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RESEARCH ARTICLE/ÉTUDE ORIGINALE

Occupancy, Land Rights and the Algonquin Anishinaabeg

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Abstract

This article is about Indigenous territorial title and land rights, and specifically those of the Algonquin Anishinaabeg Nation. In 1983, the Algonquins of Pikwàkanagàn, residing in the province of Ontario, petitioned the Crown to recognize Algonquin territorial title and rights to 36,000 square kilometres of their natal homelands in the Ottawa River watershed. With negotiations beginning in the early 1990s, an Agreement-in-Principle was developed and ratified in 2016, the penultimate step to the largest modern treaty in Ontario's history. In this article, we examine the argument for moral rights to territory, not in terms of the Canadian or international legal order, nor even through examining the documents and voice of the Algonquin Anishinaabeg, but through the lens of an argument that has been advanced as the basis of the international territorial rights of states. We argue that the justifications for state rights territory—grounded in the considerations that ensue from an analysis of occupancy groups—provides a stronger claim to territorial jurisdiction and title in the case of the Algonquin Anishinaabeg Nation than the competing claim by the Canadian state.

Résumé

Cet article explore l'idée des droits d'occupation, tels qu'ils ont été élaborés dans la documentation sur le territoire de l'État, pour les revendications territoriales autochtones, en se concentrant spécifiquement sur la revendication territoriale du peuple algonquin (en Ontario). Il analyse le fondement de l'occupation de la revendication et ses limites, tant en termes de portée géographique que de pouvoirs. Il soutient que cet argument, qui a été utilisé pour justifier le droit de l'État au territoire, s'applique également aux peuples autochtones, et prend comme exemple la situation et les revendications des Algonquins Ashinaabeg. Si cet argument est valide, il suggère que l'autorité légitime de l'État sur le territoire exige qu'il reconnaisse les droits d'occupation (des terres) des Autochtones.

Keywords: occupancy; land rights; indigenous rights; Algonquin; territory

Mots-clés : occupation; droits fonciers; droits ancestraux autochtones; Algonquins; territoire

This article is about Indigenous territorial title and land rights, and specifically those of the Algonquin peoples of Ontario. It examines the argument for moral rights to land, not in terms of the Canadian or international legal order, nor even through examining the documents and voice of the Algonquin Anishinaabeg, but through the lens of an argument that has been advanced as the basis of the international territorial rights of states. It argues that these rights—connected to a foundational moral right of occupancy—apply more securely to Indigenous peoples than to most states, and it uses the position and claims of the Algonquin Anishinaabeg as an illustrative example. Justifying Indigenous land rights through the moral argument used to justify state territorial rights strengthens Indigenous land rights by suggesting an additional argument to ground it. In addition, by deploying an argument used by states, including settler states, to justify their claims to territory, the article also shows that (1) denial of such rights to Indigenous peoples who can mount similar arguments is incoherent at best and egregiously unjust at worst, and further (2) settler states must themselves reconceive the legitimacy of their claims to territory.

The article proceeds in four parts. The first part briefly sketches the basis of the Algonquins of Pikwàkanagàn modern treaty, as well as the legal, political and institutional context and the history of resistance to it. The article then turns to sketch an argument that has been used to justify state's authority over territory, including resource rights, and applies this to the case of the Algonquins of Pikwàkanagàn. This argument makes use of the idea of occupancy rights to make a claim that is specific to a geographical area, and we sketch that argument to help render that claim generalizable. The idea behind these rights, which are an important element of the argument for international rights of states, is that there is a basic interest that people have in stability of residence, in having an entitlement to a place that can be regarded as home, from which they cannot be expelled and which they have some control over. This place, we will argue, is not only the locus of their plans, projects and relationships but also historically rooted to the group's identity as a people of a certain kind and inextricably connected to their relationship with each other and with a material and spiritual way of life.

We then pose and try to answer two very difficult questions. First, what kind of rights are attached to this claim? What sorts of claims of jurisdiction or dominion or exclusion does the group hold over the land? This is a scope question, in the sense that we need to know what a land claim involves, and we would expect that the bundle of rights, liberties, powers and immunities that are involved in a claim to territory will depend in part on the justificatory argument for the right in the first place. Second, what is the geographical scope of the claim? This, too, is a scope question, insofar as we need to know the limits of the claim. In addition to the powers and claim-rights and liberties that are involved in having a right over territory, discussed above, there is, as well, the geographical extension of the claim. These two are interrelated insofar as they bear on the underlying question that needs to be addressed in the present, in the context of unjust acquisition—namely, what kinds of entitlements, if any, do settlers or descendants of settlers have in these lands?

To approach these questions, we will argue directly for the idea of occupancy rights and then apply them to the specific case of the Algonquin land claim, giving

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a broad outline of the ways in which the normative considerations apply to the case. This is not a straightforward application of a theory that we presume to be correct to a specific case; part of the argument is to analyze the normative considerations that are not accurately theorized in the current literature but which are revealed by an analysis of the normative contours of such a case, which may, of course, involve a rethinking of the overall argument. The article then concludes with some reflections on Algonquin land rights and the broader question of state legitimacy, and particularly legitimacy over the geographical domain (land) that the state claims.

The Algonquins of Pikwàkanagàn Land Claim and Agreement-in-Principle

In 2016, the Algonquins of Ontario and the Crown ratified an Agreement-in-Principle (AIP), the penultimate step toward a modern treaty. The AIP came almost 25 years since the Crown recognized the claim and official negotiations began and nearly 300 years since the Algonquin Anishinaabeg Nation first formally notified the Crown of its claim to title to Algonquin territory. For much of this history, the Crown repudiated Algonquin assertions, variously arguing that the Algonquin Nation had extinguished its title or that it never held title. Nevertheless, the Algonquin people in the province of Ontario persisted in pursuit of their claim, which was accepted for negotiation with the federal and provincial Crowns in the early 1990s.

