

Sipekne`katik Title Claim:
Dispelling the Misconceptions and Myths,
A Mi`kmaw perspective.

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Preface

The biggest difficulty for any First Nation group claiming aboriginal title lies in the huge disconnect between the First Nation claiming title and the Government entities discrediting the claim. Most academic writing on Aboriginal people have been written by non-Aboriginal people whose views are corrupted by their Eurocentric ideologies and perspectives. Much of what has been written and what the courts have relied on as secondary sources are inherently incorrect and are fundamentally unfair for the First Nation group claiming title since the source of information relied on is based on non-aboriginal perspectives that have been influenced by Eurocentric views.

Introduction

For any First Nation-in Canada, going to court ill-prepared with a title claim will have the most detrimental, problematic, and long lasting effects. This seems to have been the case in the Supreme Court of Canada's (SCC) ruling in *Marshall; Bernard*.¹ Although, it is not clear how much evidence was presented in *Marshall; Bernard*, based on Chief Justice McLachlin (McLachlin) comments, it seems that not enough evidence was presented to give a clear understanding of the title claim. However, I do not think that this was a result of a lack of evidence, but rather, how the evidence was presented. Much of findings coming out of *Marshall; Bernard* was based on prevailing misconceptions, myths, and assumptions surrounding Mi'kmaq occupancy, culture, beliefs, and traditions, as well as, social and political structure.² In the end, what we learnt from *Marshall; Bernard*, is that, proof of occupation for "Aboriginal title" is

¹ *R. v. Marshall; R. v. Bernard*, [2005] 2 S.C.R. 220, 2005 SCC 43, [**Marshall; Bernard**].

² Mi'kmaq is derived from the word Ni'kmaq which means "kin-relations or family", Mi'kmaw refers to the language of the people, Mi'kma'ki is the land of the people, Mi'kma'kik is the overall territory of the people. L'nuk is the people. (As a Mi'kmaq, I feel that it is appropriate that I can provide such definitions to Mi'kmaq words, however a Mi'kmaq lexicon is available online at: <http://firstnationhelp.com/ali/lexicon.pdf>.)

highly contextual and fact-specific, as well as, fact-dependent.³ When there is a failure to present facts the claim is weakened. However, in 2014 the SCC in *Tsilhqot'in*, elaborated that the courts must also consider the laws and perspectives of the First Nations group claiming title.⁴ Sadly however, this was not the same view seen in the 2005 *Marshall; Bernard* case.

One might argue that the decision to include a title claim in a harvesting rights claim was over ambitious on the part of defense council in *Marshall; Bernard*. Moreover, it seems the defense council in *Marshall; Bernard* were ill-prepared to properly present evidence and in doing so inadvertently gave a false representation of Mi'kmaq people.⁵ Whatever the reason was to include title claim in that case, the resulting jurisprudence coming out of *Marshall; Bernard* did not justly represent the true complexity of pre-contact Mi'kmaq social, political and cultural realities. Instead the courts relied on Eurocentric concepts and belief systems to take precedent in their conclusions. Much of these concepts and belief systems stem from long standing misconceptions and myths surrounding Mi'kmaq people. One misconception presented in the case was that the Mi'kmaq population numbers were low and that the lands in Mi'kma'kik were mostly empty sparsely populated and therefore barely used. Such a misconception only strengthens the Eurocentric concept of *Terra Nullius*.⁶ Even though, the SCC in *Tsilhqot'in* made it clear that; the “*doctrine of terra nullius*” (that no one owned the land prior to European

³ *Marshall; Bernard supra* note 1 at para 66. The term “Aboriginal Title” has been commonly referred to in modern jurisprudence as “regular use of definite tracts of land for hunting, fishing or otherwise exploiting its resources” (*Tsilhqot'in v BC* at para 44).

⁴ *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 at para 41 [*Tsilhqot'in SCC*].

⁵ In *Marshall; Bernard* defense council only provided one elder to give oral testimony but later subtracted his statements on account of inconsistencies, unlike in *Tsilhqot'in* where a large number of elders were presented to provide oral testimony.

⁶ “*terra nullius*” — which describes land belonging to no one but that could, in some cases, be acquired through occupation. United Nations Economic and Security Council 2012, “*Doctrine of discovery*”: used for centuries to justify seizure of Indigenous land, subjugate people, must be repudiated by United Nations, permanent forum told', published 8 May 2012. Online: <http://www.un.org/press/en/2012/hr5088.doc.htm>.

assertion of sovereignty) never applied in Canada, as confirmed by the *Royal Proclamation*.⁷ I would argue that, the ideology behind *Terra Nullius* continues to have, a direct influence on Canadian jurisprudence in relation to title claims.

Another strong influence on jurisprudence in title claim cases has been the continued use of the word, “semi-nomadic”, when describing the First Nation claiming title. The word semi-nomadic has long been used to describe Mi’kmaq people. It has been used for so long that even today, many Mi’kmaq people themselves believe their ancestors were semi-nomadic. However, this word paints a false picture on early Mi’kmaq life and fails to take into account the historical, anthropological and oral evidence that demonstrates Mi’kmaq were anything but semi-nomadic. In relying on this word, the Courts in *Marshall; Bernard* state that; “*in the absence of evidence of intensive and regular use of the land, semi-nomadic lifestyle may not give rise to aboriginal title.*”⁸ Moreover, McLachlin stated that, “*seasonal hunting and fishing may establish aboriginal rights but not aboriginal title.*”⁹ Being fact-specific and fact-dependent, the Court found that the Mi’kmaq did not present enough sufficient evidence to prove their Aboriginal title claim. I feel much of this presumption had to do with the limited number of witnesses brought in to present all the available evidence. Whereas, in *Tsilhqot’in*, a large number of Elders were brought in to present Oral evidence along with a large amount of data and research, while in *Marshall; Bernard*, only a couple of witnesses were called upon and limited data was presented. Another misconception that affected the Mi’kmaq title claim is that the Mi’kmaq did not hold any true conceptualization of title or land ownership that would give rise to a fee simple right in common law. The Black Law’s Dictionary described “Title in fee simple” as “*the unconditional*

⁷ *Tsilhqot’in SCC*, *supra* note 4 para 69.

⁸ *Marshall; Bernard*, *supra* note 1 at para 126.

⁹ *Ibid* at 58.

and complete and total ownership of property".¹⁰ Since the common notion is that First Nation people lived in tandem with the land and all living things, it was therefore deduced that Mi'kmaq, like other First Nation groups, did not hold a belief that they owned the land. Moreover, that such a notion could not show any commonality with the European perspectives of land ownership nor could it give rise to common law property rights. However, this paper will show that this is far from the truth. If we are to look at it in a common-law perspective, we need to consider a Mi'kmaq perspective.¹¹ This can be done by looking at historical data by Mi'kmaq and those who had direct contact with them.

In order to assess a First Nation's title claim, a court must look at the pre-contact practices and try to tie those practices into a modern legal right.¹² However, these pre-contact practices should have room to naturally evolve and not be frozen in time.¹³ The Courts in *Marshall; Bernard* failed to do this. By focusing too much on common law and not on Aboriginal law, the court gave no room for natural evolution. By not focusing enough on Aboriginal law aspect of the Mi'kmaq people, the Courts failed to recognize a long standing knowledge that Mi'kma'kik was and has always been divided into 7 districts since time immemorial.¹⁴ Furthermore, that each district held a specific land mass with well-defined and maintained borders that were protected

¹⁰ Black's Law Dictionary Free Online Legal Dictionary 2nd Ed. Definition of TITLE IN FEE SIMPLE; Online: <http://thelawdictionary.org/title-in-fee-simple/>.

¹¹ Kent McNeil touches base on this type of Indigenous/Aboriginal common-law perspective; "*Indigenous peoples were in occupation of their traditional territories because they had laws, including laws in relation to land, that applied in those territories*" McNeil, Kent, "Aboriginal Title in Canada: Site-Specific or Territorial?" (2013). *All Papers*. Paper 19 at 6.

¹² *Delgamuukw v British Columbia*, [1997] 3 SCR 1010, paras 140, 166, 169 [*Delgamuukw*].

¹³ *R v Sparrow*, [1990] 1 S.C.R. 1075.

¹⁴ Wicken, William C., *Thesis: Encounter with Tall Sails and Tall Tales: Mi'kmaq Society, 1500-1760*, McGill University, 1994 at 135 [*Tall Sails and Tall Tales*]. Oral history tells us that the Mi'kmaq Nation was divided into seven districts. When the districts were formed is not precisely known. Bernard Hoffman's research suggests a pre contact division existed

and respected.¹⁵ Whereas, well-defined and maintained borders gave rise to the exclusionary right concepts found within modern common law perspectives of property law.¹⁶ As well as, each district also maintained a social and political infrastructure with their own Mi'kmaq laws that were important in maintaining social order, peace and harmony.¹⁷

In this paper I will explore each of these misconception more thoroughly based on research, material evidence, along with oral evidence presented in such a way it adds a Mi'kmaq perspective. I will re-explore the title claim argument presented in *Marshall; Bernard* in a more fact-based and fact-specific presentation which includes Mi'kmaq legal perspective. However, instead of looking at title claim on a Mi'kmaq Nation level, I will instead, focus more on a specific individual District. The District I will be looking at specifically is the District of Sipekne'katik.¹⁸ Looking at individual Districts instead of all of Mi'kma'ki as a whole is analogous to McLachlin's "site-specific approach" in *Marshall; Bernard*:

*"Therefore, anyone considering the degree of occupation sufficient to establish title must be mindful that aboriginal title is ultimately premised upon the notion that the specific land or territory at issue was of central significance to the aboriginal group's culture."*¹⁹

In other words, McLachlin is stating that Aboriginal title is established through either physical occupation or use of a specific area or territory.

Along with exploring the prevailing misconceptions and myths, I will also provide enough evidence to show that Mi'kmaq occupation in Sipekne'katik was sufficient, was continuous and

¹⁵ LeClercq, Chrestien, *New Relation of Gaspesia. With the Customs and Religion of the Gaspesian Indians*. By Father Chrestien Le Clercq. Translated and Edited, with a reprint of the original, by William F Ganong Toronto. The Champlain Society, Publication No 5. 1910 at 237 [**Gaspesian Indians**].

¹⁶ Adam Mossoff, *What is Property? Putting the Pieces Back Together*, 45 ARIZ. L. REV. 371, 375 (2003) (identifying this as the "exclusion theory of property").

¹⁷ Gaspesian Indians, *supra* note 15 at 236-37.

¹⁸ Hoffman, Bernard, "*Historical Ethnography of the Micmac of the sixteenth and seventeenth centuries*", PhD dissertation, Berkley: University of California, 1955 at 533. The district Sipekne'katik, "ground nut place" consisted of the modern day counties of Colchester, Hants, Kings, Halifax and Lunenburg. [**Hoffman, 1955**]

¹⁹ *Marshall; Bernard*, *supra* note 1 at para 140.

was exclusive. I will explore the complexity of the Sipekne'katik Mi'kmaq social, political, cultural and tradition realities, pre-contact and post-contact while providing a Mi'kmaq perspective to my analysis.

Addressing the misconceptions: Separating fact from fiction

a. The Doctrine of Terra Nullius was never applied in Canada.

