THE PRINCE EDWARD ISLAND *LANDS PROTECTION ACT*: THE ART OF THE POSSIBLE

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Running through the history of [Prince Edward Island]...is a strong iron thread...of permanence and stability...made up of our family farms and the agricultural community made possible by the family farm. ... The very nature and character of this province is built upon the nature and character of our farming community.

-Speech from the Throne, 3rd Session of 52nd General Assembly, Prince Edward Island, 2 March 1972

There is, in this Province, a long, tempestuous and sometimes, passionate history connected with our land and our people's relationship to the land...the citizens of Prince Edward Island, individually and through their Government, are prepared to utilize the lessons of history and deal with the problems of land use and land ownership in a resolute and vigorous fashion.

-Speech from the Throne, 5th Session of 52nd General Assembly, Prince Edward Island, 7 March 1974

Historically, Islanders have had a special concern with the ownership and use of land. My Government believes in policies that make land ownership available to the maximum number of Islanders.

-Speech from the Throne, 4th Session, 55th General Assembly, Prince Edward Island, 4 March 1982

For years, successive administrations have struggled with the complexities of land policy, and the difficulty of reconciling the rights of individual property owners with the perceived collective rights of all Islanders. This dilemma is historical, and made especially challenging to our province because of its limited geography and high population density.

-Speech from the Throne, 3rd Session, 58th General Assembly, Prince Edward Island, 19 March 1991

[H]istory has demonstrated that Islanders and their land are one in spirit.

-Speech from the Throne, 4th Session, 58th General Assembly, Prince Edward Island, 23 March 1992

Issues relating to land ownership have long historical roots in our province.

-Speech from the Throne, 3rd Session, 59th General Assembly, Prince Edward Island, 9 March 1995

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> As people living on an island, we are acutely aware that our resources are finite, fragile and limited.
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> -Speech from the Throne, 4th Session, 61st General Assembly, Prince Edward Island, 14 November 2002

Prince Edward Island, in the Gulf of St. Lawrence on Canada's east coast, comprises 1.4 million acres (5,684 sq. km.) of farms, woodlands, red clay roads, gently rolling hills with vistas to the ocean, and strip development spreading out along the province's main highways. With a population of just under 136,000, Prince Edward Island is the smallest, most densely populated, and most rural of all Canadian provinces. Tourism promoters describe the Island as the Garden in the Gulf, and the agricultural sector is seen as integral to the Island economy and aesthetic. Although 55 per cent of the population is defined in census terms as rural, 92 per cent of this rural population does not live on farms. The number of Island farms fell from 10,137 in 1951 to 3,677 in 1976, while farm size, in terms of average acreage, increased from 171 acres in 1971 to 271 acres in 1991. The nature of the farms changed, too, from mixed farms to farms focussed on potato production. Between 1971 and 1991, Prince Edward Island increased its share of Canadian potato acreage from 17 per cent to 26 per cent, with more potato farms than in any other province.[1]

In the post-war years, Island governments, whether Liberal or Conservative, have given considerable attention to how best to maintain a land base for family farms, however that problematic term might be defined. Currently, Prince Edward Island relies on the *Lands Protection Act* to ensure that Islanders will be able to acquire their own parcel of Island land. This legislation sets a limit on total land acquisition of 1,000 acres for non-resident and resident individuals and 3,000 acres for corporations. Additionally, non-resident individuals and all corporations are limited to holding five acres in total, and not more than 165 feet of shore frontage, unless the provincial Cabinet grants permission to exceed these limits.[2] As the quotations above illustrate, these restrictions emerge from Islanders' sense of themselves as a beleaguered and vulnerable people trying to sustain their way of life on a limited land base. This paper describes the history of restrictions on land

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[1] Province of Prince Edward Island, Provincial Treasury, *Thirty-third Annual Statistical Review, 2006* (Charlottetown, June 2007) at 6; *Final Report of the Special Legislative Committee on the Lands Protection Act* (Charlottetown: Prince Edward Island Legislative Assembly, 1993) at 37 and 39 [*Special Legislative Committee on the Lands Protection Act*]. A farm was defined in this report as a potato farm if it had more than 277 acres planted in potatoes. Statistics Canada defines an urban area as an area with a population of at least 1000, and no fewer than 400 persons per square kilometre. Everything outside these areas is defined as rural. According to the 2001 Census, the population of Nunavut, a territory, is 68 per cent rural. The figure for Canada as a whole is 20 per cent. The rural farm population includes the households of all farm operators, who are defined as owners, tenants or hired managers living on a farm. Farm is defined as an agricultural operation producing one or more of a list of agricultural products for sale. See Statistics Canada, 2006 Census Dictionary online: <http://www12.Statcan.ca/english/census06/reference/dictionary/atoz.cfm >.

[2] *Lands Protection Act*, R.S.P.E.I. 1988, c. L-5, consolidated to 1 November 2003, online: <http://www.gov.pe.ca/law/statutes/pdf/l-05.pdf>; Environment Canada, *Agricultural Land Use Change in Canada* by J.D. McCuaig & E. W. Manning (Ottawa: Environment Canada Lands Directorate, 1982).

ownership on Prince Edward Island, and argues that these restrictions have been enacted instead of more specialized, but less politically palatable, measures to regulate land use.

At common law, people who were not British subjects or citizens had limited rights to acquire land in Britain or its colonies. The legislature of colonial Prince Edward Island formally granted aliens the right to hold Island land in 1859, but only up to 200 acres. The Colonial Office in London, which exercised supervisory power over Island lawmaking, described this legislation as "a singular *Act* enough" but confirmed it as "legal within the general empowering clause of the *Alien Act*."[3] The Island maintained these legislative provisions after joining Canada in 1873. In 1939, this restricted right of aliens to acquire land was incorporated into the province's *Real Property Act*, but with a proviso permitting aliens to apply to the Cabinet for permission to acquire land beyond the 200 acre limit. In 1964, these sections of the *Real Property Act* were amended to limit alien land acquisition to no more than ten acres of Island land and no more than five chains (330 feet) of shoreline, unless Cabinet approved acquiring more. Although the limits on alien land holding were inconsistent with the federal *Naturalization Act*, they were not challenged in the courts, perhaps because they were rarely enforced. Indeed, alien land owners could transfer good title to others, despite the restrictions, as the legislation from 1859 forward stated: "No title to real estate shall be invalid on account of the alienage of any former owner or holder thereof."[4]

As British citizens were not aliens in the colonies, the 1859 legislation did not apply to proprietors resident in the United Kingdom. When the British Crown acquired sovereignty over Prince Edward Island (then known as Ile St. Jean) by the *Treaty of Paris*, 1763, the imperial authorities divided the Island into 67 lots of about 20,000 acres each, and distributed all but one as rewards for military service in North America or as compensation for other services to the Crown. Many of the proprietors chose to lease land to settlers rather than sell parcels of land as freeholds. Even if proprietors offered to sell rather than lease, settlers resented having to buy what was available as a Crown grant in other British North American colonies. From its inception, the colonial legislature on the Island faced serious challenges to the existing pattern of land distribution—both from proprietors who were delinquent in paying quit rents and in establishing settlers on their lots as required by their grants, and from settlers who objected to the proprietors' monopoly of land ownership.[5]

The land question, as it was called, dominated Island politics for its first century

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[3] S.P.E.I. 1859 (XXI Vic.), c. 4; Colonial Office 226/91, 28-9, Dundas to Lytton, 11 July 1859 and notations thereon.