As we will argue, when viewed against the broader international order and its attendant norms of state territorial rights, the foundations of the Algonquin claim may not appear altogether self-evident or cogent. But when read alongside the justification for state rights over territory—which underwrite international norms—the case for Indigenous territorial rights appears comparatively stronger. Place-related moral rights will justify the state's authority over territory in some places; but, we argue, these same place-based moral rights also justify, usually even more strongly, Indigenous authority over their territory. If this is so, then we need to reconceptualize the relationship between the two, so that state authority over territory is consistent with Indigenous authority, in the sense that only when there is a rightful relationship between these two can the settler state be in a rightful relationship with its territory.

The history behind the first modern treaty in Ontario presents a unique opportunity to extend the insights of the theory to the specific case of the Algonquins of Ontario. The contemporary claim was initiated in March 1983 when the Algonquins of Pikwàkanagàn petitioned the Crown to recognize Algonquin territorial title and rights to the Ottawa River watershed. The 1983 petition followed a decade of considerable shifts in the contours of Crown–Indigenous relations. In 1973, the Supreme Court of Canada (SCC) decision in *Calder v. Attorney-General of British Columbia* recognized the partial existence of Aboriginal title to land—something the Crown had long denied. The decision in *Calder* was a noticeable reversal from the long-standing position in *St. Catharine's Milling & Lumber Company v. The Queen* from 1888, which held that Aboriginal title existed solely at the pleasure of the Crown. In *St. Catharine's*, the court held that Indigenous legal interests in land was merely a "personal and usufructuary right, dependent upon the good will of the Sovereign." But, as Kent McNeil has argued, *St. Catharine's*

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was a flawed precedent. *Calder* brought a greater understanding of Indigenous law and society, properly addressing the court's mind to the facts of Indigenous legal orders around territorial title, rather than prejudiced assumptions of fact that the court relied upon in *St. Catharine's* (McNeil, 2019: 125).

In response to the landmark decision in *Calder*, the federal government established the "comprehensive land claims policy" and opened a formal institutional framework for constructing modern treaties between the Crown and Indigenous nations (Alcantara, 2013; Coulthard, 2014). The SCC's *Calder* decision came on January 31, 1973, and on August 8 of that same year, then Minister of Indian Affairs Jean Chrétien announced that the Government of Canada was adopting a policy of negotiating land claims with Indigenous nations. Chrétien explained: "These claims come from groups of Indian people who have not entered into Treaty relationship with the Crown. . . . These claims relate to the loss of traditional use and occupancy of lands in certain parts of Canada where Indian title was never extinguished by treaty or superseded by law" (Chrétien, 1973: 3). At the time, the federal government released its *Statement on Claims of Indian and Inuit People: A Federal Native Claims Policy*, and by July 1974 it had established the Office of Native Claims. This turning point ushered in a number of outstanding Indigenous claims against the state. As the Government of Canada later reported, "Following the issuance of the 1973 statement there was a marked increase in claims activities. Research funded by the federal government, and in some cases by non-government organizations and band councils, was accelerated" (Canada, 1993: 13).

It was within this new policy milieu that the Algonquin Anishinaabeg Nation undertook exploratory work regarding their own relationship with the Crown and Algonquin territorial jurisdiction. In 1974, Chief Dan Tennisco of the Algonquins of Pikwàkanagàn approached the Union of Ontario Indians (UOI) for legal solutions to remove a railway right-of-way that had previously expropriated Algonquin reserve land at Golden Lake, Ontario (Gehl, 2014). After several years of investigation by the UOI Rights and Treaty Research Programme, the research concluded that the Algonquin Nation had never modified or extinguished its title. In 1978, the Algonquins met with federal and provincial officials at Golden Lake to discuss the inquiry's findings; the Algonquins requested that the Ontario government withhold the issuance of further land patents on unceded Algonquin territory. Later that same year, the Algonquins of Pikwàkanagàn hosted the chiefs from all status Algonquin First Nations from both Quebec and Ontario to share its research findings. At that point, Pikwàkanagàn had completed sufficient research to support a comprehensive claim, but the Algonquin communities on the Quebec side had not yet concluded the necessary research (Sarazin, 1989).

Political divisions within the Canadian federation posed other problems for a unified Algonquin claim—namely, the territorial partition through Algonquin territory and the divergent policy orientation toward First Nations by the Quebec and Ontario governments. Unlike Ontario, Quebec nationalism and sovereigntist impulses of the 1970s and early 1980s did not prioritize Indigenous concerns, much less address matters of territorial title (Salée, 1995; Scholtz, 2009; Turpel, 1992). Moreover, the divisibility of the Crown—established at the Imperial Conference of 1926 and enacted by the Statute of Westminster, 1931—granted

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provinces dominion over territory apportioned to each as federated units under the Canadian Constitution. As Chrétien explained in his August 1973 announcement, "For claims arising in the provinces concerned, provincial lands are involved and so are rights of Canadians living in those provinces. Settlements with Indian and Inuit groups in those provinces can only be satisfactorily reached if the provinces concerned participate along with the Government of Canada in the negotiation and settlement" (Chrétien, 1973: 5).