As stated earlier, the Court in *Tsilhqot'in* claim that the doctrine of *terra nullius* never applied in Canadian law.²⁰ This was also expressed in *Marshall; Bernard* when the Court stated:

*“The natural and inevitable consequence of rejecting enlarged terra nullius was not just recognition of indigenous occupants, but also acceptance of the validity of their prior possession and title”*²¹

However, in the same paragraph the courts state that; *“aboriginal interest in the land is a burden on the Crown’s underlying title.”*²² Basically, the Crown has absolute title, and Aboriginal title only operates on the premise that it is a burden to the Crown’s pre-existing title. So what is the basis behind the assertion of the Crown’s title? Especially when it is in direct conflict with Aboriginal title that existed before the Crown asserted title, if it is without the precondition of *terra nullius*?

The Doctrine of "*Terra Nullius*" originated from classical Roman law, under which the doctrine of "*Occupatio*" acted to confer title upon the discoverer of an object that was "*res nullius*", that is, "belongs to nobody".²³ In post-Renaissance Europe, this doctrine was applied to the acquisition of territories and lands by the State. If a Territory was discovered to be "*res nullius*"

²⁰ *Tsilhqot'in SCC*, *supra* note 4 para 69.

²¹ *Ibid* at 134.

²² *Ibid*

²³ *The Catholic Encyclopedia, An International Work of Reference on the Constitution, Doctrine, Discipline And History Of The Catholic Church*, edited by Charles George Herbermann, New York, The Encyclopedia Press, 1913.

it could then be lawfully acquired by a state through simple occupation. This occupation was then said to be "*terra nullius*".²⁴

When the Courts requires the claimant to prove they have title to a specific territory and then the claimant somehow fails to prove that they have title, it inadvertently creates a position of *terra nullius*, as in, the land belonging to no one. In other words, that territory is now effectively claimed by Canada as *terra nullius*. Since the claimant failed to “prove” Aboriginal title, Canada will not recognize the rights of that First Nation to the territory it was asserting a claim to. The territory will now be governed by Canada. This inevitably creates a vehicle for Canadian Courts to facilitate an acquisition of territory by “*terra nullius*” since the basis behind Canada’s claim to a specific territory is that; no First Nations claimant could ‘prove’ title.

Mi’kma’kik was occupied prior to any Europeans arriving in Mi’kmaq territory, so how exactly did Canada end up with sovereign rights over all of our Mi’kmaq territory, particularly since Mi’kmaq lands were never ceded by treaty?²⁵ In *Taku River*²⁶, the SCC carefully avoided any suggestion that the Crown gained sovereignty over Aboriginal peoples in a lawful or legitimate manner. The courts in *Taku River* stated that;

“*The purpose of s. 35(1) of the Constitution Act, 1982 is to facilitate the ultimate reconciliation of prior Aboriginal occupation with de facto Crown sovereignty.*”²⁷

In other words, section 35²⁸ provides a contemporary legal vehicle to translate or ‘reconcile’ “prior Aboriginal occupation with *de facto* Crown sovereignty.” In the Black Law’s dictionary

²⁴ Connor, Michael. "*The invention of terra nullius*", Sydney: Macleay Press, 2005.

²⁵ Michael, James A. (Director, Treaty & Aboriginal Rights Research Centre), *Oral History and the Mi'kmaq Land Claim*, paper presented to “THE ORGANIZATION OF AMERICAN HISTORIANS”, Toronto, Ontario, April 22, 1999. Online: http://mikmaki.ca/PDFs/Michael_Oral_History.pdf.

²⁶ *Taku River Tlingit First Nation v. British Columbia* (Project Assessment Director), [2004] S.C.J. No. 69, [2004] 3 S.C.R. 550 [**Taku River**].

²⁷ *Ibid* at 42.

²⁸ *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11, s 35 [**Section 35**].

the term *de facto* characterizes a state of affairs that is “illegal or illegitimate” (emphasis added) but accepted for *practical purposes*.²⁹ What is extremely important to recognize in the assertion made in *Taku River* is the fact that the Courts recognize that Canada was already occupied prior to the Crown’s claim to sovereignty.³⁰ As such, this recognition gave rise to the principle of the “Honour of the Crown”³¹. Furthermore, it is suggestive that one of the reasons for section 35 is to reconcile or ameliorate the effects caused by *terra nullius*.³²

The Courts have been careful not to state the “acquisition of Sovereignty”, so instead they use the term “assertion of sovereignty”. For this paper I shall refer to it as the “acquisition of sovereignty” to demonstrate the absurdity of such a notion. In order to lawfully acquire land *via* acquisition then those lands have to be first recognized as; “*Res Nullius*”. Once recognized as “*res nullius*” then acquisition can occur by simple occupation. However, *res nullius* is a fallacy, for at the time the Europeans first landed on the shores of “The New World”³³ there was already a thriving population of people that were just as diverse as they were plenty.

b. Population size.

Over the years there has been a number of academics who have attempted to place a number on Mi’kmaq population sizes in Mi’kma’kik at the time of contact. Much of the present day research regarding population numbers come out of the work of Bernard Hoffman, Virginia Miller, Patricia Nietfeld, and William C. Wicken. Of these, the most prevailing figures come

²⁹ Black’s Law Dictionary, 5th ed. (St. Paul: West Publishing Co., 1979), at 375 and 382. Online: <http://thelawdictionary.org/de-facto/>.

³⁰ *Taku River*, *supra* note 26.

³¹ *Ibid.*

³² *Ibid.*

³³ The Western Hemisphere. The term was first used by the Italian historian Peter Martyr (1457 -1526), whose *De Rebus Oceanicis et Novo Orbe*(1516) chronicled the discovery of America.

from Anthropologist Virginia Miller (Miller). Miller places Mi'kmaq population numbers at the time of contact somewhere between thirty-five thousand and seventy thousand.³⁴ However, even though the range provided by Miller was between thirty-five thousand and seventy thousand it seems many only focus on Miller's lowest numbers.³⁵ I would argue however, this lower number is just another long-standing misconception about Mi'kmaq people. It serves no justice to Mi'kmaq people and only takes away from the true complexity of pre-contact Mi'kmaq society. The only purpose it would seem to serve is to keep a belief that Mi'kmaq lands were mostly empty and sparsely populated.

Although pre-contact Mi'kmaq population on its face, did not present an issue surrounding Mi'kmaq title in *Marshall; Bernard*, since title is determined by the date of acquisition of sovereignty, it still inadvertently influenced the outcome. If we are to get a true estimate of pre-contact Mi'kmaq population size we must look at it from all perspectives. Not just how population sizes are influence when we determine growth and decline but we must also consider population sizes of other First Nation groups in the America's at the time of contact.

The now recent prevailing position is that the Americas were well-populated rather than "*res nullius*". The Spanish priest, Bartolome de las Casas (Las Casa), spent more than 50 years in the America's and had extensive knowledge of the eastern coast line of what is now the United States ranging from Florida to New England. Las Casas described the Indigenous population along the Eastern Sea-board in 1549 as following;

“more than ten thousand leagues of maritime coast have been discovered, and more is discovered every day; all that has been discovered up to the year forty-nine (1549) is full of people, like a hive

³⁴ Miller, Virginia. "Aboriginal Micmac Population: A Review of the Evidence." *Ethnohistory* 23.2 (Spring 1976):117-127 [Miller 1976].

³⁵ Example Mi'kmaq Ecological Knowledge Study (MEKS) research studies regurgitating the same lower number at 8. Online: <https://www.novascotia.ca/nse/ea/meks/Mi'kmaq-Ecological-Knowledge-Study.pdf>.

*of bees, so that it seems as though God had placed all, or the greater part of the entire human race in these countries.”*³⁶

Since his first arrival on Christopher Columbus's second voyage to the Americas in 1493, Las Casas had witnessed countless atrocities of the Indigenous population. In his letter to the Emperor in 1542, describing the treatment of Aboriginal people Las Casas stated:

*"Thus, most illustrious Sirs, have I thought since forty-nine years, during which I have witnessed evil-doings in America and since thirty-four years that I have studied law"*³⁷

Las Casas believed that in just under a 50 year period some 12 to 15 million Aboriginal people died as direct result of these "evil-doings" he witnessed. Las Casas further stated:

*"We give as a real and true reckoning, that in the said forty years, more than twelve million persons, men, and women, and children, have perished -unjustly and through tyranny, by the infernal deeds and tyranny of the Christians; and I truly believe, nor think I am deceived, that it is more than fifteen."*³⁸

The well-respected French attorney of law and historian Marc Lescarbot (Lescarbot) in his reports to the Parliament of France during the early 1600's, spoke of the atrocities committed by the English.³⁹ Lescarbot claimed that just 70 years prior to the English permanent settlements in Virginia, the Indigenous population along the East Coast of what is now the United States numbered at over 20 million.⁴⁰ Lescarbot further stated that in just 25 of those 70 years, the English had killed the majority of the native population along the East Coast.⁴¹ Lescarbot stated:

³⁶ MacNutt, F. A. 1909. *Bartholomew de las Casas: His life, his apostolate, and his writings*. New York: Putnam's at 314-3. Online: http://archive.org/stream/bartholomewdelas005204mbp/bartholomewdelas005204mbp_djvu.txt.

³⁷ *Ibid* at 7.

³⁸ *Ibid* at 317.

³⁹ Marc Lescarbot, *La Conversion des Sauvages qui ont été baptisés en la Nouvelle France, cette année 1610* (Paris, 1610), p 59. available on line: http://puffin.creighton.edu/jesuit/rerelations/rerelations_01.html. [Des Savages].

⁴⁰ *Ibid*.

⁴¹ *Ibid*.

“But this was so little that it should not receive much consideration, since by the very confession of those who have written their histories, they have killed almost all the natives of the country, who, only seventy years ago, according to a certain historian, numbered more than twenty millions. For more than twenty-five years, the English have retained a foothold in a country called, in honor of the deceased Queen of England, Virginia, which lies between Florida and the land of the Aumouchiquois. But that country carries on its affairs with so much secrecy, that very few persons know”⁴²

When it comes to pre-contact Mi'kmaq population size, many Academics have come to rely on Miller's estimates.⁴³ Considering the accounts by Las Casas and Lescarbot pre-contact Mi'kmaq population numbers, Miller's higher estimate of 75,000 should always be considered.

In the 1950s, Bernard Hoffman suggested that ninety percent of the Mi'kmaq diet came from fishing in the ocean, lakes and rivers.⁴⁴ Patricia Nietfeld argued that the abundance of aquatic resources encouraged Mi'kmaq to live in large villages.⁴⁵ Miller's research revealed that the stable food supplies in Mi'kma'kik permitted a greater population density.⁴⁶ Considering the large number of spawning fish species and other marine life enter the waterways in and around Mi'kma'kik, a larger population size could easily be sustained.

Lescarbot described the abundance of marine life found in Mi'kma'kik in his reports.

“Furthermore, there can be caught in this port, in their season, great quantities of herring, smelt, sardines, barbels, codfish, seals and other fish; and as to shell-fish, there is an abundance of lobsters, crabs, palourdes, {14} cockles, mussels, snails, and porpoises. But

⁴² *Ibid.*

⁴³ Miller 1976 *supra* note 34.

⁴⁴ Hoffman 55, *supra* note 18 at 151.

