THE ABOLITION OF ADVERSE POSSESSION OF CROWN LANDS IN NEWFOUNDLAND AND LABRADOR

By Gregory French*

Introduction

This paper will analyse the impact of the *Act to Further Amend the Crown Lands Act*, SN 1975–76, No 20, on modern land title in Newfoundland and Labrador. The legislation marked a dramatic change in real property law in Newfoundland and Labrador, where title had historically been grounded on adverse possession of Crown lands. The author argues that the legislative intent behind the 1976 legislation, as evidenced by House of Assembly records, was misconstrued by the Courts, resulting in a subversion of the initial intention of the law, which has persisted to this day. The author examines the issues that have arisen since the passage of the 1976 statute, and suggests that the Province must address the issue of land, in order to fulfill the original intention of the legislature, and why changes are necessary.

It is important to understand the background of land settlement in Newfoundland and Labrador to appreciate the significance of the legislative intervention and the impact that the subsequent evolution of the law has had on Newfoundlanders and Labradoreans. A significant amount of title in this province is grounded in "adverse possession" against the Crown: possession that is not grounded on a conveyance or grant of title from the Crown, but instead based on open, notorious, continuous and exclusive occupation of the land. Such land has never been sold or demised by the Crown, but was instead occupied by settlers without any documentation granting such a right. "Adverse possession" permits such title to vest in the occupier of the land after a defined period.

Part I of this paper canvasses the history of settlement and treatment of real property in Newfoundland and Labrador from the 16th century to the 1970s, which gave rise to the legislative intervention in 1976. Part II discusses the land reform debates of the 1970s and uncovers the original intention of the legislature in implementing changes. Part III critically examines the first case addressing the new amendments, which the author argues undermined the legislative intent of the 1976 amendments and gave rise to the problems encountered today. Part IV examines the evolution of adverse possession against the Crown subsequent to that case. Part V critiques the legislative and judicial approach since 1982, and identifies the practical problems that have arisen for Newfoundlanders and Labradoreans since that time.

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Finally, Part VI looks to the future to determine possible solutions.

I. An Introduction to the history of Newfoundland and Labrador land possession

One must first appreciate the significance of adverse possession to the history and society of Newfoundland and Labrador to truly understand the significance of its abolition.[1]

From its initial discovery, Newfoundland's value was tied to the Grand Banks and its rich fishing grounds.[2] Its value to its European colonizers was for the rewards it could produce for the mother country, and not for the value it could produce for itself. As is well known to Newfoundlanders, its climate is often harsh and its weather unrelenting, and its rocky landscape is poor for most agricultural uses. The earliest of settlers would no doubt have found it a most unwelcoming environment. Because its value lay in the fishing grounds off its shores, its only practical value for many years following its initial discovery was as a port for the British fishing fleets. Its best ports were prized by the captains of these British ships, and as the annual fishery would begin underway from the coasts of England, it became a race to secure favourable grounds. Through the 16th century and in earnest by the 17th century, settlement of the island of Newfoundland began as English crewmen remained in ports at the end of the fishing season in order to preserve access for the following season. As the settler population began to grow in Newfoundland through the 17th century, concern developed in Britain that a permanent population on the island of Newfoundland would result in competition for access to the Grand Banks and its fishing grounds as against the British fleet. A permanent population in closer proximity to those grounds would have a greater advantage against British interests. As a result of these concerns, the Imperial Parliament in London passed laws in the 17th century restricting access to the Island of Newfoundland and ordering occupied lands to be relinquished to British fishing fleets.[3]

These restrictive laws prevented settlers from obtaining title to their lands, and such titles were expressly not recognized by the British government. These laws

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[1] For a most thorough and well-researched history of Newfoundland land ownership, see Alexander Campbell McEwen, *Newfoundland Law of Real Property: The Origin and Development of Land Ownership* (PhD Dissertation, University of London, 1978) [unpublished]. This paper will not delve as deeply into the origin and development of land tenures, except as background.

[2] The following paragraph is a condensed summary of the settlement of Newfoundland from the author's earlier work on the topic: see Gregory French, "Property Interests in Resettled Communities" (2015) 66 UNBLJ 210 at 211–14. More on the history of settlement of Newfoundland and Labrador can be found in the seminal historical text by DW Prowse, *A History of Newfoundland from the English, Colonial, and Foreign Records* (London, UK: Eyre and Spottiswoode, 1896).

[3] French, *supra* note 3 at 211, nn 2–3. The particular legislation at issue was the *Western Charter of 1634*, amended further in 1670, and ultimately *An Act to Encourage Trade to Newfoundland, 1698* (UK), Imp Act 10 & 11 Will III, c 25, which expressly prohibited settlement along the shoreline and imposed penalties for so doing.

would persist until the 19th century, by which point the settler population of Newfoundland had grown to such a level that its presence could no longer be ignored.[4]

The root cause of modern title issues can be traced back to the Imperial Parliament's refusal to acknowledge the reality of the settler situation for centuries. Settlers would have understood themselves to have a proprietary interest in the land which they occupied, even if that interest was not formally recognised by the Crown. One must bear in mind as well the unfortunate state of functioning civil society in Newfoundland until the 19th century—laws were propagated from England, with an explicit effort to disavow the interests of Newfoundland's settlers. It was not until 1791 that Newfoundland was first granted a formal civil court system[5], and not until 1832 that a legislature was established.[6] For the average fisherman in a rural outport community in the 18th or 19th century, obtaining a grant to land would have been impossible, if any need existed for obtaining one. Undisturbed possessory title was sufficient for the daily lives of most Newfoundlanders, whose forefathers had obtained their title by the same degree of possession and which was otherwise unfettered by an absentee colonial government.[7] To the extent that the settlers faced interference from English interests, those interferences were transitory at best, given the lack of institutional support for enforcement of the English enactments and the mere seasonal attendance by English authorities.[8]

Once a functioning judiciary was established in the Colony of Newfoundland, the settler population had some recourse and defence to the otherwise arbitrary decrees from a distant monarch. The history of Newfoundland through the 16th, 17th and 18th centuries is replete with examples of the thorough disregard for the interests of the settler population of Newfoundland and particularly its claims to ownership of land.[9]

It is noteworthy that the Supreme Court of Newfoundland predates the establishment of the Newfoundland legislature by some 40 years. During this period, the laws of England were to be enforced by the newly established Court "as far as the

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[4] French, *supra* note 3 at 212. Crown grants became available in the settlement at St. John's by the *Saint John's, Newfoundland Act, 1811* (UK), 51 Geo III, c 45, and became available throughout Newfoundland by the *Newfoundland Fisheries Act, 1824* (UK), 5 Geo IV, c 51, which abolished the 1698 restrictions.

