PRIVATE PROPERTY INTERESTS IN SHORELINE LAND IN NEWFOUNDLAND & LABRADOR

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Abstract

For over 130 years, Newfoundland law has recognized a reservation of land bordering on bodies of water, known as the "foreshore". There has long been public interest in acquiring good title to waterfront land, particularly the foreshore directly at the water's edge, and contrarily, there is significant public interest in the preservation of the public nature of the water's edge. This paper will explore the doctrine of adverse possession against Crown Land as it relates to the foreshore, the impact of personal ownership rights, obtaining good title, and the effect of erosion and climate change on ownership interest in waterside lands.

I. Introduction

Newfoundland's history is inexorably entwined with the sea. The wealth of the Grand Banks fishery first brought settlement to the island, and for centuries, the fishery was the dominant, if not only, industry. Hundreds of communities, and thousands of citizens, relied on the fishery for a livelihood and for simple survival. With such reliance on the bounty of the ocean, the lands which are directly adjacent to the ocean have long been the most valuable. From the earliest days of settlement, ocean shoreline has been at a premium in Newfoundland, particularly in sheltered harbours and other suitable ports for vessels. The first settlements in Newfoundland arose due to itinerant crewmen setting up camp in advantageous ports of the island for use in the seasonal fishery, which led to a widely dispersed pattern of settlement along the coastline of the island.[1]

Efforts to control settlement and occupation of Newfoundland were absolutist and refused to recognize any proprietary interest in land by the settler population.[2] In particular, shoreline lands were expressly reserved for use in the fishery, and private ownership and occupation was prohibited by law.[3] This would continue until the early

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[1] For more on the topic of early Newfoundland settlement, see Gregory French, "Property Interests in Resettled Communities" (2015) 66 UNBLJ 210 at 211–213, and the sources cited therein.

[2] *Ibid* at 211.

[3] *An Act to Encourage the Trade to Newfoundland, 1698* (UK), 10 & 11 Will III, c 25, s 5. This statute required inhabitants of Newfoundland to "relinquish, quit and leave, to the public use of the fishing ships arriving there, all and every the said stages, cook-rooms, beeches and other places for taking bait and fishing, and for the drying, curing and husbanding of Fish". There is no defined geographic scope on the land to be so yielded. Note that section 6 of the Act allows for occupation of the same lands only after the fishing fleets have been accommodated, and section 7 permits "houses, stages, cook-rooms, Train-fats or other

19th century, when the resident population of the colony had reached a tipping point and settlers' rights and interests could no longer be ignored.

Ultimately, by 1824, Crown Grants became available throughout Newfoundland, thus recognizing and making officially available an ownership interest in lands in the Colony for its resident population.[4] As can be anticipated based on the distribution of settlement, the vast majority of grants were made in coastal areas, to land adjacent to the ocean.

II. Crown Grants and Shoreline Reservations in the 19th Century

Throughout the first decades of granting land interests, the Newfoundland government seemed to place few conditions on the geographic scope of land available for alienation. Settlers interested in obtaining grants to waterside lands could apparently obtain a grant to land right to the water's edge.[5] In a colony that relied upon the fishery almost exclusively, this would seem to be a common-sense proposition; after all, beyond the limits of the urban St. John's area, the vast majority of the population worked in the fishery. Owning land abutting the water was a matter of practical necessity for those who would be launching boats at sea or coming ashore with fish to salt and dry. Indeed, the government granting of an ownership interest in such land would seem to accord with the history of settlement and reconciling established interests within the later-developed legal system of the Colony.[6]

A review of the bound volumes of Crown Grants at the Crown Lands Registry in St. John's provides some insight into the scope of granting land in the middle of the 19th century. The earliest whole bound volume in the Registry is Volume 8, which

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conveniences" to remain in areas that have not been used in conjunction with the fishery since March 25th, 1685. The scope of the Act is unfortunately broad, as permissive occupancy relates to areas that "did not belong to fishing Ships".

[4] *An Act to repeal several Laws relating to the Fisheries carried on upon the Banks and Shores of Newfoundland, and to make Provisions for the better Conduct of the said Fisheries for Five years, and from thence to the End of the then next Session of Parliament, 1824* (UK), 5 Geo IV, c 51, s 15 [*Newfoundland Fisheries Act*].