[4] *Real Property Act*, S.P.E.I. 1939, c. 44; *Real Property Act*, S.P.E.I. 1964, c. 27; John Spencer, "The Alien Landowner in Canada" (1973) 51 Can. Bar Rev. 389 at 392, 395-96; *Morgan and Jacobson v. Prince Edward Island (A.G.)*, [1973] 5 Nfld. & P.E.I.R. 129 at 134 (P.E.I.S.C.) [*Morgan*].

[5] About 100 individuals received land in the first distribution. The reserved lot, an inland lot of about 10,000 acres, was granted in 1786. On the Island land question to the 1840s, see Rusty Bittermann, *Rural Protest on Prince Edward: From British Colonization to the Escheat Movement* (Toronto: University of Toronto Press, 2006).

as a British colony, and was resolved only after Confederation in 1873. Freed of imperial supervision, the provincial legislature was able to pass legislation compelling the remaining proprietors to sell their estates to the Island government for re-sale to actual settlers. Many of those opposed to the proprietary system found it politically useful to characterize the proprietors as absentee landlords, but the post-Confederation legislation applied to all proprietors who held more than 500 acres, regardless whether they were Island residents or absentees. By then, one of the two largest Island estates, about 76,000 acres spread over seven different lots, was owned by Robert Bruce Stewart, a proprietor who lived on the Island. Nonetheless, the popular historical narrative told of a struggle to wrest control of Island land from parasitical non-resident proprietors.[6]

Absentee ownership became an issue again during the late 1960s and early 1970s, as the province turned to the federal government for assistance in modernizing the Island economy. In November 1968, Liberal Premier Alex B. Campbell was shocked by the maps used during a federal presentation on possibilities for Island development that revealed, incidentally, the extent of non-resident ownership. Restrictions on recreational developments in British Columbia's Gulf Islands had turned developers' attention to Canada's east coast, and advertisements in off-Island newspapers and magazines solicited buyers for large blocks of Island land for recreational use. As well, a flurry of land purchases by corporate interests who wanted large blocks of land for agriculture and forestry revived the old anxieties. As Campbell said: "If non-resident ownership continues to accelerate, we may reach a time when a majority of our land is owned by people who do not reside in our province, a subtle reversion to the absentee landlord situation of a century ago."[7]

In response, Campbell established a Special Committee of the Legislature to investigate the extent of land ownership by non-resident corporations and individuals. The Committee, which reported in April 1971, estimated that if current trends continued unabated, the amount of Island land held by non-residents—five per cent of all land and ten per cent of the shoreline—would almost triple by the end of the century.[8] The government addressed these concerns in two ways. An amendment to the *Real Property Act* restricted all non-residents, not just aliens, from acquiring more than ten acres of Island land or more than 330 feet of shore frontage, without

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[6] Rusty Bittermann & Margaret McCallum, "Upholding the Land Legislation of a 'Communistic and Socialistic Assembly': The Benefits of Confederation for Prince Edward Island" (2006) 87 (1) Canadian Historical Review 1; Margaret McCallum, "The Sacred Rights of Property: Title, Entitlement and the Land Question in Nineteenth-Century Prince Edward Island" in J. Phillips & B. Baker, eds., *Essays in the History of Canadian Law: Vol. VIII—In Honour of R. C. B. Risk* (Toronto: University of Toronto Press for the Osgoode Society, 1999) 358.

[7] Wayne MacKinnon, *Between Two Cultures: The Alex Campbell Years* (Stratford, PEI: Tea Hill Press, 2005) at 97, 171-75, 179 [MacKinnon]; Campbell quoted in Maurice Cutler, "Are We Alienating Too Much Recreational Land and Too Much of Our Best Agricultural Land?" (1975) 90 Canadian Geographical Journal 18 at 25.

[8] Royal Commission on the Land, *Everything Before Us*, vol. 1 (Charlottetown: Queen's Printer, 1990) at 25 [*Everything Before Us*].

Cabinet approval. This legislation was intended to limit further loss of land to non-residents, pending the appointment of a Royal Commission to be composed of suitable commissioners imbued with the desire to preserve the Island way of life.[9]

Appointed in August 1972, the Commissioners were directed to consider four main issues: the effects of rising land prices on family farm operations; the interest in other provinces and particularly in the eastern U.S.A. in developing recreational properties for sale to non-Islanders; the need to ensure that prime coastal land and conservation areas would be available for future public recreational needs; and measures to assist Island residents in developing land resources for their own benefit while protecting the Island's environmental quality and heritage.[10] Even though concern about non-resident acquisition of Island land had prompted the appointment of the Commission, its main recommendations dealt with land use, not land ownership. The Commission recommended development of detailed land use plans for all land in a strip one-half mile in depth around the entire shoreline, creation of detailed community land use plans, and a process to facilitate public participation in the creation and administration of such plans. Beyond these specific recommendations, the Commission urged the provincial government to foster and enforce a stewardship ethic with respect to land. Land owners would be required to meet minimum standards of land management, including preventing erosion, enhancing soil fertility, and maintaining buildings and fences in good repair. Those who did not would pay an annual maintenance fee.[11]

Convinced that concerns about land use should be dealt with directly rather than through controlling who could acquire land on Prince Edward Island, the Commission was not in favour of increasing the limits on non-resident land acquisition. Instead, the Commission regarded the existing restrictions as a temporary expedient that should be repealed once the Commission's other recommendations were implemented. The Commission, however, was concerned about corporate concentration of Island land holdings, and so recommended that corporations and partnerships, whether foreign or domestic, should require Cabinet

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[9] *An Act to Amend the Real Property Act*, S.P.E.I. 1972, c. 40; *The Guardian [of Charlottetown]* (1 April 1972); *The Guardian [of Charlottetown]* (15 August 1972); *Report of the Royal Commission on Land Ownership and Land Use* (Charlottetown: Queen's Printer, 1973) at 15 [*Report of the Royal Commission on Land Ownership and Land Use* (1973)].