[5] *Legislative History of the Judicature Act, 1791–1988* (St. John's: Newfoundland Law Reform Commission, 1989) at 1–10.

[6] EM Archibald, *Digest of the Laws of Newfoundland* (St. John's: Henry Winton, 1847; republished by the Law Society of Newfoundland and Labrador, 2018) at 40; *Buyer's Furniture Ltd v Barney's Sales & Transport Ltd* (1983), 43 Nfld & PEIR 158 at para 8, 2 DLR (4th) 704 (CA); *Roy v Newfoundland (Legal Aid Commission)* (1994), 116 Nfld & PEIR 232 at 10, 363 APR 232 (Nfld SC (TD)).

[7] See French, *supra* note 3 at 213–14.

[8] See generally Prowse, *supra* note 3.

[9] *Ibid* covers this period of history in great detail from the colonial and imperial records.

same can be applied" to the circumstances of Newfoundland.[10] This anomalous circumstance vested an almost legislative power in the judiciary to establish how far English law would be enforced in Newfoundland, as a matter of policy and practice.[11] Early caselaw of the Supreme Court of Newfoundland shows a few examples of the Crown's efforts to control settlement and use of land into the 19th century that were brought before the Court for enforcement.[12] In the earliest of those cases, *Rex v Kough* in 1819, the Court established that possession of land for a period of sixty years would act as a bar to recovery actions by the Crown, based on the limitation laws in force in England at the time.[13] While the standard of general occupancy was the best and only interest available for centuries, the *Kough* decision finally allowed the settlers a defence to the Crown's efforts to maintain ownership over the lands of the Colony.

The situation of possessory land titles in rural Newfoundland was concisely summarized by Justice Kent in *Murphy v Moores and Government of Newfoundland* in 1938:

> The history of this country shows that a large portion of the public or Crown lands was originally occupied by settlers, who took possession of it without any documentary title and having thus taken possession of it they cleared it, cultivated and lived upon and "worked" it in undisturbed possession for generations and still continue to do so. Much of the land around the coast is at present held by no title other than possession for the statutory period of limitation. Such of them as are fortunate enough to be in a position to prove that exclusive and continuous possession by themselves and their predecessors in title for the statutory period of sixty years may feel secure so long as that proof remains in existence and is available to them. But the proof of such possession depends upon the survival of residents in the vicinity whose memory enables them to describe the facts relating to the land and the possessors and the use of it as they were for sixty years or more before they are called upon to testify; but those who are not so fortunate have no security of title other than that of bare possession which did not avail against the Crown; it being well settled law that nothing short of proof of a grant or of exclusive uninterrupted possession for the statutory period of sixty years raises any presumption against the Crown.[14]

This is the situation as it stood until 1976, and it is against this backdrop that the government decided to take action to reform and modernize the law of adverse possession against Crown lands.

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[10] *An Act for Establishing Courts of Judicature in the Island of Newfoundland and the Islands Adjacent*, (1792) 32 Geo III, c 46, s 1.

[11] See discussion *per curiam* in *Chancey v Brooking* (1823), 1 Nfld LR 314 at 316–17 (SC).

[12] See e.g. *Rex v Patrick Kough et al* (1819), 1 Nfld LR 172 (SC) [*Kough*]; *The King v Cuddihy* (1831), 2 Nfld LR 8 (SC); *The King v Luke Ryan* (1831), 2 Nfld LR 47 (SC).

[13] See *Kough*, *supra* note 13 at 176–78.

[14] *Murphy v Moores and the Government of Newfoundland* (1938), 14 Nfld LR 161 at 163–64 (SC), Kent J [*Murphy*].

II. The Beginning of Land Reform

By the 1970s, Newfoundland had developed considerably from its colonial roots, and was a modern society in line with its sister provinces in the Canadian Confederation. However, the legacy of centuries of government inaction and *laissez-faire* settlement patterns had created significant uncertainty in land titles. For generations, settlement and development of land required little formality, particularly in rural "outport" communities. Such communities were small, scattered coastal settlements of no more than a couple of hundred residents, with limited public services and no central government—a legacy of a pattern of settlement tied to securing unoccupied ships' harbours year after year.[15]

Modernization of Newfoundland and Labrador, particularly its rural areas, began in earnest under Premier Joseph R. Smallwood, after Newfoundland joined Confederation in 1949. Smallwood's government was pressed to act to develop rural Newfoundland and to deliver on the promises made to sell Confederation to the people of Newfoundland.[16] Because of a widespread population, separated by islands, bodies of water and rough terrain, it was impossible to modernize rural Newfoundland in its existing form of thousands of tiny settlements without incurring unfathomable cost. So began the era of government-sponsored "Resettlement", beginning in 1953, when Smallwood's government provided financial incentives to encourage the relocation of the populations of isolated communities into nearby larger centres, to which government could focus its provision of services.[17] The "Fisheries Household Resettlement Programme" officially ended in 1975.[18]

It may be that the Resettlement programme is what caused the first major issues with regard to rural land title. Those whose communities were resettled were provided government money to relocate elsewhere, but no other support in moving or in particular in obtaining land elsewhere.[19] This led to an influx of people into communities where land title was often no better than the community they had just left—the same principles of longstanding adverse possession governed the acquisition of new residential property by the resettled. Indeed, it is common for the rural real estate practitioner to encounter title which is grounded on nothing more than a homemade Bill of Sale or form deed from a Justice of the Peace which dates from the

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[15] French, *supra* note 3 at 214.

[16] One can note on a district map of Newfoundland that it was rural Newfoundland that voted overwhelmingly for Confederation, and those areas closest to the City of St. John's that voted for continued independence: see "The 1948 Referendums", online: *Heritage Newfoundland and Labrador* <www.heritage.nf.ca/articles/politics/referendums-1948.php>.

[17] See generally French, *supra* note 3 for a brief history of Resettlement.

[18] See generally "The Second Resettlement Programme: The DREE Agreement, 1970-1975", online: *Heritage Newfoundland and Labrador* <www.heritage.nf.ca/articles/politics/dree-resettlement-agreement.php>.

[19] French, *supra* note 3 at 216–18.

era of resettlement of the surrounding area.[20] As had been common practice throughout history, one acquired a vacant parcel of land from its putative owner, and would place a house there, and would remain in undisturbed possession thereafter. The difference under Resettlement was the volume of such activity—instead of an isolated house being constructed or moved, communities received an influx of dozens at once. The number of new people moving into these communities undoubtedly gave rise to conflict at some level, be it in the form of unaddressed property disputes coming to light or land speculation by community residents.