⁴⁵ Patricia Nietfeld, *Determinants of Aboriginal Micmac Political Structure*, (PhD diss. University of New Mexico, 1981), 100-101 [**Nietfeld 81**].

⁴⁶ Miller, Virginia; “The Decline of Nova Scotia Micmac Population, A.D. 1600- 1850”. *Culture II* (3) (1982):107-20.

*whoever is disposed to go beyond the tides of the sea will find in the river quantities of sturgeon and salmon, and will have plenty of sport in landing them.*⁴⁷

In 1616, Biard describes the abundance fish and water fowl in Mi'kmaq as following:

*“In the middle of March, fish begin to spawn, and to come up from the sea into certain streams, often so abundantly that everything swarms with them. Anyone who has not seen it could scarcely believe it. You cannot put your hand into the water, without encountering them.....”*⁴⁸

One way of determining pre-contact Mi'kmaq population size could arise out of looking at other First Nation groups who shared similar cultural and tradition practices as Mi'kmaq. The First Nation groups found along the St. Lawrence River had very little contact with Europeans during the 1500's.⁴⁹ It was not until the early 1600's Europeans started regularly trading with the St. Lawrence First Nation groups.⁵⁰ By that time Europeans had already been in contact and trading with the Mi'kmaq for over 100 years. Many of the people living along the St. Lawrence River lived in huge villages, between 1000 to 2000 individuals.⁵¹ Much like the Mi'kmaq, majority of

⁴⁷ *Des Savages*, supra note 27, at p 67 [Miller 82].

⁴⁸ Excerpts from "Letter from Father Biard, to Reverend Father Christopher Baltazar, Provincial of France, at Paris:" in *Jesuit Relations and Allied Documents*, ed. Reuben Gold Thwaites (Cleveland, OH: Burrows Brothers, 1896), volume 3, ch IV, p 79. [Jesuit Relations]. Online: Creighton University <http://puffin.creighton.edu/jesuit/relations/>. (This site contains the "entire English translation of the "The Jesuit Relations and Allied Documents", originally compiled and edited by Reuben Gold Thwaites and published by The Burrows Brothers Company, Cleveland, throughout the latter part of the nineteenth century." Properly proofread for scholarly use in their electronic resource: *Early Encounters in North America*. "610 to 1791. Online: Alexander Street Press Early Encounters in North America" <<http://solomon.eena.alexanderstreet.com/cgi-bin/asp/philo/getobject.pl?c.234:4:4.eena>>.)

⁴⁹ Pendergast, James F.. "The Confusing Identities Attributed to Stadacona and Hochelaga." *Journal of Canadian Studies* 32, (2010).

⁵⁰ Innis, H.A. 1999 *The Fur Trade in Canada: An Introduction to Canadian Economic History*. Revised edition of 1970. University of Toronto Press Inc., Toronto.

⁵¹ *Ibid.*

their diet consisted of fish and marine life.⁵² However, their population sizes were found to be considerably larger than Mi'kmaq population sizes.

The Huron for example, live in over 20 villages along the St. Lawrence River when the French first started trading with them.⁵³ At that time, over 1000 Huron were living in each of these villages.⁵⁴ Many have speculated different reasons⁵⁴ behind the population differences in villages along the St. Lawrence River compared to Mi'kmaq villages in Mi'kma'kik. Considering the waters around Mi'kma'kik offered a far more abundant food source than the St. Lawrence river it would only be logical Mi'kmaq population size and density should be far greater than St.

Lawrence First Nation groups. The real issue therefore has nothing to do with access to food resources but more so to the time and amount of contact each group had with Europeans during the 1500's. When Europeans first started regularly trading with Huron, they had already been regularly trading with Mi'kmaq for almost 100 years. Moreover in just a mere 30 years after the French first established regular trade with the Huron, two-thirds of their entire population died from European diseases.⁵⁵ Village population numbers went from 1000 to just a mere couple of hundred and in some villages they were totally wiped out.⁵⁶

If we consider Mi'kmaq contact with European Traders and fisherman were three times the amount of time as the Huron, one could easily understand why Mi'kmaq village numbers in the 1600's were around 200 to 300 Individuals. Mi'kmaq villages could have easily seen the same population sizes as the Huron. In fact there is archeological evidence that Mi'kmaq villages of

⁵² Cartier's Account of Hochelaga 1535 and his Return to Montreal Island in 1541, Appendix I, reprinted in *Cartier's Hochelaga and the Dawson Site*, Bruce Trigger and James Pendergast, (1972) pp. 333-334.

⁵³ Conrad Heidenreich, "Huron," in *The Handbook of North American Indians*, vol. 15, ed. Bruce Trigger, (Washington: The Smithsonian Institute, 1978), 371.

⁵⁴ *Ibid.*

⁵⁵ Clarke, Peter D. *Origin and Traditional History of the Wyandotts, and Sketches of Other Indian Tribes of North America, True Traditional Stories of Tecumseh and His League*. Global Language Press, 2006.

⁵⁶ Warrick, Gary, "European Infectious Disease and Depopulation of the Wendat-Tionontate (Huron-Petun)", *World Archaeology* 35 (October 2003), 258-275.

that size did in fact existed in the Sipek'nekatik District. The Melanson Site on the Gaspereau River, in Kings County, could have easily sustained 500 to 1000 Mi'kmaq at one time.⁵⁷ The village existed right up until the late 1600, possibly as late as 1698.⁵⁸ It is believed an illness swept thru the village wiping out a large number of them. Given the food source available it could easily sustain a permanent population.⁵⁹ Another village site was discovered along a 0.5 kilometre stretch of the southeastern bank of the St. Croix River in St. Croix, Hants County, Nova Scotia.⁶⁰ The St. Croix site occupied between 3050 BCE right up until around the middle 1600's.⁶¹ The St. Croix River site is considered a large village site that could have easily supported up to 1000 Mi'kmaq's at any given time.⁶² Even though the St. Croix site was used by the Mi'kmaq for over 3000 years, the site was mysteriously abandoned around the same time the Melanson site was abandoned. During the years that both of these large village sites were completely abandoned was around the same time that both Biard and Lescarbot wrote extensively on the negative influence European diseases had on Mi'kmaq population numbers.⁶³ Since much of the earliest data collected surrounding Mi'kmaq population numbers were based upon shoreline observations with European fur traders and fisherman it is difficult to determine true numbers based on those findings. Shoreline observations never took into account Mi'kmaq numbers far inland, especially along the many major tributaries. Father Pierre Biard (Biard)

⁵⁷ Ronald J. Nash and Frances L. Stewart, *Melanson: A Large Micmac Village in King's County, Nova Scotia* (Halifax, NS: Nova Scotia Museum, 1990).

⁵⁸ Ibid.

⁵⁹ Ibid.

⁶⁰ Youngblood Henderson, J., *The Mikmaq Concordat*, Fernwood Publishing, Halifax, 1997 [**Mikmaq Concordat**].

⁶¹ Ibid.

⁶² Halwas, Sara. 2006. MA Archaeology, entitled: "*Where the Wild Tings Grow: A Palaeoethnobotanical Study of Late Woodland Plant Use at Clam Cove*", Nova Scotia.

⁶³ Letter from Father Biard, to Reverend Father Christopher Baltazar, Provincial of France, at Paris, 10 June 1611, Jesuit Relations, vol. 1,175; Lescarbot, Last Relation of What Took Place in the Voyage Made by Sieur de Poutrincourt to New France, twenty months ago, Jesuit Relations, vol. 2, 141, 147.

spoke of these greater inland population numbers in his letter written on June 10, 1611, to Father Christopher Baltazar in Paris. Biard stated that;

*“What I say about the sparseness of the population of these countries must be understood as referring to the people who live upon the coast; for farther inland....a great many people.”*⁶⁴

It wasn't until after over 100 years of coast-line trading had elapsed did we see any established permanent European settlements in Mi'kmaq territory. By the time any real inland observations were made a large percentage of the population had been decimated by diseases contracted during these brief trade encounters. In 1688 the governor of Port Royal, Louis Alexander de Friches de Meneval stated in his Memoire that the fur trade in Acadia was suffering due to the loss of many of the Mi'kmaq hunters due to diseases.⁶⁵

In his Thesis, titled, *“Tall Sails and Tall Tales”*, William Wicken (Wicken) spoke at length on the effect of European-borne diseases to Mi'kmaq populations. Wicken suggested that, prior to 1600, there was not much data of Mi'kmaq people being affected by such diseases.⁶⁶ However, Mi'kmaq Grand Chief Membertou insisted that diseases decimated a fair number of the Mi'kmaq population.⁶⁷ Grand Chief Membertou claimed that prior to the French coming to their shores; the populations of his people were as thick as the stands of hair on his head.⁶⁸ According to Biards' recollection of Membertou:

“Membertou assures us that in his youth he has seen....Savages, as thickly planted there as the hairs upon his head. It is maintained that they have thus diminished since the French have begun to

⁶⁴ *Jesuit Relations, supra* note 48 Volume 1 p 177.

⁶⁵ Memoire du sieur de Menneval, gouverneur de l'Acadie, touchant les affaires de cette Province pour l'annÉe 1688., Sept 10 1688, CI 1D-2, f. 100v.

⁶⁶ *Tall Sails and Tall Tales, supra* note 14, at p 185.

⁶⁷ *Jesuit Relations, supra* note 48, at volume 1, p 175.

⁶⁸ *Ibid.*

frequent their country.....During this year alone sixty have died at Cape de la Hève, which is the greater part of those who lived there”⁶⁹

At the time Biard documented Membertou’s claims regarding Mi’kmaq population density in Mi’kma’kik, Membertou was believed to be over 100 years old.⁷⁰ He was not just the District Chief, but also the Grand Chief of the entire Mi’kmaq Nation.⁷¹ Chief Membertou was well known, highly respected and feared among many neighboring Aboriginal groups.⁷²

By the time the French had settled in Annapolis Basin, over a 100 years had passed since Europeans first started entering Mi’kma’kik looking to fish the rich waters off the coast line or trade for furs with Mi’kmaq. The waters in and around Mi’kma’kik were so abundant with fish and other marine life that a vast number of European fishing boats started increasingly visiting the Coast line along Mi’kma’kik.⁷³ With the increase of European fishing boats anchoring along the shore lines of Mi’kma’kik, contact with Mi’kmaq increased. These early contacts had a devastating consequence on Mi’kmaq population since the Mi’kmaq had no initial immunities to the diseases brought to them by early contact.⁷⁴

By 1504 French and Portuguese fisherman were frequently coming into contact with Mi’kmaq.⁷⁵ Between 1504 and 1534 Mi’kmaq were regularly in contact with Basque, Breton, British, Normans, French and Portuguese Fisherman and fur traders.⁷⁶ In turn, the Mi’kmaq themselves were coming to contact with neighboring Aboriginal groups such as the Abenaki. It is

⁶⁹ *Ibid.*

⁷⁰ *Ibid* at volume 1, p 73.

⁷¹ Faragher, John, Mack, *A Great and Noble Scheme*, W. W. Norton & Company, New York, 2005.

⁷² *Ibid.*

⁷³ Lear, W.H. 1998. *History of fisheries in the Northwest Atlantic: The 500-Year Perspective*. Journal of Northwest Atlantic Fisheries Science 23: 41-73.