[5] A review of the earliest Crown Grants at the Crown Lands Registry discloses few reservations along bodies of water. Where they are present, they usually make express reference to a road or an intended actual pathway. These include grants at St. John's: Crown Lands Registry (Fol 6, Fol 37, Fol 49, Fol 126); however, cf St. John's, Crown Lands Registry (Fol 94); Tickle Cove, Bonavista Bay: St. John's, Crown Lands Registry (Fol 18); Smith's Sound, Trinity Bay: St. John's, Crown Lands Registry, (Fol 3); Pope's Harbour, Trinity Bay: St John's, Crown Lands Registry (Fol 4); Brigus: St. John's, Crown Lands Registry (Fol 73), however cf: St. John's, Crown Lands Registry, (Fol 50); Spaniards Bay: St. John's, Crown Lands Registry, (Fol 65); and Grand Bank: St. John's, Crown Lands Registry, (Fol 83). These Grants can be found at the Registry in Volume 8; Volumes 1 to 7 were lost in the Great Fire of 1892 which destroyed much of the City of St. John's. Some scattered grants recorded in these volumes have been recovered from various sources.

[6] See generally Kenneth Norrie and Rick Szostak, "Allocating Property Rights Over Shoreline: Institutional Change in the Newfoundland Inshore Fishery" (2005) 20:2 NLS 233.

includes grants from the late 1850s to mid-1860s.[7] The majority of grants that appear in this Volume make no reservation along the bank of any body of water – fresh or salt; such reservations are very much the exception rather than the rule. Those grants that do reserve the shoreline are on the eastern half of the island and are generally in populated areas or areas of longstanding settlement.[8] Longstanding population, however, is not a determinative factor in reserving the shore; other grants in this Volume, to coastal land at St. Mary's Bay, Trinity Bay, Bonavista Bay, Fortune Bay and Conception Bay, run right to the shoreline and follow the shoreline as a boundary, and these are some of the oldest settled areas of Newfoundland. Nor are the reservations determined by whether they border freshwater or saltwater – some reservations are made in both instances. Contrarily, grants in the same Volume are made up to the water's edge and follow the shoreline of both freshwater and saltwater bodies. The logic to these particular reservations is not clear and may reflect the unique population patterns of these areas, the use of the land itself prior to being granted, or the necessity in those instances to preserve for public use. There does not appear to have been a universal rule imposed by Crown Lands in this period as to when a reservation would be imposed and when the land would be freely granted to the water's edge.

Two particular grants from this Volume warrant mention and perhaps give some insight into the reasons for sporadic preservation. A grant to James Clift et al, dated May 28th, 1861 includes a significant amount of land at Boot Harbour Bight, Hall's Bay.[9] This land includes both the banks of a river and the coastline along Hall's Bay. A peculiar reservation in this grant, not observed in other grants, notes that the grant is made for the purposes of a mill, and shall not interfere with private property or fishery rights. The preservation of fishery rights in this grant hearkens back to the ancient statutes preserving Newfoundland's shoreline for the use of the fishery.[10] It may be that public access to the shoreline, where public access had previously been exercised and noted, warranted the reservation in these instances. Secondly, a grant to one George Greenland of land at Coley's Point, Conception Bay, dated June 24th, 1861 runs inland but near the coast and is bounded on the coastal side by a "Fishing Room" occupied by the same George Greenland.[11] By 1861, the concept of the "Fishing Room" was relegated to history, and certainly so by the enactment of the *Newfoundland Fisheries Act*. The reference is curious but seems to indicate a continued adherence to the notion of the reservation of the shoreline to the fishery, rather than to freehold interests. In this particular instance, it is impossible to know why the reference remained. Both grants indicate a focus on fishery access to the shoreline, whether by a prohibition on interference or preservation of shoreline already dedicated. Perhaps these considerations did not apply when dealing with virgin shoreline.

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[7] See *supra* note 5.

[8] *Ibid*.

