ON THE LAW OF *LIS PENDENS* IN NEWFOUNDLAND AND LABRADOR

Gregory French*

The original common-law doctrine of lis pendens has been supplanted in all of Canada by statutory provisions, except in the Province of Newfoundland and Labrador. In this province, the doctrine has been shaped by local practices of the bar with the endorsement of the Courts. The result is a doctrine of unclear rules, in spite of the wide application of the doctrine in property law. Court decisions have muddied the waters between the underlying received law and common practice. This paper hopes to clarify the law surrounding lis pendens and its practical application in the absence of statutory rules.

I. Introduction

The idea of *lis pendens* is deceptively simple and straightforward. It is the notion that parties and property, being the subject of litigation, should be bound by the outcome of that litigation. The goal is to avoid frustration of litigation by transfers of property. From this simple principle, the doctrine of *lis pendens* emerges.

For clarity, the common law of *lis pendens* will be referred to as the "Doctrine". References to registration of documentary notice of pending litigation will be referred to as "Notice".

While the Doctrine's underlying rationale is easy to understand, its application in law can be less so, particularly in Newfoundland and Labrador, which is the lone province without statutory regulation of the Doctrine or statutory importation of Notice. Local practices have developed based upon the Doctrine to give practical effect to the intention behind it. It is important to understand the Doctrine from its first principles in order to understand its application today. Proper understanding of the Doctrine is necessary for its exercise in practice. Too liberal of an approach can invite litigation and cost consequences. Too conservative of an approach can frustrate its intended use. The Courts of Newfoundland and Labrador have grappled with the same confusion, leaving many practitioners uncertain about when and how the Doctrine actually applies and what its rules are. The result is a unique creation of common law Notice in Newfoundland and Labrador, affirming local practice but without clarifying its rules or its impact on the received Doctrine. The unique situation in Newfoundland and Labrador means that there are few

* Associate Lawyer at Mills, Pittman & Twyne, NL.

resources to guide the practitioner through the maze of domestic jurisprudence, and little reliance can be made on the caselaw from other provinces.

This paper will address the historical root of the Doctrine and distinguish its operation in Newfoundland and Labrador from that of other provinces. It is hoped that this paper will assist in clarifying how the law of *lis pendens* should correctly operate, by synthesizing modern jurisprudence and the received common law into a single theory with common rules.

II. The Doctrine of Lis Pendens Generally

The *lis pendens* Doctrine traces its origins back centuries. It is premised on the open and public nature of the justice system, that all persons ought to be aware of matters before the courts. As stated by the Lord Chancellor in *Worsley v Earl of Scarborough* in 1746:

> There is no such doctrine in this court, that a decree made here shall be an implied notice to a purchaser after the cause is ended, but it is the pendency of the suit that creates the notice; for as it is a transaction in a sovereign court of justice, it is supposed all people are attentive to what passes there, and it is to prevent a greater mischief that would arise by people's purchasing a right under litigation and then in contest […].[1]

The Doctrine, as originally conceived, did not rely upon specific notice of a dispute to be effective. The open and public nature of the Courts, and the presumption of public awareness of matters before the Court, meant that all persons were deemed to have notice of litigation, whether or not they had actual notice. The result of such was that *bona fide* purchasers for value were bound by the outcome of litigation, whether or not they had actual notice. In the later case of *Bellamy v Sabine*, Lord Chancellor Cranworth stated:

> It is scarcely correct to speak of lis pendens as affecting a purchaser through the doctrine of notice, though undoubtedly the language of the Courts often so describes its operation. It affects him not because it amounts to notice, but because the law does not allow litigant parties to give to others, pending the litigation, rights to the property in dispute, so as to prejudice the opposite party.
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> Where a litigation is pending between a plaintiff and a defendant as to the right to a particular estate, the necessities of mankind require that the decision of the court in the suit shall be binding, not only on the litigant parties, but also on those who derive title under them by alienations made

[1] *Worsley v The Earl of Scarborough* (1746), 26 ER 1025 at 1026.

> pending the suit, whether such alienees had or had not notice of the pending proceedings.[2]

The potential for injustice to be done to *bona fide* purchasers without notice led to statutory reform of the Doctrine in the United Kingdom by the *Judgments Act* in 1839.[3] This statute introduced for the first time a mandatory registration provision: no buyer of land would be subject to the *lis pendens* rule unless it was first registered as specified by statute.[4] This created the requirement of Notice for the first time.

In Canada, all common-law provinces except for Newfoundland and Labrador have codified the Notice provisions of the *Judgments Act* of 1839 in their domestic legislation.[5] The Canadian statutes are uniform, in that they confirm the requirement of registered notice on the appropriate property registry to bind third party purchasers of the property, and that such notices are issued by the Court. Newfoundland and Labrador stands alone as having no statutory equivalent. One should note that the United Kingdom's *Judgments Act* became law after the date of reception in Newfoundland and Labrador, being 26 July 1832.[6] Accordingly, Newfoundland and Labrador has never received any statutory amelioration of the strict common law Doctrine, which was adopted into the law of the province.

Notice requirements arose as a statutory response to the harshness of the Doctrine. Notice is a creature of statute, not of common law. In those provinces where the 1839 *Act* forms part of received law, Notice has always been required from for *lis pendens* to have effect. Subsequent legislation in these provinces specifies the form and issuance of such Notice by the Court. Notice requirements are met by a form of a certificate from the Court, registered at the appropriate registry. Without this specific public notice, one cannot rely on the Doctrine to protect one's interest in property under litigation in these jurisdictions. However, the rules regarding registered Notice are separate from the Doctrine. As stated by the Ontario Supreme Court over a century ago:

> The certificate must be distinguished from the lis pendens itself. The phrase 'lis pendens' means precisely what its component words indicate, 'law suit pending' – and what is sometimes called the doctrine of lis pendens was

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[2] *Bellamy v Sabine* (1857), 44 ER 842 at 847 [*Bellamy*]. Note that this case dealt with pending litigation commenced in 1835, prior to the passage of the *Judgments Act, 1839*, *infra*.

[3] *Judgments Act, 1839,* 2 & 3 Vic, c 11.

[4] *Ibid,* s 7.

