specific responses - in terms of both research requirements, and political management. Depending on the facts, they also bring different parties into play - sometimes neighbouring communities, sometimes other nations, sometimes provincial governments. In the sections that follow we will try to elaborate on each of these kinds of overlap by providing some examples. Needless to say, there are many other kinds of overlaps which are not mentioned here. All we can do is draw from our experience and our fact situation to provide readers with a reflection of the communities' circumstances.

Overlaps are real. They hold the potential for being divisive. But at the same time, they offer an opportunity to exercise First Nation jurisdiction and responsibility in a positive way that affirms and recognizes both Aboriginal and treaty rights. We share the information that follows in the hope that other indigenous nations and communities might find something of use to apply to their own circumstances or research strategies.

4. Traditional territories.

4.1. At contact.

Algonquin people had clear concepts of territory and tenure at first contact. These had been worked out through centuries of dialogue among the Algonquins themselves and with other indigenous nations. However, the arrival of Europeans, who brought with them their own rivalries and concepts of tenure, had a profound impact on pre-existing indigenous practises.

The French established a presence in Atlantic Canada, up the St. Lawrence, and through the Great Lakes to the interior. In the process, they entered into treaties of trade and military alliance with many tribes, including the Mi'kmaq, Algonquin, Huron, Innu, and Ojibway. The English also established trade and military alliances with - among others - the Iroquois in the south, and (following the establishment of the Hudson's Bay Company in 1610) with the Cree and Dene of James and Hudson Bay in the north.

Economic interest and military alliance with one or the other of the European powers began to impact on territorial issues. Beginning in the 1600's and until the late 1700's, diplomacy was often discarded as a means of managing territorial disputes: the Algonquins were involved in numerous wars (often with the Iroquois, but also with other nations) to protect and maintain their territory. This was largely a function of the strategic location that they occupied: the Algonquin homeland covers the Ottawa River watershed, which was a major trade corridor, linking the Upper Lakes and the 'Western Indians' with the fur trading centres of Montreal, Trois Rivieres, and Quebec. Access was therefore pivotal in determining who would benefit from (or not benefit from) the fur trade. The growth of the fur trade and the economic pressures it unleashed, created a volatile situation.

The Algonquins were very familiar with the relationship between territory, tenure and commerce at the time of European contact. In the early1600's, French writers observed that the Algonquins resident on Allumette Island charged a toll to traders (Aboriginal and French) who had to pass by the island on their way on down to Montreal:

> This island is in the great River Ottawa, and the savages who inhabit are very haughty. The Hurons and the French now staying in the Huron country, wishing to come down here, pass first through the lands of the Nipisiriens [Nipissings] and then come alongside this Island, the inhabitants of which cause them every year some trouble, by demanding toll from all the canoes of the Hurons, Ottawas and French.[2]

Annual and semi-annual councils provided an opportunity to clarify and confirm the respective territories of the neighbouring nations, and neighbouring communities within

[2] Jesuit Relations Vol. XX: p.275

each nation.

Similarly, seasonal councils (most often revolving around the feast) were used by each community to review and revise family territories within the band, based on local circumstances and needs.

> The primary social events in the Algonquin calendar were also the primary political events. Usually four times a year, at the cusp of the changing seasons, the Algonquin gathered in favoured places of rendezvous. Serious discussions followed a feast featuring the best things to eat offered by the land: indeed, the range, quality, and quantity of foods available at the feast told of the success people had on the land. After the feast, and whenever opportunity arose, people spoke of where they had been and what they had done in the past season and what they intended to do in the coming season. The objective was to let everyone know where people would be on the land and what degree of pressure would be placed on resources throughout the land. Dreams were narrated and discussed as clues of what the future held. New ways of solving common problems were discussed and passed on to those who could take advantage of another's ideas. The chief spoke last, after everyone else had their say. His task was to capture and express the diversity of views and opinions expressed by many individuals and to offer a summary that could be taken s consensus.[3]

Tenure had a number of levels, depending on the resource and the location. Generally speaking, trapping territories were exclusive to particular families, passed on from generation to generation. There were severe sanctions for poaching fur-bearers on another family's hunting grounds, as Alexander Henry noted in 1761:

> I learned that the Algonquins [...] claim all the lands on the Outouais [Ottawa], as far as Lake Nipisingue [Nipissing]; and that these lands are subdivided, between their several families, upon whom they have devolved by inheritance. I was also informed that, they are exceedingly strict, as to the rights of property, in this regard, accounting an invasion of them as an offence, sufficiently great to warrant the death of the invader.[4]

Small and big game, however, could be taken by others who were passing through if they were in need. At the same time, locations which held particular resources (for

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[3] Peter Douglas Elias, Faculty of Management, University of Lethbridge, Alberta, *Socio-Economic Profile of the Algonquins of Barriere Lake* (Lethbridge, January 1996): p. 62.

