LAW SOCIETY
Newfoundland & Labrador

What Is Good Title?
2024

The Report of the Ad Hoc Land Titles Committee of the Law Society of Newfoundland and Labrador

September 12, 2024

Editor and Chair of Ad Hoc Land Titles Committee

Gregory French, Clarenville, NL

Contributing Authors and Committee Members

Adam Baker, Corner Brook, NL
Ben Blackmore, Grand Falls-Windsor, NL
Marc Cooper, Dildo, NL
Keith Morgan, St. John's, NL
Jonathan Moore, St. John's, NL

Table of Contents

Introduction....1
Executive Summary of Title Standards....2
Chapter 1 Background to History of Registry System in Newfoundland and Labrador....3
Chapter 2 Root of Title....4
Chapter 2.1 Crown Grants....4
Chapter 2.2 Veterans Land Act Deeds....9
Chapter 2.3 Conveyances from Established Sources....10
Chapter 2.4 Expropriated Lands....15
Chapter 2.5 Quieting of Titles Certificate....16
Chapter 2.6 Possessory Title....17
Chapter 3 Chain of Title....17
Chapter 3.1 Proper Deeds and Descriptions....18
Chapter 3.2 Unregistered Documents....18
Chapter 3.3 Late Registered Documents....19
Chapter 3.4 Non-Standard Documents and Descriptions....20
Chapter 3.5 Encumbrances and Clouds on Title....22
Chapter 3.6 Colour of Title....25
Chapter 3.7 Parties Executing Deeds....26
Chapter 3.8 Co-Ownership....30
Chapter 3.9 Affidavits of Status....31
Chapter 3.10 Restrictive Covenants in Deeds....32
Chapter 4 Possessory Title....32
Chapter 4.1 The Wickham Principles....34
Chapter 4.2 Adverse Possession Generally – Defining Possession....36
Chapter 4.3 Open, Notorious, Continuous, and Exclusive Possession....38
Chapter 4.4 Trespass vs. Adverse Possession....41
Chapter 4.5 Special Considerations for Family Land....42
Chapter 4.6 Restrictive Fencing (Good Fences Make Non-Adverse Neighbours)....44
Chapter 4.7 Co-Owners/Occupiers – Possession and Dispossession....45
Chapter 4.8 Dispossessing the Crown....47
Chapter 4.9 Municipal Records and Adverse Possession....49
Chapter 4.10 Agricultural Possession and Clearing of Land....50
Chapter 4.11 Vacant Structures on Land....52
Chapter 4.12 Drafting Affidavits of Long Possession....53
Chapter 5 Nunatsiavut Lands....54
Chapter 6 Easements and Rights of Way....56
Chapter 6.1 Statutes on Easements/Rights of Way....57
Chapter 6.2 Easements vs. Rights of Way at Common Law....58
Chapter 7 Title in Unincorporated Areas....63
Chapter 8 Prior Noncompliant Title....63
Chapter 9 Role of Title Insurance....67

Introduction

Author's note: The information contained in these pages is thought to be correct, but it is not warranted. Neither the Ad Hoc Land Titles Committee, the individual writers, nor the Law Society of Newfoundland and Labrador accept any responsibility for the reliance by others on the information contained herein. Solicitors are expected to exercise their individual professional judgment in all matters of title. These materials are intended to assist in the exercise of professional judgment but are not determinative. Legislative or policy changes or subsequent jurisprudence may change the validity of the information contained herein.

The Ad Hoc Land Titles Committee of the Law Society of Newfoundland and Labrador was formed by the Benchers of the Law Society in September 2023, in response to questions raised about standards of title utilized by practitioners in this province and a perceived lack of consistency and definitive answers on title. The Committee was formed by solicitation of the Law Society Membership and appointed in December 2023 by resolution of the Benchers of the Law Society.

Research and consultation was undertaken by Committee Members through the first half of 2024. Committee Members have endeavoured to consult widely with Law Society Members to determine consistent standards of title and best practices. The Committee represents a broad geographical sample of the membership, with members familiar with title practices in all areas of the province.

This Committee has been tasked with presenting a summary of the present-day standards for title in real estate and property law in Newfoundland and Labrador, and to identify any potentially applicable areas of law that impact on real estate and title practice in this province. This very task had been undertaken by previous members of the Law Society of Newfoundland and Labrador through a Joint Committee on Continuing Legal Education in 1990, which resulted in the Seminar Materials "What is Good Title?" (published May 17, 1990). What has become abundantly clear to this Committee is that, as it was in 1990, there is no simple answer to this question.

It is worth highlighting a portion of the Preamble from the 1990 Committee's work as it is no less true today and helps highlight the difficulty with this task:

> It has become abundantly clear ... that not even titles that are accepted routinely by the vast majority of those involved in real estate are necessarily without question. Often titles have been, by the passage of time determined to be marketable, while other titles acceptable in the past, have become, because of changing standards, unacceptable by the passage of time.

Notwithstanding the difficulties, it is the mandate of this Committee to present what is considered the present-day standards of title as guidance to the practicing bar and the Law Society.

Executive Summary of Title Standards

Standards of Good Title

1. Good title consists of a root of title and an acceptable chain of title from the root, or satisfactory proof of adverse possession forward from the root.

Acceptable root of title:

- Crown Grant (all types except s. 36/134B), subject to restrictions and conditions in the grant.
- Crown Grant, *Lands Act*, SNL 1991, c. 36, *Crown Lands Act*, 1970, SNL c. 71, or quitclaim, with evidence of 30 years of possession.
- Deed from Director of the *Veterans' Land Act,* R.S.C. 1970, c. V-4.
- Deed from an established corporate entity identified by the Committee.
- Conveyance from a government department, Newfoundland and Labrador Housing Corporation ("NLHC"), Canada Mortgage Housing Corporation ("CMHC"), or St. John's Housing Corporation ("SJHC") (except in foreclosure).
- Expropriation by statute.
- Quieting of titles certificate under the *Quieting of Titles Act*, RSNL 1990, c. Q-3, s. 13(3).
- Adverse possession for the requisite period, established as provided herein.

Acceptable chain of title

- Clear and unequivocal conveyances of all interests in land.
- Accounts for all identified interests in land either transmitted by conveyance or adversely possessed for a requisite period.
- Sufficiently specific and objectively certain property description.
- Affidavits of spousal status.
- Signed by appropriate vendors: (individual Vendor, properly appointed Executor, authorized Guardian, designated Attorney).

2. Obligations of Solicitors
   - Ensure client obtains the property interest anticipated for the purposes for which the client is acquiring the land, including ensuring access to land, free from competing interests or encumbrances.
   - Investigate title to satisfaction of solicitor that the solicitor can provide an opinion on title.
   - Inform clients of any conditions, restrictions or encumbrances on the land where clear title cannot be provided, or any other qualifications on the solicitor's ability to certify title.

Chapter 1 - Background to History of Registry System in Newfoundland and Labrador

When attempting to determine what is “good title” in Newfoundland and Labrador, one must examine this question in the context of the history of how we got here as a province.

Newfoundland and Labrador’s unique history as fishing outpost, to colony, to dominion, to commission government and now province of Canada, has all shaped its present-day real estate and property title system.

Due to several factors, not the least of which is its unique history, Newfoundland and Labrador is the last province in Canada to operate under what is considered a true registry system of land ownership. At its most basic, our registry system is simply a depository of deeds and other documents. There is an index (which is now partially online under our Companies and Deeds Online or “CADO” system) which can be used to assist with locating relevant documents. Once all documents relevant to a specific land title are located, it is up to the legal practitioner to draw their own conclusions as to their meaning. A solicitor must review the documents and other “evidence” and then formulate their own “conclusion”. The “conclusion” reached is based on applying the documents and “evidence” to the present-day acceptable “title standards” to determine if said title is “good and marketable”.

In terms of searching title, a title searcher will be hired by a solicitor for the purpose of examining and making a report of the relevant deeds and other documents. The report is called an “Abstract of Title”. It is simply a summary with copies of the relevant documents as all “originals” remain at the Registry Office. The title searcher summarizes the “evidence” which is reviewed by the solicitor who then draws their own “conclusion” and expresses a “title opinion”.

We contrast Newfoundland and Labrador’s registry system with the land title system (or modified land title system) used in all other provinces of Canada. The land titles system (or modified land titles system) used in every other province of Canada is based on the principles of the “Torrens system” of land title registration. The Torrens system relies on the principle of making the land registry itself conclusive, as the government or its agent guarantees an indefeasible title based upon registration on the Title Register. The system eliminates the need for historical searches (i.e. Abstracts of Title) to prove validity of title. The registration itself is conclusive of land ownership. This type of land title system provides an up-to-date official and public record of who owns the land, and the charges and interests that relate to land titles. It makes determining land ownership quicker, easier, and certain, thus providing confidence and business

certainty to all parties involved, from purchasers and sellers to lenders. The system, because it is conclusive, allows title to be "assured." Such assurance is provided through a guarantee (usually through the relevant government authority or its agent) that, should an error be made in a title, individuals who suffer a loss will be compensated.

There is little, if any, discretionary determination of land title under a Torrens model. Title is absolute by registration and may be relied upon on its face. Contrarily, title in our registry system is almost exclusively subjective. It is a matter of opinion whether title is good, and opinion may vary across solicitors. What one solicitor considers good; another may find defective.

With these considerations in mind, the Committee is hopeful that this Report will assist the legal profession in coming to some common conclusions about title standards within our subjective model, to assist with consistency of practice.

Chapter 2 - Root of Title

The "root of title" is the origin of the title of the property.

All land in Newfoundland and Labrador is presumptively Crown Land, i.e., owned by the Government of Newfoundland and Labrador. Ownership and control of all land in the province is vested in the provincial Crown at its origin. The "root" of title is the indication of how the Crown became divested of the land in question.

There are two ways to divest the Crown: by express conveyance (such as a Crown Grant or deed), or by adverse possession.

This chapter will address different acceptable roots of title, on which practitioners may rely as origins of good title.

Chapter 2.1 - Crown Grants

Crown Grants are issued by the appropriate department administering Crown Lands, on behalf of the Minister responsible for Crown Lands. At present, this is the Minister of Fisheries, Forestry and Agriculture.

Crown Grants are registered at the Crown Lands Registry at the Howley Building in St. John's. Grants are sequentially registered in volumes. The primary method of searching Crown Grants is the "Land Use Atlas": a map-based tool that plots the location of known and placeable Crown Grant surveys on a map of the province. It is

also possible to conduct a search of the Crown Lands Registry in person at the Howley Building using an internal search engine of the Department.

It is important to note that there are limitations to the Land Use Atlas. It is not comprehensive of all grants issued. An unknown number of Crown Grants are registered at the Howley Building but are not mapped because of imprecise surveys and vague descriptions. Many Crown Grants were lost in the Great Fire of 1892, including Volumes B, C, D, 1-7, 10-16, 19, 20 and 28, and Free Grants Volumes 1 and 2. Some grants contained in these volumes have been re-registered in the intervening years as original documents have been brought forward, but many more have never been re-registered.

It is important for practitioners to understand the limitations of the Crown Lands Registry and the Land Use Atlas when determining title, as registered deeds or other evidence may indicate an origin of title in a lost or unmapped grant.

i. Rules Applicable to Grants in General

Practitioners must read and review the grant. Do not presume the existence of the grant as being a good root of title. Beware of conditions in the grants and reservations. This determination must be made contextually, where the grant is available for review. Modern grants may contain specific usage restrictions or prohibitions on subdivision.

Where there is a chain of title back to a grant, but the grant cannot be placed (i.e., vague description in the original grant), the presumption is that a good chain back to the grant holder with affidavits of possession will confirm that the land is in the grant. It is important to confirm that your land is the same land defined in the grant. Inquiring with a surveyor may assist in such confirmation.

A Licence for Occupation is a licence and not a grant. Some Licences of Occupation are recorded as ‘grants’ on the Land Use Atlas but are not grants. Do not rely on the Land Use Atlas for accuracy, review the grant itself. The land conveyed by the grant should be interpreted in accordance with the written land description and not the drawing. Particularly with older grants, there may be a mismatch about the boundaries of the property in comparing the written description and the drawing, particularly where following natural boundaries like the shoreline of a body of water. The express written language prevails as the more specific description of the land.

ii. Conditions Within Grants

a. <u>Positive Obligations with Temporal Limitations</u>

Grants may contain positive obligations to maintain validity, such as to clear a percentage of the land within five years, or to plant trees for ten years. It will be difficult, if not impossible, to prove compliance or noncompliance with such conditions in the present day. Such conditions should be regarded as temporal conditions subsequent: if the condition was not met, then the grant would have been terminated. Such conditions subsequent are not ordinarily found in modern grants and when found, will usually be found in grants from eighty or more years ago.

The opinion of the Committee is that if the time period expressed for the obligation has expired and the grant has not been cancelled, the conditions should be presumed to have been met. It is not necessary to obtain proof of completion of the specific positive obligation, as compliance may be presumed by the passage of time and non-termination of the grant. This is premised on the presumption of regularity, i.e., that Crown Lands has been satisfied not to cancel the grant to the present day, therefore the condition must have been met. The Committee concludes that a helpful guideline is that if the timeline for the condition has expired over forty (40) years ago, that the condition may be presumed to be met.

It is not necessary to amend grants where such conditions have expired or to provide proof of fulfillment of such conditions. The non-termination of the grant may be safely relied upon as proof of meeting the condition, where the condition would have to have been completed forty (40) or more years ago.

If such conditions are found in modern grants, from the 1970s onward, then compliance should be confirmed with reference to aerial photography or in writing from the Crown Lands Administration. In such cases, it will be possible to confirm compliance with the stated condition.

b. Use Restrictions and Prohibitions in Grants

Specific-use restrictions or continuing prohibitions on the land remain in perpetual effect if stated on the face of the document. Such grants should be considered a defeasible estate: the grant may be terminated at any point in the future if there is noncompliance. This will include usage restrictions (such as restrictions to use the granted land as a school or cemetery) or subdivision restrictions. Title will be good as long as the condition is maintained. In many cases, the issuance of such grants was premised on its purpose, particularly for free grants to churches, schools and municipalities. The land at issue was granted by the Crown for a specific limited purpose for nominal consideration.

Where there is concern about the applicability of a condition, solicitors should apply to vary the grant or obtain client's approval in writing to accept the grant in its

existing form. Clients must be made aware of such restrictions.

iii. Bodies of Water Within Grants

Where grants include land that may include bodies of water or the shorelines thereof, there may be a reservation unless expressly stated in the grant. The starting proposition is to presume that there will be a reservation on a body of water, and to look to the wording of the grant.

The language adding the presumptive reservation to the ocean shoreline to the *Lands Act* was not added until 1991. The opinion of the Committee is that the legislation is not retroactive. Older grants may expressly refer to a boundary as the "high water mark" or "to the waters of" a body of water. The written description of the grant is understood to be the more specific, and thus more accurate, determination of what was intended to be conveyed: see *Boyd v. Luscombe* (1986), 57 Nfld. & P.E.I.R. 242; *Taylor v. City Sand and Gravel,* 2020 NLCA 22. A grant that states it extends to the high-water mark or the waters of a body of water will thus encompass the shoreline.

Caselaw has held that minor brooks and small bodies of water were not intended to be reserved under the applicable Crown Lands statute unless expressly noted in the grant: see *Jerrett v. Parsons* (unreported decision of Bartlett J., May 10, 1978, 1977 No. 172 (District Court at Brigus). It is not possible to determine where the threshold is crossed with regard to the size of a body of water within a grant if it is based on size alone. To do so is to make an arbitrary case-by-case determination that provides no guidance and does not establish a practice rule. The expectation is that a body of water sizable enough to be referenced on the grant will contain an express reference to the reservation, or the grant itself will refer to any applicable reservations in the property description.

In the view of the Committee, the presumption is that a grant is intended to dispose of what it purports to dispose. Solicitors may thus rely on the grant as being dispositive of what it purports to convey, and practitioners need not impute conditions which are not contained in the grant. Unless the written description of a grant contains reference to a reservation, then the presumption is that the grant has conveyed the land described therein.

There is no professional consensus on questions of erosion and accretion of land, where land is defined in reference to bodies of water.

iv. Purpose Grants

Presume good title if the purpose is the same and there is no risk of termination for

noncompliance. Ensure that clients are aware of the restrictions imposed by conditional grants or purpose grants, because intended uses of the land may change with time, and so too may clients' perceptions of what they acquired. It is best practice to document the confirmation that clients are accepting a conditional grant with the condition intact.

Solicitors must be aware of the substance of a "purpose" grant and not simply rely on a reference on the title of the grant. The title may be misleading as to whether there is any condition or restriction. A common example is the mid-20th-century "Grant for Agriculture", which is titled "grant for agriculture", but were issued as grants in fee simple pursuant to the provisions of the *Crown Lands Act, 1930,* 1930 S. Nfld. 234. Such grants are so titled because they were issued for fulfillment of the terms of a prior "Lease for Agriculture", not for the continuation of a restrictive condition. The statute itself makes clear that the grant is in fee simple. When in doubt, solicitors should review the statutory provisions by which the grant is made.

v. Adverse Possession Grants (s. 36, s. 134B) and Crown Quitclaims

"Section 36" grants are grants made pursuant to the adverse possession provisions of the *Lands Act*, SNL 1991, c. 36, s. 36. These were formerly known as "134B Grants", under the former provisions of the *Crown Lands Act*. Modern practice of the Crown Lands Administration is to issue a Crown quitclaim in similar circumstance. Regardless of the title, these grants are the same in substance. They provide for a release of the Crown's interest where the Crown is satisfied that the Crown has been adversely possessed.

Section 36 grants are distinct from general grants under other provisions of the *Lands Act*. General grants are premised on the absence of prior occupation and non-existence of any other claimant. Such granted lands are Crown Lands at the time of the grant. Thus, ordinary grants are dispositive with no further investigation. This is not true for Section 36 grants, since they are premised on the existence of prior interests defeasing the Crown.