[10] The chair of the commission was Charles Raymond, a professional geographer from Nova Scotia. As a federal civil servant, Raymond had co-authored a report on land use in Prince Edward Island. See C. W. Raymond, J. B. McClellan, & J. A. Rayburn, *Memoir #9, Land Utilization in Prince Edward Island, Geographical Branch, Mines and Technical Surveys* (Ottawa: Queen's Printer, 1963). The other two members of the Commission were Islanders—James Wells, a retired businessman and lawyer from Alberton and Charles Jones, a farmer from Pownal. See *The Guardian [of Charlottetown]* (15 August 1972).

[11] *Report of the Royal Commission on Land Ownership and Land Use* (1973), *supra* note 9 at 5-6, 41-44; the Commission produced a separate report prepared by an employee of the federal Department of Regional Economic Expansion on the land stewardship idea. See Mary Rawson, "Minimum Maintenance: A Report for the Royal Commission on Land Ownership and Land Use, Prince Edward Island" (April 1973), Charlottetown, Prince Edward Island Public Archives and Records Office (PARO) (RG 24.3).

approval to acquire more than 200 acres of Island land.[12] The Campbell government accepted only part of this recommendation, maintaining the limits of ten acres and five chains of shorefront for non-residents, but amending the *Real Property Act* to extend these limits to all corporations, foreign or domestic.[13] The government also created a permanent Land Use Commission to advise the Cabinet on guidelines for land use; policies for enforcing the minimum maintenance of land; programmes for voluntary identification of land for a specific use, such as agriculture; and policies relating to the purchase, ownership and sale of land by partnerships, syndicates, companies, and corporations. A land identification programme was instituted in 1977, permitting limits on land use as a condition for non-resident and corporate acquisitions, or for government-assisted purchases of agricultural land.[14]

Despite these measures, by July 1975, non-residents owned over 100,000 acres of Island land, about eight per cent of the total Island land base.[15] Doubts about the government's legal capacity to regulate non-resident land acquisition had been resolved by the 1975 decision of the Supreme Court of Canada in *Morgan and Jacobson v. Prince Edward Island (A.G.)*. In this litigation, two American citizens, residents of New York state, challenged the 1972 provisions of the *Real Property Act* limiting the amount of land that non-residents could acquire. Both the Island Supreme Court and the Supreme Court of Canada upheld the legislation as a valid exercise of the provincial government's power to legislate with respect to property and civil rights within the province. Had the restriction been limited to aliens, the outcome might have been different. However, because the legislation applied to Canadian citizens who did not reside in Prince Edward Island, but did not apply to aliens who resided on the Island, the restrictions could not be said to be directed at aliens, but rather at regulation of land ownership. In their reasons for decision, both courts referred to the Island's history of resistance to absentee ownership; it was one of Chief Justice Laskin's few references to history in a constitutional case.[16]

In a speech at a federal-provincial conference in 1972, Premier Campbell had said:

> We in Prince Edward Island have no intention of allowing our province, through attrition, neglect or oversight, to end up in the hands of non-residents who have little interests in the communities of our province, little

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[12] *Report of the Royal Commission on Land Ownership and Land Use* (1973), *supra* note 9 at 69-70.

[13] *Real Property Act,* S.P.E.I. 1974, c. 84; the following year, S.P.E.I. 1975, c. 80 amended the legislation to exempt acquisitions through inheritance from spouses or parents who were Island residents when they died.

[14] *An Act to Establish the Land Use Commission*, S.P.E.I. 1974, c. 22; *Everything Before Us, supra* note 8 at 30-31, 207.

[15] *Everything Before Us, ibid.* at 205.

[16] *Morgan, supra* note 4; Maurice Cutler, "Shall Canada's Land Go to the Richest Bidders?" (1975) 91 Canadian Geographical Journal 26 at 38; Philip Girard, *Bora Laskin: Bringing Law to Life* (Toronto: University of Toronto Press for the Osgoode Society for Canadian Legal History, 2005) at 468.

> concern for the preservation of our way of life, little involvement in our Island institutions, and who may simply view the province as the place to spend a holiday or opt out of the urbanized society.[17]

Such declarations notwithstanding, in the next four years, Cabinet approved 85 per cent of the applications for permission to exceed the statutory limits on land acquisition. The existence of the limitations, however, may have deterred non-resident purchasers, as the per centage of Island land held by non-residents did not increase as rapidly as had been feared at the beginning of the decade.[18]

The change in government with the Conservative election victory in 1979 produced little change in non-resident or corporate land ownership policy. The new government asked the Land Use Commission to review the existing legislation, and its recommendations were the reverse of those of the 1972 Commission. The Land Use Commission supported limits on non-resident ownership but not restrictions on corporate landholding. According to the Commission, the main issue was not corporate land ownership per se but corporate control of the agricultural sector. If an agribusiness corporation owned land for crop production and also owned the facilities for processing those crops, it could dictate the terms on which it would buy crops from smaller producers who did not have access to alternative processing facilities. In effect, the agribusiness corporation could use its control of the market to reduce small producers to "a form of tenancy" where they would have to produce what the processors wanted on the processors' terms. To limit the expansion of agribusiness on the Island, the Commission recommended passage of legislation, drafted in consultation with the public, to be "used in a judicious and responsible manner" to limit the expansion of non-family-farm corporations.[19]

The Land Use Commission's recommendations would apply particularly to Cavendish Farms, a producer of frozen French fries, and part of the vertically-integrated business empire founded by New Brunswick-born K. C. Irving. In 1979, Cavendish Farms had taken over C. M. McLean Ltd. in New Annan, the Island's biggest potato buyer and only potato processor.[20] Two years later, Cavendish Farms

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[17] MacKinnon, *supra* note 7 at 177.

[18] Prince Edward Island Land Use Service Centre and the Maritime Resource Management Service Council of Maritime Premiers, *Non-Resident Land Ownership Legislation and Administration in Prince Edward Island* (Ottawa: Environment Canada, 1978); Lands Directorate Environment Canada, *The Land Use Impacts of Recent Legislation in P.E.I.: An Analysis of the Land Development Corporation and Non-resident Ownership* by Esther Keinholz (Ottawa: Environment Canada, 1980); Edward MacDonald, *If You're Stronghearted: Prince Edward Island in the Twentieth Century* (Charlottetown: Prince Edward Island Museum and Heritage Foundation, 2000) at 308.

[19] Wightman to Binns (25 June 1980), PARO, Department of Community Affairs (RG 38, Acc. 98-008, Land Use Commission, Box 5); Report to Executive Council on Non-Resident and Corporate Land Ownership (8 January 1980), PARO, Royal Commission on Land Ownership and Land Use on P.E.I. (1988) (RG 24.11, Land Use Commission, Box 3).