[9] Grant No 1683, St. John's, Crown Lands Registry (Vol 8, Fol 23).

[10] *An Act to Encourage Trade to Newfoundland*, *supra* note 3, s 5.

[11] Grant No 1684, St. John's, Crown Lands Registry (Vol 8, Fol 29).

The turning point on the regular and standardized imposition of shoreline reservations appears to be in late 1883. The first such grants appear early in Volume 30, and specifically in Folio 10, where the grant defines the boundary as the shoreline, but the survey sketch denotes a "Public Reservation 30 feet wide".[12] The grants immediately preceding Folio 10 in the same volume, which are bounded by the shoreline, do not make any express reservation.[13] Subsequent grants, registered after Folio 10, do not specifically identify the location of a right-of-way or reserve the shoreline, but make a written provision that the grant is made "reserving a public road running through the same thirty feet wide where required".[14] The same language appears in grants through to February of 1884, referring to a "reserved road" "when required".[15] This appears to be short lived, before a seemingly universal practice of reservation of thirty feet along a body of water is reserved in grants forward from February of 1884.[16] Note that this reservation seems to have applied only to grants in settled areas. One grant noted after February of 1884 granted an entire island and made no reservation of the shoreline around that island.[17] One could conclude from this island grant that the shoreline reservations were, by that point in time, made in recognition of the interests of neighbouring residents, rather than bestowing a universal reservation of all possible seashore lands to the uses of the fishery.

One should note that the Crown lands reservations noted above began seemingly from nowhere. The first mandated specific legal restrictions on waterside land ownership did not involve land adjacent to the ocean. In 1884, the legislature passed a restriction that reserved an area ranging from 25 to 100 feet along the shores of lakes and ponds, and along the banks of rivers, from grants, leases or licences.[18]

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[12] Grant No 4820, St. John's, Crown Lands Registry to land at Indian Brook, Hall's Bay, Notre Dame Bay. Note, though, that the grants in the Crown Lands Registry are not necessarily registered in sequential order, and attention should be paid to the grant number itself.

[13] These are particularly Grant No 4767, St. John's, Crown Lands Registry (Fol 2); Grant No 4760, St. John's, Crown Lands Registry (Fol 3); Grant No 4771, St. John's, Crown Lands Registry, (Fol 4); Grant No 4758, St. John's, Crown Lands Registry (Fol 7); and, Grant No 4793, St. John's, Crown Lands Registry, (Fol 8). All were granted in October of 1883. The lands in these grants are in Notre Dame Bay and Fortune Bay.

[14] See Grant No 4823, St. John's, Crown Lands Registry (Vol 30, Fol 11) and Grant No 4825, St. John's, Crown Lands Registry, (Vol 30, Fol 13). The former is at West Point, Burgeo & LaPoile District, and the latter is at Saint Jones Harbour, Trinity Bay. Both are dated December 24th, 1883.

[15] See Grant No 4841, St. John's, Crown Lands Registry (Vol 30, Fol 37) and Grant No 4851, St. John's, Crown Lands Registry (Vol 30, Fol 40) which are both dated February 1st, 1884. The former grant refers only generally to a "reserved road 30 feet wide when required", but the latter refers to "a road 30 feet wide for public use along the shore when required".

[16] See St. John's, Crown Lands Registry (Fols 41, 45, 47, 76, 85). The practice appears to be a reservation of 30 feet along saltwater bodies, and the lone example in this series of a freshwater reservation is 25 feet. See Folio 45, in particular, which reserves 25 feet along Grand Bank Brook and Grand Bay Brook at Channel, Port-aux-Basques.

[17] See Grant No 4861, St. John's, Crown Lands Registry (Vol 30, Fol 62) which grants an island offshore of Channel, Port-aux-Basques. There is no express reservation of that island's shoreline in the grant, nor does any such reservation appear on the survey drawing.

[18] *An Act to Amend and Consolidate the Several Acts Respecting the Crown Lands of Newfoundland* (1884), 47 Vic, Cap 2, s 22 [*Crown Lands' Amendment Act*].