By 1983, as the sole Algonquin community in Ontario with federal status under the Indian Act, the Algonquins of Pikwàkanagàn chose to forgo the complexities and challenges posed by Canadian federal divisions and instead pursued a comprehensive land claim for the 36,000 square kilometres of unceded Algonquin territory that lies within the province of Ontario. Following centuries of settler incursions and continued dispossession of their lands—while the Algonquins were relegated to small parcels of land that are held in trust by the Crown under the designation as Indian reserves—the Algonquins petitioned the Crown to enter into discussions to "settle the questions of compensation for their use and occupation of our lands and resources, and of compensation for the taking of those lands" (Algonquins, 1983). The petition and the attendant claim documents were largely ignored by both the Canadian and Ontario governments for nearly a decade. The Algonquins made continuous inquiries throughout the remainder of 1980s: the federal government disregarded the claim, and in 1987, the province of Ontario indicated that its land policy would carry on unabated: "Disposition of Crown land would proceed without any requirement for notice to, or consent from, the Algonquins" (Sarazin,1989: 194). By the early 1990s, both the governments of Canada and Ontario acquiesced to the petition and agreed to enter into tripartite negotiations to resolve the matter of territorial title and rights.

The land that is claimed is unceded, so there is no complicating argument about treaties, including especially unfair treaties (as many of them were). Because the land is unceded, the case is, in one sense, more compelling: for if the land rightfully belonged to the Algonquin Anishinaabeg and was wrongfully taken, then it looks like it should be returned— or, at the minimum, some of the land returned and some of the value of the land returned (in cases where, for various reasons, restitution is problematic). In another sense, however, this makes the case more complicated, because the claim is either (or both) a moral (nonlegal) claim and/or a legal claim, but one in a political and legal tradition that is not recognized by the Canadian state. Despite the shifts in Canadian law, the recognition of Indigenous territorial title remains partial. The courts continue to acknowledge the Crown, not Indigenous nations, as the sovereign over territory. Indigenous title, it continues to be said, is merely a burden on the Crown's underlying title —the comprehensive and fundamental sovereignty over territory (Williams, 2021). Although the SCC finally disabused Canadian law of the notion of terra nullius in its 2014 decision in *Tsilhqot'in Nation v. British Columbia*, it restated that the sovereignty over Indigenous territory was vested in the Crown. Chief Justice McLachlin noted that "at the time of assertion of European sovereignty, the Crown acquired radical or underlying title to all the land in the province" (*Tsilhqot'in*). The sovereign's underlying title, the SCC went on to observe, gives the Crown "the right to encroach on Aboriginal title if the government can justify

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this in the broader public interest under s.35 of the *Constitution Act, 1982*." Regardless of the entrenchment of Indigenous title in the Constitution, the SCC still put the Crown atop Indigenous people. John Borrows (2015) notes that *Tsilhqot'in* reproduced the doctrine of terra nullius by way of the Crown's unilateral assertion of sovereignty over Indigenous nations and their territory, despite recognizing the set of rights entailed by Indigenous title.

Territorial Rights and the Moral Right of Occupancy

This section sketches an account of territorial rights sufficient to tee up the discussion of Indigenous land rights to come. In what follows, we briefly explicate the occupancy right argument in the territorial rights literature and then apply the central argument to the case.

It is now generally recognized in the literature on state legitimacy that it is insufficient to argue that the state is legitimate if it respects human rights or treats its citizens in a certain way or has democratic institutions: even if true, that may show only that the political authority is in a legitimate relationship to the people who live under its rules. What is also needed is an argument that explains how one can come to legitimately exercise state power in a particular place, over a particular territory (Miller, 2012; Moore, 2015; Stilz, 2019). To solve this problem in the literature on state territory, it is usual to appeal to the idea that people have both individual and collective identities and, in many cases, have place-specific commitments and attachments, which are part of both their individual identities and their identities as members of particular groups. They are, in other words, connected in normatively significant ways to places, which gives rise to occupancy rights, to be detailed below. This argument concerning occupancy rights, which proceeds by linking particular groups of people with particular spaces, has been used to explain how states have legitimate authority over their territory. It can be applied, with some modifications, to stateless Indigenous people to justify *their* territorial rights. Indeed, the Indigenous case is typically stronger than the argument for state territorial rights.

Appealing to an argument that has been made in Western state territory theory doesn't displace many of the moral and legal arguments that Indigenous people have been making to justify their land claims (Burkhart, 2019)—indeed, it is consistent with them; but by showing that Indigenous land rights or territorial rights can also be rooted in an argument that Western theories of state legitimacy have had to appeal to makes it difficult for the majority settler-descendant population to reject the argument *as an argument*. Of course, people who are reluctant to acknowledge Indigenous land rights may still question the basic facts. Such an appeal also makes clear that if state territory is to be legitimately held, it has to be built on the state being also in a legitimate relationship with Indigenous communities, who are occupancy groups in the state and who have moral occupancy rights over the land.

The central idea of occupancy rights, as deployed in the political theory of state territory, is that in order for the state to have legitimate authority over a place, the people who live in the state (who live under rules of government) must have a moral right of occupancy in that place. The idea behind that moral right of

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occupancy is that people, both as individuals and as groups, ought to have a basic liberty right to live in a place that they occupy, not unjustly, because living in a place is a background condition for living their lives, for making plans and projects and having relationships with people. We are all physical beings, who take up space, and we acquire relationships, commitments and attachments connected to residing in that space.[1] Moreover, in order to live our lives in an integrated way, consonant with our beliefs and values and commitments, we need to be able to express them externally, in the way that we relate to each other and to the place that we live in. This is at the heart of the value of collective self-determination, which involves control over place.