Section 36 grants alienate only the Crown's interest and are made with conditions and exceptions. Such a grant is premised on actual occupation for the relevant statutory period. However, by the issuance of the grant, the Crown is satisfied that it has been adversely possessed by some party's occupation. Such a grant will form a good root of title against the Crown. However, the fact that the issuance of such grants is premised on adverse possession by private parties, means that those underlying private interests must be properly accounted for. The Committee thus believes that good title under a section 36 grant still requires affidavits of possession for a period of thirty (30) years to be considered good title. The Committee is aware

of instances where individuals who have acquired deeds under this section, where the possession was subsequently challenged by another individual, allege that they were the actual party in possession. Where possible, solicitors may review the Crown Lands' file on the grant issuance, and the evidence filed therewith, which may provide a satisfactory root of title.

The holder of a section 36 grant (or equivalent) has already established adverse possession to the date of issuance, to the satisfaction of the Crown. Title can thus be relied upon based upon the paper title forward from that date. After thirty years from the issuance of the grant, the paper title may be relied upon on its face, by the doctrine of colour of title. Any potential adverse claimant would have thirty years to come forward to assert ownership in the face of the chain of title direct from the Crown to the grant holder.

Thus, in the view of the Committee, it is safe to proceed with an adverse possession grant alone, without the need of thirty years' affidavits, if the grant is more than thirty years old. It would still be good practice to obtain affidavits of thirty years' possession for added certainty. In the event that the underlying adverse possession was in favour of a person other than the named grant holder, those prior interests can be deemed to be dispossessed by the passage of thirty years. Within the thirty-year period since issuance of the grant, affidavits of thirty years' adverse possession should be obtained.

More on adverse possession can be found at Chapter 4 ("Adverse Possession") in these materials.

Chapter 2.2 - Veterans Land Act Deeds

The *Veterans Land Act*, RSC 1970, c. V-4, is a federal statute governing lands deeded by the Director of the *Veterans Lands Act*. Section 5(3) of the Act deems a conveyance from the Director of the Veterans Land Act to be equivalent to a Crown Grant.

There is no caselaw from this province on the constitutionality of the *Veterans Land Act*. However, in other provinces, this section has been upheld as being constitutionally valid, under section 91(1) and/or 91(7) of the *Constitution Act, 1867*.

Deeds from the Director of the Veterans Land Act will therefore constitute a good root of title, with no requirement to search behind. This should be considered as a conveyance by a delegate of the Crown.

References: *Re Armstrong and Van Der Weyden*, [1965] 1 O.R. 68 (H.C.J.);
Patterson v. Gallaugher (1983), 10 D.L.R. (4th) 151 (Ont. H.C.J.);
Cowichan Valley Regional District) v. Little (1987), 12 B.C.L.R. (2d) 103 (C.A.); and
Carmichael v. Durant (1995), 143 N.S.R. (2d) 234 (S.C.).

Chapter 2.3 - Conveyances from Established Sources

Certain origins of title are not commonly searched behind and are accepted as a good root of title. This is an unsatisfactory limitation of a name-based registry system, whereby the sheer volume of deeds from one source makes a fulsome search difficult, if not impossible. In practice, it is common to assess the source of the title and weigh the risk of acceptance. The subsections below identify satisfactory vendors whose conveyances will constitute an acceptable root of title and provide direction to solicitors about when to accept such titles as a good root.

i. Deed from Government (Federal or Provincial)

A deed from the provincial government, in the absence of a grant, will be considered good title. While a grant may be technically required for a branch of the provincial government to take ownership of land, a purchaser can assume a merger of the Crown's interests, such that a deed from a provincial government department will have the same effect of a grant. It is considered unlikely that the provincial Crown will impugn a deed conveying the interest of a department of the provincial Crown.

Note that this does not apply where the land is contained within an existing Crown Grant to another person. In such circumstances, it is important to ascertain how the provincial Crown came to be re-seised of the land.

A deed from the federal Crown will be governed by the *Federal Real Property and Immovables Act*, S.C. 1991, c. 50. This Act encompasses any land of the federal Crown. An instrument from the federal Crown has the effect of being issued under letters patent (s. 5(1). However, there must be a root of title whereby the federal Crown acquired the land from the provincial Crown. All land in the province is vested in the provincial Crown pursuant to sections 92(5) and (13) of the *Constitution Act, 1867*. It is still necessary to ascertain title behind the Federal Crown.

Note that the *Quieting of Titles Act*, R.S.N.L. 1990, c. Q-3, s. 13(3)(a), expressly permits the Court to issue a Certificate of Title binding against the Crown where "the title of the applicant stems from a grant or conveyance made by or on behalf of the Crown" [emphasis added]. This necessarily extends broader than just Crown Grants, and reference to conveyances "on behalf of the Crown" imports the notion of agents

of the Crown having authority to divest the Crown. Thus, a conveyance which can be traced back to the Crown in right of Newfoundland and Labrador or an appropriate agent of the Crown will constitute a good root of title, as it is enforceable at law under the *Quieting of Titles Act*.

ii. *Housing Corporation Deeds (NLHC/SJHC/CMHC)*

Common practice is to accept a deed from the NLHC, SJHC, or CMHC as a root of title, since these are Crown agencies tasked with land development, and would thus be presumptively authorized to alienate the government's interest. A conveyance from these entities, as Crown Corporations, may be considered a "conveyance on behalf of the Crown", per the *Quieting of Titles Act*, R.S.N.L. 1990, c. Q-3, s. 13(3)(a), which would divest the Crown. Such deeds will generally constitute a good root of title in lieu of a Crown Grant.

Although the Housing Corporations are "arm's length" Crown Corporations rather than direct agents of the Crown (such as government departments), the lawful alienation of land by a Crown Corporation responsible for housing and land development may be accepted as a root of title on its own, where there is no evidence of a prior interest.

Leasehold estates from the NLHC were converted to freehold conveyances by the *The Newfoundland and Labrador Housing Corporation (Amendment) Act*, S.N. 1986, c. 23. Where older deeds refer to the title as a leasehold, it is in substance a freehold and no requisition is necessary to amend same, as it is statutorily resolved.The standard adopted by the Committee is to presume that a Housing Corporation Deed constitutes a good root of title except in circumstances where there is cause to doubt it as the origin of title. Such doubt requires further investigation. This will primarily arise in two circumstances:

a. *Where the land is plotted inside of an existing Crown Grant to another party*

Where there is an indication that the Housing Corporation land is in a Crown Grant to another person, it is necessary to determine how the Housing Corporation became seised of the land. The land cannot have two separate roots of title. Where the land plots inside of a Crown Grant, good title requires an investigation as to how the Housing Corporation acquired the granted land. Such acquisition may involve an expropriation or other acquisition. This is not an issue of divesting the Crown, but rather whether private owners with pre-existing title have been divested. The Crown cannot sell the same land twice, and the first sale divested the Crown.

b. *Where the Housing Corporation Deed is a mortgage foreclosure*

The Housing Corporations historically issued mortgages to homeowners for home improvement and modernization, particularly in the 1970s. The title underlying these mortgages is often defective, and reliant on *pro forma* documentation to support the mortgage. A full search behind the Mortgagor is necessary on a mortgage sale, and title must be satisfactory. Where the underlying documentation is defective, it should be rectified to acceptable standards where possible. It is possible to argue that the doctrine of merger applies to any Crown interests where the Housing Corporation sells in foreclosure or by power of sale, and that the Housing Corporation has authority to divest the Crown, thus rectifying any underlying title defect.

However, the Committee is aware of at least one instance where a defective-title property was sold by NLHC on power of sale, where Crown Lands later objected to the title. On this basis, the Committee thus recommends caution when dealing with NLHC mortgage sales.

iii. *Major Corporations*

Title to certain large companies is accepted as a good root of title due to the volume of transactions from them as a source and the legitimate acceptance of same. These companies are the Reid Newfoundland Company, Anglo-Newfoundland Development Company, Iron Ore Company of Canada, Abitibi-Price, and Bowater's Newfoundland Paper Mills Ltd. Such deeds will be assessed in terms of known history of the area. For example, many communities in Central Newfoundland will trace back to the Anglo-Newfoundland Development Company or Reid Newfoundland Company, and all titles in Labrador West will trace back to the Iron Ore Company of Canada.

In the opinion of the Committee, such deeds may constitute a good root of title, but it is not possible to definitively state that it is so in all circumstances. Best practice will be to investigate the root of title even where it traces back to a major corporation. For ease of searching and investigation, the Committee recommends that when in doubt about the root of title, solicitors investigating title in areas outside of their usual practice region contact a solicitor familiar with that region. It is important that solicitors understand the general root of title in communities in which they are conducting transactions, because the community history will be important to establishing a satisfactory root of title.

Note that in certain circumstances, it may be necessary to search behind deeds from these companies, such as in cases of late registrations, to ensure the land was not sold in transactions occurring between the date of the deed and the date of registration. Title searches behind these companies are difficult, and in some cases

may be impossible to conduct, where entire towns may be rooted in deeds from a single source. Title insurance is strongly recommended when a company deed cannot be fully investigated to a solicitor's satisfaction.

With particular reference to the Reid Newfoundland Company and the "Railway Lots" across the province, solicitors should be aware of the Reid "master deed" in 1974, which conveys Reid's landholdings to the Crown, but excepting out parcels that were previously conveyed. This deed is known to contain otherwise unregistered title deeds from the Reid Newfoundland Company to private individuals, which are recorded as exceptions to the conveyance of Reid grants back to the Crown. The "master deed" indexes land by Reid Lot Numbers. This deed comprises the entirety of Vols. 1652 and 1653 at the Registry of Deeds. It is not known whether or not this comprises all deeds from the Reid Newfoundland Company, but any deed from the Reid Newfoundland Company dated prior to July 23, 1974, is dispositive of the company's interest in land, which was otherwise held by grant which was cancelled on that date. See *Reid Lands (Acquisition) Act*, S.N. 1975, No. 38.

iv. *Municipal Governments*

Deeds from a Town Council or the cities of Corner Brook and Mount Pearl are not a good root of title. Municipalities are subordinate governments to the provincial government and have no inherent authority to sell or manage Crown Land. Municipalities are not agents of the Crown.

Municipal sales by the city of St. John's are the exception to this rule, because of provisions of the *City of St. John's Act*, R.S.N.L. 1990, c. C-17, s. 69(1). The City of St. John's is delegated authority by the Crown to manage Crown Lands within the city boundaries that existed as of June 1st, 1981. While the Crown Land is vested in the City of St. John's by statute, section 69 only authorizes the City to lease it. However, the opinion of the Committee is that the City of St. John's is a delegate of the Crown by specific legislation, and thus a deed from the City of St. John's may be considered a deed from a Crown delegate enforceable under the *Quieting of Titles Act*, R.S.N.L. 1990, c. Q-3, s. 13(3). Thus, a deed from the City of St. John's would be considered a safe root of title. Crown Lands within the boundaries of the City of St. John's as of June 1st, 1981, are vested in the City of St. John's, and the doctrine of merger would allow the sale in fee simple of all of the interest vested in the City. Areas outside of the 1981 boundaries of the City of St. John's sold by municipal tax sale will not be free of Crown Lands claims and do not have a good root of title. See *City of St. John's Act*, R.S.N.L. 1990, c. C-17, ss. 69(1), (3) and 281(13).

Other statutory powers of sale exist which allow the City to convey title, including the tax sale provisions at section 281 of the *City of St. John's Act*, and the provisions of

the *Leaseholds in St. John's Act*, R.S.N.L. 1990, c. L-10. Both acts of the legislature confer the ability of the City to convey land, and must be interpreted in that vein, when coupled with the title vested by section 69 of the Act. The Committee therefore views a deed from the City of St. John's under the *Leaseholds in St. John's Act* and tax sale deeds from the City of St. John's to be a valid root of title which dispossesses all, including the Crown, where the land is within the City of St. John's boundaries as of 1981. Outside of the 1981 boundaries, the tax sale deeds will dispossess all except the Crown.

Town Councils incorporated under the *Municipalities Act, 1999,* S.N.L. 1999, c. M-24, can validly sell land as an ordinary corporation, and title must be traced as it would for an ordinary company. Note the restrictions on the sale of land by a municipality in the *Municipalities Act*, *1999*, S.N.L. 1999, c. M-24, s. 201.2. The acquisition of land by Towns is also restricted: see section 201 of the *Municipalities Act, 1999,* S.N.L. 1999, c. M-24.

Municipal tax sales conducted since 2011 statutorily clear all interests except the Crown and easements and will form a good root of title if contained within a Crown grant or other acceptable root of title to divest the Crown: see *Municipalities Act*, *1999*, S.N.L. 1999, c. M-24, s. 147. This is confirmed by the Supreme Court of Newfoundland and Labrador in *Re Hickey*, 2020 NLSC 19, at paras. 31 to 35. There is therefore no requirement to search behind a municipal tax sale deed, except to ascertain easements and whether or not there is proof of dispossession of the Crown.

This only applies to town tax sales conducted after May 30, 2011, when the statute was changed to provide municipal taxes as a super priority lien that cleared all other encumbrances. See *Municipalities Act, 1999*, S.N.L. 1999, c. M-24, s. 147, amendment 2011, c. 7, s. 23. The previous version of section 147 provided that the title would vest clear of municipal encumbrances only, effectively conveying only the interest of the tax debtor in the land. Tax sales pre-2011 therefore only convey the interest of the named tax debtor and must therefore be searched in full. Pre-2011 tax sales are not cleared of liens by virtue of the tax sale.

The foregoing provisions for Town tax sales under the *Municipalities Act, 1999,* are the same for the Cities of Corner Brook and Mount Pearl: see *City of Corner Brook Act*, R.S.N.L. 1990, c. C-15, s. 162.11; *City of Mount Pearl Act*, R.S.N.L. 1990, c. C-16, s. 161.11. Both City statutes were amended by the *City of Corner Brook (Amendment) Act, City of Mount Pearl (Amendment) Act and City of St. John's (Amendment) Act*, S.N.L. 2016, c. 49, on December 14, 2016. Prior to that date, both cities' statutes mirrored the pre-2011 language of the *Municipalities Act, 1999*. Therefore, tax sale deeds from the Cities of Corner Brook and Mount Pearl will

constitute a good root of title only for sales after December 14, 2016, and do not divest the Crown.

Note that while the statute vests control and management of Crown Lands in the City of St. John's, in practice the Committee understands that the City does not actively manage such lands. The City does not provide leases or grants, apart from management of leasehold estates under the *Leaseholds in St. John's Act* (see following section).

v. *Estates in St. John's*

Ancient leasehold estates have been traditionally accepted as a root of title in practice, though these titles may trace back to nothing. The Court of Appeal's decision in *Eddy v. Newfoundland and Labrador*, 2023 NLCA 37, confirms longstanding registration at the Registry of Deeds is not sufficient to dispossess the Crown.

Where the ancient leasehold estate is conveyed by deed from the City under the *Leaseholds in St. John's Act*, R.S.N.L. 1990, c. L-10, it will constitute a good root of title, on the basis of the City's statutory stewardship of Crown Lands within its boundaries and the presumptive merger of the City's title to Crown Lands vested into the City by section 69(1) of the *City of St. John's Act*.

This statute applies to land occupied before June 1, 1977, and the interest of the lessor is statutorily vested in the City (see *Leaseholds in St. John's Act*, s. 2.1), thus there is no issue with the City's boundaries under section 69(3) of the *City of St. John's Act*.

Leasehold estates will therefore be a satisfactory root of title if conveyed by the City pursuant to the *Leaseholds in St. John's Act*. However, one must search behind the City deed, since the possession will antedate the deed and private interests would not be extinguished by the City deed. The City deed can be taken as divesting the lessor by section 2.1 of the *Leaseholds in St. John's Act*, and by inference the Crown by section 69(1) of the *City of St. John's Act*. However, it does not divest anyone except the Lessor and the Crown, thus a full search remains necessary to account for all other private interests behind the City deed.

Chapter 2.4 - Expropriated Lands

Title by expropriation (by any level of government or a public utility) will constitute good title. This is premised on the statutory power of expropriation granted by the legislature. Expropriation happens under the auspices of delegated authority. All land

is inherently held by the Crown and may be recovered by the Crown in accordance with its legislation. Thus, the Crown is deemed to have consented to the expropriating authority taking control of the land at issue by virtue of the power being so delegated. Statutory delegation would amount to the expropriating authority becoming a delegate of the Crown, such that the deed from the authority may be considered as divesting the Crown under the *Quieting of Titles Act*, R.S.N.L. 1990, c. Q-3, s. 13(3).

Any sale of land which is rooted in an expropriation under provincial law will therefore constitute good title unless the expropriation statute states otherwise. It is not necessary to search behind the expropriation, which extinguishes all prior interests.

The Committee cautions that practitioners must read the expropriation statute to confirm its terms. Where the statute is silent on whether or not it divests the Crown, the Committee states that it is acceptable to presume that the Crown's interest is alienated by the expropriation. However, if the statute states that it does not apply against the Crown's interest, then the Crown must be alienated by other means, such as by Crown grant or adverse possession.

Chapter 2.5 - Quieting of Titles Certificate

A Quieting of Titles Certificate is statutorily a good root of title: *Quieting of Titles Act*, R.S.N.L. 1990, c. Q-3, s. 26. There is no need to examine title behind a Quieting of Titles Certificate. An unqualified certificate dispossesses all private interests in the land.

Review the certificate to ensure that the certificate dispossesses the Crown. See the *Quieting of Titles Act*, R.S.N.L. 1990, c. Q-3, s. 13(2) and 13(3). A Quieting of Titles Certificate will dispossess the Crown if the certificate is unqualified. Section 26 of the *Quieting of Titles Act*: the certificate shall be conclusive as regards the Crown and all persons, except for exceptions or qualifications referenced in the certificate. A certificate issued under section 13(2) reserved against the Crown will expressly state the qualification thereon.

Quieting of Titles proceedings may be commenced to rectify title issues that cannot be resolved by other means. The commencement of a Quieting proceeding presumes a defective but legitimate title claim. The Quieting proceeding is an in rem proceeding, which provides a binding declaration of ownership of land against the world. The issuance of a Certificate will overcome underlying title problems, as the Certificate is deemed conclusive of title pursuant to section 26 of the *Act*.

When faced with otherwise unresolvable title issues, practitioners are recommended

to seek recourse to the *Quieting of Titles Act*.

Chapter 2.6 - Possessory Title

Possessory Title will constitute a good root of title where possession is established for the statutory period defined in the *Lands Act*, S.N.L. 1991, c. 36, s. 36. This is the twenty-year period immediately prior to January 1, 1977, being December 31, 1956, to January 1st, 1977.