This statute was silent on reserving any oceanside lands. Two particular statutory conditions dealt with reservations, however, that would seem to apply to the ocean shore. From the very first Crown lands legislation in 1844, the Crown has had the permissive authority to "reserve such and such portion of forest as may be necessary for the uses of the Fishery".[19] There is no definition of "forest" in the Act, though one could surmise that any use of woodland in connection with the fishery would have to be coastal in nature. The 1872 Consolidated Statutes of Newfoundland ("CSN") were more specific, providing that the "Governor-in-Council may reserve, set apart and appropriate…such portions of unappropriated ships' room, beaches and shores as may be deemed necessary or convenient to set apart for general and public uses".[20] There was no mandatory requirement for a reservation, nor was there a definitive size for such reservation specified. One provision of note, dealing with licences of occupation of significant parcels of land, required a reservation to be made "as may be necessary for the preservation of the sea shore for the fishery and for all other public purposes."[21] Between these provisions, there appears to be a general permissive power for the Crown to reserve the ocean shoreline, generally for the fishery or the public. It does not appear, however, that this power was exercised with regularity until late in 1883.

The reason why the reservations became commonplace after 1883 is difficult to ascertain with specificity. That said, a review of the House of Assembly Journals of the 1880s provides some possible insight. The starting point may have been the Report of the Committee on Land Tenure, chaired by P.G. Tessier, which had to deal with questions of land tenure relating to shoreline lands in St. John's harbour.[22] By the early 1880s, the harbour area in St. John's was subject to many private claims along the shoreline and encroachment by "breastworks and wharves". The government commissioned a report to deal with the question of land tenure and development of the harbour which was finalized and presented on May 13th, 1882. Later that year, in his annual report to the legislature, Surveyor-General J.O. Fraser suggested that a uniform system of surveying be adopted, with particular attention paid to the continuation of surveying of the coastline.[23] In his annual report the following year, Surveyor-General Fraser made specific note of the expansive efforts to survey areas in the central and western portions of the province. In the course of preparing such surveys, Fraser raised concerns of a "monopoly of land" being taken in by speculators

[19] *An act to make provision for the disposal and sale of ungranted and occupied Crown Lands within the island of Newfoundland and its dependencies, and for other purposes* (1844), 7 Vic, Cap 1, s 8; later in *Of the Mode of Obtaining Grants,* CSN 1872, c 45, s 9.

[20] *Of the Mode of Obtaining Grants, supra* note 19, s 8, which continued in *An Act Respecting Crown Lands* (1880), 43 Vic, Cap 3, s 25; *Crown Lands' Act* (1903), 3 Edward VII, Cap 6, s 9; and, *Of Crown Lands, Timber, Mines and Minerals,* CSN 1916, c 129, s 11.

[21] *Crown Lands' Amendment Act, supra* note 18, s 16.

[22] *Journal of the House of Assembly of Newfoundland,* 1st Sess, 14th Gen Assembly (19 May 1882) at 705 (PG Tessier).

[23] *Journal of the House of Assembly of Newfoundland,* 1st Sess, 14th Gen Assembly (13 Dec 1882) at 477 (JO Fraser, Surveyor General).

and spurious squatters' claims along the shoreline.[24] Reading Fraser's particular reviews of the Hall's Bay and Random Island areas, summarized in his Annual Report, one can perhaps tie his concerns to specific grants which were surveyed at particular dates and which included significant coastal claims. Accordingly, one could conclude that the oceanside shoreline reservations are a product of Surveyor-General Fraser's concerns about private occupancy and land claims interfering with public rights and an exercise of the scarcely-used discretionary authority in the then-current Crown lands legislation to make shoreline reservations a standard practice. If any formal directive was made to introduce this practice, then the author has been unable to locate the same.[25]

III. Judicial Consideration of the Shoreline in the 19th Century

The transition to recognition of private property rights generally in Newfoundland created no shortage of confusion in the judiciary. The Supreme Court of Newfoundland voiced the uncertainty with which they approached land tenure in the Colony in the early days of acknowledging property interests.[26] With the passage of the *Newfoundland Fisheries Act*, it became apparent that it was possible to hold an ownership interest in land in the Colony of Newfoundland, but the shoreline remained a source of confusion. Over 200 years of history had barred private occupation of the Newfoundland coastline, and the notion of the sanctity of the shoreline appears to have held fast.