[20] On the Irvings generally, see Russell Hunt & Robert Campbell, *K. C. Irving: The Art of the Industrialist* (Toronto: McClelland & Stewart, 1973); John DeMont, *Citizens Irving: K.C. Irving and His Legacy* (Toronto: Doubleday, 1991); Douglas How & Ralph Costello, *K.C.: The Biography of K. C. Irving* (Toronto: Key Porter, 1993) [How & Costello]; Harry Sawler, *Twenty-First Century Irvings* (Halifax: Nimbus, 2007).

informed the government that it planned to apply for permission to purchase additional land, adding to the pressure for action on the recommendations of the Land Use Commission. Angus McLean, the Conservative Premier, referred the matter to the legislature's Standing Committee on Agriculture.[21] The Committee reported that the public favoured controls on corporate ownership, and the Committee chair, Gordon Lank, summarized the committee's recommendations as "Don't let Cavendish Farms do what they want to do."[22] Premier James Lee, who had replaced Angus McLean as Conservative leader, reiterated the committee's sentiments: "We won't let the Irvings or Cavendish Farms take control of our lands."[23]

The bill to implement the Committee recommendations retained the limits of ten acres and 330 feet of shoreline for non-residents and corporations other than farm corporations, and introduced acreage limits for both residents and non-residents: 1,000 acres for individuals and 3,000 acres for corporations, unless they received permission to hold more.[24] The Land Use Commission in its 1980 Report, after warning against enacting legislation that would create work for corporate lawyers, suggested that Prince Edward Island look to Saskatchewan's *Farm Ownership Act* as a model. At the time, the Saskatchewan legislation, first enacted in 1974, prohibited non-residents from holding more than ten acres of agricultural land, and required non-agricultural corporations to obtain permission from the Farm Ownership Board in order to hold more than 160 acres of agricultural land. The Island government borrowed ideas from the Saskatchewan *Act*, but did not copy it.[25]

With the bill before the legislature, the Standing Committee on Agriculture asked for further public comment. The most contentious issues were whether to permit non-residents and non-farm corporations to exceed the statutory limits on land acquisition, and whether to permit exceptions to the limits on aggregate land holdings. The final version of the legislation provided for the Land Use Commission to review applications for exemptions from both sets of restrictions, but left the decision to Cabinet, as that ensured accountability to the electorate. The *Act* also provided for monitoring and enforcing the limits. If an individual's or corporation's aggregate holdings of land owned in fee simple and land held by lease exceeded the statutory limits, the individual or corporation had until 1 April 1985 to reduce aggregate land holdings to the amount owned in fee simple when the *Act* came into force or to the statutory limit, whichever was greater. The government could force

[21] Marge Misek & Mark B. Lapping, "Making Land Policy: P.E.I.'s Attempts to Control Individual and Corporate Land Ownership" (1984) 24 (2) Plan Canada at 57-58.

[22] "3,000 Maximum Limit Urged on Ownership of PEI Land" *The Globe and Mail* (30 January 1982) 14.

[23] How & Costello, *supra* note 20 at 363.

[24] *The Guardian [of Charlottetown]* (8 April 1982); *The Guardian [of Charlottetown]* (5 May 1982).

[25] Report to Executive Council on Non-Resident and Corporate Land Ownership (8 January 1980), PARO, Royal Commission on Land Ownership and Land Use on PEI (1988) (RG 24.11, Land Use Commission, Box 3); *Farm Ownership Act*, S.S. 1973-74, c. 98; R.S.S. 1978, c. S-17; R.S.S. 1978 (Supplement), c. 66 (Supp.); S.S. 1979-80, c. 94.

compliance by obtaining a court order requiring land owners to dispose of excess holdings.[26]

In its 1980 Report, the Land Use Commission had noted the need to close a loophole in the existing rules that restricted outright purchases only, not acquisition through long-term lease arrangements.[27] The *Lands Protection Act* attempted to do so, by defining land holding as "an interest conferring the right to possession, occupation or use of land in the province . . ." and also with an explicit statement that aggregate land holding "comprises both land owned and land held by way of lease."[28] The government interpreted these provisions as requiring land holders to count both lands they held in fee simple but leased to others (their interests as lessors), and lands they leased from others (their interests as lessees), in their aggregate land holdings. Cavendish Farms disagreed.

At the time, Cavendish Farms purchased 80 per cent of the potatoes that it processed at its New Annan plant from about 75 different growers, and grew the rest on 2,000 acres that it owned or leased. The firm's media people argued that, in order to maintain year-round employment at the New Annan plant, Cavendish Farms needed to grow enough potatoes to have early potatoes to process in late summer, as well as quality potatoes to store over the winter for processing almost a year later. Because good farm husbandry requires that potatoes be planted in rotation with other crops, Cavendish Farms said it needed 6,000 acres in total in order to grow 2,000 acres of potatoes each year. Critics contended that Cavendish Farms could meet its needs by purchasing potatoes from independent growers, and that the firm wanted to grow enough of its own potatoes to give it the power to dictate prices when negotiating purchasing contracts with independent growers. Whatever its motives, Cavendish Farms had been busy acquiring Island land. In 1984, when it applied for permission to buy more, the Land Use Commission held public hearings on what to recommend to Cabinet. Based on the public response, Cabinet denied the application and required Cavendish Farms to divest itself of 1,400 acres it held over the 3,000 acre limit. Instead, Cavendish Farms challenged the government's interpretation of the *Lands Protection Act*.[29]

The government referred the matter to the Island Supreme Court for a ruling, with Cavendish Farms granted intervenor status. In its written submission on the *Reference*, Cavendish Farms asserted, without supporting citations, that the primary purpose of the *Lands Protection Act* was the preservation of land for agricultural

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[26] *The Guardian [of Charlottetown]* (6 May 1982); Misek & Lapping, *supra* note 21 at 58; *Lands Protection Act*, S.P.E.I. 1982, c. 16 [*Lands Protection Act 1982*].

[27] Report to Executive Council on Non-Resident and Corporate Land Ownership (8 January 1980), PARO, Royal Commission on Land Ownership and Land Use on PEI (1988) (RG 24.11, Land Use Commission, Box 3).

[28] *Lands Protection Act 1982, supra* note 26 at ss. 1(1)(g), 7(1)(a).

[29] *Everything Before Us, supra* note 8 at 75, 77-85; *Special Legislative Committee on the Lands Protection Act, supra* note 1 at 5-6; Misek & Lapping, *supra* note 21 at 58. The *Agricultural Crop Rotation Act*, S.P.E.I. 2001, c. 25, currently requires farmers to plant potatoes and other crops in a three-year rotation.

purposes. Thus, Cavendish Farms argued, the *Act*'s definition of land holdings encompassed only interests in land giving the right to possess, occupy, and use the land physically, and not interests such as those of a lessor, which carried no right to immediate possession. The Attorney General asserted in its written statement, also without supporting citations, that the *Act* had quite a different purpose—to limit and control the amount of land held by non-residents. Therefore, to include land leased to others in aggregate land holdings was consistent with the whole purpose and object of the *Act*. "Considering the history of the Province . . . it is inconceivable that the Legislature intended to exclude lessors from the application of the *Act*. After all it is common knowledge that the absentee landlord issue was a factor in the Province's decision to enter Confederation."[30] Curiously, given the issue to be determined on the *Reference*, the Attorney General's written submission did not stress that the *Act's* limit on aggregate land holdings of 1,000 acres for individuals and 3,000 acres for corporations applied to anyone, Islander or non-resident.