⁷⁴ Bourque, Bruce J, *Twelve Thousand Years, American Indians in Maine*, University of Nebraska Press, 2001.

⁷⁵ Hoffman, Bernard G., *Cabot to Cartier, Sources for a Historical Ethnography of Northeastern North America, 1497-1550*, University of Toronto Press, Halifax, 1961 [**Hoffman, Cabot to Cartier**].

⁷⁶ Haviland & Power, *The Original Vermonters: Native Inhabitants, Past and Present* (University Press of New England, Hanover NH, 1981 at 209 [**Original Vermonters**]).

inconceivable to state that not one single fisherman on all those boats, hundreds if not thousands of boats, never started an epidemic among Mi'kmaq that then spread to the neighboring groups like the Abenaki.⁷⁷ By 1534 the Mi'kmaq had grown so accustomed to trading with the Europeans that when the French explorer, Jacques Cartier, dropped anchor in Chaleur Bay, he suddenly found himself surrounded “*by hundreds of Micmac in canoes waving beaver skins.*”⁷⁸ Not long after Cartier's encounter with the Mi'kmaq, a mysterious epidemic swept through St. Lawrence First Nation groups in 1535.⁷⁹

At the time of Cartier's visit, Mi'kmaq maintained a political structure and hierarchy since time immemorial and all seven Districts maintained constant communication with each other. A couple of times per year the Mi'kmaq held gatherings where all the District Chiefs would assemble.⁸⁰ Majority of the time these gatherings were held in the district of Sipekne'katik because of the Shubenacadie water way system and its connecting rivers and lakes linked all seven Districts together. It is documented that even furthest bands could be at the gathering in less than ten days.⁸¹

Lescarbot wrote:

*“The Savages of Port Royal can go to Kebec in ten or twelve days by means of the rivers, which they navigate almost up to their sources; and thence, carrying their little bark canoes for some distance through the woods, they reach another stream which flows into the river of Canada, and thus greatly expedite their long Voyages.”*⁸²

⁷⁷ *Ibid.*

⁷⁸ Gordon, Alan. *The hero and the historians: historiography and the uses of Jacques Cartier*. Vancouver: UBC Press, 2010 at p 15.

⁷⁹ *Original Vermonters, supra note 76 at p 209.*

⁸⁰ *Jesuit Relations, supra note 48, at Volume 3, p 93.*

⁸¹ *Ibid*, at volume 1, p 99.

⁸² *Ibid.*

Moreover, since the Mi'kmaq were so knowledgeable of their river systems and waterways throughout their entire territory and used them extensively, an epidemic could have easily spread throughout Mi'kma'kik. The English knew this, so in 1746 the English purposely traded contaminated clothing with Mi'kmaq in their ongoing campaign of genocide against Mi'kmaq.⁸³ As a direct result of the English using an early method of germ warfare tactics, it was reported that in one village alone over 200 Mi'kmaq, including woman and children lost their lives.⁸⁴

Father Abbe Maillard reported that;

*“In 1746, some stuffs that the savages had bought of the English, who then traded in the bay of Megagouetch at Beau-bassin, there being at that time a great scarcity of goods over all the country, were found to be poisoned, [Is it possible a missionary of the truths of the Gospel could gravely commit to paper such an infernal lie? If even the savages had been stupid enough of themselves to imbibe such a notion, was it not the duty of a Christian to have shewn them the folly of it, or even but in justice to the Europeans? But what must be their guilt, if they suggested it? Surely, scarce less than that of the action itself.] so that more than two hundred savages of both sexes perished thereby.”*⁸⁵

In the material related to the early history of New Hampshire, New York, Vermont and Maine, there are accounts of mysterious epidemics that killed many aboriginal people between 1564 and 1570 and again in 1586.⁸⁶ Many believe the culprit behind these mysterious epidemics was Typhus.⁸⁷ These have been documented among Abenaki, Penacook and a number of other

⁸³ Miller, Virginia P., “The Micmac: a Maritime Woodland Group”, R. Bruce Morrison and C. Roderick Wilson, *Native Peoples: the Canadian experience*, (2d) Toronto: McClelland and Stewart, 1995 at 365 [*The Micmac*].

⁸⁴ Maillard, Abbé Antoine Simon Pierre. (1758.) “An Account of the Customs and Manners of the Micmakis and Maricheets Savage Nations, Now Dependent on the Government of Cape-Breton”. From an original unpublished French manuscript letter. London: Printed for S. Hooper and A. Morley at Gay’s Head, near Beaufort Buildings in the Strand. Online: <http://www.gutenberg.org/files/15567/15567-h/15567-h.htm>.

⁸⁵ *Ibid.*

⁸⁶ Heald, Bruce D. “A HISTORY OF THE NEW HAMPSHIRE ABENAKI”. History Press, 2014. \$19.99 ISBN: 978-1-62619-422-9 at 16.

⁸⁷ *Ibid.*

Aboriginal groups in Maine and New Hampshire.⁸⁸ The Abenaki and especially the Penacook blamed the Mi'kmaq as the cause of epidemics. The dates of their epidemics would also coincide with Membertou's claims.

Biard wrote in his memoirs that he has often heard Aboriginal people complain that since the French started interacting and trading with them much of their population size have decreased.

Biard Stated:

“They are astonished and often complain [67] that, since the French mingle with and carry on trade with them, they are dying fast, and the population is thinning out. For they assert that, before this association and intercourse, all their countries were very populous, and they tell how one by one the different coasts, according as they have begun to traffic with us, have been more reduced by disease”⁸⁹

At the time Baird recorded this statement, the French had no conceptualization on how susceptible the Mi'kmaq were to European-borne diseases. This was touched on by Nicholas Denys when he wrote that *“in old times.....they were not subject to diseases, and knew nothing of fevers.”*⁹⁰ Mi'kmaq had no immunity to European diseases, even common influenza virus's devastated the Mi'kmaq population. The French reported that Mi'kmaq encampments close to Acadian settlements were hit hard by European-borne diseases.⁹¹ No one knows the true extent to the devastation that occurred further inland away from Acadian settlements.

In 1746, the Mi'kmaq of Chebucto *“Kjipuktuk”*⁹² (Bedford Basin) along with hundreds of warriors from the Sipekne'katik District and neighboring District's along with over a dozen Chief's waited for Duc d'Anville fleet of over 70 ships bringing supplies of arms, ammunition,

⁸⁸ *Original Vermonters*, supra note 76 at 209.

⁸⁹ *Jesuit Relations*, supra note 48, at volume 3, ch VI, p 103

⁹⁰ William F. Gangong, ed., *“The Description and Natural History of the Coasts of North America (Acadia)”* by Nicolas Denys (Toronto, 1908), pp. 445–446.

⁹¹ *Tall Sails and Tall Tales*, supra note 14 at p 198.

⁹² French wrote it as Chebucto, for the Mi'kmaq word *“Kjipuktuk”* which means great harbour.

along with over a 1000 soldiers to fight the English.⁹³ Before departing France some of the crewmen on those ships had been infected by European-borne viruses and illness.⁹⁴ Fueled by the crowded, unsanitary conditions, along with poor food, and polluted water on the ships, many died on route from a deadly combination of scurvy, typhus, and typhoid.⁹⁵ By the time 40 ships of the original 70 arrived in “*Kjipuktuk*” a large number had perished.⁹⁶ The Mi'kmaq of “*Kjipuktuk*” and the warriors of Sipekne'katik were expecting ammunition and supplies but instead they were greeted by an armada of death and destruction. Hundreds of Mi'kmaq's died in “*Kjipuktuk*”, oral traditional accounts state the numbers of Mi'kmaq deaths were well over 1000. They were buried along with over 1000 French sailors and soldiers in two mass graves.⁹⁷ The ones that survived spread the deadly combination of scurvy, typhus, and typhoid all across Mi'kma'kik, which ended up killing over one-third the entire Mi'kmaq population.⁹⁸

Mi'kmaq oral tradition records the catastrophe that decimated their numbers. Many died on their traditional camping grounds, where they were quickly buried. The Mi'kmaq called the disease “the black measles,” even naming one of their camping areas “*Iktuk'maqtawe'g'alusol'*”, the “place of the black measles.”⁹⁹ Before the arrival of English settlers, the Mi'kmaq camped in the sheltered coves around “*Kjipuktuk*” Bedford Basin. One such cove, Birch Cove was used as a semi-permanent camp by four or five families. As a base for resource extraction, Birch Cove was perfectly situated and the upper cove an ideal camp site.

⁹³ Clowes, *History of the Royal Navy*, 3: 116-117; Douglas, *'Nova Scotia and the Royal Navy'*, 116-130; Graham, *Empire of the North Atlantic*, 132-134; Jenkins, *History of the French Navy*, 113-114.

⁹⁴ *Ibid.*

⁹⁵ James Pritchard. “*Anatomy of a Naval Disaster: The 1746 French Expedition to North America.*” Montreal and Kingston: McGill-Queen's University Press, 1995 at p 143.

⁹⁶ *Ibid.*

⁹⁷ Thomas Chandler Haliburton, in Ruth Holmes Whitehead, *The Old Man Told Us: Excerpts from Micmac History, 1500-1950* (Halifax: Nimbus Publishing, 1991) at 108 [***Old Man Told Us***].

⁹⁸ *Ibid.*

⁹⁹ Ingalls, Sharon and Wayne. “*Sweet Suburb: A History of Prince's Lodge, Birch Cove and Rockingham*”. Glen Margaret Pub, Publishing, 2010, 1st Edition, 1st Printing 2010 at 14 [***Sweet Suburb***].

Even though we are told population was not the problem in *Marshall; Bernard*, and if we wish to be fact specific, than it must be clearly understand, that “fact”; at the time of Crown’s acquisition of sovereignty in Mi’kma’kik, the Mi’kmaq of Sipekne’katik were well populated from the Minas Basin all the way to the protected waters of “*Kjipuktuk*” (Bedford Basin). Fact, not only was Sipekne’katik far from *res nullius*, the Mi’kmaq were well organized with highly complex social and political structure and prepared to defend their District at any cost. If Duc d’Anville fleet never brought with them an armada of deadly disease and illness to “*Kjipuktuk*” in 1746, Cornwallis would have never been able to settle there, only 3 years later. Especially considering as previously noted, this area was highly sacred to the Mi’kmaq of Sipekne’katik ¹⁰⁰

c. Mi’kmaq were semi-nomadic

To describe Mi’kmaq people as “semi-nomadic” is quite misleading and gives a false perception and interpretation of pre-contact Mi’kmaq society. This misconception has prevailed over the centuries and has in many ways caused detriment to Mi’kmaq title claims. The word “nomadic” gets its origins from the word “*nomas*” which means, wandering in search of pasture. A nomad would be a member of a group of people with no fixed home, no fixed address and move according to seasons from place to place in search of food.¹⁰¹ The word “semi” is a combining form meaning “half,” “partially,” “somewhat”.¹⁰² By placing such a description on the Mi’kmaq people Canada’s claim is strengthened while any Mi’kmaq claim is weakened. The use of semi-

¹⁰⁰ Halifax Peninsula where , if you follow the Halifax Peninsula around it comes to a small cove that is protected by the rough seas what is now referred to has the Armdale Rotary, it is called *Wejkwe'tukwaqn* which means “to come to a legend”, or “where the legend comes from”, it is the place where our Legendary Warrior *Amntu'* resides at his Lodge (*Amntu'apsi'kan* or “Sprit Lodge”) and guards the Eastern Door to protect the *Lnu'k*, “the people” from any dangers that come from the open sea.