The case of *Bransfield v Beatty* is an example of this confusion.[27] In *Bransfield*, the Court was faced with a dispute regarding the construction of a building on the seashore and over the harbour of Pilley's Island. The Plaintiff built a store on the shoreline and an erection over the harbour waters, upon both of which the Defendant held mining rights. The Defendant tore down the Plaintiff's erections and alleged trespass on the basis of mining leases and grants. In finding for the Plaintiff, Justice Little found the Defendant's title to the land at issue defective, and he stated:

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[24] *Journal of the House of Assembly of Newfoundland*, 2nd Sess, 14th Gen Assembly (31 Dec 1883) at 453 (JO Fraser, Surveyor General).

[25] The author notes that the House of Assembly does not appear to have sat from April 22nd, 1883 to February of 1884. There is no legislative amendment made to specifically address the oceanfront reservation, nor does any reference to the same appear in the House of Assembly Journals of 1883 or 1884. A similar canvass of the *Royal Gazette* for this period also discloses nothing of note. One could infer a relationship between the seemingly standardized practice of reserving the shoreline beginning in February of 1884 with the resumption of the sittings of the House of Assembly, though any direct link, such as a directive, regulation or other enactment, does not appear in the public record.

[26] See e.g.: *Rex v Thomas Row* (1818), 1 Nfld LR 126 at 127; *Rex v Patrick Kough* (1819), 1 Nfld LR 172 at 174; *The King v Cuddihy* (1831), 2 Nfld LR 8 at 17; *The King v Luke Ryan* (1831), 2 Nfld LR 47. The former cases deal with confusion about land tenure before the passage of the *Newfoundland Fisheries Act*, *supra* note 4; the latter cases deal more particularly with interpretation of coastal restrictions.

[27] *Bransfield v Beatty* (1894), 7 Nfld LR 813 [*Bransfield* cited to Nfld LR].

> [I]n my judgment, it would be found that the defence resting upon the title claimed under these grants to an exclusive and absolute right over the shores and waters in question would be found untenable. I should, under the circumstances, regard any such claim or title as being directly opposed to and in contravention of the provisions of certain well-known Imperial Acts relative to the use and occupation of the coasts of this island for the general purposes of our fisheries…The granting of [shoreline lands] would also be regarded as contrary to public policy and in derogation of the rights secured by statute to those of the public immediately engaged in the prosecution of our fisheries.[28]

Going further, Justice Little remarked that "the shores and navigable waters of our harbours cannot be alienated in the manner and under the conditions contended for" and he consequently found that any grants purporting to convey the same would be *ultra vires* the legislative competence of the Colony.[29]

Bransfield is inconsistent not only with the repeal of the shoreline restrictions by the *Newfoundland Fisheries Act*, but, more curiously, with the longstanding practice of the colonial government's alienation of the shoreline through to the 1880s. Looking at the contemporary legislative context, there is no statute of the colonial legislature specifically preserving the coastline. Indeed, it seems that the practice of reserving the shoreline from Crown Grants after the mid-1880s arose from similar concerns of preservation against privatization of the public commons. This may explain Justice Little's commentary that granting shoreline lands would be "contrary to public policy" and "in derogation of the rights secured by statute to [the fishery]".[30] It does not explain why Justice Little referred to Imperial legislation of years gone by, which had long been rendered obsolete by the *Newfoundland Fisheries Act* and by the modern practice of the colonial government. Perhaps, echoing Surveyor-General Fraser's commentary, Justice Little's decision was a reflection of the broader concern that privatization of the shoreline created conflicts that were better avoided. This may account for Justice Little's commentary that a party asserting a right to privatize the shoreline should not succeed.

It may also be the case that the old notions of the shoreline restrictions continued in effect through the 19th century in the public conscience, regardless of legislative change. The legislature's silence on the shoreline preservation was simply because preservation was not considered necessary; ship's rooms and open access to the shore for the fishery were so thoroughly impressed upon Newfoundland society for so long that the notion persisted. As remarked upon in the previous section, some evidence of this theory is visible on grants into the 1860s.[31] It may also explain the peculiar and seemingly random reservation practice observed in the historical grants: in places where the shoreline had already been dedicated to the public use for so long,

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[28] *Ibid* at 817.