Prior to the establishment of the statutory period by *The Crown Lands (Amendment) Act*, 1976, S.N. 1975-76, No. 20, taking effect on January 1, 1977, the period of adverse possession required to dispossess the Crown was sixty continuous years, adopting the United Kingdom's rule for adverse possession: see *Rex v. Kough* (1819), 1 Nfld. L.R. 172 (Supreme Court of Newfoundland).

Establishing possessory title is discussed in Chapter 4 of these materials.

Chapter 3 - Chain of Title

The "chain of title" refers to the transactions connecting the current owner of land to the "root of title". Every transfer of land forward from the "root of title" is a link in the "chain" of title. The chain of title is important because it connects historical ownership. Searches of title will establish the deeds that make up the "links" in the chain of title. A break in the chain of title, such as a missing or defective deed, is a title issue requiring rectification.

A chain of title may be quite long, depending on the distance from the root of title and the number of intervening transactions. Newfoundland and Labrador prescribes no guidelines for the length of a title search, and thus a search must always be conducted for the full length of the chain of title. Title must always trace back to a good root of title to constitute good title. Where no root of title is found, a proper search of the Registry will go back as far as the Registry's records go, to confirm that there is no root of title.

Common practice is to search backward from the name of the current purported owner of the land, transaction by transaction, to find the root of title. In some circumstances, it may be appropriate to search forward from an historically identified owner. What constitutes a satisfactory title search is a matter of opinion to the reviewing solicitor, in order to be satisfied that they have done reasonable diligence on the title to identify any potential outstanding interests in the subject property.

An acceptable chain of title will account for every property owner from the grant

holder/origin of title to the current title claimant and will have that person (or their personal representative) sign off on each successive transfer.

The focus for establishing title should be on (a) dispossessing the Crown by finding a good root of title against the Crown; and (b) obtaining satisfactory releases/conveyances from all claimants and owners in the last 30 years, or when dealing with vacant or unoccupied land, for the last 30 years of use of the land. This is because the overall limitation period under the *Limitations Act*, S.N.L. 1995, c. L-16.1, s. 22, is the overarching limitation period regardless of notice.

Chapter 3.1 - Proper Deeds and Descriptions

There is no specific form for a deed. The question is whether the document, in substance, conveys the full interest in the property to the recipient. Note that the *Conveyancing Act*, R.S.N.L. 1990, c. C-34, s. 3-4, provides deemed provisions to conveyances, and in particular to conveyances for value.

Consider each document in the chain of title. A valid deed and a proper chain of title should be sufficient to allow the conclusion:

> …that each document on its face effectively passes a sufficient interest of the property to the person purporting to take under the document, and then from that person to the next, and so on up to the party now claiming ownership. Equally, the property being passed must also be sufficiently described or otherwise identified in each of the documents. *Pelley Estate v. Ellis*, 2015 NLTD(G) 73, para. 16.

Where there is a discrepancy in a deed or property description between the written description and the drawing, the written description will prevail to the extent of inconsistency: *Boyd v Luscombe* (1986), 57 Nfld. & P.E.I.R. 242 (NL District Court); *Taylor v. City Sand and Gravel*, 2010 NLCA 22.

Chapter 3.2 - Unregistered Documents

Registration of documentation is important for establishing the validity of transfers of land. Registration is proof that a document existed at the time of registration and to ensure that there is a conveyance recorded from the last registered owner. See the *Registration of Deeds Act*, S.N.L. 2009, c. R-10.01, s. 37: an unregistered conveyance is deemed fraudulent and void as against a prior registered instrument. A missing registration means that a search of a previous owner's name may not disclose that owner's sale of the land and may leave a misleading impression on a title search that the owner has never conveyed his or her interest.

Any unregistered deed should be registered as a standalone document, where possible, in order to maintain the chain of title. Searches may be conducted in a former owner's name, and it is preferable if the deed from a former owner can be discovered on a search of that former owner's name, to allow public notice of the sale of the land by that individual. For example: title is registered into Person A, who sells by an unregistered transaction to B, and B subsequently sells to C in a proper registered transaction. The unregistered transfer may be covered by affidavits of possession, or by the unregistered document being attached as a schedule to C's deed. Searching the names of B or C will lead back to A, but searching A will not lead to B or C. If Person A purports to sell the land a second time, the sale to B is not discoverable in a search of A's name. The chain of title in A's name will not disclose that A has sold the land. It is best practice to register all conveyances on their own, so that a search of any prior owner's name will lead forward to the current owner.

Where an earlier deed is not registrable and a replacement deed or deed of confirmation cannot be executed, the unregistrable document should be attached as a Schedule to the current deed being registered, so it will at least appear when searching backward from the current claimant. Where there is a break in the chain that cannot be rectified by a registered document, the next deed should contain recitals of the registration history, and the earlier deeds noted on the Registry of Deeds registration form as "related documents". This will connect the current transaction to a previous registration and will be flagged as a "related document" on the older registration on the CADO computer system.

The Committee recommends that solicitors apply the principle of "leave the title better than you found it". Include attachments and schedules that build upon the title history where such documents are missing from the Registry. More information being added to a registration will provide a more complete picture of the title and assist future solicitors in understanding the ownership history.

Chapter 3.3 - Late Registered Documents

Ideally, deeds will be registered contemporaneously with their execution. However, it is not uncommon to find that deeds will be registered many years after their execution. This is especially true in informal or private transactions.

Newfoundland and Labrador's registration law may be summarized as "first in time, first in right": the first party to register will be deemed to be the valid deed, and a later registered deed (even if dated earlier) will be "fraudulent and void": see *Registration of Deeds Act*, S.N.L. 2009, c. R-10.01, s. 37; *Butt v. Parsons* (1988), 71 Nfld. & P.E.I.R. 240) (NL Trial Division). This is a sensible proposition: registration confirms the

existence of the document on the date of registration, and it is available in the public record for discovery. Deemed knowledge of the public Registry records applies to discoverable documents. Unregistered deeds or late registered deeds may be backdated, perhaps even fraudulently so in an effort to disrupt title.

With late registration, the prudent solicitor must presume two effective dates of the transaction: the date of the purported deed and the date of registration.

This is important to note for title searching, as late registration of documents is common in this province. Where a deed from X to Y is late registered, the search must cover the registered ownership as well as actual ownership, searching the names of X up to the date of registration of the deed, not up to the date of the purported conveyance in the document. This is because the late registration may leave title on the public record in the name of X, notwithstanding the sale to Y, and thus potentially encumbered or conveyed under X's name. However, since Y owned the property from the original date of sale, it is possible that Y may have encumbered the property since his acquisition, notwithstanding the failure to register.

Demonstrating the above with an example: X sells Blackacre to Y by unregistered deed in 1970, which is not registered until 1980. A proper title search will cover Y from 1970 to present (period of acquisition), and X from X's original acquisition to 1980 (period of registered ownership). This will result in an overlapping search of both X and Y for the period 1970 to 1980, necessitated by the mismatch of ownership and registration.

Chapter 3.4 - Non-Standard Documents and Descriptions

Homemade documents or documents prepared from non-lawyer sources may be dispositive in effect but can create problems on their own. They are often not compliant with common practices, may be ambiguously worded, may not contain Affidavits of Status, and may have homemade property descriptions. Deeds and documents must be assessed contextually, and on a case-by-case basis.

The standard is to have unambiguous deeds for every transaction, or affidavits of possession which avoid the need for same, if past owners are outside of the 30-year limitation period. These deeds should conform to the standard stated previously in *Pelley Estate*: that each deed:

> …effectively passes a sufficient interest of the property to the person purporting to take under the document, and then from that person to the next, and so on up to the party now claiming ownership. Equally, the property being passed must also be sufficiently described or otherwise identified in each of

the documents.

Recall the provisions of the *Conveyancing Act* as well, R.S.N.L. 1990, c. C-34, regarding deemed provisions of deeds.

Where possible, deeds of confirmation in accepted form should be done to confirm the original transaction. Affidavits of status should be signed where they are missing, confirming status to the date of sale. This may be accomplished by deed recitals which recite to the earlier "homemade" deed registration. A Deed of Confirmation can be registered at the Registry of Deeds to confirm the earlier transaction in proper form. Confirmation Deeds should also recite the defect with the original registration for which it is being registered, such as missing Affidavits of Status or current survey of the property.

Title cannot be certified using a homemade description. Certification requires certainty of the metes and bounds of the land and its location, and thus requires a proper survey of the land with an objectively determinable description. A homemade measurement will not suffice owing to lack of necessary precision. Jurisprudence is replete with examples of disputes over boundaries where the area of land in dispute may be minor, so the certainty of the land is imperative to certification. A meter in either direction may mean the difference between peaceable possession and a land dispute.

Many homemade descriptions are made with reference to boundaries understood by the parties executing the deed. It may be said of such descriptions that "you'd know where it is if you know where it is". The homemade description may have no objective description that would allow an unknowing outsider to determine the exact location of the land at issue, and such descriptions require prior knowledge of the land purported to be conveyed. This is not acceptable for title certification purposes, which must allow an unknowing outsider to assess the title to the "four corners" of the land without having subjective foreknowledge.

Where land is surveyed later, Deeds of Confirmation from previous owners will be necessary to confirm the property is the same as earlier conveyed. Alternatively, affidavits of possession confirming possession of the surveyed property may be used to make the connection.

Note that transactions may still be completed using homemade descriptions or demarcations made by clients with reference to their existing surveys.* This will be particularly common in low-dollar-figure transactions, such as "squaring up" parcels of land between neighbours, who may trade minor parcels of land to adjust boundaries, and may draw those adjustments on existing professional surveys.

Solicitors may proceed with a transaction using an informal description as long as the property description is unambiguous and satisfactorily certain. The Committee concludes that on a cost-value consideration, if a description created by a client is sufficiently certain that it can be determined objectively by an outsider with no prior knowledge of the land, it may be used at the solicitor's discretion. Title insurance should be considered in such instances.

Lawyers should avoid creating property descriptions for clients, including the creation of rights of way or mapping water or sewer lines. Errors and ambiguities created by lawyer-created descriptions run the risk of liability on the solicitor. Clients may create their own descriptions if they do not wish to obtain a survey, though clients should be advised that it is preferable for a surveyor to prepare same for liability purposes.

* *Lawyers should not utilize existing survey plans to create property descriptions or subdivisions of land, as this may constitute an offence under the Land Surveyors Act, S.N.L. 1991, c. 37, s. 34(2). Written property descriptions made with reference to surveyed boundaries should be used instead of altering a surveyor's diagram.*

Chapter 3.5 - Encumbrances and Clouds on Title

No standards exist on length of time an encumbrance may remain on title. There is no legislation in NL relieving against ancient encumbrances or mortgages. As such, the default position is that all registrations against title remain in effect. Practical considerations may allow encumbrances and clouds on title to be disregarded in certain circumstances, and it will be a matter of individual professional judgment to determine whether or not that may be done in a given case. It is not a recommended practice, although the Committee notes that there is no standard of "perfect" title, thus professional judgment – ideally supported by title insurance – may be relied upon to do so.

i. Mortgages

A mortgage is in substance a conveyance of land to the Mortgagee. As a conveyance at law, it survives the debt associated therewith until the land is conveyed back to the Mortgagor. Thus, the limitation period for the debt is irrelevant, as the mortgage is the conveyance of title and title is held by the Mortgagee.

In practice, the Committee suggests that any unreleased mortgage should be discharged where possible. Where it is not possible to obtain a discharge, it is suggested that any mortgage which has been registered on title for more than 50 years may be treated as discharged, but only if it is unreasonable to expect a

vendor's lawyer to obtain such a release, such as mortgages to private individuals or defunct companies. This standard is adopted because of the difficulty in obtaining releases for private mortgages or from defunct companies after such a length of time, and reasonable expectation of resolution of the debt. Such circumstances would require an *ex parte* application to the Supreme Court to obtain a discharge or even a Quieting of Titles Certificate, to resolve a mortgage that in practical reality is likely not enforceable. The best practice is that title insurance must be obtained if proceeding with an unreleased mortgage of any age.

Proceeding without obtaining a discharge would only be acceptable in circumstances where the Mortgagor no longer exists or is defunct, or private mortgages where one can infer the settlement of the mortgage by the passage of time and lack of continued presence of the Mortgagee.

Where it is possible to obtain a release to a mortgage, even where the mortgage is 50 years old or older (i.e., from an established source that is still around), the release must be obtained. It will be a valid requisition for a purchaser to request the release in situations where the release can be obtained.

ii. Lis Pendens

A notice of lis pendens is not a lien, it is a cloud on title. Registration of a notice of lis pendens does not mean that the registering party has an interest in the land, just that they assert one. A proper lis pendens should contain the court particulars, including style of cause and court file number.

The scope of a lis pendens is broad in Newfoundland and Labrador, and it can be validly registered before the commencement of litigation: *Paro Enterprises Ltd. v. Murphy*, 2015 NLCA 33. Even where litigation is not existing at the time of registration, applying to Court to strike the notice of lis pendens will fail if the registering party commences litigation before the hearing of the motion to strike: *Residents of Old Bonaventure v. Trinity Historical Society Inc.*, 2021 NLSC 23.

Best practice when faced with a lis pendens is to determine the status of the litigation and the interest being asserted in the litigation. A purchaser cannot be forced to subject themselves to the threat of litigation, so presence of a lis pendens will be grounds for the purchaser to walk away from the sale. The onus will be on the vendor to obtain a release of the lis pendens if the purchaser will not accept title with the notice of lis pendens in place.

Given the provisions of the *Limitations Act*, S.N.L. 1996, c. L-16.1, a lis pendens registered on the Registry of Deeds may be considered a nullity after ten years, unless

the litigation threatened thereby has been commenced. Registration of a Notice of Lis Pendens (or any other document) on the Registry of Deeds without commencing an action in court does not constitute an "action" for the purposes of preserving the limitation period: *George Quieting of Titles*, 2012 NLTD 196, paras. 37-48. Review the rules applicable to adverse possession (Chapter 4) where the lis pendens is asserted by someone with a legal interest in the property such as a former spouse or co-tenant, who is out of possession.

Best practice for a solicitor filing a notice of lis pendens is to identify the court particulars (court file number and parties) in the traditional form of the style of cause of pleadings. This will put potential purchasers on specific notice of the litigation and the particulars thereof and prevent litigation to remove the lis pendens for technical noncompliance. See discussion in *Paro Enterprises Ltd. v. Murphy*, 2015 NLCA 33, para. 31, and cautions at paras. 43 and 82 regarding abuse of process by lis pendens.

iii. Judgment Liens

A judgment lien registered on the Judgment Enforcement Registry will bind land*: Judgment Enforcement Act*, S.N.L. 1996, c. J-1.1, s. 46(2). However, this will be upset in bankruptcy unless the judgment lien is also registered at the Registry of Deeds: *Re Tom Woodford Ltd.* (2010), 298 Nfld. & P.E.I.R. 342, at paras. 35-41(NL Supreme Court, Trial Division); *Registration of Deeds Act*, S.N.L. 2009, c. R-10.01, s. 7(1)(d).

A proper search of title would generally require a judgment registry search and any other personal liens for any owner within the last ten years. After ten years, a judgment is statute-barred: *Limitations Act*, S.N.L. 1995, c. L-16.1, s. 7(1)(a). Affidavits of Status will generally address prior owners' judgment and lien status and may be relied upon by solicitors in conducting transactions. Thus, where A sells to B and a proper deed and affidavit of status are executed and registered in that transaction, it will generally be unnecessary to conduct any personal lien or judgment searches against Owner A when B sells to C.

The Committee notes that this advice is general, and there may be circumstances where it is appropriate to conduct such searches back to previous vendors, such as situations where there are quick turnarounds of title or any other suspicious circumstances warranting investigation. The Committee notes that such liens may still be binding on the land and may follow the title to the land, even if not registered at the Registry of Deeds. However, relying on the decision in *Re Tom Woodford Ltd.*, any lien against a prior owner which is secured against real property should be registered at the Registry of Deeds in addition to the Judgment Enforcement Registry.

Chapter 3.6 - Colour of Title

Starting Point: Where a purchaser enters into possession of a defined property, the purchaser is deemed to be in possession of the whole surveyed property. This does not apply to dispossess Crown interests.

Colour of title arises as a subsection of the law of adverse possession, and couples pedal possession of a portion of land to the defined boundaries of deeded land, whether or not there is actual possession of the remainder. It is based upon the principle that the "true owner" of land is always in possession, and that one is seised of the land by virtue of documentary title.

Entry upon land pursuant to documentary title is deemed to be possession of the whole of the defined land, even though the possession may only be of a portion of the land. A person who acquires a deed from the legal owner is deemed to be in possession of the whole of the land. Contrast this to a squatter entering land without documentary title, who is in possession only of what is actually occupied.

Consideration of this doctrine may arise when buying larger parcels of land where there is a break in the chain of title. Where land is contained within a grant and is preceded by registered chains of title under which previous owners have entered possession, colour of title may apply. It will apply against the "true owner", being the last person in the broken chain of title.

In such circumstances, colour of title may assist for adverse possession pursuant to documentary title, such as where a purchaser enters into possession of land under a defective title. Possession of a portion of the land must still be open, notorious, continuous and exclusive, but will be deemed to include the whole land described in the instrument.

Colour of title does not arise to dispossess the Crown.

References: *Bentley v. Peppard* (1903), 33 S.C.R. 444.
O'Connor v. Snow (1916), 10 Nfld. L.R. 203.
Wickham v. Wickham Estate, (1977), 17 Nfld. & P.E.I.R. 452, at paras. 99-100 (NL Supreme Court, Trial Division).
Genge v. Oram (No. 2) (1989), 74 Nfld. & P.E.I.R. 111, at paras. 31-32 (NL Supreme Court, Trial Division).
Matchless Group Inc. v. Carpasia Properties Inc. (2002), 216 Nfld. & P.E.I.R. 206 (Newfoundland Court of Appeal).

Earle Estate v. Mullins, 2016 NLTD(G) 144, at paras. 83-85.
Eddy v. Newfoundland and Labrador, 2023 NLCA 37.