¹⁰¹ The American Heritage® Dictionary of the English Language, Fourth Edition copyright ©2000 by Houghton Mifflin Company. Updated in 2009. Published by [Houghton Mifflin Company](#).

¹⁰² Random House Kernerman Webster's College Dictionary, © 2010 K Dictionaries Ltd. Copyright 2005, 1997, 1991 by Random House.

nomadic when describing Mi'kmaq only creates false representation of how the Mi'kmaq lived. Furthermore, it takes away from the well-defined and highly respected territories and Districts the Mi'kmaq kept and maintained since time immemorial.¹⁰³

In a modern context, do we describe a Canadian who maintains a winter home in Florida as semi-nomadic? In the end it is a matter of interpretation and how the Courts interpret the term semi-nomadic when describing a particular First Nations group. We see this in *Marshall; Bernard*, where the Court considered whether or not seasonal use of land could give rise to Aboriginal title. In *Marshall; Bernard*, McLachlin wrote:

*“It follows from the requirement of exclusive occupation that exploiting the land, rivers or seaside for hunting, fishing or other resources may translate into aboriginal title to the land if the activity was sufficiently regular and exclusive to comport with title at common law. However, more typically, seasonal hunting and fishing rights exercised in a particular area will translate to a hunting or fishing right. This is plain from this Court’s decisions in Van der Peet, Nikel, Adams, and Côté. In those cases, aboriginal peoples asserted and proved ancestral utilization of particular sites for fishing and harvesting the products of the sea. Their forebears had come back to the same place to fish or harvest each year since time immemorial. However, the season over, they left, and the land could be traversed and used by anyone. These facts gave rise not to aboriginal title, but to aboriginal hunting and fishing rights.”*¹⁰⁴

As noted by McLachlin, whether seasonal or nomadic use of land could amount to Aboriginal title,¹⁰⁵ “depends on the evidence” and is a “question of fact, depending on all the circumstances” including the nature of the land and the manner in which it is commonly used.¹⁰⁶

However, what McLachlin did not consider was the wealth of historical data and research that is

¹⁰³ *Gaspesian Indians*, supra note 15 at 236-37.

¹⁰⁴ *Marshall; Bernard*, supra note 1 at para 58.

¹⁰⁵ *Ibid* at Para 66.

¹⁰⁶ *Ibid*.

available. Nor did she take into consider the countless testimonies of the Mi'kmaq in the Sipekne'katik District and those who have encountered and interacted with them over the last 400 years. McLachlin seems to be following a “frozen in time rights approach”, and totally ignores the dynamic nature of Mi'kmaq culture and traditional territorial claims that existed long before any Europeans stepped foot in Mi'kmaq lands.¹⁰⁷ Such is seen in many Aboriginal rights and Aboriginal title claims where the courts attempt to take a snap shot of some arbitrary moment in time, and based on some archaic Eurocentric belief to define the Aboriginal right or title without first considering the overall Aboriginal peoples' perspective.

By trying to place Mi'kmaq into context of modern land rights in reference to ancient customary laws, inadvertently confines Mi'kmaq to the practices carried out in the pre-colonial past. Thus, we see history repeating itself, with the Courts using the same old arguments used in the early years of European colonial expansion all for the sole purpose of denying the legality of Mi'kmaq property rights.

While it is true there were many Mi'kmaq that moved to the coast lines during the summer months to take advantage of the highly productive oceans, there were just as many Mi'kmaq who remained in the interior along the main rivers systems such as the Shubenacadie River and its tributaries.¹⁰⁸ The Shubenacadie River in particular was a main highway that connected the Bay of Fundy with the Atlantic Ocean.¹⁰⁹ The Shubenacadie river system, like all major river systems in Mi'kma'kik was just as productive year round as the coast line.¹¹⁰ The Shubenacadie river

¹⁰⁷ Borrows, John (1998) “Frozen Rights in Canada: Constitutional Interpretation and the Trickster” American Indian Law Review 22(1):37-64.

¹⁰⁸ Hoffman 55, supra note 18.

¹⁰⁹ Eaton, A. W. H., History of Kings County, The Heart of Acadian Land, The Salem Press Company, Salem Mass., 1910. [**Heart of Acadian Land**](A Post Contact site and long-time encampment was located at the “Pine Woods” northwest and across the river from Kentville. This encampment of traditional bark shelters was there until at least mid-1800's when Camp Aldershot was established and absorbed the “Pine Woods” area.)

¹¹⁰ Nova Scotia Museum of Natural History, T12.1 *Colonization by People, Natural History of Nova Scotia*, Volume 1, Topics and Habitats, 2011. Online: <file:///C:/Users/Owner/Downloads/3759-5671-1-SM.pdf>.

system was so productive; a number of Mi'kmaq had no need to travel to the coastline and were able to maintain permanent settlements along the river.¹¹¹ The Mi'kmaq of Sipekne'katik still maintain this deep routed connection to the Shubenacadie River. Those Mi'kmaq that maintain shore line summer villages, always returned to the same location each summer.¹¹² During the winter months they would only venture inland a short distance away from the coast lines to their winter encampments along the many rivers that scatter the coast line. This is described in Biard's memoirs;

*“Now our savages in the middle of September withdraw from the sea, beyond the reach of the tide, to the little rivers, where the eels spawn, of which they lay in a supply; they are good and fat.”*¹¹³

In a letter to Father Pierre Mailard (Mailard), on May 8, 1756, Monsieur De La Varenne (Varenne), alluded to possible permanent village sites, namely Chipnakady (Shubenacadie) along with a couple of other locations in Sipekne'katik district .

*“The savages themselves rarely have any fixed hut, or village, that maybe called a permanent residence. If there are any parts they most frequently inhabit, it is only those which abound most in game, or near some fishing-place. Such were formerly for them....Chipoody, Chipnakady....La Héve...”*¹¹⁴

One location that was said to hold permanent village sites was Chebucto, as previously noted, derives from the Mi'kmaq word “Kjipuktuk” which in English means Great Harbour.¹¹⁵ A number of Clans called this area home which held a number of coves that offered protection from the elements, a place to beach canoes, and a constant supply of fresh water from the

¹¹¹ Lacey, Laurie, *Micmac Medicines, Remedies and Recollections*, Nimbus, 1993.

¹¹² *Hoffman 55, supra* note 18.

¹¹³ *Jesuit Relations, supra* note 48, at volume 3, ch IV, p 81.

¹¹⁴ "Letter from Mons. de la Varenne", Louisbourg, 8 May 1756, in "An Account of the Customs and Manners of the Micmakis and Maricheets, Savage Nations", Now Dependent on the Government of Cape Breton (London[^] 1758), 8T7 [**Micmakis and Maricheets**].

¹¹⁵ *Ibid.*

streams flowing down from one of many lakes nearby.¹¹⁶ There was also a wide diversity of marine life in this area that provided food all year round, especially large marine mammals such as grey seals, harbour seals and even Atlantic walrus were plentiful at the time of Sovereignty.¹¹⁷

The Melanson Site on the Gaspereau River, in Kings County, is considered the site of one of the largest Mi'kmaq Villages in Sipekne'katik, considering its large size and area it sat; it could have easily sustained 500 to 1000 Mi'kmaq at one time. The village existed right up until the late 1600, possibly 1698. It is believed an illness swept thru the village wiping out a large number of them. Given the food source available it could easily sustain a permanent population.¹¹⁸

As to this notion of semi-nomadic, it is import to note that in his writing Biard spoke of the Mi'kmaq near what is known as Chignecto, or Chinictou which is close to Amherst. Biard wrote:

*“At this Chinictou there are many large and beautiful meadows, extending farther than the eye can reach; many rivers discharge their waters into it, through some of which one can sail quite far up on the route to Gachepé. The Savages of this place may number sixty or eighty souls, and they are not so nomadic as the others, either because the place is more retired, or because game is more abundant, there being no need of their going out to seek food.”*¹¹⁹

Referring back to paragraph 58, McLachlin states; *“However, the season over, they left, and the land could be traversed and used by anyone.”*¹²⁰ This presumption paints a false picture on the Mi'kmaq people and assumes that Mi'kmaq territory was not respected and even more so, as if to say that land was free for the taken. This one statement is not only insulting, it takes away from the factual information that Mi'kmaq territory was divided into seven separate Districts and

¹¹⁶ *Sweet Suburb*, supra note 99 at p 11.

¹¹⁷ *Hoffman, 1955* supra note 18.

¹¹⁸ Ronald J. Nash and Frances L. Stewart, *Melanson: A Large Micmac Village in King's County, Nova Scotia* (Halifax, NS: Nova Scotia Museum, 1990).

¹¹⁹ *Jesuit Relations*, supra note 48, at volume 3 ch XXII at p 247-248.

¹²⁰ *Marshall; Bernard*, supra note 1 at para 58.

these Districts were well defined and respected.¹²¹ Not only by other Mi'kmaq, from other Districts, but other neighboring Aboriginal groups as well.¹²² Whenever the boundaries were disrespected it was quickly dealt with and the invaders would be quickly eliminated.¹²³ It was not until the Mi'kmaq population was decimated through disease and scalp bounties that their territory boundaries could be traversed upon. However, even with low numbers the Mi'kmaq still asserted their rights to their lands as we noted earlier.

Biard described in his memoirs that the Mi'kmaq would pack their food storages in large sacks and hang them from trees in different locations in their territory.¹²⁴ Biard wrote:

*“Sometimes They Will Make Some Storehouses for the winter, Where They Will Keep smoked meat, roots, shelled acorns, peas, beans, golden plums Bought from us, etc....They place provisions in sacks...tie up in big pieces of bark....suspend these from the interlacing branches of two or three trees so...rats...animals...dampness.....can insult them. These are their Storehouses. Who is to take care of them when they go away?”*¹²⁵

The Mi'kmaq were able to leave these sacks and not have to worry about anyone coming along and taking their food storages.¹²⁶ However, McLachlin claimed that when the season was over and the Mi'kmaq left an area *“the land could be traversed and used by anyone.”* If the land could be traversed and used by anyone why would Mi'kmaq leave large food storages hanging from trees in different locations on their lands? Such a statement would be analogous to stating that if person leaves their home and land to spend the winter in Florida, that land and home could be traversed and used by anyone. McLachlin failed to take into account that when Mi'kmaq left

¹²¹ Hoffman 55, *supra* note 18 at 533- 537

¹²² *Ibid.*

¹²³ Denys, N.1908 *The Description and Natural History of the Coasts of North America*. Translated by W. F. Ganong. The Champlain Society, Toronto.

¹²⁴ *Jesuit Relations*, *supra* note 48, at volume III, ch 6, p 107-109.