[29] *Ibid.*

[30] *Ibid.*

[31] See Grant No 1683, *supra* note 9; Grant No 1684, *supra* note 11.

it would remain to the public use. In this context, Justice Little's comments on the "certain well-known Imperial Acts" may also make sense – the rights granted by those Acts from long ago had taken hold and could not then be interfered with.

Regardless of the reason, the *Bransfield* decision is an indication of the disconnect between the legislature, the Crown lands officials, and the judiciary on this topic. While the legislature remained silent, the Surveyor General and the Supreme Court of Newfoundland found fault with the freedom by which the shoreline was granted by the colonial government and both parties respectively took their own steps to fill the void to protect public access to the coastline. Eventually, whatever the reason, the practice of reserving the shoreline took hold and remained, absent a legislative requirement to do so. This legislative silence, however, would continue for another century.

IV. Legislative Evolution on Shoreline Reservations in the 20th Century

Crown lands legislation continued to preserve a reservation "round and adjoining all lakes and ponds and on both banks of all rivers" of "not less than twenty-five feet, and not exceeding one hundred feet" until 1951.[32] It should be noted that this is not a universal reservation around all lakes, ponds and rivers. Rather, this was only a reservation in "grants, leases, licences and location tickets".[33] This would later be fixed as a "strip of Crown lands not less than thirty-three feet wide" around lakes, ponds and rivers, beginning in 1951.[34] By the 1990 consolidation, the statute was converted to metric: the reservation was now set at 10 meters.[35]

In 1991, the *Crown Lands Act* was repealed and replaced with the *Lands Act*.[36] The new statute substantially changed the shoreline reservation law, and expanded it for the first time to include the sea coast:

> Where Crown lands that border on a lake, pond, river, the seashore or foreshore are granted, leased or licensed under this Part, it is considered, in the absence of an express grant, lease or licence of those Crown lands, that a strip of Crown lands not less than 15 metres wide around and adjoining the lake, pond, seashore or foreshore or along each bank of the river was not intended to pass and did not pass to the grantee, lessee or licensee.[37]

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[32] *Crown Lands' Amendment Act, supra* note 18, s 22; *Of Crown Lands, Timber, Mines, and Minerals, supra* note 20, s 14.

[33] *Crown Lands' Amendment Act, supra* note 18, s 22.

[34] *Crown Lands (Amendment) Act, 1951,* SN 1951, No 86, s 15(186B); *Crown Lands Act,* RSN 1952, c 174, s 121; *Crown Lands Act,* RSN 1970, c 71, s 129.

[35] *Crown Lands Act,* RSN 1990, c C-42, s 83.

[36] *Lands Act,* SNL 1991, c 36, ss 74–76.

[37] *Ibid*, s 7(1).

This statute again makes clear that the reservation is not an automatic application around all bodies of water, including (for the first time) the ocean. Rather, it is an exception out of express grants, leases or licences. It is also noteworthy that there is no special status or designation for the shoreline reservation; it is merely Crown land, as any other ungranted land would be. The statute makes clear that, absent express transfer, there is no conveyance of shoreline land.

V. Principles of Adverse Possession in Practice

If the shoreline along bodies of water and along the seashore is no more than ordinary Crown land, then the principles of adverse possession applicable to Crown lands generally would apply. As is well known to practitioners of property law in Newfoundland, an adverse claimant against the Crown must demonstrate open, notorious, continuous and exclusive use and occupation of Crown lands for a twenty-year period immediately prior to January 1st, 1977.[38] There is no general rule in modern Crown lands legislation prohibiting ownership or occupancy of the foreshore; but, demonstrated use and occupancy for that twenty-year period would suffice to divest the Crown. Indeed, a recent review of the *Lands Act* by the government's Lands Act Review Committee affirms this proposition.[39] Further, jurisprudence has confirmed that the shoreline reservation statutes from 1884 to present do not operate retroactively to cover waterside lands already granted.[40] If there was such a generally-applicable intention to preserve the shoreline to public use, one would expect it to apply retroactively and permanently. The scope and intention of the legislation is limited to maintaining Crown ownership of the foreshore, where not otherwise expressly conveyed.