The three judges who heard the *Reference* in the Island Supreme Court recognized that the *Lands Protection Act* was motivated by anti-monopoly as well as anti-absentee sentiments. Justice McQuaid, writing for the court on this issue, described the legislation as having being enacted "for the purpose of controlling the acquisition of land holdings within the province to avoid concentration of lands, particularly but not necessarily restricted to, agricultural lands, in large holders, whether individual or corporate."[31] No one disputed that the interest of a lessee of land fell within the definition of land holding in the *Lands Protection Act*, and Justice McQuaid so ruled. Justice McQuaid approached the second question—whether the definition included the interest of a lessor of land—by asking whether the legislation was concerned with all ownership interests, or only, as Cavendish Farms argued, with those interests that included the right to immediate physical possession and use of the land. In Justice McQuaid's view,

> [t]he entire thrust of the legislation is undoubtedly the intended control of present ownership, i.e. possession and occupation, of Island land. . . . There can be little doubt that the Act restricts, for its purposes, the broader meaning of land "use" to the actual physical husbandry thereof, either immediate or immediately intended. It is not within the contemplation of the Act that, for its purposes, land might be acquired merely for the
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> purpose that it be "used" as a source of revenue other than such as might arise out of its employment in agriculture.[32]

Thus, Justice McQuaid ruled that a fee simple owner of land would not have to count

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[30] *Reference re Lands Protection Act (P.E.I.)*, Factum of the Intervenor, "Cavendish Farms"; Factum of Attorney-General, Prince Edward Island Supreme Court, file GD 6847.

[31] *Reference Re Lands Protection Act* (1987), 40 D.L.R. (4th) 1 (P.E.I.S.C.) [*Reference Re Lands Protection Act*] at 4.

[32] *Ibid.* at 8.

any portion leased to others as part of its land holdings.[33]

This conclusion seems inconsistent with Justice McQuaid's acknowledgement that the *Lands Protection Act* was inspired by "memories of the troubles occasioned by the system of absentee landlords prevalent in pre-Confederation days" and that its purpose was "prevention of concentration of ownership of [the Island's] limited [land] resource in the hands of a limited number of elite landholders."[34] If the legislation was motivated by anti-landlord sentiment, why exclude land leased to others from an individual's or corporation's aggregate land holdings? Justice McQuaid justified this conclusion by focussing on the nature of the lease relationship, whereby the lessor gives up the right to exclusive possession of the land for the term of the lease. Justice McQuaid's description of the nature of the lease, though, is not determinative of the issue that the court had to decide, particularly given that leases and growers' contracts common in the potato industry contain such detailed and specific requirements for the tenant's use of the land that, in reality, the lease maintains the lessor's control of the land even without the immediate right to exclusive possession.[35]

Cavendish Farms also argued that the *Lands Protection Act* violated the *Charter of Rights and Freedoms*, in effect since 1982. Cavendish Farm relied on two *Charter* provisions—s. 7, which protects the right to life, liberty, and security of the person, and s. 6, which protects the right of Canadian citizens and permanent residents to pursue a livelihood in any province. Cavendish Farms argued that the limits on aggregate land holdings restricted individuals and corporations from engaging in land-based industries such as agriculture on an economically viable basis, and so infringed the security of the person and the right to pursue a livelihood in any province. Justice McQuaid and Chief Justice Carruthers rejected this argument, concluding that s. 7 did not include economic rights, including the right to own property. As well, there was nothing in the *Lands Protection Act* that prevented a person from becoming a resident of Prince Edward Island in order to buy land there. Justice Mitchell wrote separate reasons for decision in which he too rejected the *Charter* argument. In his view, *Charter* protection of security of the person encompassed a limited right to acquire enough property to provide for the basic needs of physical survival, such as food and shelter, but the *Lands Protection Act* was not so restrictive as to infringe this right.[36]

The Supreme Court released its ruling on the *Reference* in July 1987. The new Liberal government led by Joe Ghiz, whose election victory the previous spring had ended seventeen years of Conservative government, did not introduce legislation immediately to overturn the ruling. Instead, the government enacted legislation

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[33] *Ibid.* at 11.

[34] *Ibid.* at 8.

[35] Tom Murphy, "Potato Capitalism: McCain and Industrial Farming in New Brunswick" in Garry Burrill & Ian McKay, eds., *People, Resources and Power* (Fredericton: Acadiensis Press for the Gorsebrook Research Institute of Atlantic Canada Studies, 1987) 19 at 24-26.

[36] *Supra* note 31 at 16-17.

halving the limits of ten acres and 330 feet of shore frontage for non-resident and non-farm corporate owners.[37] In October 1987, the government appointed a Royal Commission on the Land, to consider questions of land ownership, land use, and the quality of the landscape. After extensive public hearings and research into land legislation in other jurisdictions, the Commission concluded that there was general acceptance on the Island of the *Lands Protection Act*. However, the lack of administrative staff, failure to require divestment of excess holdings, and "marked degree of reluctance" to block land transfers to non-residents had turned the legislation into "a virtual open-door policy to non-resident land ownership." The Commission called for regulations defining the circumstances that would justify granting exceptions to the limits on land holdings. The Commission also criticized the government for failing to amend the *Lands Protection Act* to reverse the *Reference* decision that had "markedly altered" it.[38]

As in the early 1980s, public concern about land ownership had been generated in part by another Irving move to acquire Island land. By 1990, Cavendish Farms had gained a 30 per cent share of the eastern Canadian frozen French fry market. Mary Jean Irving, grand-daughter of K.C. Irving, lived on the Island with her husband, Stewart Dockendorff, and was acquiring land through their company, Indian River Farms. In April 1990, news broke that the couple had recently spent $10 million to buy 4,000 acres of farmland in the western part of the province. Farmers marched to Premier Joe Ghiz's office to protest. A marcher's sign summarized people's fears in three words: "Prince Irving Island." In his capacity as Minister of Justice, Ghiz wrote to Indian River Farms, requiring that the company and its owners disclose their land holdings, and divest themselves of any excess holdings; otherwise, the government would take legal action against them. The next day, on 24 April, the government introduced a bill to amend the *Lands Protection Act*. In two days, the bill passed the required three readings and received royal assent. Only three sections long, the *Act* deleted various words and clauses in the existing legislation, and would make sense only to people reading it with the text of the *Lands Protection Act* in front of them. The consequences of the amendments, however, were clear: henceforth, farm corporations, like other corporations, would require the government's permission to acquire more than five acres or 165 feet of shore. Six months later, Mary Jean Irving acquiesced in the face of Ghiz's ultimatum, complaining that any "legal proceedings against me would be used to explore other private aspects of the Irving family's business interests."[39]

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[37] S.P.E.I. 1988, c. 37.

