LOCKE'S DOCTRINE OF PROPERTY AND THE DISPOSSESSION OF THE PASSAMAQUODDY

by

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This work is dedicated to Hugh Akagi, Lou van Eeckhaute, and members of the Passamaquoddy Nation, in recognition of their continuing struggle to preserve the lands at Gunasquamcook for future generations. It is also dedicated to Patricia Bernard, without whose friendship, support and encouragement, this work would not have been possible.

This work examines John Locke's doctrine of property, as developed in his *Second Treatise of Government*, in the context of colonial expansion in North America. Specifically, the thesis analyzes the role that the Lockean view of property acquisition through labour played in rationalizing the dispossession of the Passamaquoddy people of the Maine-Maritime region. Locke's view that humans could come to have ownership rights in lands upon which they expended labour was used as a justification for displacing Aboriginal groups like the Passamaquoddy. Native peoples in North America possessed a radically different view of the relationship between humans and Nature. They saw themselves as intimately connnected to their surroundings, as part of a continuum between humans and the earth. Europeans were able to undermine the legitimacy of this relationship and vindicate the dispossession of the Passamaquoddy by characterizing Passamaquoddy land use as wasteful.

INTRODUCTION

> *A culture that discovers what is alien to itself simultaneously manifests what is in itself.*[1]

In attempting to write what he describes as an "archaeology of anthropology", Bernard McGrane delineates the different stages through which European understanding of the non-European cultures has passed, from the sixteenth to the early nineteenth centuries. Prior to the development of anthropology as a distinct social science, non-European cultures were understood through different lenses, each of which gave its own specific meaning to those cultures. In the sixteenth century, it was Christianity which provided the mode of understanding of non-European cultures. During the Enlightenment, it was science and knowledge that provided the lens through which non-Western societies were examined. As McGrane notes:

> In the Enlightenment it was *ignorance* that came between the European and the Other. Anthropology did not exist; there was rather the negativity of a psychology of error and an epistemology of all the forms and causes of untruth; and it was upon this horizon that the Other assumed his significance.[2]

Finally, in the nineteenth century, the era of Darwin and evolutionary theory, it was time which "came between" the European and the Other.

McGrane's analysis of European conceptualizations of 'alien' cultures is significant for what it reveals about the Western intellectual tradition. He asserts that from its earliest

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[1] Bernard McGrane, *Beyond Anthropology: Society and the Other*. (New York: Columbia University Press, 1989), p. 1

[2] *Ibid.*, 77.

Western mind to identify itself as separate from what it perceives as external to itself."[3] But McGrane's characterization of anthropology can be extended to the whole of the Western intellectual tradition. Calvin Martin has, for example, argued that the ethnocentric bias of "Indian-white history" has never fully been acknowledged by members of the discipline.[4] What has passed for Amerindian-white history in the past has, in his view, been simply a history of the interaction of whites with Native peoples, written with only a superficial understanding of Native "phenomenology, epistemology and ontology."[5] As such it has only limited value.

> Admittedly, there is nothing novel about decrying this tendency among historians, many of whom would doubtless protest that they are faithfully reproducing the literary record of the Indian-white experience. Fair enough. But we should quit deluding ourselves about the significance and explanatory value of such history, for it is essentially white history: white reality, white thoughtworld.[6]

Analyses such as these serve as caveats to those who are seeking a truthful account of Aboriginal history. Seen in these terms, McGrane's typology of the Western intellectual tradition provides a useful guide to understanding the way in which Western cultures have dealt with Aboriginal peoples throughout the world, from colonization to the present.

It is trite to say that European understanding of Native cultures has always been

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[3] *Ibid.*, 5.

[4] Calvin Martin, "The Metaphysics of Writing Indian-White History", in *The American Indian and the Problem of History* (New York: Oxford University Press, 1987), pp 27-34.

[5] *Ibid.*, 27.

[6] *Ibid.*, 28.

in practical terms. Anthropological and historical records have served ideological purposes that extend far beyond their immediate, ostensibly educational and explanatory role. They have helped to shape Western perceptions of Aboriginal cultures and have played an important role in determining the manner in which those cultures are, or have been treated by Western societies. In practical terms, the less an Indigenous society resembles Western culture politically, socially and economically, the easier it is for Western societies to deny the legitimacy of those Indigenous societies. Once similarities are found between Western and non-Western societies, however, it becomes more difficult to deny the validity of those cultures. The perspective is consistently that of Western civilization and any insight gained into non-Western cultures inevitably serves to validate that viewpoint.

Since the first encounters between Native and non-Native cultures, Western societies have never strayed from a belief in their own superiority; in a belief that all other cultures are less highly evolved. This is a constant theme which runs throughout the history of Native-European relations in North America. It is a focus of this work, which examines in detail the way in which Europeans have understood the relationship between Native peoples and the lands they inhabit. In particular, this work analyzes the manner in which Western societies have attempted to undermine the legitimacy of Native land "ownership", in order to justify the appropriation of Native lands. The political theorist John Locke provided an effective intellectual edifice for this process in his theory of property acquisition through labour. By contrasting his theory of property acquisition with the landholding patterns of North American Native peoples, Locke was able to provide a rationale for unrestrained acquisition of Aboriginal lands by European settlers.

So successful was Locke's labour theory of property acquisition that it was taken up by Western institutions of law and government, with the result that his understanding of that fundamental institution of Western society has endured and still operates in the present.

In the late nineteenth and twentieth centuries, as McGrane has noted, the discipline of anthropology began to provide a seemingly more objective analysis of Aboriginal societies. After nearly three centuries of unabated destruction of their cultures by European immigrants, Aboriginal peoples in North America were mostly destitute and landless. Ethnographers and ethnohistorians who were, in the main, sympathetic to the plight of Aboriginal peoples, began to uncover evidence that there was a 'legitimate' social order among those societies. A manifestation of this approach to understanding Aboriginal cultures was the family hunting territory debate, sparked by the work of Frank Gouldsmith Speck, an early pioneer ethnographer. Speck was regarded by his peers as a "friend" of Aboriginal peoples and his discovery of what was believed to be a form of private property amongst the Algonkians of North America was no doubt, in his view, evidence of the legitimacy of their social order. Once again, however, the tendency of the European intellect to search for signs vindicating the institutions of its own societal order, is highlighted by the family hunting territory debate. Speck's theory held sway until the mid-twentieth century, when Eleanor Leacock's work among the Montagnais-Naskapi of Northern Labrador revealed that family hunting territories had not existed aboriginally, but were, in fact, an artifact of the European fur trade.

McGrane asserts that much insight can be gained by examining that which a particular culture perceives as alien to itself. This assertion finds support in Locke's use

Locke utilized America, as an empirical example of a pre-civil society, in effect pre-figures the search by modern ethnographers for indications that private property existed amongst Aboriginal peoples. They represent examples of the continuing search by modern liberal societies for empirical evidence which will validate the ideological tenets forming the basis of institutions such as property. When confronted with social orders in which these tenets do not dominate, Western scholars will leave no stone unturned in their search for signs of these 'universal' values.

The central purpose of this work is to demonstrate the role that these elements of the European intellectual tradition have played in determining the course of colonization in North America. It provides an examination of a particular political ideology within the context of North American colonialism. The history of the Passamaquoddy of southwestern New Brunswick and Eastern Maine, serves as a case study in this examination. From the first encounters between European explorers and the Passamaquoddy, the conflict between two opposing views of land and its relationship to humans, has been resolved in favour of colonizing governments, despite the fact that European settlements relied greatly on the beneficence of Native groups like the Passamaquoddy. A distorted and ethnocentric understanding of Aboriginal cultures has aided this process.

The treatment of this subject in this thesis is structured in two parts. The first part contains, in chapter one, a detailed analysis of Locke's doctrine of property as described in his *Second Treatise of Government*. It includes as well, a comparison of Locke's

conception of the origin of property ownership with the theories of two of his influences, Hugo Grotius and Samuel von Pufendorf. This comparison places Locke's doctrine against the backdrop of his nation's colonial interests. Lastly, a discussion of the influence of Locke's doctrine of property on Aboriginal peoples in North America is included. The focus turns next, in chapter two, to a discussion of the relationship between Aboriginal peoples and the lands they occupied. Included in this chapter is a discussion of the family hunting territory debate, which serves to illustrate the continuing misperception of Aboriginal landholding patterns. The debate also serves as a forceful illustration of the view expressed at the outset that the study of non-Western cultures serves mainly to validate the Western worldview.

The second part of the thesis contains an account of the history of the Passamaquoddy people and their treatment by colonizing governments. Their history provides a case study which demonstrates the process of colonization and the dispossession of an Aboriginal group. Central to this analysis is the continuing attachment of the Passamaquoddy to Gunasquamcook, or what is today known as St. Andrews, New Brunswick. This important settlement has figured prominently in the history of the Passamaquoddy people but its importance to them, like other elements of Aboriginal culture, has been systematically ignored by successive governments. The second part of the thesis is divided into four chapters which encompass significant phases in Passamaquoddy history. Chapter three details the pre- and proto-historical periods, describing the ancient attachment of the Passamaquoddy to Gunasquamcook and their subsistence patterns in pre-contact times. Chapter four recounts Passamaquoddy history under the French regime, beginning with the arrival of Champlain at St. Croix in 1603 and

ending with the promulgation by the British regime of the Royal Proclamation, in 1763. Although the French claimed sovereignty over the Maine-Maritime region and made grants of Passamaquoddy territory to French settlers, displacement of the Passamaquoddy did not occur under the French regime. The main goal of French colonialism was to acquire a productive, revenue-producing population. This goal remained out of reach for French colonial administrations, however, due to the continuing ambivalence of government officials in France. Aboriginal groups in the Maine-Maritime thus retained access to their traditional homelands. In chapter five, the focus turns to the Revolutionary era, a crucial period in Passamaquoddy history. The chapter details a thirty-one year period during which English settlement in the Maritime region began in earnest. In the period following the end of the American Revolution, it is the influx of Loyalist settlers which leads to the displacement of the Passamaquoddies in the Maritimes. Lastly, in chapter six, an account of the period from the early nineteenth century to the present is included. In this era, the influence of Locke's doctrine of property is still detectable in the practices of colonial administrations, with respect to lands reserved for groups such as the Passamaquoddy. But the articulation of Locke's theory of property in public forums such as legislatures and courts of law is more subtle. His theory manifests itself in these forums, but it is, to some degree masked by a discourse of conquest, discovery and settlement.

As important as it is to expose the underlying rationales which have historically been used to underwrite the dispossession of Native peoples, it is equally if not more important to educate members of modern polities about the legitimate claims of Aboriginal cultures to the lands they inhabit. The history of the Passamaquoddy not only illustrates

Native group, it also demonstrates the strong connection between the Passamaquoddy and their ancestral homeland. Through all the various phases of European colonization, up to and including the present era, the relationship between the Passamaquoddy and Gunasquamcook has remained unchanged. It is a spiritual and physical attachment to place which endures.

CHAPTER ONE: LOCKE'S DOCTRINE OF PROPERTY

Introduction

The relationship to the land found amongst Native people in North America was incompatible with European settlement. Native cultures did not perceive the lands they inhabited as property to be acquired, cultivated and "improved." Rather, they viewed themselves as intimately connected to their surroundings, every element of which was possessed of a soul no different from their own. A vindication of the right of Europeans to dispossess Aboriginal peoples was thus an important element in enabling European expansion to proceed. In the initial stages of colonization, this justification was based primarily on religious teachings. In particular, the Biblical dictum that God had given the world to mankind to subdue, served to underwrite the rush by Christian nations to claim as much new territory as they could. When this scramble to acquire new lands led to conflicting claims between various nations, new, more refined political and legal doctrines were sought to legitimize European claims in the 'New World.'

One of the most potent rationales for dispossession in the Enlightenment era lay, in part, in the writings of the seventeenth century philosopher, John Locke. Locke based his entire rationale for the existence of civil society on the right of individuals to privately appropriate land and resources. His writings are particularly relevant to the discussion of Aboriginal land tenure in North America because he expressly mentioned Native Americans as a putative example of the points he was making in his discussion of

property.[7] In her extensive thesis on John Locke and colonialism, Barbara Arneil asserts that Locke's understanding of the 'New World' derived from two principle sources: his collection of books containing accounts of contemporary travel; and his involvement in colonial administration, first as Secretary to the Lords Proprietors of Carolina and later as a Commissioner on the Board of Trade.[8] His argument for private appropriation of land and resources was adopted implicitly, and sometimes explicitly, by European settlers.

John Locke's *Two Treatises of Government*, written over 300 years ago, are generally held to have been written partly as a response to Sir Robert Filmer's *Patriarcha* and partly as a justification for the overthrow of the English monarch Charles II, in the latter part of the seventeenth century.[9] The influence of the *Two Treatises* however has

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[7] Noam Chomsky and Harry Bracken have argued that there is a connection between the philosophy of empiricism and the expression of racist doctrines. Specifically, they argue that empiricism, an approach to philosophy which Locke helped to develop, provides a methodology "within which theories of political control have been successfully advanced." They trace the link between racism and empiricism to Locke's account of essence and concept acquisition in the development of human intellect. Bracken and Chomsky argue that Locke's view of humans as blank slates who are therefore malleable, opens the door for theories of social control. In defense of Locke, K. Squadrito argues that there is no logical connection between the empiricist view of concept acquisition and racism, and "although theories of human malleability might be put to the service of a totalitarian doctrine, it is in fact true that they might not." See K. Squadrito, "Racism and Empiricism", *Behaviorism*, 7:1 (Spring 1979): 105-115 See also H.M. Bracken, "Essence, Accident and Race," *Hermathena*, CXVI, Winter 1973 and Noam Chomsky, *Reflections on Language* (New York: Pantheon Books, 1975).

[8] Barbara Arneil, *'All the World Was America.' John Locke and the American Indian.* Dissertation University College of London, 1992. p. 36.

[9] David McNally, "Locke, Levellers and Liberty: Property and Democracy in the Thought of the First Whigs" *History of Political Thought*, 10:1 (Spring 1989): 17-40. McNally argues that Locke's *Two Treatises* were greatly influenced by the politics of his mentor, the First Earl of Shaftesbury. Shaftesbury is portrayed as an earnest opponent of absolute monarchy, and thus of Charles II. At the same time, Shaftesbury is depicted as a supporter of the idea of a constitution comprised of the three elements of monarchy, aristocracy and democracy in balance with one another.(p.25) Peter Laslett regards Locke's work as "a deliberate and

been felt far beyond the immediate historical context in which they were written. Most notably, Locke's theories are generally recognized as having been a major influence on the drafters of the United States' constitution. The idea of a constitutional government delegated authority by its citizens, who possess the right to life, liberty and property and to overthrow any government which ceases to uphold these rights, is Locke's best-known contribution to modern political thought. Theorists continue to employ the concepts developed by Locke and many of his ideas continue to inform much of modern political and legal thought. This is particularly true of Locke's justification of private property based on labour.

Yet the significance of Locke's view of property for Aboriginal peoples is routinely ignored by modern political analysts. It is important to understand that the supposedly timeless and transcendental ideas which Locke expressed were in fact the expression of a particular ideological viewpoint which was gaining ground in Locke's own time. His ideas were written with particular political purposes in mind. Accordingly, the discussion which follows in this chapter analyzes not only Locke's idea of property, but also the context in which it was written and the effect it had on the treatment of Native peoples by European colonizers. The chapter is divided into three parts: the first part lays out Locke's theory of property, contained in the sections leading up to, and including, Chapter Five of the *Second Treatise*. The second part of this chapter provides an analysis of the origins of Locke's theory, and something of the economic and political background

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polemically effective refutation of the writings of Sir Robert Filmer, intellectually and historically important because of that fact and not in spite of it..." "Introduction", *John Locke: Two Treatises of Government*. Edited by Peter Laslett. (Cambridge: Cambridge University Press, 1960) p. 89.

theory vis-a-vis Aboriginal peoples is discussed.

"Of Property"

Locke begins his *Second Treatise* with a refutation of the idea of a divine right of rulers, derived from their special status as descendants of Adam. A restatement of the ideas expressed in the *First Treatise*, this argument is intended as a response to Filmer's work on that subject, *Patriarcha*.[10] Locke argues that since it is impossible to prove that any ruler is a direct descendant of Adam this cannot be used as justification for supreme executive power.

> ...it is impossible that the Rulers now on Earth, should make any benefit, or derive any the least shadow of Authority from that, which is held to be the Fountain of all Power, Adam's Private Dominion and Paternal Jurisdiction...[11]

He then sets himself the task of deriving another, more rational justification for political power, which he takes to mean the right of determining laws and penalties for breaches of those laws, including the penalty of death.

He begins by describing the state of nature, a situation which exists prior to civil society, where positive (human-made) laws are absent. In this state of nature, each individual has perfect freedom, to "order their Actions, and dispose of their Possessions,

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[10] Peter Laslett, *John Locke: Two Treatises of Government*. Edited by Peter Laslett. (Cambridge: Cambridge University Press, 1960) n.,p.306.

[11] John Locke, "The Second Treatise of Government." In *John Locke Two Treatises of Government*. op. cit., II, 1. (Numbers used in this paper refer to Second Treatise, followed by the paragraph number).

and Persons as they think fit. This freedom is subject only to the restrictions imposed by the laws of nature. In this state of nature, Locke argues, men are basically governed by the maxim: "do unto others as you would have them do unto you"; that is, if you harm someone else, you may expect harm in return.[13] The laws which govern human behaviour in the state of nature, then, are the laws of nature which are also the laws of reason.

Notwithstanding this general rule of behaviour, however, men also have in the state of nature a duty to preserve themselves. This is true, Locke argues, in paragraph six of the chapter, "Of the State of Nature", because men are the "workmanship" of god, and are therefore his property, "made to last during his, not one another's Pleasure."[14] As the property of god, men are obligated to preserve themselves. To accomplish this, they must have the power to punish those who interfere with their person or property.[15] The only reason an individual may lawfully do harm to another is punishment for violations of the law of nature, for "in transgressing the Law of Nature, the Offender declares himself to live by another Rule, than that of reason and common Equity, which is the measure God has set to the actions of Men for their mutual security..."[16] Those who do not adhere to the law of nature, are in Locke's view, dangerous to mankind, and others have a right to

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[12] *Ibid.*, II, 4.

[13] *Ibid.*, II, 5. Note: the absence of gender neutral language here reflects the context in which the Two Treatises were written and the audience for which they were intended.

[14] *Ibid.*, II, 6. The use of the word "workmanship" is significant, connecting as it does the ideas of property and labour. It foreshadows some of the points he will make in his chapter on property.

[15] *Ibid.*, II, 6. Locke does not use the word property here, but says "what tends to the Preservation of the Life, Liberty, Health Limb or Goods of another."

declares, the "Executioner of the Law of Nature."[17]

In defending this thesis, Locke argues that laws made by national governments have no extraterritorial authority and so they cannot govern those, who, like Aboriginal people, are not citizens of those nations. This is the first use made by Locke of the example of Aboriginal peoples. He argues that the only law which can be said to command the obedience of all mankind, is the law of nature.

> Those who have the Supream Power of making Laws in England, France or Holland, are to an Indian, but like the rest of the World, Men without Authority: And therefore if by the Law of Nature, every Man hath not a Power to punish Offences against it, as he soberly judges the Case to require, I see not how the Magistrates of any Community, can punish an Alien of another Country, since in reference to him, they can have no more Power, than what every Man naturally may have over another.[18]

It is significant that Locke uses the example of Aboriginal peoples in the context of a justification for punishment of transgressors of the law of nature.

The problem which arises, however, if each individual has the right to decide who has done him an injury, and to be both judge and jury so to speak in his own case, is that they will almost certainly decide in their own favour and may go too far in punishing those they believe to be offenders. Locke agrees that the remedy for these "inconveniences" of the state of nature is government, but he argues that a monarch who can be both judge and

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[16] *Ibid.*, II, 8.

[17] *Ibid.*, II, 8.

[18] *Ibid.*, II, 9.

jury in *his* own cause is actually worse than the situation in the state of nature. ...

summing up his thesis regarding the state of nature, Locke answers the objection which may be raised as to whether and where such a state of nature could be said to have existed. He argues that contemporary rulers of the nations are in a state of nature with one another because the only act which can negate such a state is the mutual agreement to enter into one political community. In addition, Locke again expressly mentions the case of Native peoples in America as an example of the state of nature:

> The Promises and Bargains for Truck, etc. between the two Men in the Desert Island, mentioned by Garcilasso De la vega, in his History of Peru, or between a Swiss and an Indian, in the Woods of America, are binding to them, though they are perfectly in a State of Nature, in reference to one another.[19]

In Chapter Three Locke makes the distinction between the state of nature and the state of war. A state of nature exists where men live together, according to reason, without a common superior or authority to judge between them. A state of war arises at the moment when one person uses force or aggression against another. Unlike Hobbes' state of nature, in which "every man is Enemy to every man", Locke's imagined state of nature is less brutal.[20] It is only the use of force which places men in a state of war with one another. To avoid this, men enter into society with one another and agree to be governed by a common authority.

Having thus dealt with one justification for political society, Locke turns next, in Chapter Five of the *Second Treatise*, to a discussion of property, the preservation of

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[19] *Ibid.*, II, 14.

[20] Thomas Hobbes, *Leviathan*. Edited by Francis Randall. (New York: Washington Square Press, 1964) p. 85.

He begins his discussion with the statement that whether we appeal to natural reason, or to God's directives as stated in Genesis, it is clear that the world was given to mankind in common for their preservation.[21] Given the fact of original communistic property ownership, Locke's sets himself the task of trying to answer what he calls "the very great difficulty" of how any one person should ever come to have a property right in lands which were originally given by God to all men.[22] It is here that Locke presents his version of the labour theory of property. He argues that "every Man has Property in his own Person."[23] If an individual appropriates something from Nature he has mixed his labour with that thing, and has, therefore, removed it from the commons. It then becomes his own property. By attaching something to it which is one's own property, that is, one's labour, an individual is able to claim that item as his own. He "hath by his labour something annexed to it, that excludes the common right of other Men."[24] Since man has a duty to preserve himself, his appropriation of items from the commons does not require the consent of others. If it did, Locke argues, one would starve for want of such

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[21] Locke, II, 25.

[22] *Ibid.*, II, 25. Tully, op. cit., p. 109, describes the question as follows: "Specifically, the problem consists of two parts: how is the commons appropriated by individuals in such a way that they come to have property rights in parts of it, and how is it done legitimately without the consent or agreement of others." Locke scholars have debated the exact meaning of this phrase in Locke. The debate centers around the question of whether for Locke, common ownership is intended to mean that men have a positive right to the world (ie: everyone owns everything) or a negative right (no one owns anything).

[23] *Ibid.*, II, 27.

[24] *Ibid.*, II, 27.