Occupancy rights have both individual and collective dimensions. They are individual in the sense that they attach to individuals and protect individual interests, but individuals also have collective identities, which are often integral to their sense of who they are, and their collective aspirations as members of groups are an important part of their lives. In many cases, the connection that individuals have to a place is not simply a one forged independently by individuals living in a place but one experienced by individuals as members of a collective, a group, whose members share a geographical location with one another. The idea here is that individuals see the land as important to them not only as individuals, as the locus of their relationships and plans and projects, but also as members of groups that are attached to specific areas, specific bits of land, which form an important source of the group's identity.[2]

The central idea of occupancy rights, then, is that it confers on groups within the state authority over certain geographical spaces, which is based on their relationship with these places. This relation holds in the case of the Algonquin Anishinaabeg, who as Indigenous people have repeatedly apprised settler and foreign officials of their earlier residency and established occupancy on this land prior to European settlement and struggled to retain their distinctive forms of political authority over the land in the 500 years since European contact, up to the present day. There were numerous, repeated claims to the geographical area: approximately 36,000 square kilometres of continuous territory south of the Ottawa River. The March 1983 petition to the Crown cited 23 previous petitions, dating from 1791 through 1863, where the Algonquins previously asserted their various rights and outlined settler obligations (Algonquins, 1983; Lawrence, 2012). If there were any fresh misgivings about their prior and extensive occupancy of the territory, the Algonquins of Pikwàkanagàn reminded the Crown in the opening of the 1983 petition "that since time immemorial our Nation has occupied and enjoyed the territory of the valley of the Ottawa River and its tributary streams which form its watershed" (Algonquins, 1983).

And there was an integral connection between the material and spiritual life of the Algonquin Anishinaabeg and the area in which they lived, as different communities interacted with the physical landscape and the natural environment—the native flora and fauna—of this part of the world. Put another way, there is in both Anishinaabe thought and action an "attachment to locality," as Stilz (2019) would have it. Over millennia, the Algonquin Anishinaabeg have cultivated social and religious practices that are deeply entangled with specific territorial features.

Akikodjiwan, a land and waterscape in what is now Canada's capital city of Ottawa, was a longtime Algonquin settlement. Significantly, at Akikodjiwan,

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among the numerous islands on the Kitchi Sipi (the Great River, or the Ottawa River) is the sacred Algonquin site of Akikpautik—the Pipe Bowl Falls, known more widely as Chaudière Falls. Imbued with enormous spiritual significance, Akikpautik has and continues to be the site of sacred rituals and quasi-religious ceremony long practised by the Algonquin Anishinaabeg. Further north along the Kitchi Sipi is Pinesî Asin Mîkânsing (known more commonly as Oiseau Rock), a 150-metre sheer rock face emerging from the river, which was another sacred Algonquin site, replete with approximately 75 ancient pictographs of considerable spiritual substance.

Algonquin existence—both individual and collective life projects—is profoundly dependent upon the material surroundings of the natural world. Algonquin scholar Lynn Gehl notes that within Anishinaabe ontology, there are four orders of creation and existence in the naturally occurring world. According to this worldview, humans emerged as the fourth order of being and were viewed as a "pitiful" essence—a subordinate and woeful dependant of the natural world in need of its endowment. As Gehl (2017: 22) explains, "The plants and animals all lived here on Mother Earth for a very long time without us, and thus can continue to live without us, humans cannot live without them, as it is these three orders of Creation that provide us with the protection and subsistence humans need to live and survive."

In this regard, Anishinaabe philosophy recognizes moral agency within animals, and this is reflected in social and political conventions; Anishinaabe social and political ordering acknowledges that nonhuman relations are vested with natural and inalienable sets of moral interests and privileges that similarly inhere in humans (Gehl, 2017). The specific locality of the Algonquin people's long-standing occupation was so significant to them that it cultivated intense kin-like affinities: "Over long periods of time and through meaningful and respectful engagement with the environment the Algonquin people were able to develop relationships with the territory expressed in kinship derived terminologies. That is, the relationships that people built up over generations often took the form of caring for a loved one" (Puppe, 2015: 83). Viewed in this way, Anishinaabe legal orders endowed much of the natural world with rights, interests and privileges normally reserved exclusively for humans in most contemporary legal regimes.

All this suggests that Indigenous people had a moral right to occupancy of the entire area and, indeed, had forms of jurisdictional authority over their lives and over this space. This clarifies the initial wrong of settler-colonialism and also explains the ongoing wrong in denial of this right over time. The Algonquin Anishinaabeg claim to land has been persistent throughout the post-contact period of European settlement. Quite apart from the Crown's declaration in the Royal Proclamation of 1763 that is enshrined and specifically referenced in the Canadian Constitution Act, 1982—which promised that Indigenous nations would "not be molested or disturbed" in their unceded territory—the Algonquin relationship to land supports an initial right of occupancy and thereby identifies the wrong of taking the land, taking control over the land, the wrong of removal from the land—which we can term "expulsion"—and the continuing wrong involved in the persistent denial of these claims.

At this point, it is necessary to consider a potential objection to the argument advanced here and its applicability to Indigenous land rights. This objector

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might insist that the right of occupancy is an individual right and argue that it cannot attach to groups. If this objection holds, then it is possible to resist the argument advanced above. If occupancy rights are strictly individual, and the only scaling-up can be done by a political authority, then they cannot be applied to Indigenous groups and group land claims.