[4] Alexander Henry, *Travels and Adventures in Canada and the Indian Territories between the years 1760 and 1776, originally published in 1809* (Edmonton: M. Hurtig, 1969): p. 23.

instance, sturgeon fishing spots) were often shared collectively by a number of families or communities.[5]

In summary, traditionally there were practises in place which determined allocation of lands and resources, and mechanisms to resolve disputes when they arose. These were not completely without conflict, but they worked, so long as everyone shared the same understanding of what the rules were. The presence of Europeans introduced new influences and pressures which impacted on those rules, and created uncertainty as to just what they were.

4.2. Settlement & displacement.

The increasing influence of Europeans accelerated the reality of uncertainty. The advent of settlement in Algonquin territory was not preceded by treaty making as in other parts of Canada. As a result, settler concepts of territory and tenure were imposed on the land without any reference to the prior rights or laws of the Algonquins and other tribes. Large numbers of Aboriginal people were displaced by settlers, and this put pressure on traditional boundaries and arrangements.

Beginning in the late 1700's, but especially during the 19th century, unregulated settlement and exploitation on the north and south shores of the St. Lawrence and up the Ottawa River disrupted the inter-tribal arrangements which had been concluded in previous generations. As early as the 1790's, the Algonquins and Nipissings were petitioning about encroachments (by Europeans and other indigenous nations), and asserting their ownership of their territory, which was defined by them at that time as covering both sides of the Ottawa River watershed, from the Long Sault (in the present day Township of Hawkesbury) up to Lake Nipissing. They obtained formal testimony from the Iroquois corroborating their claim to ownership of this territory.[6]

But the Crown took no measures to restrict illegal encroachment, and inter-tribal disputes regarding territory and overlaps began to multiply. During the 1820's and 1830's, there were a series of conflicts between the Algonquins and adjacent tribes over territory: the Abenaki to the east[7], the Iroquois to the south-east[8], and the Mississauga to the south-west.[9] Crown officials understood that the hunting grounds of the various

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[5] Wolf Lake and Timiskaming Land Use Studies, 1996.

[6] 7 September 1838: NAC RG10 Vol.96: pp. 39539-541, Reels C-11,469-470

[7] 27 August, 1829: NAC RG8 Vol.268: pp. 554-556.

[8] 17 August, 1827: NAC RG10 Vol.20: pp. 14,166-68, Reel C-11,004.

[9] 22 July, 1827: NAC RG10 Vol.20: pp. 14,130-14,132, Reel C-11,004.

tribes were originally defined among themselves, "with the boundary of each perfectly understood by all", and acknowledged that "it would be preferable to have the matter dealt with by their custom".[10] They also admitted that these disputes were due to settler encroachment, which "compelled those to hunt elsewhere against their laws and customs".[11] However, no serious efforts were made to protect these Aboriginal lands from settlement and timber exploitation.

For the most part, diplomacy had come to replace communal warfare as a means of resolving these conflicts (although there were cases of violence between individuals involved in disputes). Normally, these overlap situations were managed by the indigenous nations themselves, often at inter-tribal councils hosted by a nation who was not directly involved in the dispute.[12] Oral history, current practise and evidence of prior agreements (in the form of wampum[13]) were introduced as evidence at these councils. In some cases representatives of the Crown were invited to attend and observe, and informed of the result of these deliberations, but it was understood that they were matters internal to the First Nations themselves. The Crown's policy of non-interference was a reflection of the terms of the Royal Proclamation of 1763, which recognized Aboriginal title in lands and resources.

However, the waves of immigration that followed the American Wars and the Irish Potato Famine began to change the balance, and the recognition of the reality of Aboriginal title faded. By at least by 1827, government officials were asserting that only they authority to resolve inter-tribal territorial disputes, and began to intervene more directly.[14] Certain officials also began to question to veracity of wampum and oral history as evidence of prior inter-tribal agreements, and to suggest that the provisions of the Royal Proclamation of 1763 did not protect the right of individual tribes to their territories, but only reserved the Indian territory generally, to be used freely by all tribes.[15]

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[10] 13 November 1829: NAC RG8 Vol.268: pp. 790-793.

[11] 23 February 1829: NAC RG8 Vol.268: pp. 85-86.

[12] For example, a Council was convened at Kahnawake on 13 March 1828 to resolve a territorial dispute between the Mississauga and the Algonquin (NAC RG10 Vol.791: pp.7255-7256, Reel C-13,499). Another Council was held at Kahnawake in July 1830 regarding a dispute between the Abenaki and the Algonquins (NAC RG10 Vol.25: pp.26,184-26,190, Reel C-11,006).

[13] Record of Council between Algonquins, Hurons & Abenakis and Crown at Trois Rivieres, 26 October, 1829: NAC RG10 Vol.6750 File 420-10B: Quebec Game Laws 1932-1936.