Continuing into modern development required overhauling a system of land title that had long rested on adverse possession. By the 1970s, Newfoundland's informal system of settlement was at odds with modern practice. This led to inhibitions in the ability to develop land, because of uncertainty regarding title—land claims often did not rest on formality, and may or may not be readily ascertainable, creating conflicts between those seeking title in the proper route via Crown lands applications, and those who asserted private property rights to ungranted land.

The debate on the matter came to the floor of the House of Assembly on May 31st, 1976, under the Progressive Conservative government of Premier Frank Moores. At issue was a proposed amendment to the *Crown Lands Act*[21], which proposed a radical change to the law by abolishing adverse possession of Crown land. The changes were brought forth by then Minister of Forestry and Agriculture Joseph Rousseau, and, according to Minister Rousseau's statements in the House of Assembly, the goal of the legislative changes was to facilitate obtaining land title:

> What we would like to do now, Mr. Speaker, is to reduce the amount of time [for obtaining title by adverse possession] from sixty years to twenty years and give those people who have had what we call squatters rights, as defined, the right to that land, get this backlog of people off the list of people looking for the land and not accept any adverse possession after January 1, 1977….[22]

The shortening of this period to twenty years was intended "to provide a method of confirming possessory titles in appropriate instances."[23]

Edward Roberts, then Liberal Party leader and Leader of the Opposition, endorsed the changes. Part of the issue from Mr. Roberts' perspective was the problem with Newfoundlanders obtaining funding from the Canada Mortgage and Housing

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[20] The author speaks from personal experience in practice on this point, as many communities in Trinity Bay, Bonavista Bay and Placentia Bay were resettled in the 1960s.

[21] *Crown Lands Act*, RSN 1970, c 71.

[22] "Bill No 21, An Act Further To Amend The Crown Lands Act", 2nd reading, Newfoundland and Labrador, House of Assembly, *Verbatim Report (Hansard)* 37-1, No 74 (31 May 1976) at 9197 (Hon Joseph Rousseau).

[23] *Ibid* at 9198.

Corporation (CMHC), which required residents to have title to land as a precondition to obtaining funding.[24] Possessory titles were an antiquated relic that could not meet the demands of modern society. And more practically, they posed a challenge to a government that was trying to straighten out matters of land title and take stock of its land holdings. In many communities, the Crown Lands Administration could not say with any certainty who owned what land, or whether or not it had been alienated from the Crown. Figuring out whether any given parcel of land on a grant application was Crown land or not was time consuming and costly for government. Hundreds of millions of dollars had been spent on surveying and aerial photography and other control and recording mechanisms required to keep track of over 400,000 square kilometers of land.[25]

Two problems with government's absolutist approach to terminating adverse possession were noted in debate by the Liberal Reform Party, then the third party in the House of Assembly.

Firstly, this change was proposed for the first time in 1976, proposing to end adverse possession of Crown Lands within less than a year. To those who had settled on the land for a period of less than twenty years, but whose occupation had started before the proposed legislation, what would become of their interests?[26] Without the legislative changes, those individuals would one day expect their interests to vest, presuming that they were aware of any such challenge to their claims to begin with. To Minister Rousseau's view, the government of the day would give such claimants consideration morally, but not legally, should those individuals apply for Crown grants.[27] Liberal member Tom Rideout raised particular concern in that context that the number of people potentially impacted by this change would number well into the thousands, and who would now be at risk of prosecution for unlawful possession of Crown land.[28] Minister Rousseau responded to that concern:

> [I]t would not be our intention, for example, if a man was continuously, whatever you call that term, Mr. Speaker, in open, notorious, continuous and exclusive possession of Crown lands for a reasonable period. I do not think that would apply. Something would be worked out.[29]

A second, related, problem was foreseen by Liberal Reform Party leader (and former Premier) Joseph R. Smallwood. Recalling the particular informal methods by

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[24] *Ibid* at 9201. One should note that "the familiar loan and mortgage" was a foreign concept to rural Newfoundland, whose impoverished population had neither the means nor opportunity to obtain one (see French, *supra* note 3 at 213–14 and sources cited therein).

[25] House of Assembly, 31 May 1976, *supra* note 23 at 9229–30 (Hon Joseph Rousseau).

[26] *Ibid* at 9225 (Roderick Moores: Liberal Reform-Carbonear).

[27] *Ibid.*

[28] *Ibid* at 9225–26.

[29] *Ibid* at 9227.

which land was transferred in centuries past, Mr. Smallwood had concern that "there must be many, many thousands in Newfoundland who acquired the land, you know, twenty, thirty, fifty, a hundred years ago, and yet no form of written title. Is that not so? It is not just those who have squatters land on January 1 next?"[30] Smallwood's concern appears to regard past transactions of land that are not necessarily "squatters rights" claims, but which would otherwise have been recognized title historically, and whether or not these changes would impact those not in possession. Minister Rousseau responded as follows:

> The most important principle of this bill is that nobody is trying to do anybody out of their land. What we are saying is, "look if you have had squatters rights for twenty years, why do it for another forty years? Let us clear it up so we know that that land belongs to John Jones or John Q. citizen. We are going to give it to you after twenty years. If you do not have it up to 20 years by January 1, 1977 you go through the normal path, the normal procedure that everybody else goes through for a crown land application." That plus the fact that we hope to have our surveys in so we know where the markers are, where we can say who owns what land across the Province, we hope to greatly expedite the question and the problems that arise in respect to crown lands.[31]

With that, the bill passed without amendment, and entered the law of Newfoundland and Labrador on June 11th, 1976, as the *Act to Further Amend the Crown Lands Act*.[32] For the purposes of this paper, the operative part of this statute would become section 134B.(2) of the *Crown Lands Act* of 1970, which read as follows at the time of its enactment in 1976:

> The period of possession of Crown lands prior to the 1st day of January, 1977, which would, by the application of the law pertaining to the acquisition of an interest in land based upon open, notorious and exclusive possession existing prior to the enactment of this section, have been necessary to confer upon any person an interest in such land is deemed to be, and always to have been, twenty years.[33]

Subsection 134B.(3) of the 1976 Act provided that the Minister may issue a Crown Grant "upon being satisfied that a person has acquired an interest in Crown lands pursuant to the provisions of subsection (2)".[34]

Taking the statute at face value, it is an apparent retroactive change to the law of adverse possession of Crown lands. The period of possession, which had previously

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[30] *Ibid* at 9230.

[31] *Ibid* at 9231.

[32] *Act to Further Amend the Crown Lands Act,* SN 1975–76, No 20, s 3.

