

5.4. LAND TENURE AND LAND USE

- *Indians occupied and used their territory communally; they did not have the concept of private ownership of land.*
- *Europeans recognized private ownership of land; ultimate title to all land in a European country was vested in the Crown.*
- *Europeans did not gain title to land in the Maritime region by discovery, occupation, conquest or cession.*

NATIVE CONCEPTS OF LAND TENURE

Before the arrival of Europeans in North America, the Native peoples relied entirely upon the plants and animals found around them for food, clothing, shelter and fuel; they used stone for many of their tools and weapons. They had a thorough, first-hand knowledge of when and where each type of plant and animal could be found and how best to gather and prepare it for use. Through their constant interaction with these resources, they asserted their collective ownership of the land. As nations, the Micmacs and the Maliseets each had territory, which, along with their unique language and way of life, distinguished them from their neighbours.

- Territory was occupied and used for sustenance.

As is true for any people who inhabit one area for many generations — hundreds of generations in the case of Micmacs and Maliseets in the Maritimes — members of a Native community frequented certain spots, such as seasonal campsites, village sites, meeting points, canoe and portage routes, footpaths and cemeteries. They identified many of the significant landmarks and unusual geographical features with spiritual powers. All of these places gave the people who lived in the area a deep sense of familiarity and belonging. Although they did not conceive of owning land itself, it was their territory because they occupied it, used it and managed its resources. They were an integral part of the life it sustained. Indian peoples or nations owned their land just as European nations owned theirs.

Land itself was not marked with boundaries, described in deeds or claimed as property. People had areas in which they resided and made their living, but not property or “real estate.”

- Land itself could not be owned as property by individuals.

The Micmacs and Maliseets did not try to exclude European settlers, nor did they think of selling or giving them parcels of land. At first they understood the Europeans' occupancy in the terms they themselves had always taken for granted: the Europeans were using the natural resources of the area. This in fact was the case — for a time. Only when great numbers of settlers arrived and colonial governments began to exert control did the Indians realize that they were losing land itself, together with all it held, permanently.

FIRST ENCOUNTER WITH THE INDIANS

THIS IS A STORY my grandfather told me about the first Europeans to come here. Whoever they were, they thought the Indians were not smart — because they didn't want money.

There were three questions given to each individual. When the Indian's turn came to say what he wanted, they asked him, "What would you always want to have plenty of?" — "Well," he would say, "enough to eat, all the time." — "Number two?" — "Well," he says, "I'd like to have all the tobacco I could smoke." — "The third?" — He thought, and he couldn't think of anything else. "Well," he says, "well, I'll take more tobacco."

EUROPEAN CONCEPTS OF LAND TENURE

The Europeans came to North America with a different idea of land tenure: private land ownership under the ultimate authority of the Crown. It was customary in European societies for individual people to have title to land — the soil and rock forming the surface of the earth. They built permanent structures on the land; they cleared away the timber and then cultivated crops, using the same fields year after year. If a settler had title to a certain lot, he could exclude others from it. This idea was just as difficult for the Indians to understand as the Indian system was for the Europeans. As the European presence increased, it inevitably meant the end of the Indians' well-established way of life. "Nil yut nsipum" no longer applied in its original sense.¹

The Europeans did not consider that the Indians were really using most of the land, still less that they owned it. Indians, in their eyes, wandered about, perhaps growing a few things here and there, taking game and other food as they passed. Samuel Purchas, a British clergyman writing from Virginia in 1625, spoke of "that unmanned wild Countrey, which they range rather than inhabite."² The newcomers felt that they were the first people to settle North America. Even the Indians' year-round village sites, such as those on the shores of the Miramichi, were sometimes characterized by Europeans as "camping spots." It is revealing to note that later the Europeans generally respected the small plots of land used for agriculture, when Indians in the Maritime region began to plant crops.

Even though North America had been populated and thoroughly explored for thousands of years before Europeans first set foot on its shores, they nonetheless claimed title to the land. Since then, a number of principles have been put forth to justify those claims. But the validity of applying them to the territories of aboriginal

¹ "This is my river," meaning "This is my hunting, fishing or gathering place." See Introduction.

² S. Purchas, "A Discourse on Virginia" (1625), in *Hakluytus Posthumus or Purchas His Pilgrimes*, vol. XIX, p. 231.

• For the man who has everything . . .

• In European countries, the Crown owned all land, but individuals could hold exclusive title to a piece of land.

• In Europe, owners of land must develop its resources productively.

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peoples is questionable. Discovery — that is, being the first European nation to set foot in a place — was often given as a reason for claiming ownership of Indian land. Actually, this was no more than a way of regulating competition among the European powers. Even at the time of exploration, international law did not allow claims to inhabited or uninhabited lands based only on discovery. The “discovering” nation gained no more than an exclusive option to acquire the land and make settlements on it, ahead of other nations. As we have seen in the *Calder* decision, the discovering nation also limited the Indians’ choices in deciding what to do with their land.

The principle of gaining title by discovery plus occupation — that is, uninterrupted and permanent possession by Europeans — was applied to the lands of aboriginal peoples based on their supposed failure to use the land in a “civilized” way. As we have seen, the courts reject this argument. Conquest — acquisition of land through open warfare — cannot apply to lands acquired by treaty; and in Canada, at least, neither Britain nor France waged open war against aboriginal peoples in order to conquer their territories. Cession — the voluntary surrender of territory — is the least questionable means by which European governments gained title to Indian lands. (In the Maritimes, no lands were ceded.) It remains unclear, however, whether Indians who signed treaties did so voluntarily. In any case, whether they gave up land willingly or unwillingly, knowingly or unknowingly, Indians did not surrender their sovereignty, the power of independent self-government.

Where the French settled, they considered the land a part of France — Nouvelle France — and not Micmac or Maliseet territory. They realized, however, the strategic necessity and economic benefits of having Indian allies. With this in mind, they travelled and worked among the Indians, converted them to Roman Catholicism, and kept up friendly relations by providing the Indians with gifts and trade goods. Some settlers married Indian women and the couples spent time in both Indian and French communities. Close interaction with the Native people, especially in missionary activity, was one way the French had of maintaining control over their North American land base.

- In the past, European claims to Indian territory have been called legitimate because of

- discovery,
- occupation,
- conquest, or
- cession.

- But these doctrines have now been discredited or called into question.

- The French maintained close relations with the Indians in order to keep control over the land.



Micmac Indians, 1839.
Painting by Millicent
Mary Chaplin.
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