Perfecting title to shoreline lands would follow the ordinary course of title to any other Crown lands, either by affidavit alone, application for a grant, or by a quieting of title application. One should note that to perfect an adverse claim to the shoreline reservation in a quieting claim, express reference to possession of shoreline lands must be made in the quieting application.[41]

VI. Adverse Possession of Shoreline Reservations

Two cases of the modern era have addressed the issue of shoreline reservations, and competing private claims to shoreline lands. These cases provide some insight into private property rights where a shoreline reservation exists. In *Genge v Oram (No 2)*, the Court addressed a claim of trespass made by a Plaintiff who complained that the

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[38] *Ibid*, s 36; *Ring v Newfoundland and Labrador*, 2012 NLTD(G) 141, 328 Nfld & PEIR 119, aff'd 2013 NLCA 66, 344 Nfld & PEIR 23.

[39] Newfoundland, The Department of Municipal Affairs, *Lands Act Review Final Report*, by Krista Connolly, Tracy Freeman & Paul Pope (St. John's: Lands Act Review Committee, August 2015) at 93–94.

[40] *R v Tors Cove Excavating Ltd* (1994), 122 Nfld & PEIR 39 at 41, 24 WCB (2d) 388 (Nfld SC (TD)).

[41] *Quieting of Titles Act*, RSNL 1990, c Q-3, ss 22(1)(a), 22(1)(e), 22(2).

Defendant had built sheds on the Plaintiff's waterside land and were crossing the Plaintiff's land on a regular basis.[42] One notes the similarity of this case to *Bransfield* one century prior, although in *Genge* neither side's claim rested on a grant to the foreshore itself, but, rather, both parties relied on adverse possession. Nor does *Genge* turn on a statutory reservation of the seashore; it was decided in 1989, two years prior to the *Lands Act* amendments which encompass the seashore in the statutory reservation. Rather, the reservation at issue in *Genge* was express and noted on the Crown Grant of the upland property.[43] The Court assessed the competing claims of the Plaintiff and Defendant to the foreshore land, and Justice Barry found that the Defendant's claim may well give rise to eligibility to seek a Crown grant to the foreshore based on adverse possession – although barring such application, the shoreline remained vested in the Crown.[44] Notably, Justice Barry went further in discussing public rights to shoreline access when private claims are alleged. Of note, until such time as the private claim to land is crystallized with a formal grant, such property remains public. Accordingly, any such use of the shoreline as a private right-of-way cannot arise, because until the contrary is established, the land remains vested in the Crown and thus remains dedicated to public use.[45] This would seem to be a rule of general application, whether reserved by statute or expressed reservation in a grant. An adverse claimant must prove dispossession of the Crown and obtain the express grant from the Crown in order to remove the land from its presumptive reservation.

The case of *Reddy v St. John's (City)* dealt with an express statutory reservation.[46] In that case, the land at issue was adjacent to a freshwater pond. The Plaintiff had enclosed his property with a fence up to the high-water mark of the pond. The land at issue had previously been granted and was the subject of a 1980 quieting of titles application which left uncertain whether the foreshore had been included in the quieting.[47] It should be noted that this case confirms the requirement to expressly address the shoreline reservation if seeking to have such land included in a private quieting claim.[48] In the absence of such a declaration, the quieting will be taken to preserve the public right-of-way provided in statute. Given the change to the *Lands Act* in 1991, this would include any such oceanside reservations. Quietings predating the statutory reservation in the *Lands Act* may well have dispossessed the shoreline reservation, as it did not exist in statute prior to 1991, insofar as such quietings

[42] *Genge v Oram (No 2)* (1989), 74 Nfld & PEIR 111, 5 RPR (2d) 221 (Nfld SC(TD)) [*Genge* cited to Nfld & PEIR].