[14] Minutes of Council between DC Napier and Caughnawaga Iroquois, 22 July, 1827: NAC RG10 Vol.20: pp.14,130-14,132 Reel C-11,004.

[15] Couper to Duchesnay, 1 September, 1829: NAC RG10 Vol.6750 File 420-10B: Quebec Game Laws 1932-1936.

This was the beginning of a major change in Crown policy and the political realities facing the First Nations: in future, the Crown would discount Aboriginal laws, oral history, and practises related to tenure and interest in land, and it would pay less and less attention to their territorial interests in the allocation of resources and the exercise of its responsibilities.

It was politically expedient for the Crown to take this approach to policy - even though it was contrary to the terms of the Royal Proclamation of 1763 - because of settler economic interests, and because First Nations were no longer regarded as a serious military threat.

With the erosion of First Nation control over the land, and the intrusion of settlers and their governments, traditional laws relating to territory - and inter-tribal mechanisms for resolving overlap issues - were seriously undermined.

All of this has led to a situation where there are many different overlap situations facing communities. Many of them are difficult to resolve, not only because they sometimes pose tough research questions, but also because other governments - and many First Nation communities - have lost the capacity to manage them effectively.

5. Provincial boundaries.

Inter-provincial boundaries raise their own complexities. When the Ontario-Quebec border was established, the Ottawa River and Lake Timiskaming were used to define the boundary. The territories of the Algonquins of Timiskaming and Wolf Lake (as well as other Algonquin Bands) lie on both sides of these bodies of water. As a result, their traditional territories were divided by the provincial border.

5.1. Some research issues.

This situation poses particular problems for the researcher, particularly since Indian Affairs administration, like the Algonquins themselves, did not conform to the boundary. The communities in the south of the territory (Kipawa, Wolf Lake) often received services through Mattawa, Ontario, and were ostensibly the responsibility of the resident Agent at Sturgeon Falls, Ontario (near North Bay on Lake Nipissing). On the other hand, the Algonquins of Abitibi, many of whom "lived" in Ontario, were administered through the North Temiskaming Agency at the head of Lake Timiskaming, in Quebec.

There are other examples of this inter-provincial ambiguity. The relocation of some members of the Oka Band to Gibson (Watha) in Ontario during the late 1800's was partially paid for out the Indians of Quebec Fund, since they were considered "Quebec

Indians". On the same reasoning, throughout the late 1800's, relief and agricultural assistance provided to the Algonquins of Golden Lake (in Ontario) were also paid out of the Indians of Quebec Fund, because they too were considered "Quebec Indians".

What this means in practical terms is that the researcher must be prepared to sift through federal and provincial government records for both Ontario and Quebec, in order to ensure that relevant material is captured. Essentially, it doubles the work.

5.2. Land use issues.

Up until the early 1900's, the inter-provincial border was only a line on a map, and it did not seriously affect community land use. However, as development moved north and each province began to assert its authority more aggressively, this changed. From the late 1800's, both Quebec and Ontario began to exploit the northern reaches of the Ottawa watershed and the Abitibi-Temiscamingue region generally. They also began to regulate harvesting activities more stringently. These developments adversely affected Algonquin economy, occupancy patterns, and society.

By 1907, Ontario was formally distinguishing between "resident" and "non-resident" fishermen in its regulations.[16] Although many Algonquins of Timiskaming, Wolf Lake and neighbouring communities had used and occupied lands in both Ontario and Quebec from time out of mind, they were considered "non-residents" by the Ontario government.

In 1909, the government of Ontario made illegal to act as a guide unless licenced and approved by the local game warden.[17] These game wardens did not give priority to "Quebec Indians" when recommending or issuing licences to guide, and in some instances simply refused to issue them. This was the case in 1928, when the Indian Agent at North Temiskaming reported that "[...] some of our Quebec Indians who have been employed as guides in Temagami District Ont. for many years are not permitted to go back to their work this year because the game warden will not sell them their licence".[18]

As increasing numbers of Aboriginal people from Quebec were charged by Ontario officials for harvesting in that province, Frank Pedley of Indian Affairs wrote Ontario's Minister of Fish & Game to ask for special consideration, explaining that, "Of course, Indians have their own peculiar way of regarding such matters, and are unable to

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[16] Ontario O-in-C of 3 May 1907: NAC RG10 Vol.6743 File 420-8 Pt.1.

[17] Ontario O-in-C, 20 March, 1909: NAC RG10 Vol.6743 File 420-8 Pt.1.

[18] Caza to McLean, 13 July 1928: NAC RG10 Vol.6750 File 420-10A, Reel C-8,106.

appreciate distinctions between provincial boundaries as others do [...]".[19] His request was declined.

Although it held responsibility for "Indians" and "lands reserved for Indians" by virtue of s.91(24) of the BNA Act, 1867, the federal government did precious little to protect or maintain Algonquin connection with the land in Ontario. Instead, it deferred to the province in matters related to land within its boundaries. This worked to detriment of the Algonquins.