[33] *Ibid*.

[34] *Ibid*.

been held to be 60 years, "is deemed to be, and always to have been" 20 years. On the plain reading of the statute, any period of twenty years prior to the enactment of that section would seem to amount to a statutory dispossession of the Crown. What changed was not the nature of adverse possession, but the length of same. The period required is deemed to always have been twenty years, much as any period of sixty years' prior occupation had previously been exercised. Shortening the time period to twenty years would also align with the general limitation period for recovery of land in effect at the time.[35] This interpretation can be confirmed by reviewing Minister Rousseau's statements on the debate of the bill—the goal of the legislation was to make it easier for those in possession of their land to obtain title, as a compromise of sorts to the termination of adverse possession of Crown lands going forward from 1977.

As can be seen from the review of the transcripts from the House of Assembly, the legislative intent behind the 1976 amendments was not just to put an end to the centuries-old "free for all" system of simply taking Crown land. Instead, it was to usher in an era of certainty not just for government, but also for landowners, who could have some certainty in their title, and could have that certainty more quickly. The legislature's intention was ameliorative—to ensure that those in possession of land can have title vested and to implement some certainty on land tenure, and to ensure that the Crown could better control its own land holdings for future use and development. Together these intended outcomes would lead to the better administration of land title in Newfoundland and Labrador.

III. Early Judicial Consideration of the 1976 Amendments—*Ball v Day*

Knowing what the legislature intended by review of the statements of the Members of the House of Assembly in debate, we must now look at how that legislation took effect in practice. Dealing only with the language of the statute and not with the express statements made in the House, how would the Courts interpret the legislative change? Regrettably, rather than furthering the ameliorative purposes of the 1976 amendments, the Court of Appeal took a much narrower view of the law, which set in motion a restrictive interpretation of the statute which continues today.

The matter came before the Newfoundland and Labrador Court of Appeal in 1982 in the case of *Ball v Day*.[36] This is the first appellate case dealing with the 1976 legislative amendments. That case was an appeal from the District Court of Newfoundland on an action for trespass and recovery of land between two competing private claimants. The Appellant had constructed a house in 1973–74 and had applied for a Crown grant to the land on which he had built his house. As noted in the 1976 debates, Crown lands faced significant backlogs in making title determinations and

[35] *Limitation of Actions (Realty) Act*, RSN 1970, c 207.

[36] *Ball v Day* (1982), 38 Nfld & PEIR 365, [1982] NJ No 50 (CA) [*Ball* cited to Nfld & PEIR].

issues of ascertaining potential private claims during this era. When the Appellant renewed his application for a Crown grant, the Respondent entered an adverse claim as successor in title to a previous occupant of the same land, who had been there for a period from 1917 to 1947. The Respondent's predecessor in title (one Heber Porter) had had a dwelling house on the parcel for a period of 27 years, from 1917 to 1944, and had kept vegetable gardens on the same land for three more years, for a total of 30 years' physical possession. The land remained vacant thereafter, but Heber Porter had sold the land at issue to the Respondent in 1963, who staked off the boundaries but did nothing else with the land. At the District Court level, the Respondent was successful. Barry DCJ held that the operation of the 1976 amendments operated retrospectively, shortening the period of adverse possession against the Crown from 60 years to 20 years. As the land had been possessed by Heber Porter for at least 20 years, the land had been adversely possessed and the Crown could not grant an interest to the Appellant.[37]

A unanimous Court of Appeal overturned Judge Barry's decision, finding that "the learned trial judge ... misconstrued the amendment to the Crown Lands Act ... and he erred in his application of that Act to the factual situation before him."[38] The reason for the disagreement with Judge Barry's decision lay in the Court's interpretation of the doctrines of adverse possession generally. Citing to Halsbury's Laws of England, the Court endorses the principles that a person in adverse possession has only a transmissible interest which is good against all but the rightful owner until "the statutory period has elapsed"; and if the property is abandoned before the statutory period has elapsed, then a subsequent occupier cannot rely on his predecessor's adverse possession—the clock effectively runs *de novo*.[39] On the facts *of Ball v Day*, the Court held that the thirty years of possession by Heber Porter was insufficient to divest the Crown during the era of that possession. While the *Crown Lands Act* amendments were retrospective, "it does not operate to revive the title of one who held possession for less than 60 years and abandoned possession before January 1st, 1977."[40]

This interpretation invites some criticism. Firstly, this interpretation is at odds with the plain language of the 1976 amendments, which expressly deems the period of possession "to be, and always to have been, twenty years". If the "statutory period" is retroactively deemed to have always been twenty years, would not the thirty year occupation of the parcel in *Ball v Day* meet that requirement? No issue seems to have been taken with the quality of Porter's use of the land or the duration of his occupation, just with the timeframe in which it occurred and the legal significance of it. One could argue that the general presumption against retroactivity of legislation was applied in this instance. However, the Court of Appeal agreed with the trial judge that, in fact,

[37] *Ibid* at para 2.

[38] *Ibid* at para 3.

[39] *Ibid*.

[40] *Ibid*.

the law was intended to apply retrospectively.[41] The scope of the retrospective application is where the Court of Appeal and trial level parted ways. While there is a general presumption at law against retroactivity, an express statement that the law is deemed "always to have been" would seem to be a plain statement of retroactive intent. For the law to take effect as of January 1st, 1977, no statement is required that adverse possession is deemed to always have been twenty years. One would fairly interpret the language chosen by the legislature being more expansive in effect, particularly when read in light of the legislature's concerns and intentions.

Secondly, one notes that the facts of *Ball v Day* are peculiar. The original occupant of the land, Heber Porter, expressly renounced an *animus possidendi* in his trial evidence. Upon leaving the land in 1947, Mr. Porter expressly abandoned it. Yet there appears to be little discussion of how it was that Porter came to sell parcels of that same land in the 1960s, if he had disavowed his ownership of same.[42] The evidence at trial indicates that the land remained fenced for some time thereafter, although in disrepair, and boundary markers were put in place by the Respondent upon his acquisition of same in 1963. The Appellant's construction of a dwelling house on the lot would seem, on that evidence, to have occurred notwithstanding a visible adverse presence on the land at issue. The appeal does not explore the root of the Appellant's title prior to his Crown Grant application, or why the Appellant felt entitled to construct his home where he did. The Applicant having applied for a Grant only after building his house in 1974, predating the *Crown Lands Act* amendments of 1976, would seem to invite a question of the possession as it may have existed for the 60 years prior thereto, and not just for the 1956–1977 period.[43] Perhaps more importantly, it would invite some inquiry into the Appellant's root of title to begin with, noting that the Appellant appears to have had none, whereas the Respondent's claim was grounded in historical occupation. The appellate decision makes no reference to what evidence, if any, was adduced regarding use prior to 1917, which may or may not have been available at the time and may have been relevant to determining whether the Crown had already been dispossessed by 1973, as the law stood at that time. This may be a case of bad timing and bad facts, as it relates to the principles to draw.