But there is a powerful response to the individualistic picture on which this objection rests. This response focuses on the interrelationship between individual and collective occupancy rights and especially the fact that we are unable to articulate the domain of individual residency rights without reference to the collective context in which people live. To see this, consider the difficulty in figuring out what should count as the relevant location in which an individual has moral residency rights—something that is not only philosophically necessary but applies whenever a group is displaced. Where do they have a right to return to? Suppose the home is destroyed. To answer this question would depend on the cultural and institutional context in which people live. For people living in remote or culturally or institutionally distinctive communities, such as the Labrador Inuit who were removed from their traditional homelands to the High Arctic, the relevant community might not correspond to the political and institutional demarcations that we commonly think of as relevant in modern, industrialized societies (for example, France, Britain, Canada). After all, they were displaced to somewhere that was in Canada! This means that the individual right that members of a community have in a place, and also in controlling the place—the geographical location—which they live in and are attached to, cannot be specified without considering at the same time the collective dimensions of that right. This means that the objection above can't hold.

Scope Rights No. 1: What Particular Land-Based Rights Are Involved in the Idea of Being an Occupancy Group?

If we are to rely on the idea of Indigenous occupancy rights to ground a claim to the area, we need to explain the scope of such rights, both in terms of the rights, liberties, powers, and so forth involved in occupancy and in terms of the geographical scope of the area claimed. This section addresses the first part of the scope question.

We have already, in the first part of our argument, said something about the kind of right that is involved, because we have shown that Indigenous people held rightful authority over the land—that there was a serious moral wrong involved in the taking of land that the Anishinaabe had rightful jurisdiction over—but we have not yet fully explicated the nature of occupancy rights. In this section, we clarify more fully the kind and nature of the rights of occupancy and connect these to some of the claims that have been made by the Algonquin Anishinaabeg in their pursuit of land rights, while recognizing that there is a natural gap between what a group may be entitled to morally and what they claim—since the rights that groups, especially vulnerable groups, are likely to claim will be conditioned by the power structures that they confront; so we will also distinguish between these two issues. In analyzing the claims advanced, we rely on the March 1983 petition in which the Algonquin requested nation-to-nation discussions with the Crown not only to address possible remedies for past injustices but also to put their will and minds to an agreement on the co-constitution of a people sharing

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what has otherwise been Algonquin sovereign territory. At the time, the Algonquins of Pikwàkanagàn were merely asserting a blanket declaration of territorial title; however, under the auspices of this broad claim to territory, protracted discussions and negotiations between the parties clarified specific rights—of jurisdiction, resources and exclusion, which are discussed below.

People with occupancy rights have elements of all four of the rights that are associated with territorial rights, which is hardly surprising, since state territorial rights are built on group occupancy rights.

What specific rights did and currently do the Algonquin Anishinaabeg have under each of these categories? The first and perhaps fundamental right is the right to jurisdictional authority—that is, to make rules to regulate their lives together and govern themselves. Second, there are rights of exclusion—at least in the sense of rights to exclude people from the geographical space that they have authority over and to assert Anishinaabeg understandings in place of the definitions and conceptions of the colonizer—as well as rights of exclusion from the geographical region. Third, there are rights over resources broadly conceived. Here, resources are not limited to the land and animals that the Algonquin Anishinaabeg rely on for sustenance, in some kind of instrumental way, although they do include this kind of resource right. In addition, though, because there is a worldview based on relationships with land, plant and animals, and duties connected to these, resource rights are broadly conceived to be not just about use but also about having relationships with other living beings, as well as some control over the land to discharge the duties that may emerge from these relationships. In state territorial rights, there is a fourth right—the right of defence, which is interpreted as a right to defend the territory of the group from aggression. We set aside defensive rights as beyond the scope of this article. However, it is noteworthy that we could interpret a right of defence as a derivative right in the sense that it applies when the previous three rights are violated. Defensive rights apply at the minimum as a recourse to ensure that rights are respected. If we adopt this view, then occupancy rights implicate all four kinds of rights that states claim as part of the bundle of territorial rights (Miller, 2012; Moore, 2015; Simmons, 2011, 2016).

We will examine the different kinds of territorial rights in separate analytical categories, while acknowledging that they are closely interrelated—rights over resources, for example, being also an exercise of jurisdiction over the resource and not simply use-rights to access and consume them or ordinary property rights.

One of the rights claimed by states in their exercise of territorial authority is right to resources within the area of the state, and resource rights were an important source of discussion and contention in negotiations between the Algonquin Anishinaabeg and the Crown. States claim to have an extensive right to resources—they claim the right to all the resources in the ground, all the way to the inner core of the Earth, and rights over airspace over the land too. It's difficult to see how the state can legitimize this extensive right, but it's not difficult to see why resource rights might be important to occupancy groups in the state, who live in the place and seek to exercise forms of self-determination in the place that they live. For the Algonquin Anishinaabeg, the resource claim is inextricably connected to their status as occupancy groups. The claim is partly to use resources in the area in which they live and partly the exercise of jurisdiction over specific things that exist where they

live, including jurisdiction over watershed areas where people drink and fish and swim and over land on which people live and hunt and grow food. The connection with place cannot be merely symbolic but involves people relating to place through their sense of obligations of stewardship over the place, the husbanding of resources found within a place, and organizing their lives with respect to rules governing the place. All this is to say that collective occupancy involves, at the minimum, accessing food and water and other resources to maintain a way of life, as well as local forms of jurisdiction, including rights to resources, in the area in question.