[5] *Land Titles Act*, RSBC 1996, c 250, s 215; *Land Titles Act*, RSA 2000, c L-4, s 148 and *Forms Regulation*, Alta. Reg. 480/1981, Form 30; *Queens Bench Act, 1998*, SS 1998, c Q-1.01, s 46; *Court of Queens Bench Act*, CCSM c C280, s 58; *Courts of Justice Act*, RSO 1990, c C-43, s 103; *Land Titles Act*, SNB 1981, c L-1.1, s 38 and *Rules of Court*, NB Reg 82-73, rule 42.01; *Land Registration Act*, SNS 2001, c 6, s 58; *Judicature Act*, RSPEI 1988, c J-2.1, s 46.

[6] *Buyer's Furniture Ltd v Barney's Sales and Transport Ltd* (1983) 43 Nfld & PEIR 158 (CA); *Roy v Legal Aid Commission (Nfld)* (1994), 116 Nfld & PEIR 232 (T.D.); *Babstock v Atlantic Lottery Corporation Inc*, 2014 NLTD(G) 114.

> well known and recognized in England many years before the organization of our Court of Chancery. [Court cites to *Worsley*, supra] The theory, object and extent of the doctrine are here set out with great clearness: the effect being that purchasers for valuable consideration without actual notice were sometimes defrauded of their purchase by operation of this rule of implied notice of lis pendens.[7]

It is important to understand the origin of the Notice rule as a separate development from the common law Doctrine when looking at *lis pendens* law in Newfoundland and Labrador. Notice is a statutory response to the Doctrine, but not a part of the Doctrine itself. It is ancillary to what *lis pendens* actually is, and importantly, it is not part of the received law of Newfoundland and Labrador.

III. The Evolution of the Doctrine in Newfoundland and Labrador

For many years, the Doctrine of *lis pendens* existed in Newfoundland and Labrador without fanfare or judicial comment. It was not until 1987 that the substance of the Doctrine was addressed in caselaw at all, in the case of *Newfoundland and Labrador Housing Corporation v Ennis*.[8] The facts of that case involved a dispute regarding creditor priorities in a hotel. Of relevance to this paper was the dispute between a judgment creditor and an unregistered mortgagee. The mortgage at issue was signed in December of 1985, but never registered. The litigation involving the judgment creditor was commenced in March of 1986. The judgment creditor argued, in part, that it should have priority under the common law of *lis pendens* (the Doctrine), as the mortgage was unregistered at the time the litigation commenced. Justice Cameron considered the Doctrine and confirmed that "*the doctrine of lis pendens is part of the body of law received into the law of Newfoundland*," and further confirmed that the *Judgments Act* of 1839 was not.[9] On the facts of the *Ennis* case, the Doctrine was of limited utility: the mortgagee acquired its interest three months before the litigation had commenced. Cameron J held that the operative time for inquiry was the date at which the third party had acquired its interest, rather than the date of registration.[10] The *Ennis* case does little to set out the parameters of the Doctrine, except to cite to the *Bellamy* decision as indicative of the state of the law, and implying that there is no requirement for Notice of the litigation to be filed in order to rely on the Doctrine.[11] There is no discussion of Notice in the case, but the Doctrine is discussed at length. If Notice had been a determining factor, one would expect its presence or absence to be addressed.

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[7] *Brock v Crawford* (1908), 11 OWR 143 at 145–146 (SC).

[8] *Nfld & Labrador Housing Corp v Ennis*, 1987 CarswellNfld 133, 64 Nfld & PEIR 22 [*Ennis*].

[9] *Ibid* at para 46.

[10] *Ibid* at para 48.

[11] *Ibid* at paras 43–46. Note the facts at paras 7 and 30, which indicate that there is no registration of a notice of pending litigation. The facts support this case as being about the pure doctrine of *lis pendens*.

The *Ennis* case confirms when the Doctrine is triggered. It arises on the commencement of litigation – with or without notice to anyone else. However, Cameron J does not go into particular detail about what type of litigation gives rise to *lis pendens*. The Doctrine is stated in earlier-referenced caselaw to apply to litigation over "the right to a particular estate".[12] In a case such as *Ennis*, which involved litigation over the priorities of creditors on a single property, it would have been unnecessary to delve into the scope of the Doctrine when its application was clear. *Ennis* provides a useful starting point to connect the earliest English common law with the modern law of Newfoundland and Labrador.

As further cases arose dealing with *lis pendens*, they paradoxically arose in circumstances that did not deal with the Doctrine itself. Rather, Notice has been the focal point of subsequent litigation. It should be remembered at this stage that on the original common law Doctrine, Notice was not required for the *lis pendens* Doctrine to operate. The public nature of the Court was deemed sufficient knowledge to the public at large. This had to be changed statutorily in 1839 in the United Kingdom. While such statutory changes were adopted in all other parts of Canada, no such action has yet been taken in Newfoundland and Labrador. Nevertheless, "Notices of Lis Pendens", registered at the Registry of Deeds and identifying the parties and purporting to give notice of litigation, have long been utilized in this province by lawyers seeking to secure their clients' interests in real property. One notes, however, that registration of such Notices were not provided for in statute until 2009, in spite of their usage before that time.[13]

As a creature of statute, there had been no common-law rules governing the registration of Notice. The rules had been set out in the enabling statute. Every other province statutorily mirrors the *Judgments Act* of 1839 and provides for a registrable document to be issued by the Court for filing on the appropriate property registry. Newfoundland and Labrador has no such procedure and no such law. Notices of Lis Pendens in Newfoundland and Labrador are creations of the practicing bar. For registration purposes in Newfoundland and Labrador, nothing more is required than a properly witnessed signature on a document purporting to assert a legal claim in land, and the document may be registered at the Registry of Deeds.

A comparable situation once existed in Prince Edward Island. Prior to the passage of the *Supreme Court Act* in 1987, Prince Edward Island had a similar gap in

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[12] *Bellamy, supra* note 2.