In paragraph thirty-two of the *Second Treatise*, Locke comes to the "chief matter of Property", which is not the produce of the land, but rather the land itself. Here Locke argues that "as much Land as a Man Tills, Plants, Improves, Cultivates and can use the Product of, so much is his Property." This private appropriation of land also does not require the consent of others, Locke argues, because when God gave the world to all men, he also commanded them to subdue and improve it.[26] Thus men, in obeying God's command and improving or cultivating the land, join their labour with it and are entitled to it as property.

There are limits set by nature, however, on the right of private appropriation of property. The first limitation is that of sufficiency; that is, the notion that there must be "enough and as good" left for others. Secondly, Locke argues that there is a spoilage limitation in that no one can appropriate more than he is capable of using before it spoils.

> As much as any one can make use of to any advantage of life before it spoils; so much he may by his labour fix a Property in. Whatever is beyond this, is more than his share, and belongs to others. Nothing was made by God for Man to spoil or destroy.[27]

A third limitation is that which is imposed by man's own abilities. He is only able to appropriate as much as he can procure by his own labour; "the measure of Property,

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[25] *Ibid.*, II, 28.

[26] Locke, II, 32.

[27] *Ibid.*, II, 31.

Nature has well set, by the Extent of Mens Labour, and the Conveniency of Life...

It is the introduction of money, however, which allows these limitations, imposed by nature, to be overcome. Locke states explicitly that the rule of property, whereby men may only appropriate as much as they can use, would still govern property in contemporary societies were it not for "the Invention of Money, and the tacit Agreement of Men to put a value on it..."; money thereby "introduced (by Consent) larger Possessions and a Right to them.[29] Thus, to use Locke's oft-quoted phrase, before men "agreed, that a little piece of yellow Metal, which would keep without wasting or decay, should be worth a great piece of Flesh, or a whole heap of Corn", land and its products could not be appropriated by one person in such large amounts that the rights of others would be infringed.[30]

At this point in his discussion of property, Locke digresses to present an argument for a labour theory of value. He begins by asserting that labour increases the common stock of mankind. To illustrate this view he uses the example of America. He argues that a thousand acres of uncultivated and unimproved land in America would support as many people as ten acres of cultivated land in Devon. In paragraph forty, Locke asserts that labour "puts the difference of value on everything." He argues that ninety-nine percent of all the things that are really useful to the life of man, are the products of labour. Locke again uses the example of America to support his view, arguing that the poorest person in

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[28] *Ibid.*, II, 36.

[29] *Ibid.*, II, 36.

[30] Locke, op. cit., II, 37.

England is richer than any of the inhabitants of America who, though they have plenty of lands and resources, have not cultivated, tilled or otherwise "improved" them.[31] Although an acre of land in England and an acre of land in America no doubt possess the same intrinsic value, the benefit received from one is greater than the other. With land, as with other items, "tis to [labour] we owe the greatest part of all its useful products."[32] Locke is preparing the way for his explanation of the manner in which unequal acquisition of property is justified. By arguing that labour increases the common stock of mankind, he can present a partial justification for the unequal division of property, which occurs with the introduction of money into societies.

In paragraph forty-five Locke discusses the emergence of nations. In the beginning, he notes, men simply made use of what "unassisted" Nature provided. But as people and stock increased and money was introduced, lands became scarce and, therefore, more valuable. As a result, communities were formed and their boundaries were established. Within those communities laws of property were also established to regulate property. Nations, by their tacit agreement to recognize each other's boundaries, gave up their original rights to the commons. They have, in effect, settled a property amongst themselves. However, this is not true of all the world. According to Locke:

> ...there are still great Tracts of Ground to be found, which (the Inhabitants thereof not having joyned with the rest of Mankind, in the consent of the Use of their common Money) lie waste, and are more than the People, who dwell on it, do, or can make use of, and so still lie in common.[33]

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[31] *Ibid.*, II, 41.

[32] *Ibid.*, II, 43.

[33] *Ibid.*, II, 45.

This is not the case (lands still held in common), says Locke, where men have consented to use money. Locke talks here, as Aristotle did, of the difference between the value of objects which inheres in their usefulness, and the value of things like money, which are desired as commodities. Most things which are useful in sustaining life are perishable. But things such as gold, silver and diamonds, have value because of the "fancy and agreement" of men, not because they are inherently useful.[34]

Locke argues that until the introduction of money, the material and moral limits of one's property could not be exceeded. If one had more than one could use before it spoiled, one might trade it for other useful items and this would not be considered a breach of the natural laws which bounded property, since nothing had been left to spoil. Men could also trade their surplus produce for non-perishable items, such as shells or metal, etc. Again, since nothing was allowed to spoil, the laws of nature were not violated; "the exceeding of the bounds of [one's] just Property not lying in the largenesse of his Possessions, but the perishing of anything uselessly in it."[35] Since money does not spoil, it allows one to overcome the spoilage limitation.

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[34] *Ibid.*, II, 46. Aristotle, in his discussion of the household and its importance, also made this distinction. He presents a view, held by some people, that currency exists entirely by convention: "Naturally and inherently (the supporters of this view argue) a currency is a nonentity; for if those who use a currency give it up in favour of another, that currency is worthless, and useless for any of the necessary purposes of life. A man rich in currency (they proceed to urge) will often be at a loss to procure the necessities of subsistence; *and surely it is absurd that a thing should be counted as wealth which a man may possess in abundance, and yet none the less die of starvation - like Midas in the fable, when everything set before him was turned at once to gold through the granting of his own avaricious prayer.*" *The Politics of Aristotle*. Translated and introduced by Ernest Barker. (Oxford: Oxford University Press, 1958) p. 25.

> without spoiling, and that by mutual consent Men would take in exchange for the truly useful, but perishable Supports of Life.[36]

By consenting to use money, "Men have agreed to disproportionate and unequal Possession of the Earth, they having by tacit and voluntary consent found out a way, how a man may fairly possess more land than he himself can use the product of, by receiving in exchange for the overplus, Gold and Silver."[37]

Locke's Influences: Grotius and Pufendorf

In the Renaissance era, the discovery of the 'New World' and its inhabitants had sparked new debates with respect to canon and Roman law.[38] In the initial stages of 'discovery' of North America, the ecclesiastical authority of the Pope, based on God's grant of the world to all men, was used as a justification for European nations to claim dominion over lands which were not under the control of a Christian ruler.[39] As various European monarchs began making overlapping claims to territories in North America, however, it became necessary to develop new political and legal doctrines which would

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[35] *Ibid.*, II, 46.

[36] *Ibid.*, II, 47.

[37] *Ibid.*, II, 50.

[38] Olive Patricia Dickason, "Renaissance Europe's View of Amerindian Sovereignty and Territoriality", *Plural Societies*, 8:3-4 (Autumn-Winter 1977): 97-107, p. 97

[39] *Ibid.*, 97. In 1493, the year after Columbus' landing in the Americas, Pope Alexander VI issued the famous bulls, which divided the world between Spain and Portugal. See Wilcomb E. Washburn, "The Moral and Legal Justifications for Dispossessing the Indians", in *Seventeenth Century America. Essays in Colonial History*.(Chapel Hill, NC: University of North Carolina Press, 1959),pp.15-32,p.15.

during the sixteenth and seventeenth centuries, especially the rise of science and rationalism and the decline of ecclesiastical authority resulting from the Protestant Reformation, required new ways of explaining the order of human existence. The doctrine of natural law fulfilled this need. As Leonard Krieger notes:

> ...[It is not] difficult to see why the idea of natural law, with its pre-Christian origins, with its obvious analogy to the laws of physical nature which were undergoing displacement from the cosmic scheme of Creation to the uniformities of specific equal phenomena, and with its appeal to the universal rational faculty in man, should be chosen as the new axis.[40]

Locke was one of those who found the concept of natural law useful in defining this new axis. In basing his doctrine of property on natural law theory, he was following in the tradition of two important political theorists who preceded him: the Dutch jurist Hugo Grotius (1583-1645) and his student, the German philosopher Samuel Pufendorf (1632-1694). All three of these theorists were concerned with reviving the concept of natural law which had existed since Roman times but had been largely superseded by theistic doctrines, to provide a new, more rational justification for the modern political and social order.

It is important to realize, however, that Locke, like Grotius and Pufendorf, developed his ideas within the social and economic context of his day. More importantly, he framed his theory of government with a view to his own nation's political and economic interests. In the introduction to his analysis of Locke's *Essay Concerning*

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[40] Leonard Krieger, *The Politics of Discretion: Pufendorf and the Acceptance of Natural Law*. (Chicago: University of Chicago Press, 1965) p. 103.

Human Understanding, Neal Wood describes Locke in the following way:

> Contrary to the judgment of some, Locke was not a compartmentalized man of ideas who could file his philosophy and politics in separate pigeonholes. He was a philosophic partisan and a partisan philosopher, not a detached, disinterested, and transcendent truth-seeker.[41]

Like the theories of Grotius and Pufendorf, Locke's doctrine of property was "tempered by the exigencies of his own country's colonial interests", a fact which has apparently either been overlooked or accorded little significance by modern analysts of political theory.[42]

Natural law, especially as it applied to appropriation of new lands, served to justify increasing territorial expansion by European governments. Barbara Arneil uses the telling example of Hugo Grotius', *Mare Liberum* (1609), which was written primarily as a justification for freedom of the seas. In it, Grotius develops a theory of property which depends on the idea of enclosure. He argues that since the seas cannot be enclosed, they are open to all and no national government can restrict the access of another nation to any part of them.[43] Arneil notes that Grotius originally developed this view of property to justify his nation's claims against the Spanish, with respect to trade in the East Indies. In 1611, however, when the English 'joined the fray' and began tapping into trade in the East Indies, the Dutch were forced to defend their interests and resorted to the same arguments

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[41] Neal Wood, *The Politics of Locke's Philosophy: A Social Study of "An Essay Concerning Human Understanding"* (Berkeley,CA: University of California Press, 1983) p. 3.

[42] Barbara Arneil, "John Locke, Natural Law and Colonialism", *History of Political Thought* 13:4 (Winter 1992): 587-603, p. 587

[43] *Ibid.*, 589.

to argue against the position he had previously advanced, in favour of an unlimited right to freedom of the seas.[44]

Grotius' subsequent work, entitled *De Jure Belli ac Pacis*, "On the Law of War and Peace (1620-25), was written primarily to provide a justification for war as a legitimate defense of self and property. To accomplish this Grotius first had to define property. Like Locke, he did this by theorizing a state of nature. It is with Grotius that the comparison of America to a state of nature originates.

> Beginning with Grotius and followed shortly by John Locke, the state of nature as it has developed in political and Christian thought from Cicero to Aquinas is, with the seventeenth-century thinkers wholly grafted, without consideration for the implications, on to the European notion of America and its natives. Christianity and legal theory are fused and become, through natural law, the singular viewpoint for understanding the New World and its inhabitants.[45]

Roger Scruton describes Grotius' theory of natural law as being designed to suit the needs of the new nation states of Europe. He believes that the idea of natural law harmonized with existing principles of law, as defined by ecclesiastical jurisdiction. Unlike religious law, however, it could "command assent at all times and places, irrespective of whether there is some power, secular or ecclesiastical, able to give support to its manifest moral authority."[46]

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[44] *Ibid.*, 590.

[45] Arneil, op. cit., 591.

[46] Roger Scruton. *A Dictionary of Political Thought*. (London: Macmillan, 1982) p. 192-93. It is ironic, in the context of the dispossession of Aboriginal peoples, that, as Scruton notes, Grotius developed the important principle of international law: *pacta sunt servanda*:

Samuel von Pufendorf also followed the natural law tradition which Grotius had developed.[47] Pufendorf was German born, but spent most of his career in Sweden as professor of law and later as court historian to the King of Sweden.[48] Some have asserted that it was Pufendorf's *De Jure Naturae et Gentium* which proved to be the greatest influence on Locke's work.[49] This is a significant point, in view of the fact that Pufendorf's theory of property and his view of the peoples of America, differed greatly from Locke's. Unlike Grotius, Pufendorf was not concerned with providing a justification for colonial interests, an important point which can be attributed to the fact that the nation in which he was developing his ideas was not as aggressively expansionist in character.[50] This is reflected in Pufendorf's formulation of natural law. Although he also begins by describing a state of nature he does not use the example of America. Pufendorf's state of nature is something which existed only in the earliest stages of human development. In contrast to Locke, he does not see the peoples of America as constituting a contemporary example of the state of nature. According to Arneil, Pufendorf:

> makes clear that he believes the inhabitants of the Americas are not atomized individuals within one great natural state, as Locke and Grotius seem to believe,

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promises and treaties are to be adhered to.

[47] Erik Wolf, "Samuel von Pufendorf", *Encyclopedia of Philosophy*, Volume 7. Paul Edwards, Editor-in-Chief. (New York: Macmillan Company and Free Press, 1967), pp. 27-29. He is described by Wolf as being one of the first philosophers of the era to understand the connection between sociological theory on the one hand and law and politics on the other. Wolf notes that he "saw the social realities of human life as a whole." p. 28

[48] *Ibid.*, 28.

[49] Laslett, op. cit., 88.

[50] Arneil, op. cit., 594.

European states.[51]

Like Grotius and Locke, Pufendorf views natural law as a universal concept which provides the basis for all human social orders. But property is not derived by Pufendorf in the same way as the other two theorists and it does not play the same role. Pufendorf agrees that the world was given to all in common, but he does not see this original grant as conferring a positive right upon mankind; that is, the world is not owned by everyone, rather the world "while owned by nobody, is open for use by everyone."[52] This distinction is an important one because, as Barbara Arneil notes, it means that ownership is detached from appropriation.[53] Pufendorf concludes that property ownership exists by convention, and is legitimate only so long as it is agreed to.

The idea that ownership of property requires the consent of others is the main point of attack for Locke in the works of Grotius and Pufendorf. He was greatly concerned to provide a theory of property which did not rest on the idea of consent.

> Locke was intent on basing his doctrine of the right to property on a notion of property-for-survival, a version of a labor theory of value. He eschewed the positions taken by both Grotius and Pufendorf - whose analyses of the origins of property he knew well - for they based the right of property on the concurrence of the rest of mankind. And throughout the *Second Treatise* he held fast to his refusal to rest the right of exclusive ownership on the consent of one's fellows.[54]

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[51] *Ibid.*, 595.

[52] *Ibid.*, 597

[53] *Ibid.*, 597.

[54] Herman Lebovics, "The Uses of America in Locke's *Second Treatise of Government*", *Journal of the History of Ideas*, 47:4 (Oct-Dec 1986): 567-581

as a "natural right" and not simply something which exists by convention. Yet, on the other hand, he admits that money, the advent of which allows one to accumulate disproportionate amounts of property, exists only by the agreement of men.[55] Apparent inconsistencies such as this one in Locke's doctrine of property become easier to understand when one examines his theory against the background of the economic interests of his nation.

Locke's point of departure for his discussion of property is also to be found in God's original grant of the world to mankind. Like Grotius, Locke sees this as a conferring a positive right of ownership to mankind; that is, everyone has a right to everything. The advantage of this idea of positive ownership as it relates to the acquisition of colonial territories, is aptly summed up by Arneil:

> Nothing could reflect more clearly the aggressive colonialism of the Dutch and English than the assumption that we actually possess everything on earth and it is up to each individual person or nation to grab its claim before anyone else can.[56]

But it remained for Locke to decide how this could legitimately be accomplished, without constituting an infringement of the rights of others. Locke's response to this problem was the idea of labour. An individual's property in their own person mixed with some item of nature through the labour which is expended on it, is sufficient to confer a right of property in that item. Men must preserve themselves; this is manifest not only in God's directives as stated in the Bible, but also in the nature of man's physical existence. To

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[55] Locke, II, 37.

[56] Arneil, op. cit., 601.

Having thus justified private appropriation of lands originally given to all, Locke must next provide a justification for unequal division of property. He must conceive of a way in which the natural limits to property of sufficiency, spoilage and labour, may be overcome. Locke's main concern was to liberate the individual right to property from the difficulties inherent in natural law. This he did by describing the advent of a money economy. By consenting to use money, to attach value to gold, silver or diamonds and to accept those things in return for commodities, Locke argues that men tacitly agree to an unequal division of property. This is so for the simple reason that money cannot spoil, and may thus be acquired in unlimited amounts.

What flows from Locke's labour theory of private appropriation of resources and the introduction of money is that the ownership one has in one's own labour power can be sold to another. Marx recognized Locke's version of the labour theory of value and used it to explain the manner in which capitalists were able to exploit workers by appropriating the value which had been added to commodities as a result of the labour expended upon them.[57] Workers, who owned only their labour but not the means of production, were forced by capitalists to sell their labour power on terms dictated by capitalists. For Marx, capital "came into being when and because exploitable labour did, as a consequence of the resource dispossession of pre-capitalist peasants."[58] It was theorists like Locke who

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[57] It should be noted, for purposes of clarity, that despite similar terminology, Locke's labour theory of value differs from Marx's.

[58] G.A. Cohen, "Marx and Locke on Land and Labour", *Proceedings of the British Academy* 71 (1985) :357-388, at p. 360.

provided the ideological framework within which this process of dispossession and alienation of labour could proceed.

The implications of Locke's introduction of money into his theory, what Herman Lebovics refers to as Locke's "coin trick"[59], have been dealt with most effectively by C.B. Macpherson in his influential work: *The Political Theory of Possessive Individualism: Hobbes to Locke*. Macpherson was one of the first modern political theorists to note the way in which Locke was able to justify unlimited private accumulation of property.

> The chapter on property, in which Locke shows how the natural right to property can be derived from the natural right to one's life and labour, is usually read as if it were simply the supporting argument for the bare assertion offered at the beginning of the *Treatise* that every man had a natural right to property 'within the bounds of the Law of Nature'. But in fact the chapter on property does something much more important: it removes 'the bounds of the Law of Nature' from the natural property right of the individual. Locke's astonishing achievement was to base the property right on natural right and natural law, and then to remove all the natural law limits from the property right.[60]

Macpherson argued that Locke was first and foremost an apologist for the rising bourgeoisie, a mercantalist, concerned with justifying the accumulation of capital.

Yet many modern political analysts have disagreed vigorously with this conception of Locke. They point to references in the *First Treatise* in which Locke indicates that no one has a right "to retain control over resources which are superfluous to his own needs" if those resources could be used by someone else who is in extreme want.[61] Kristen

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[59] Lebovics, "The Uses of America in Locke's *Second Treatise*", op. cit., .573.

[60] C.B. Macpherson, *The Political Theory of Possessive Individualism: Hobbes to Locke* (Oxford: Clarendon Press, 1962). p. 199.

[61] Jeremy Waldron, "Locke, Tully and the Regulation of Property", *Political Studies*, 32

Shrader-Frechette argues, in explicit contrast to Macpherson's thesis, that the limits which Locke placed on property continue to apply even after the introduction of money.[62] In presenting her case, however, she at times distinguishes between what may be deduced or inferred from the text of the *Two Treatises*, and what the historical Locke actually intended.[63] It is necessary for her to make this distinction because it is quite clear that the historical Locke certainly envisaged unequal division of property and capital, not only among individuals, but among nations.[64]

One of the most influential defences of Locke against the charge of being a spokesperson for the rising bourgeoisie, is James Tully's *A Discourse on Property: John Locke and His Adversaries*.[65] Tully also points to Locke's references to the duty of

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(1984): 98-106. See also Ramon M. Lemos, *Hobbes and Locke: Power and Consent* (Athens: University of Georgia Press, 1978) p. 150. Lemos asserts that Locke's theory can actually be used as a justification for the development of social welfare policies. They refer to paragraph 42, in the *First Treatise*: "But we know God hath not left one Man so to the Mercy of another, that he may starve him if he please: God the Lord and Father of all, has given no one of his children such a Property, in his peculiar Portion of the things of this World, but that he has given his needy Brother a Right to the Surplusage of his Goods" But Locke attributes this right to charity: "As Justice gives every Man a Title to the product of his honest Industry, and the fair Acquisitions of his Ancestors descended to him; so Charity gives every Man a Title to so much out of another's Plenty, as will keep him from extream want, where he has no means to subsist otherwise."

[62] Kristin Shrader-Frechette, "Locke and Limits on Land Ownership", *Journal of the History of Ideas*, 54:2 (April 1993): 201-219

[63] *Ibid.*, 202.

[64] J.E. Parsons, Jr., "Locke's Doctrine of Property", *Social Research*, 36 (1969): 389-411 He notes at p. 407: "it is not, as sometimes supposed, Locke's doctrine that the mere protection of wealth is the chief objective of civil society: the protection of a differential capacity to acquire wealth becomes that objective."

[65] James Tully, *A Discourse on Property. John Locke and His Adversaries*, (Cambridge: Cambridge University Press, 1980).

charity, but goes further in arguing that Locke's philosophy is underwritten by religious doctrines in which the public good is the primary consideration.[66] He locates Locke's theory, not in the social and economic context of his day, but rather in the natural law discourse of the era which was influenced largely by religious teachings. Like others who defend Locke from charges of being an apologist for burgeoning capitalism, however, Tully ignores the evidence of Locke's own values and outlook, as he himself expressed them. How, Wood asks, can Tully's Locke be reconciled with the Locke:

> who justified slavery and invested in the slave trade, approved of indentured servants and the apprentice system, charged interest on loans to close friends and was always tightfisted and demanding in money transactions, recommended a most inhumane - even for his times - reform of the poor laws, and bequeathed only a minute proportion of a total cash legacy of over 12,000 pounds to charity?[67]

In addition, it is quite clear that Locke saw nothing wrong with the social hierarchy of his society, or with the effects of the enclosure movement, which eliminated the means of subsistence of a large proportion of the population, leaving them to either starve or lead a hand-to-mouth existence. Wood concludes that "on the basis of what we know of Locke and his age, Tully's argument that Locke was a social and political egalitarian ...simply transcends the bounds of common sense and empirical evidence."[68]

Wood characterizes Locke not as a spokesperson for mercantilist interests, but rather as an advocate of agrarian capitalism. He draws attention to the fact that Locke

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[66] Neal Wood, *John Locke and Agrarian Capitalism.* (Berkeley: University of California Press, 1984), p. 74.

[67] *Ibid.*, 74.

[68] *Ibid.*, 75.

basically distrusted men of commerce, such as, for example the founders of the Bank of England. In addition, Locke expressed a profound interest in the science of husbandry. This is reflected in Locke's doctrine of property acquisition. He bases the right of property on the labour which is mixed with nature, but he places emphasis on a particular type of labour, the enclosure, tillage and cultivation of land. Locke expends a good deal of energy defending this type of labour as contributing to the increase of the "common stock of mankind."

There is some empirical evidence which would support this characterization. One can look, for example, at the constitution which he and his mentor, the Earl of Shaftesbury drafted for the Carolinas, in 1669. In framing this constitution, Locke and Shaftesbury were able, in effect, to 'start from scratch', without being concerned with any pre-existing social structures.