[38] *Everything Before Us*, *supra* note 8 at 7, 33-34, 89-90, 223, 227-28. The Commission was chaired by Douglas Boylan, former clerk of the provincial Cabinet. Members were Gail Wellner, a Charlottetown business consultant; Elmer MacDonald, a farmer, businessman, and past president of the Prince Edward Island Potato Marketing Board; and Hugh Robbins, a retired engineering consultant living in Montague, in Kings County. See "Land Information Hearings Near" *The Guardian [of Charlottetown]* (2 February 1989).

[39] DeMont, *supra* note 20 at 185-86; Sawler, *supra* note 20 at 58-62; Prince Edward Island, Leglislative Assembly, *Journal 1990*, 144, 162, 168, 169, 173; Kevin Cox & Charles Duerden, "K.C. Irving's Granddaughter Told to Reduce Land Holdings on PEI" *Globe & Mail* (16 May 1990) A11.

Further Irving attempts to expand their land holdings on the Island provoked further flurries of anxiety over loss of farm land to non-agricultural uses, and increasing corporate dominance in agriculture. In 1991, with the creation of the Island Regulatory and Appeals Commission (IRAC) as a permanent body to assume responsibility for a variety of administrative matters and decisions, Premier Ghiz tried to distance the government from controversial land acquisition issues by giving IRAC the power to decide applications for exceptions to the restrictions in the *Lands Protection Act*.[40] The following year, Mary Jean Irving applied for permission to purchase 5,700 acres of land, including a potato packing facility, in Morell on St. Peter's Bay, Kings County. In response to public demands that the Irving application be determined by the people's elected representatives after public discussion, and not by bureaucrats, Ghiz introduced amendments to the *Lands Protection Act* that continued IRAC's responsibility for reviewing applications, but left the final decision to Cabinet. The amendments also repealed the *Act*'s provisions for granting special permits to hold more than 1,000 or 3,000 acres, and voided all pending applications for special permits. One of those hoping to sell land to Mary Jean Irving complained about this interference with his retirement plans, and a couple of letters to the editor denounced the move as an attack on democracy, the free market, and the rights of private citizens. Ghiz's decision, however, received widespread support, including from the Conservatives and the New Democrats, the Social Action Commission of the Roman Catholic Diocese of Charlottetown, and farm leaders.[41]

In introducing the 1992 amendments, Ghiz promised a comprehensive review of the *Lands Protection Act*. A Special Legislative Committee spent a year on this task, holding public hearings and releasing its report in March 1993, just prior to the provincial election in which the new Liberal leader, Catherine Callbeck, led her party to another victory. The Committee hearings revealed "intense support" for keeping the Island's "productive agricultural resource in family farming." The Committee concluded that the "central purpose" of the limits on aggregate ownership was "to support family farm-based agriculture on P.E.I. for the social and economic benefit of the province...by preventing large-scale corporate farming, and by promoting the wide distribution of land ownership rather than its concentration in a few hands. As such, the limits encourage the continued operation of a large number of moderately-sized farms, and promote the availability of agricultural land for new and developing farm operations." The Committee Report provided a brief account of legislative attempts to control land ownership, and noted some divergence between the original focus on limiting non-resident ownership, and the current concern about monopoly control of the Island's agricultural land. The divergence was not as great as the Committee supposed, however, as the post-Confederation legislation that resolved the land question through government acquisition of all large estates also had an anti-monopolist focus.[42]

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[40] S.P.E.I. 1991, c. 18.

[41] *The Guardian [of Charlottetown]* (7, 8, 9, 11, 14 April 1992); S.P.E.I. 1992, c. 38.

[42] *Special Legislative Committee on the Lands Protection Act*, *supra* note 1 at 8-11.

Identifying the problem as absentee ownership helped generate widespread support on the Island for the limitations on land acquisition in the *Lands Protection Act*.[43] The Committee noted, as had others before it, that restrictions on land ownership were insufficient to protect the land base necessary for productive agriculture, but there was little public support for regulating what owners could do with their land.

> The fundamental question is the extent to which the public good should override individual freedom to do with one's land as one wishes. Land use restrictions such as zoning and maintenance requirements can have a significant impact on a large number of Islanders. Land ownership restrictions can achieve some of the same policy goals, while confining the impact to those Islanders who wish to sell or purchase land.

Overall, the Committee recommended changes that would strengthen the existing provisions. In the Committee's view, permission to exceed the statutory limits of five acres and 165 feet of shoreline should be granted only in defined exceptional circumstances, with the decision to be made by the Island Regulatory and Appeals Commission. The Committee also recommended that corporations other than farm corporations owned by resident farmers should be limited to holding 1,000 rather than 3,000 acres. As had the 1990 Commission, the Committee called for legislation to reinstate the interpretation of the *Lands Protection Act* that the *Reference* decision had repudiated. The Committee rejected Cavendish Farm's request for reinstatement of the special permits under which, prior to Ghiz's 1992 amendments, individuals or corporations could exceed the limits on aggregate land holdings. The Committee, however, supported retaining the provision giving Cabinet the power to make regulations exempting land owners or land holdings or classes of land owners or land holdings from the 1,000 or 3,000 acres limits.[44]

The Committee recommendations reflected the majority public opinion as expressed at the Committee hearings, but the amending legislation introduced in 1995 did not implement the Committee recommendation to treat farm and non-farm corporations differently. Nor did the legislation return the power to determine applications to the Island Regulatory and Appeals Commission. The legislation reversed the *Reference* decision, providing that aggregate land holdings included land owned and occupied by the owner, land held on leasehold, and land owned but leased to another. The *Act* also amended the definition of land that had been in the *Act* since 1982, dropping the requirement that the land be "used or capable of being

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[43] Just before the Committee released its report, the Prince Edward Island Supreme Court (Trial Division) rejected a challenge to other legislation that discriminated between Islanders and non-residents. In *McCarten v. Prince Edward Island*, the applicants sought a declaration that provisions of the *Real Property Tax Act* violated the Charter in creating a tax credit for Island residents that was not available to off-Island property owners: [1993] P.E.I.J. No. 15. In the Court of Appeal, Justices Mitchell and Carruthers affirmed the trial judge's rejection of the applicants' challenge, with Justice McQuaid dissenting: (1994), 112 D.L.R. (4th) 711. The Supreme Court refused leave to appeal: [1994] S.C.C.A. No. 173.