[13] *Registration of Deeds Act 2009*, SNL 2009, c R-10.01, s 7(1)(e) authorizes the registration of notices of pending litigation. Previous versions of the Act had permitted such registrations under a catch-all clause of "other documents": see RSNL 1990, c R-10, s 7(1)(f); RSN 1970, c 328, s 6(1)(f). A review of the Registry of Deeds online service, which records registration particulars for documents back to 1980 and permits a search by document type, discloses 640 documents registered as "lis pendens" since 1980, including several registered in that year. The practice has evidently existed for some time prior to 1980, though it is not possible to search the bound paper records of the Registry of Deeds by document type for documents prior to 1980.

its law relating to *lis pendens*. While registered Notice was statutorily required to bind property in Prince Edward Island, as was the case in the United Kingdom after 1839, no rules existed for the issuance of a Notice by the Court. Instead, the statutory provision in Prince Edward Island only specified what was required in the Notice, and that the Notice be filed with the Prothonotary in Charlottetown, where it would be registered similar to a minute of judgment.[14] It appears that, as in Newfoundland and Labrador today, issuance of such a Notice was at the discretion of individual lawyers. Controversy arose on the exercise of such discretion in *B.L. Construction & Tile Ltd v Waugh*.[15] In that case, the Plaintiff filed suit in relation to an unpaid debt for construction of a house, and filed a Notice as provided under the statute in effect at the time. The Defendant objected to the Notice, arguing that the facts of the case did not give rise to the *lis pendens* Doctrine. Counsel for the Plaintiff argued in part that "*in view of the lack of rules in our jurisdiction covering lis pendens or statutory authority for same, it is submitted that the present practice which has grown up is a proper practice.*"[16] Trainor CJ rejected this argument, holding that a strict reading of the origin of the Doctrine applied, and that "*such instances should not be taken as setting up a legal practice which could otherwise have no validity. If such a practice is desirable it is for the Legislature and not the Courts to vary the existing law by giving recognition to an unauthorized practice.*"[17] The Prince Edward Island Supreme Court adopted a strict interpretation of the Doctrine in order to limit the scope of registered Notices. Such a strict interpretation in Newfoundland and Labrador, however, would seem to eliminate any requirement for Notice. There is no statutory provision ameliorating the harshness of the Doctrine in this province. In a technical sense, the "unauthorized practice" of registering Notice in Newfoundland and Labrador amounts to a "variation of the law" of *lis pendens*, to mirror the words of Trainor CJ. Nevertheless, the Courts of Newfoundland and Labrador have allowed expansion of the common law to incorporate Notice. But with the local practice of Notice acknowledged and approved by the courts and unconstrained by legislation, how far does Newfoundland and Labrador's own Notice law extend? Is it in fact a legal requirement for the Doctrine to operate today?

The lack of rules on registering a Notice of Lis Pendens at the Registry of Deeds has led to a confusing interpretation of the Doctrine, both by practitioners and by the Court. Not because the jurisprudence deals with the Doctrine dating back to *Worsley*, but because all modern caselaw deals with these registered notices, which are uniquely creations of Newfoundland practice. One must review the current body of law of "Notice" caselaw with consideration of the Doctrine before one can synthesize this practice into the law of *lis pendens*.

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[14] *Judgment and Execution Act*, RSPEI 1951, c 78, s 10.

[15] *B.L. Construction & Tile Ltd v Waugh*, 1973 CarswellPEI 40, 4 Nfld & PEIR 490 40 DLR (3d) 139 [*Waugh*].

[16] *Ibid* at para 16.

[17] *Ibid* at para 17.

In *Anchorage Contracting Services Ltd v Meaney*, a contractor's mechanics lien was denied, and the contractor immediately filed a Notice of Lis Pendens and amended its pleadings to claim fraud and breach of fiduciary duty.[18] O'Regan J held that in such "unique circumstances", an equitable claim based on "fraud, breach of trust, misappropriation of funds or similar like activities" supports a claim to an interest in land.[19] In that case, the *lis pendens* arose after the failure of a mechanics lien claim.[20] The *lis pendens* was upheld on the basis of a possible equitable entitlement in the property in the underlying litigation, arising from the potentially fraudulent activities of the Defendant in using the Plaintiff's assets to benefit his own property.[21] The Notice in this case almost acts as a surrogate for the dismissed mechanics lien. One could liken this case to the fact pattern in the *Waugh* case in Prince Edward Island, where Trainor CJ refused to allow the Notice to stand and thus *lis pendens* did not apply. The *Anchorage Contracting* decision does not discuss the authority to register such a Notice, or by what law it exists. The authority to register such a Notice is taken for granted.

The Notice issue next arose in the case of *Infini-T Holdings Ltd v Bell Aliant Regional Communications Inc*.[22] In that case, the issue was the disconnect between the filing of a Notice at the Registry of Deeds in April 2009 and the commencement of litigation seeking specific performance in December 2010. Confusion around the Doctrine is apparent in this decision. Leblanc J explores the Doctrine to reconcile the common law with Notice filings at the Registry of Deeds, looking to caselaw in other provinces which touched on the historic aspects of *lis pendens* and its Notice requirement. Justice Leblanc correctly notes that the Doctrine was adopted into Newfoundland's common law by 1832, but looks to the Doctrine for rules on Notice.[23] As implied in the *Ennis* decision, there is no common law Notice provision inherent in the *lis pendens* Doctrine. The legislative gap becomes clear in this case. The Doctrine exists at common law, and registration of a Notice was permissible under the *Registration of Deeds Act*.[24] However, the legislation does not circumscribe the authority by which Notices can be registered, and the received Doctrine from the United Kingdom does not recognize Notice as a requirement. Registration of Notice

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[18] *Anchorage Contracting Services Ltd v Meaney,* 2007 NLTD 33, 267 Nfld & PEIR 241 [*Anchorage Contracting*].

[19] *Ibid* at paras 7–9.

[20] *Ibid* at para 3.

[21] *Ibid* at para 5

[22] *Infini-T Holdings Ltd v Bell Aliant Regional Communications Inc,* 2010 NLTD 205, 310 Nfld & PEIR 67 (TD) [*Infini-T*].

[23] *Ibid* at para 11.

[24] Although Leblanc J cites to the *Registration of Deeds Act*, RSNL 1990, c R-10, there is no specific authority for registration of a *lis pendens* notice in this statute. The *Registration of Deeds Act, 2009*, SNL 2009, c R-10.01 does permit registration of "notices of pending lawsuits" (at s 7(1)(e)), but the 2009 Act came into force only one week before the *Infini-T* decision, and was not in effect during the registration at issue in that case.

in Newfoundland and Labrador is a development of local legal practice, and not of the law. Hence, any requirement for Notice in Newfoundland and Labrador would be a unique creation of our common law. In *Infini-T*, Leblanc J establishes the rule that Notice must be "*co-existent with the filing of an action in this court, as regards a claim to an interest or estate in land*", keeping with the common-law Doctrine that would give rise to such a Notice in the first place.[25] Justice Leblanc also confirms that the propriety of registering a Notice turns on the remedy intended from the underlying litigation. Specific performance is an equitable remedy that may be denied when damages are an adequate remedy.[26] The Court reconciles the earlier *Anchorage Contracting* case, with its high bar for removal of a registered Notice, with the adequacy of the remedy. It is not a question whether or not a Plaintiff may be successful in his or her claim, but whether or not the Plaintiff is entitled to specific performance or an *in rem* right.[27] The Plaintiff's Notice was ultimately struck, because damages would be an adequate remedy and the continued existence of the registered Notice caused hardship to the Defendant in dealing with land. This invites an analysis of appropriate remedies at a preliminary stage of litigation, where a Notice may be challenged. This is the first case to establish some rules regarding the Notice practice in Newfoundland and Labrador, and by so establishing, it becomes the seminal authority on the Notice rules in this province.