> The society they envisioned was to be a landed not a mercantile society. Commercial development, while it was to be encouraged, was to be strictly tied to the needs and interests of the landed proprietors.[69]

The conceptualization of Locke as a defender of property acquisition by agrarian labour, is particularly relevant to the discussion of the dispossession of Native peoples. Locke's view of property as being those lands which are cultivated, tilled and otherwise 'improved' by human labour, was a powerful colonial tool. The view of Native land use as 'wasteful', which Locke expressed in the *Second Treatise*, was extremely influential in colonial dealings with Aboriginal peoples, as illustrated by the history of the Passamaquoddy people in the Maine-Maritime region.

One of the purposes of Locke's chapter on property was undoubtedly to provide a justification for the appropriation of lands in North America already occupied by Aboriginal peoples. James Tully has recently turned his attention to the role played by Locke's doctrine of property in the dispossession of Aboriginal peoples during the period of European colonial expansion in North America.[70] Tully argues that Locke purposely constructed his idea of property in contrast to Aboriginal forms of property, to negate the latter and to justify appropriation of Native lands in America by English settlers. This Locke is able to do by depicting America as a state of nature, and then contrasting it with Western 'civilization'. By comparing the state of Aboriginal peoples to a state of nature, a pre-civil society, in which laws and government (as defined by Europeans), and property are effectively absent, Locke is able to argue that European appropriation of lands without the consent of Native peoples is justified.[71]

As has already been noted, Locke begins his chapter on property with the assertion that whether one appeals to Biblical teachings or to natural reason, it is clear that God has given the world to all men in common. This is an important element of Locke's argument. Tully notes that Locke characteristically presents more than one line of argument, usually theistic and nontheistic, to defend his views from attack on either side. This, according to

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[69] McNally, "Locke, Levellers and Liberty", op. cit., 22.

[70] James Tully, "Rediscovering America: The *Two Treatises* and Aboriginal Rights" In *An Approach to Political Philosophy. Locke in Contexts* (Cambridge: Cambridge University Press, 1993), pp. 137-176.

[71] *Ibid.*, 146.

Tully, "offers the attractive promise of gaining the agreement of people with a plurality of philosophical starting points."[72] Others have pointed out, however, that Locke had no choice but to base his arguments on ostensibly secular ideas such as natural law and reason because he was using the example of Aboriginal peoples, who obviously would not have had access to Scripture, to illustrate his argument.

> Locke, who took the old Testament as history, interpreted Genesis I, 28 (which tells of God's injunction to Adam to subdue the land and have dominion over the creatures) as giving Adam and his descendants land ownership in common. In the *Second Treatise*, Chapter V, Locke states that Reason as well as Revelation tells humanity this. This point is of course normatively important with respect to indigenous non-Christian peoples who lacked the Scriptures before the arrival of Anglo-Europeans.[73]

An important element in Locke's characterization of America as a state of nature is his distinction between industrious and rational use of land as contrasted with the "waste" and lack of cultivation found among Aboriginal peoples. The effect of this distinction is to undercut what is, in actual fact, extremely rational and industrious land use by Native North Americans.

> The planning, coordination, skills and activities involved in native hunting, gathering, trapping, fishing and non-sedentary agriculture which took thousands of years to develop and take a lifetime for each generation to acquire and pass on, are not counted as labour at all, except for the very last individual step (such as picking or killing) but are glossed as 'unassisted nature' and 'spontaneous provisions' when Locke makes his comparison.[74]

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[72] James Tully, "Property, Self Government and Consent, a review of John A. Simmons' *The Lockean Theory of Rights*", *Canadian Journal of Political Science*, 28:1 (March 1995): 105-132, p. 106.

[73] Marilyn Holly, "The Persons of Nature versus the Power Pyramid: Locke, Land and American Indians", *International Studies in Philosophy*, 26:1 (1994): 14-31, p. 20.

[74] Tully, "Rediscovering America", op. cit., 156.

The idea that land not improved by human labour is 'waste', would, as Tully notes, have been sacrilegious to Native peoples who saw nature as "alive and of infinite value independent of human labour."[75] Moreover, it is arguable that in the long term, Western land use is actually less rational and certainly less ecologically sound than that of Native peoples. It is the 'ethic of improvement' which forms the basis for an exploitative view of nature, which in the present era has led to worldwide environmental degradation. The distinction between the industrious, rational and value-creating land use of Europeans and the wastefulness of Aboriginal peoples, not only serves to vindicate the appropriation of Native lands, it also underwrites the destruction of Native peoples themselves, should they resist encroachment by European settlers.[76] Those who did not follow the laws of nature in subduing and improving lands, as dictated by Genesis and the laws of reason, were declaring themselves to live by "another Rule than that of reason and common Equity."[77] It was the responsibility, then, of Europeans as upholders of the law of nature, to punish the offenders.

Marilyn Holly argues, however, that Locke's use of natural law in this case is "ill-suited to bear the normative weight he places on it." She notes that in his *Essay Concerning Human Understanding*, Locke had argued that social and political phenomena could be classified as man-made ideas. He is thus effectively advocating the destruction of those who transgress what are not universal natural laws, but are, in fact precepts which

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[75] *Ibid.*, 163.

[76] Holly, op. cit., 20.

[77] Locke, op. cit., II, 8.

> Locke's censure of Indians for 'wasting' land and his rather more than implied rationale in the *Second Treatise* for settler appropriation of allegedly wasted land really has no secure or certain basis in reason.[78]

The practical effect of Locke's rationale was to place 'right' squarely on the side of settlers in defending the property they acquired by labour, while Native peoples defending their homelands, were relegated to the role of aggressors.[79]

A recent and striking example of the use of Locke to justify the dispossession of Aboriginal peoples can be found in an essay by Thomas Flanagan, published in the *Canadian Journal of Political Science*.[80] He defends the private appropriation by Europeans of Native lands, using Locke's arguments about the increase in productivity which results from a private property regime. In addition, he points to the benefits of superior technology which are made available to Aboriginal peoples as a byproduct of European colonization. Flanagan concerns himself with defending Locke's theory from

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[78] Holly, op. cit., 22.

[79] Francisco Castilla Urbano, "El Indio Americano en la Filosofia Politica de John Locke", *Revista de Indias*, XLVI:178 (1986): 589-602, 437.

[80] Thomas Flanagan, "The Agricultural Argument and Original Appropriation: Indian Lands and Political Philosophy" *Canadian Journal of Political Science* 22:3 (1989): 589-602. His essay is in part a reaction to a discussion resulting from a book review by David Gauthier published in the journal *Dialogue*. In his review, Gauthier discusses the issue of Aboriginal rights. He argues that Locke's theory of property acquisition could serve to legitimize appropriation of Native lands "by any group which could leave the original inhabitants better off than they were under their initial appropriation." Gauthier is taken to task on this point in a response by Nicholas Griffin. Griffin points out that if Gauthier's principle were applied universally, it would allow "wide-ranging redistribution of property *within* European society." See David Gauthier, "Book reviews: *Contemporary Issues in Political Philsophy*", *Dialogue* 18 (1979): 432-440 and Nicholas Griffin, "Aboriginal Rights: Gauthier's Arguments for Despoilation," *Dialogue* 20 (1981): 690-696.

attack on the basis that if it is extrapolated to include all societies, it would allow for the appropriation of territories in any society by any other group possessing superior technology or more efficient land use techniques. Flanagan's response to this criticism is to argue that once original appropriation has taken place and land is brought under a private property regime, the market will provide for the efficient allocation of resources.

Flanagan goes further in his argument than simply examining utilitarian considerations which he believes justify European appropriation of Aboriginal lands. He also delves into the moral questions surrounding the dispossession of Aboriginal peoples. In responding to the criticism that Locke's doctrine serves merely to rationalize the asymmetrical acquisition of Native lands by Europeans, Flanagan argues that because Native peoples did not recognize each other's territorial rights in any "lasting way," Europeans were justified in appropriating Aboriginal lands.

> By what moral principle can one claim today that the Europeans could not appropriate lands in the same way as the Indians of the day were accustomed to do for themselves? This not just to say that, since the Indians treated each other badly, the Europeans were justified in doing likewise. The point is rather the reappearance of symmetry in the equal right of appropriation by Indians and Europeans.[81]

Assuming that 'symmetry' is necessary to rationalize European appropriation of Native lands, it is difficult to see exactly how private appropriation by Europeans of Native territories can be considered comparable to appropriation of Native lands by other Native peoples. True symmetry would only occur in a situation in which Native peoples appropriated European territories.

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[81] Flanagan, op. cit., 599.

More disturbing than Flanagan's spurious arguments about symmetrical

appropriation however, are his neo-Darwinist arguments about evolutionary progress. In the concluding portion of his essay, Flanagan asks the rhetorical question:

> ...does any group have a right to expect that it can continue to live as it always has? The surface of the earth undergoes constant, and sometimes rapid, changes in climate that affect the abundance of fish, game and edible plants. Human beings are frequently discovering new products and processes that are diffused around the globe and change the lives of faraway groups. Agriculture had spread northward from Mexico across the eastern United States to Canada in the centuries before the arrival of the Europeans. Even without the arrival of the Europeans, it is quite possible that permanent settlement, land enclosure and organized states would have arisen among the Indians of North America, just as they had among the Indians of South and Central America.[82]

Flanagan's use of this type of argument in the context of a discussion of modern-day Aboriginal rights issues is particularly troubling. By linking Locke's doctrine of property to an argument about ecological and environmental changes, Flanagan has renovated Locke for use in a contemporary political discussion of Aboriginal land rights. If nothing else, his views demonstrate the persistence of Locke's conception of property and its striking utility in the process of colonialism.

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[82] Flanagan, op. cit., 600. Nicholas Griffin's response to this question is compelling. He argues that Flanagan's question should instead be asked of Western societies, noting that:

> The factors Flanagan alludes to, such as climatic changes are largely irrelevant for a consideration of European colonialism. (Such major environmental changes as we are now seeing result almost entirely from Western practices.) The appropriate question is: "Does any group *A* have the right to demand that another group *B* change the way it lives in order to solve *A*'s perceived problems (in ways congenial to *A*) or (more realistically) in order to satisfy *A*'s greed, when *B*'s way of life is not in any way harming *A*?" The answer to that question is, surely, "No." Nicholas Griffin, "Reply to Professor Flanagan," *Canadian Journal of Political Science* 22:3 (1989): 603-606, at p. 606.

theory of John Locke, it is only in the last decade that research has emerged examining the nexus between his theory of property and the Aboriginal peoples of North America.[83] Those who have recently shed light on the connection between Locke's conception of property acquisition and the dispossession of Native peoples have demonstrated that his theory did, in fact, play a role in justifying the appropriation of lands occupied by various Native groups in the Thirteen Colonies. Locke's theory of property was frankly quoted in discussions concerning the legitimacy of European territorial claims.[84] But the role of the Lockean conception of property in the Maine-Maritime region is somewhat more complex, owing to the fact that the struggle between French and English, and between English and American colonial regimes, influenced the way in which Native lands in the region were acquired by non-Native settlers.

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[83] See for example, Roland Hall, *Eighty Years of Locke Scholarship* (Edinburgh: University Press, 1983).

[84] An essay by Reverend J. Bulkley, written in 1724 and entitled "An Inquiry into the Right of the Aboriginal Natives to the Lands in America," has been cited as an example of the utilization of Locke's doctrine of property in justifying appropriation of Native lands. Bulkley declares of Native land title that: "to assert their right in that extent that many do, and suppose it, without excepting any, to extend to all lands in the country, whether cultivated by them or not, is what I never could , nor yet can, see any sufficient reason for." His essay is found in the *Collections of the Massachusetts Historical Society,* Series I, Volume 4 (1795): 159-181.

In much the same way that Locke utilized the example of Native people to illustrate his arguments with respect to property, modern anthropologists and ethnohistorians have also used the example of Aboriginal landholding patterns to support the Western idea of property. After more than two centuries of colonial presence in North America, the land-base of most Aboriginal groups had been drastically eroded. Without access to land and the ability to obtain subsistence, Native peoples were left mostly destitute. No longer posing a threat to expanding North American empires, Native peoples became instead the subject of ethnological study. The 'family hunting territory' debate arose early this century, when ethnohistorians discovered what they believed was an Aboriginal form of property. The theoretical framework within which Aboriginal societies were scrutinized had changed, but the underlying rationale - the search for evidence confirming the universality of existing institutions such as property - remained the same. Where Locke had distinguished Aboriginal land use from European land use in order to justify private property, ethnohistorians and anthropologists attempted to draw comparisons between the two types of land use, again, in order to justify the institution of private property.

The debate surrounding Aboriginal "property" ownership began in 1915 with the work of Frank Gouldsmith Speck, a pioneer ethnographer who was the first to describe what he termed the "family-owned hunting territory." Following the tradition of his mentor, the German ethnologist Franz Boas, Speck adopted an orientation to ethnology

Evolutionists."[85] Speck's approach to ethnology involved first-hand observation and description of Native cultures, often obtained from close contact with Native groups.[86] He described the family hunting system as a fundamental institution among all the Algonkian peoples, and indeed his studies included Algonkian groups ranging from Newfoundland to Northern Ontario.[87] The discovery of family hunting territories reveals much about Western notions of property. More importantly, however, it reveals a great deal about the Aboriginal understanding of, and relationship to, the land.

At a very early stage in their studies of Aboriginal cultures, anthropologists noted that amongst most Native groups in North America, spirituality was animistic in nature. J.R. Miller explains the significance of such a spiritual belief system:

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[85] Alvin H. Morrison, "Frank G. Speck and Maine Ethnohistory," In *Papers of the Eleventh Algonquian Conference*. Edited by William Cowan. (Ottawa: Carleton University, 1980). p. 8-9. The cultural evolutionist theory developed out of, but transcended the frame of reference provided by studies in biological evolution. Inherent in the cultural evolutionist position, was the idea that societies develop in a linear fashion, from small to large, simple to complex, informal to formal social orders. Modern anthropologists criticized the nineteenth century evolutionists as being "unilinear", meaning that the latter believed all societies must necessarily progress through the same stages (p. 223). Elman R. Service, "Evolution: Cultural Evolution" *International Encyclopedia of the Social Sciences*. Volume 5. Edited by David L. Sills. (New York: Macmillan and Co., 1968) p. 223.

[86] Morrison, op. cit., 8. Morrison is critical of Speck's approach to ethnohistory. He argues that Speck emphasized field work at the expense of library research using historical documentation, which could sometimes result in a distorted or inaccurate study. Morrison cites criticisms made by some of Speck's peers, who suggest that Speck's orientation toward the study of Aboriginal peoples was more that of natural historian than ethnohistorian.

[87] Frank G. Speck, "The Family Hunting Band as the Basis of Algonkian Social Organization", *American Anthropologist*, N.S., 17 (1915): 289-305, p. 290.

> Animistic religions place humans in the physical environment without drawing any distinction or barrier between them and the physical world. Creation myths could vary from one nation to another, but the underlying understanding of what constituted being was the same for all Indians. All people, animals, fish, and physical aspects of nature were animate; all had souls or spirits.[88]

All spirits required respect, which was demonstrated in various ceremonies. This aspect of Native culture was also noted by Diamond Jenness, who argued that it was impossible to understand the culture of Northeastern Algonkians without some understanding of their interpretation of what they saw around them.

> They lived much nearer to nature than most white men, and they looked with a different eye on the trees and the rocks, the water and the sky. One is almost tempted to say that they were less materialistic, more spiritually-minded, than Europeans, for they did not picture any great chasm separating mankind from the rest of creation, but interpreted everything around them in much the same terms as they interpreted their own selves.[89]

Frank Speck noted this aspect of Aboriginal culture. He characterized the Micmacs as "harmonic extensions of nature", as conservationists, in tune with their surroundings.[90] Such an understanding of nature as "a continuum", in which humans hold no special place, is incompatible with the idea of private ownership of property, as understood by Western societies.[91] Land was viewed as a gift from the Creator, which

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[88] J.R. Miller, *Skyscrapers Hide the Heavens.* (Toronto: University of Toronto Press, 1989), p. 12.

[89] Diamond Jenness, "The Indian's Interpretation of Man and Nature", *Transactions of the Royal Society of Canada.* Section II (1930): 57-62.

[90] Christopher Vecsey, "American Indian Environmental Religions", in *American Indian Environments.* Edited by Christopher Vecsey, et. al. (Syracuse, NY: Syracuse University Press, 1980), 1-37, p. 5

[91] Miller, op. cit., 13.

earth as their "Mother", and thus regarded it as being sacred. The burning of tobacco and sweetgrass was intended to be a means of conveying thanks to the Creator for this gift.

What follows logically from this description of the relationship between Aboriginal peoples and the lands they inhabited is the idea that land cannot become the subject of a transaction. In an essay describing land ownership among the Iroquois and their allies, George Snyderman quotes the native leader Black Hawk:

> My reason teaches me that land cannot be sold. The Great Spirit gave it to his children to live upon, and cultivate as far as necessary for their subsistence; and so long as they occupy and cultivate it, they have the right to the soil - but if they voluntarily leave it, then any other people have the right to settle upon it.[92]

Amongst many Native groups, there was an attitude of stewardship towards the land, "the belief that the land belonged not only to the present generation, but to all future generations." Thus, no one generation would have the right to sell the land, thereby disinheriting those who would follow. Snyderman's essay supports this view. He notes that among the Iroquois and their allies there was a communal view of land ownership. To be more precise, there was a pervasive view among many Native groups that the land belonged to all those who inhabited it and no one individual could have, (or would have) made a personal claim to some part of it.[93] George Bird Grinnell notes of North American Aboriginal cultures in general, that:

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[92] George S. Snyderman, "Concepts of Land Ownership Among the Iroquois and their Neighbours", *Symposium on Local Diversity in Iroquois Culture*, Bureau of American Ethnology, Bulletin 149. (Washington: Smithsonian Institution, 1951), pp. 15-34.

[93] Snyderman, op. cit., 18.

> it, or cultivated it; and as they passed away the same operations were performed by one generation after another; and after those now occupying it shall have passed from life, their children and their children's children for all succeeding generations shall have in it the same rights that the people of the past have had and those of the present possess, but no others. This land cannot be sold by the individual or the tribe.[94]

When Native peoples did pass rights of occupancy to white people, what they were usually doing was lending them the use of the land. Eleanor Leacock touches on this in the opening pages of her account of the Montagnais-Naskapi. She notes significantly that:

> There is no material advantage to an individual hunter in claiming more territory than he can personally exploit. Nor is there any prestige attached to holding a sizeable territory, or emphasis on building up and preserving the paternal inheritance. Nor can land be bought or sold. In other words, land has no value as "real estate" apart from its products. What is involved is more properly a form of usufruct than "true" ownership.[95]

Her use of the term usufruct is significant. Usufruct, is defined in Western common law tradition as " a real right of limited duration on the property of another."[96]

In his article dealing with Maine-Maritime Native groups, Ray details the period between 1625 and 1675, when Native peoples signed deeds "conveying most of coastal

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[94] George Bird Grinnell, "Tenure of Land Among the Indians", *American Anthropologist*, N.S., 9 (1907): 1-11.

[95] Eleanor B. Leacock, *The Montagnais "Hunting Territory" and the Fur Trade*, Doctoral Dissertation, Columbia University, (Ann Arbor, MI: University Microfilims, 1952), p. 8.

[96] Henry Campbell Black, *Black's Law Dictionary*, Sixth Edition. (St. Paul, MN: West Publishing Co., 1990) p. 1544.

were signed by local tribes, there is evidence to suggest that they did not believe they would be giving up occupancy of the land forever. On the contrary, in fact, most Native groups tended to remain on the lands in question, and in some cases this fact was reflected in the deeds themselves.

> The Maine Indian deeds of this period frequently contain rights these Indians reserved for themselves, while allowing the buyers to also enjoy the fruits of the land. The deeds with the rights reserved show that the Indians intended to live right where they had previously lived.[98]

Ray argues that most Native peoples would only have signed deeds of purchase if they believed that they and their ancestors would continue to be able to use the land as before.

> It seems clear that the Maine Indian deeds meant one thing to the Maine Indians and quite a different thing to the English/Massachusetts land buyers. It also seems clear that the land buyers knew that the Indians intended to continue to draw upon the bounty of the land they conveyed in these deeds and to continue their accustomed habitation locations.[99]

However, the fact that Native peoples in Maine reserved their right to use the lands even after sale, is interpreted by Emerson Baker to signify that they did, in fact, understand the concept of exclusive ownership. He argues, referring to the Kennebecs of seventeenth century Maine that:

> Although it is possible that the Indians did not completely comprehend the English concept of exclusive ownership, these clauses in deeds guaranteeing continued

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[97] Roger B. Ray, "Maine Indians' Concept of Land Tenure" in *Maine Historical Society Quarterly* 13:1 (Summer 1973): 28-51.

[98] *Ibid.*, 40.

[99] *Ibid.*, 43.

> of exclusive ownership, why did they demand clauses stipulating the rights they would retain after sale? The Indians must have demanded these rights, for it is doubtful that the English grantees would have unilaterally surrendered them.[100]

But Ray's opinion that Native peoples believed they were exchanging only usufruct rights, is supported by others, including William Cronon. In speaking of Aboriginal groups in colonial New England, he explains that when Native peoples exchanged rights to a particular piece of land, it was in fact "usufruct rights" which were being exchanged. Such rights lasted only as long as the land was in use and did not include many of the concepts which in the European mind are subsumed under the idea of property. Again, the notion of exclusive use comes into play, as Cronon explains, "...a user could not (and saw no need to) prevent other village members from trespassing or gathering nonagricultural food on such lands, and had no conception of deriving rent from them."[101]

In reading the discussions regarding family hunting territories, one is struck by the ethnocentricism of various theories, by the total absence of any consideration of the views of Native peoples themselves regarding their relationship to the land. It is clear that Aboriginal land tenure cannot be understood in isolation from the culture of which it forms an integral part. Those involved in the hunting territory debate could only have concluded it represented an Aboriginal form of private property, by completely ignoring the Aboriginal interpretation and understanding of man and nature.

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[100] Emerson W. Baker, "A Scratch with a Bear's Paw": Anglo-Indian Land Deeds in Early Maine", *Ethnohistory*, 36:3 (Summer 1989): 235-256, p. 245.

[101] William Cronon, *Changes in the Land: Indians, Colonists and the Ecology of New England* (New York: Hill and Wang, 1983), p. 62.

The family hunting ground system was thought to be an early form of Aboriginal property ownership because it represented a systematized distribution of specific areas of land occupied by a band or tribe. The territories were divided into "distinct and permanent tracts for more or less exclusive use by hunting groups of two to four related nuclear families."[102] These tracts of land were supposed to have been owned "from time immemorial by the same families and handed down from generation to generation."[103] Because the territories were controlled exclusively by a family or families, rather than a band or tribe, and because this control was passed from generation to generation, this system of land tenure was regarded as a form of private property.