[43] See *ibid* at 113 for the grant at issue: Grant No 7534, St. John's, Crown Lands Registry (Vol 54, Fol 44) was made in 1894, and expressly reserves the shore "one chain distant from the high-water mark".

[44] *Ibid at* 122–123, 124–125, 128. This would affirm the belief that indeed, adverse possession of the shoreline would give rise to an entitlement to grant, in accordance with the general rules of dispossessing the Crown.

[45] *Ibid* at 124–125.

[46] *Reddy v St. John's (City)* (1993), 114 Nfld & PEIR 52, 44 ACWS (3d) 787 (Nfld SC(TD)) [*Reddy* cited to Nfld & PEIR].

[47] *Ibid* at 53–54.

[48] *Ibid* at 54–55, 59–60.

extended over any ungranted areas. Where the exclusions of a reservation were made in a grant prior to 1991, it was no different than any other Crown land in the province that remained ungranted. *Reddy* does turn on its unique facts, as there had been no private interference with the public right-of-way to the pondside shoreline until 1989 and the public nature of the reservation had been previously acknowledged by the municipal council.[49] However, this decision can be read in line with Justice Barry's decision in *Genge*, holding that private interference with public access is impermissible if the private claim is not expressly granted from the Crown – one presumes a quieting of title to the foreshore will also suffice, although on the facts of *Reddy* and in light of the Plaintiff's prior acknowledgement of the public right-of-way, it was not necessary to inquire further. Adverse possession of the foreshore may well give rise to such a grant, but adverse possession alone is insufficient to interfere with the presumptive public reservation. The added step of receiving clear title from the Crown must be met to formally divest the Crown reservation.

Extending the above interpretation of the foreshore reservation as a simple holdback of Crown lands, presumptively retained by the Crown unless expressly granted out, a question arises as to the effect of erosion of shorelines or other variation in the existing shoreline after a parcel of waterfront land is granted. This question arose in *obiter* before the Court of Appeal in *Evans v Newfoundland*, but was not decided in that case.[50] It should be noted that the reservation in the current section 7 of the *Lands Act* states that in the absence of an express grant, "a strip of Crown lands not less than 15 meters wide…was not intended and did not pass to the grantee, lessee or licensee."[51] This situation has no application to an adverse possession claim, as the Crown did not "pass" any land to an adverse possessor – the adverse possessor has taken his interest without permission. With regards to changes to the shoreline or high-water mark after the granting of land, the plain reading of the current statute and its predecessors indicates that the reservation (whether by statute or in the grant itself) is no more than ordinary Crown land. Thus, any erosion of the shoreline would not serve to adjust the reservation *ex post facto*; instead, the Crown simply loses a portion of the reservation to erosion or gains new Crown land in the event that the shoreline may extend further. Erosion, therefore, has no impact on private land claims. In instances of adverse possession, it is a question of ordinary occupation of the land at dispute, and in cases where there is a grant, no changes to the terrain after the making of the grant affect the scope of the private interest granted. The Crown cannot recall the land after the grant without making an express variation or expropriation in accordance with the provisions of the *Lands Act* or other applicable statutes, and the existing foreshore reservation provisions do not apply an automatic perimeter that changes as the shoreline may change.

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[49] *Ibid* at 56.

[50] *Evans v Newfoundland*, 2001 NFCA 1 at para 42, 197 Nfld & PEIR 44.

[51] *Lands Act*, supra note 36, s 7.

VII. Conclusion

In sum, it appears from a review of the jurisprudence and the evolution of the statute that the shoreline reservation along bodies of water is of no greater encumbrance or significance than any other parcel of Crown lands within the province. The reservation is a mere holdback of land, to be retained by the Crown except where expressly granted otherwise. As such, it is capable of being adversely possessed in the same manner as any other Crown land may be: by open, notorious, continuous, and exclusive use and occupation for twenty years immediately prior to 1977. This applies to the foreshore of all bodies of water, be they ponds, lakes, rivers or the ocean itself.

Surveyors and real estate practitioners should take care to review both the survey and written grant descriptions when addressing title to coastal lands granted prior to 1884, as these grants may retain foreshore rights which would not require proof of adverse possession of Crown lands.