The rules created by Justice Leblanc in *Infini-T*, would come before the Court of Appeal a few years later, in *Paro Enterprises Ltd v Murphy*.[28] This case would create confusion about the permissive scope of the Notice and the remedies for those aggrieved by such Notice. The *Paro Enterprises* case involved a Notice registered in relation to a matrimonial dispute. The property was a former matrimonial home, which had been transferred by the parties to Paro Enterprises, a corporation owned or controlled by the husband. The wife (Murphy) commenced an action in the Supreme Court Family Division against her husband in July of 2013, and registered a "Notice of Lis Pendens" on the Registry of Deeds in August of 2013. The Notice named Paro Enterprises Ltd., which was not a party to the matrimonial litigation, and identified specific properties at issue. Paro Enterprises applied to strike the Notice in February 2014. At that date, Paro Enterprises was not a party to the family litigation. Paro was subsequently added to the Family Division litigation in June 2014. The matter was heard by the Supreme Court of Newfoundland and Labrador and was subsequently appealed to the Court of Appeal, resulting in four different decisions on the law of *lis pendens*. In attempting to clarify the law of *lis pendens*, matters only became more muddled.

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[25] *Ibid* at para 11.

[26] *Ibid* at paras 16–19.

[27] *Ibid* at para 21.

[28] *Paro Entreprises Ltd v Murphy*, 2014 NLTD(G) 39, 348 Nfld & PEIR 248 [*Paro Trial Decision*], aff'd on other grounds 2015 NLCA 33 [*Paro Appeal Decision*], leave to appeal to SCC refused (17 March 2016).

The *Paro* trial decision sets out the law on *lis pendens* as follows, which was adapted from *Anchorage Contracting* and *Infini-T*:

> - A "lis pendens" is a notice of a pending legal action regarding an interest in land, and is intended to preserve rights up to and during litigation, involving an action *in rem*.
> - A registered "lis pendens" is not a lien or charge, but is a cloud on title.
> - Registering a "lis pendens" must coincide with filing an action in court.
> - If damages provide an adequate remedy, the "lis pendens" should not stand.[29]

The first point is the most controversial: it defines *lis pendens* as Notice. This is incorrect. The Doctrine and Notice are two distinct lines of jurisprudence. The Doctrine has existed at common law for centuries, dating back to *Worsley* in 1746. Notice was introduced by statute elsewhere beginning in 1839. By the common law, the Doctrine exists without Notice, but Notice cannot exist without the Doctrine. Without a rule that property at issue in litigation will be bound by the outcome of the litigation, there is no need for Notice in the first place.

The Court of Appeal's deciding reasons by Welsh JA endorsed the summary of the law of *lis pendens* as had been stated by Handrigan J at trial level.[30] The language employed throughout refers to the registered Notice as the "lis pendens". This case conflates the Doctrine and the Notice into a single concept. The principles stated in the *Paro Enterprises* decision are thus confusing. The Doctrine has always existed in Newfoundland and Labrador; rules surrounding Notice have not. Absent statutory amendment, the Doctrine applies with full force and effect as it did in the early 19th century. The *Paro* case must be considered in terms of Notice, but bearing in mind that the Doctrine continues to exist undisturbed.

As to the parameters of Notice, the trial decision by Handrigan J looked to the subject matter of the underlying litigation: the matrimonial action between the Respondent Mrs. Murphy and her husband. In that litigation, the Applicant claimed an interest in several properties which were owned not by her husband, but rather by his various companies.[31] The companies had not been named to the Family Division litigation, but the properties were identified in the action by Mrs. Murphy against her husband. Justice Handrigan relied on the provisions of the *Family Law Act* which create a potential spousal interest in real property held by a corporation when used as

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[29] *Paro Trial Decision, supra* note 28 at para 4.

[30] *Paro Appeal Decision*, *supra* note 28 at paras 14–15.

[31] *Paro Trial Decision*, *supra* note 28 at para 11.

a matrimonial home.[32] Ultimately, the outcome of the trial decision was based on Paro failing to prove that the Notice was unperfected or groundless.[33]

> On appeal, three different sets of reasons arise:
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> > Welsh JA held that the family law litigation filed in August of 2013 sufficiently grounded the July 2013 Notice, although the Notice should have named the appropriate titleholder, and its validity began on the date the litigation commenced, even though it does not name the corporate titleholder.[34]
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> > Hoegg JA concurred with the outcome of Welsh J.A.. However, Hoegg J.A. held that the rationale for a Notice was to give notice of the parameters of a potential claim so a potential purchaser could assess the risk of proceeding. Rigid adherence to doctrinal rules could result in injustice, and the Notice should be upheld, as it serves its purpose in notifying the public of the risk.[35]
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> > White JA, in dissent, held that Murphy's Notice was a nullity. Without a pending lawsuit affecting title to the land at the time of registration, the Notice could not be effectual. Even if it became effectual *ex post facto*, it could not be effectual on Paro without Paro being a party to the underlying litigation.[36]

The four decisions appear to reflect the differences of application of Notice, the underlying principles of which had never been expressly defined in Newfoundland law. Other provinces, with the benefit of a legislative framework on Notice, do not have to make such considerations. The problem at issue in *Paro Enterprises* would not have arisen in any other province, all of which prescribe the form of Notice and its issuance by the Court. The challenge now becomes synthesizing the Notice decisions into one coherent theory of the law of *lis pendens*: one which reconciles the Doctrine itself with unregulated local practice on Notices. It is necessary to do so because the law regarding *lis pendens* is now confused. As White JA asserted in his dissenting reasons, the majority decision reflects a seismic shift in the law of Newfoundland and Labrador.[37] Uncertainty in the application of *lis pendens* law may lead to misuse of Notice, or conversely, reluctance to file Notice. Misuse of Notice could attract further litigation and cost consequences. Reluctance to file Notice may prejudice litigants who wish to protect their asserted interest in property. It also leaves unaddressed a fundamental question: is Notice even a requirement in Newfoundland and Labrador,

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[32] *Ibid* at para 17, citing to the *Family Law Act*, RSNL 1990, c F-2, s 6(3).