Chapter 3.7 - Parties Executing Deeds

Starting Point: The proper vendor on a sale is the named owner. Where the named owner is deceased, the Executor or Administrator of the owner's estate is the proper vendor. Deeds from next-of-kin of a deceased owner may be accepted at a solicitor's professional discretion if the owner is deceased for more than ten years. Where the named owner is under disability, the owner's lawfully appointed guardian or attorney may execute the deed in the name of the owner.

i. Practice Considerations Regarding Estates/Deceased Owners

In the Estate context, a deed must be obtained from the Executor/Administrator if the decedent has died within the past 10 years. Best practice is to administer the estate at all times where the Estate is not dispossessed by 30 years of open, notorious, continuous and exclusive use and occupation. See *Limitations Act*, S.N.L. 1995, c. L-16.1, s. 22.

The limitation period for the estate to recover land is ten years, and it is the Estate that must be dispossessed in accordance with the rules applicable to adverse possession, as land vests into the estate and not into the individual beneficiaries. See *Limitations Act*, S.N.L. 1995, c. L-16.1, s. 7(1)(g); *Chattels Real Act*, R.S.N.L. 1990, c. C-11; *Mugford v. Mugford* (1992), 103 Nfld. & P.E.I.R. 136 (Newfoundland Court of Appeal).

Solicitors may assess the risk of proceeding on a transaction where there is open, notorious, continuous and exclusive use and occupation of the land for more than 10 but less than 30 years. After 10 years (the statutory limitation period for recovery of land under s. 7(1)(g) of the *Limitations Act*), it is at a solicitor's discretion to accept a deed from the beneficiaries of the estate in the form of a deed of release or deed of confirmation, though proceeding by same should be accompanied by title insurance.

This is because title is vested in the estate, not in the beneficiaries, per the *Chattels Real Act*, R.S.N.L. 1990, c. C-11, and 10 years will dispossess the estate. It is the estate being dispossessed, not the beneficiaries, who hold no interest in specific estate property and no individual standing to pursue a claim against specific estate property: see *Mugford v. Mugford* (1992), 103 Nfld. & P.E.I.R. 136 (Newfoundland Supreme Court, Court of Appeal). The estate being dispossessed by ten-year limitation period and accounting for the interests of those who could be entitled to bring an action via the estate should provide adequate comfort to rely on the ten-year period. The law will not necessarily assume that open, notorious and continuous occupation of property by

a family member will necessarily be exclusive or include an *animus possidendi* against the underlying estate.

Solicitors are expected to rely on their professional judgment and contextually assess proceeding in such a manner. This is not a recommended practice, as prudence favours obtaining a deed from the estate. When proceeding by beneficiary deed without probate of the underlying estate, affidavits of possession must be obtained in order to confirm dispossession of the estate in the event of a future claimant of the estate arising. In *Chafe v. Hunter*, 2013 NLTD 67, the next of kin of an individual who died in 1937 returned in 2010 to assert a claim on behalf of her father's estate to a parcel of vacant land. In that case, the estate had been administered, and thus the beneficiary's claim was against the estate administrator. However, this case is indicative of the potential risk of reliance on beneficiary deeds, and the necessity of affidavits of possession when proceeding by beneficiary deed. Proceeding by next-of-kin alone is thus potentially perilous, regardless of the date of death, if there is insufficient adverse possession against the estate to fully oust the limitation period.

When proceeding with releases or sale by the next of kin, it is recommended that the solicitor obtain affidavits from the next of kin confirming the dates of death of the decedents from whom they have inherited, matrimonial status of the decedent(s), and confirming that the listed next of kin are all of the next of kin, identifying all next of kin by name and confirming there are no others.

Where an estate is conveying property, it is best practice to recite the particulars of the issuance of Letters of Probate/Administration, including date and court number, for future purchasers' investigation. It is not necessary to attach a copy of the Letters as a Schedule to the deed.

Purchasers buying from an estate should obtain proof of issuance of the Letters of Probate/Administration in the course of the transaction.

Issues have arisen in the past where a deed purports to be conveyed by an Executor or Administrator, but no Letters of Probate/Administration have been issued. <u>This is not good title</u>. The assets of the estate are vested in the office of Executor/Administrator, and until the Executor/Administrator is appointed by probate, the decedent remains seized of the asset, per the *Chattels Real Act*, R.S.N.L. 1990, c. C-11.

Letters of Probate or Letters of Administration issued outside of Newfoundland and Labrador are not valid for conveying land in this province. Probate/Administration is valid only within the jurisdiction issuing same. Where a decedent's estate is administered in another jurisdiction, the administration must be resealed in

Newfoundland and Labrador under rule 56.20 of the *Rules of the Supreme Court, 1986,* SNL 1986, c. 43, Schedule D, and the *Judicature Act*, R.S.N.L. 1990, c. J-4, s. 132.

When the vendor on a transaction is an estate, the searches and clearances should be obtained against the estate, and not against the executor/administrator personally. The executor or administrator has no personal interest in the property being conveyed, except by the authority vested in the office of executor/administrator. One may consider the fact that the executor or administrator is replaceable on application to court as being a reasonable basis for this conclusion. If the estate administrator is fungible, without needing to first clear their own liabilities and debts, then it cannot be that the property would be vested into the estate administrator such that the estate becomes eligible by the administrator's creditors.

Be cautious of possession of property by a child on the death of a parent, as possession may be permissive and not adverse to the estate. Such possession may be with the consent of the estate or next of kin, in which case, it may not be exclusive (i.e., with intent to exclude the other entitled parties) and may be a tenancy or a licence. On consideration of the authorities, the Committee determines that it may be necessary to obtain a Deed of Confirmation or a Deed of Release from the next of kin or (ideally) the Estate where *animus possidendi* is ambiguous. This is required because ambiguity creates uncertainty on the title that may result in subsequent legal action against a purchaser. See *Wills v. Steer* (1907), 9 Nfld. L.R. 208 (Supreme Court of Newfoundland); *Ocean Harvesters Ltd. v. Quinlan Brothers Ltd.* (1971), 1 Nfld. & P.E.I.R. 609 (Supreme Court of Newfoundland, on Appeal); aff'd [1975] 1 S.C.R. 684; *Petten v. Petten Estate* (1988), 74 Nfld. & P.E.I.R. 289 (Newfoundland Court of Appeal); *Fitzpatrick's Body Shop Ltd. v. Kirby* (1992), 99 Nfld. & P.E.I.R. 42 (Newfoundland Supreme Court, Trial Division). See also discussion in *Tucker v. Registrar of the Supreme Court*, 2018 NLSC 254. Contra, see *Wickham Estate*, (1977), 17 Nfld. & P.E.I.R. 452, at paras. 143-144 (NL Supreme Court, Trial Division).

ii. *Sale by Guardian*

Guardianship bears resemblance to the estate context, in that it is Court appointment, but is more akin to a Power of Attorney in that the individual is living and the land remains vested in the living owner. The property of the party under guardianship vests in the Guardian: *Mentally Disabled Persons Estates Act*, R.S.N.L. 1990, c. M-3, s. 3(1) and 6(1)(a) ("MDPE Act"). As the Guardian is appointed by Court order as guardian of the estate of the disabled person, the Deed should be structured similarly to the estate of a deceased person. Like the context of a deceased person's estate, the property remains vested in the guardian *qua* administrator, to sign on behalf of the disabled person.

Sale of property by a Guardian requires Court approval: *MDPE Act*, s. 8 to 11. Section 11 defines what a Guardian may do without Court approval, which does not include the sale of property, and section 10(a) refers to discretionary power that may be approved by the Court. This is confirmed by implication in the Court of Appeal decision of *Re A.A.*, 2019 NLCA 7, para. 85.

Absent such a grant of authority by the Court, the concern is that a transaction may be undone by subsequent Court order should the party under guardianship, or someone on their behalf, challenge the conveyance.

Note that the same rules will apply to the disposition of a child's interest in land, which also requires Court approval pursuant to the *Children's Law Act*, R.S.N.L. 1990, c. C-13, s. 66.

iii. *Sale by Power of Attorney*

Signing by Power of Attorney requires the Power of Attorney documentation to be registered at the Registry of Deeds prior to, or within six months, of registration of a deed. See *Registration of Deeds Act*, S.N.L. 2009, c. R-10.01, s. 7(1)(b) and 13. Deeds executed by Power of Attorney should be in ordinary form and identify only the donor of the power on the face of the deed as the vendor. The signing page of the Deed should state that it is executed by Power of Attorney under the signature of the Attorney. This is because the property is not vested in the Attorney by the Power of Attorney. Rather, it only grants the Attorney the power to execute the deed on behalf of the Donor. The Donor is always the vendor and is all times seised of the property.

Issues have arisen where Powers of Attorney are not witnessed by Commissioners of Oaths or Notaries Public. While the *Enduring Powers of Attorney Act* does not require that a Power of Attorney be witnessed by a Commissioner or Notary, (see R.S.N.L. 1990, c. E-11, s. 3(1)), it is a requirement for registration under the *Registration of Deeds Act,* S.N.L. 2009, c. R-10.01, s. 15- 17. The Committee notes the discrepancy created by the conflict of provincial legislation, as a valid Power of Attorney may be unregistrable at the Registry of Deeds.

The Committee has determined that two acceptable methods to register a Power of Attorney which is valid but unregistrable are:

a) To obtain an affidavit of execution from the witness (see *Registration of Deeds Act*, S.N.L. 2009, c. R-10.01, s. 17(2), which will be the preferable option allowing the Power of Attorney to be registered as a standalone document.

b) Where the witness is unavailable or for any other reason an

affidavit of execution cannot be obtained, the Power of Attorney may be registered as an attachment to the deed by which it is executed. The *Registration of Deeds Act*, S.N.L. 2009, c. R-10.01, requires the registration of the Power of Attorney, but not its registration as a standalone document. The Committee concludes that its registration as an appendix or schedule to the deed would constitute "registration" within the meaning of the *Registration of Deeds Act* and such a deed will comply with the statutory requirements, as the document will be discoverable in the Registry.

iv. *Affidavits of Status Where Sale by Administrator/Guardian/Attorney*

Affidavits of Status where there is a sale by estate, guardianship, or power of attorney may be executed by the Executor/Administrator/Guardian/Attorney, but the affidavit must state that the deponent is swearing to the information to the best of their knowledge, information and belief. The signing party cannot attest to facts on behalf of the donor/decedent, and affidavits must be executed personally by the party attesting to that knowledge.

Chapter 3.8 - Co-Ownership

Where two people hold title to a property by deed, and the document does not specify how title is held, the presumption is a joint tenancy (*Hunter v. Chafe*, 2014 NLCA 44, para. 26). Express language must be used if the parties are to hold as tenants-in-common.

This presumption can be rebutted contextually by a break in any of the "four unities", being:

- Unity of title: parties take under the same instrument;
- Unity of interest: parties have identical interests in nature, extent, and duration;
- Unity of possession: the parties are entitled to undivided possession of the whole of the property; and
- Unity of time: the parties acquire their interests at the same time. See *Chafe v. Hunter*, 2013 NLTD 67, para. 7.

Limiting words in a deed may also apply to rebut the presumption of joint tenancy. This has been previously held to be such language as "to be divided between", "in equal shares", "share and share alike", "in equal proportions", "between", "respectively", and "equally". All of these infer that the shares in the land are intended to be separate, rather than joint ownership of an undivided whole.

While ownership of property may start as a joint tenancy, it may be severed in one of three ways:

- Unilateral action by one joint tenant in relation to their own share (such as selling or encumbering their share);
- Mutual agreement of the joint tenants to sever the joint tenancy into a tenancy in common; or
- Through any other course of dealing by which the co-owners indicate an intention to sever their ownership into a tenancy in common.

See *Chafe v. Hunter*, 2013 NLTD 67, at paras. 9-15.

Note that a general exception to this rule exists. A bequest of land in a will to multiple people is presumptively a tenancy in common: *Re Chafe Estate* (1995), 134 Nfld. & P.E.I.R. 345 (Newfoundland Supreme Court, Trial Division); *Re McNeil Estate* (1959), 43 M.P.R. 357 (Nfld. S.C.). Contra, see *Sullivan v. Sullivan* (1947), 16 Nfld. L.R. 16 (S.C. *en banc* on appeal): where the testator made several bequests expressly on tenancies in common, omission of the words "tenancy in common" in another bequest implied a joint tenancy. *Expressio unius est exclusio alterius*.

Chapter 3.9 - Affidavits of Status

Affidavits of Status are considered necessary to confirm spousal status and absence of any co-owners or other parties with a right to or interest in the land. There should be an Affidavit of Status for every owner within the last 30 years.

By statute, the Affidavit of Status is deemed proof and satisfactory compliance for ascertaining spousal interests: see *Family Law Act*, R.S.N.L. 1990, c. F-2, s. 12. For this reason, an Affidavit of Status is considered a necessity of good title and must at a minimum confirm spousal status of the vendor and the spousal/matrimonial use of the property.

Other content of Affidavits of Status is standard in practice, and covers other issues such as UFFI warranty, tax liens, bankruptcy, workers compensation and labour compliance. These issues relate to liens and warranties and do not go to the title itself. Solicitors should use their own discretion as to what will be satisfactory in any given circumstance and may make requisitions for any missing information deemed necessary to confirm good title.

Practitioners may rely on Affidavits of Status for personal lien-related matters (i.e. finance clearances, tax clearances, bankruptcy searches, judgment searches) on prior transactions in lieu of *de novo* searches, except where circumstances warrant further investigation.

Chapter 3.10 - Restrictive Covenants in Deeds

Restrictive covenants may arise in the chain of title. They may be express in the deeds or attached as a schedule referenced in the deed. Solicitors may be asked to opine on the validity of such restrictive covenants and whether or not they carry forward. Those that run with the land will carry forward and bind the use of the land to successive purchasers, who will be on notice of the provisions from the registration of same.

A restrictive covenant which runs with the land on which it is a burden, has five characteristics:

1. It is negative in substance.
2. There is a defined servient tenement, and the benefit of the covenant is annexed to dominant lands which are ascertainable with reasonable certainty.
3. The covenantor is the owner of the land (the "servient tenement") which is to be burdened by the covenant.
4. The covenantee owns the land (the "dominant tenement") which is to be benefited by the covenant and that land is mentioned in the covenant.
5. It is not unlawful as offending public policy or for any other reason.

See: *Swan Properties Ltd v. Irving Oil Ltd.*, 2004 NLSCTD 206, at para. 31. See also *Westbank Holdings Ltd v. Westgate Shopping Center Ltd.*, 2001 BCCA 268, at para. 16.

Chapter 4 - Possessory Title

Preamble – A History of Adverse Possession:
Possessory title is one of the most misunderstood, debated, and litigated areas of the law in Newfoundland and Labrador. If 10 different lawyers were asked to define possessory title, they would provide 10 different answers. Given a huge percentage of real property in this province is based upon possessory title, this is a serious issue.

The courts and lawyers have long concluded that possessory title can be used to fill in the gaps of a chain of documentary title and may be used to ground a good root of title. In simple terms, possessory title can be good title. Unfortunately, given the extreme limitations of our registry system, (mainly owing to the fact that many people did not and continue not to register their lands in Newfoundland), this has been a necessary evil.

In *Re Ellis* (1997), 154 Nfld. & P.E.I.R. 271 (Newfoundland Supreme Court, Trial Division), Justice Puddester gave a clear synopsis of the role of possessory title in establishing land titles in Newfoundland and Labrador [emphasis added]:

> As the parties themselves have addressed, indeed primarily in both evidence and argument, the existence of a perfected and complete chain of documentary or paper title from an original grant is not an essential requirement in establishing good title (although in some circumstances and absent proof of intervening third party possession de facto, it may be sufficient). Title may be acquired by acts of possession sufficient to satisfy the several well-settled elements in law necessary in that regard. Such possession can of course consist solely of possession itself, with no intervening documentary assistance.

However, in this case, as indeed in many cases of similar nature, incidents of possession may, if they meet the necessary legal requirements, serve to "fill in" gaps in a chain of documentary title itself. As well, sufficient possessory title at a certain point may constitute a good "root of title" in place of a documentary grant in order to start or ground a subsequent perfected chain of documentary title (again in the absence of proof of dispossession by third parties). Therefore, it is necessary to turn now to consider this second aspect of and basis for the applicants' claim in this proceeding.

Thus, when establishing title, the registered or “paper documented” history is only one element of “good and marketable title”. It is therefore essential that all lawyers have a common definition and understanding of possessory title to ensure there is an orderly definition of good and marketable title. Given the amount of possessory title in our province, our current lack of common definition is a serious issue that must be corrected.

One of the principal goals of this report is to provide guidance and coherency for the practicing bar on matters of title and the standard of good title expected of solicitors. The standard of good title is at its most subjective when dealing with adverse possession, and a review of its underlying principles is important to establishing standards of practice.

Executive Summary of Adverse Possession Practice Standards

- The standard of good title for adverse possession of private entities (everyone except Crown) is thirty (30) years of adverse possession, based on the *Limitations Act*, S.N.L. 1995, c. L- 16.1, s. 22.
- Title may be accepted at a purchaser’s election where there is adverse

possession between 10 and 30 years, based on the *Limitations Act*, S.N.L. 1995, c. L-16.1, s. 7(1)(g).
    - Note that there are exceptions that may postpone the running of the limitation period for up to 20 years, thus why 30 years is the standard of good possessory title.
    - When proceeding with occupation for more than 10 but less than 30 years, title insurance is strongly recommended.
- Adverse possession against Crown must run for the period of December 31, 1956, to January 1, 1977, based on the *Lands Act*, S.N.L. 1991, c. 36, s. 36.
- Adverse possession relies on the "*Wickham Estate* principles" for open, notorious, continuous and exclusive use and occupation (see Chapter 4.1).
- Adverse possession requires physical presence on the land with some activity occurring by the claimant.
- There is no hard and fast rule as to what types of use and occupation will meet requirements. Consider caselaw when looking at particular uses.
- Must be assessed contextually by solicitors. Judgment will be left to professional discretion. It is not possible to make a hard and fast rule for where dispossession will be met, as it will be fact dependent.
- Affidavits will be most reliable for dispossessing land where:
    - Land is small or the use is otherwise fully coterminal to boundaries;
    - Land has physical structures on it for operative periods; and
    - Land is fenced or boundaries otherwise marked.
- Caution is advised whenever dealing with adverse possession of Crown Land.

Dispossession of Crown Land by adverse possession has become more complex and uncertain due to current practices of the Crown Lands administration. Solicitors may use their best judgment as to whether or not the Crown is dispossessed. General rules for adverse possession may not apply against the Crown. There is no reliable standard for what possession will dispossess the Crown or to what degree.