The rationale for family hunting territories was based in part upon an ecological interpretation of Aboriginal subsistence patterns. The territories were thought to exist because of the reliance by some Aboriginal peoples upon furbearing animals such as the beaver, for subsistence. Because they are small and relatively sedentary animals, beaver could more easily be hunted by an individual, rather than a group. Where Native peoples depended for subsistence upon larger, migratory, herd animals such as buffalo or caribou, hunting was more easily undertaken in groups, and therefore land would be "owned" by groups as well.[104]

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[102] Rolf Knight, "A Re-examination of Hunting, Trapping and Territoriality Among the Northeastern Algonkian Indians", In *Man, Culture and Animals*. (Washington: American Association for the Advancement of Science, 1965), p. 27.

[103] Speck, op. cit., 290.

[104] John M. Cooper, "Land Tenure Among the Indians of Eastern and Northern North America", *The Pennsylvania Archaeologist*, 8 (1938): 55-69, p. 59.

Following Speck's lead, ethnographers

Hallowell and others began to look for evidence of the family hunting ground in different Algonkian groups. Cooper found that the family hunting ground system existed over a wide range, "among the Algonquian-speaking Montagnais-Naskapi, Cree and Ojibwa, north of the St. Lawrence and Great Lakes from Labrador to the Lake Winnipeg region, and among the Algonquians of Maine and the Maritime Provinces."[105] In an article published in 1968, Dean Snow also made a case for the family hunting territory system among the Wabanaki peoples, which include the Micmac, Maliseet, Penobscot, Pennacook, Abenaki and the Passamaquoddy peoples. Based upon the work of Speck and Hadlock,[106] Snow argued that Wabanaki family hunting territories were distributed along river drainage systems, as for example in the case of the Maliseet territory, which was situated along the drainage basin of the St. John River.[107] It was Snow's contention that the fur trade resulted in the "crystalization" of pre-existing patterns of subsistence among these groups. He thus makes a case for the aboriginality of the family hunting ground system, which merely intensified among the Wabanaki peoples following the establishment of the fur trade in the region.

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[105] *Ibid.*, 56.

[106] Frank G. Speck and Wendell S. Hadlock, "A Report on Tribal Boundaries and Hunting Areas of the Malecite Indian of New Brunswick", *American Anthropologist*, N.S., 48 (1946): 355-374.

[107] Dean R. Snow, "Wabanaki Family Hunting Territories", *American Anthropologist*, N.S., 70 (1968): 1143-1151, p. 1147. For a differing view on this point, see Bruce J. Bourque, "Ethnicity on the Maritime Peninsula, 1600-1759", *Ethnohistory*, 36:3 (Summer 1989): 257-284.

argue for property as a universal human institution. An example of this view is found in an essay by A.I. Hallowell, "The Nature and Function of Property as a Social Institution", published in 1943. Hallowell makes a case for property as one of the most fundamental institutions of any human society.[108] It is his contention that "man as a species, faced with certain persistent problems of environmental and social adaptation, solved them in terms of basically similar modes of adjustment."[109]

Hallowell notes at the outset that there are certain difficulties involved in discussing property in different cultures, since our understanding of it is derived principally from concepts and terms which are unique to institutions of western civilization. He concedes this point, but nevertheless falls back on western legal and economic thought to frame his discussion, arguing that:

> it is lawyers and economists, rather than sociologists or anthropologists, who, in dealing with the institution of property in western culture from a practical and theoretical point of view, have contributed most to our understanding of it.[110]

He makes the important distinction between ownership of property and simple possession, explaining that property ownership implies a relationship not between a person and some object, but rather between individuals. This is best explained in terms of a triad, in which A owns B against C, where A is the owner of property, B is the property

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[108] A.I. Hallowell, "The Nature and Function of Property as a Social Institution", *Journal of Legal and Political Sociology*, 1 (1943): 115-138.

[109] *Ibid.*, 116.

[110] *Ibid.*, 119.

to take into account when determining the nature of property as a social institution. They are: the nature and kinds of rights which are exercised over a thing; the individuals or groups in whom rights, privileges, powers or duties are invested; the kinds of things or objects over which the rights extend; and the legal or non-legal instruments which serve to reinforce behaviour with respect to ownership.[112] Thus the term "ownership" actually implies a "bundle" of rights which may (or may not) include the right to use, the right to exclude others from the use of, the right to alienate or the right to bequeath.[113]

In his discussion of property Hallowell notes the variations which can occur with respect to property ownership in various societies. One example of this is his discussion of laws which govern property. He describes the Western legal tradition, as captured by Jeremy Bentham's statement that without laws, there can be no property. In Hallowell's opinion, this leaves out other types of sanctions, such as customs and traditions, which may govern behaviour as it relates to property. This would then include societies in which there are no positive laws regarding property, but where property can nevertheless be said to exist. There may, in his view, be other non-legal institutions, which serve to secure property interests, operating in the same way as laws.[114]

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[111] *Ibid.*, 120.

[112] *Ibid.*, 119.

[113] Adrian Tanner, "The New Hunting Territory Debate: An Introduction to Some Unresolved Issues", *Anthropologica*, N.S., 28:1-2 (1986): 19-36, p. 27.

[114] Hallowell, op. cit., 133.

> ...human society, by definition, implies the existence of ordered relations and ordered relations mean that individuals *do* enjoy the security of socially sanctioned rights and obligations of various kinds.[115]

In any society, according to Hallowell, "we inevitably find socially recognized and sanctioned interests in valuable objects." It is his view that the social relationships which govern property offer individuals protection against "the necessity of being constantly on the alert to defend such objects from others by physical force alone..."[116] This, for Hallowell, is the primary contribution of the institution of property to human social orders.

Because Speck's discovery seemed to provide concrete evidence supporting the views of those, such as Hallowell, who asserted that property was an inescapable fact of human society, it represented a profound challenge to the accepted view among ethnologists and anthropologists, that "at the hunter-gatherer stage, land and the basic resources used in production did not exist as 'private property' but were held 'communally'."[117] It thus also represented a challenge to Marxist evolutionary theory, as described in works such as Frederick Engels', *The Origin of Family, Private Property and the State*.

The Origin of Family, Private Property and the State was based on the work of Lewis Henry Morgan, a nineteenth century lawyer and anthropologist. In 1877, Morgan

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[115] *Ibid.*, 138.

[116] *Ibid.*, 138.

[117] Tanner, op. cit., 20.

published *Ancient Society*, in which he attempted to answer questions related to the development of successive social organizations. He did this by analyzing entire cultures, including those of the Iroquois, Aztecs, Australians and others.[118] He established a series of stages, based on productive technology, through which different societies were supposed to have passed. Maurice Bloch explains that Morgan's work differed from other evolutionary studies:

> because of the sympathy of the writer for primitives, and because it not only defined stages but in many cases suggested mechanisms which explained why one stage should change to another.[119]

Engels expanded upon the comparisons which Morgan made between different "stages" of development, drawing out the political implications, one of which concerned the development of property. Engels argued the Marxist theory of the origin of property, which is that in pre-capitalist societies, where production occurs not for exchange but for the subsistence of the producer, there is no private appropriation of resources.[120] The historical introduction of commodity production however, is marked by the introduction of private ownership of the means of production.[121]

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[118] Eleanor Burke Leacock, "Introduction" to *The Origin of Family, Private Property and the State*, by Frederick Engels. (New York: International Publishers, 1972), pp. 7-66, p. 11.

[119] Maurice Bloch, *Marxism and Anthropology: The History of a Relationship* (Oxford: Clarendon Press, 1983), p. 8.

[120] Tanner, op. cit., 20.

[121] Friedrich Engels, "The Origin of Family, Private Property and the State". In *The Marx-Engels Reader*. Edited by Robert C. Tucker (New York: W.W. Norton & Co., Inc.) 1972. pp. 651-659.

Engels and Marx found anthropological studies such as those of Morgan, useful in supporting their attack on capitalism, because they helped to demonstrate the historical development of the capitalist system. The laws of capitalism, which were held by economists to be as natural and inevitable as the laws of physics, were shown by Marx to be the product of a particular moment in human evolution. By comparing the capitalist system with systems which had existed in other societies, Marx was able to show that social relations of production were themselves a product of the social system in which they occur.[122] Marx's theories, including his view of human social evolution, obviously occupied a large place in Soviet anthropology, and predictably, Speck's discovery was not well-received by social scientists in the Soviet Union.[123] In fact, there were those who regarded Speck's theory as a direct attack on Morgan and by extension, on Marx and Engels.

From the beginning Speck's theories were challenged by those who did not believe that the hunting grounds pre-dated European contact.[124] Definitive support for this position came in the early 1950's, when Eleanor Burke Leacock published an account of her work among the Montagnais-Naskapi of Labrador. She challenged the view that family hunting grounds were aboriginal, arguing instead that "such private ownership of

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[122] Bloch, op. cit., 12.

[123] Harold Hickerson, "Some Implications of the Theory of the Particularity or "Atomism" of Northern Algonkians", *Current Anthropology*, 8:4 (October 1967): 313-328, p. 318.

[124] Francis E. Ackerman, "A Conflict Over Land", *American Indian Law Review*, 8 (1982), 259-298. Ackerman points out that two of Speck's contemporaries in particular, Diamond Jenness and Alfred G. Bailey, pointed to the historical records made by Jesuit missionaries who spoke of their efforts to change the land holding patterns of Native peoples in Acadia, by settling families on separate territories.

exchange into Indian economy which accompanied the fur trade."[125] Using both field observation and ethnohistorical data, Leacock was able to refute some of the assumptions underlying Speck's theory. She contended that there was actually less reliance upon beaver and other furbearers prior to the advent of the fur trade, than was previously thought by Speck and others. It was Leacock's assertion that, as the fur trade took hold among Algonkian peoples like the Montagnais, the imperative of hunting and trapping for food was replaced by an economic imperative: the acquisition of furs for exchange, causing a greater emphasis on the trapping of beaver. This in turn changed what had formerly been cooperative relationships between band members, into competitive ones, and communal "ownership" of land, into individual (family) ownership. Where families had once depended on and helped one another in the hunt, they were now in competition for limited resources.[126] She cited, as part of the evidence to support her argument, the fact that the individualized land holding pattern decreased in strength as one moved away from the "center of the earliest and most intensive fur trade."[127]

In support of his belief in the Aboriginality of family hunting grounds, Speck had argued that there was evidence of the existence of the territories dating from the early eighteenth century, which according to him, was only half a century (at most) after the fur trade had become important. This, in his view, meant that the fur trade could not have

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[125] Leacock, *The Montagnais "Hunting Territory"* op. cit., 9.

[126] *Ibid.*, 18.

[127] *Ibid.*, 16.

and others had mistakenly dated the advent of the fur trade from the establishment of the Hudson's Bay Company in 1670, ignoring a history of trade by European fishermen dating back to the early 1500's.[128] Leacock's refutation of these and other points in Speck's theory essentially ended the debate over the aboriginality of family hunting territories.

The debate serves to illustrate the implicit ideological assumptions underlying Western notions of property. The fact that so much effort was expended by anthropologists in searching for signs of property among Aboriginal peoples, in North America and elsewhere,[129] and so much discussion devoted to the forms of property ownership, can only lead one to conclude that in Western societies, it is an institution which is of singular identity. Through each of the various phases in the development of European understanding of Aboriginal landholding patterns, the spiritual attachment of Native peoples to the lands they inhabit has remained unchanged. What follows in the second part of the thesis is a description of the relationship between one particular Aboriginal group, the Passamaquoddy, to their ancestral lands. The history of the Passamaquoddy provides a clear and forceful example of the way in which conflicting views of land 'ownership' have been resolved in favour of colonizing governments.

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[128] *Ibid.*, 25.

[129] Cf., L.P. Mair, "Native Land Tenure in East Africa", *Africa*, 4 (1931): 314-329.

PART II

CHAPTER THREE: THE PASSAMAQUODDY AT GUNASQUAMCOOK

When Europeans first arrived in what is now New Brunswick, they found it inhabited by two principal Native groups, the Micmac or Souriquois, who occupied an area from Nova Scotia to the Gaspe, and the Maliseet-Passamaquoddies or Etchemins, who inhabited the valley of the St. John River and the Passamaquoddy region.[130] The Passamaquoddy people are closely related to the Maliseets, the two groups differing essentially only in the territories they inhabited. Both the Maliseets and the Passamaquoddies are descended from the Etchemins, whom Champlain first encountered in 1604, as evidenced by the fact that he named the St. Croix River, "Rivière des Etchemins."[131] Together with the Micmacs, Penobscots and Eastern and Western Abenakis, the Passamaquoddies and the Maliseets formed the Wabanaki Confederacy.

In an article dealing with tribal boundaries of the Maliseets, Frank Speck delineated the Passamaquoddy territory as follows:

> The division line between Malecite and Passamaquoddy habitats began at Lepreau river and Mace Bay on Bay of Fundy, striking northwest some fifty miles to Magaguadavic Lake, then bearing northward to near Pokiok river, keeping about

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[130] W.F. Ganong, *Historic Sites in the Province of New Brunswick*, (St. Stephen: Print'n Press Ltd., 1983), p. 5. Reprinted from "A Monograph of Historic Sites in the Province of New Brunswick", *Transactions of the Royal Society of Canada*, 1899.

[131] Guy Murchie, *Saint Croix Sentinel River*. (New York: Duell, Sloan and Pearce, 1947), p. 66.

fifteen miles south of St. John river until it reaches the present border of Maine on the sources of the Mattawamkeag river.[132]

This differs slightly however, from Passamaquoddy boundaries as described by Louis Mitchell, himself a member of the Passamaquoddies, who in 1887, defined the Passamaquoddy territory as extending "from the Preaux River in New Brunswick to the Cherryfield or Narraguagas River near Machias and north to the heads of the Machias and St. Croix Rivers."[133] Thus, the ancestral Passamaquoddy territory is today bisected by the U.S.-Canadian border.[134]

The close links between the Maliseet, Passamaquodddy and Penobscot peoples are attested to by Andrea Bear Nicholas. She describes political, cultural, and linguistic similarities between these groups, noting that the closest ties were those which existed between the Maliseets and Passamaquoddies.[135] This close relationship is perhaps what has led many twentieth-century ethnohistorians to speculate that the Passamaquoddy are

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[132] Frank G. Speck and Wendell S. Hadlock, "A Report on Tribal Boundaries and Hunting Areas of the Malecite Indian of New Brunswick", *American Anthropologist* (N.S.), 48 (1946): 355-374, p. 363. Ganong, op. cit., at page 6, suggests that the boundary between the Maliseet and Passamaquoddy people, "...practically one tribe as they were, was not a sharp one."

[133] Andrea J. Bear, [now Andrea Bear Nicholas], *The Concept of Unity Among Indian Tribes of Maine, New Hampshire and New Brunswick: An Ethnohistory*, (Waterville, Maine: Colby College, 1966), p. 110.

[134] For a discussion of the effect of geopolitical borders on Native groups, see Sharon O'Brien, "The Medicine Line: A Border Dividing Tribal Sovereignty, Economies and Familes", *Fordham Law Review* 53 (1984): 315-350. She argues that Native groups whose territories span the Canada-U.S. border face serious problems. She notes at p. 315:

> This border is an arbitrary barrier to their sovereignty and a sunderer of their political institutions, tribal membership and even family cohesion. It thus seriously impedes tribal political, economic and social development.

[135] Bear, op. cit., 3.

result of European influences. However, this view is not supported by early historical accounts such as those which Fannie Hardy Eckstorm relates in her work on the history of Maine. Eckstorm cites the Jesuit Relation of 1677, in which "Pessemonquote (Passamaquoddy) is mentioned as a river on which the Indians were settled."[136] She also notes evidence of the antiquity of the Passamaquoddy people contained in official correspondence of French administrators.

> In 1694 Villebon wrote that the Maliseets live on the St. John and along the sea-shore, occupying "Pesmonquadis, Majais (Machias), les Monts Deserts and Pentagoet" (Castine). In addition to this is a letter, dated Feb. 10, 1638 (old style), from Louis XIII to the Sieur D'Aunay de Chantsay, "commandant of the forts of La Heve, Port Royal, Pentagoet and the coasts of the Etchemins," establishing the boundary between D'Aulnay and De la Tour, shows clearly that the Etchemins occupied not only the St. Croix valley, but the whole southeastern coast of Maine, including the eastern coast of Penobscot Bay.[137]

"After this", according to Eckstorm, "the identity of the Etchemins with the modern Maliseets and the antiquity of the Passamaquoddy tribe can hardly be denied."[138]

The principal settlement of the Passamaquoddy people was Gunasquamcook, meaning (roughly) "at the gravel beach of the pointed top."[139] Gunasquamcook is today

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[136] Fannie Hardy Eckstorm, "The Indians of Maine", in *Maine: A History*, Edited by Louis Clinton Hatch. (New York: American Historical Society, 1919), pp. 43-64, at 48.

[137] *Ibid.*, 48.

[138] *Ibid.*, 48.

[139] Albert S. Gatschet, *All Around the Bay of Passamaquoddy: With the Interpretation of its Indian Names of Localities*. (Washington: Judd and Detweiler Printers, 1897), p. 22. Reprinted from the *National Geographic Magazine*, VIII No. 1 (January 1897): 16-25. The placename has also been spelled Kun-as-kwam-kuk and Quun-os-quam-cook.

Passamaquoddies called Gunasquamcook is still known locally as "Indian Point." In his monograph on historic sites of New Brunswick, William Francis Ganong explained that certain factors influenced the selection of camping sites by Native peoples. Among these were the site's nearness to a river, which would have provided a travel route and an abundance of game, "particularly of game occupying a fixed position, as shell-fish do."[140] Gunasquamcook is such a site. Located on Passamaquoddy Bay, where the St. Croix River empties into the Bay of Fundy, Gunasquamcook would have provided a site from which the sea's products could be easily harvested. The name Passamaquoddy is itself a reference to pollock, a species of fish which were found in abundance in Passamaquoddy Bay.[141] Gunasquamcook is also referred to as the site of an important Passamaquoddy burial ground.[142]

The importance of Gunasquamcook to the Passamaquoddy people is evident. It figures prominently in Passamaquoddy legend, an example of which, is the story told by Passamaquoddy elders of the last fight between the Passamaquoddies and their ancient foes, the Mohawks. A version of this story is related by Vincent Erickson, in his essay entitled, "The Mohawks are Coming! Elijah Kellogg's Observation."[143] Erickson recounts

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[140] Ganong, op. cit., 7.

[141] Gatschet, op. cit., 23. According to Gatschet, Passamaquoddy is actually an English corruption of the word "*Peskedemakadi*." "*Peskedem*" is the Passamaquoddy term for pollock-fish or "skipper", so-called for its tendency to skip along the surface of the water. The suffix "*akadi*", refers to an abundance of the item at a particular location.

[142] Ganong, op. cit., 11.

[143] Vincent Erickson, "The Mohawks are Coming!" Elijah Kellogg's Observation, *Actes du*

mid-eighteenth century. The Passamaquoddy people are gathered at Gunasquamcook, where a Mohawk chief has come to visit. The Mohawks are well-received by the Passamaquoddies, since the two groups are not currently at war with one another. The sons of the Passamaquoddy and Mohawk chiefs go hunting together and manage to kill a white sable. The two boys subsquently fight over who will take credit for the kill and in the course of the struggle the Mohawk boy is killed. The two groups are thus once again at war. To settle the dispute, the Passamaquoddies offer the Mohawks a contest between the two best warriors in each group. The Passamaquoddy warrior wins out over the Mohawk, and a battle is averted. Although there are different versions of this legend, one of the constant elements is that the two groups are gathered at Gunasquamcook.[144] The legend illustrates the significance of Gunasquamcook as an important meeting place for the Passamaquoddies.

The name St. Andrews is believed to originate from the Acadian period, when a French priest erected a cross at the site.[145] Ganong notes that in the documents of the commission established to determine the boundary between Canada and the U.S. following the Revolutionary War, there is a statement by a Passamaquoddy witness, Nicholas

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Quatorzième Congrès des Algonquinistes. Edited by William Cowan. (Ottawa: Carleton University, 1983) pp. 37-47.

[144] See also Nicholas N. Smith, "The Wabanaki-Mohawk Conflict: A Folkhistory Tradition," *Actes du Quatorzième Congrès des Algonquinistes.* Edited by William Cowan (Ottawa: Carleton University, 1983) pp. 49-56.

[145] Harold A. Davis, *An International Community on the St. Croix (1604-1930).* (Orono, ME: University Press,1950),p. 51.

Awawas, that a cross was put up at St. Andrews Point by a priest called St. André, and that the cross was there until sometime between 1772 and 1773.[146] Although there seems to be little historical evidence available about the naming of the site, Ganong speculates that Gunasquamcook was named St. Andrews after a mission was established there, "some time subsequent to Church's raid in 1704."

In addition to Gunasquamcook, there were other important sites in the Passamaquoddy Bay area, such as the burial ground at Schoodic Falls. In his work on the St. Croix River, Guy Murchie notes that the main street of what is now Milltown, New Brunswick, probably transects a Passamaquoddy burial ground.

> There they had their sacred fire (connected with mystic ceremonies of the tribe) which is said to have been kept burning continuously during each seasonal catch of fish at the Schoodic Falls.[147]

Murchie quotes James Vroom, who noted that Schoodic was a word meaning "where it burns."[148]

Much in the way that modern ethnohistorians criticized Speck and others for neglecting historical documentation in deriving their theories about Aboriginal peoples, Bruce Trigger argues that archaeology has been a neglected element of ethnohistory until

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[146] William Francis Ganong, "The Naming of St. Andrews - A Miss", *Acadiensis* 2 (1902): 184-188, p. 185. The essay relates Ganong's hypothesis that the name was derived from the Order of the Monks of St. Andre-au-Bois, the members of which he believed had come to Acadia to establish a mission at St. Andrews. Ganong abandoned this theory however, when he discovered that none of the members of this Order had ever actually travelled to Acadia.

[147] Murchie, op. cit., 68, n. 2.

[148] *Ibid.*, 68, n. 2.

made, Native peoples had already been in contact with Europeans for possibly as long as 150 years. Trigger argues that "in most instances the description of native cultures prior to being altered as a result of European influence must be based entirely or principally upon archaeological data."[150]

Archaeological investigations in the area around Passamaquoddy Bay present an interesting case in point. Beginning in the late nineteenth century archaeological studies of the Passamaquoddy area yielded evidence of human occupation dating as far back as 1060 B.P. (before present).[151] Archaeological remnants found in the immediate vicinity of St. Andrews date from at least 70 A.D.[152] These findings enable researchers to reconstruct subsistence patterns among the inhabitants of the area, which greatly contradict previously-held theories regarding Aboriginal subsistence strategies. Based on the historical accounts of early French missionaries in the Maine-Maritime region, ethnohistorians reconstructed Aboriginal pre-contact subsistence strategies which involved a round of inland hunting and trapping in the winter and early spring followed by summers

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149 Bruce G. Trigger, "Response of Native Peoples to European Contact", in *Early European Settlement and Exploitation in Atlantic Canada: Selected Papers*, Edited by G.M. Story. (St. John's, NF: Memorial University, 1982) p. 148.