A complicating factor in all of this was that the laws, seasons and limits in each province were different, and although officials rarely took the trouble to inform the Algonquins of the regulations, they had no qualms about prosecuting them. John Angus Wabie, a member of the Timiskaming Band who had purchased furs from other Algonquins in Quebec and then went over to the Ontario side to sell them, was prosecuted in 1912[20] on the basis that "it was not permissible to have such furs in possession in the Province at that time". He had $400.00 in furs confiscated, a small fortune at the time.[21] His status as a 'non-resident' was central to his prosecution.

By 1922, the Ontario government was taking the position that only Indians "permanently resident in the province" could avail themselves of the harvesting exemptions applying to Indians.[22] This meant that when a closed season was declared on beaver in 1923, and "Ontario Indians" were granted exemptions (which were meagre and rigorous nonetheless),Quebec Algonquins whose territory lay in Ontario were effectively prohibited from this activity altogether.[23]

Two decades later, in 1942, the government of Ontario was simply refusing to allow "Quebec Indians" to trap in Ontario, without qualification,[24] and it continued to prosecute them vigorously when it was able to track them down.[25] Things came to a head in 1944-

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[19] Pedley to Tinsley, 14 November, 1909: NAC RG10 Vol.6743 File 420-8 Pt.1.

[20] 11 July, 1912: NAC RG10 Vol.6750 File 420-10: Quebec Game Laws 1895-1926; Reel C-8,106.

[21] *Ibid.*, 8 October, 1912.

[22] JD McLean to Ontario Game & Fisheries, 22 March 1922: NAC RG10 Vol.6747 File 420-8X Pt.1, Reel C-8104.

[23] Bulletin, 1923: NAC RG10 Vol.6745 File 420-8 Pt.3, Reel C-8103. (It should also be noted that Aboriginal people resident in Ontario who traditionally harvested in Quebec were facing the same problems during this period - see NAC RG10 Vol.6750 File 420-10A: Quebec Game Laws 1926-1932)

[24] Hugh Conn to DJ Allan, 1 February 1942: NAC RG10 Vol.6751 File 420-10X Pt.5, Reel C-8107.

[25] Indian Affairs to RCMP, 10 December 1943: NAC RG10 Vol.6750 File 420-10 Vol.5.

48, when Ontario introduced and refined the registered trapline system. Ontario First Nations themselves found that the province was using the introduction of the trapline system to appropriate their territories and replace them with whites.[26] Under these circumstances, it was obvious that "Quebec Indians" would have even less of a chance of obtaining recognition of their rights to family trapping grounds in Ontario.

Many families whose territories were in Ontario lost their traplines and their livelihood during this period, but it did not totally eradicate continuing use and occupation of lands on the other side of the border. Land use studies conducted at Timiskaming and Wolf Lake in 1996/97 confirm that many people continued to harvest big game and furs in Ontario throughout the 1940's and 1950's, in spite of prejudicial laws and aggressive enforcement.

But they had to do it covertly, and be prepared to face prosecution if they were caught. They would travel at night, only make fires if completely necessary, and used rafts made of logs to cross the Ottawa River instead of canoes, since the rafts could be taken apart once they reached the other side, leaving less evidence for the game wardens. A number of different methods were developed to bring furs back into Quebec and sell them on the market, including body packs of beaver skins.[27]

It also bears mentioning that First Nations resident in Ontario whose traditional lands extended into Quebec also faced the same problems in their efforts to maintain their connection with their land base, except in reverse. For them, it was the government of Quebec who pursued a policy of restricting and eliminating their continued use and occupation of traditional lands.

5.3. Conclusions.

Despite Ontario's efforts to eliminate use and occupation of traditional lands by "Quebec" Algonquins, community members have continued to do so wherever possible. The current generation of harvesters continue to hunt and fish at locations which the communities have traditionally used in Ontario.

However, such use has been severely curtailed as a direct result of Ontario's long-standing policy of non-recognition of rights. If one compares traditional community territories from 1867 to those of today, it is obvious that there has been a significant shrinkage.

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[26] Memo from Hugh Conn, 19 April, 1944: NAC RG10 Vol.6747 File 420-8X Pt.3, Reel C-8104.

[27] Wolf Lake and Timiskaming Land Use Studies, 1996.

From a researcher's point of view, it is important to consider this shrinkage from an objective point of view. Yes, current use does not cover the full extent of the traditional territory. But the facts demonstrate that this was not 'willful abandonment' - in other words, it was not by free choice, but because of prejudicial actions by the government of Ontario, which represent an unjustified infringement on Algonquin Aboriginal title and the exercise of Aboriginal rights. The facts also demonstrate that despite Ontario's best efforts, Algonquin people have continued to make use of their traditional lands in that province.