The materials in this Chapter are intended as general guidance only. Solicitors must be satisfied based on their own knowledge, research and investigation that title established by adverse possession is sufficiently reliable. Title insurance is recommended when dealing with title based on adverse possession (see Chapter 9).

Chapter 4.1 - The Wickham Principles

The seminal case on adverse possession in Newfoundland and Labrador is *Wickham v. Wickham Estate* (1977), 17 Nfld. & P.E.I.R. 452 (Newfoundland Supreme Court, Trial

Division). Practitioners are recommended to review the Wickham case as a comprehensive summary of the law of adverse possession in this province. Later cases build on the foundation that the *Wickham* decision provides.

These rules define the required conditions of use to establish adverse possession.

Despite the fact that *Wickham* is now approaching 50 years old, it continues to be the leading case on possessory title in our province. Perhaps the best synopsis of the "Wickham Principles" in recent years was given by Justice Handrigan in *George Quieting of Titles,* 2012 NLTD(G) 196. While the *Wickham* principles have been set forth many times in many different fashions, Justice Handrigan condensed *Wickham* into 12 core principles that are applicable to most cases (at para. 7):

1. No action for possession of land may be brought after 10 years has expired since the cause of action arose*.
   *(This will be discussed later in this document.)
2. The title of the person, who has the right to bring an action but does not do so, is extinguished after 10 years.
3. The limitation period starts to run only when the legal owner has been dispossessed or has discontinued possession of the property and another has occupied the property exclusively for his own benefit.
4. Possession must be open, exclusive, notorious and continuous, not equivocal, occasional or for special or temporary purposes.
5. The adverse claimant must possess the property as it permits.
6. Possession does not have to be adverse for the limitations legislation to be engaged.
7. The adverse claimant's possession extends only to that area of the property that he actually occupies, but the person who claims title by right is deemed to occupy the whole.
8. While the acts on which the adverse claimant relies must be of possession and not of trespass, distinguishing between the two can be difficult sometimes since true possession is no more than a high level of trespass.
9. If it is unclear that the adverse claimant possesses the property or is merely trespassing, he must show that he intended to exclude the owner and other people.
10. Next-of-kin who remain in possession hold the properties as tenants-in-common amongst themselves but as joint tenants against those they dispossess.
11. If a co-owner with an undivided interest in land has been dispossessed by other co-owners in possession, and before the limitation period has run its course, the dispossessed co-owner acquires an additional

undivided interest in the land from a co-owner in possession, the period of possession of the other co-owners in possession is interrupted and time starts to run again not only as to the newly acquired undivided interest of the co-owner out of possession but also as to the undivided interest already held by him.

12. The claimant has to prove that he is entitled to the benefit of the Act.

Chapter 4.2 - Adverse Possession Generally – Defining Possession

Before a legal practitioner gets into the actual nature of possession, we first need to define what possession is. The courts have consistently held that possession is an absolute requirement for adverse possession. Without possession, the adjectives of open, notorious, continuous, and exclusive mean nothing. In his decision of *Re Ellis*, 154 Nlfd. & P.E.I.R. 271 (Newfoundland Supreme Court, Trial Division), Justice Puddester quoted the decision of *Crowley v. Crowley* (1984), 51 Nfld. & P.E.I.R. 150 (Newfoundland Supreme Court, Trial Division):

> It has to be noted that a person who seeks title by long possession is trying to assert a title to the land against the true owner, be it the Crown or a person, known or not. It ought not to be believed that this can be done passively or with a faint heart. It is said that the Statute of Limitations was enacted to protect the possessor or dispossessor who has, in Newfoundland, applied 20 years of his life to the possession of the land. He may have improved it and lived on it; he may have cultivated it; he may have used it for timber or minerals; he may have used it for recreation; he may have possessed it in any number of ways.
>
> Possession there must be. A person cannot trespass and call it possession.
>
> Before an act graduates from trespass to possession, it must have some positive quality. It must be vital and vibrant.
>
> The act must not only be open, exclusive, notorious and continuous, it must be possessory. Without possession, the adjectives mean nothing.
>
> The vitality of possession is sometimes indicated by the nature of the land. The nature may call for very little use. In such case possession may be difficult to achieve and if achieved may not survive the test of open, exclusive, notorious and continuous. In Leigh v. Jack (1879), 5 Ex. D. 264, Cotton, L.J., said there can be no discontinuance of possession by the owner where the land is not capable of use and enjoyment.

Perhaps the most important part of this quote is the distinction between mere trespass and actual possession. If simple trespass is to rise to the robust standard of adverse possession, it must meet certain requirements.

Possession by an adverse possessor must be of a nature to give rise to an action for recovery of land by the "true owner", and not merely an action for trespass. "Possession" requires the adverse possessor to do something with the land which is incompatible with the "true owner's" control and dominion over the land: *Wickham Estate* (1977), 17 Nfld. & P.E.I.R. 452, at para. 112 (NL Supreme Court, Trial Division), ("*Wickham Estate*"); *Pelley Estate v. Ellis*, 2015 NLTD(G) 73, at para. 33; *Russell v. Blundon* (1999), 185 Nfld. & P.E.I.R. 181, at para. 43 (Newfoundland Supreme Court, Trial Division). The possession of the land must not be equivocal or for a special or temporary purpose: *Lundrigan's Ltd. v. Prosper and Brake* (1981), 38 Nfld. & P.E.I.R. 10 (Newfoundland Court of Appeal). (C.A.). Possession will be contextual to the land and its nature: *R. v. Gough*, 2006 NLCA 3; *Collingwood v. Newfoundland* (1996), 138 Nfld. & P.E.I.R. 1 (Newfoundland Court of Appeal).

It is fundamental that there must be possession by an adverse possessor. It is not sufficient for affidavits of possession to simply state that a person is "in possession of" land without elaboration on the nature of the use. As stated in *Wickham Estate* (1977), 17 Nfld. & P.E.I.R. 452, at p. 492 (NL Supreme Court, Trial Division): *if [the adverse possessor] is not there, there is no possession*. There must be some explanation of what acts an adverse possessor has done upon the land to constitute his or her "possession", evidencing a physical presence on the land. Absent an explanation of the specific uses made of the land, then such a recital will be meaningless. Quoting from *Wickham Estate* (1977), 17 Nfld. & P.E.I.R. 452, at page 478 (NL Supreme Court, Trial Division):

> The claimant must do something with the property whether it be wilderness or improved land. He must have such use and occupation as the land lends itself to for if he does not have this at least he is not in possession. If he does less, he is a trespasser. If he does nothing, he has acquired nothing.

As adverse possession must be inconsistent with the dominion of the true owner over the land, it must not be possession under licence, under contract, or in trust. One must look to the nature of the possession, character of the land, and in certain circumstances, the relation of the possessor to the true owners and the *animus possidendi* by the possessor: *Wills v. Steer* (1907), 9 Nfld. L.R. 208 (Supreme Court of Newfoundland); *Ocean Harvesters Ltd. v. Quinlan Brothers Ltd.* (1971), 1 Nfld. & P.E.I.R. 609 (Supreme Court of Newfoundland, on Appeal); aff'd [1975] 1 S.C.R. 684; *Petten v. Petten Estate* (1988), 74 Nfld. & P.E.I.R. 289 (Newfoundland Court of Appeal); *Fitzpatrick's Body Shop Ltd. v. Kirby* (1992), 99 Nfld. & P.E.I.R. 42 (Newfoundland

Supreme Court, Trial Division).

Contrasting an adverse possessor with the "true owner", the "true owner" need not do anything with the land. The "true owner" is deemed to always be in possession of the land, whether or not they ever do anything with the land. The onus is on the adverse possessor to establish that they have occupied the land to the exclusion of the "true owner" in a manner inconsistent with the true owner's rights: *Wickham Estate* (1977), 17 Nfld. & P.E.I.R. 452 at para. 90 (NL Supreme Court, Trial Division); *Earle Estate v. Mullins,* 2016 NLTD(G) 144, paras. 85-86; *Tapper v. Tapper* (1978), 20 Nfld. & P.E.I.R. 301 (Newfoundland District Court).

This is where the idea of "open, notorious, continuous and exclusive" comes into play.

Chapter 4.3 - Open, Notorious, Continuous, and Exclusive Possession

Understanding what constitutes "possession", we may now examine the nature of possession required to vest an adverse possessor with title. Every lawyer practising real estate will recall that possession must be "open, notorious, continuous and exclusive" ("O/N/C/F"). We say these words like everyone has a common definition. But what do they mean? They are not merely words to be recited, as they are a legal standard and not a prayer. It is important to understand each aspect, as "*every word of the term 'open, exclusive, notorious and continuous possession' is important and when any one is missing, the adverse claim fails*". *Wickham Estate* (1977), 17 Nfld. & P.E.I.R. 452, at paras. 188-189 (NL Supreme Court, Trial Division); *Crowley v. Crowley* (1984), 51 Nfld. & P.E.I.R. 140, at page 146 (NL Supreme Court, Trial Division).

When applying the O/N/C/E standard, all four adjectives must be present. Should the possessor fail on one, the possessor's claim fails on all. Furthermore, to meet this standard the possession must not be passive or temporary in nature. As stated in *Wickham Estate* (1977), 17 Nfld. & P.E.I.R. 452 at para. 188 (NL Supreme Court, Trial Division) [emphasis added]: "*I would say that the extinguishment of an owner's title by 'adverse' possession is not something to be lightly brought about. <u>There must be some vigor to the possession.</u>*" The actual meaning of "vigor" is entirely situationally dependent, but jurisprudence provides many examples of what has met and what has failed this test, which are more particularly discussed in these materials.

Open

In order to be open, possession must be "*visible to the public at large for the requisite period*": *Sherren v. Pearson* (1887), 14 S.C.R. 581; *Crowley v. Crowley* (1984), 51 Nfld. & P.E.I.R. 140 (NL Supreme Court, Trial Division); *Re Ellis* (1997), 154 Nfld. & P.E.I.R. 271, at para. 181 (Newfoundland Supreme Court, Trial Division). While the term

"open" may seem self-explanatory, it is clear that in order to meet the definition of "open" the claimant must be clearly visible to the public at large as being in possession of the subject property. Hiding one's actions or taking action that is not publicly visible will not constitute adverse possession.

The actions of the party claiming adverse possession must be open for the world to see. If their acts are not open for the world to witness, and fully known by the rightful owner(s), they will fail this test. This should lead the real estate practitioner to take special caution when dealing with usage that is not "open for the world to see." Things like remote cottages or other acts which are not readily visible to potential rightful owner(s), or the public at large could pose significant problems.

Openness was at issue in *Lundrigan's Limited v. Prosper and Brake* (1981), 38 Nfld. & P.E.I.R. 10 (Newfoundland Court of Appeal), where the construction of a cabin on remote land was not visible from road, river or air. While the Court of Appeal held there was no deliberate intention on the part of the adverse possessors to hide their activities in *Lundrigan's*, what mattered was that the activities were not readily visible or discoverable by the true owner. Openness, coupled with notoriety, go toward the "constructive knowledge" of the true owner: if the possession is not hidden and is open and visible, then the actual knowledge of the true owner is irrelevant, as such adverse possession was discoverable by ordinary diligence. It is the ability to see the adverse use that is at the heart of "openness".

Notorious

While notoriety may seem akin to openness, there is a clear distinction. In order for possession to be notorious, the courts have consistently held that the possession must be actually known in the community at large. It is not enough that the surrounding community or interested parties "could know" about the possession, the public and potential owner(s) must know. The possession itself must be notorious, not just notoriety of asserted ownership: *Crowley v. Crowley* (1984), 51 Nfld. & P.E.I.R. 140 (NL Supreme Court, Trial Division).

The applicant must be able to demonstrate that the possession is well known by the adverse parties and the community as a whole.

Notoriety was in issue in *Lundrigan's Limited v. Prosper and Brake* (1981), 38 Nfld. & P.E.I.R. 10 (Newfoundland Court of Appeal), which dealt with a cabin in a remote woodland area. The Court of Appeal found that not only was the possession not discoverable by the true owner by lack of "openness", the party claiming adverse possession adduced no evidence establishing that the cabin was known to anyone outside of the adverse possessor's family.

Notoriety, coupled with openness, goes to the "constructive knowledge" of the true owner. If one's occupation of the land is not hidden and is well known in the community at large, the Court will more readily infer that the true owner ought to have been on notice of the adverse possession, such that the limitation period for such possession can run.

Continuous

Most people think this item is somewhat self-explanatory, but the courts have been adept at redefining continuity in relation to the usage of land. For example, in the case of farmland, continuous usage has been continuously defined. Thus, practitioners must be careful to apply the continuous standard to reflect the actual usage of the property.

In general, any interruption of the adverse possessor's occupancy by the true owner breaks the continuity of the adverse possession: *Wickham Estate* (1977), 17 Nfld. & P.E.I.R. 452 (NL Supreme Court, Trial Division), *Mallard v. Bragg* (2001), 198 Nfld. & P.E.I.R. 238 (Newfoundland Supreme Court, Trial Division); *Matchless Group Inc. v. Carpasia Properties Inc.,* 2002 NFCA 56.

If the possession of the adverse claimant is interrupted, even for a short period of time, the time period set forth in the *Limitations Act* may be reset. Thus, the legal practitioner must be cautious in ensuring the running period has not been "reset", especially as the nature of continuous usage varies with the nature of the land.

Despite this, the practitioner should not take any interruption as being an automatic "limitation reset". In *Matchless Group Inc. v. Carpasia Properties Inc.,* 2002 NFCA 56, the Court of Appeal held that construction of stairs by a legal titleholder was considered a "benign event" that had "no legal relevance to the questions at issue" and was not a reclamation of the property and without *animus possidendi*. The same was held in *Vickers v. Tobin*, 2010 NLTD 32, in relation to surveying and the construction of a well, where either action alone did not constitute sufficient action to reset the limitation period. Thus, the interruption of the party claiming to be the true owner must have the clear intention of reclaiming the property.

Based on the precedents in *Matchless Group,* 2002 NFCA 56, and *Vickers,* 2010 NLTD 32, it is difficult to determine a bright-line rule regarding a break in continuity. Such determinations will be contextual and must be decided on a case-by-case basis. Prudence dictates that practitioners should regard any re-entry by the true owner as being a *prima facie* interruption of continuity. Litigation may be required to fully determine the matter.

Exclusive

In order to establish exclusive possession, the applicant(s) must be able to show

they were the only party(ies) who utilized the subject property. This can be a bit of a murky standard and of the 4 adjectives given in Wickham, seems to be the most ill-defined. The nature of the possession being claimed must be exclusive to the applicant(s) or the application will likely fail.

What distinguishes adverse possession from trespass is the intention of the adverse possessor to take ownership of the land: the "*animus possidendi*". The adverse possessor must have an intention to exclude all, including the true owner and anyone else who may have a right to occupy the land. This will often be inferred by the actions taken by the adverse possessor. See *Re Patrick Devereaux Estate*, 1981 G.B. 66, (Unreported decision of Cummings D.C.J., August 20, 1982); *Fitzpatrick's Body Shop v. Kirby* (1992), 99 Nfld. & P.E.I.R. 42 (Newfoundland Supreme Court, Trial Division); *Hollett v. Hollett* (1993), 106 Nfld. & P.E.I.R. 271 (Newfoundland Supreme Court, Trial Division); *Greeley v. Greeley*, 2015 NLTD(G) 65.

It is the exclusive aspect that signifies the claimant's assertion of claim and control. The conduct of the "wrongdoer" in trespassing upon the real property must be of such an extent that it excludes the rightful owner of their usage of the land.

Chapter 4.4 - Trespass vs. Adverse Possession

An unlawful occupier of land is capable of having his wrongful possession and occupation of land ripen into good title. That being said, someone claiming to have met the standard of adverse possession needs to be more than a mere trespasser. Converting trespass to a valid adverse claim is a significant jump. In *Pelley Estate v Ellis*, 2015 NLTD(G) 73, Chief Justice Whalen quoted the 1963 Ontario case of *Brown v. Phillips,* [1964] 1 O.R. 292 (Ontario Court of Appeal):

> To satisfy the statute the plaintiff must give satisfactory evidence as to the quality and the duration of the possession on which he relies; as to the quality - that his possession of the land in dispute was such as to give the defendants a right of action for the recovery of the land, as distinguished from a mere right to bring an action for trespass; as to the duration – that such right of action was allowed to go on unenforced for a continuous period of 10 years.
>
> The right of an owner to bring an action for the recovery of land against the wrong-doer depends not on the wrongful entry by the wrong-doer which would be the foundation for an action for damages for trespass. The right of action for recovery of land accrues only when the conduct of the wrong doer on the land in question is such that the owner thereof is prevented from enjoying that measure of physical possession of which land of the character of the land in question is capable. In other words, the conduct of the wrong- doer must be

> such that the owner is excluded from his land. Consequently, any degree of possession by the wrong-doer which does not prevent the owner from enjoying some use of the land (whether or not such conduct may be sufficient to create some easement in favour of the wrong-doer) will not, even if continued for the statutory period, extinguish the title of the real owner.
>
> The right to bring an action for recovery of land accrues when possession, of the necessary quality, occurs. If possession of that quality is interrupted, or there be any cessation in the exclusion of the owner, then necessarily the right of action itself terminates and time ceases to run under the statute. If wrongful possession is later resumed a new cause of action for recovery accrues and time again begins to run but will be calculated only from the beginning of the latter act of possession. To satisfy the requirements of the statute the possession of the wrong doer must therefore be exclusive and continuous in the sense I have above described.

The difference between a trespasser and an adverse possessor can only be defined by usage by the adverse possessor, to the exclusion of others. It is not wrongful entry that gives rise to the action (that would be trespass), it is the conduct of the squatter that gives rise to the cause of action. Conduct of the squatter must be such that the true owner is excluded from the land. Any degree of possession by the squatter which does not prevent the owner from enjoying the use of the land will not extinguish the legal titleholder's ownership. Possession must be of a necessarily intensive quality. If possession of that quality is interrupted, or stopped, or the true owner re-enters possession, then the right of action ceases (see *Wickham v. Wickham Estate* (1977), 17 Naldo. & P.E.I.R. 452 (Newfoundland Supreme Court, Trial Division).

Thus, the possession must be to exclusion of other parties, especially those whom adverse possession is being claimed against.(See Chapter 4.3.) Permission to use land or a lease/licence/rental will not suffice as this does not satisfy the exclusion criteria.