150 *Ibid.*, 148.

151 Frances L. Stewart, "Seasonal Movements of Indians in Acadia as Evidenced by Historical Documents and Vertebrate Faunal Remains from Archaeological Sites", *Man in the Northeast*, 38 (1989): 55-77, p. 62.

152 Richard Pearson, "Archaeological Investigations in the St. Andrews Area, New Brunswick", *Anthropologica*, 12 (1970): 181-190, p. 186.

and falls spent harvesting coastal food sources. The historic accounts, however, do not accord with archaeological evidence found at various sites, nor do they represent a subsistence strategy which would have allowed a large pre-historic population to survive and flourish for millennia.

David Burley, in discussing the Micmac of Northeastern New Brunswick, argues that food sources which were subject to varying availability, or were unpredictable, would have been less important pre-historically in influencing seasonal migration patterns amongst Aboriginal peoples.[154] Burley reconstructs pre-and proto-historic subsistence strategies for the Micmac people based on ecological considerations. An important anomaly in the historical records is the winter hunt, which is portrayed in missionary accounts as a time of great hardship, a time when Native peoples often experienced periods of starvation.

He argues that prior to contact with Europeans the winter hunt, as described by Jesuit missionaries, was probably not the major factor influencing Native subsistence strategies that it later became. He draws attention to the fact that at the time that the Jesuits were making their observations, in the early seventeenth century, the Micmac population, like many other Native groups in North America had been devastated by diseases and alcohol brought by traders and missionaries. By the beginning of the seventeenth century, the Micmac population was likely half of what it had been prior to

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153 Bruce J. Bourque, "Aboriginal Settlement and Subsistence on the Maine Coast", *Man in the Northeast*, 6 (Fall 1973):3-20.

154 David V. Burley, "Proto-historic Ecological Effects of the Fur Trade on Micmac Culture in Northeastern New Brunswick", *Ethnohistory*, 28: 3 (Summer 1981): 203-216.

the arrival of Europeans. He astutely asks:

> If a reduced population found it difficult to survive, how could a larger protohistoric group not only persist but persist for possibly as long as three thousand years prior to contact?[156]

It is his view that prior to contact with Europeans, the Micmac possessed a stable hunting and gathering system which was well adapted to its environment. He theorizes that this hunting and gathering system involved permanent settlements. It is his view that:

> the most adaptive strategy is nucleation, to at least some degree, in areas where both hunting could be undertaken and preserved surpluses could be maintained. Although highly speculative, those areas in the vicinity of summer and fall fishing stations are most aptly suited.[157]

He attributes the periods of precarious subsistence and in some cases starvation, to the disruption of subsistence patterns which resulted from the introduction of the European fur trade.

Burley warns that his theory of Micmac adaptive strategy cannot be generalized to include all Native groups in the Maine-Maritime region, owing to considerable regional variation in food sources. However, ethnohistorians studying Native peoples of coastal Maine, including the Passamaquoddy, have also noted the conflicting historical and archaeological evidence.[158] Specifically, studies by Bruce J. Bourque, David Sanger and

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[155] Dean R. Snow and Kim Lamphear, "European Contact and Indian Depopulation in the Northeast: The Timing of the First Epidemics", *Ethnohistory* 35: 1 (Winter 1988), 15-33.

[156] Burley, op. cit., 206.

[157] *Ibid.*, 208.

[158] Bourque, op. cit., 8.

others since the early 1970's, have concluded that the patterns of coastal versus inland habitation among the inhabitants of the Maine coast were in some cases actually the reverse of those which ethnohistorians had derived based on historical documents. David Sanger summarizes the implications of these studies:

> As Bourque noted, the evidence for winter occupation on the coast ran counter to expectations based on traditional ethnographic reconstruction, which placed the native people inland, hunting and trapping in the winter and then fishing and trading with Europeans on the coast during the summer.[159]

Again, the discrepancy between the historical accounts of Aboriginal subsistence patterns and the archaeological findings, was thought to have resulted from European contact.

> Of several possible explanations for this apparent shift in seasonal settlement, the most favoured was a reaction to the European contact, whose summer sailing schedule made it mandatory for the native people to be on the coast during that season if they wished to participated in trade. As the former had mostly furs to exchange, it made sense to travel inland during the cold weather months to trap fur bearers when the pelts were prime.[160]

It is the introduction of fur trading activities into the area which is thought to have resulted in changed subsistence patterns in pre- and post-contact Aboriginal societies.

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[159] David Sanger, "Changing Views of Aboriginal Seasonality and Settlement in the Gulf of Maine", *Canadian Journal of Anthropology* Vol. 2, No. 2 (Spring 1982): 195-203, p. 196. Frances L. Stewart, op. cit., 69, supports Bourque's findings in a 1989 study of the Bay of Fundy excavation sites. She concludes that:

> In sum, the faunal remains from the majority of the upper Bay of Fundy sites suggest that their shell middens accumulated over the winter season with some use of the bay in the warm weather months. This indicates that a simple dichotomy of inland winter versus coastal summer habitation is inaccurate. Furthermore it corroborates Bourque's findings in Maine that the historical and archaeological evidence are in opposition.

[160] *Ibid.*, 196.

based on the ethnohistorical record. They assume, for example, that a "transhumance" pattern existed before contact with Europeans; that is, it is assumed that Aboriginal peoples always moved about in search of game, and that their patterns of movement simply changed when they came into contact with Europeans. Sanger notes, referring specifically to excavations he conducted of shell midden sites around Passamaquoddy Bay, "that year-round residence could not be denied, neither could it be demonstrated. What is clear is that a cold-season occupancy definitely existed in Passamaquoddy Bay."[161] In his view, "choice of settlement is not wholly dependent on subsistence", and in choosing a particular site for settlement the inhabitants of the Passamaquoddy Bay area, "partook of a wide range of options in a flexible fashion."[162]

Some tentative conclusions with respect to Gunasquamcook may be arrived at from the preceding discussion. The first, is that in the prehistoric period, sites such as the one at Gunasquamcook probably represented more permanent settlements for ancestral Maliseet-Passamaquoddies than has previously been described by ethnohistorians. Secondly, the picture which has developed over time of Aboriginal "nomadism", with its connotations of continual aimless movement in search of game, is not an accurate representation of Native subsistence patterns prior to contact with Europeans. This is an extremely important point because, as Wilcomb Washburn explains, in the eighteenth and

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[161] Sanger, op. cit., 199. It should be noted as well, that in the late nineteenth century, Dr. G.F. Matthew excavated a site at Bocabec, and according to Ganong, "found evidence to show that [the site] may to some extent have been occupied the entire year." Ganong, op. cit., p. 8.

[162] *Ibid.*, 202.

nineteenth centuries, one of the most popular justifications for the dispossession of Aboriginal peoples was the view that "they were wandering hunters with no settled habitations."[163] The subsistence strategies which had sustained Native peoples for thousands of years were, to Europeans, "too wasteful in a world in which other countries faced (or thought they faced) problems of overpopulation."[164] In one of the many ironies of Aboriginal-European contact, it is likely that the intensive fur trade which Europeans introduced into Aboriginal societies was the cause of a change in subsistence patterns whereby Native people became more unsettled than they had been prior to contact. Thus, the "nomadism" for which Europeans berated Native peoples was actually caused by the European prosecution of the fur trade. Nevertheless, the prevailing view that "hunters might justly be forced to alter their economy by a pastoral or agricultural people was voiced by many, humble and great, in the colonies and in England."[165]

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[163] Washburn, "Moral and Legal Justifications", op. cit., 22.

[164] *Ibid.*, 22.

[165] *Ibid.*, 22.

CHAPTER FOUR: PASSAMAQUODDY HISTORY TO 1763

The period from 1603 to 1763, encompasses the French presence in the Maine-Maritime region. The era was mainly one of conflict between the French and English for control of the region, during which time the Passamaquoddy and their neighbours struggled to retain access to their lands. Despite the fact that the French asserted sovereignty over the area and made grants of Passamaquoddy territory to French settlers, the era did not see the dispossession of the Passamaquoddy. One of the main points emerging from an analysis of this period is the fact that it was English and not French colonialism which resulted in the dispossession of the Passamaquoddy. It was the uniquely English, Lockean view of land acquisition through labour which provided the moral justification for the displacement of Aboriginal peoples in the Maine-Maritime region.

From the beginning of the historic period, the Passamaquoddy people and the area they inhabited, figured prominently in Aboriginal-European relations. The first European settlement in Acadia, as well as the scene of the first conflicts between French and English in the region, was the Isle of St. Croix, (now Dochet Island) in the Passamaquoddy region. Champlain and his party of explorers were the first Europeans to record their experiences in the Passamaquoddy region, in 1604. With Champlain was Pierre de Gua, Sieur de Monts, a Huguenot merchant. In 1603, de Monts had been granted title to all the lands between the Restigouche River and what is now New Jersey by the French Crown. De Monts was instructed to settle these lands, and Christianize the Aboriginal population in

the region, in return for which, he received a monopoly of trade.

The English made claims to the area as well, based on Cabot's exploration and 'discovery' of the Newfoundland area.[166] In 1613, Captain Samuel Argall of Virginia attacked French settlements in the area, "seized whatever he could lay hands on, burned buildings and erased all marks of French dominion, in accordance with orders received from the Virginia government." In 1621, the Scottish monarch James, I, made a grant of the lands between the Gaspe and the St. Croix River to Sir William Alexander, naming the area Nova Scotia.[167] The St. Croix River was to be renamed the Tweed, "since it would separate New Scotland from New England."[168] The settlement at Passamaquoddy was reestablished by the French but was subsequently retaken by the English. Finally, in 1632, at the close of a five-year war between England and France, all of Acadia was ceded to the French, under the terms of the Treaty of Germaine.

Soon after, the Compagnie de la Nouvelle-France began making grants in "New France." The first important grant was made at Passamaquoddy on the St. Croix River, to Isaac de Razilly, consisting of a piece of land twelve leagues by twenty. The grant

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[166] Washburn, op. cit., 17. He notes that this was the only argument with respect to England's claims in North America, owing to the fact that "she had slumbered during the hundred years following the Cabot voyages. As in the case of the king's charter, it is doubtful that the argument was accorded much weight even by the English themselves, except as a formal answer to the claims of prior discovery by other nations."

[167] In doing so, the monarch actually transferred some lands which he had already granted in a patent issued to "the Council established at Plymouth, in the County of Devon, for the planting, ruling, ordering and governing of New England in America." *Maine Bicentennial Atlas: An Historical Survey*. Edited by Gerald E. Morris. (Portland ME: Maine Historical Society, 1976). p.2.

[168] Harold A. Davis. *An International Community on the St. Croix 1604-1930*, (Orono, Maine: University Press, 1950), p. 22.

conveyed to Razilly, "the river and bay Sainte-Croix, the islands therein contained and the adjacent lands on each side in New France, to the extent of twelve leagues in width." Another grant was made in June 1684, by the Governor General of Canada, M. de la Barre, to Jean Sarreau de St. Aubin. He received a grant "of five leagues in from on the sea shore and five leagues in depth at a place called Pascomady and its environs with the isles and islets of rocks about six leagues off for seal fishery." The next year a grant was made by Governor Denis to the ecclesiastics of the Episcopal Seminary of Foreign Missions at Quebec. They received a tract of land on the River St. Croix.[169] A grant was also made of the Island of Grand Manan, to Paul Daillebousť, Sieur de Perigny, in 1691. Other grants in the area include one at Schoodic and at St. Stephen in 1695, to Sieur Michel Chartier and another at Magaguadavic, to Jean Meusnier in 1691.[170]

Seigneurial grants were made throughout the rest of the province of New Brunswick, up until the year 1700. The seigneur was usually a man who had attained a high social position in French society, by virtue of his birth and education. He received his seigneurial grant from the French Crown, which retained the right to make use of oaks for the royal navy, of lands required for fortifications and highways and of all mines and minerals. In addition, it was necessary for the seigneur either to reside on his land himself or to ensure that a certain number of tenants were residing there. Lastly, he was required to clear and improve a portion of his lands within a certain time, or the grant would be

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[169] James Vroom, *Glimpses of the Past*. (New York: New York Public Library, 1957).

[170] Davis, op. cit., 24-25.

Ganong states that there is evidence from censuses and other sources to indicate that grantees at Passamaquoddy did settle upon their lands.[172]

Throughout the seventeenth century, there was a nearly constant struggle between the French in Acadia and the English of Massachusetts. The English had established Plymouth in 1620 and thereafter maintained that the eastern border of Massachusetts was the Kennebec River in what is now Maine. The French hold in Acadia was tenuous, the territory occasionally falling under English and even Dutch control. In 1654, Acadia was captured by Major Robert Sedgewick and remained in English possession until it was restored once again to France in 1667, by the Treaty of Breda. So weak was the French hold on the territory, that gaining control of it during this period seems to have entailed the taking of only a few forts, at St. John, Jemseg and at Pentagoet, on the western border of Acadia.

The English were anxious to gain a foothold in Acadia. Their motivation, in part, stemmed from a desire to tap into the lucrative fur trade and fishery in Acadia, to which they had been denied access by the French.[173] William Roberts argues that a decline in the influx of immigrants to New England in the 1640's had meant a decrease in the amounts of money coming into the colonies, which in turn caused a greater demand for furs as a

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[171] W. O. Raymond, *The River St. John: Its Physical Features, Legends and History from 1604 to 1784*. Second Edition, edited by J.C. Webster. (Sackville, NB: Tribune Press, 1950), p. 45.

[172] Ganong, *Historic Sites*, op. cit., 92.

[173] Raymond, op. cit., 46.

source of revenue. This led New Englanders to range farther afield, into French and Dutch territories, bringing them into conflict with both groups.

In 1688, Massachusetts governor Andros pillaged the trading post at Pentagoet, inhabited by the Baron de St. Castine, a French noble who had married the daughter of Madockawando, a Maliseet chief. This incident led to the outbreak of King William's War, the first of several major conflicts which became known as the "French and Indian Wars." These conflicts raged over a period of seventy years, during which time, the fate of settlements in the Passamaquoddy area was uncertain. King William's War itself lasted ten years. However, by 1703, France and England were once again at war in a conflict named for the British sovereign at the time, Queen Anne. At the same time that Queen Anne's War was being fought in North America, the War of Spanish Succession was taking place in Europe between France and Spain on the one hand, and England, Holland and Austria, on the other.[175] In 1704, a New Englander, Colonel Benjamin Church was sent to attack settlements in Acadia. He succeeded in razing French settlements at Port Royal, Penobscot, Chignecto, Minas and Passamaquoddy.[176] Ganong states that after

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[174] William I. Roberts, III *The Fur Trade of New England in the Seventeenth Century* (Doctoral Dissertation, University of Pennsylvania, 1958). *Dissertation Abstracts*, 19:1 (1958): 126-127, p. 127.

[175] The War of Spanish Succession, which was basically a renewal of the ongoing conflict between England and France, began when Louis XIV's grandson, Phillip of Anjou, was offered the Spanish throne, in 1700. Louis saw this as an opportunity to expand France's power, but England and Holland feared that it would tip the balance of power in Europe. In an action which was guaranteed to provoke the British and the Dutch, he quickly seized exclusive control of Spanish trade. In 1701, France and Britain, along with their allies were once again at war. See Paul Kennedy, *The Rise and Fall of the Great Powers*. (New York: Random House, 1987), pp. 104-106

[176] Vroom, op. cit., 98.

Church's attack at Passamaquoddy, the seigneurs were never heard of again in the region.

At the close of Queen Anne's War, in 1713, the famous Treaty of Utrecht was signed, a document which ostensibly handed permanent control of Acadia to the British. In actual fact however, the Maine-Maritime region remained in dispute for the next fifty years, owing to the French assertion that Acadia included only the peninsula south of the Bay of Fundy. This claim, as W.O. Raymond notes, was "strangely at variance with their former contention that the western boundary of Acadia was the River Kennebec."[177] Almost immediately after the signing of the Treaty of Utrecht, the French began building the Fort at Louisbourg, an ambitious structure, "designed to serve as a Gibralter for the St. Lawrence."[178] The building of the fort is a good indication that the French did not regard the Treaty of Utrecht as a permanent settlement.[179]

British authorities saw the Treaty of Utrecht as giving them sovereignty over Acadia, "on the grounds that since it had been recognized as a French possession, France must have extinguished aboriginal title."[180] The French for their part, did not trouble to recognize Native ownership of the lands they occupied until those lands threatened to fall under English jurisdiction. In fact, it is clear that the French were never troubled at all by

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[177] Raymond, op. cit., 95.

[178] J. Bartlet Brebner, "Paul Mascarene of Annapolis Royal", in *Historical Essays on the Atlantic Provinces*. Edited by G.A. Rawlyk. (Toronto: McClelland and Stewart, Ltd, 1967), pp. 17-32, p. 20.

[179] R.O. MacFarlane, "British Indian Policy in Nova Scotia to 1760", *Canadian Historical Review* 19 (1938): 154-167, p. 155.

[180] Olive P. Dickason, "Amerindians Between French and English in Nova Scotia 1713-1753", in *American Indian Culture and Research Journal* 10:4 (1986): 31-46, p. 33.

> Like the English, the French did not admit legally that the Amerindians had "sovereign rights" in the land or that they possessed "absolute ownership." Although the French wrote about Amerindian kingdoms and made kings of chiefs and priests of *sachems*, they never recognized the native tribes as sovereign powers and they never accorded them any diplomatic recognition because they did not belong to the accepted "family of nations."[181]

But the Native inhabitants of Acadia had never regarded the French as possessing title to their lands, they merely welcomed them as allies. The French also relied on Native peoples as allies and as trading partners and were, therefore, careful not to 'advertise' their claims to Native lands. The year 1713 marked the beginning of a new era in the struggle of Native peoples to retain control of their lives and their lands. The French were fighting for control of the region, and did not hesitate to try and influence the Micmac, Maliseets, Passamaquoddies and Penobscot to resist British incursions into Acadia. It was the hope of French administrators that the British would never gain control of the territories above the Bay of Fundy. The main vehicle used by the French to influence Native peoples was the missionary. W.O. Raymond noted that "civil and ecclesiastical authority in France were at this time very closely intertwined", and that if a missionary failed to use his influence to keep Native peoples hostile to the English, he was liable to be replaced by the authorities at Quebec, no matter how effective his mission might otherwise be.[182]

In the period following the signing of the Treaty of Utrecht, French officials

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[181] *Ibid.*, 160.

[182] Raymond, op. cit., 84.

peoples.[183] In addition, officials encouraged the Native inhabitants of the St. John River area to regard the region as their own.[184] It is evident however, that the French were intentionally duplicitous in their dealings with the Wabanaki peoples, hoping to increase anti-English feeling among them. In his report to French authorities in 1722, the missionary Jean Baptiste Loyard, who had been in Canada since 1706, berated French administrators for the way in which they dealt with Native peoples. He noted that France was only interested in "the savages", when she needed their help.[185] The Jesuit historian, Charlevoix, was anxious that French officials should settle the question of the boundaries of Acadia, in such a way that Wabanaki peoples would be guaranteed possession of their lands. Charlevoix's statements are revealing, pointing out to the need for a Native bulkhead against British incursions, "for if the English were allowed to occupy the country and to secure themselves in possession by building strong forts the result would be that they would become masters of all of New France south of Quebec."[186] Later, after the signing of a treaty in 1749 between British officials at Halifax and delegates from the St. John River, including the Passamaquoddies, French officials denied any responsibility for the actions of their Native allies. In doing so, French authorities admitted that Native

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[183] Dickason, "Amerindians Between French and English", op. cit., 33.

[184] Raymond, op. cit., 104.

[185] *Ibid.*, 84.

[186] Raymond, op. cit., 104.

Because of the precariousness of British settlements in Nova Scotia in the period between 1713 and 1763, government officials realized that it was necessary to make peace with Native peoples. They signed treaties of Peace and Friendship, which usually contained promises that Native peoples would be able to hunt, fish and fowl as before. One of the most important treaties of this era was signed in 1725, at the close of what was known variously as Dummer's, Lovewell's or Rasles' War. The conflict had erupted in 1722, after unsuccessful negotiations between the Wabanaki tribes and government of Nova Scotia. In 1721, eastern Wabanaki peoples sent a message to the government of Massachusetts, asserting their sovereignty over lands east of the Connecticut River. The Wabanaki peoples agreed to allow those settlers already there to remain, but protested further English encroachments on their lands.[188] Olive Dickason writes that "rather than seeing this as an effort at compromise, the English regarded it as insolence that had been encouraged by French missionaries..."[189] The response of the Massachusetts government to this message was to declare war in 1722.[190]

The treaties signed at the close of Dummer's war were to be extremely important to the Wabanaki peoples because they served as the basis for other treaties which followed

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[187] MacFarlane, op. cit., 161.

[188] Olive Patricia Dickason, *Canada's First Nations: A History of Founding Peoples from Earliest Times*. (Toronto: McClelland and Stewart, 1992), p. 119.

[189] *Ibid.*, 119.

[190] *Ibid.*, 119. Passamaquoddy Bay was the site of one of the first conflicts of this war, when a groups of officials from Annapolis, who were unaware of the renewal of hostilities, went ashore there for water and were taken prisoner. See James Vroom, op. cit., 100.

in 1749 and 1760. In addition, the treaties of 1725 were believed by the Maliseet and Passamaquoddy peoples to contain the most recent recognition by the British Crown of their aboriginal hunting and fishing rights. However, in an article published in 1986, Andrea Bear Nicholas describes new controversies and questions arising from her discovery that documents bearing different terms were drafted during the Boston conferences.[191] In her essay, Bear Nicholas explains that Dummer's Treaty was signed at Boston on December 15th, 1725, by four Penobscots who claimed to be delegates of the other three Nations (Maliseets, Passamaquoddies and Micmacs). However, this treaty was not known to have been ratified by representatives of any of the other groups. Moreover, it was negotiated and signed between the Massachusetts government and the Penobscots, and not the government of Nova Scotia, under whose jurisdiction the other three groups would have fallen.[192]

In the course of researching Dummer's Treaty, Bear Nicholas discovered that another treaty had also been drafted in December of 1725 at Boston, by Paul Mascarene, a representative of the Nova Scotia government. This treaty was apparently ratified by the "St. John River Indians", at Annapolis Royal, in June of 1726. However, this second treaty contained none of the recognition of aboriginal hunting and fishing rights contained in Dummer's Treaty. Moreover, it demands that Native peoples acknowledge King George as the possessor of all of Nova Scotia, which would have included Maliseet,

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[191] Andrea Bear Nicholas, "Maliseet Aboriginal Rights and Mascarene's Treaty, Not Dummer's Treaty", in *Actes du Dix-Septième Congrès des Algonquinistes.* Edités par William Cowan. (Ottawa: Carleton University, 1986), pp. 215-229

[192] *Ibid.*, 217.

would not have signed such a treaty without some assurances of their continued right to hunt and fish as they had always done. Her theory proved to be correct. She discovered, in documents pertaining to the ratification of peace at Annapolis Royal in 1726, a separate document signed by Mascarene containing evidence of official English recognition of Aboriginal rights in lands occupied by Micmac, Maliseet and Passamaquoddy peoples.[194] Mascarene's Treaty with its set of promises supporting it was signed by seventy-seven delegates of each of the Micmac, Maliseet, Penobscot and Passamaquoddy Nations. She argues that Mascarene's promises must also have been understood by Native peoples to have been part of the agreement in each of the later ratifications of treaties.[195] This treaty continues to be an important recognition of Aboriginal rights for the Micmac, Maliseet and Passamaquoddy people.[196]

At the same time that British colonial administrations were signing treaties promising to recognize Wabanaki rights, their main goal was to encourage expansion of settlement in the area. This fact, combined with the continuing influence of French missionaries in the area who encouraged Native peoples to believe that British treaties

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[193] Bear Nicholas, "Maliseet Aboriginal Rights", op. cit., 219.