[33] *Ibid* at para 22.

[34] *Ibid* at paras 28–29.

[35] *Ibid* at paras 37–39.

[36] *Ibid* at paras 51–67.

[37] *Paro Appeal Decision, supra* note 28 at paras 76, 79.

in order to secure an interest in property under litigation? If so, such a rule is a new creation of the Courts, and is at odds with the Doctrine.

One notes that the *Paro Enterprises* majority decision is correct when looking at the original common-law roots of the Doctrine, divorced from the idea of Notice. Whether or not there was public notice of Mrs. Murphy's claim to the subject property, if she claimed a proprietary interest in her August 2013 litigation, then the Doctrine is triggered under the *Worsley* rule. Specific notice is irrelevant. By filing a claim against an individual which involves the property, public notice is deemed satisfied by commencement of litigation. On Justice Welsh's interpretation, Notice can exist separate and apart from the actual litigation, only becoming effective upon actual commencement of litigation. One notes that Justice Welsh grounds the Notice on litigation to which the titleholder of the property was not a party, which would seem to hearken back to the original Doctrine. The actual property owner would not necessarily have actual knowledge of litigation of which it was not a part, and there is no discussion of actual notice to Paro itself of the 2013 litigation, by which the Notice became effective. One could liken such a situation back to the original Doctrine, where the public nature of the Court action imputes knowledge to all. This leaves aside the question of whether such litigation could be effective against a subsequent owner if commenced against its predecessor in title. Such a question would arise on conclusion of any litigation. For the purposes of the Notice, it was sufficient that litigation existed and sought recovery of the subject property, regardless of the parties thereto.

The practical concerns animating White JA's dissent indicate the hazards of Newfoundland's unregulated and cavalier approach to Notice as a local practice. If anyone can register a Notice on the Registry of Deeds, without commencing any litigation, "pernicious effects" can flow.[38] Justice White went so far as to state emphatically that registration of Notice in the absence of litigation could constitute abuse of process.[39] Public policy issues arise in the absence of clear control. The very act upheld by two justices of the Court as legitimate is emphatically decried by a third. For the prudent practitioner, it is important to know when registration of Notice will be permissible and when it will be deemed an abuse of process.

The challenge to reconciling these opinions becomes apparent when looking at caselaw post-*Paro Enterprises*.

In *Duffitt v Conception Bay South (Town)*, a contractor sought to discharge a Notice filed by the Plaintiff over certain property.[40] In that case, Murphy J relied on White JA's dissenting opinion regarding policy reasons for restricting the scope of such Notices as narrowly as possible.[41] *Duffitt* builds on Justice White's comments

[38] *Ibid* at para 80–82.

[39] *Ibid* at para 43, 83.

[40] 2016 NLTD(G) 89 [*Duffitt*].

[41] *Ibid* at para 13, 21.

about the policy reasons to narrow the focus of a Notice, and further confirms the hardship and damages rules incorporated from *Inifini-T*.[42] Justice White's dissent does not contradict from the principles of Justices Welsh and Hoegg in *Paro Enterprises* as their reasons relate to the impact of litigation (the application of the Doctrine), but does challenge their approach to Notice. Nor do Justices Welsh and Hoegg contradict Justice White's policy considerations on Notice. These positions are reconcilable when looking at *Paro* as discussing two different concepts: the effect of the litigation itself (the Doctrine) and the effect of the publicly registered Notice. The former is long-established law of *lis pendens* going back for centuries, the latter is a local practice with rules of modern creation. Justice White's emphasis on the policy reasons for circumscribing Notice appears to be adopted by Murphy J in *Duffitt*.

In *Bitmain Technologies Ltd v Great North Data Ltd*, the court was faced with an application to discharge a Notice.[43] The Plaintiff claimed an interest in several properties in Labrador City, and upon challenge to the registered Notice, the Plaintiff applied to amend its pleadings to particularly claim a constructive trust over the Labrador City properties.[44] Orsborn J was critical of the filing of a Notice when the original litigation did not incorporate, on any reading, a claim in respect of an interest in the land itself. He categorized it as "improper" and invited an inference of strategic use of Notice.[45] However, the *Bitmain* decision vacillates between addressing Doctrine and Notice. Orsborn J correctly notes that the Doctrine applies where litigation is commenced respecting an interest in land, but goes on to state that "registration legislation subsequently alleviated the potential hardship of the doctrine by requiring a plaintiff to give notice of the claim in order to obtain the benefit of the doctrine".[46] This incorporates Notice as a required precondition of the Doctrine in Newfoundland and Labrador, which is, with the utmost respect, an error. The majority decision in *Paro Enterprises* discusses the Notice, but not the underlying original Doctrine, although an inferential reading of Welsh JA's reasons indicates reliance on the Doctrine to uphold the Notice. The conflation of the Doctrine and Notice, with reliance on the *Infini-T* decision, meant that the Doctrine was not expressed specifically in *Paro*. Notice is not the *sine qua non* of *lis pendens* – litigation is. The Doctrine applies, with or without Notice, so long as litigation is commenced. This is evidenced by the statutory reforms in 1839 and the statutory enactments in every other province. As *Paro* demonstrates, Notice can exist without litigation, thus divorcing it from the Doctrine.

On the balance of the *Bitmain* decision, the correct outcome is reached: the litigation did not claim an interest in land. Rather it claimed a possible future interest that may arise if a constructive trust was proven. Orsborn J declined to exercise a

[42] *Ibid* at paras 22–25.

[43] *Bitmain Technologies Ltd v Great North Data Ltd*, 2018 NLSC 130 [*Bitmain*].

[44] *Ibid* at paras 6–12.

[45] *Ibid* at paras 45–51.