This is contingent on how the land is used and it will vary with the purpose of the land. That being said, the party claiming to have adversely possessed the owner must be able to show at least equal, if not greater usage of the land than the original owner.

Chapter 4.5 - Special Considerations for Family Land

Things become even more difficult to define when the complex relations and permissions of family members get involved. As stated in *Hollett v. Hollett* (1993), 106 Nfld. & P.E.I.R. 271 (Newfoundland Supreme Court, Trial Division) [emphasis added]:

> Generally, acts of possession by family members or relatives against other relatives will be considered to be either acts of trespass or acts of possession by licence, unless a clear intention to' exclude the other persons is shown.

This is the "*animus possidendi*": the intention to take ownership as against the family. It can be unclear in circumstances where possession may be permissive or equivocal. In *Prince Estate v. Maloney*, 2017 NLTD(G) 97, aff'd 2018 NLCA 18 (as *Maloney v. Fry*), the Court upheld dispossession of family land by one family member on the facts in evidence, where the applicant had independently controlled development of the land and other family members were not present on the land and had acquiesced to the applicant's control over the land. The determination in *Prince Estate* was fact-specific, as will be in every such instance. Practitioners must look to the specific facts of use in each case and determine by professional judgment if the *animus possidendi* is sufficiently made out.

Acts of possession by family members may be considered trespass or possession by licence without clear exclusion of the others: *In Re Kennedy; Butler v. Dawe* (1941), 15 Nfld. L.R. 424 (Supreme Court of Newfoundland); *Petten Estate v. Petten and Hender* (1989), 74 Nfld. & P.E.I.R. 289 (NLCA). Otherwise, the dispossession of family members will be treated the same as dispossession of strangers, whether co-owners or not: *Maloney v. Fry*, 2018 NLCA 18.

Exclusion can be difficult to prove where possession may be rooted in a licence or permission. Exclusion in the family context may be inferred from conduct by the dispossessor, or abandonment or inaction by the party adversely possessed: *Taylor v. Nfld. Concrete Products Ltd.* (1947), 16 Nfld. L.R. 4 (S.C. *en banc* on appeal). As discussed in previous sections, where the *animus possidendi* is ambiguous and may be rooted in permissive use or licence, it may not be possible to rely on adverse possession as a resolution of title, and it may be necessary to obtain deeds of release or probate of estate.

See further discussion of permissive occupation in *Wills v. Steer* (1907), 9 Nfld. L.R. 208 (Supreme Court of Newfoundland); *Ocean Harvesters Ltd. v. Quinlan Brothers Ltd.* (1971), 1 Nfld. & P.E.I.R. 609 (Supreme Court of Newfoundland, on Appeal) aff'd [1975] 1 S.C.R. 684; *Petten v. Petten Estate* (1988), 74 Nfld. & P.E.I.R. 289; *Fitzpatrick's Body Shop Ltd. v. Kirby* (1992), 99 Nfld. & P.E.I.R. 42 (Newfoundland Supreme Court, Trial Division). See also discussion in *Re Patrick Devereaux Estate*, 1981 G.B. 66 (Unreported decision of Cummings D.C.J., August 20, 1982); and *Tucker v. Registrar of the Supreme Court*, 2018 NLSC 254. Contra, see *Wickham Estate*, (1977), 17 Nfld. & P.E.I.R. 452, at paras. 143-144 (Newfoundland Supreme Court (Trial Division).

Practitioners must treat situations involving family land and adverse possession particularly carefully. A purchaser's concern over the potential *animus possidendi* of a vendor in such circumstances may create a situation akin to a reverse onus presumption on possession, i.e., that possession should be seen as presumptively by consent, with a vendor's onus to demonstrate specifically how other family members were dispossessed.

One should bear in mind the caution of Justice Henry Winter, writing for the unanimous Supreme Court sitting *en banc*, in the appeal decision of *Taylor v. Nfld. Concrete Products Ltd.* (1947), 16 Nfld. L.R. 4, at page 11-12 (Supreme Court of Newfoundland):

> It may prove helpful and save the expense of fruitless litigation (often out of all proportion to the value of the land involved) if it is clearly recognized that in all such cases the only safe and sure method of keeping one's rights alive is to exercise them actively and sensibly and not to rely upon some slip or neglect of the other man; and to realize that, whatever may be the position of a trespasser excluding an owner, one of several co-owners may exclude himself by his own inaction. And twenty years [then the statutory limitation period for adverse possession] seems ample time in which to act.

The facts of *Taylor* involved two brothers dispossessing their sisters who were co-owners of the land of their late father.

Chapter 4.6 - Restrictive Fencing (Good Fences Make Non-Adverse Neighbours)

Fencing is one of the most common acts of possession and one of the most argued pieces of evidence in our case law. This makes perfect sense as rural Newfoundland and Labrador was based upon animal usage and fences were needed to either "keep animals out or keep animals in" as an elder individual once succinctly explained. As it was once put to one of the writers: "You see young feller, you needed the crops to eat, you needed the animals to eat, but one couldn't eat the other…"

All the way back to 1877, in the case of *Seddon v Smith,* (1877), 36 L.T.R. 168, at Vol. CCCVI, N.S. 169 (House of Lords, Court of Appeal), the courts have determined that "Enclosure is the strongest possible evidence of adverse possession, but it is not indispensable." This has been upheld in this province.

Fencing is not the *sine qua non* of adverse possession and is not a requirement to maintain a claim of adverse possession: *Burgess v. Russell* (1987), 67 Nfld. & P.E.I.R. 208 (Newfoundland Court of Appeal); *Collingwood v. Newfoundland* (1996), 138 Nfld.

& P.E.I.R. 1, at paras. 32-33 (Newfoundland Court of Appeal).

While fencing alone will not be sufficient to prove adverse possession, it will always be strong evidence. Furthermore, given a vast amount of claims for adverse possession involve either crops or animals, at least partial fencing may be a practical necessity for an argument to make logical sense, particularly involving larger parcels of land.

Beyond this, the courts have found fencing to be valuable to determine the scope and boundaries of a claim: *Barrett v. Glynn* (2000), 193 Nfld. & P.E.I.R. 255 (Newfoundland Supreme Court, Trial Division); *Prince Estate v. Maloney*, 2017 NLTD 97.

While the courts have been clear that fencing is not a required element to prove adverse possession, practitioners should be wary of title where there are no clear boundary markers. This is particularly so with larger parcels of land, given the necessity of proving exclusivity, notoriety and openness of adverse possession of the whole of what is claimed to be possessed.

Chapter 4.7 - Co-Owners/Occupiers – Possession and Dispossession

i) Establishing Possession

Where two or more persons acquire an interest in land through adverse possession, they acquire same in joint tenancy: *Coady Estate v. Coady* (1981), 48 Nfld. & P.E.I.R. 355 (Newfoundland Supreme Court, Trial Division); *Re Parsons* (1987), 68 Nfld. & P.E.I.R. 181 (Newfoundland Supreme Court, Trial Division). This is in line with the common-law presumption that any joint ownership is a joint tenancy unless contrary intention is clearly expressed.

Despite this presumption, the real estate practitioner should be cautious that the "four unities" of title are common between the parties: unity of title, interest, possession and time. (See preceding chapter on co-ownership.) A break in any of the "four unities" will not result in joint adverse possession and may result in actual adverse possession by only one of the "joint possessors".

As stated by Justice Cameron in *Re Parsons* (at para. 26):

> I accept the principle that where two or more acquire title by possession they become joint tenants. However, the basis of this principle is that the four unities required for joint tenancy are present. In this case, unlike next-of-kin who remain in possession, the unity of time has not been established.

ii) Establishing Dispossession

Dispossession of co-owners or co-occupiers by adverse possession can be more complicated.

To adversely dispossess a co-owner, the co-owner must be excluded and must be aware of the exclusion: *Russell v. Blundon* (2002), 210 Nfld. & P.E.I.R. 326 (Newfoundland Court of Appeal). This is because open, notorious and continuous use and occupation is consistent with the ordinary right of ownership by a co-owner. Exclusion will be the key characteristic to dispossess a co-owner. This may be inferred from abandonment. Dispossession by a co-owner rests not on Co-Owner A's possession (which A has of right), but by Co-Owner B's inaction and failure to counter A's total dominion: *Taylor v. Nfld. Concrete Products Ltd.* (1947), 16 Nfld. L.R. 4 at 9 (S.C. *en banc* on appeal).

Acts of possession by family members may be considered trespass or possession by licence without clear exclusion of the others: In *Re Kennedy; Butler v. Dawe* (1941), 15 Nfld. L.R. 424 (Supreme Court of Newfoundland); *Petten Estate* (1988), 74 Nfld. & P.E.I.R. 289 (Newfoundland Court of Appeal). Otherwise, the dispossession of family members will be treated the same as dispossession of strangers, whether co-owners or not: *Maloney v. Fry*, 2018 NLCA 18. See also discussion in *Re Patrick Devereaux Estate*, 1981 G.B. 66 (Unreported decision of Cummings D.C.J., August 20, 1982).

Exclusion can be difficult to prove where possession may be rooted in a licence or permission. As discussed in previous sections, where the *animus possidendi* is ambiguous and may be rooted in permissive use or licence, it may not be possible to rely on adverse possession as a resolution of title, and it may be necessary to obtain deeds of release or probate of estate.

One should bear in mind the caution of Justice Henry Winter, writing for the unanimous Supreme Court sitting *en banc*, in the appeal decision of *Taylor v. Nfld. Concrete Products Ltd.* (1947), 16 Nfld. L.R. 4, at page 11-12 (Supreme Court of Newfoundland):

> It may prove helpful and save the expense of fruitless litigation (often out of all proportion to the value of the land involved) if it is clearly recognized that in all such cases the only safe and sure method of keeping one's rights alive is to exercise them actively and sensibly and not to rely upon some slip or neglect of the other man; and to realize that, whatever may be the position of a trespasser excluding an owner, one of several co-owners may exclude himself by his own inaction. And twenty years [then the statutory limitation period for adverse possession] seems ample time in which to act.

The *Taylor* case arose in the context of family members dispossessing each other of land of their late father, but the doctrine holds for all co-ownership situations.

Chapter 4.8 - Dispossessing the Crown

Unlike claims between other parties, the Crown is not subject to the 10-year limitation as set forth in section 7(1)(g) of the *Limitations Act,* S.N.L. 1995, c. L-16.1. Section 36 of the *Lands Act*, S.N.L. 1991, c.36, abolishes adverse possession against the Crown, except for the following exceptions [emphasis added]:

> (1) Notwithstanding a law or practice to the contrary, no period of possession of Crown lands after December 31, 1976, counts for the purpose of conferring upon a person an interest in the lands so possessed unless the period is permitted to count as against the Crown for the constitution of that interest under or by virtue of an Act of the province, or as a condition of a grant, lease, licence or other document validly made or issued by or on behalf of the Crown under that Act.
>
> (2) The period of possession of Crown lands prior to January 1, 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 a person an interest in that land is considered to be, and always to have been, 20 continuous years.

As such, when evaluating title where the crown has not been otherwise dispossessed, a legal practitioner must look at the key 20-year period of possession which is December 31, 1956, until January 1, 1977. This was confirmed by the Newfoundland and Labrador Court of Appeal in *Ring v. Newfoundland and Labrador*, 2013 NLCA 66, where the court stated (at para. 16):

> 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.

As such, no other periods of time can be used to dispossess the Crown.

Affidavits should recite possession from at least the year 1956, and not 1957. If use began in the summer of 1957, it would be 19.5 years prior to January 1, 1977, and would not run out the limitation period. Reciting to 1956 or an earlier year will confirm the possession ran through the full 20-year statutory period without ambiguity.

Before the passage of the legislation aforesaid in 1976 (*Quieting of Titles (Amendment) Act,* S.N. 1975-76, No. 20), the former standard was sixty years of open, notorious, continuous and exclusive use and occupation (see *Rex v. Kough* (1819), 1 Nfld. L.R. 172 (Supreme Court of Newfoundland). It is an open question as to whether or not the 1976 amendments would invalidate possession based on 60 years of occupation pre-1976: *Newfoundland v. O'Brien* (1979), 27 Nfld. & P.E.I.R. 269, at paras. 23-24 (Newfoundland Supreme Court, Trial Division). Section 36(2) of the *Lands Act* creates an ambiguity on this point, which has yet to be fully tested in Court. If it is invalidated, the Committee notes that this would amount to an expropriation of established proprietary interests. Courts have held that a legislative enactment should not be held to take away property rights without compensation unless the statute is clear and unambiguous that such is the intent: *Imperial Oil Ltd. v. The Queen*, [1974] S.C.R. 623; *Gerry's Food Mart Ltd. v. St. John's (City)* (1989), 80 Nfld. & P.E.I.R. 107 (Newfoundland Supreme Court, Trial Division), aff'd (1992), 104 Nfld. & P.E.I.R. 294 (Newfoundland Supreme Court, Appeal Division).

Nevertheless, the determination of this question may be largely moot. For the question to arise, it would be necessary for an adverse possessor to establish open, notorious, continuous and exclusive use and occupation of the property at issue for a period beginning from on or before 1916, which is a practical impossibility to prove today. Further, any possession for sixty consecutive years beginning on or after 1917 will meet the current statutory period in section 36 of the *Lands Act*.

Proceedings to claim adverse possession from the Crown are further complicated by the fact that the courts have held that constructive possession was not sufficient to disposes the Crown. In the recent case of *Eddy v. Newfoundland and Labrador,* 2023 NLCA 37, the Court of Appeal expressly stated that constructive possession could not dispossess the Crown. Registered title alone will therefore not dispossess the Crown. This may create issues with previous determinations of title, which may be premised on longstanding registration and a lengthy chain of title as being equivalent to dispossession of the Crown. However, indicia of possession in title documents (such as old surveys depicting buildings on land) may constitute sufficient evidence to prove adverse possession by contemporaneous records.

While the timeframe to prove adverse possession is significantly different with respect to the Crown, the actual requirements of said possession are much the same. As previously set forth, the fundamental rules governing the nature of adverse possession still apply. All possession must still be "open, notorious, continuous and exclusive" and actual possession must still be extensive and vigorous. A claimant will only be able to make claim to the portion of their property they have had actual acts of usage upon from 1956 until 1977, regardless of further registered title.

Chapter 4.9 – Municipal Records and Adverse Possession

Municipal tax rolls and civic numbers are not proof of ownership or of adverse possession and are inapplicable to the determination of actual open, notorious, continuous and exclusive possession of the land. Tax rolls do not speak of possession or usage, although they may be evidence of notoriety. However, notoriety is only one component of adverse possession, and "notoriety" must be of the possession itself, not of the mere claim of ownership.

In *Vickers v. Tobin*, 2010 NLTD 32, Justice Faour stated (at para. 82):

> The records of the Town show no evidence of possession and occupation, only evidence that the taxes were paid by Leonard Tobin Jr. The payment of taxes follows ownership and occupation, not the other way around. As for the civic numbers which appear to indicate two parcels along Gallows Cove Road these, by themselves, are not evidence of actual possession, only a reference to a categorization for the purpose of payment of the taxes. The Town's records did not indicate how or if Leonard Tobin Sr. ever acquired an interest in the land and did not contain any information on the possession and occupation of the land.

Payment of municipal taxes is therefore not a basis to assert adverse possession. There must still be actual, physical possession of the land. Payment of municipal taxes may be evidence of notoriety of one's claim on the land, perhaps even openness and continuity. However, it is not a stand-in for actual occupation. It is not proof of exclusivity, nor is it proof of possession and occupation.

Ownership will be determined by the standards of title covered in these materials, based on a good root of title. All such determinations are made at the provincial level, as it is the provincial Crown that must be dispossessed, and land title is recorded provincially by the Registry of Deeds. Good title is not a precondition to being assessed for municipal taxes, as an occupier of land may be considered to be the owner where the true owner is unknown: *Municipalities Act*, *1999*, S.N.L. 1999, c. M-24, s. 115. Land remains assessable for taxation even where ownership is unclear or unknown: *Municipalities Act*, *1999*, S.N.L. 1999, c. M-24, s. 137(3). It is not the obligation of municipalities to establish title to their residents, but rather it is the responsibility of owners of land to come forward for assessment.

Chapter 4.10 – Agricultural Possession and Clearing of Land

The real estate practitioner must take special caution when dealing with land which was only utilized for agricultural purposes. While the courts have consistently held that agricultural usage can ground good title, it comes with its own potential pitfalls.

Cultivation of land requires the exercise of some care or effort with a reasonable expectation of harvesting. As the Court of Appeal stated in *Newfoundland and Labrador v. Janes*, 2006 NLCA 4, at para. 18:

> In my view, while planting crops would be sufficient to constitute putting land into cultivation, it is not necessarily an essential component. For example, land may be put into cultivation using plants already established such as wild blueberries or grasses harvested for hay. However, in either case, putting land into cultivation would require activity by the farmer to nurture the soil and plants in the process of producing a product. This may, of course, include land lying fallow for a period of time as part of an agricultural plan. However, the spreading of manure, by itself, is simply an activity undertaken on the land, which may improve the fertility of the land, but which, in the absence of something more, would not produce a product. The actual harvesting of a product is not an essential component of putting land into cultivation since, for example, crops may fail. However, taking sufficient steps with the reasonable objective of harvesting is a necessary component.

Note that cultivation does not require physical planting. As stated in the above excerpt from *Janes*, you may use species already present such as blueberries or hay. Cultivation does not require planting but does require effort to encourage crops with an eye to harvesting (see para. 18 of *Janes*).

That being said, the courts have established that the person claiming adverse possession must not be merely "*harvesting the bounty of nature*": see *Wickham Estate* (1977), 17 Nfld. & P.E.I.R. 452, at page 492 (NL Supreme Court, Trial Division); *Strickland v. Murray* (1977), 17 Nfld. & P.E.I.R. 368, at page 381 (Newfoundland Supreme Court, Trial Division). The distinguishing factor is in the exercise of effort to get the crops to grow for harvest, and the ongoing maintenance of the land for cultivation. As stated in *Wickham Estate* (para. 179), the distinction is where there is "*nothing more than reaping of the fruits of nature […] where no effort is employed other than the reaping itself*". Picking or cutting what occurs naturally, with no additional effort beyond collection, is merely "harvesting the bounty of nature".