This right to resources does not need to be defined in terms of standard liberal property rights over a place; in fact, it would do violence to the understanding that Anishinaabe people have to the place to define it in this way. But, following Armstrong (2017: 22–23), who himself follows Ostrom (2000), we can distinguish at least four first-order rights over resources that may be involved and four second-order rights, where the former refer mainly to property rights— not liberal property rights, but more general rights to use, access, and so on—and the latter refer to rights of jurisdiction. First-order rights are rights to access the resource (the land, the water, the place), to withdraw it, to alienate it and to derive income from it. Second-order rights are the right to exclude others from accessing it, managing it, regulating its alienation and regulating income derived from it. In the literature on this, and especially the idea of first- and second-order rights, it seems that the first two first-order rights can be straightforwardly derived from the idea that people, in living in a place, need things that are found in that place in order to survive—they need to eat, to drink, to build shelters—and all this involves altering their surroundings (possibly in minimalist ways, but still withdrawing specific things that were in common). The third and fourth listed first-order rights—alienating it and benefiting specifically in terms of deriving income from it—do not seem basic to the idea of use-rights but rely on the idea of full liberal property ownership which is a specific, and problematic, understanding of the appropriate form of humans' relations to the external world. But regardless of whether we think it is problematic or not, it hardly seems foundational: whether we have such rights seems to depend on the rules of jurisdiction that apply. It is the self-governing legitimate authorities that decide the terms, if any, in which people should be able to alienate their rights or resources, and of course not all things are alienable; and not all things should be capable of generating an income. Some things, arguably, should not be for sale.[3]

Both use and jurisdictional rights over resources were at the heart of the discussions that began with the March 1983 petition and eventually led to the 2016 AIP with the Crown. Over the course of nearly 25 years of negotiations and consultations, the AIP focused the purview of Algonquin rights to limited natural resource harvesting and the possibility of self-government negotiations over the land base of the Indian reserve (approximately 6.8 square kilometres or 1,700 acres). While self-government would, ostensibly, entail most first-order rights of jurisdiction normally retained by legitimate subnational governments (for example, municipal-level), Algonquin resource harvesting rights are considerably narrower in range, and the scope is limited to the first-order rights of access and withdrawal. As negotiated, the Algonquins will formalize rights to access and withdraw certain wildlife—through hunting and angling—for personal, noncommercial subsistence; and the

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right of subtractive withdrawal is limited to prescribed tracts of Crown land. In terms of forestry, the AIP proposes future discussions around the involvement of Algonquin in comanagement of industry activity (that is, the second-order right of management); a similar proposal for parks and cultural sites is contemplated in the AIP. Viewed from pleas and declarations entailed by the March 1983 petition, the Algonquins have conceded considerable first- and second-order occupation rights of jurisdiction over the resources where they live. Control rights in regulating and establishing the rules around resources and the environment generally are particularly important given that the right to access and use a resource is not very robust if there's no control over the environmental management of the area.

Scope Rights No. 2: Jurisdiction, Exclusion and the Scope of Geographical Authority

In the section above we argued that resource rights are important to people's survival, to their relationship with the land on which they live and to maintaining a way of life, but a key element of resource rights is jurisdictional control. Indeed, jurisdictional power is probably the most fundamental territorial right. Jurisdictional rights are rights to make rules and policies to regulate the relationships that people have with each other within a place and over the place. They are rights of control, or in Hohfeld's ([1919] 1978) term, powers. For the Anishinaabeg, this involves the right to be self-determining as a people or First Nation and rights to control collective goods and a way of life that is important to the group, including land and resources. In the 1983 Petition to the Crown, the land claim placed front and centre the right of jurisdiction: what was requested was nation-to-nation discussions with the Crown; self-government over their lives; and control over those things that relate to Indigenous persons' relationship to each other and the practices and customs that should govern it—including their relationship with the land and space in which they lived. This has been expressed in terms of an insistence on self-government in the area of Indian reserves, as well as broader rights of comanagement of vital industries; both forms of authority are important to making choices and having authority over the collective conditions in which the Anishinaabeg live.

The right of jurisdictional authority raises two kinds of scope questions: What is the geographical domain of rightful Algonquin Anishinaabeg authority? And what functional areas of jurisdiction specifically do they claim? We've discussed the second question in the section above, and argued that, in addition to resource rights claimed over the whole traditional domain, the Algonquin Anishinaabeg claim jurisdictional authority over those resources. These rights of control are justified by the idea that it is very difficult to exercise robust forms of self-determination if one lacks the power to make decisions about the very land or rivers or animals and birds that live in a place and on which the community relies for their material and spiritual lives. Merely residing in a place, without any form of collective authority to make decisions about how the water is used or how public places are organized, is an impoverished form of self-determination or autonomy, because individuals and the group are unable to determine the very conditions of their existence.

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In addition to the question of jurisdictional control, there is also the question of whether the Algonquin Anishinaabeg have, or should have, the power to exclude people from the group and from the geographical domain in which they are self-governing. The right of exclusion—which is the second-named right in the "bundle" of territorial rights discussed above—is justified as a clear extension of the idea that people have rights of control over the place that they live and the locus of their group culture, identity and relationships. It is important to lay out the justificatory argument for the right of exclusion because a possible objection that this argument might face is that while occupancy rights explain the wrong of forcible removal, and we can combine this with the obvious wrong involved in the forcible destruction of Indigenous forms of government, the violation of these two rights do not explain the wrong of *settlement*. This objection requires us to separate settlement from the forcible removal of Indigenous people from their land and then requires us to explain why occupancy rights should involve exclusion. To see this, consider, as an analogy, a case where someone arrives at your doorstep, fleeing violence or hunger or persecution. You let them in. This could be described as a humanitarian gesture; it may even be described as a duty to give shelter. But however we describe it, it does not entitle the new arrival to invite all their friends into your house and take it over. This is an important point, because one possible objection to the broad definition of occupancy rights is that it only involves a right against dispossession in the sense of expulsion, but not against settlement. It's important to reflect on the need to control the relationship of an occupancy people with land to see that this can't be so because it is inconsistent with the exercise of self-determination and having authority over the place. Even if one doesn't accept the analogy with the house, it is worth noting that the rights of exclusion that states typically claim (and enjoy) is exclusion from territory, not simply from citizenship. And the basis of that exclusion has been articulated in terms of a moral right of occupancy and the value of self-determination (Stilz, 2019; Moore, 2015; Miller, 2012).