[194] *Ibid.*, 223.

[195] *Ibid.*, 224.

[196] See for example the 1993 decision of Judge J. Clendenning, in *R. v. Fowler*. Judge Clendenning acquitted a non-status Maliseet from Fredericton, N.B. who had been charged with violating provincial game laws. The judge based her decision on Fowler's ability to trace his ancestry to signatories of the 1725 treaty. The ruling was an important recognition of the Aboriginal rights of non-status Natives. It is reported at [1993] 3 C.N.L.R. 178. (N.B.Prov. Ct.)

could not be relied upon, led to continued outbreaks of hostilities. The Wabanaki were able, to a certain extent, to stem the tide of English settlement on their lands although some encroachment on Native lands did occur in Maine and in Nova Scotia in the period following the Treaty of Utrecht. Native groups who were not directly affected by the encroachments became involved in the struggle on the side of the French, because they knew that those Native groups in New England who had lost their lands "had been ultimately annihilated or at best, dispersed."[198]

With the Acadian expulsion in 1755 and the fall of Quebec in 1759, the settlement of the region by the English and the displacement of Aboriginal peoples could proceed without further impediment. Added to the English belief that their defeat of France automatically gave them title to Aboriginal lands, even though they had never been ceded to the French government, was the "popular colonial view that the Acadian natives, as hunters and gatherers, did not have as strong a claim to the land as did farmers."[199] In 1758, the governor of Nova Scotia issued a proclamation stating that with the defeat of France in Acadia, the fear of attack had been removed and opportunities for settlement were available.[200] The proclamation was essentially an advertisement designed to attract

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[197] Stephen E. Patterson, "Indian-White Relations in Nova Scotia, 1749-1761: A Study in Political Interaction", *Acadiensis*, 23:1 (Autumn 1993): 23-59, p. 26.

[198] Andrea Bear Nicholas, "The St. John River Society and the Dispossesion of the Maliseet People" (Paper presented to the St. John River Society, Fredericton, New Brunswick, 1995), p. 3.

[199] Olive Dickason, "Amerindians Between French and English", op. cit., 35.

[200] Margaret Ells, "Clearing the Decks for the Loyalists", *Canadian Historical Association Collections*, Annual Report (1933): 43-58, p. 44.

year set out conditions under which lands would be granted to prospective settlers, one of which was that a third of the total land grant had to be 'improved' within ten years, otherwise the grant would be forfeit.[201] This attempt by the Nova Scotia government to attract settlers succeeded, and by 1760, New England settlers were beginning to arrive.[202]

Although the first Europeans to settle in Passamaquoddy territory were the French, the dispossession of the Passamaquoddies and other Native peoples in the Maine-Maritime region did not occur under French administrations. This is one of the reasons that historians describing the period of contact between French colonizers and Native peoples have held that relations between the two groups were generally friendly. However, Andrea Bear Nicholas offers a caveat against accepting without question, "the myth of the benevolent French embrace."[203] She notes that in many respects the world views of the two groups were incompatible, that French attitudes towards Native peoples were undeniably racist, and that the French, believing their culture to be superior to that of Aboriginal peoples, intended to "civilize" them by force if necessary.[204] Her arguments are supported by Cornelius Jaenen, author of *Friend and Foe: Aspects of French-Amerindian*

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[201] *Ibid.*, 44.

[202] *Ibid.*, 45.

[203] Andrea Bear Nicholas, "Wabanaki and French Relations: Myth and Reality", In *A Call For Dialogue Between Native Peoples and Whites: Interculture* XXIV No. 1 (Winter 1991): 12-34, p. 17.

[204] *Ibid.*, 12-34, passim.

Cultural Contact in the Sixteenth and Seventeenth Centuries. He describes the French attitude towards Native peoples as one of "minimal racism" and argues that the French viewed Aboriginal peoples as less evolved than Europeans.[205]

It is important to understand as well that the colonial practices of the French were shaped at least in part by the landholding patterns which prevailed in France at the time of colonial expansion. This is reflected in the ongoing ambivalence which French monarchs and their advisors expressed towards their colonial possessions and is also reflected in the practices of French colonial administrations. During this particular period of French history, the main method of national aggrandizement was conquest of populated territories.[206] In this way, a French monarch could acquire a population which was already settled and productive and which would thus provide a source of revenue through feudal levies. Territories in the North America, by contrast, required some expenditure of time and money in order to provide at some future date, a productive population and a source of taxation.[207] To lessen the financial burden on the Crown of establishing colonies, the administration of French colonies was initially ceded to companies of entrepreneurs, usually Huguenot merchants.[208] This strategy proved unsuccessful, however, mainly

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[205] Cornelius Jeanen, *Friend and Foe: Aspects of French-Amerindian Cultural Contact in the Sixteenth and Seventeenth Centuries.* (Toronto: McClelland and Stewart, Ltd., 1976), p. 153.

[206] Roberta Hamilton, "Feudal Society and Colonization: A Critique and Reinterpretation of the Historiography of New France," *Canadian Papers in Rural History*, VI (1988): 17-135, p. 65.

[207] *Ibid.*, 66.

[208] Cornelius Jaenen, "Problems of Assimilation in New France 1603-1645," in *Canadian History Before Confederation. Essays and Interpretations.* Edited by J.M.

because these merchants actually resisted attempts to settle the colonies, since this would have interfered with "the relatively uncomplicated plundering of a new land and its resources."[209]

Once officials in France realized that their representatives in the colonies were concerned with anything but settlement, the colonial administrative responsibility passed to the Church. Their representatives took up the challenge, becoming among the first seigneurs of the colony. Roberta Hamilton argues that in the early years of the French colonial enterprise development and expansion was mainly the result of Church undertakings.[210] As long as the French government remained ambivalent about settlement in its colonies Native lands were not in jeopardy. In fact, so long as the fur trade remained an important source of revenue for the French, it was necessary for Native peoples to have continued possession of, and access to, their lands to be able to trap furs. The development of family hunting territories resulting from an intensified trade altered the landholding patterns of Native peoples in a fundamental way, but Aboriginal people maintained possession of their ancestral lands during the period of French colonialism in the Maine-Maritime region.

There is little substantive research available on the connection, if any, between Lockean views of property and French colonial practice. However, on the basis of what is known about colonial practices of the French, as well as the differing landholding patterns

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Bumsted. (Georgetown ON: Irwin Dorsey, 1973), pp. 58-77.

[209] Hamilton, op. cit. 87.

[210] *Ibid.*, 89.

about the relationship between the two. Paschal Larkin discusses Locke in the French context, in his work on property in the eighteenth century. He notes that although Locke's *Second Treatise* was published in French before the end of the seventeenth century, it was not until the period leading up to the French Revolution that his theory of property became important in France.[211] Prior to that time the main authority on the subject of property was the Church, whose teachings held that property was a natural right, but emphasized as well "the social character of wealth; the right of the poor to succour from the rich; and the unlawfulness of excessive wealth accumulation."[212] Larkin notes, for example, that the difference of opinion as to the practice of charging interest, "even amongst writers who, in the main, believed that the unhampered pursuit of individual self-interest involved in some mysterious way the realisation of justice for all", serves to illustrate the grip which the traditional theory of property had on the French mind.[213] It seems reasonable to suppose that if a Lockean view of property had been prevalent in France, it would have provided ideological support for the agrarian capitalism which was so important in influencing British economic history. Enclosure on a scale

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[211] Paschal Larkin, *Property in the Eighteenth Century, With Special Reference to England and Locke*. (New York: Howard Fertig, 1969. P. 176-177.

[212] *Ibid.*, 184. See also Elfrieda T. Dubois, "The Exchange of Ideas Between England and France as Reflected in Learned Journals of the Later Seventeenth and Early Eighteenth Centuries," *History of European Ideas*, 7:1 (1986): 33-46. She presents an interesting examination of the dissemination in France of Locke's *Essay Concerning Human Understanding*, as well as the works of other English writers. She concludes that although there was an attempt among the editors of learned journals to provide their readers with information about new ideas, new works were always received and interpreted from a nationalistic and orthodox Catholic point of view.

undoubtedly produced comparable numbers of potential immigrants for the colonies. Roberta Hamilton highlights the striking differences between English and French populations in the colonies, noting that after 150 years of colonial presence, there were only 70,000 French in Canada, compared with some 1,000,000 English citizens who had become established in the same time. It is her view that historians have emphasized the failure of French colonies without taking into account the fact that England was able to export such large numbers of her citizens to America because English landlords had been much more successful than their French counterparts in separating peasants from their land through the enclosure movement and the destruction of feudal tenure.[214] At the close of seventeenth century, English landlords controlled seventy to seventy-five per cent of arable land, whereas in France, almost forty-five per cent of available land remained in the possession of peasants.[215]

The policy of French colonial administrators was one of assimilation, through conversion to Christianity and what Cornelius Jaenen refers to as "frenchification." This goal remained beyond the reach of French administrators due to the fact that they were unable to bring large numbers of their people to settle in Acadia as the English had done with their displaced population. This is not to say, however, that the success or failure of colonialism depended simply on numbers of immigrants. It is important to understand that

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[213] *Ibid.*, 184.

[214] Hamilton, op. cit., 32.

[215] Robert Brenner, "Agrarian Class Structure and Economic Development in Pre-industrial Europe," *Past and Present* 70(1976): 30-75, p. 73.

and who advocated their development, was unique. Locke expressed the view among colonial administrators that the best means of colonization was to appropriate land by industry, not by conquest. This meant that the limits of colonial settlement were to be governed by the extent of industry available to cultivate lands. Barbara Arneil explains that Locke was concerned that more land was being claimed by European powers than could actually be cultivated, and would therefore be lying 'waste.'[216]

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[216] Barbara Arneil, "Trade, Plantations, and Property: John Locke and the Economic Defense of Colonialism," *Journal of the History of Ideas* 55 (1994): 591-609, p. 601.

CHAPTER FIVE: PASSAMAQUODDY HISTORY 1763-1794

With the fall of Quebec and the expulsion of the Acadians, English settlement in the Maine-Maritime region could proceed without further impediment. The thirty-one year period following the issuance of the Royal Proclamation was a crucial era in Passamaquoddy history. Despite guarantees by British colonial governments that the Passamaquoddy and neighbouring groups would retain access to their lands, the primary goal of local administrations was settlement and expansion in the region. Lands occupied by the Passamaquoddy showed up on maps as uninhabited 'waste' lands, available for cultivation by incoming settlers. This was particularly true of the years immediately following the close of the Revolutionary War, when Loyalist settlers flooded into what is now Maine and New Brunswick. The ever-present Lockean distinction between uncultivated 'waste' lands inhabited by Native peoples and lands which were 'settled', was a critical factor in the advancement of English settlement in the region.

Events of the Revolutionary era in many ways mirrored the struggle between the French and English for control of North America. Native peoples were once again caught between two alien cultures vying for supremacy. Once again, they were sought out by both sides as allies in the struggle. One of the most important events of the era with respect to Native peoples, was the Royal Proclamation of October 1763. Jack M. Sosin argues that the Proclamation was a direct result of the experiences of successive British administrations in fighting the colonial wars against Native peoples and their French allies. Officials at Whitehall concluded that in order to maintain the security of the colonies in North America, they would need to win the confidence of the Indian tribes. "As a

consequence", Sosin asserts, "England emerged from the struggle with certain pledges to the natives."[217] He argues that the primary purpose of the Royal Proclamation was to discourage settlement by non-Natives west of the Appalachian mountains. Thus, the Proclamation drew a line "down the backs of the colonies from Canada to East Florida and proclaimed territories to the west to be under native sovereignty."[218] The Proclamation explicitly stated that no governor or other authority in any of the English possessions in North America was:

> until Our further Pleasure be known, to grant Warrants of Survey, or pass Patents for any Lands beyond the Heads or Sources of any of the Rivers which fall into the Atlantick Ocean from the West and North West, or upon any Lands whatever, which, not having been ceded to, or purchased by us as aforesaid are reserved to the said Indians, or any of them.[219]

The Proclamation thus effectively reserved to the Crown, "the exclusive right to deal with Indians for the surrender of their lands."[220] Sosin's argument that the purpose of the Proclamation was to provide for the security of the existing colonies, is evident in the language used. It states plainly that:

> ...it is just and reasonable and *essential to our Interests, and the Security of our Colonies*, that the several Nations or Tribes of Indians...who live under our Protection, should not be molested or disturbed in Possession of such Parts of our

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[217] Jack M. Sosin, *Whitehall and the Wilderness*. (Lincoln, NB: University of Nebraska Press, 1961), p. 4.

[218] James Tully, "Placing the *Two Treatises*", in *Political Discourse in Early Modern Britain*, Edited by Nicholas Phillipson and Quentin Skinner. (Cambridge: Cambridge University Press, 1993), pp. 253-280, p. 270.

[219] Kenneth M. Narvey, "The Royal Proclamation of 7 October 1763, The Common Law, and Native Rights to Land Within the Territory Granted to the Hudson's Bay Company", *Saskatchewan Law Review*, 38:1 (1973-74):123-233, p. 129

[220] "Early Surveys of Indian Reserves", *Men and Meridians*, 2 (1962): 277-286.

dominions and territories, as not having been ceded to Us, are reserved to them as their Hunting Grounds.(Emphasis mine)

The Royal Proclamation has been described as marking the start of the Revolutionary era.[221] In constraining the ability of American colonists to expand their settlements westward, it served as an irritant to the increasingly independence-minded colonists.[222] The ideology of laissez-faire individualism and free trade was gaining ground among colonists who saw the Proclamation as an unjustified limitation of their freedom to settle and trade where they wished.

Despite the fact that the Proclamation has been described as an "Indian Bill of Rights", Andrea Bear Nicholas argues that for the Maliseet people and neighbouring groups such as the Passamaquoddy, the Proclamation provided the impetus for settlement of their lands by English colonists from the New England states. The effect of limiting settlement to the west of the established colonies was to encourage migration to territories occupied by colonists, such as Nova Scotia. This proved to be disastrous for Native peoples in the Maine-Maritime region, as settlers began to flood into the area. The Proclamation also opened up free trade with Native peoples in the colonies, a move which Bear Nicholas argues led to the granting of Native lands to traders as "almost instantly the opening of trade became the excuse for authorities to begin granting away small chunks of our land for trading establishments."[223] The Royal Proclamation's directives respecting

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[221] Sosin, op. cit., 128.

[222] Robert A. Williams, Jr. *The American Indian in Western Legal Thought: The Discourses of Conquest* (New York: Oxford University Press, 1990), p. 229

[223] Andrea Bear Nicholas, "The St. John River Society and the Dispossession of the

local colonial governments. The Proclamation was motivated by the strategic concerns of the imperial government to maintain good relations with Native peoples to provide for the security of English settlements. Local colonial governments, by contrast, were more concerned with providing incoming settlers with lands. John Hurley explains that this divergence between imperial and local colonial policies resulted in the granting away of reserved lands. The distances separating the two levels of government and the slowness of communications between them made enforcement of imperial policy difficult.[224]

In an essay entitled "Aboriginal Rights in the Maritimes," Nancy Ayers argues that grants of land made by colonial governments in the Maritime provinces are of doubtful legitimacy.[225] She points out that the power of the colonial governors could not have exceeded that of the imperial government. Since no Wabanaki lands were ever ceded to, or purchased by, the imperial government, grants of unceded Wabanaki lands by local colonial governments were made *ultra vires* their authority and in violation of imperial policy.[226] Ayers explains that:

Maliseet People", (Paper presented to the St. John River Society, Fredericton, New Brunswick, 1993), p. 15.

[224] John Hurley, "Aboriginal Rights, the Constitution and the Marshall Court," *Revue Juridique Thémis* 17 (1982-83): 403-443, at p. 410.

[225] Nancy Ayers, "Aboriginal Rights in the Maritimes," *Canadian Native Law Reporter* 2 (1984): 1-84, at p. 19.

[226] *Ibid.*, 63. Ayers argues, as Andrea Bear Nicholas has, that the treaties made by the English indicate that they intended to respect the rights of Native groups in the region. She notes that: "In none of these treaties were the Indian aboriginal rights directly or expressly ceded or extinguished."

> The power of a colonial governor, being derived from a grant from the Imperial Crown, could not be greater than that of the Crown itself. The authority of a governor of a colony was prescribed by the terms of his commission and could be further defined by other prerogative instruments such as royal proclamations, orders-in-council, or instructions issued to colonial governors. Acts done in excess of the authority granted a governor or in violation of restrictions imposed by a royal proclamation would normally be considered invalid.[227]

Ayers argues that grants of unceded Wabanaki lands made by colonial governments in violation of the Royal Proclamation "would at most convey a title subject to the Indian right of occupancy."[228]

The initial step in the process of granting away Wabanaki lands, was the surveying and mapping of the area concerned. Bear Nicholas notes that this was an important element of colonial expansion, and it was also heavily influenced by the distinction, so preeminent in Locke's writings, between cultivated and 'waste' lands.

> To the colonial mind a land was empty if it was not cultivated. It did not matter if it was occupied by a people. If they were non-agricultural peoples their lands would show up on maps as empty and therefore free for the taking.[229]

The surveying and mapping of their lands, however, was guaranteed to arouse suspicion and hostility amongst the Wabanaki people, who at times were forced to physically prevent surveyors from completing their task.[230]

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[227] *Ibid.*, 19.

[228] *Ibid.*, 20.

[229] Bear Nicholas, "The St. John River Society", op. cit., 5.

[230] Gregory O. Buesing, "Notes on Wabanaki History to 1800", (Honours Thesis. Wesleyan University, Connecticut, 1970) p. 48. He recounts an incident which occurred in 1760, when an Englishman named Simonds attempted to establish a fishery on the St. John River but was driven off by hostile Natives and Acadians. In 1762 Simonds returned with

A survey of the Passamaquoddy region, the "earliest account of the region in the modern period of history" was made in 1764, by John Mitchel.[231] Mitchel, a New Hampshire surveyor, was sent to Passamaquoddy in 1764 by the Massachusetts government to settle the question of the identity of the St. Croix River, which was considered the boundary between Massachusetts and Nova Scotia.[232] Although it was generally agreed that the boundary was the St. Croix River there was a dispute as to which river was, in fact, the St. Croix since the name was applied to each of three rivers; the Schoodic, the Cobscook and the Magaguadavic. In the aftermath of the Treaty of Paris, Massachusetts and Nova Scotia argued over the border between the two jurisdictions just as the French and English colonial regimes had done.

A telling example of the treatment accorded the Passamaquoddy people as local settlers moved in, is contained in the journal of William Owen.[233] Owen kept a record of events which occurred during his residence at Campobello, in the years 1770 and 1771. In an entry dated the 16th of August, 1770 at Port Owen, he records that:

> at about 10 o'clock, the Priest and almost the whole tribe of Indians came over to pay their compliments to Lord Wm Campbell... A Congress was held at my house, the Governor settled some complaints relative to the encroachments on their hunting ground, the fishermen destroying the Seafowl's eggs and some English people (James Brown and Jeremiah Frost) taking possession of a tract of land at

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a party of men to survey a township near Fredericton but was once again prevented from proceeding by a group of Natives.

[231] W.F. Ganong, "John Mitchel's Diary and Field Book of his Survey of Passamaquoddy in 1764", *New Brunswick Historical Society Collections*, 2:5 (1904): 175-188

[232] *Ibid.*, 178.

[233] W.F. Ganong, "Journal of William Owen" in *New Brunswick Historical Society Collections*, I:2 (1894): 153-220.

agriculture and particularly the planting of potatoes to them, a civil deportment towards their brethren and a due obedience of the laws.[234]

This passage illustrates the importance of St. Andrews as an ancient burial ground of the Passamaquoddy. It also provides an example of the emphasis placed by European settlers on agrarian labour and the general disdain for traditional Aboriginal subsistence activities.[235]

One consequence of the treatment of the Passamaquoddies by encroaching English settlers was the decision of Passamaquoddy to align themselves with the Americans at the outbreak of the Revolution in 1776. However, even if the Passamaquoddies had wished to avoid choosing sides in the conflict it would not have been a simple matter because, as Colin Calloway notes, "the Revolution tolerated few neutrals."[236] Referring to Abenakis, he notes that they "at all times shared the goal of preserving their community and keeping the war at arm's length. All that they disagreed upon was the means to that end."[237] The difficulty in attempting to remain neutral, however, was that Native groups were likely to be regarded by both the British and the Americans as hostile. Calloway argues that both the Americans and the British subscribed to the view that if Aboriginal peoples were not fighting as allies they were aiding the enemy. Thus, instead of neutrality, most Abenakis

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[234] *Ibid.*, 200.

[235] Davis, op. cit., 59.

[236] Colin Calloway, *The American Revolution in Indian Country: Crisis and Diversity in Native American Communities.* (Cambridge: Cambridge University Press, 1995), p. 65

[237] *Ibid.*, 65.

"opted instead for limited and sometimes equivocal involvement in the conflict.

During the course of the war the Passamaquoddy and Maliseet peoples signed treaties with the Americans, who persuaded them to relinquish most of their lands in return for promises that some of their ancient hunting grounds would be left to them. As the conflict progressed British officials eventually realized that the loyalty, or at least neutrality, of the Natives along the border between Massachusetts and Nova Scotia could make the difference in its eventual location. The two powers thus vied for the support of the Native inhabitants again, as the French and English regimes had done.

As many as one third of the total population of the Thirteen Colonies were opposed to the American Revolution. As the Revolution progressed it became necessary for British officials to find a haven for these loyalists. William Knox, a Georgia loyalist working for the British government in London, devised a plan to create a new province, "New Ireland", which would encompass the region between the St. Croix and Penobscot Rivers in what is now the state of Maine.[239] Thus, in 1778, English officials ordered the establishment of a military post at Castine which had been known to Native people and their French allies as Pentagoet. In 1780, a constitution for the new province was approved by the British Parliament and officials were named to its government.[240] At the close of the Revolution however, American negotiators in Paris succeeded in persuading

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[238] *Ibid.*, 65.