"Cultivation" of land has no specific scope. In *Burgess v. Russell* (1986), 57 Nfld. & P.E.I.R. 171 (Newfoundland Supreme Court, Trial Division), aff'd (1987) 67 Nfld. &

P.E.I.R. 208 (Newfoundland Court of Appeal), cultivating a hedge was sufficient possession.

Cultivation may be seasonal, and the seasonal cultivation will suffice for adverse possession, if it is consistent with the uses to which the land lends itself: *Taylor v. Newfoundland Concrete Products* (1941), 15 Nfld. L.R. 200 (S.C.); *Dawe v. Avalon Coal and Salt Ltd.* (1950), 26 M.P.R. 112 (Nfld. S.C.); *Tapper v. Tapper* (1978), 20 Nfld. & P.E.I.R. 301 (Newfoundland District Court).

Clearing of land is not sufficient possession: *Janes*, 2006 NLCA 4, *Brown v. Newfoundland* (1993), 109 Nfld. & P.E.I.R. 11 (Newfoundland Supreme Court, Trial Division). Like "harvesting the bounty of nature", it is merely cutting what occurs naturally. Clearing land, without more, is not possession. However, clearing the land for a purpose, with concrete steps taken toward that purpose, may cross the threshold to possession. In *Re Chatman*, 2020 NLSC 139, aff'd 2022 NLCA 18, the clearing of mature spruce trees and ground cover and pegging a house foundation for a building lot were sufficient to constitute adverse possession (see para. 28 of 2020 NLSC 139). This was considered contextually, in relation to a small parcel of land, located on the main road, and coupled with regular physical attendance at the property by the claimant.

More sporadic usage of land short of clearing, such as woodcutting or harvesting hay, is more complicated. It is impossible to make a universal rule as to when such uses will cross a threshold from trespass to occupation. Evidence of fencing with intentional cultivation will cross this threshold. Fencing may be instructive on whether such use rises to adverse possession*: R. v. Gough*, 2005 NLTD 70, at para. 83, aff'd 2006 NLCA 3.

Proximity to the homestead will also factor into whether it rises to occupation: *Wickham Estate*, paras. 148-150; *Neary's Estate v. Neary* (1981), 29 Nfld. & P.E.I.R. 276 (Newfoundland District Court, St. John's); *House v. Toms*, 2017 NLCA 40; *Prince Estate v. Maloney*, 2017 NLTD 97.

More remote woodcutting and hay harvesting will not rise to that threshold: *Wickham Estate*, para. 179; *Blundon v. Russell*, 2002 NFCA 20; *R. v. Gough,* 2005 NLTD 70, aff'd 2006 NLCA 3.

Chapter 4.11 - Vacant Structures on Land

The courts have ruled that the presence of a house, even if said house has been vacant for some time, still constitutes good possession. While the house cannot fall into the "neglected and abandoned" territory, periods of non-use will not necessarily invalidate a possessory claim. As stated in *Trowbridge v. Newfoundland Resources and Mining Co.* (1987), 67 Nfld. & P.E.I.R. 333, at paras. 23-24 (Newfoundland Supreme Court, Trial Division):

> Counsel for the respondent has argued that because there were short periods when the person in possession moved out of a house before transferring his interest to a successor, that there has not been continuity of possession and hence a full 20 years had not run at the date of the application. I find on the facts, that I must reject that argument. Though there were short periods when the occupier was absent from his dwelling, there was no evidence to show an abandonment of possession. The contrary was in fact the case, because in each instance there was in due course a transfer of possession to a new occupier.
>
> I note that the property passed from one occupier to another without formal deed of conveyance, and at best with only a written receipt for money which is often referred to in outport Newfoundland as "a bill of sale". Regard must be had to the custom in this Province over the years. The methods of transfer used in this case, were the usual ones employed in rural areas of Newfoundland until very recent times and they are on occasion still used today. They were informal methods, but they served the needs of communities which were usually small and tightly knit. Despite the lack of formal and/or registered documentation, the fact of transfer became quickly apparent to the whole community by reason of possession and occupancy.

Furthermore, the Newfoundland Court of Appeal took the stance that abandonment of land is a practical impossibility because possession must be somewhere, vested in somebody. The Newfoundland Court of Appeal cited this legal principle, in *Matchless Group Inc. v Carpasia Properties Inc.*, 2002 NFCA 56, as was first stated in *Bentley v. Peppard* (1903), 33 S.C.R. 444.

Whether or not possession by the presence of a vacant structure will constitute adverse possession will be contextual. It will depend on who is being dispossessed and what actions are taken in relation to the continuity of ownership of the building. The presence of the building will be a clear indication of occupation, provided the buildings are open and notorious, the building is present continuously, and the owner of the building enforces exclusivity of the land surrounding it. Where those conditions

are met, the presence of the structures, with or without actual occupation of the structures, may rise to adverse possession.

This must be interpreted in conjunction with the scope of land claimed by the presence of the structures, and the presence or absence of fencing in determining the scope of land associated with the structures (see e.g., *Barrett v. Glynn* (2000), 93 Nfld. & P.E.I.R. 255 (Newfoundland Supreme Court, Trial Division).

Chapter 4.12 - Drafting Affidavits of Long Possession

Ideally, affidavits of possession should be detailed and specific, and refer to the specifics of the deponent's source of knowledge and familiarity with the property and its uses. Tendency in litigation is to put little weight on *pro forma* affidavits that are "fill in the blank" (*Prince v. Prince*, 2015 NLTD(G) 166; *Tulk v. Tulk*, 2017 NLTD(G) 11; *Re Ellis* (1997), 154 Nfld. & P.E.I.R. 271, at para. 245 (Newfoundland Supreme Court Trial Division). However, this arises in situations where there is a dispute over title and the accuracy of those affidavits. In such a case, one understands that more detailed and specific affidavits will hold greater weight than fill-in-the-blank forms.

This does not invalidate "*pro forma*" affidavits. An accurate history will be consistent across multiple people and there would be little deviation in accurate facts. In substance, accurate but brief affidavits may be indistinguishable from "*pro forma*" affidavits. However, in the event of future challenge, more detailed affidavits may be considered more reliable in a future proceeding. The prudent solicitor should anticipate in advance that these affidavits may be necessary in a future proceeding which may occur long after the deaths of the deponents: *Re Ellis*, (1997), 154 Nfld. & P.E.I.R. 271 at paras. 115-120 (Newfoundland Supreme Court, Trial Division).

When considering affidavits of possession, one must consider the facts they disclose, rather than their form. Do the affidavits contain specific reference to the actual use of the land for the requisite period? If they do not, then the affidavits are not useful. A statement that someone is "in possession of" land with no further information is not a valid affidavit of possession. It is the acts of possession that are the important details of the affidavit, not merely a statement that someone is recognized as owner, or that someone is vaguely "in possession" of land. What concrete acts has the adverse possessor done to lay claim to the property? As noted in *Wickham Estate* (page 492), if the claimant is not there, there is no possession.

Chapter 5 - Nunatsiavut Lands

Lands in the Nunatsiavut area of Labrador are governed by the Labrador Inuit Land Claims Agreement, statutorily provided for in the *Labrador Inuit Land Claims Agreement Act*, S.N.L. 2004, c. L-3.1 ("*LILCA Act*"), which adopts (at s. 3) the Labrador Inuit Land Claims Agreement ("*LILCA*") as a treaty and with force of law. Nunatsiavut legislation applies to land in this area.

Nunatsiavut is comprised of five settlements on the north coast of Labrador: Nain, Hopedale, Makkovik, Rigolet and Natuashish, known as "Inuit Communities", and governed locally by Inuit Community Governments, which are legal entities with the same capacities as natural persons (*LILCA*, s. 17.4.1; *LILCA Act*, s.3(2) gives this force of law).

Section 5(1) of the *LILCA Act* states that the Land Claims Agreement prevails over any act of the Province where provincial law is inconsistent with the Land Claims Agreement. Section 7 of the *LILCA Act* addresses land claims and confirms that "Labrador Inuit Lands" are owned by the Inuit, and private claims to Labrador Inuit Lands are statutorily extinguished (*LILCA Act*, s. 7(2)).

Title in these communities is a mix of Inuit Title and ordinary land title (treated the same as land in all other areas of the province). All Crown Land within four of the five communities was conveyed fee simple in Inuit Lands to the "Inuit Community Governments" of each community by registered deed and Minute of Council. The land conveyed vests all Provincial Crown Land in the Inuit Community Government as "Inuit Land" (*LILCA*, s. 17.42.1).

Nunatsiavut makes a distinction between Labrador Inuit Lands under section 4 of the Land Claims Agreement and land conveyed under section 17 of the Agreement.

"Labrador Inuit Lands" are those described in section 4.3.1 of the LILCA and are vested in fee simple in the Inuit (i.e. the Nunatsiavut Government). Land held on Inuit Title may not be alienated except to the federal or provincial Crown and is not subject to liens or other charges on land (see *LILCA*, sections 4.4.1 to 4.4.12). Inuit Law, passed by the Nunatsiavut Government, governs acceptable creation of interests in Labrador Inuit Land, for "attachment, charge, seizure, distress, execution or sale": s. 4.4.11 of *LILCA*. However, only an estate less than fee simple can be alienated to anyone by the Inuit Community Government (s. 4.4.4(b) and 4.4.5 of *LILCA*). Labrador Inuit Land may not be conveyed or sold and can only transfer land to the Crown (see s. 4.4.5 of *LILCA*). Adverse possession of Labrador Inuit Lands was abolished in Nunatsiavut by *LILCA* (s. 4.4.9) and private interests in Labrador Inuit Land were extinguished by s. 7(2) of the *LILCA Act.* A separate Torrens-style Land Title Register

exists for interests in Labrador Inuit Lands under Nunatsiavut legislation (Consolidated Inuit Laws, c. L-1, Part 8). This register is based on the Nunatsiavut administrative offices in Nain and tracks interests created by the Nunatsiavut Government under s. 4.4.4(b) of the *LILCA*.

Land within Inuit Communities is vested in the local Inuit Community Government (s. 17.39.1 and 17.42.1). This is held on ordinary fee simple title and may be conveyed, mortgaged and sold under ordinary Newfoundland and Labrador law, as anywhere else in Newfoundland and Labrador may be. Inuit Community land is distinct from Labrador Inuit Land and is considered not subject to the same restrictions as Labrador Inuit Land. Section 17.42.2 of the *LILCA* confirms Inuit Community lands are not "Labrador Inuit Land", and thus not subject to restrictions under section 4 of the *LILCA*. Interests in Inuit Community Lands follows the ordinary course of title to land in the rest of the province.

A deed from the Inuit Community Government will constitute a valid root of title because of the conveyance of Crown Land to the Inuit Community Government, provided the land is contained in that deed. Where the land is excepted out of the deed, title may be founded on the same basis as any other parcel of land in Newfoundland and Labrador. Review the Crown deed to the Inuit Community Government to confirm the status of title to any individual parcel.

Note that the conveyances to the Inuit Community Government except out a number of parcels which were already claimed at the date of transfer. Many of these exceptions are Crown Grants, but some are registrations at the Registry of Deeds. Those exceptions in the Inuit Community Government deed which are registrations at the Registry of Deeds must still have a valid root of title from Crown Lands, as they are not encompassed in the conveyance from the Crown to the Inuit Community Government.

For the purposes of title to parcels within Inuit Communities, the Moravian Church and the Government of Newfoundland and Labrador will both constitute good roots of title. Moravian title is grounded on a 1769 grant from King George III to the *Society Unitas Fratrum* (today known as the Moravian Church). See Special Grants Vol. 1, Fol. 336 at the Crown Lands Registry for a description of the lands conveyed to the Moravian Church.

Practitioners dealing with land in Nunatsiavut are cautioned to carefully review the root of title, and particularly the Crown Deed to the local Inuit Community Government.

Chapter 6 - Easements and Rights of Way

General Comments on Easements and Rights of Way
Purchasers' counsel must be satisfied that there is appropriate access to property. Where land does not front on a municipal or provincial road, a solicitor must be satisfied that the access way is assured. This is a particular issue in unincorporated areas, where there are private roads and driveways that may traverse private property and may require right of way agreements or easements.

In all circumstances, the Committee recommends that practitioners reduce any access rights or other necessary rights to writing, executed by the appropriate parties. An express grant of a right will be preferable, especially where they are newly created, such as in the subdivision of land.

Note that easements and rights of way can only bind the land, not individual owners. A covenant that requires the landowner themselves to do something is not transferred to subsequent owners absent a separate contract. See *Lohse v. Fleming*, 2008 ONCA 307.

Public highways, rights of way and other easements are not extinguished by a Quieting of Titles proceeding unless expressly requested in the petition, and thus survive a Quieting Certificate unless expressly eliminated by the Court: *Quieting of Titles Act*, R.S.N.L. 1990, c. Q-3, s. 22(1)(e); *Re Noel Quieting of Titles* (unreported decision of Handrigan J., #2017 06G 0081, Dec. 31, 2018).

In relation to existing or established rights, practitioners may have to assess the applicability of the common law to establishing rights in favour of dominant tenements, or burdens on servient tenements. Easements or other burdens on title may exist without being recorded in writing, but may appear on the land itself, or may be referenced on surveys. Such circumstances require practitioners to investigate title and determine whether or not rights are established that benefit or burden the parcel of land under examination.

The general rules for establishing and proving easements and rights of way are established by common law. The following discussion of the law of easements in this province indicates the status of the law of easements as of the date of writing, which will assist practitioners in assessing rights which are created or alleged to have been created in land.

Chapter 6.1 - Statutes on Easements/Rights of Way

Newfoundland and Labrador has not adopted legislation regarding the regulation of easements or rights of way, and continues to follow common law.

Statute of Limitations - Limitations Act, 1995

It has been argued that the *Limitations Act*, S.N. 1995, c. L-16.1 s. 7(1)(g) may apply to prescriptive easements in Newfoundland and Labrador. As of now, this argument has been rejected by the Courts in *Labrador Investments Ltd v White Bear Construction Ltd.*, 2013 NLTD 95, where the Court noted that while Newfoundland and Labrador does not have any statutes governing the limitation period for a prescriptive easement, other Canadian jurisdictions do have such statutes, and in those statutes the limitation period for a prescriptive grant is always noted to be higher than recovery of land. The court surmised that there must be a solid policy reason for the distinguishment between the two.

The law therefore remains at present that the *Limitations Ac*t is inapplicable to establishing an easement.

Crown Land – Lands Act, 1991

With regards to Crown Lands, according to the *Lands Act*, S.N. 1991, c 36, s. 5, the Minister may issue an easement over Crown Lands under the terms and conditions they set. The provisions of section 36 of the *Lands Act* preclude obtaining "an interest" in land based on "possession". The principles of the *Lands Act* and judicial commentary on same lead the Committee to conclude that any rights gained by prescription or adverse possession against the Crown were extinguished by section 36, and any alleged easements by prescription against the Crown must comply with the 1956-77 period discussed previously in these materials.

Therefore, do not presume an easement over Crown Land unless there is an express grant of same.

Prescription Act, 1832 (U.K.)

The United Kingdom's *Prescription Act, 1832,* 2 & 3 Will. IV, c. 71 (UK), is often argued with respect to prescriptive easements in Newfoundland and Labrador. The case law in this regard is settled with the Courts of this province at all levels agreeing that the *Prescription Act, 1832* does not apply to Newfoundland and Labrador common law as it was not re-enacted by Newfoundland and Labrador's colonial legislature and never received into law (See: *Franklin v St. John's (City),* 2012 NLCA 48).

There is therefore no statutory rule establishing easements by prescription in

Newfoundland and Labrador, and recourse may only be had to common law for establishing an easement.

Chapter 6.2 - Easements vs. Rights of Way at Common Law

The distinction between an easement and a right-of-way relates to the dominant tenement. An easement serves a particular parcel. A right-of-way is in the nature of a road, which may serve multiple destinations or no particular dominant tenement.

I. Public Rights of Way

Public roads are rights-of-way in favour of the public, which may not serve a particular destination. The general rules applicable to establishing a public right-of-way were stated by Handrigan J. in *Re Witherall*, 2014 NLTD(G) 57, at para. 4:

- A claim to a public right-of-way may be based either upon dedication and acceptance, or upon statute.
- Whether a public right-of-way has been dedicated and accepted is a question of fact, not law.
- Dedication requires an intention to dedicate (*animus dedicandi*), which may be openly expressed but is more often inferred from evidence of the acts and behavior of the landowner whose land is affected by the right-of-way.
- Acceptance by the public requires no formal act of adoption but is generally inferred from the public user of the right-of-way.
- A court will generally require evidence of open and unobstructed user for a substantial time to find that a right-of-way has been dedicated by a landowner and accepted by the public.
- Public user of a right-of-way must be open and unconcealed.
- The public must use a right-of-way in the belief that it has a right to do so.
- Length of user is important but there is neither a minimum nor a maximum duration to find that a right-of-way has been dedicated to the public.
- Interruption is an interference with the public's enjoyment of its right of passage over a right-of-way, and a single act of interruption by the owner is more compelling than many acts of enjoyment by the public.
- The common-law rule "once a highway always a highway" still applies but a public right-of-way can be extinguished by natural causes or if access to it is cut off at both ends or destroyed by the lawful stopping up of the paths leading to it.
- The public may have a right to deviate onto the landowner's unenclosed adjoining land if a right-of-way is rendered foundered and impassable, but it is doubtful if the right to deviate exists independently of evidence of user.

A public right of way requires “dedication” of the land to that purpose by the landowner, and “acceptance” by the public of the right to use same. Dedication can be inferred by conduct if it is not expressed.

The general rule is that once a public right of way is established, it remains a public road in perpetuity. It is said that “once a road, always a road”, and it cannot be extinguished by private money and labour: *Newfoundland Telephone Co. v. King* (1983), 42 Nfld. & P.E.I.R. 146 (Newfoundland Supreme Court, Trial Division); *Kennedy v. Hickey*, 2011 NLTD 120.

Note that *Re Witherall,* 2014 NLTD(G) 57, holds that a public right of way can be extinguished by natural causes or lawful blockade that leads to its non-use. In that case, the provincial government’s installation of a highway severed the old public road, effectively replacing it and rendering the old path useless.

II. Common-law easements

The types of easements that can be granted in Newfoundland and Labrador are those done so by express grant or reservation, prescription, necessity, estoppel, or implication.