[46] *Ibid* at paras 57–59.

discretionary authority discussed in the *Anchorage Contracting* decision to find that the type of contingent interest would give rise to a proprietary claim that could justify the Notice.[47]

The most recent application of the law of *lis pendens* in Newfoundland and Labrador arose in *Residents of Old Bonaventure v Trinity Historical Society Inc*.[48] At issue in that case was a claim made by the residents of a community to claim title to a church which was put up for sale by the defendant Historical Society. A "representative" of the community residents filed a Notice in relation to the property at the Registry of Deeds and commenced an action to block the sale of the property.[49] The Notice was filed before litigation had commenced, and in fact the litigation seeking an *in rem* remedy was commenced one day after the Defendant's application to strike the Notice. The Court upheld the Notice, notwithstanding that litigation only existed subsequent to the application to strike.[50]

IV. Principles to Draw

Understanding that the Doctrine and Notice are two separate concepts goes some way toward reconciling the decisions on the current state of the law. In trying to determine how the Doctrine should apply in Newfoundland and Labrador, it is necessary to find a common reading of the few cases on point to find a coherent theory that practitioners can follow and rely on in deciding whether or not to take action relating to *lis pendens*. The law has become confused, as evidenced (and in some degree caused) by the *Paro* decisions. *Paro* holds that Notice can exist without litigation, and the Doctrine holds that litigation binds property without Notice. Referring to the two as a singular concept means that it is unclear what the actual rules are, and whether Notice is in fact a requirement at all.

Notice provisions are a creature of statute elsewhere. No such statutory requirement exists in Newfoundland and Labrador, except for a permissive authority under the *Registration of Deeds Act, 2009*.[51] It falls to the discretion of individual lawyers to determine whether the circumstances of a matter warrant the filing of a Notice on the Registry of Deeds. One must be cognizant of the requirements for validity, as improper or tactical registration can give rise to a claim for damages for

[47] *Ibid* at paras 69–81.

[48] 2021 NLSC 23 [*Old Bonaventure*].

[49] I refer to the "Representative" in quotation marks, as the concept of a 'representative plaintiff' accords with the law of class actions. This case does not appear to be a certified class action in accordance with the *Class Actions Act*, SNL 2001, c C-18.1. One should note that Old Bonaventure is not an incorporated municipality and thus has no municipal corporate body to pursue such an action.

[50] *Ibid* at paras 47–50.

[51] SNL 2009, c R-10.01, s 7(1)(e).

wrongfully filing same and for slander of title, or a costs award at minimum.[52] Registration of a Notice indicating that litigation has been commenced when such has not been issued by the Court may constitute an abuse of process.[53]

At common law, the Doctrine arises upon litigation, not upon registration of Notice. The litigation is the "notice" at common law. Nothing in the law of Newfoundland and Labrador has changed this proposition. Where the interests of a *bona fide* purchaser for value without notice arise, one must question whether registration of a Notice on the Registry of Deeds is a requirement. The common law would hold that it is not required: commencement of litigation is all that is needed for the Doctrine to apply. The common law of Newfoundland and Labrador has long held that reasonable diligence and inquiry is expected of a purchaser, and failing to make appropriate inquiry disentitles reliance on equitable principles.[54] Knowing that the common law, as yet unchanged in Newfoundland and Labrador, does not require notice, can a *bona fide* purchaser for value shelter behind a failure to conduct a litigation search or obtain a warranty from the vendor? The *Registration of Deeds Act* provides that "*an instrument that has not been proved and either registered or had a notice of instrument registered in relation to it, shall be judged fraudulent and void both at law and in equity, as against a subsequent purchaser or mortgagee for valuable consideration who first registers the instrument or notice of instrument.*"[55] This principle works when dealing with transfers or encumbrances on the title. But a *lis pendens* Notice is not an encumbrance or a lien on the land itself – it is merely a cloud on title.[56] A cloud on title does not give substantive rights, but only raises uncertainty about the purported owner's title.[57] It is not a question of an encumbrance or charge or transfer being "fraudulent and void", as there are no substantive rights to void or transfers to deem fraudulent. Either the underlying litigation exists or it does not. If it exists, then the *lis pendens* Doctrine is triggered, regardless of Notice. Litigation is not an "instrument" as defined in the *Act*. Even if section 37 of the *Act* could be interpreted so broadly, one could suggest it repugnant to deem "fraudulent and void" a duly instituted legal proceeding before the Supreme Court on such vague and general language. The principles of justice as stated back to the *Worsley* decision in 1746 hold that the Court must not be deprived of its due authority to rule on an *in rem* proceeding, regardless of the subsequent conduct of the Defendant in dealing with the land. This is what was contemplated in the *Ennis* decision, although on the facts it was not necessary to investigate further because the unregistered transaction predated the litigation. The *Registration of Deeds Act* does not seem to address the issue.

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[52] *James v Alcock* (1996) 143 Nfld & PEIR 106 at paras 79–85 (TD). On costs, see *Paro Appeal Decision*, *supra* note 28 at paras 19, 31(5) and (7), and 65; *Bitmain*, *supra* note 43 at paras 84–85.

[53] *Paro Appeal Decision*, *supra* note 28 at paras 65, 85.

[54] *McKay v Coady* (1875) 6 Nfld LR 109 at 111–112.

[55] *Registration of Deeds Act*, 2009, s 37.

[56] *Paro Appeal Decision*, *supra* note 28 at para 52, 81; *Duffitt*, *supra* note 40 at para 24.

[57] *Watton v Kennedy*, 2020 NLCA 24 at para 10; *EPC Industries Ltd v Union Electric Supplies Co*, (1985), 55 Nfld & PEIR 186 (TD).

If, as the common law Doctrine holds, Notice is not required, then failure to register a Notice is not fatal to the Plaintiff's claim against the property, whether or not the buyer is a *bona fide* purchaser for value. As such, unlike other provinces with mandatory registration requirements offering protection to *bona fide* purchasers without notice, purchasers in Newfoundland and Labrador may be required to engage in further diligence to ensure that no litigation is pending against land, either by conducting additional searches or by warranties from vendors. A *bona fide* purchaser for value would, of course, have recourse against a Defendant who sold property which was the subject of litigation.

One should consider the Notice of Lis Pendens in Newfoundland and Labrador a *sui generis* protective mechanism. It exists as its own adjunct common law doctrine, apart from the Doctrine of *lis pendens* generally. It is a "self-help" prophylactic, as it is not issued pursuant to the authority of the Court or by statute. It falls to litigants, or their counsel, to register Notice themselves. The goal of the Notice registration is to prevent the Defendant from taking action involving the land, and to serve as actual notice to prevent buyers from acquiring the Defendant's interest. While not necessarily required to rely on the Doctrine, the registration of Notice is a protective mechanism to prevent further litigation, and to warn off any potential purchasers. At a minimum, it bolsters the argument of an aggrieved litigant whose proprietary interests could be undermined by a *bona fide* third-party purchaser without actual notice. The Courts of Newfoundland and Labrador have never had to address such an argument to date. Notice could thus be seen as a form of "insurance" in the event that such litigation arises, to proactively avoid any equitable arguments by *bona fide* third-party purchasers.