[239] W.H. Siebert, "The Exodus of the Loyalists from Penobscot and the Loyalist Settlements at Passamaquoddy," *Collections of the New Brunswick Historical Society* No. 9 (1914): 485-529, at 487.

[240] *Ibid.*, 495.

administrators were thus forced to seek a new location for the loyalists at Castine. It was decided that they should be relocated to St. Andrews, the first convenient harbour east of the Anglo-American border. The move was made between October 1783 and January 1784.[242]

The fate of the settlement at St. Andrews remained in question, however, owing to an unresolved question concerning the precise location of the border between Nova Scotia and Massachusetts. Carl Winter notes that although the U.S.-Canadian border from Passamaquoddy Bay to the St. Lawrence River is "only a small portion of the line which extends almost four thousand miles, to the Pacific,... this portion has caused more difficulties than all the rest combined."[243] Settlers began moving onto lands which they assumed were within the borders of their nation. In 1798, the Boundary Commission finally declared that the Schoodic River was, in fact, the river known as the St. Croix.[244]

In October 1783, when loyalists began arriving at St. Andrews, John Allen, the agent of the Massachusetts government, went to St. Andrews to warn the settlers off. Upon arriving at St. Andrews, Allen found a number of settlers, "in possession of St.

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241 *Ibid.*, 498.

242 Theodore C. Holmes. *Loyalists to Canada. The 1783 Settlement of Quakers and Others at Passamaquoddy.* (Camden, Maine: Picton Press, 1992. P. 152.

243 Carl George Winter, "A Note on the Passamquoddy Boundary Affair", *Canadian Historical Review*, Volume 34 (1953): 46-52, 46. He notes that the boundary at Passamaquoddy remained a source of international disputes until 1910.

244 "The Identity Crisis of the St. Croix River in 1794," *Canoma* 9 (1983): 14-16.

the close of the Revolutionary War, provides an account of "the famous old Indian cross at St. Andrews Point [that] was pulled down by drunken revelers."[246] Allen also found surveyors at work preparing town plans. He directed Passamaquoddies at St. Andrews not to permit surveyors in the area and this appears to have had an effect on the settlers. William Siebert notes that some of the Penobscot loyalists "thought it necessary to patrol the [Passamaquoddy] Bay in the frigate *Ariadne* throughout that season," to protect their settlement at St. Andrews point from attack by Passamaquoddies.

Grants of shore and river land were made to the Penobscot Associated Loyalists in 1784. When most of the desirable shore lots had been taken up, grants were made inland along the St. Croix, Digdeguash and Magaguadavic rivers.[247] In 1786, Charlotte County was formed and subdivided into the parishes of St. Stephen, St. David, St. Andrews, St. Patrick, St. George, Pennfield and the West Isles. St. Andrews was declared the County seat. From that point onward, Passamaquoddies faced gradual encroachments on their land, as the town of St. Andrews became established. They subsequently established settlements at Indian Island, in the Bay of Passamaquoddy and then at Pleasant Point or Sipayik in what is now Maine.[248]

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[245] Siebert, op. cit., 502.

[246] Davis, op. cit., 59. See note 132.

[247] Siebert, op. cit., 520.

[248] Vincent O. Erickson, "Maliseet-Passamaquoddy," in *Handbook of North American Indians*, Volume 15: Northeast. (Washington: Smithsonian, 1978) pp.123-136.

John Allen had succeeded in developing a relationship of trust with the Passamaquoddies. He made promises that their services in the Revolutionary War would not go unrewarded. In 1784, he sent a letter to the Passamaquoddies written by George Washington, in which Washington thanked them for their contribution to the American effort. Finally, in 1794, ten years after the war had ended, a formal treaty was signed between the Passamaquoddy people and the Commonwealth of Massachusetts setting aside land for the Passamaquoddies. At that time, their contribution on behalf of the Americans was noted but not rewarded. Susan MacCulloch Stevens notes that the treaty signed by the Passamaquoddies:

> ...was as notable for imposing restrictions as it was for fulfilling promises. The land reserved for Indians was somehow seen to be a benevolent gift of the state, rather than a miserly scrap of what was really their own territory.[249]

Lands comprising 23,370 acres, including an area known as Indian Township and a 10 acre tract at Pleasant Point were reserved to the Passamaquoddies. This represented only a fraction of the tribe's former territories.[250] Despite the fact that they had played a vital role in securing eastern Maine for the newly-created United States, a contribution which had been acknowledged at the highest levels of government, the Passamaquoddies were disregarded and neglected. So much of the land set aside for the Passamaquoddies in

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[249] Susan MacCulloch Stevens, *Passamaquoddy Economic Development in Cultural and Historical Perspective*. (Mount Vernon, Maine: Smithsonian Institution and U.S. Economic Development Administration Research Division, 1974), p. 49.

[250] Francis O'Toole and Thomas Tureen, "State Power and the Passamaquoddy Tribe: A Gross National Hypocrisy?" *Maine Law Review* 23:1 (1971): 1-39, p. 9.

reserved lands remained.[251] In the late 1960's, a movement began among the Passamaquoddies and Penobscots to force the State of Maine to acknowledge the theft of their lands. The movement culminated in a successful court action to force the federal government to recognize its trust relationship with the Passamaquoddies.[252] This relationship had been relinquished to the State of Maine which was responsible for a catalog of abuses of Passamaquoddy welfare.

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[251] David Welsh, "The Passamaquoddy Indians", *Ramparts*, 5 (1967): 40-45, p. 41.

[252] The story of the Passamaquoddies' land claim against the State of Maine is detailed in *Restitution: The Land Claims of the Mashpee, Passamaquoddy, and Penobscot Indians of New England* by Paul Brodeur, (Boston MA: Northeastern University Press, 1985).

CHAPTER SIX: PASSAMAQUODDY HISTORY: NINETEENTH CENTURY TO PRESENT

The history of the American Indian in Western legal thought reveals that a will to empire proceeds most effectively under a rule of law.[253]

In 1820, the treaty obligations of the Massachusetts government were transferred to the newly-created state of Maine. Almost immediately, the state began selling and leasing the rich timberlands which had been reserved for the Passamaquoddies and the neighbouring Penobscots. Susan MacCulloch Stevens points to a "dreary recital of abuses of Passamaquoddy and Penobscot welfare", throughout the 1800's.[254] Not coincidentally, it was during this same era that the land rights of Aboriginal peoples became the subject of judicial scrutiny. In five influential decisions respecting Native claims to the territories they occupied, the United States Supreme Court under the leadership of Chief Justice John Marshall "established the fundamental principles of aboriginal rights by which courts in many jurisdictions have guided themselves ever since."[255] It is significant that Aboriginal rights as they are articulated in American and Canadian common law developed almost entirely out of the struggle between the state and Aboriginal peoples for control of land.[256] Although at first glance the decisions appear to 'side-step' Lockean arguments

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[253] Robert A. Williams, op. cit., 325

[254] *Ibid.*, 50.

[255] John Hurley, "Aboriginal Rights, the Constitution and the Marshall Court", op. Cit., 407.

[256] Patricia Monture-Angus, "The Familiar Face of Colonial Oppression: An Examination of Canadian Law and Judicial Decision-making." Paper presented to Royal

examination of the decision reveals that the distinction between the mode of subsistence of Aboriginal peoples and cultivation of land by Europeans is, in fact, an underlying assumption.

The first of the Supreme Court decisions respecting Aboriginal title to land was *Fletcher v. Peck*.[257] The case involved the ability of the State of Georgia to grant a fee simple title to lands within its borders which were still subject to Aboriginal title. Counsel for the state of Georgia presented the argument that Native people, as hunters and gatherers, had no legitimate title to the lands they occupied. The court upheld the Georgia statute enabling the state to grant lands within its borders regardless of whether they were subject to the title of the Native inhabitants. No precise definition of what precisely was meant by Aboriginal title was provided by the Marshall court. This was to follow in the next decision with respect to Aboriginal land rights, *Johnson and Graham's Lessee v. M'Intosh*.[258]

The question in *Johnson* was whether Aboriginal peoples could alienate their lands without the approbation of either the British crown or its successor, the U.S. government. Like many nineteenth century cases involving the question of Aboriginal title, no Native people were actually involved in the dispute. The conflict had arisen between two non-Natives, one of whom had received title to certain lands as part of a private transaction

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Commission on Aboriginal Peoples, published in full text on CD-ROM, *For Seven Generations*, 1994.

[257] (1810) 6 Cranch 87 (U.S.S.C.)

[258] (1823) 8 Wheaton 543, 21 U.S. 240 (U.S.S.C.)

between colonists and Natives in the late eighteenth century. Counsel for the plaintiff, in asserting the validity of the title acquired through purchase from Native peoples, argued that Aboriginal people as the original proprietors of the soil had an absolute right to alienate their lands. Since they were not subjects of the British government they were not bound by its edicts, including the Royal Proclamation to which the lands in question would have been subject. In finding against this argument, Marshall offered an extensive discussion of the history of settlement and colonization in North America. He did so to derive what became known as the Doctrine of Discovery. Marshall rationalized the ability of Europeans to acquire lands already occupied by peoples organized into nations by asserting that "discovery gave exclusive title to those who made it."[259] According to Marshall, this right of the original "discoverers" passed automatically to the government of the United States after the Revolution.

Robert A. Williams, Jr. notes "the disenchanted nature" of the Chief Justice's discussion of Aboriginal title, pointing to the manner in which he distances himself from "abstract" principles of justice and morality.[260] It is evident in Marshall's discussion that he realizes the specious nature of his attempts to legitimize European appropriation of territories held by Aboriginal peoples, but he is nevertheless willing to compromise principles of justice and of morality in the name of political expediency. This is particularly evident in the following passage from *Johnson*:

However extravagant the pretension of converting the discovery of an inhabited

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[259] *Ibid.*, 574.

[260] Williams, op. cit., 312.

> country into conquest may appear, if the principle has been asserted in the first instance, and afterwards sustained; if a country has been acquired and held under it; if the property of the great mass of the community originates in it, it becomes the law of the land and cannot be questioned.[261]

Interestingly, the Chief Justice refuses to entertain the argument presented by counsel for the defense, that Aboriginal peoples, as hunters and gatherers, had no valid title to the lands they inhabited.

> We will not enter into the controversy, whether agriculturalists, merchants and manufacturers, have a right, on abstract principles, to expel hunters from the territory they possess, or to contract their limits.[262]

This has been held by some analysts to be a repudiation by Marshall of the Lockean view of acquisition of property through agrarian labour. Barbara Arneil asserts that Marshall's justification of European appropriation based on discovery and conquest rather than on the Lockean doctrine of property is an indication that the Chief Justice did not subscribe to Locke's view of Native peoples. Arneil contends that:

> Marshall's judgments were important, not least because they became the foundation for all subsequent decisions on Indian land claims, but also, for the purposes of this thesis, because they completely undercut the Lockean view of Indians...[263]

However, on closer examination of Marshall's jurisprudence in general and his judgment in *Johnson*, this proves to be an incorrect assessment. There are, in fact, important strains of Locke's argument which can be detected in the Chief Justice's jurisprudence. One can

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[261] (1823) 8 Wheaton 543 at 591.

[262] *Ibid.*, 588.

[263] Barbara Arneil, '*All the World Was America.*', op. cit., 372.

only speculate that he chose not to follow the Lockean line of argument not because he believed it to be false, but again, for reasons of political expediency.

Marshall was heavily influenced by Locke's *Second Treatise* and believed strongly in the right to property, which he felt was a "sacred" right, second only to the right to life.[264] It was not solely possession which was to be protected. Rather, it was the right to possess the fruits of one's labour, which Marshall, like Locke, believed to be of fundamental importance.

> The right of property was not so much the right to possess as the right to possess what one has worked for. This was the premise, developed in Chapter V of Locke's *Second Treatise*, which Marshall took to be "generally admitted," and from which his arguments on property in general, and on vested contractual rights in particular, took their beginning.[265]

Like Locke, Marshall viewed the individual's right to acquire property through labour as a force which would lead, in the end, to public good. In his view, the object of government was to protect the ability of individuals to acquire property in unequal amounts.[266]

While Marshall appears on the surface to reject the view that it is agrarian labour, that is, the "improvement" and cultivation of lands which creates property, a closer look at the judgment in *Johnson* reveals that this is, in fact, an underlying assumption. In a revealing passage in *Johnson*, the Chief Justice asserts that Native peoples inhabiting North America were "fierce savages, whose occupation was war, and whose subsistence

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[264] Robert Kenneth Faulkner, *The Jurisprudence of John Marshall* (Princeton, NJ: Princeton University Press, 1968) p. 17.

[265] *Ibid.*, 18.

[266] *Ibid.*, 19.

of their lands, would have been to leave the country "a wilderness."[267]

Francis Jennings draws out the implicit Lockean rationale in Marshall's judgment. He argues that in international law, to invade and dispossess a "civilized" nation would not be permissible. Therefore, to rationalize the dispossession of Native peoples it was necessary to characterize them as savages outside the boundaries of moral and civil law. The key element in developing this characterization was the fact that Aboriginal people relied on hunting and gathering for their subsistence.

> For Justice Marshall the fundamental criteria of legal savagery were two: subsistence "from the forest" and the "occupation" of war. Since it could hardly be argued that civilized societies eschewed war or withheld honor from professional soldiers, the critical factor in being savage reduced to a mode of subsistence...Insofar as the difference between civilized and uncivilized men is concerned, the theorists of international law, whom Marshall followed, have held consistently that civilized people stay in place and thus acquire such right in their inhabited lands as uncivilized wanderers cannot rightfully claim.[268]

It is likely that Marshall framed his discussion in terms of discovery and conquest, rather than on agrarian labour, in order to bolster the authority of the sovereign government in opposition to individual property rights. Robert Faulkner notes that Marshall subscribed to the belief that "although the American nation's success depended above all upon the restless application of private energies, their calculated coordination could be secured only

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[267] (1823) 8 Wheaton 543 at 590.

[268] Francis Jennings, *The Invasion of America: Indians, Colonialism and the Cant of Conquest* (Chapel Hill, NC: University of North Carolina Press, 1975) p. 60.

In subsequent decisions of the Marshall Court, the judicial view of Aboriginal rights was further elaborated upon.[270] These decisions became the starting point for judicial analysis of Aboriginal rights in other jurisdictions. Because they included a discussion of the treatment of Aboriginal peoples in British colonies, the decisions provided a basis for judicial consideration of Aboriginal title in other common law jurisdictions, including Canada. In 1888, the case of *St. Catherine's Milling and Lumber Company v. The Queen*[271] was heard by the Judicial Committee of the Privy Council, that portion of the House of Lords responsible for hearing appeals from courts of the colonies. Reminiscent of the Marshall Court decisions, the case involved a dispute between the federal government of Canada and the provincial government of Ontario. The federal government had issued a permit to the St. Catherine's Lumber Company to harvest timber on lands in Ontario. The provincial government objected that the federal government had no authority to grant such permits on lands controlled by the province. At issue was whether the lands, which had belonged to the Ojibway people, had been purchased by the federal government through treaty negotiations and were thus federally controlled, or whether the lands had simply become Crown lands which passed to the control of the province at Confederation.

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269 Faulkner, op. cit., 45.

270 Three important decisions of the Marshall Court which followed *Johnson*, were *Cherokee Nation v. State of Georgia* (1831) 5 Peters 1; *Worcester v. State of Georgia* (1832) 6 Peters 515; and *Mitchel v. United States* (1835) 9 Peters 711.

271 (1888) 14 A.C. 146 (J.C.P.C.)

title was a "burden" on Crown title, that it was merely a usufructuary right, dependent upon the will of the Sovereign. The case of St. Catherine's Milling:

> ...resulted in a decision of extraordinary importance to Canada's Aboriginal peoples, drastically circumscribing the nature of their title to their traditional lands, and at the broadest levels, affecting the course of Canadian history. Both the balance of federal and provincial powers and the value of unextinguished Aboriginal title (and perhaps ultimately the respect accorded Aboriginal peoples by the Canadian state hung in the balance.[272]

Ironically, neither the Ojibway people nor any other Aboriginal peoples in Canada were ever included in the judicial proceedings at any level and "it is unlikely they were made aware that the case was being prosecuted."[273] In 1890, *St. Catherine 's Milling* was cited by the New Brunswick Supreme Court in the case of *Burk v. Cormier*.[274] The case involved a dispute over title to lands forming part of the Buctouche Indian reserve of Eastern New Brunswick. Following the decision in *St. Catherine 's* the court held that the title to lands reserved for Indians vested in the provincial and not the federal government. In his judgment, Chief Justice Allen took the opportunity to declare that the Royal Proclamation of 1763 did not apply to lands in New Brunswick, although he gave no reasons to support this assertion.[275]

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[272] Peter Kulchyski, ed. *Unjust Relations: Aboriginal Rights in Canadian Courts* (Toronto: Oxford University Press, 1994.), p. 22.

[273] *Ibid.*, 22.

[274] (1890) 30 N.B.R. 142.

[275] *Ibid.*, 148. His views on this point were overturned by the New Brunswick Supreme Court in 1958, in the case of *Warman v. Francis*, (1958) 20 D.L.R. (2d) 627.

Passamaquoddies retained their ancient attachment to Gunasquamcook and the surrounding area. In 1785, the Schoodic reserve was established at Milltown, New Brunswick. Seventeen years later, the land was granted to the Church in the Parish of St. Stephen.[276] Correspondence between the New Brunswick Indian Agents and the Provincial Secretary, indicates that members of the Passamaquoddy Nation attempted on numerous occasions to reestablish settlements in the St. Andrews area. In addition, the correspondence shows that the New Brunswick government was concerned to at least some degree, with the state of the Passamaquoddies in Charlotte County.

Beginning in 1840's Passamaquoddies, as well as various people concerned with Native affairs, appealed to government officials to make provision for some kind of relief for the Native inhabitants of the area. Attempts were also made to secure money for a 'camping ground' for Passamaquoddies residing in Charlotte County. In March of 1846, Moses Perley wrote to the Provincial Secretary in response to a request by the latter for details concerning the "real state of certain Indians near St. Andrews, represented as being in a destitute situation."[277] It is clear in this correspondence, that the Provincial government considered providing relief for the Passamaquoddies. Perley remarks at the close of his communication that:

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[276] James Wherry, *Documents Relating to the History of the Passamaquoddy Indian Presence in Charlotte County, New Brunswick.* Fredericton, N.B. Arctician Books, 1981.) p. 8.

[277] "Letter from Moses Perley to the Provincial Secretary concerning the state of the Indians near St. Andrews", 18 March 1846, Executive Council: Cabinet Meeting Records. Public Archives of New Brunswick [hereinafter PANB]. Indian Documentation Inventory, RS9

temporary, and not to be expected in future - as otherwise, the whole of the destitute Indians from Pleasant Point, in the State of Maine, would be very likely to take up their abode permanently in this Province.[278]

This passage is interesting in several respects. Firstly, it is clear that the Natives concerned are, in fact, Passamaquoddies from Pleasant Point. Secondly, it is evident, at least in Perley's view, that conditions among the Passamaquoddies in Maine were such that they would easily consider a move to St. Andrews. Two years later Harris Hatch, the Indian Commissioner for the area, also corresponded with the Provincial Secretary concerning the Passamaquoddies at St. Andrews. This letter is particularly illuminating in its discussion of the attempts by Passamaquoddies to establish a settlement near St. Andrews. It is dated August 2nd, 1848, at St. Andrews and is transcribed, as nearly as possible, as follows:

> Sir
> I have the honor of receiving your letter of the 19th (?), requesting me to furnish for the information of His Excellency, a list _____?, of all the Indians in the District. In reply, I beg to say that the Indians in this quarter have made frequent applications to Government for a piece of land in this County, where they might make a permanent establishment. They were led to believe, at one time, they would succeed in their wishes, but, I believe nothing has been done, and the Government of the United States have given them land at Pleasant Point, near Eastport, where within a few years, they have erected frame houses and a chapel, in which they have been aided by the same government, giving a salary to a Priest to attend the Indians. The winter before last, from ten to fifteen families wintered at Chamcook, near this place. The Indians do not ? having acquired all the vices incident to civilization with very few of its virtues. They are well disposed to the British government, but having had no encouragement in the allotment of land, they were compelled to succumb to circumstances.

(#4032)

[278] *Ibid.*, n.p.

Grand Manan, their favorite dealing station, and a piece of land on the Waweig River, where their families could remove (?) in the winter season, the men would be enabled to go a hunting, leaving the women and children to make baskets - the particular kind of wood for this purpose being at hand. This would be doing an act of justice to these poor creatures, and giving back a part, of which their forefathers possessed by occupancy, the origin of all possession of property.

If his Excelllency would be pleased to entertain the foregoing suggestions, I should be happy, on the ? of humanity, to go into further details, if necessary, for His Excellency's further information - to donate ? this land for the Indians in the different places I have determined as best suited to observe their interests.

I am not able to give you a particular detail of the number of men, women and children but the aggregate number living on both sides of the Saint Croix are about five hundred souls.

I have the honor to be
Your most obedient humble
servant,

H. Hatch.[279]

Hatch's description of the subsistence activities of the Passamaquoddies in the area is revealing. It is evident that the Passamaquoddies continued to pursue traditional modes of subsistence in the Passamaquoddy area, despite the fact that they had established a settlement at Pleasant Point, Maine. Later in the same month, Hatch wrote to the Provincial Treasurer requesting information about a grant of 50 pounds made by the Provincial Legislature in 1841. He noted that the money was to be used for the purchase of a camping ground for the "Saint Croix Indians", but the money had never been drawn out for this purpose.[280] Hatch was apparently unsuccessful in determining the fate of this

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[279] "Letter from Harris Hatch, Indian Commissioner to the Provincial Secretary responding to circular requesting numbers of Indians at St. Andrews", 2 August 1848, Executive Council: Cabinet Meeting Records. PANB, Indian Documentation Inventory, RS9 (#174).

[280] "Letter from Harris Hatch to John R. Partelow, "Provincial Treasurer", regarding the

money, for he wrote two more letters in 1849, requesting information about the grant, from the Indian Agent R.L. Hazen.[281] No further communication on this matter appears to have taken place.

In 1851 land was set aside at the mouth of the Canoose River as a result of a petition by a Passamaquoddy, Pierre Lacoute.[282] Three years later, a petition, signed by twenty-five Passamaquoddies, was submitted to the Provincial House of Assembly. The petitioners described themselves as "the Indians and descendents of Indians residing in Saint Andrews on Indian Point at the time of the landing of the American Loyalists." It states that in the fall of 1785, a group of Loyalists had landed at Indian Point and offered to pay the Passamaquoddies 25 pounds to stay there until spring, at which time they would leave. The petition states that the money was never received and the settlers remained, taking up permanent residence.