[44] *Special Legislative Committee on the Lands Protection Act*, *supra* note 1 at 8, 16-18, 21-28, 30-33, 49.

used for agriculture." In addition, the *Act* required individuals holding more than 750 acres and corporations holding more than 2,250 acres to file an annual statement with the Land Use Commission disclosing details of their land holdings. The legislation did not reinstate the general provisions for applying special permits to hold more than 1,000 or 3,000 acres, but a "grandfathering" clause enabled individuals or corporations whose land holdings as of 1 December 1994 exceeded the statutory limit to apply for a special permit to continue to hold excess land, providing they arranged to lease the excess to others by 1 June 1997.[45]

Alan Buchanan, who as Minister of Provincial Affairs introduced the 1995 legislation, argued that the grandfathering clause was necessary to avoid undermining the viability of farming operations that depended on a land base acquired under the old rules. He also cited the *Reference* as determining that the government did not have the power of "retroactively making someone's landholding illegal." Although there is nothing in the *Reference* decision to justify this assertion, it was repeated in an editorial defending the legislation against its critics.[46] The *Reference* decision in 1987 had enabled Cavendish Farms to avoid the divestment requirements of the 1982 *Lands Protection Act*. In its presentation to the 1993 Special Legislative Committee, Cavendish Farms argued that it needed 12,000 acres of land, as freehold or leasehold, in order to grow 4,000 acres of potatoes in a proper crop rotation—twice the acreage that it had argued it needed just a few years earlier. The Committee had reported public concern that a large, integrated producer/processor operation could exercise undue control in the industry, as well as public support for preventing this development by setting limits on land acquisitions.[47] It is not surprising, then, that the National Famers Union denounced the 1995 amendments as "an Irving bill", while Herb Dickieson, leader of the New Democrat Party, criticized the government for creating two classes of land owners—those who could keep the land they had already acquired above the statutory limits and those who were subject to the limits.[48]

The Liberals lost the election in November 1996. During the campaign, Pat Binns, the leader of the Conservatives, criticized the Liberals for their lax enforcement of the *Lands Protection Act*. Once in office, however, the Conservatives postponed the deadline for implementing the 1995 amendments while considering how to proceed.[49] In December 1997, Minister of Community Affairs and Attorney General Mitch Murphy, introduced legislation that would require all individuals and corporations to reduce their total holdings to the statutory limits within nine years,

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[45] *An Act to Amend the Prince Edward Island Lands Protection Act,* S.P.E.I. 1995, c. 22.

[46] "Land use laws amended—Province closes loopholes in Lands Protection Act, tightens up enforcement" *The Guardian [of Charlettetown]* (13 April 1995) at 1, 2; "NFU suggestion goes over the line" *The Guardian [of Charlettetown]* (19 April 1995) at 6.

[47] *Special Legislative Committee on the Lands Protection Act, supra* note 1 at 22, 57-63.

[48] "Land act amendments fail to deal with major issues: NFU" *The Guardian [of Charlottetown]* (18 April 1995) 3; "Land act sows inequality: NDP" *The Guardian [of Charlottetown]* (19 April 1995) 4.

[49] MacDonald, *supra* note 18 *at* 374-5; "Looser land limits popular way to go for many farmers" *Guardian* (20 May 1998) A3; S.P.E.I. 1997, c. 26; S.P.E.I. 1997, c. 56; S.P.E.I. 1997, c. 58; S.P.E.I. 1998, c. 78.

regardless whether the land was owned and occupied, leased to others, or leased from others, and regardless when they had acquired the excess acres. The bill was then referred to the Standing Committee on Agriculture, Forestry and Environment. After holding public hearings, the Committee supported the bill's requirement that land owners dispose of their excess holdings, but suggested further amendments to permit land owners who used most of their land for agriculture to exclude non-arable land from their aggregate land holdings. Committee Chair Jamie Ballem warned, however, that allowing farmers to exceed the ownership limits because part of their land was not suitable for agriculture would mean giving them special treatment on the basis of occupation, and might make the *Lands Protection Act* vulnerable to a *Charter* challenge or to a challenge under the provincial *Human Rights Act*.[50]

Given the differences between the government's bill and the Report of the Standing Committee, the opposition Liberals suggested that the Conservatives were deeply divided on what to do with the *Lands Protection Act*. With widespread support for maintaining the existing limits, and without the bureaucracy necessary to implement the Committee's suggestions, there was little pressure to try something new. The legislation enacted in June 1998 repealed the grandfathering provisions for special permits introduced in 1995, and substituted a new special permit regime that required that permit holders divest themselves of all land holdings in excess of the statutory limits within nine years from the date of the permit, and, prior to divestment, to lease all excess land to another person or corporation. Perhaps to aid the government in defending the *Lands Protection Act* should it face a legal challenge, the amending legislation also added the following as s. 1.1 of the *Act*:

> The purpose of this *Act* is to provide for the regulation of property rights in Prince Edward Island, especially the amount of land that may be held by a person or corporation. This *Act* has been enacted in the recognition that Prince Edward Island faces singular challenges with regard to property rights as a result of several circumstances, including:
>
> > a) historical difficulties with absentee land owners, and the consequent problems faced by the inhabitants of Prince Edward Island in governing their own affairs, both public and private;
> >
> > b) the province's small land area and comparatively high population density, unique among the provinces of Canada, and

[50] Prince Edward Island, Legislative Assembly, *Journal 1997-1998*, Appendix V, "Report of the Standing Committee on Agriculture, Forestry and Environment", 919, 922-24; "Looser land limits popular way to go for many farmers" *The Guardian [of Charlettetown]* (20 May 1998) A3; "Province sticking to land limits: Premier says no dice to panel recommending slacker rules" *The Guardian [of Charlettetown]* (29 May 1998) A1, A3; "No easy fixes for land laws" *The Guardian [of Charlettetown]* (29 May 1998) A6; Prince Edward Island, Legislative Assembly, *Hansard*, 5446-5450 (28 May 1998), online: The Legislative Assembly of Prince Edward Island <http://www.assembly.pe.ca/sittings/1998spring/hansard/1998-05-28-hansard.pdf>.