Thirdly, this is a case between two private individuals. The Provincial Crown does not appear to have played any role in the proceedings or advanced any interpretation of the *Act*. One is left to wonder if the outcome of this case truly represented the expectations of the Crown Lands Administration, particularly in light of the Ministerial statements in the House of Assembly and the concerns expressed on all sides in the House at the time. It appears from a review of the Court of Appeal decision that the Appellant's argument that the Crown had superior title to the Respondent would be an improper *jus tertii* defence to the Respondent's assertion of

[41] *Ibid.*

[42] *Ibid* at para 2.

[43] See *ibid*.

ownership.[44] The slightest possession by the Respondent, on the limited facts presented in the appellate case, should have been sufficient to repel the Appellant's claim, as there is no indication whatsoever of the Appellant having colour of title or any other root of title himself at the time the Appellant entered into possession of the land at issue.[45]

Fourth, the facts of this case are almost directly analogous to the facts of *Murphy v Moores and the Government of Newfoundland*.[46] In that case, Moores claimed damages and an injunction against Murphy for interfering with Moores' fence, which was on land which was leased by Moores from the Crown. Murphy countersued seeking to set aside the Crown lease on the basis of Murphy's prior possession of the land. The land at issue had been cultivated by Murphy's great-grandfather, but had laid fallow for approximately 45 years prior to the Court action.[47] However, Murphy had maintained the boundaries with wooden pegs and made sporadic use of the land for grazing. Of particular importance is the holding of Justice Kent: "mere discontinuance without entry by someone else does not amount to abandonment".[48] This is based on the continuation of the interest in the land by Murphy via inheritance, notwithstanding the limited activity on the land by Murphy himself. The maintenance of the boundary and occasional grazing was sufficient to maintain possession, and "*actual and legal possession are the same thing for the purpose of the Statutes of Limitation*".[49] No reference to this case is made in *Ball v Day*, but instead to the principles of adverse possession as stated in *Halsbury's Laws of England* and as applied to the then-recent statutory amendment. Nevertheless, these principles had stood in the jurisprudence of Newfoundland and Labrador for over 40 years prior to the *Ball* decision, and in all likelihood to the reliance of the practicing bar and the public. It invites some question of how the doctrine of "colour of title" might impact such a claim, if the Respondent had possessed a written instrument from the original occupier of the land.[50]

Reviewing *Ball v Day* overall, the correctness of the decision can be debated insofar as the application of the statute is considered. The decision does not follow the clear language of the statute. Perhaps it is a case of bad facts making bad law, as the Court was faced with a review of peculiar circumstances—apparent abandonment of

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[44] *House v Town of Glovertown* (1977), 17 Nfld & PEIR 416 at paras 69–70, [1977] NJ No 131 (TD).

[45] *Ibid* at paras 72–73. This principle was more recently discussed and approved by our Court of Appeal in *House v Toms*, 2017 NLCA 40.

[46] *Murphy, supra* note 15.

[47] *Ibid* at 164–65.

[48] *Ibid* at 167.

[49] *Ibid* at 166 [emphasis added]. However, *cf Wickham's Estate, infra* note 50 at paras 184–85. Note, though, that the legislative changes at issue predate the *Wickham Estate* decision by about five months.

[50] *Wickham's Estate v Estates of Wickham and Wickham* (1977), 17 Nfld & PEIR 452 at paras 85–91, 99–101, 129–30, [1977] NJ No 134 (TD).

the land some thirty years prior, followed by a sale to the Respondent and house construction by the Appellant, all occurring before the law changed. Nevertheless, the Court's interpretation of the statute law in this case would shape the law of adverse possession in Newfoundland and Labrador going forward.

IV. Evolution of Land Reform—The Legislature Reconsiders

We must now look at the law not just by the actions of the legislature, but by the interpretation of the Courts. It was not just *Ball v Day* that led to further legislative amendment, but other developments in the jurisprudence after 1976. The dialogue between the Courts and the legislature becomes apparent as the developing caselaw appears to shape the legislature's response and the law becomes increasingly restrictive.

Within a year of the *Ball v Day* decision, the issue of adverse possession of Crown land returned to the House of Assembly. While the Progressive Conservative party remained in power, the government was now led by Premier Brian Peckford, and the new head of Crown Lands was Minister of Forest Resources and Lands Charles Power. On December 21st, 1983, Bill No. 74 came before the House, to further amend the *Crown Lands Act*. This time, the amendments take on a very different tenor. Gone are the discussions of facilitating title to confirm existing possession, and in its place is a more punitive tone. The amendments propose to tighten up restrictions on adverse possession even further, and to specifically limit the eligibility for application for a grant based on adverse possession to the period "immediately prior to" January 1st, 1977. It is evident from the Hansard transcript that the concerns of the House have been impacted by jurisprudence. Although there is no reference to *Ball v Day*, there is some discussion about an unnamed Provincial Court case at Goose Bay before Judge Kean, involving a Crown land claim at Tom Luscombe's Brook in Lake Melville, Labrador.[51] It appears from the discussion that the decision was a prosecution for unlawful construction of a cabin on Crown land, and the accused had successfully beaten the charge, much to the consternation of other constituents of the Labrador Members.[52] Of note in the decision is that, according to the debate, former Liberal Party leader (and then ordinary opposition Member of the House of Assembly) Edward Roberts had represented the accused in that case. Given the awareness of jurisprudence by the Members of the House, one could surmise that a Court of Appeal decision on Crown Lands would not have escaped notice.

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[51] The author has attempted to find out more about this case, but the decision is unreported and no details are given about the parties in the Hansard.

[52] "Bill No 74, An Act To Amend The Crown Lands Act", 2nd reading, Newfoundland and Labrador, House of Assembly, *Preliminary Unedited Transcript (Hansard)* 39-2, No 83 (21 December 1983) at 9479–84. One should take note of the discussion of enforcement in *Newfoundland v Collingwoo*d (1996), 138 Nfld & PEIR 1, [1996] NJ No 33 (CA) [*Collingwoo*d]. The Court of Appeal made note, in reviewing the trial evidence, that the Crown Lands representative at trial gave evidence of taking action against Mr. Collingwood to "maintain credibility with the residents of Labrador" by pursuing a claim against the "high profile cabin" of "businessmen from the island" (*ibid* at para 23).