One of the key issues around jurisdiction is that of the geographical domain of the claimed jurisdiction. The Algonquin Anishinaabeg are the rightful occupants of the Ottawa River watershed territory—more than 146,000 square kilometres in eastern Ontario and western Quebec that they have occupied since time immemorial. Parts of the territory bounded by the Ottawa River watershed have been occupied in the past by other Indigenous nations, particularly nations that belonged to the larger Anishinaabe confederacy such as the Nipissing, but also treaty partners, which includes the Mohawks that resided at Lake of Two Mountains. Quite apart from any border ambiguities with adjacent Indigenous nations, there is no question that the Algonquin Anishinaabeg are the Indigenous peoples to the Ottawa River watershed.

Because of the difficulty of negotiating with two provinces and the federal government, the Algonquins of Pikwàkanagàn chose to negotiate only the Ontario part of their territory, which means that the part of their territory that is in Quebec is still unceded and would still need to be subject to negotiations. And within that smaller, partitioned area, encompassing that part of the Ottawa River watershed that falls within Ontario, the Algonquins of Pikwàkanagàn have distinguished between reserves where they seek powers to be collectively self-governing and make rules over their lives, including rights of exclusion, and the rest of the

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territory, where they seek only jurisdictional authority over specific functions, such as control of resources, including hunting and fishing rights in so-called Crown land and comanagement of forestry. This is still a claim to the right of jurisdiction, but jurisdiction can be exclusive or shared, and they have conceded considerable powers in recognizing that how to manage and regulate these areas can proceed in a non-exclusive way.

It is unclear whether this is based on a recognition of (a) the legitimate interests of the settler population or (b) their power, by which is meant that it is highly unlikely that the Canadian state would consent to an agreement that left them powerless to regulate resources and displaced large numbers of the settler population; and the Algonquins could not enforce their will without an agreement (even if they had moral claims on their side). Patrick Macklem's examination of land claims and the negotiation of the distribution of territorial title is suggestive of (b), generally. Although colonial institutions have unilaterally asserted legal interests, these stakes have been claimed by way of an unequal distribution of bargaining power that has long favoured the Crown (Macklem, 2001: 96–97).

The recent experience of the Tsawwassen Nation, which arrived at a Final Agreement through British Columbia's treaty process, is illustrative of the Crown's relative bargaining leverage in contemporary times. Initiated in 1993, the modern treaty was ratified in 2007 as the Tsawwassen was put under considerable financial stress, having reached its borrowing limit of $4 million—to service legal costs and other consultation expenses—merely halfway through treaty negotiation process. Facing off with the Crown and its deep pockets, the Tsawwassen were left with slightly more than 7 square kilometres out of a traditional land base of 2,796 square kilometres, or approximately 0.25 per cent of its territory (Monchalin, 2016: 250–55). The Tsawwassen case is foreboding for the eventual outcome of the Algonquin modern treaty. Far from the assertion of title to 36,000 square kilometres in their 1983 petition, the negotiated land base that was ratified in the 2016 AIP will leave the Algonquins with 475 square kilometres, or about 1.3 per cent of their territory. As a new tactic to ensure extinguishment of title and rights, the Crown has offered loan forgiveness to see Indigenous peoples through the end of negotiations. But for the March 2020 loan forgiveness, the Algonquins had otherwise accumulated $27.9 million debt for over 25 years of treaty negotiations.

In the original 1983 petition, when the Algonquins of Pikwàkanagàn made a broad claim to territorial title, they acknowledged that settlers had acquired interests and rights to justice despite past wrongs: "We recognize the strength of our rights and claims, but that we would not wish to create more injustice by seeking justice ourselves, not to dispossess other without compensation as we have been dispossessed ourselves" (Algonquins, 1983), which suggests that both (a) and (b) above may be true. And in the discussion of comanagement over the broad territory, the animating idea was not just the protection of their interests, although that is indeed important and significant, but the idea that they were a nation among other nations. They requested, that is to say, nation-to-nation discussions with the Crown, aimed at an agreement on the co-constitution of a people sharing what has otherwise been Algonquin sovereign territory.

This strategy of exclusive and shared sovereign authority is in line with the rights of occupancy that we've argued represent the Algonquin relationship to land. They

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are legitimate occupants, but there are other people now, settlers, who may also now have a relationship to land, which needs to be taken into account, while mindful that this relationship did not extinguish the Algonquin claim as original legitimate occupants with unmodified territorial title. What remains to be worked out is how, procedurally, we can have a legitimate state with more than one occupancy group, which shares authority.