> c) the fragile nature of the province's ecology, environment, and lands and the resultant need for the exercise of prudent, balanced and steadfast stewardship to ensure the protection of the province's ecology, environment, and lands.[51]

The Binns government, which remained in power until 2007, did not introduce any more changes to the *Lands Protection Act*.[52] In 2004, non-residents owned nine per cent of the Island land base. This figure had remained constant since 1997, even though Cabinet approved almost all applications from non-resident individuals (about 105 per year from 1996 to 2006) and from corporations, both resident and domestic (about 2000 per year in the same period) for permission to acquire land in excess of the statutory limits of five acres and 165 feet of shoreline. The Island Regulatory and Appeals Commission offered three reasons why the high rate of approvals did not produce an increase in non-resident ownership: some non-residents became residents after acquiring property on the Island; some approvals were for transfers from non-residents to non-residents; and some non-residents transferred property to residents. In 2005-2006, 115 individuals and 27 corporations filed statements disclosing their land holdings, a requirement since 1995 of those holding over 750 and 2,250 acres respectively.[53]

In the first years following enactment of the divestment requirements, the Island Regulatory and Appeals Commission focussed on achieving compliance with the *Act* rather than imposing penalties.[54] So far, the Commission has imposed penalties in only two cases where land owners have failed to divest themselves of excess land holdings. In 2003, Walter Wells, who owned 2,660 acres across two counties, was fined $1,800 for exceeding the limit on individual aggregate land holdings. Wells considered challenging the validity of legislation that made it illegal for him to hold land that he had acquired legally, but he decided not to waste money on litigation, and instead to create a family trust to hold his excess acres.[55] In 2006, the Commission began to investigate the land holdings of a related group of Irving companies, including Grand Forest Holdings, Island Holdings, Cavendish Agri-Services, Simmac Packaging, J.D. Irving Ltd. and M.F. Schurman Company,

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[51] S.P.E.I 1998, c. 79.

[52] Two acts, passed in May and December of 2002 (S.P.E.I. 2002, c. 32 and S.P.E.I. 2002, c. 15 respectively) clarified existing provisions of the legislation.

[53] Island Regulatory and Appeals Commission, *Report on Trends in Non-Resident Land Ownership, 1994 to 2000* (Charlottetown, 2001); *Report on Non-Resident Land Ownership, 2000 to 2002* (Charlottetown, 2003); *Report on Non-Resident Land Ownership, 2003 to 2004* (Charlottetown, 2005) at 6, *Annual Report, 2005-06* (Charlottetown, 2006) at 30-33.

[54] *In the Matter of Alleged Violations of the Prince Edward Island Lands Protection Act by Grand Forest Holdings Incorporated et al.* (27 February 2008), Island Regulatory and Appeals Commission, Order TLF08-001, online: IRAC <http://www.irac.pe.ca/dcoument.asp?file=orders/landsprotection/200/tlf08-001.htm>.

[55] *In the Matter of Alleged Violations of the Price Edward Island Land Protection Act by Walter E. Wells*, (4 April 2003) Island Regulatory and Appeals Commission, Order TLF08-001, online: IRAC <http://www.irac.pe.ca/dcoument.asp?file=order/landsprotecttion/2003/tlf03-001.htm>.

Limited. In 1999, Irving companies owned or controlled 5,600 acres of Island land, and were ordered to take steps to reduce their holdings to the permitted acreage. A complex corporate structure and complicated leasing and sub-leasing arrangements made it difficult to determine whether Irving entities were complying with the Act, but in February 2008, IRAC found that the Irving entities had failed to disclose leased land as required and had failed to apply for approval for leases totalling over 2,000 acres. The maximum penalty possible under the Act is a fine of $10,000; IRAC ordered the maximum penalty for one of the violations, and an additional $3,000 in total for two others.[56]

Further constitutional challenges to the *Lands Protection Act* are unlikely, given the high probability of success for non-residents and corporations who apply to acquire land above the limit of five acres and 165 feet of shoreline. A non-Canadian might argue that these limits violate the guarantee in Chapter 11 of the *North American Free Trade Agreement* that non-Canadian investors will be treated as well as residents of the province in which they might invest, but in Annex II of the Agreement, Canada reserved the right to set residency requirements for the ownership of oceanfront land. The limits of 1,000 and 3,000 acres on aggregate land holdings are not vulnerable to a challenge under the *North American Free Trade Agreement*, as they apply equally to Islanders and non-Islanders.[57] Nor are they as absolute as they appear. The definition of aggregate land holdings imposes some constraints on land owners' ability to use family trusts or closely-held corporations to acquire excess land, but does not preclude all possibilities for using surrogate owners to amass large land holdings. As well, Cabinet can exempt specific land owners or classes of land owners or specific land transactions from the aggregate limits, thus providing another way for land owners to circumvent, rather than challenge, the *Act*. Since 1992, specific land acquisitions for private developments have been exempted by regulation, including several land purchases by J.D. Irving Ltd., Cavendish Farms, and by the New Brunswick based food processing business, McCain Foods Limited.[58]

The strength of the *Lands Protection Act*, as successive commissions and

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[56] Island Regulatory and Appeals Commission, *order TLF08-001, In the Matter of Alleged Violations of the Prince Edward Island Lands Protection Act by Grand Forest Holdings Incorporated et al, 27 February 2008*, online: IRAC <http://www.irac.pe.ca.dcoument.asp?file=orders.landprotection/200/tlf08-001.htm>; "Irving fined under P.E.I. Land Act" *CBC News* (11 March 2008) online: CBC News <http://www.cbc.ca/canada/ new-brunswick/story/2008/03/11/irving-land.html>.

[57] *North American Free Trade Agreement Between the Government of Canada, the Government of the United Mexican States and the Government of the United States of America*, 17 December 1992, Can. T.S. 1994/2. 32 I.L.M. (1993), at Annex II-C-2 (in force 1 January 1994).

[58] This power was used to create an exception to the five acres or 165 feet of shoreline for transfers to non-residents by way of gift or inheritance from a close relative, or for land acquisitions by municipal corporations, as well as exemptions for specific projects such as the Confederation Bridge or school or hospital construction. *Prince Edward Island Lands Protection Act Exemption Regulations* made under s. 17(1)(b) of the Prince Edward Island *Lands Protection Act*, R.S.P.E.I. 1988, c. L-5, consolidated to 2 June 2007, online: IRAC <http://www.irac.pe.ca/document.asp?file=legislation/LandsProtectionAct ExemptionRegulations.asp>.

committees have observed, is the widespread support it enjoys among Islanders. Both Liberal and Conservative governments found that imposing limits on non-resident and corporate land ownership was a politically expedient response to controversies about Island development. Legislation that restricts land acquisition or ownership for non-residents and corporations, neither of whom vote in Island elections, may have fewer political risks than legislation that regulates land use. Enacting such legislation may temporarily allay concerns about loss of local access to prime recreational land, corporate concentration in the agricultural sector, damage to the Island's soil and water because of poor farming practices, and the increasing urbanization of the countryside. Restrictions on land ownership, however, are not a solution to these problems, and when concern flares into controversy, the *Lands Protection Act* comes under scrutiny. As John McClellan, executive director of the Land Use Commission, commented in 1987, "there has never been a consensus within our society on the purpose of the [*Lands Protection*] *Act* and how it should operate. . . . The public interest that the *Act* is presumably designed to protect has never been adequately defined."[59] That ambiguity is central to the *Act*'s genesis and to its longevity.

[59] John McClellan, "Land Ownership: Patterns and Problems" (1988) 3 *Cooper Review* 87 at 91.