All of this - the good and the bad - must be documented to establish the facts necessary to prove continuing Algonquin Aboriginal title on the Ontario side. The researcher's challenge in this context is to survey all of the available sources to ensure that the communities have access to all of the relevant facts - so that defensible research conclusions can be reached, and informed political decisions made.

6. Treaty boundaries.

As mentioned earlier, the Algonquins of Timiskaming, Wolf Lake and Barriere Lake are not party to any land cession treaties, and their Aboriginal title has not been extinguished by any other means. However they have been impacted by a number of treaties that were concluded with adjacent tribes. Because of Quebec's policy of refusing to allow treaty-making with Aboriginal peoples within its borders, each of these treaties covers territory only in Ontario, which further complicates the situation. All of this not only affects not only current use, but also research strategies.

6.1. Mississauga treaties.

In 1819 the Crown entered into a treaty with the Mississauga which purported to surrender title to lands which formed part of the Algonquin nation's territory on the south side of the Ottawa River. The Mississauga received annuities from this sale. Meanwhile, the Algonquins were experiencing severe economic and social dislocation because of the rapid spread of settlement along the southern reaches of the Ottawa River. Throughout the 1830's and 1840's, the Algonquins brought this to the attention of the Crown, and sought compensation.[28] Their petitions received no substantive answer, and this remains as a claim to be pursued.

6.2. Robinson Huron Treaty.

[28] NAC RG10 Vol.96: pp.39,550-551 and following, Reels C-11,469-470. Also NAC RG10 Vol.69: pp. 64,932-64,938, Reels C-11,023-11,024.

In 1850, the Robinson Huron Treaty was concluded with the Anishnabe of Lake Huron and Georgian Bay. There are two neighbouring First Nations in Ontario who are party to this treaty: Temagami and Nipissing. The description of territory to be covered by the treaty was as follows:

> [...] the eastern and northern shores of Lake Huron from Penetanguishene to Sault Ste. Marie, together with the islands in the said lakes opposite to the shores thereof, and inland to the height of land which separates the territory covered by the charter of the Honourable Hudson's Bay Company from Canada.[29]

This description does not include the lands east of Lake Nipissing or the Ottawa valley watershed. In the 1870's, Crown officials acknowledged that Aboriginal title to this area had not been dealt with, and proposed that the Mississauga be approached for a surrender (despite the fact that it was completely outside of their traditional territory).[30]

In 1881 the Deputy Superintendent General for Indian Affairs, L. Vankoughnet, advised Prime Minister John A. MacDonald (who was also Minister responsible for Indian Affairs) that the Robinson Huron Treaty did not cover the lands east of Lake Nipissing to the Ottawa River, and suggested that steps be taken to obtain a surrender, since these lands were being settled.[31] A map produced by the department around this time showed the boundary of the Robinson Huron Treaty curving around the eastern end of Lake Nipissing and following the Sturgeon River to the height of land.[32]

However, nothing was done, and although the issue would come up from time to time, it was not until Treaty #9 in the years following 1905 that Canada would address the matter of title in that area.[33]

By 1939, Indian Affairs officials still took the position that the Robinson Huron Treaty's

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[29] Canada, *Indian Treaties and Surrenders*, Vol.1 (reprinted by Fifth House Publishers, Saskatoon, 1992): p.149.

[30] Report from W. Spragge, 19 May 1870: NAC RG10 Vol.2328 File 67,071 Pt.1, Reel C-11,202.

[31] 11 March 1881: NAC RG10 Vol.2328 File 67,071 Pt.1, Reel C-11,202.

[32] NAC NMC Acc 789073/78 Item 2041; NAC RG10 Vol.2832 File 170,073-1. Cited in James Morrison, *The Robinson Treaties of 1850: A Case Study* (report prepared for the Royal Commission on Aboriginal Peoples), 31 March 1993: pp. 144-145.

[33] Memo from McRea, 3 June 1901: NAC RG10 Vol.3033 File 235,225 Pt.1, Reel C-11,314.

boundaries did not extend east of Lake Nipissing.[34] In fact, as late as 1966, and Indian Affairs treaty map still showed most of the territory between the east end of Lake Nipissing and the Ottawa River as unsurrendered.[35] But, mysteriously, in 1977, a revised map of treaty boundaries prepared by Indian Affairs had expanded the boundaries of the Robinson Huron Treaty right up to the Ottawa River, and the unsurrendered portion of land had disappeared.[36]
We have found no evidence that the Crown consulted with the Anishnabe signatories to the Robinson Huron Treaty, or the Algonquins, regarding its changing version of the treaty boundary. However, it has a profound effect on claims development and research requirements, since one of the tests of the federal government's Comprehensive Claims policy is that the "claimant group" must prove that their title has not been extinguished by treaty.

The 'overlap' between Algonquin unceded territory, covered by Aboriginal title, and the purported boundaries of the Robinson Huron Treaty requires that the communities must fully research the background and implementation of the Robinson Huron Treaty and assess its impact.