¹²⁵ *Ibid.*

¹²⁶ *Ibid.*

an area they did not travel far, considering the large diversity of wildlife, as well as fish and fauna, the Mi'kmaq only traveled a short distance to a nearby lake or river.¹²⁷

Again when we consider the larger diversity of wild life and the huge stocks of fish, there was no need for the Mi'kmaq of Sipekne'katik to wander in search of food. It was not until the Europeans settled in Mi'kma'kik and putting a strain on the resources did the Mi'kmaq have to travel further away. As time progressed, things got even worse for the Mi'kmaq. Even more so when the English started purposely burning large tracts of forest just so they can push the Mi'kmaq out of their traditional hunting areas, as noted by Varenne in 1756 in his letter to Mailard.¹²⁸

*“The English, sensible of this effect, and who seemed to place their policy in exterminating these savage nations, have set fire to the woods, and burnt a considerable extent of them. I have myself crossed above thirty leagues together, in which space the forests were so totally consumed by fire.”*¹²⁹

The British Columbia Supreme Court in *Tsilhqot'in* applied the principles set out in *Marshall; Bernard* when considering semi-nomadic circumstances of the Tsilhqot'in people.

Justice Vickers (Vickers) noted that the standard for exclusive occupation to prove the existence of title was set too high.¹³⁰ In *Marshall; Bernard*, the Courts stated that, to prove aboriginal title, the claimant must demonstrate, "*regular use or occupancy of definite tracts of land*".¹³¹

According to Vickers, this proposes that "Aboriginal title is not co-extensive with any particular First Nation group's traditional territory."¹³² That is to say, when speaking of a First Nation group

¹²⁷ Prins, Harold E. L., *The Mi'kmaq Resistance, Accommodation and Cultural Survival, Case Studies in Cultural Anthropology*, Holt, Rinehart and Winston, 1996.

¹²⁸ *Micmakis and Maricheets*, supra note 114.

¹²⁹ *Ibid.*

¹³⁰ *Tsilhqot'in Nation v. British Columbia*, 2007 BCSC 1700 at para. 583.

¹³¹ *Marshall; Bernard*, supra note 1 at para 56.

¹³² *Ibid.*, at para 554

who is described as living semi-nomadic on a large tract of land but only occasionally traversing on specific section, then title is not proven. In *Marshall; Bernard*. McLachlin states:

*“To say that title flows from occasional entry and use is inconsistent with these cases and the approach to aboriginal title which this Court has consistently maintained.”*¹³³

Therefore according to McLachlin, for a claimant to prove title, the courts require evidence of “regular use of definite tracts of land” and moreover, the occasional entry or close proximity to an area will not establish Aboriginal title. However, the SCC in *Tsilhqot'in* state, while it is important to consider if the common law test for possession is met, the court must always “consider the perspective of the Aboriginal group in question; sufficient occupation is a “question of fact, depending on all the circumstances, in particular the nature of the land and the manner in which it is commonly used”.”¹³⁴

If we follow McLachlan’s fact-specific and fact-dependent approach used in *Marshall* for the Mi’kmaq of the Sipekne’katik District we must look at all the facts. Fact, the Mi’kmaq of Sipekne’katik have lived in the Sipekne’katik since time immemorial. Fact; prior to British acquisition of sovereignty the Mi’kmaq have maintain a complex social and political infrastructure with well-defined borders that were respected and protected. Fact, the Mi’kmaq of Sipekne’katik used their entire territory extensively and exclusively up until they started sharing their lands with the French just prior to sovereignty. At the time of sovereignty, the Mi’kmaq of Sipekne’katik continued to maintain and defended much of their territory. Moreover, Mi’kmaq defense of their territory was a catalyst to the Treaties of Peace and Friendship that the English wished to sign in. Fact, the word semi-nomadic does not accurately describe Mi’kmaq people before nor at the time of Sovereignty. Based on a number of factors, such as, abundant food

¹³³ *Marshall; Bernard, supra* note 1 at para 59.

¹³⁴ *Tsilhqot'in SCC, supra* note 4 at para 44.

supplies, and maintenance of assigned territories, the Mi'kmaq had no need to live a nomadic life style. This was clearly stated in Biards memoirs:

*“they are not so nomadic as the others, either because the place is more retired, or because game is more abundant, there being no need of their going out to seek food.”*¹³⁵

That one sentence illustrates life of Mi'kmaq, before and after the time of acquisition of Sovereignty. The truth of the matter is, the Mi'kmaq did not need to be semi-nomadic. It was not until long after the acquisition of Sovereignty and the ever expansion of Europeans into their territories, along with the fear of being murdered, or contracting European-borne diseases; the intentional burning of large tracts of forest in their traditional hunting grounds; the loss of traditional coastal fishing grounds to English settlements; and the over-harvesting and extermination of much of their food resources by Europeans; did the Mi'kmaq have to start moving around in search of food. Such a nomadic behaviour was the result of British expansion into Mi'kma'kik and not illustrious to Mi'kmaq society or their way of life.

The Mi'kmaq in Sipekne'katik however, remained in much of their original territory right up until the time of the “Peace and Friendship” Treaties. The Mi'kmaq of Sipekne'katik remained in much of their original territory and still use the lands just as they always had done since time immemorial. The Mi'kmaq of Sipekne'katik also continued to defend their territory not only in their words but in their actions which forced the English to sign into Treaty with the Sipekne'katik District Chief, Major Jean Baptist Cope (Kopit¹³⁶) (Chief Cope) in 1752.¹³⁷

d. Mi'kmaq had no conception of property hence no title.

¹³⁵ *Jesuit Relations*, supra note 48, at volume 3 ch XXII at p 247-248.

¹³⁶ The name Cope derived from the name *Kopit* which is Beaver in Mi'kmaq, the family line of Kopit come from the Beaver clan. Whitehead, Ruth Holmes, *The Old Man Told Us Excerpts from Micmac History 1500-1950*, Halifax: Nimbus, 1991 at p 78.

¹³⁷ The original document of the 1752 Treaty is at the Nova Scotia Public Archives, Halifax.

One of the biggest problems in modern jurisprudence when it comes to Aboriginal title claims is trying to translate Aboriginal practices into some type of European legal perspective. Since First Nation groups differ all across Canada, trying to put a “one size fits all” perspective on title claims will only inevitable result in important facts being lost in translation. Trying to place contemporary property law onto an evolving Mi'kmaq society at the time of sovereignty only leads to misinterpretation and devalues Mi'kmaq perspective, practices and Mi'kmaq laws.¹³⁸

English property law is full of numerous intricate and artificial dogmas that arose out of a feudal system, which, even in modern time, is filled with artificial and arbitrary rules.¹³⁹ In applying English rules, courts may unconsciously misinterpret and devalue modes of First Nation practices of seasonal hunting, fishing, trapping and gathering, all based on the fact, that such practices are foreign to European agricultural economies.¹⁴⁰ This is, of course, nonsensical since there was no concept of private property in Mi'kmaq society in the 1700s.¹⁴¹

For Mi'kmaq in Mi'kma'kik, land was communal that was shared among the group who lived on it.¹⁴² However, this did not mean others from neighboring groups or even neighboring districts could come and use the land freely.¹⁴³ Boundaries were clearly respected.¹⁴⁴ If they were not then force would be used. Such is noted in a letter written by Abbé Le Loutre wrote to Governor Lawrence, on August 26, 1754.

“They agree to give no insult to those of the English whom they shall meet travelling on the highway; but that those, who shall depart from it, for the purpose of going into the woods, as the

¹³⁸ *Mikmaw Concordat*, *supra* note 60.

¹³⁹ Sheppard, Steve, ed. *“The History of Legal Education in the United States: Commentaries and Primary Sources.”* Pasadena, Calif.: Salem Press, 1999, at volume 1 p 402.

¹⁴⁰ Slattery, *The Land Rights of Indigenous Canadian Peoples, As Affected by the Crown's Acquisition of Their Territories* (D.Phil. thesis, Oxford University, 1979; reprint, Saskatoon: University of Saskatchewan Native Law Centre, 1979) at 95-125, 357-61.

¹⁴¹ In private conversations with William Wickens.

¹⁴² : Robertson, M., *Red Earth*, Nova Scotia Museum, 1969.

¹⁴³ *Ibid.*

¹⁴⁴ *Ibid.*

*detachment did which came lately to Chigabenakady, which they consider an infraction, shall be treated as enemies.*¹⁴⁵

This statement is a clear demonstration of the Mi'kmaq of Sipekne'katik declaring that the Shubenacadie River is out of bounds to the English and anyone entering the area uninvited will be seen as an enemy.

If we are to look at property in an English concept, then property is the social concept, that is to say, property is a "social relationship".¹⁴⁶ It is within this relationship that the essence of property arises, and is at its core is the right to exclude others.¹⁴⁷ In this sense, the Mi'kmaq were asserting their right to exclude others when they stated that that "*those, who shall...came lately to Chigabenakady...shall be treated as enemies*".¹⁴⁸ Moreover, this was not the first time Mi'kmaq of Sipekne'katik declared title to their lands. In October of 1720, three Chiefs, including the District Chief of Sipekne'katik, met with the French in Les Minas.¹⁴⁹ The Chiefs requested the French to draft a letter for them and have it sent to Governor Richard Phillips stationed at the English Garrison in Annapolis.¹⁵⁰ The letter was a warning to the English to stay in Annapolis and stay out Mi'kmaq lands in Sipekne'katik. The contents of the letter in part stated:

"We believe Niskum "God" gave us these lands. However, we see you want to drive us from the place where you are living (Annapolis), and you threaten to reduce us to your servitude.....we are our own masters and not subordinate to anyone....we do not want English living in our lands

¹⁴⁵ Akins, *Public Documents of Nova Scotia*, p. 217. Letter from the Abbé Le Loutre to Governor Lawrence, 27 August 1754, read at Council, Halifax, 9 September 1754 [**Letter from Abbe'**].

¹⁴⁶ Cohen, Felix S. 1954. "Dialogue on Private Property". *Rutgers Law Review* 9(2):357-387.

¹⁴⁷ Merrill, Thomas W, and Henry E Smith 2001. "What Happened to Property in Law and Economics?" *Yale Law Journal* 111(2): 357-398.

¹⁴⁸ *Letter from Abbe'*, *supra* note 145.

¹⁴⁹ A. J. B. Johnston, *Endgame 1758: The Promise, the Glory and the Despair of Louisbourg's Last Decade* (Lincoln: University of Nebraska Press, 2007 at p 39 [**Endgame**]). (Pisiguit derived from the Mi'kmaq word *Pesaquid*, meaning "Junction of Waters".

¹⁵⁰ *Ibid.*

*(District of Sipekne'katik). The land we hold only from God. We will dispute with all men who want to live here without our consent*¹⁵¹.”

A similar letter was sent by the Mi'kmaq Chief's to Governor Saint-Ovide at Fortress of Louisbourg:

*“But learn from us that we were born on this earth that you march with feet, before even the trees that you see beginning to grow and leave the earth. It is ours and nothing can ever force us to abandon it.”*¹⁵²

Considering the words used by the Mi'kmaq Chief's in both letters, there is a clear demonstration of the Chiefs asserting title over the lands, and their right to exclude others, “such as the English” from their lands. As we noted earlier, a property right is the right to exclude others. It is important to note that these letters were both sent in 1720, which is, after the date of sovereignty. The contents of both letters, is a clear display of a Mi'kmaq exclusionary conception of property rights, as in those who are not apart of the communal right of ownership and use of the land are not allowed to use that property.