This is not difficult to conceptualize in a federal system, where we already have nested authority and power, though it might be hard to realize in practice. After all, there is no reason why occupancy groups can't have various kinds of authority (exclusive authority over some areas and shared authority over others), just as provinces and the federal government have multiple co-competencies. A number of scholars have noted the versatile, yet durable, nature of Canada's constitutional foundation to accommodate multi-jurisdictional power-sharing arrangements (Borrows, 2010; Tully, 1995). Some point to treaties between the Crown and Indigenous nations—enshrined in section 35 of the Constitution Act, 1982—as evidence of feasibility for apportioned territorial powers that acknowledge prior and inherent Indigenous jurisdiction (Macklem, 2001). Kiera Ladner (2005) has examined numerous parallel cases that are instructive of the practical matter of formalizing divided jurisdiction with Indigenous peoples, such as Mi'kmaq jurisdiction over the Atlantic fishery in Mi'kmaki and how it would fit in a new constitutional order. Joyce Green has surveyed the possibilities for shared sovereignty in decolonizing arrangements that sufficiently attend to considerations of self-determination of colonized peoples within state institutions. Green (2013: 54) tells us that "decolonization requires structural and procedural changes. Canadian federalism, which is designed so that the national and provincial governments hold all the jurisdiction of the Crown according to the constitutional distribution of powers, must be transformed to include a third order, Aboriginal government jurisdiction."

Conclusion

In this article, we have examined the claim to territory in the area that the Algonquins of Pikwàkanagàn occupy and their pursuit of that claim. We have argued that the very ideas that are necessary to explain contemporary state authority over their particular territory (that is, to address the particularity question in the state territorial rights literature) applies also to stateless Indigenous people and their authority over place. Although the idea of occupancy groups and rightful authority over land was deployed to solve a problem in a different set of literature, it draws on ideas that have been expressed by Indigenous peoples and their leaders for centuries. We have argued that Indigenous people are an occupancy group, using the Algonquins of Pikwàkanagàn as a touchstone and their negotiations to explore the implications for land rights claims. The moral justification we have argued here is independent of existing Crown obligations, both legal and moral (for example, the Royal Proclamation of 1763).

The central argument of this article has a cantilever structure, showing that something accepted by non-Indigenous people to ground international rights to territory applies equally or better to Indigenous people. This means that if we accept the first kind of argument (concerning the territorial rights of states),

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then we must accept the second (concerning the territorial or land rights of Indigenous people). Moreover, if we accept the latter move—that Indigenous people meet the conditions of an occupancy group and accordingly have land rights, including jurisdictional authority over their people, rights to resources and authority over rules regarding their place—it has implications for state claims to territory because the state must itself recognize Indigenous territory within the state. If this is right, then the state, which is built on occupancy rights, must, to be legitimate, recognize the occupancy rights, which include land rights, of Indigenous peoples.

We believe—although we do not have space to argue this here—that the central problem that we face is not the strength or lack thereof of Indigenous arguments or Indigenous moral rights but the significant power asymmetries between Indigenous people and non-Indigenous people, and we assume that the interests of non-Indigenous peoples are represented in the Canadian state. We believe that, in many cases—and the Algonquins of Pikwàkanagàn claim is a case in point—the position set out already goes very far in recognizing the interests of the settler population by arguing for co-constitution of peoples rather than exclusive authority over the whole domain, although we have also argued that exclusive authority is justified as an extension of the justification for jurisdictional rights.

But what remains, and is not really captured fully in our ordinary understanding of land claim, is the extent to which settlers' ideas and beliefs, legal rights, and relationships with land have to be interrogated and dismantled in order to arrive at a true co-constitution of Canada and for the Algonquins and other Indigenous peoples to realize all their rights as occupancy people. It will have to involve fundamental and far-reaching social, economic and political change for co-constitution to be possible, which we expect will be a long process, involving the very way in which we relate to each other and the world, as well as the assumptions and practices that have underwritten Indigenous dispossession and marginalization. We have not discussed the various dimensions of that more far-reaching, fair settlement except to say that the most difficult part is persuading those in power to give up the very positions, beliefs and institutions that ensure their continuing dominance. But if that were to happen, and Canada were to have legitimate authority over its territory because the state would be in a rightful relationship with the occupancy group(s) that have authority over land, then we will have a more just political order. This is an end-goal that we should all embrace, along with the decolonization of ideas, beliefs, institutions and practices that are required.

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Notes

1 It is noteworthy that the idea of occupancy rights also implies a right of return in the case of wrongful expulsion, and it means that, at least in the first instance, moral rights of residency attach to a person when they are settled on land, not unjustly. By *not unjustly*, we mean that their settlement there did not involve

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coercion or unjust actions. Since, in many places, this condition is not met, we need an account of corrective justice to deal with places where land was acquired unjustly—especially in cases where that land was acquired unjustly long ago. But, in the first instance, we need to understand why stripping people of control over the place in which they enjoy occupancy rights and expelling them from the land is wrong and where they have the right to return to, which implies where they hold occupancy rights.

2 In Moore's (2015) formulation, occupancy rights, which attach to groups, give the group the same rights as individuals—rights of nondispossession and rights of return—but they are not merely an aggregative form of individual residency rights. In addition, occupancy rights serve the function of helping to define the location of these individual rights, and they also confer a (defeasible) right to control the land on which the group lives. Under this formulation, state territory is built on an amalgam of group occupancy rights, yielding a variegated view of state territory rather than the usual homogenous view. See also Moore 2020.

3 This is true of Indigenous understandings of land, including the Algonquin. But even in the Western liberal tradition, there are voices that recognize that not all things should be regarded as property—this is at the heart of the rejection of chattel slavery, which involved disrespecting the dignity of African human beings, as well as the arguments found in Satz (2010) and Sandel (2012). In many traditions, there is a recognition that conceiving of the relation between human beings and other things such as animals and land in purely instrumental terms, as a resource, is deeply impoverished.

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