6.3. Treaty #9.

The conclusion of Treaty #9, which purportedly covers the territory north of the height of land separating Hudson's Bay from the Great Lakes, poses problems similar to those raised by the Robinson Huron Treaty, but further north. It covers a portion of the traditional and current use territory of the Timiskaming Band.

Initially, the federal government conceived of a treaty which would cover all of the lands in Ontario and Quebec north of the height of land and bounded by the waters flowing into James Bay & Hudson Bay. There were also thoughts of treating it as an adhesion to the Robinson Huron Treaty, but this was ruled out as being too generous.[37]

In 1903, as the federal government began to develop its approach to what would become Treaty #9, officials acknowledged that the Algonquins of Barriere Lake, Grassy Lake (Wolf Lake), Mattawa, Kipawa and Long Point (among others) had an outstanding interest in the territory which had not been dealt with.[38] However, later that year a policy

[34] Marleau to MacInnes, 9 May 1939: NAC RG10 Vol.6747 File 420-8X Pt.2.

[35] NAC NMC, Canada, Indian Treaties (1966).

[36] DIAND, Revised map: Indian Treaties, 1977.

[37] Indian Affairs to Clifford Sifton, 17 August 1903: NAC RG10 Vol.3033 File 235,225 Pt.1, Reel C-11,314.

[38] McRea to Pedley, 1 April 1903: NAC RG10 Vol.3033 File 235,225 Pt.1, Reel C-11,314.

decision was made that there should be no treaty with the Quebec Bands. Instead of fulfilling its responsibilities under s.91(24) of the *BNA Act, 1867*, Canada deferred to the position of the government of Quebec, which refused to recognize Aboriginal title:

> So far as the Indians of Quebec are concerned, it is suggested that no treaty should be made with them or that any Quebec Indians living temporarily in Ontario should be included in the Ontario treaty, but we should endeavour to obtain an understanding from the Province of Quebec that as claims are made by the outlying tribes, [...] the Province should be willing to set apart at proper times suitable reserves. The Indian title in the Province of Quebec has never been recognized or surrendered as in the Province of Ontario, and, I presume, that it is not proposed to change the policy in that regard.[39]

Regardless of lands within Quebec, the final boundaries of Treaty #9 purport to include a portion of the traditional and current use territory of the Timiskaming Band which lies in Ontario and to which they still possess Aboriginal title. As with the Robinson Huron Treaty, this requires focussed research into the making of the treaty, its implementation, and its effect on land and resource use.

6.4. Treaty/non-treaty.

Earlier, we described how the government of Ontario began to characterize many Algonquins as being "non-resident", and therefore without Aboriginal rights. During World War I, Ontario also began to distinguish between the harvesting rights of "treaty" and "non-treaty" Indians. "Treaty" Indians were allowed to harvest without purchasing a licence, and to harvest during closed season (although with many restrictions), so long as they could provide a treaty certificate.

"Non-treaty" Indians, however, were regarded as "no different than whites", and expected to purchase licences and conform to the regulations for sports hunters and white trappers.[40] During closed season they did not enjoy the same exemptions applied to "treaty" Indians. The Algonquins of Golden Lake and of western Quebec, not being party to any treaty, found their livelihoods in further jeopardy. Doubly so for the Quebec Algonquins, since they were now considered both "non-treaty" and "non-residents".

As a result, a number of members of the Timiskaming Band whose territories lay in Ontario were faced with a difficult choice: lose whatever recognition they had of their

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[39] Memo to Clifford Sifton, 17 August 1903: NAC RG10 Vol.3033 File 235,225 Pt.1, Reel C-11,314.

[40] Bacon to McLean, 6 March 1917: NAC RG10 Vol.6743 File 420-8 Pt.3. This was a departure in Ontario policy, since from the late 1800's, special exemptions had applied to both Treaty and Aboriginal title lands.

rights in that province, or else transfer membership to neighbouring bands on the Ontario side. This had a demonstrable effect on the membership rolls of the Timiskaming Band in the period following the conclusion of Treaty #9.

6.5. Conclusion.

Much more could be said on the relationship between existing treaties and Algonquin Aboriginal title. Crown treaty policy has consistently ignored the rights and interests of the Algonquins, and in the process, it has created a situation where Algonquin Aboriginal title overlaps with treaty areas; where title has supposedly been extinguished by other First Nations, without the participation or consent of the Algonquins. This poses challenges for the researcher and for policy generally.

7. Community boundaries & current use.

7.1. Federal Policy.

Many communities have undertaken, or are planning to undertake current use & occupancy mapping, to document the use of their territory within living memory. This kind of research is important in proving Aboriginal title, since the federal Comprehensive Claims policy requires that the "claimant group" prove continuing use and occupancy of its traditional lands. The issue of overlap has come up in this context because the same federal policy requires that such use and occupancy was to the exclusion of other Aboriginal societies. This has turned overlaps into a zero-sum game and proven quite divisive among the First Nations themselves in many cases.