After receiving the letter in Annapolis, the English kept entering the Sipekne'katik territory. The English did not respect the Mi'kmaq's assertion of title. In response, the Mi'kmaq repeatedly attacking the English. From 1722 to 1726 the Mi'kmaq attacked and destroyed over 100 English ships.¹⁵³ After suffering many losses, the lieutenant-Governor of Annapolis, Captain John Doucett, wanted to make peace with the Mi'kmaq so finally a “Peace and Friendship” treaty was signed in 1726.¹⁵⁴

In 1749, the Mi'kmaq of Sipekne'katik once again asserted rights to their lands when the English

¹⁵¹ *Ibid.*

¹⁵² NAC, MGIS, £29, “1720, *Speeches of the Indians...*,” in “R. v. Stephen Frederick Marshall et al. Defence Document Books, vol.6, no.93”.

¹⁵³ *The Micmac*, *supra* note 83, at p 364.

¹⁵⁴ Fergusson, Charles Bruce, *John Doucett*, Dalhousie University, Halifax, 2012, <http://ns1763.ca/bio/7bio-doucett1670.html>.

settled in Halifax on June 14, 1749.¹⁵⁵ This enraged the Mi'kmaq. The spot where they built their settlement was sacred land to the Mi'kmaq. As noted early, Halifax is known to Mi'kmaq as "*Kjipuktuk*". The place where the English built their fort and settlement was known to the Mi'kmaq as "*Amntu'kati*", which in English means, "spirit place" or "the place of spirits".¹⁵⁶ Every year since time immemorial the Mi'kmaq from all over Mi'kma'kik would come and gathered at "*Amntu'kati*" for seven days after the first full moon during "*Tquoluiku*," "the frog croaking month" in the spring.¹⁵⁷

On August 14, 1749, Cornwallis called for a meeting with the Mi'kmaq and neighboring tribes.¹⁵⁸ It was crucial for the English to sign a Treaty with the Mi'kmaq especially with the Mi'kmaq of Cape Sable Island. The English needed a treaty to end the hostilities in Annapolis Royal and the constant attacks at English settlements in Maine and New England.¹⁵⁹ However, the Mi'kmaq of Sipekne'katik refuse to come to this meeting, instead the Chiefs and Elders of Sipekne'katik drafted a letter to Cornwallis expressing their anger over the English settlement in *Kjipuktuk*, and in doing so the Mi'kmaq asserted their rights to their lands.¹⁶⁰

The letter in part to Cornwallis stated:

"The place where you are, where you are building dwellings, where you are now building a fort, where you want, as it were, to enthrone yourself, this land of which you wish to make yourself now absolute master, this land belongs to me. I have come from it as certainly as the grass, it is the very

¹⁵⁵ Akins, Thomas Beamish, "*History of Halifax City, Collections of the Nova Scotia Historical Society for the years 1892-1894*", v.8, Halifax: Morning Herald Printing and Publishing, 1895.

¹⁵⁶ Byrd Awalt speaks of this in his essay from multiple sources, including oral, however Byrd Mi'kmaq was slightly off. Don (Byrd) Awalt "*The Mi'kmaq and Point Pleasant Park An Historical Essay in Progress*," Halifax, NS at p 2. Available on line: http://www.pointpleasantpark.ca/site-ppp/competitionwebsite/ppp.isl.ca/media/documents/Historical_MikmaqandPPPAwalt2004.pdf.

¹⁵⁷ Akins, Thomas B. "*History of Halifax City*"; Murdoch, Beamish. "*History of Nova Scotia or Acadie, in 3 Volumes*"; Raddall, Thomas H. "*Halifax, Warden of the North*."

¹⁵⁸ *Ibid.*

¹⁵⁹ : O'neill, Dianne, curator, *At the Great Harbour: 250 Years on the Halifax Waterfront*, Art Gallery of Nova Scotia, 1995 [*Great Harbour*].

¹⁶⁰ *Ibid.*

*place of my birth and of my dwelling, this land belongs to me the Mi'kmaq (Lnuk), yes I swear, it is God (Niskam) who has given it to me to be my country forever ... Show me where the Mi'kmaq (Lnuk) will lodge? You drive me out; where do you want me to take refuge? You have taken almost all this land in all its extent. Nothing remains to me except Kchibouktouk (Kjipuktuk). You envy me even this morsel...Your residence at Port Royal does not cause me great anger because you see that I have left you there at peace for a long time, but now you force me to speak out by the great theft you have perpetrated against me."*¹⁶¹

Cornwallis refuse to accept the Mi'kmaq claims to *Kjipuktuk*, so the Halifax settlement remained. In September, less than a month after Cornwallis received the letter, the Mi'kmaq started attacking the settlement of Halifax.¹⁶² These attacks on the Halifax settlement were a clear message to Cornwallis that this land belongs to the Mi'kmaq of Sipekne'katik. Even more so, the Mi'kmaq had already previously warned the English in 1720, that they will attack anyone who settled in their land without their consent (as noted above). The Mi'kmaq were clearly stating their rights to their lands in their recent letter that is repeated in part here.

*"this land of which you wish to make yourself now absolute master, this land belongs to me. I have come from it as certainly as the grass, it is the very place of my birth and of my dwelling, this land belongs to me the Mi'kmaq (Lnuk), yes I swear, it is God (Niskam) who has given it to me to be my country forever."*¹⁶³

These attacks on the English could be interpreted as a clear demonstration of the Mi'kmaq asserting their right to exclude others from their lands. However, the English did not want to accept Mi'kmaq sovereignty. In response to the Mi'kmaq attacks Cornwallis gave the order for

¹⁶¹ *Endgame, supra* note 149, at p 24.

¹⁶² *Great Harbour, supra* note 159.

¹⁶³ *Endgame, supra* note 149, at p 24.

all British military under his power, to attack and kill any Mi'kmaq on site.¹⁶⁴ The date of this order was October 01, 1749.¹⁶⁵ Cornwallis included a bounty of 10 Guineas for every Mi'kmaq scalp produced to commanding officers at Annapolis, Minas and Halifax.¹⁶⁶ This bounty included woman and children.¹⁶⁷

Skirmishes between the Mi'kmaq of Sipekne'katik and the English continued for three years. In response to English bounty on Mi'kmaq scalps the Mi'kmaq of Sipek'nekatik declared war on the English.¹⁶⁸ The Mi'kmaq of Sipekne'katik started launching a series of destructive attacks against Protestant settlers in the Halifax area.¹⁶⁹ Eventually Cornwallis was forced to resign in failure and was replaced by Governor Peregrine Thomas Hopson in August 1752.¹⁷⁰ One of Governor Hopson's first priorities was to make peace with the Mi'kmaq.¹⁷¹ Governor Hopson sent messages to the Mi'kmaq of Sipekne'katik that the English wish to make peace and lifted the bounty Cornwallis had out for Mi'kmaq scalps.¹⁷² What is most interesting is the response received by Hopson from the District Chief of Sipekne'katik, Chief Cope. Chief Cope felt that the Mi'kmaq of Sipekne'katik should be compensated for the lands settled in their district. Chief Cope stated: "*the Indians should be paid for the land the English had settled upon in this country.*"¹⁷³ These words clearly demonstrate a Mi'kmaq assertion of title, especially when they are asking for compensation. Although the Council did not address Chief Cope's proposal for

¹⁶⁴ Akins, Thomas B., *Selections from the Public Documents of the Province of Nova Scotia*, Resolution of the House of Assembly, 1865.

¹⁶⁵ *Ibid.*

¹⁶⁶ *Endgame*, *supra* note 149, at p 40.

¹⁶⁷ *Ibid.*

¹⁶⁸ *Ibid.*

¹⁶⁹ John Mack Faragher, *A Great and Noble Scheme: The Tragic Story of the Expulsion of the French Acadians from their American Homeland* (New York: W.W. Norton & Company, 2005) at p 282.

¹⁷⁰ Haliburton, *History of Nova Scotia*, vol. 1, p. 317; Brebner, *New England's Outpost*, at p 186.

¹⁷¹ *Ibid.*

¹⁷² *Ibid.*

¹⁷³ Akins, *Public Documents of Nova Scotia*, p. 671. Council Minutes, Halifax, 14 September 1752 at p 671.

monetary compensation for the lands settled on by the English, they did recognize the lands were still controlled by the Mi'kmaq by the words written in the treaty.

*“We will not suffer that you be hindered from Hunting, or Fishing in this Country, as you have been used to do, and if you shall think fit to settle your wives and children upon the River Shibenaccadie, no person shall hinder it, nor shall meddle with the lands where you are.”*¹⁷⁴

It is important to note that this was not the first recorded occurrence of a Sipekne'katik Chief asking compensation for the use of their lands. In August 1720 the Chief of Minas, Peter Nunquadden “*Ne'wt'kadaagan*”¹⁷⁵, demanded a trading fee from New England Captain, John Alden if he wished to do trading in the Sipekne'katik District.¹⁷⁶ Captain Alden stated that he was approached Chief Nunquadden along with 11 other Mi'kmaq from the Minas and that the Chief demanded payment for the liberty of trading. Captain Alden reported: *“At Menis, on 22nd Aug., 11 Indians with Peter Nun-quadden their Chief, demand 50 livers of him for liberty to trade, saying this cuntry was theirs, and every English trader should pay tribute, to which payment Deponent agreed being under necessity.”*¹⁷⁷ A few days later Chief Nunquadden “*Ne'wt'kadaagan*” returned and stated: *“if any person came there with any orders from General Philipps he (the Chief) would make him prissonner and distroy what he had, neither should any orders of that Government be observed there.”*¹⁷⁸ Again, these words clearly demonstrate an assertion of title in 1720 after the date of the “Acquisition of Sovereignty”.

Re-examination of title claim - Mi'kmaq of Sipekne'katik

¹⁷⁴ Akins, *Public Documents of Nova Scotia*, p. 673. Council Minutes, Halifax, 16 September, 1752 at p 673.

¹⁷⁵ Nunquadden derives from the Mi'kmaq name Ne'wt'kadaggan “the ones who fish for eels”, this name is in reference to the Ne'wt'kadaggan Clan that lived in Minas.

¹⁷⁶ PRO, (GB), CO, 217, V.4, no.18 (xii), “September 14, 1720, Memorial of John Alden,” in “R. v. Donald Marshall Jr., Defence Document Books, vol.2, doc.55”.

¹⁷⁷ *Ibid.*.

¹⁷⁸ *Ibid.*

a. What is title?

For the Mi'kmaq, title is the Mi'kmaq's attachment to the land, the rivers, the lakes, seas and all the resources within their territory that was given to them by "Niskum", the Creator, who is the supreme being of all. Title to the Mi'kmaq is not just the attachment, but also their connection to the lands and waters. For the Mi'kmaq, we are as much a part of the lands and waters as the lands and waters are a part of us. We have come from land and waters just as certainly as the lands and waters it is the place of their birth and has provided for them since the beginning of time. For thousands of seasons we have existed here and the lands and waters have belonged to us and have been under our care; as a gift from *Niskum* to the *Lnu'k* of Mi'kma'kik and it was given to us until the end of time.