Minister Power commented on the proposed amendments as follows:

> One other major one we are doing, Mr. Speaker, is to make adverse possession, I guess squatters' rights in many persons' terminology, make that land—if occupancy has been twenty years immediately prior to January of 1977, then certainly that land will be deemed to be, I guess, removed from the Crown lands through adverse possession. We have also put in a small amendment to make sure that persons who have occupied Crown land illegally between 1957 and 1977 are punishable by law because they have committed an offence. There is now a sort of loophole there, and unless we can prove that occupancy took place before 1957, or after 1977, it is somewhat difficult to prove our case, even though people have adversely occupied Crown land.[53]

With that, the Bill passed, and the operative provisions for obtaining a grant by adverse possession under section 134B were amended as follows:

> (3) The Lieutenant-Governor in Council may, upon being satisfied that
>
> (a) a person has acquired an interest in Crown lands pursuant to subsection (2); and
> (b) the land has been in continuous use for agricultural, business or residential purposes or for any of the purposes set out in section 14 for a twenty year period immediately prior to the first day of January, 1977,
>
> cause the Minister to issue a Crown grant to that person in respect of such land, and such Crown grant may be issued subject to those charges, exceptions or qualifications as the Lieutenant-Governor in Council may direct.
>
> (4) Where the Crown lands affected by this section contain not more than twenty hectares, the Minister may issue the Crown grant, upon being satisfied that
>
> (a) a person has acquired an interest in Crown lands pursuant to subsection (2); and
> (b) the land has been in continuous use for agricultural, business or residential purposes or for any of the purposes set out in section 14 for a twenty year period immediately prior to the first day of January, 1977, and the grant may be issued subject to those charges, exceptions or qualifications as the Minister may decide.[54]

The tide had turned. No longer could there be any debate about whether or not ancient possession could apply; the legislature expressly stated that it must be a

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[53] House of Assembly, 21 December 1983, *supra* note 53 at 9478.

[54] *Crown Lands (Amendment) Act*, SN 1983, c 80, s 6.

twenty year period "immediately prior to the first day of January 1977". The legislative change bolstered the Court of Appeal's decision in *Ball v Day* by confirming the Court's interpretation. Indeed, the Courts of Newfoundland would go on to confirm consistently that the twenty year period would have to cover the period immediately prior to January 1st, 1977, in reliance on *Ball v Day*.[55]

Of note, though, is that notwithstanding the addition of subsections 134B.(3) and (4) to the *Crown Lands Act* in 1983 that specify the period must be "immediately prior to" January 1st, 1977, subsection (2) was not so amended until 2016.[56] Up until that period, the 1976 language had continued in effect, being that the period of possession prior to January 1st, 1977, was "considered to be, and always have been" twenty years.[57] The Court of Appeal in *Ring v Newfoundland and Labrador* remarked on the distinction between subsections 36(2) and 36(3) of the 1991 *Lands Act* on this point, but remarked that the decision in *Ball v Day* must have been understood by the legislature to be a sufficient interpretation and thus did not require legislative intervention.[58]

With the *Ring* decision, no longer could there be a debate or misunderstanding. The twenty year period had solidified as being the twenty year period immediately prior to January 1st, 1977, being December 31st, 1956 to December 31st, 1976.[59]

The decisions made by both the Courts and the legislature appear to have disconnected from one of the two intended outcomes of the 1976 amendments. An increasing focus on the enforcement of Crown rights and abolition of adverse possession against the Crown overtook the secondary reason for the amendments—to confirm existing land titles up to 1976.

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[55] *Crowley v Crowley* (1984), 51 Nfld & PEIR 140, [1984] NJ No 201 (TD); *Collingwood*, *supra* note 53; *Ring v Newfoundland and Labrador*, 2013 NLCA 66 [*Ring*].

[56] *An Act to Amend the Lands Act*, SNL 2016, c 53, s 14.

[57] Note the minor language shift in subsection (2) from *Act to Further Amend the Crown Lands Act*, SN 1975–76 No 20: "deemed to be, and always to have been, twenty years"; which became "considered to be, and always to have been, 20 continuous years" in the new replacement *Lands Act*, SNL 1991, c 36, s 36(2). This change would not appear to affect the substance of adverse possession, which had always required continuity.

[58] *Ring*, *supra* note 56 at para 15.

[59] Note that several cases remark on the period being from 1957–1977. However, possession which began at any date later than January 1st, 1957, would not meet the twenty year requirement. For instance, if one began occupancy in the summer of 1957, the period of possession by January 1st, 1977 would be 19.5 years. Further, it is the period "immediately prior to" January 1st, 1957, which implies an exclusion of the date of January 1st. All possession should therefore be traced back to December 31st 1956 at a minimum.

V. Criticism of the Modern Interpretation

Looking at the end result of legislative changes and caselaw since 1982, Newfoundland and Labrador finds itself afflicted with a peculiar problem. For a province where title for centuries had rested on adverse possession against the Crown, no person can obtain title based on such adverse possession unless it occurred during a particular defined twenty year span in the mid-20th century, regardless of historical use, and regardless of one's understanding and intention in the pre-1976 period. For a jurisdiction which traces its occupied history back as far as the 16th century, such a restrictive view of title ignores centuries of use and occupation as had long been established by the time of the legislative changes.[60]

The Court of Appeal's decision in *Ring* cannot be said to be wrong. It reflects the holding in *Ball v Day*, and it reflects the statutory amendments made in 1983. However, that it is right does not mean that it is immune from criticism. The decision did appear to come as a shock to many practitioners in Newfoundland.[61] And indeed, it was the legislature that followed the Court in making alterations to these provisions—*Ball v Day* predated 134B.(3) and (4) of the *Crown Lands Act*; *Ring* predated the amendments to 36(2) of the *Lands Act*.

Of note in particular in *Ring* is the Court of Appeal's interpretation of the original statutory changes of 1976:

> In addition, the legislative objective of section 36 may be gleaned from the two changes made to section 134B in 1976. These were to abolish thenceforth adverse possession as against the Crown and to change the required period of open, notorious, exclusive and continuous possession from sixty to twenty years. The first of the changes, abolishing claims where possession occurred after December 31, 1976, indicates an intention by the legislature to significantly limit future claims by preventing an adverse claim from succeeding based on possession occurring after the critical date. The second change, reduction from sixty to twenty years of possession, must be interpreted in this context. It could not reasonably be inferred that the legislature intended to make establishing adverse possession as against the Crown easier. That is the result that would follow if the claimant had only to demonstrate adverse possession for any

[60] Prowse, *supra* note 3. Prowse noted from historical records that there was evidence of permanent settlement by 1522, when some forty to fifty houses were documented on the island of Newfoundland, but that it would be impossible to determine the exact date when settlement began because of the lack of recordkeeping regarding early settlement (*ibid* at 59). Even by the first English-sanctioned settlement efforts under the Royal Charter issued to John Guy in 1610, a settler population had established itself in Newfoundland with its own established mores (*ibid* at 99–100). One notes that in that early time, the interests of the settled population of this island were thoroughly disregarded by the English and treated as a nullity and Newfoundland itself treated as a *tabula rasa*.