In April of 1864, the petition of Edward Jack of Saint Andrews, in the County of Charlotte was submitted to the Lieutenant Governor of New Brunswick, the Legislative Council and the House of Assembly, stating:

that there are now thirty Indians, men women and children of the Passamaquoddy

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purchase of a camping ground for the St. Croix Indians", 22 August 1848, Executive Council: Cabinet Meeting Records. PANB, Indian Documentation Inventory, RS9 (#178)

[281] "Letter from Harris Hatch to R.L. Hazen, Indian Agent, relative to a grant of money to the St. Andrews Indians for purchase of camping ground in Charlotte County", 30 March 1849, Executive Council: Cabinet Meeting Records. PANB, Indian Documentation Inventory, RS9 (#183) and also "Letter from Harris Hatch to R.L. Hazen relative to a grant of money for purchasing a camping ground in Charlotte County", 10 April 1849, Executive Council: Cabinet Meeting Records. PANB, Indian Documentation Inventory, RS9 (#186)

[282] Wherry, op. cit., 11.

> tribe living about one mile from the town of Magaguadavic in the said County of lands the property of private individuals to whom they are forced to pay rent, that they are forbidden by the owners of these lands to cut any green trees for firewood and only allowed to use such as may be dead or decaying, that the Indians have from time immemorial resided near the spot where their huts now stand, that owing to the scarcity of game in their neighbourhood a considerable portion of their living is denied...? porpoise shooting during the summer months, that they are desirous of obtaining a lot of land whereon to live free of rent contiguous to the shores of Passamaquoddy Bay which it will be necessary for them to purchase as all suitable lands are granted that they are desirous of obtaining a grant of 800 acres of Crown land in the County of Charlotte whose...? vacant, the title to be vested in the Justices of Charlotte with power to sell and apply the proceeds to the purchase of a small lot at or near the sea there upon which they can reside and which they may cultivate, such purchase to be subject to the approbation of the justices aforesaid...[283]

Again the letter illustrates that Passamaquoddies continued to pursue traditional subsistence activities, despite the fact that their access to resources was constrained. The mention in this letter of the porpoise hunting is significant. It is evident that the hunting of sea mammals was still a major subsistence activity for the Passamaquoddy, which would have led them to seek land close to Passamaquoddy Bay. The letter also illustrates the view that in order for the Passamaquoddies to sustain themselves, it would be necessary for them to obtain land which they could cultivate.

A final petition is made by several residents of Charlotte County on behalf of the Passamaquoddies in April of 1868, who are "in a comparatively destitute and suffering condition, and who are sustained to a great degree by the charities of the white population of the County..." The petition states that there are approximately 50 Passamaquoddies living in the area and requests that some provision for their support be made by the

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[283] "Petition of Edward Jack to the Lieutenant Governor praying for a grant of land to certain Indians living in Charlotte County", 9 April 1864, Executive Council: Cabinet Meeting Records. PANB, Indian Documentation Inventory, RS9.

Croix River in York County in 1881 which became known as the Canoose Reserve. Documents relating to this reserve indicate that within a relatively short span of time non-Natives were harvesting timber from the reserve and ownership of the lands was the subject of a dispute. The land was eventually transferred to the Crown in 1944.[285] There seems to be no official documentation indicating that lands were reserved at Indian Point in St. Andrews. However, in a plan of the Town of St. Andrews dating back to 1900, an area at Indian Point is marked as being an "Indian Encampment."[286]

Even if the Provincial government had undertaken to acknowledge the cause of the Passamaquoddies at St. Andrews it is unlikely that it would have set aside lands for them since Legislative authorities during this period were rapidly disposing of lands already reserved for Native peoples in the Province. As Loyalists moved into Nova Scotia and New Brunswick following the American Revolution government officials had set aside lands for the Wabanaki peoples on the basis of treaties which had recognized them as occupying particular territories.[287] The boundaries of these territories, however, were not clearly indicated in the treaties. Between 1783 and 1810, government representatives

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[284] "Petition of eight inhabitants of Charlotte County to the Lieutenant Governor requesting aid to the Indians of this County", April 1868, Executive Council: Cabinet Meeting Records, PANB, Indian Documentation Inventory, RS9.

[285] Wherry, op. Cit. 13.

[286] The plan, dated 1900, shows "the location of roads and lots of the St. Andrews Land Company at Indian Point, St. Andrews, N.B." Contained in Wherry, op. Cit., p 26

[287] W.D. Hamilton, "Indian Lands in New Brunswick: The Case of the Little South West Reserve", *Acadiensis*, 13:2 (1984): 3-28, p. 3.

granted licenses of occupation to Native peoples

territories. These licenses did not grant ownership; they merely allowed for occupancy and possession of the lands in question, the ultimate title being vested in the crown.[288] Only 100,000 acres, or one half of one per cent of the land area of New Brunswick was included in these licenses.[289] By 1838, when the first survey of reserve lands was completed, only 61,000 acres of the land originally set aside for Native people in New Brunswick remained.[290]

In 1838, when control of Native affairs was transferred from the British government to the New Brunswick government, a period of further reduction of reserve lands commenced.[291] The beginning of the nineteenth century brought with it a huge and rapid influx of Scottish and Irish immigrants to New Brunswick and Nova Scotia. Between 1800 and 1825, the population of New Brunswick more than doubled.[292] The new settlers generally cared little for the struggles of Native people to retain their lands and their way of life. In fact,

> ...they despised the wandering nature of Indian existence as vagrancy; the proceeded to occupy attractive Indian lands, regarding the Indians' failure to cultivate land as a conclusive argument for dispossession.[293]

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[288] *Ibid.*, 3.

[289] *Ibid.*, 4.

[290] L.F.S. Upton, "Indian Affairs in Colonial New Brunswick", *Acadiensis*, 3:2 (Spring 1974): 3-26, p. 5.

[291] Hamilton, op. cit., 4.

[292] W.S. MacNutt, *New Brunswick: A History 1784-1867.* (Toronto: Macmillan Canada, 1963), p. 162.

[293] G.P. Gould and A.J. Semple, *Our Land the Maritimes.* (Fredericton, New Brunswick:

Squatters posed a significant threat to reserve lands during this era.[294] They settled on Native land, sometimes in ignorance of the boundary lines, but at other times knowing full well that the lands were reserved to Native peoples and could not be sold. They then commenced erecting buildings, clearing land and otherwise 'improving' the land they were unlawfully occupying. After a certain amount of time had passed, they petitioned the government for title to the land, usually citing the improvements which had been made. L.F.S. Upton points out that the squatters were "without the shadow of a title to their holdings", and the government was thus fully within its rights to eject them from Wabanaki lands.[295] But he argues that government officials were basically sympathetic to squatters on reserves, whom they felt "had contributed greatly to the progress of New Brunswick by improving waste lands that otherwise lay as barriers to the extension of thriving settlements."[296]

In addition, it was the generally-held view of legislative authorities that since many Native people persisted in traditional hunting and gathering activities, rather than taking up farming, the reserve lands were of no use to them. The views expressed by governmental officials embody Locke's distinction between 'waste' lands occupied by Aboriginal peoples and lands 'improved' by cultivation. An Act passed in 1844, explicitly stated as much. Officially titled *An Act to Regulate the Management and Disposal of*

St. Anne's Point Press, 1980), p. 56.

[294] Upton, op. cit., 7.

[295] *Ibid.*, 7.

[296] *Ibid.*, 8.

that:

> ...the extensive tracts of valuable Land reserved for the Indians in various parts of this Province tend greatly to retard the settlement of the Country, while large portions of them are not, in their present neglected state, productive of any benefit to the people, for whose use they were reserved...[297]

This Act laid out the government's solution to both the problem of squatters and the continuing problem of providing relief for the destitute Micmac and Maliseet peoples, whose livelihood had been all but destroyed. This solution was to sell off the unused portions of reserved lands and apply the proceeds to a relief fund.

This became the dominant theme in the New Brunswick government's official policy with respect to Native peoples. In 1841, Moses Perley, then the Commissioner of Indian Affairs, submitted a report on the Aboriginal peoples of New Brunswick.[298] The report exemplifies the view that Native peoples who were willing to abandon traditional subsistence activities to take up farming, were to be rewarded. Perley indicates that those Native people located closest to urban centres were more acculturated than those in outlying regions.

> The first step toward the real improvement of the Indians is to gain them over from a wandering to a settled life, and to form them into compact Settlements, not very remote from older Settlements, with a due portion of Land for their cultivation and support. They must be induced to remain stationary on the Land during the principal part of the year, without which they cannot attend the Agriculture-have

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[297] *Statutes of New Brunswick 1845*. Reproduced in Gould and Semple, op. cit., 194-196.

[298] Harold F. McGee, Editor, "M.H. Perley's Report on the Indians of New Brunswick", in *The Native Peoples of Atlantic Canada: A History of Indian-European Relations* (Ottawa: Carleton University Press, 1983), pp. 81-89.

any of the comforts of good habits of domestic life, or cultivate Religion or Education.[299]

Perley's report also details conditions of disease and poverty among New Brunswick's Native peoples during the nineteenth century. He described conversations with elders who informed him that they had had children who died in infancy from scarlet fever, whooping cough, typhus, small pox and other diseases.

Native peoples who pursued traditional modes of subsistence were likely to face dispossession. It was Perley's idea that 'unused' portions of reserves should be sold and used to relocate the Native inhabitants closer to non-Native settlements. In this way, Aboriginal peoples in New Brunswick would pay for their own assimilation.[300] In the concluding paragraph of his essay on this era of New Brunswick history, L.F.S. Upton states frankly that it is remarkable that the Native peoples of New Brunswick survived the policies of local colonial administrations. It is Upton's view that had New Brunswick's strategy for Aboriginal peoples had been applied to all of Canada, it would have proven to be a "final solution" for Native peoples in this country.[301]

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Despite a body of historical evidence detailing the Passamaquoddy attachment to Gunasquamcook, the town of St. Andrews has to date successfully ignored any evidence of Aboriginal occupation at St. Andrews. In 1989, the Town brought an application to

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[299] *Ibid.*, 84.

[300] Ayers, op. cit., 47.

[301] Upton, op. cit., 26.

have its title to lands at Gunasquamcook judicially recognized, a process known as "quieting of title."[302] In the court decision, the lands in dispute are referred to as the "Eastern Commons."[303] Descendants of the Passamaquoddies living at Indian Point were able to resist the claims of the Town to a portion of the lands at Indian Point, using the legal doctrine of adverse possession. The doctrine holds that open and notorious possession of lands for a certain period of time, prescribed by law, gives rights of ownership.

The reasons for judgment in *St. Andrews v. Lecky* contain a brief history of the development of Gunasquamcook from the mid-nineteenth century to the present. The Town traced its title back to an original Crown grant. Between 1894 and 1983, the Town leased the disputed lands at Indian Point to the Canadian Pacific Railway. A building known as the Inn was constructed on the property in the 1850's, was later purchased by the C.P.R. and served as a residence for the local manager of the New Brunswick and Canada railway line. This building was located adjacent to the residence of John Nicholas, a Passamaquoddy, who was a great grandfather of the respondents. In his decision, Jones J. recognized the connection of the Passamaquoddy to St. Andrews. He notes that:

> Evidence led indicates that in early days Indians moved about the Passamaquoddy area and I take it this would to some extent be in accordance with the seasons. When in St. Andrews they apparently tended to encamp in this area. In fact the whole area the title to which is sought to be quieted has in the past, and may to

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[302] An action to quiet title is usually the result of assertion by various people of rights to a particular parcel of land. In New Brunswick the process is governed by statute. John A. Yogis, *Canadian Law Dictionary*, Third Edition. (New York: Barron's Educational Series, 1995), p. 186.

[303] *Town of St. Andrews v. Lecky* [1993] N.B.J. No. 72 (N.B.Q.B.) (QL Database)

However, since the case was fought on the issue of adverse possession and not on the basis of Aboriginal title, no consideration of the latter issue was included in the reasons for judgment. In the end, the respondents retained possession of a portion of the lands in dispute at Gunasquamcook, but the Town was successful in attaining title to the remaining portion.

The quieting of the Town's title was a first step in launching development at Indian Point. But attempts by the Town of St. Andrews to develop the land at Gunasquamcook resulted in a sustained effort on the part of Passamaquoddies on both sides of the Canada-U.S. border to push for increased recognition of their claims in the area. In the early summer of 1995, members of the Passamaquoddy Nation from St. Andrews and Eastport, Maine, attended a council meeting of the Town of St. Andrews. They were present at the meeting to protest proposed development at Indian Point. A local resident and member of the Passamaquoddy Nation, Hugh Akagi, argued that the land in question belonged to the Passamaquoddy people, who were dispossessed by Loyalist settlers arriving after the American Revolution.[305] Akagi spoke of his ancestors who were driven from Indian Point to an island in Passamaquoddy Bay, "where they suffered the same fate as Champlain and his crew on St. Croix Island."[306]

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[304] *Ibid.*, n.p.

[305] Sandy Morgan, "St. Andrews' Indian Point Development Opposed", *The Daily Gleaner*: Fredericton, N.B., June 8, 1995. P. 19.

[306] *Ibid.*, 19. Ironically at approximately the same time this meeting was taking place, a Celtic Cross was erected at Indian Point and dedicated to Irish Immigrants. These

the Town of St. Andrews, citing construction of new housing on the site of a sacred burial ground.[307] At the same time, the Passamaquoddy Tribal Government issued a statement to the Town calling for the return of undeveloped portions of Indian Point and an acknowledgment that the Passamaquoddies never surrendered tribal rights to the lands at Gunasquamcook.[308] In a letter from the Tribal Government at Pleasant Point and Indian Township, dated May 26, 1997, the spiritual significance of Gunasquamcook to the Passamaquoddy was reaffirmed.

> Qonasqamkuk is to the Passamaquoddy people what Mecca is to the Moslems. We have buried on Indian Point Chief John Neptune, Chief Pierre Toma and many other Passamaquoddy People. We have Tribal members alive now who remember spending time on Indian Point. We have relatives who died in wars for Canada.[309]

No response from the Town has been forthcoming. Passamaquoddies continue to hold demonstrations in the Town and have distributed pamphlets detailing their cause to local residents. The final chapter in the history of the Passamaquoddy at Gunasquamcook has yet to be written.

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immigrants, who were driven out of Ireland in the mid-nineteenth century, died in quarantine on Hospital Island, six miles off the coast of St. Andrews. See Sandy Morgan, "Celtic Cross Dedicated to the Memory of Irish Immigrants", *The Daily Gleaner*: Fredericton, N.B., June 1, 1995, p. 19.

[307] Sandy Morgan, "Tribe Angry Over Development on Sacred Ground", *The Daily Gleaner*: Fredericton, N.B., May 9, 1997., p. 11.

[308] Draft Proposal of the Passamaquoddy First Nation to the Town of St. Andrews, N.B., Pleasant Point and Indian Township, Maine, May, 1997.

[309] Letter to the People of St. Andrews from the Passamaquoddy Tribal Government Regarding Land at Indian Point, 26 May 1997, Pleasant Point and Indian Township,

Maine. Excerpted with permission.

CONCLUSION

The fundamentally different view of land and its relationship to humans possessed by Native peoples played a significant part in the process of colonization. Within the larger framework of their relationship to Nature, Aboriginal peoples viewed the land as a gift from the Creator, given to sustain them and to hold in trust for future generations. All of Nature was possessed of a spirit and all spirits required respect. The concept of exclusive ownership of land simply did not exist among Native groups such as the Passamaquoddy prior to contact. European colonists, by contrast, possessed a profoundly different understanding of the relationship between humans and the land. Their understanding of land ownership, as exemplified by Locke's *Second Treatise of Government*, was that men came to have a right of property in the lands which they cultivated, tilled and improved. Appealing both to reason and to Biblical teachings, Locke argued that although the world was given to all men in common, individuals could come to have a right of ownership in land, by mixing their labour with it. The property one possessed in their own labour was transferred to items of Nature, when one enclosed, cultivated or tilled. The emphasis in Locke's writing was on the value of agrarian labour. Native lands, without agricultural improvement, were seen as 'waste' and were, therefore, free for appropriation by European settlers. The fact that Native peoples viewed the lands they inhabited as of infinite value independent of any expenditure of human labour upon them was of little consequence. Settlers took for granted that theirs was the superior conception of land ownership. In the early stages of colonization, the doctrine of property

which Locke developed served to undermine the validity of the Aboriginal relationship to the land. It was also useful in rationalizing the dispossession of Native groups like the Passamaquoddy.

In the later stages of colonialism in North America, Native peoples became the subject of anthropological and ethnological study. In the aftermath of Darwinism, the social science of anthropology became the new lens through which Western society viewed Native peoples. Ethnohistorians discovered what they believed to be an Aboriginal form of private property, in the form of family hunting territories. These ethnohistorians were largely sympathetic to Native peoples and from their perspective, the discovery of a form of private property amongst Native peoples served to legitimate their culture. The dominant policy in the nineteenth and twentieth centuries towards Native peoples became one of assimilation and acculturation. The discovery of a form of private property served as an indication that Aboriginal societies were more advanced than was previously thought. Attitudes towards Native peoples had changed somewhat from Locke's time, but the underlying ideological motivations for analyzing their relationship to the lands they inhabited remained the same. Analysis of Native landholding patterns served to validate private property, despite the fact that it was and is still, a uniquely Western idea.

The struggle of the Passamaquoddy people to retain their connection to Gunasquamcook is a forceful example of the way in which this facet of the colonialist enterprise has proceeded. The history of the region from the time of contact to the beginning of the nineteenth century was marked by almost continual conflict and

competition between European nations. While the English and French competed for control of the lucrative fishery and fur trade, the Passamaquoddy and neighbouring groups sought mainly to retain their access to lands which they and their ancestors had occupied since time immemorial. Recent archaeological findings indicate that the introduction of the fur trade into Aboriginal societies changed their subsistence strategies dramatically. Where formerly groups such as the Passamaquoddy had maintained permanent settlements such as the one at Gunasquamcook, with the introduction of the fur trade, they became more unsettled. Thus, in what must surely be considered one of the ironies of North American colonial history, the description of Native peoples as nomadic, a label which has served to undermine their occupation of land, developed as a result of the European fur trade.

Although French settlers were present in the Passamaquoddy area from the time of Champlain until the fall of Quebec, it was not the French who succeeded in dispossessing the Passamaquoddies. The goal of French colonial administrations was the assimilation and conversion of Native peoples, but this aspiration remained unattainable, due, at least in part, to the fact that the French were unable to export large enough numbers of settlers to the colonies. In addition, the French practice of national aggrandizement through the conquest of settled colonies rather than through establishment of new settlements resulted in an ambivalence on the part of officials in France towards the colonial enterprise. English colonialism, by contrast, was much more 'successful.' Its effectiveness can be attributed, in part, to the large numbers of English settlers who were transported to North America. It can also be attributed to the uniquely English and uniquely Lockean practice of settlement by industry rather than by conquest. English colonial practice was influenced

than through simple discovery and assertion of sovereignty. It was thus English, Lockean colonialism which proved to be the greatest threat to Aboriginal peoples.

The history of the Passamaquoddy people provides an example of the role which Lockean conceptions of property have played in the dispossession of an Aboriginal people. It was Loyalist settlers, arriving from Penobscot after the American Revolution who succeeded in dispossessing the Passamaquoddy at Gunasquamcook. Armed with an idea of land as something which needed to be cultivated in order to be possessed, they arrived, surveyed 'waste' lands, began planning townships and in the process, devalued both the mode of subsistence of the Native inhabitants and their spiritual connection to the land. The journal of William Owen exemplifies this process. It contains one of the first descriptions of the displacement of the Passamaquoddy. In his journal, Owen recorded that St. Andrews was the site of an ancient Passamaquoddy burial ground, as well an important place for harvesting food resources. Yet the reaction to a plea by the Passamaquoddy for recognition of the site's importance was that they should adopt European agricultural practices. The implication is that only agricultural labour would lend legitimacy to the relationship between the Passamaquoddy and their homelands.

In the nineteenth century, Lockean conceptions of land ownership were employed in judicial decision-making and in legislative initiatives by local colonial governments. The decisions of the United States Supreme Court, which became the starting point for judicial scrutiny of Aboriginal land rights in Canada, were based on an underlying distinction between a mode of subsistence drawn 'from the forest' and the sedentary subsistence of

declared that 'neglected' lands reserved for Native peoples in the province were a hindrance to the expansion of settlements. The response of government officials to this perceived problem was to sell the 'unused' portions of reserved lands and to utilize the proceeds to provide relief for destitute Native people in the province.

Through each of the various phases of colonialism, the physical and spiritual attachment of Native peoples to the land has always been an obstacle to the expansion of European settlements on this continent. The solution to this "problem" has been either to deny the legitimacy of a society based on such a relationship, or alternatively, to transform it into something which resembles European land ownership. Through each of these phases of colonialism, the connection of Aboriginal groups such as the Passamaquoddy to their ancestral lands has endured.

In Aboriginal cultures, time is not linear. Rather, it is like a circle, with each day repeating itself, each season following in the same cyclical pattern. What has gone before is not simply the past; it remains a real and vital component of the present. In much the same cyclical pattern, history often repeats itself. Events of one era often echo those of a previous age and certain patterns reveal themselves over time. In non-Native cultures, however, events of the past are regarded as simply that; they are gone forever. The weight of time can serve to erase events which may be injurious to the collective psyche of Western societies. But analysis of events of the past is always a means of acquiring a clearer understanding of the present. A new understanding of the history of colonialism in North America can serve as the basis for a renewed relationship with Aboriginal peoples.

Western culture which served to rationalize the dispossession of Native peoples be exposed and scrutinized. Perhaps, in this way, a measure of truth may form the basis for a new dialogue between the two cultures.

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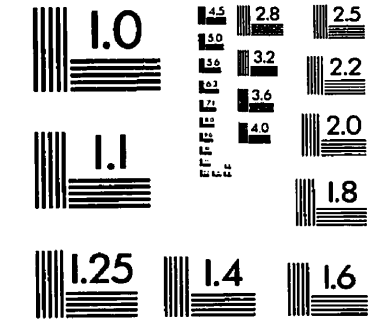

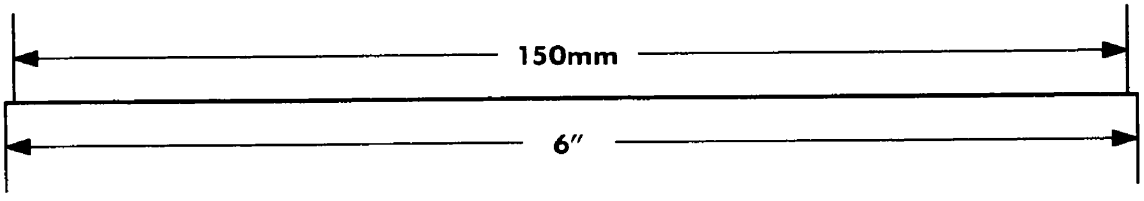

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