In 1978 the Union of British Columbia First Nation Chiefs described Aboriginal title as following:

"The Sovereignty of our Nations comes from the Great Spirit. It is not granted nor subject to the approval of any other Nation....we have the sovereign right to jurisdiction rule within our traditional territories....The land is provided for the continued use, benefit and enjoyment of our People and it is our ultimate obligation to the Great Spirit to care for and protect it. Our power to govern rests with the people and like our Aboriginal Title and Rights, it comes from.....supreme and absolute power over our territories, our resources and our lives with the right to govern, to make and enforce laws, to decide citizenship, to wage war or to make peace and to manage our lands, resources and institutions. Aboriginal Title and Rights means we as Indian people hold Title and have the right to maintain our sacred connection to Mother Earth by governing our territories through our own forms....since time immemorial and continue to this day.....Our power to govern

*rests with the people and like our Aboriginal Title and Rights, it comes from within the people and cannot be taken away”.*¹⁷⁹

In this sense Aboriginal title refers to the inherent Aboriginal right to land or a territory from which they are from. The Canadian Courts have stated that Aboriginal title is “*sui generis*”, that is to say, it is unique, one of a kind. In *Canadian Pacific Ltd. v. Paul*, the Court stated: “*The inescapable conclusion from the Court's analysis of Indian title up to this point is that the Indian interest in land is truly sui generis. It is more than the right to enjoyment and occupancy*”¹⁸⁰

Moreover, it is a First Nation’s right to the use of and jurisdiction over their ancestral territories. This right is not granted from some external source but is a result of that First Nation group’s relationship and occupation of their territories. Aboriginal title arises from Aboriginal occupation of the land prior to Crown acquisition of sovereignty and from the historic relationship between Aboriginal people and the lands and waters.¹⁸¹ Under the “Doctrine of Continuity”, it stands that, Aboriginal title continued at the time of the acquisition of sovereignty.¹⁸² Further, any interest a First Nation group had in the land or any customary laws or practices that governed them would have continued by virtue of the doctrine of continuity.¹⁸³

In the dissenting comments coming out of *Calder v. British Columbia*, the Court noted that under the common law, people who are in occupation of land are presumed to have possession and thus title to the land they occupy.¹⁸⁴ Even in *R. v. Bernard* and in *R. v. Marshall*: The SCC confirmed the common law theory of Aboriginal title when McLachlin stated:

¹⁷⁹ Union of British Columbia Indian Chiefs, online: <http://www.ubcic.bc.ca/Resources/atrp.htm>.

¹⁸⁰ *Canadian Pacific Ltd. v. Paul* [1988] 2 S.C.R. 654, at 677, 678.

¹⁸¹ EAGLE, *Nation to Nation: The Law of Consultation and Accommodation*, looseleaf (Surrey, BC: EAGLE, 2005).

¹⁸² Brian Slattery, *The Land Rights of Indigenous Canadian Peoples* (Saskatoon: University of Saskatchewan Native Law Centre, 1979), 50-59; Mark D. Walters, “The ‘Golden Thread’ of Continuity: Aboriginal Customs at Common Law and Under the Constitution Act, 1982” (1999) 44 McGill L.J. 711.

¹⁸³ *Ibid.*

¹⁸⁴ *Calder v. British Columbia*, [1973] SCR 313 per Hall J at 368, 375 [**Calder**].

“an aboriginal group which occupied land at the time of European sovereignty and never ceded or otherwise lost its right to the land, continues to enjoy title to it.”¹⁸⁵

In addition to occupying lands, First Nation groups also had their own traditional laws that governed themselves, and further, that were held in relationship to the land.¹⁸⁶ In her dissenting comments in *R. v. Van der Peet*, McLachlin alluded to suggesting that, it would be appropriate to base Aboriginal title on pre-existing Aboriginal Law.¹⁸⁷ However this was not the case in *Marshall; Bernard*. In *Marshall; Bernard*, McLachlin seem to move away from the Aboriginal law approach. Instead, McLachlin focused on physical occupation that translated Aboriginal perspectives and practices into legal common law property rights. According to McLachlin, Aboriginal title has to be established by proof of physical occupation of specific sites.¹⁸⁸

Professor K. McNeil contended that, McLachlin’s jurisprudence appeared to reject the territorial approach to Aboriginal title.¹⁸⁹ However, the SCC in *Tsilhqot’in*, disagreed with this contention: McLachlin asserted;

“In fact, this Court in *Marshall; Bernard* did not reject a territorial approach, but held only (at para. 72), that there must be “proof of sufficiently regular and exclusive use” of the land in question, a requirement established in *Delgamuukw*.”¹⁹⁰

Moreover, that the Court in *Marshall; Bernard*, were stating; “regular use of definite tracts of land for hunting, fishing or otherwise exploiting its resources” is sufficient for establishing Aboriginal Title.¹⁹¹

b. What are the steps accepted by law?

¹⁸⁵ *Marshall; Bernard*, *supra* note 1 at para 39.

¹⁸⁶ John Borrows, *Canada’s Indigenous Constitution* (Toronto: University of Toronto Press, 2010).

¹⁸⁷ *R. v. Van der Peet*, [1996] 2 S.C.R. 507 at para 261-275.

¹⁸⁸ *Marshall; Bernard*, *supra* note 1 at para 140.

¹⁸⁹ Kent McNeil, “Aboriginal Title and the Supreme Court: What’s Happening?” (1996) 69 Sask. L. Rev. 281

¹⁹⁰ *Tsilhqot’in SCC*, *supra* note 4 at para 43.

¹⁹¹ *Ibid* at para 44.

The SCC in *Tsilhqot'in*, reaffirms the test set out in *Delgamuukw*.¹⁹² Whereas, Aboriginal title must possess three characteristics. It must be *sufficient*; it must be *continuous* (where present occupation is relied on); and it must be *exclusive*.¹⁹³ However, *Tsilhqot'in* rejected the narrow “postage stamp” or “site specific” approach to Aboriginal title used by the Court of Appeal, and adopted the broader territorial approach of Justice Vickers.¹⁹⁴ McLachlin in *Tsilhqot'in* is basically rejecting her own “site specific approach” used in *Marshall; Bernard*. McLachlin recognized that *Delgamuukw* affirmed a “territorial used- based approach to Aboriginal title”¹⁹⁵ McLachlin also agreed with Chief Justice Lamar in *Delgamuukw* by holding that, when looking at Aboriginal title, the Courts must look at it from both the common law and the Aboriginal law perspective.¹⁹⁶ Moreover that Aboriginal perspective includes “*laws, practices, customs and traditions of the group*”¹⁹⁷.

It seems McLachlin has moved beyond *Marshall; Bernard* by including Aboriginal Law, and that she is more open to the idea that, it is not just about fact base and fact specific, when it comes to occupation and possession. The courts must also consider the laws and perspectives of the Aboriginal group claiming title. This idea of change is illustrated, when McLachlin stated:

“*The common law test for possession —which requires an intention to occupy or hold land for the purposes of the occupant — must be considered alongside the perspective of the Aboriginal group which, depending on its size and manner of living, might conceive of possession of land in a somewhat different manner than did the common law.*”¹⁹⁸

¹⁹² *Delgamuukw*, *supra* note 12 at para 143.

¹⁹³ *Tsilhqot'in SCC*, *supra* note 4 at para 25.

¹⁹⁴ *Tsilhqot'in Nation v. British Columbia*, 2007 BCSC 1700 at para 610.

¹⁹⁵ *Tsilhqot'in SCC*, *supra* note 4 at para 57.

¹⁹⁶ *Ibid* at para 34.

¹⁹⁷ *Ibid* at para 35.

¹⁹⁸ *Ibid* at para 41.

Occupation through Mi'kmaq law is a territorial approach: Mi'kmaq were in occupation of their traditional district territories because they had laws, including laws in relation to the land that applied to their District boundaries.¹⁹⁹ As such, Mi'kmaq were in occupation because they exercised governmental authority over their District, and maintained the same boundaries for generations, in part through the application of their own laws, customs and beliefs.²⁰⁰ In the Minority Judgement of *Marshall; Bernard*, Justice Lebel stated at paragraph 127;

*“In my view, aboriginal conceptions of territoriality, land-use and property should be used to modify and adapt the traditional common law concepts of property in order to develop an occupancy standard that incorporates both the aboriginal and common law approaches. Otherwise, we might be implicitly accepting the position that aboriginal peoples had no rights in land prior to the assertion of Crown sovereignty because their views of property or land use do not fit within Euro-centric conceptions of property rights.”*²⁰¹

For the Mi'kmaq in Sipekne'katik, land was communal, more-over, that it was shared among the Clans who lived on it.²⁰² Boundaries were maintained and respected. If they were not respected then force was used.²⁰³ This has been clearly demonstrated when the English settled in Sipekne'katik. As I noted earlier, property is a social concept, based on social relationships. It is in this relationship that the essence of property arises, and at its core, is the right to exclude others. At the time of the British acquisition of sovereignty, the Mi'kmaq asserted their right to exclude others from their territory right up until and beyond, the signing of “Peace and Friendship” Treaties. Even after all the wars, and losses from the influx of disease, and untold

¹⁹⁹ *Mikmaw Concordat*, *supra* note 60..

²⁰⁰ *Hoffman 55 supra* note 18.

²⁰¹ *Marshall; Bernard*, *supra* note 1 at para 127.

²⁰² Patricia Nietfeld, "*Determinants of Aboriginal Micmac Political Structure*", Ph.D. thesis, University of New Mexico, 1981, at 457.

²⁰³ *Jesuit Relations*, *supra* note 48 volume 2 at 91.

losses as a direct result of scalp bounties imposed by Cornwallis, the Mi'kmaq of Sipekne'katik still maintained and assert their right to exclude others from their territory.

c. So where do we go from here?

Aboriginal title to land is based on “occupation” prior to assertion or rather the unlawful acquisition of British sovereignty. As previously noted, the courts require sufficiency, continuity and exclusivity. The SCC refined it as; sufficient pre-sovereignty occupation; continuous occupation (where present occupation is relied on); and exclusive historic occupation.

If we considered the Mi'kmaq of Sipekne'katik, then we must look at the date Britain asserted their acquisition of Sovereignty in Mi'kma'kik. In *Marshall; Bernard*, it is noted the date British declared sovereignty for mainland Nova Scotia is 1713.²⁰⁴ Since that date the Mi'kmaq of Sipekne'katik maintained continuous occupation.

When we consider exclusivity, Chiefs of Sipekne'katik asserted their right to exclude the British from their lands. The Chiefs demonstrated assertion of exclusive possession in contents of the letters they sent to the British and the actions they took in attempt to keep the British out of their lands. If European viruses and diseases did not have such a detrimental effect on the Mi'kmaq from occupying all of their territory, then the Mi'kmaq would have maintained full continuity. The Mi'kmaq did however, continue to use the lands much as they always have done by way of traditional, customary and spiritual practices. Mi'kmaq occupation in Sipekne'katik was sufficient, was continuous and was exclusive.

²⁰⁴ *Ibid* at 71.

Conclusion

In my paper I presented a number of leading misconceptions and myths often used to describe Mi'kmaq people. These misconceptions had a direct and indirect influence on the jurisprudence coming out of *Marshall; Bernard*. As long as these prevailing misconceptions and myths remain Mi'kmaq will continue to have a difficult time in any title claim. Perhaps it is time for Mi'kmaq to rewrite their history and show the true complexity of pre-contact Mi'kmaq social, political, and cultural realities.