The federal government also expresses concern about overlaps because of its policy requirement for the extinguishment of Aboriginal rights: Canada cannot be certain that it has obtained a full and total surrender of the Aboriginal interest if there are other parties out there who can demonstrate title. However, there are always exceptions to the rule: there are a number of instances where Canada has proceeded to finalize land claim agreements with some nations notwithstanding assertions of legal interest by adjacent nations (ie., the Denesuline of northern Saskatchewan & Manitoba and the Tungavit Federation of Nunavut claim; and, more recently, the Nisga'a and the some of their neighbours).

Many of the problems communities now face regarding boundaries and interests in land are a result of federal policy requirements which often serve only to polarize discussions between communities or nations.

7.2. Delgamuukw and joint exclusive use.

However, the landscape has changed in light of the Supreme Court of Canada's December 11, 1997 ruling in *Delgamuukw*. The Court found - quite logically - that social relations between nations and communities inevitably result in situations of overlap and shared interest, which can be a reflection of joint ownership:

> [...] the requirement of exclusive occupancy and the possibility of joint title could be reconciled by recognizing that joint title could arise from shared exclusivity. The meaning of shared exclusivity is well-known to the common law. Exclusive possession is the right to exclude others, shared exclusive possession is the right to exclude others except those with whom possession is shared. There clearly may be cases in which two aboriginal nations lived on a particular piece of land and recognized each other's entitlement to that land but nobody else's. [at para. 158]

This is consistent with aspects of traditional Algonquin concepts of tenure and ownership. There were different levels of tenure, based on the nature of the land or the resource in question, and the practises and relations that had evolved within and between communities and nations. The Supreme Court's conception of "joint exclusive use" is an indication that settler institutions are beginning to get a better grasp of indigenous laws and practises, but it does not define the full range of indigenous concepts of tenure or interest in land. For each nation and each First Nation community they are different, reflecting their history and circumstances.

7.3. Some research issues.

(i) *Delgamuukw* changes aspects of the research strategy for use and occupancy.[41] Not only must one gather evidence of exclusive use; one must also anticipate and address the potential for shared or joint exclusive use. This leads to the question of coordination and/or cooperation between communities or nations. From the researcher's point of view, it is important to ensure that projects are designed to maintain a consistent methodology and standard of data collection. Otherwise, two adjacent communities could each have their own land use studies, but they cannot be compared or measured against each other because of significant differences in the way they were carried out. This could end up leading to more conflict, instead of facilitating resolution.

(ii) It is essential to maintain a high standard of rigour in collecting and interpreting land use and occupancy data. This is because it will inevitably be challenged - whether by provincial governments and the federal government over current use, or by other First

[41] The Supreme Court of Canada's decision in *Delgamuukw* impacts on territorial research on many levels - for instance, the matter of evidence related to continuity of use over time and dislocation. Here we focus only on overlap and joint exclusivity.

Nation communities or nations who assert an interest in the lands in question. The best rule of thumb is to meet the standards that would be required in court - that way, you can be certain that the results will withstand harsh scrutiny. You want a result that is reliable, defensible, and easily explained.

(iii) Attitude and approach are key in terms of dealing with neighbouring communities or nations where an overlap may exist. Some of the essential elements include: courtesy, respect, diplomacy, good faith, pursuit of the facts (and acceptance of the facts), compromise, and a belief in First Nation authority and responsibility as owners of the land.

7.4. Exercise of First Nation jurisdiction.

We would like to close with an example of successful management of an overlap situation - one which embodies many of the kinds of overlaps we have been discussing: provincial boundaries, treaty boundaries, and boundaries between communities and nations.

In the 1970's, the Teme-agama Anishnabai launched a court action asserting Aboriginal rights within their territory. As a part of this process, they realized that they would have to seek clarification of their traditional boundaries with adjacent communities. This was done through a series of internal discussions and community meetings, with a focus on cooperation, and a recognition that First Nations themselves possess the authority to determine these matters.

These discussions involved the neighbouring First Nations of Nipissing (Robinson Huron Treaty), Matachewan, Mattagami (Treaty #9), and Timiskaming (Saugeeng). The result was a large map outlining the respective territories of each, along with an indenture of agreement, which were ratified in September 1978:

> We the Chiefs and Councils of the Indian nations or tribes whose ancestral lands border upon the ancestral lands of the Teme-agama Anishnabai, on behalf of ourselves and on behalf of all other members of our respective nations or tribes, after due investigation, consultation with our elders and consideration by our peoples, do hereby acknowledge and confirm that the boundary of the ancestral lands of the Teme-agama Anishnabai is as delineated, designated and described upon the accompanying plan.[42]