[61] The Law Society of Newfoundland and Labrador expressed its concerns about the *Ring* decision in the Lands Act Review process of 2015, highlighting this case: see Krista Connolly, Tracy Freeman & Paul Pope, "Lands Act Review Final Report" (August 2015), online (pdf): *Government of Newfoundland and Labrador* <www.gov.nl.ca/ffa/files/lands-lands-act-lands-act-review.pdf>.

> continuous twenty rather than sixty years prior to January 1, 1977. The only reasonable interpretation consistent with the legislative intention restricting future adverse possession claims is that the twenty-year period means those years immediately preceding January 1, 1977. [62]

As is apparent from a review of the 1976 Hansard, the intention of the legislation was to put a stop to the continuation of squatters' claims on Crown lands going forward, but not to work injustice to those whose claims existed prior to the changes. With respect, the Court's interpretation that the 1976 amendments were intended to make it more difficult to obtain title would seem to be incorrect. The period was shortened to allow existing title to be confirmed. The holding in *Ball v Day* is vulnerable to criticism itself, but ultimately that decision rested more on an interpretation of adverse possession generally more than it did on the interpretation of the statute, given that the issue in *Ball* was the explicit abandonment of the land and whether the *Act* would operate retrospectively to revive such title.

And indeed, this interpretation could be seen to work injustice in a way that defied the initial intentions. Take, for instance, the facts of the *Ring* case.[63] Ms. Ring and her ex-husband acquired title to four acres of land from one Joan Dillon in 1975. Ms. Dillon had acquired ten acres of land from the Estate of Patrick Lawlor in 1972.[64] Appended to the 1972 deed was an affidavit of possession covering the period from 1913 to 1933 by the late Patrick Lawlor. The land had remained in use for general woodcutting subsequent to Patrick Lawlor's death in 1933. In 1986, the land adjacent to Ms. Ring's parcel, which had also been part of the ten acres purchased by Joan Dillon in 1972, was successfully quieted in a *Quieting of Titles* proceeding.[65] Ms. Ring's quieting failed, and the failure was upheld on appeal, in no small part because of the absence of use from 1957 to 1977.

The decision in *R v Ring*, while legally correct, is problematic on a practical level. One must consider the parties expectations at the time of acquisition of the land. In 1975, when Ms. Ring acquired her land, the general expectation of sixty years of

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[62] *Ring*, *supra* note 56 at para 16.

[63] Facts taken from the trial level decision: *Ring v Newfoundland and Labrador* (2012), 328 Nfld & PEIR 119, [2012] NJ No 336 (TD) [*Ring* (trial decision)].

[64] Deed from the Estate of Patrick Lawlor to Joan Dillon, dated 8 June 1972, registered at the Newfoundland Registry of Deeds at Vol 1310, Fol 261. The deed was registered contemporaneously, and prior to the 1976 legislative amendments.

[65] *Re Tweeddale Quieting of Titles*, Court File No 1986 St J No 1054, certificate registered at the Newfoundland and Labrador Registry of Deeds at Roll 300, Frame 1155. A review of the Newfoundland and Labrador Land Use Atlas indicates that the 1986 quieting is immediately adjacent to Ms. Ring's piece (in Court File No 2010 01G 4699) and of the same size and shape, and the property description in the 1986 quieting as registered indicates a common boundary with the Ring parcel of 978.5 feet. The property description in the 1986 quieting certificate expressly notes that the land is part of the conveyance from the Estate of Patrick Lawlor to Joan Dillon.

possession would have been sufficient.[66] An affidavit of possession was prepared which covered the history back to 1913, being 62 years prior to the date of purchase by Ms. Ring. In line with the ratio of the 1938 *Murphy* decision of the Supreme Court, the fallow woodland would seem to have continued in the legal possession of the Lawlor family until such time as the Lawlor family deeded it out, given that the Lawlors appear to have made analogous sporadic use of the land as in the *Murphy* case. At the time of purchase in 1975, Ms. Ring's title may well have been satisfactory. The legislative enactments in 1976 and their subsequent legal interpretation thus had the effect of defeasing individuals whose title may well have been acceptable before that date. One cannot read *Ball v Day* as revoking titles which were based on 60 years' possession against the Crown prior to the legislative changes. *Ball* only held that the title would not be revived if not possessed for the statutory period. As noted above, there is good reason to critique the *Ball* decision on its application of this principle in light of the legislative intent.

The retrospective application of the law reducing adverse possession to a period of twenty years makes sense as an ameliorative provision, to give certainty to those seeking title they already had. Looking at the Hansard, concerns were raised about Newfoundlanders applying for CMHC loans and needing to confirm title in order to obtain financing. A retroactive application of a restrictive provision is significantly more troubling. Land title effectively became a game of "musical chairs" that nobody knew they were playing—the result being that when the proverbial music stopped on January 1st, 1977, only those who had maintained use and occupation of land for the preceding twenty years could rely on their title, and not those who could trace their roots of title back for hundreds of years but had the misfortune of allowing a lapse in use in that period. This is the same concern that Joseph Smallwood raised in 1976, and which Minister Rousseau adamantly denied would be an issue. The government was not "trying to do anybody out of their land", according to the Minister at that time. However, that is exactly the outcome that occurred. Indeed, Ms. Ring and her predecessor's absence of use from 1972 to 1977 was noted by the trial judge.[67] Many individuals acquire vacant land with an eye to building on it—would the legislature truly intend that the acquisition of vacant land, appearing to accord with the standards of the day, be undone by legislative fiat? Such an outcome does a disservice to landowners in Newfoundland and Labrador. Indeed, it would appear to become that even contemporaneous registration of title documents throughout history would still fail if not accompanied by actual possession for a period which was determined *ex post facto*. Such would appear to have been the case in *Ball v Day*, and such was the case in *Ring*. An individual buying land in the 1950s, 1960s or early 1970s could hardly be faulted for failing to realize that in 1976, their ownership would be judged

[66] Prior to amendments to the *Quieting of Titles (Amendment) Act*, RSN 1976, No 19, the Crown could be defeased in a proceeding upon presentation of satisfactory proof of possession for sixty years (see *Quieting of Titles Act,* RSN 1970, c 324, s 12(1) and (2)). Note that amendments in SN 1975–76, No 19 introduced a specific requirement to notify the Minister responsible for Crown Lands, separate and apart from the general notice requirements, in order to defease the Crown.