As a *sui generis* mechanism, Notice has developed distinctly in this province. Relying on the *Paro Enterprises* majority decision, such a Notice can legitimately be registered prior to the commencement of litigation.[58] This is a distinct practice in Newfoundland and Labrador – one which does not exist in other provinces with legislated rules. There are valid policy reasons why such registration may be considered legitimate. Registration of Notice on the Registry of Deeds can be accomplished instantly by electronic submission on the Registry of Deeds online service by an authorized user, which can be done online from anywhere in the province on a moment's notice.[59] Notice can be drafted and registered in a matter of minutes by a solicitor. A Statement of Claim at Supreme Court must be drafted in detail, then filed and issued and returned by Supreme Court, which is more time consuming. In exigent circumstances, Notice could be filed while a Statement of Claim is prepared and filed simultaneously. As stated by Welsh JA in *Paro*, the issuance of the Statement of Claim is what will render the Notice valid, while registration of the Notice will serve as public

[58] *Paro Appeal Decision*, *supra* note 28 at para 16.

[59] *Registration of Deeds Regulations*, NLR 110/10, s 3(1).

notice of the intended litigation.[60] One could consider it perhaps an expansive definition of the term "pending" when considering *lis pendens*' literal translation as "pending litigation". Litigation is "pending" insofar as the action will be filed, but the Notice has been registered before the Statement of Claim is issued. By the *Paro* Appeal Decision, this is now an authorized practice.

One may be tempted to draw the parallel with mechanics lien law in Newfoundland and Labrador, which requires a lien claimant to file a Certificate of Action issued by the Supreme Court in order to maintain a valid lien.[61] However, the proper point of comparison for Notice is not with the Certificate of Action, but rather with the Notice of Lien provisions which commence the mechanics lien process. Such a Notice of Lien is not issued by the Court, and comprises an identification of the parties' property description, reason for the claim, and amount sought on lien.[62] Failure to perfect the Mechanics Lien with a Certificate of Action issued by the Court renders it a nullity. One could argue for a similar approach with registered Notices which are long standing in the Registry but which are not supported by timely commencement of litigation. These registered Notices will create a cloud of uncertainty on title. Given that a registered document on the Registry of Deeds cannot simply be removed from the Registry, practitioners must have some certainty where a Notice is registered but remains unreleased.

One should give thought to the practical protective element afforded by Newfoundland and Labrador's unique Notice doctrine, particularly in the COVID-19 era, where the pandemic has led to lengthy closures of the Supreme Court for filing and issuing documents.[63] In time-sensitive matters where notice may be required to stop an imminent transfer of property, the unrestrained power to register such a notice may be seen as a practical solution.

Justice White's concerns about abuse of process and pernicious use of Notice can, at present, be addressed by an aggrieved party bringing an Application to discharge same. As endorsed by both White and Welsh JJA, "*if a lis pendens is registered and litigation has not been commenced, application to the Court will result in the lis pendens being vacated with an appropriate order for costs*."[64] Further,

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[60] *Paro Appeal Decision*, *supra* note 28 at para 16.

[61] *Mechanics Lien Act*, RSNL 1990, c M-3, s 23(2) and (3).

[62] *Ibid* at s 17.

[63] The Supreme Court of Newfoundland and Labrador was closed provincewide for filings from March 18th to June 3rd, 2020, except for circumstances with imminent statutory deadlines or limitation periods. See *Supreme Court of Newfoundland and Labrador Notices to the Profession and General Public*, dated March 20th, 2020 and June 3rd, 2020. A further closure occurred from February 18th to March 4th, 2021.

[64] *Paro Appeal Decision*, *supra* note 28 at para 31(5) and 76(a).

improper use of Notice can result in an action for wrongful filing and slander of title.[65] At a minimum, inappropriate strategic use of the Notice will attract costs.[66]

However, one must be concerned that an application to discharge a Notice for failure to commence litigation would then be met with the commencement of the litigation, justifying its registration *ex post facto*. This appears to have been what happened in *Old Bonaventure*, where the litigation itself commenced after the application to strike the Notice had been filed. On that basis, one would rightly consider it a pointless endeavour to apply to strike a Notice, if the litigation can arise in response to the application to strike. Contrarily, one would justifiably question the practicality of striking a Notice after the appropriate litigation has commenced, since the Doctrine would apply at that point. The remedy for the Plaintiffs in *Old Bonaventure*, had the Notice been struck, would be to simply re-file the Notice with reference to the subsequent litigation. Striking the Notice would not change the fact that there was pending litigation affecting the property at issue. To paraphrase Hoegg JA in *Paro Enterprises*, rigid and technical adherence to rules, where the outcome may be pointless, should be avoided. On the basis of this case, one could consider it an exercise in futility to try to strike a Notice filed without pending litigation. The ability to do so, as endorsed in *Paro Enterprises*, is illusory.

It thus becomes necessary for practitioners to determine what to consider when faced with a registered Notice. Attempting to strike the Notice on technical grounds may well be a pointless effort. It thus falls to the practicing bar to determine the validity of a Notice on its merits.

The scope of proprietary interest at issue in the litigation determines whether or not a Notice is appropriate. There is confusion over whether or not equitable claims will give rise to a legitimate application of the Doctrine and thus by extension the Notice: *Anchorage Contracting* suggests that it can, *Bitmain* suggests that it cannot.[67] "Unique circumstances" appears to be the distinguishing feature between these cases.[68] However, confusion arises when "unique circumstances" are the stated reason for an outcome, as it removes certainty and predictability in the law. It is difficult to reconcile a coherent rule if decisions give the appearance of arbitrariness in pursuit of an ephemeral notion of fairness. This is the danger posed by deference to "unique circumstances" as a justification. The reasoning must still fit within the framework of the established law, or else the rules no longer matter.

The law is unclear in its present state, partially because of the "unique circumstances" justification. It poses confusion to those who are faced with common

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[65] *James v Alcock* supra note 52 at paras 79–85 (TD).

[66] *Bitmain, supra* note 43 at paras 84–85.

[67] *Anchorage Contracting, supra* note 18 at paras 3–9; *cf Bitmain*, *supra* note 43 at paras 80–82.