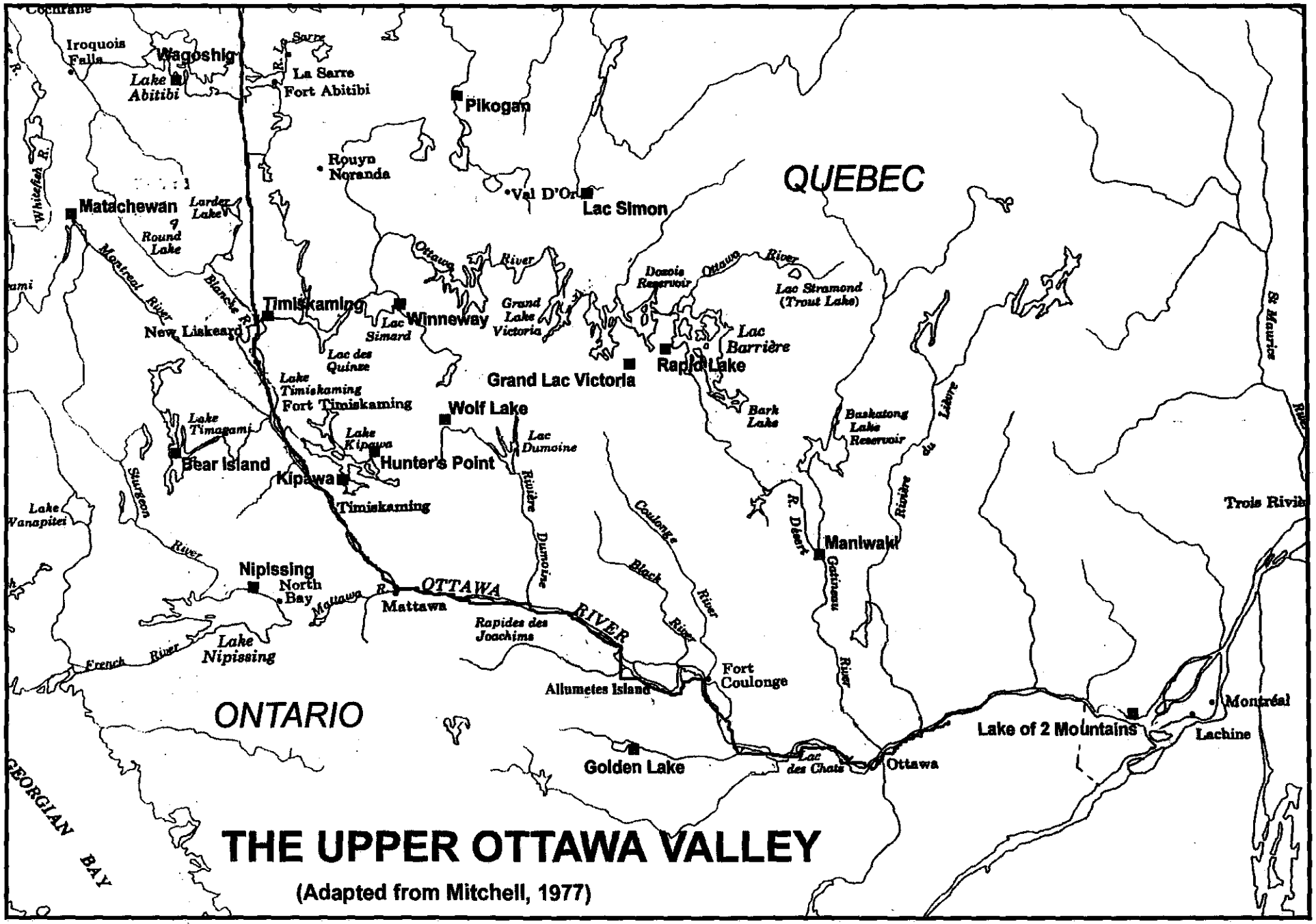
This agreement was conceived and drafted in the shadow of *Baker Lake*, and Canada's

[42] Indenture of Accord between the Mattawagama, Nipissing, Saugeeng [Timiskaming], Matachewan, Teme-agama Anishnabai First Nations, 7 September, 1978.

policy requirement proof of exclusive use. It probably would have evolved differently in the shadow of *Delgamuukw*. Nonetheless, it represents an example of the positive exercise of First Nation jurisdiction, responsibility, and mutual support -without the involvement or interference of settler governments.

8. Conclusions.

Overlap issues are complex. Because traditional mechanisms for addressing these matters have been undermined by federal and provincial laws and policies, many communities faced with a double problem: first, to identify and document situations of overlap, and second, to resolve overlap issues responsibly and positively with their neighbours. In the short time available, we could not hope to cover these issues comprehensively. However, we hope that others may find something that they can take back and apply to their own circumstances.



THE UPPER OTTAWA VALLEY

(Adapted from Mitchell, 1977)