[67] *Ring* (trial decision), *supra* note 64 at para 58.

solely on the set period spanning 1956 to 1977, and not on the centuries of occupation and records preceding it. Smallwood's concerns have metastasized into reality.

These concerns affect everyday Newfoundlanders and Labradoreans, and communities throughout the province. The intended outcome in 1976, which would have provided greater certainty to land title held up to that date, was lost and replaced with a punitive enforcement provision, the effects of which would not have been known to those who would be impacted by it going forward.

VI. The Modern Problem—Where do we go from here?

Considering the matters addressed above, it is apparent that the current provisions of the *Lands Act* regarding adverse possession of Crown lands have not been satisfactory to the people of this province, especially in areas of longstanding settlement and in small communities. The Crown's position has become adverse to the interests of many residents, and puts an increasingly onerous burden on the public.

The 1956 to 1977 period is fixed in statute law, and each passing year takes us further and further from the period of possession that must be proven. Leaving aside the question of the morality and effects of the legislative changes as interpreted over the years, a practical problem arises with the passage of time. It is simply becoming harder to prove possession back to 1956 as people with such a memory age and die off. Note as well that such witnesses to the title history would have to have been present in the community since 1956, and of such an age to appreciate the nature and quality of occupation of the land at that time. With the rural exodus from such small communities in the 1990s and continuing today, it is difficult to find individuals who meet sufficiently the requirements to prove dispossession for the required period. Indeed, in communities that may have only been a hundred or so people at their peak, it may be impossible in some instances to satisfactorily prove possession by affidavit—there simply is not anyone left alive and of sound mind who could do so. To real estate practitioners in rural Newfoundland, the problem of resolving title proves more difficult with each passing year.

In 2015, the Government of Newfoundland and Labrador appeared to take action on the problems that had developed. A review committee was established that year to solicit input from the public and from various stakeholders in matters of real estate and real property throughout the province. The goal was to determine what changes, if any, should be made to address the problems that have arisen regarding the administration of Crown lands, including the effects of the defined twenty year adverse possession period.

The final report of the Lands Act Review Committee was released in August of 2015.[68] The Committee reviewed the possibility of legislative change, and in

[68] *Supra* note 62.

particular proposals which were advanced by interested members of the public, which included revising the fixed date to a later period (i.e. from possession ending in 1977 to possession ending at a later year), or reintroducing adverse possession for a set period of years (as had been the case before 1976). Those options were rejected by the Committee, which recommended maintaining the 1977 period.[69] Nevertheless, the suggestions made to the Review Committee seem to hearken back to the initial intention of the 1976 amendments:

a) Implanting a registration "recognition" period, whereby documentation registered before a set date or for a set period of years will be deemed to have divested the Crown, as a sort of constructive possession.
b) Setting a running period of years for adverse possession (as proposed by the Law Society, 20 years of possession in a municipality and 30 years of possession outside of a municipality).
c) Adjust the cutoff date to another, later, period, which would cover possession made prior to the 1976 legislative change but not possession thereafter.
d) Institute a "grace period" for those in unlawful possession of Crown Lands to obtain a grant without paying market rates for same.

For various reasons these recommendations were rejected by the Provincial Government, and the status quo has remained in effect. Indeed, there may be as many negative effects as positive effects to making such changes now, given that the law and consequently the public has followed a given trajectory for over 40 years. However, with each passing year it becomes increasingly difficult to obtain affidavits of possession from individuals with knowledge of land possession from the 1950s, leading to either a casual disregard of the provisions of the *Lands Act* or recourse to costly remedies such as Quieting of Title applications. Given that historical title is generally accepted in certain areas (particularly in older areas of St. John's), or that a chain of deeds may be found which predate the 1976 amendments, there is a temptation to assume that title would be acceptable, but the provisions of the *Lands Act* are of universal application across the province. If a parcel of land cannot be traced directly to a Crown Grant, then possession from 1956 to 1977 must be proven, regardless of whether the land is in the centre of St. John's or a rural outport. That Crown Lands may not actively investigate every conveyance and land claim in the province does not mean that the issue does not exist—it is rather like the proverbial tree falling in the forest with nobody around to hear it. When land conveyancing becomes a matter of either ignoring the law for administrative efficacy, or investment of thousands of dollars to confirm a title already long held and recognized as against the Crown, the law and the policy cannot be viewed as successful. Changes are needed today for the good of the public and for the better administration of real property law in our province.

[69] *Ibid* at 78, 81–87.

The issues raised in this paper are not merely esoteric questions of academic interest. Land tenure is a foundational issue for those looking to invest in our province. Buyers of land need certainty that they have a full and unencumbered title to their land before they are willing to invest in it. Those in current possession of land must have certainty of title to sell or mortgage, and development is hindered by the inability to prove clear title.[70] Outstanding questions of title to those in occupancy of land is thus a matter which remains as unsettled and tenuous today as it was some 45 years ago, when the untenable status quo of the day forced the legislature to act. We find ourselves at a similar crossroads today, as rural practitioners of property law would attest.

It would not be the place of this paper or its author to recommend a particular course of action, except to highlight the historical circumstances that must be considered, including in particular the apparent intentions of the legislature in 1976. The current state of the law has failed to realize on the balance that was intended at that time—adverse possession of Crown Lands was abolished going forward, but those with historical possession at that time would have their efforts at obtaining title facilitated. This was an expressly intended goal at the time of the original amendments, as CMHC funding for Newfoundlanders and Labradoreans turned on the ability of the landowner to prove satisfactory title. Indeed, the same issue exists today for those who sell and mortgage their land, except the legislation has worked to undermine the legitimate past expectations of the citizenry. Any modern amendment to the statute must consider the interests of the people in obtaining title to their own lands and recognize that such title and such claims existed long before the idea of abolishing adverse possession entered the political landscape.

[70] See e.g. the works of noted economist Hernando de Soto, in particular his 2000 book *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else* (New York: Bantam Press, 2000). De Soto's treatise highlights the connection between poverty and unsettled property rights, which prevents individuals from leveraging property interests into a source of capital. One should consider the parallels to both the land title situation and economic situation in rural Newfoundland and Labrador.