[68] One notes that "unique circumstances" are cited in the *Paro Appeal Decision*, *supra* note 28 at para 39 (Hoegg J.A.) and are criticized by White JA at para 79.

situations which could hardly be said to be "unique", as to whether or not they can rely on the Doctrine to protect their interests. For example, common-law cohabiting relationships are common, but no proprietary interests are afforded by statute in such relationships.[69] The applicable rule in common law separations is the notion of the resulting trust or constructive trust, to establish a proprietary interest in real property.[70] This would hardly be considered "unique", as litigation on common-law interests is commonplace. A strict reading of the aforementioned caselaw would hold that no common-law partner can file a Notice, relying on *lis pendens*, on the basis of a constructive or resulting trust, as their interest is undetermined until post-trial. However, a cohabiting partner could legitimately claim an *in rem* remedy as against real property on the current state of the law. Certainly, where litigation is commenced by a cohabiting partner claiming an interest in property, a purchaser should be put on notice of the claim as a cloud on title, if the underlying litigation is claiming an interest in the property itself. Sale of the subject property would frustrate the other partner's interest, if such an interest is proven to exist. On the understanding that the Notice is only a "cloud" on title to serve as fair warning of intended litigation, it is suggested that the Newfoundland rule should be construed broader than both *Bitmain* and *Anchorage Contracting*, in order to maintain coherency. This is consistent with the admonition to avoid rigidity in interpretation, per *Paro Enterprises*.

Any litigation calling into question an interest in land, seeking an *in rem* remedy should give rise to the *lis pendens* Doctrine, whether or not the interest is contingent on a subsequent determination. While there is a risk that this may give rise to an abuse of process, that argument may be raised in an application to strike the Notice, as contemplated by *Paro Enterprises*, as an expedited procedure.[71] Note that such an application to strike is not based on the technicalities of the filing, but rather on the substance of the relief sought in the litigation. This hearkens back to the original Doctrine, as received in Newfoundland and Labrador unchanged from English common law. It is the litigation itself to which we must look, and not to the Notice. The determining factor must be whether the Applicant seeks an *in rem* remedy against the property, rather than general damages, based on the initial pleadings. The former would give rise to a valid Notice because the Doctrine is engaged, the latter would not. The basis for the claim, at law or in equity, must be premised on claiming an interest in a particular property for a particular reason. General damages or other pecuniary loss, whatever the cause, does not attract a claim against a specific property. This is consistent with the underlying principle of the Doctrine and its general application. It is an interest which can be said to exist at the time an action is commenced, but is an interest which requires the Court's determination to prove.[72] The interest claimed is not a collateral consequence of the underlying litigation, but rather is the purpose of

[69] *Cf Family Law Act*, RSNL 1990, c F-2, s 6–8.

[70] See, e.g. *Locke v Dyke*, 2009 NLTD 18; *Dyson v Williams*, 2012 NLTD(G) 158; *Moran v Crocker Estate*, 2013 NLTD(G) 172.

[71] *Paro Appeal Decision*, *supra* note 28 at para 31(7).

[72] *Waugh*, *supra* note 15 at para 13.

the underlying litigation. The action undertaken must be an action to recover that proprietary interest against the property itself, and not a consequential claim of damages arising from a claim to the property. The recovery aspect is important, as this is what triggers the doctrine of specific performance. Otherwise, damages are an adequate remedy, as established in the *Infini-T* case.[73] It is submitted that this is the proper threshold for validity of a Notice and the Doctrine generally.

The solution for the practicing bar may be to model Notice in *lis pendens* on the Notice of Lien claim under the *Mechanics Lien Act*, providing a suitable description of the nature of the claim asserted. This would permit the common practice of registering a Notice to continue as it has to date, while mitigating against the "pernicious effects" cautioned by White JA in *Paro Enterprises*. A prospective purchaser can evaluate the risk of the litigation before buying, and the Court can make a determination on whether or not to strike the Notice based on the content thereof. This would give effect to a broader idea underlying Notice, as endorsed by Hoegg JA in *Paro Enterprises*, to prevent frustration of litigation based on enforcement of the common-law rules "*in a rigid and technical manner to a pointless or possibly unjust end*."[74] This would seem consistent with the prevailing decision of Welsh JA, but also with White JA's dissent, which emphasizes the importance of a potential purchaser being able to assess the risks of a transaction. This may not match with the law as it exists in other provinces, but the evolution of the Doctrine in Newfoundland and Labrador is distinct from the rest of Canada. Today, Notice and Doctrine are entwined, but Notice is a uniquely common-law creation in Newfoundland and Labrador, distinct from its statutory basis in every other province.

One should take final note that the concept of unspecified "notice" exists in Newfoundland and Labrador statutory law. The Registry of Deeds permits registration of documents as "notices" generally, without reliance on the Doctrine of *lis pendens* to underlie same.[75] Such "notices" may constitute a lien or a cloud on title, but would be considered on the basis of the interest they purport to claim and depend on their individual characteristics. In *Duff v Dawe*,[76] a solicitor utilized a "Notice of Lis Pendens" to assert a solicitor's lien against a client's properties. Without pending litigation between solicitor and client, and without the solicitor claiming an *in rem* remedy in the client's properties, the Notice was deemed invalid and struck.[77] Although held invalid as a Notice of Lis Pendens, Adams J did permit it to serve as a "valid notice of solicitor's lien."[78] This should not be construed as a broadening of the

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[73] *Infini-T*, *supra* note 22 at para 16–19.

[74] *Paro Appeal Decision*, *supra* note 28 at para 39.

[75] *Registration of Deeds Act, supra* note 13, s 7(1)(e) provides for "notices of pending lawsuits," but also "other notices in relation to a charge or encumbrance on land".

[76] *Duff v Dawe*, 2018 NLSC 3.

[77] *Ibid* at paras 52–54.

[78] *Ibid* at paras 50, 53.

Doctrine of *lis pendens*, but instead an example of a miscategorized registration. Correct form may have avoided the notice being struck.

V. Conclusion

The law of *lis pendens* is not well understood in Newfoundland and Labrador in large part due to its historical roots and the absence of statutory regulation of same. Practices of local creation have developed the law distinctly from other jurisdictions, and these practices have received endorsement from the Courts of this province. The unique state of the law in this province must be better understood in order to ensure the proper application and exercise of rights, pending litigation. It is hoped that this paper will assist the Courts and the practicing bar in understanding the law in this area and to facilitate its operation.