Express Grant or Reservation:
The law in Newfoundland and Labrador for an express grant or reservation is clear that the grantor must make it expressly clear that he or she is granting an easement. “In order for such a grant to be recognized, its terms, as well as the intention, must be clearly ascertainable and unambiguous” (See: *Long Harbour Holdings Inc. v Barnes*, 2018 NLSC 149, at para. 7, The Courts have often refused an express grant or reservation unless there is clear evidence in a deed outlining the easement in question.

The Courts have rarely been open to finding exceptions, but in *Rideout v Tobin,* (1980), 30 Nfld. & P.E.I.R. 268 (Newfoundland District Court), the Court did make an exception as it found that while there was no evidence in a deed of any express reservation, there was an unequivocal declaration by the Defendant that his rights to the well on his property were not absolute. Further, the previous property owner had granted herself a reservation for use of the well that vested to the Plaintiff when he bought his property.

Recently, the Courts have been less likely to find exceptions to the strict rule of express grants or reserves. In *Long Harbour Holdings Inc. v Barnes,* 2018 NLSC 149, the plaintiff brought forth an action claiming an express grant for a “right of way to New Meadow”. The Court considered the extensive chain of title for both the Plaintiff and the Defendant from 1900 to the present and found no evidence of an express

grant. While earlier surveys noted a “right of way to New Meadow”, no easement has been expressly reserved in any attached deed. The right of way was instead interpreted as a portion of land that was excluded from conveyance to an earlier owner.

This conveyance can be traced from 1929 to present and therefore defeats the claim for an express grant.

Prescriptive easements:
Prescriptive easements can be given by statute, claims through lost grant or common law. Newfoundland and Labrador, unlike other jurisdictions, does not have any statutes that govern prescriptive easements. Instead, prescriptive easements in Newfoundland and Labrador primarily follow the doctrine of lost modern grant as:

> Where a right can be shown to have been enjoyed for twenty years or more the Court will assume that it owes its origin to a lost grant, whether that be a deed, a royal charter, an ecclesiastical faculty or a ministerial consent under statute”.
>
> In order to support a prescriptive claim on the doctrine of prescription at common law, it must be shown to have been "user as of right", that is, having been enjoyed nec vi, nec clam, nec precario. Nec vi means that enjoyment must not be by violence; nec clam means that the enjoyment must not be secret and finally, nec precario requires that the enjoyment must not be permissive.
>
> See: *Henley v Ryan,* (1980), 25 Nfld. & P.E.I.R. 431 (Newfoundland District Court) referencing, in part, *The Law of Easements and Profits* (Jackson), at paras. 27-28.

Henley remains the leading case in this jurisdiction on establishing prescriptive easements.

A prescriptive easement ultimately relies on the acquiescence of the servient tenement where it must be shown that the servient tenement had knowledge of the acts done, power to stop the acts or sue in respect of them and abstinence on their part from the exercise of such power. For a claim of prescriptive easement to be successful the onus is on the plaintiff to establish their claimed use was “as of right” and not through license or permission. Evidence of a license or permission to use another land is fatal to a claim of prescriptive easement regardless of the passage of time (See: *Henley v Ryan,* (1980), 25 Nfld. & P.E.I.R. 431 (Newfoundland District Court); *Stairs v. Baker*, 2023 NLSC 29.

The decision by Steele J.A. in *Henley v Ryan* (1980), 25 Nfld. & P.E.I.R. 431 (Newfoundland District Court), continues to be the law followed by the Courts in Newfoundland and Labrador. In 2006, *Maher v Bussey,* 2006 NLCA 44, further affirmed the above framework for determining a prescriptive easement in Newfoundland and Labrador while also distinguishing the rule of prescriptive easements with adverse possession. In 2012, *Franklin v St. John's (City)* the framework for prescriptive easements in Newfoundland and Labrador was further affirmed by Wells J.A.

Easement by estoppel:
Easements by estoppel are an equitable remedy the Court may establish on the basis of representation, reliance, detriment or so to avoid an unfair result. In *Pearce v Pearce* (1986), 63 Nfld. & PEIR 321 (Newfoundland Trial Division), the Court set out the law surrounding equitable estoppel in Newfoundland and Labrador. The Court held that to find an easement of equitable estoppel it must find that the party raising the estoppel was relying upon some type of representation by another and acted in some way to their detriment due to their reliance.

Thus, a representation of an easement or access right may arise in such circumstances. However, this must be balanced against requirements for interests in land to be created in writing by the *Statute of Frauds*.

Necessity:
The law of easements of necessity is settled and may only be granted in instances where there is no other means to access the property by land and such an easement may only be granted when the property would otherwise be incapable of "reasonable enjoyment". An easement of necessity "can arise where, following a sub-division of property, an owner of a land-locked property requires an easement over the other land necessary to provide reasonable enjoyment of the property" (See: *Mackinnon v MacDonald,* [1988] N.S.J. No. 426 (Nova Scotia Supreme Court, Trial Division). In *C.A.C. Realty Ltd. v O'Keefe* (1979), 26 Nfld. & P.E.I.R. 63 (Newfoundland District Court), an easement of necessity was granted by the Court due to access to the Plaintiff's property being landlocked.

The Principle of Wheeldon v Burrows ("Implied Grant"):
The principle in the case of *Wheeldon v Burrows* (1879), 12 Ch.D. 31 (Chancery Division), is a branch of an easement of necessity that protects purchasers of land where there is a subdivision. As stated by Thesiger, L.J. in that case (at page 49):

> …two propositions may be stated as what I may call the general rules governing cases of this kind. The first of these rules is that on the grant by the owner of a tenement or part of that tenement as it is then used and enjoyed,

> there will pass to the grantee all those continuous and apparent easements (by which, of course, I mean *quasi* easements), or in other words, all those easements which are necessary to the reasonable enjoyment of the property granted, and which have been and are at the time of the grant used by the owners of the entirety for the benefit of the part granted. The second proposition is that if the grantor intends to reserve any right over the tenement granted, it is his duty to reserve it expressly in the grant.

As noted in *MeGarry and Wade on Real Property*, it is an implied easement in favour of the grantee against the party holding the remainder. It is a "translation into easements of rights over the grantor's retained land which are necessary to the proper enjoyment of the land granted", to "look at the grantor's previous use of the land, and to allow the grantee to take easements corresponding to the facilities which the grantor himself found necessary."

See discussion in *C.A.C. Realty Ltd. v O'Keefe* (1979), 26 Nfld. & P.E.I.R. 63, at paras. 32-35 (Newfoundland District Court).

Note that in situations where a property is not landlocked, but rather an easement would have been more convenient for the owner to access his property, the requirement under the principle cannot be met (See Report on the Doctrine of Implied Grant, Burrows, 2012 CanLIIDocs 371).

Easement of Non-Derogation:
Implied easements are found based on the derogation of grant principle where the easement is required to avoid reduction/elimination of the usefulness, value or "quiet enjoyment" over the sold property. It arises by implication and relates to the purposes for which land is sold or leased to the purchaser/lessee.

Implied easements are found based on the derogation of grant principle where the easement is required to avoid reduction/elimination of the usefulness, value or "quiet enjoyment" over the sold property. It arises by implication and relates to the purposes for which land is sold or leased to the purchaser/lessee. Under certain circumstances there will be implied on the part of the grantor or lessor obligations which restrict the user of the land retained by him further than can be explained by the implication of any easement known to the law. Thus, if the grant or demise be made for a particular purpose, the grantor or lessor comes under an obligation not to use the land retained by him in such a way as to render the land granted or demised unfit or materially less fit for the particular purpose for which the grant or demise was made. (See Browne v. Flower, [1911] 1 Ch. 219).

In *Aircraft Maintenance Enterprises Inc. v. Aerospace Realties (1986) Ltd. et al.* (1992),

94 Nfld. & P.E.I.R. 271 (Newfoundland Supreme Court Trial Division), the Court found an easement of non-derogation in favour of the Plaintiff for the parking of aircraft adjacent to a hangar sold by the Defendant to the Plaintiff.

Chapter 7 - Title in Unincorporated Areas

Establishing title in unincorporated areas follows the same rules as stated in these materials. There must be a chain of title back to a good root of title. Title itself is no different in unincorporated areas, apart from the absence of a municipal level of government tracking ownership via tax rolls, or providing compliance letters. Enforcement of local matters that would otherwise fall within the municipal level may be borne by provincial agencies.

Solicitors must ascertain the purpose for which the client is acquiring land, and verify that the land will be useable for the client's intended purpose. Determining zoning and control within a municipality is easily accomplished by inquiring with the municipal government. However, solicitors should be cognizant of provincial-level restrictions on development in unincorporated areas, such as development regulations and infill limits. Do not assume that land in unincorporated municipalities can be free to develop. See, the *Protected Road Zoning Regulations* (CNLR 996/96).

Exercise caution when identifying non-municipal properties with a civic number, as the civic numbers may not be properly established or may change. Only use a civic address when it is established by a municipal council. In the deed, you may include any references deemed necessary or helpful to the property description, such as "locally known as", or putting the "civic address" in parentheses in the deed.

Chapter 8 - Prior Noncompliant Title

Solicitors cannot rely on a prior certification by a solicitor to their client. Every solicitor engaged on a real estate transaction is engaged by his or her client to certify title over to them at that time. Title must be compliant with current standards in the opinion of the solicitor certifying same.

It is acceptable to reject prior certified title, since the measure of title is by current standards at the time of current certification. Beware of accepting title that has been certified by yourself or your own firm in the past, as noncompliant certification in the past may be statute-barred. See *Limitations Act*, S.N.L. 1995, c. L-16.1, s. 5(b), 13(b)(iii), and 14(3): professional negligence has a 2-year limitation period, with a ten-year maximum based on discoverability. Reliance on noncompliant certification in a subsequent transaction will renew the limitation period for action if the title is rejected in the future, since the new certification will give rise to a new cause of action based

on that certification.

The former standard advocated in the Law Society of Newfoundland and Labrador's materials ("What Is Good Title?" Seminar Materials, Law Society of Newfoundland and Labrador Joint Committee on Continuing Legal Education, dated May 17, 1990 ["Seminar Materials"]) advocated a movement away from what was termed "the most picky lawyer test", which was defined as requiring compliance with all title requisitions on defective title, regardless of how remote the likelihood of an issue would be. The following was stated at page 121 of the Seminar Materials: "*Users of the most picky lawyer test are failing to exercise legal judgment. The most picky lawyer is seeking a perfect title and vendors are not required to show perfect title*."

Based upon subsequent jurisprudence, the Committee has concluded that this standard is no longer valid and must no longer be used.

Firstly, title is a matter of opinion for the purchaser's solicitor, who is aware of his or her client's intentions on the land and risk tolerance. The position of the vendor will always be to minimize the likelihood of a problem developing based on remoteness, but it is not the vendor or his or her solicitor who bears responsibility for that issue if the purchaser is convinced to accept it. To do so is tantamount to telling a purchaser to "try my opinion at his expense" (William Ian Innes, *The Doctrine of Marketable Title*, (1976), 25 U.N.B.L.J. 97 at 99. The purchaser's solicitor has obligations to the purchaser as a client, but also to any lending institutions and any requirements to meet financing approval. A solicitor persuaded to accept defective title may find themselves in breach of professional obligations to their purchaser client or their lender client. It is submitted that yielding to convenience or exigency is tantamount to "failing to exercise legal judgment," by allowing a risk for which the new solicitor assumes responsibility and potential liability.

Secondly, the absence of objective title standards mean that what one solicitor feels is remote or unlikely, another solicitor may consider a live concern. This perception may be coloured by practice experience, consideration of jurisprudence, and on which side of the transaction a solicitor sits. There is no objective measure for what one solicitor may consider a reasonable request and another may consider an unreasonable request. It is unlikely that a Court will impose specific performance on an unwilling purchaser where a defect is identified and not rectified, if the vendor's argument to compel completion is that the objection exists but is considered by the vendor to be trivial. Such a standard only works on the mutual recognition of solicitors prepared to ignore a problem, which is considered by the Committee to be an undesirable standard. There is no definition of what problems may be safely ignored, and which problems, if ignored, would trigger a negligence claim. Careless practices adopted for convenience are not to be endorsed. In circumstances of disagreement,

prudent practice favours rejection of title where there is an identified risk, unless it can be satisfactorily. The principal concern with the "most picky lawyer test" is that there is no defined level of what constitutes "too picky" a requisition, versus a negligent failure of a solicitor's obligations to their client. The proper standard will hew closer to "perfect title" than proceeding with noted defects.

Thirdly, matters that have historically seemed "remote" may indeed be live issues. The Seminar Materials provided the following express example (at 121-122):

> How often does a Newfoundland lawyer encounter an eighty year chain of title to a house and property, which chain of title has no root? The lawyer checks at Crown Lands and there is no recorded Crown Grant, there is only the long chain of title. Is that title good and marketable? The modern practice of the picky lawyer is to require Affidavits of Possession and use, but are such Affidavits necessary for a house that has existed for more than one hundred years in St. John's? Until a statutory length of title search for our province is adopted, lawyers should exercise legal judgment and accept such titles as marketable.

In *Eddy v. Newfoundland and Labrador*, 2023 NLCA 37, the Court of Appeal upheld the denial of a Quieting of Titles Application where the Applicant held title on a registered chain of title over 75 years, part of which contained a house built in 1946 (para. 11). The Court of Appeal held (at para. 43):

> In describing the quality of possession required under the statute [*Lands Act*, S.N.L. 1991, c. 36, s. 36], the words used are clear: only actual possession of Crown Land could result in dispossession of the Crown. An assertion of colour of title depends on an exception to the requirement to show open, notorious, continuous and exclusive possession; colour of title is not, and was not, such a mode of possession.

In *Chafe v. Hunter*, 2013 NLTD 67, a claimant with an interest in a parcel of land had moved off of the parcel as a child around 1940, after her father's death in 1937. Her father's estate was administered in 2010 to sell a parcel of land over which the father was one of three grant holders.

The Court held that her father's estate had continued to own one-third the land by severance of a joint tenancy, though he had died over 70 years before the litigation had been commenced. This should indicate the hazard of potentially dormant claims being asserted.

Notwithstanding the endorsement of a less stringent approach in the Seminar

Materials using this exact example, **this approach is now confirmed by the courts to be wrong**. Solicitors who may have previously derided "the most picky lawyer" standard and followed this advice may now find themselves answering to negligence claims when a previously-certified title is rejected in a future transaction. Solicitors certifying title should be mindful of the potential for such issues to arise and not merely ignore title defects.

It bears repeating in conclusion that title must be examined at the time of the transaction. Past title certification, to prior standards, may no longer constitute valid title. In the absence of objective title rules in this province, subsequent legislative changes and judicial pronouncements may render unsound past determinations. Title must be looked at anew on each transaction, regardless of whether or not a solicitor has been engaged on the title in the past. Failure to do so may invite a negligence claim against a solicitor who relies only on the existence of a past title determination without assessing it by present-day standards.

This should not be taken as an endorsement of a requirement for "perfect" title. Title must always be reasonably assessed to the purchaser's acceptable level of risk. The Committee rejects the "most picky lawyer test" because it is not an objective standard and creates a murky boundary between "acceptable title" and negligence. When an actual title issue can be identified, it is incumbent on the purchaser to either accept the issue or requisition a solution. Failure to satisfactorily resolve the issue to a purchaser's satisfaction entitles the purchaser to resile from the transaction.

The usual test for "good and marketable title" is what a vendor can force on an unwilling purchaser. In light of modern jurisprudence, absence of objective or statutory standards on title, and overall uncertainty in our property law system, it is impossible to say what a Court would impose on an unwilling purchaser. It appears to the Committee that any action to force title on a purchaser where there is a noted title defect is likely to fail. A reluctant purchaser could justify a refusal to close on a minor defect but could explain the rationale for failure to close. The onus is on the vendor to provide relief of the issues identified by the purchaser. While there is no requirement to provide "perfect title", it is not possible to definitively state what the threshold would be for compelling a sale by specific performance. Existing jurisprudence indicates the standard for an unwilling purchaser to defend such an action will be low, where the purchaser can identify a specific title defect.

Chapter 9 - Role of Title Insurance

Title insurance should be treated as the standard of good title in the modern context. Title insurance may be used as a "barometer" of our standards of title.

- Title is good and marketable if there are no defects identified requiring title insurance to cover same. There are no defects which a purchaser can identify as posing a threat to peaceful possession and ownership of the property.
- Title is marketable at the purchaser's election if there are remote defects which title insurance agrees to cover, and which do not pose a risk of imminent litigation or other problems.
- Title is unmarketable where title insurance will not insure over the identified issue. Such title issues must be resolved, and it is unsafe to proceed with such an issue on the title.

Title need not be "good" to be marketable, as marketability remains a matter of opinion by the purchaser. It must only be satisfactory on the basis of the purchaser's lawyer's opinion. That opinion will be coloured by the needs of the client, including intended uses of the land, value of the land, cost of the transactions, avenues to remedy the land in the future, particulars of the problem identified and insurability of title. Title which may be considered "good" by one lawyer for one purpose may not be considered "good" by another lawyer for another purpose, particularly in circumstances where there will be an accompanying change in the nature of the use of the land that may ignite a dormant problem. "Marketable title" has a wide gradient depending on opinion and circumstance. Title insurance allows solicitors to proceed in circumstances where title is "marketable", but not necessarily "good". This allows title insurability to supplant the former "most picky lawyer" test, as an insurer will backstop the solicitor's determination of title.

Even where title insurance is available, title may be rejected by a purchaser who does not feel comfortable with the risk posed by the identified issue. The purchaser may requisition a fix to the problem rather than accept title insurance. Such title issues may be theoretical or distant. Issues should be raised directly with title insurance prior to proceeding to ensure coverage. Any situation where a third party has threatened litigation or raised an issue with title or boundaries will fall within this category regardless of the strength of paper title. A vendor's solicitor cannot compel closing where there is a real or threatened risk of litigation: *EPC Industries Ltd. v. Union Electric Supplies Co.* (1985), 55 Nfld. & P.E.I.R. 186 (Newfoundland Supreme Court, Trial Division). To do so is tantamount to telling a purchaser to "try my opinion at his expense" (William Ian Innes, *The Doctrine of Marketable Title*, (1976) 25

U.N.B.L.J. 97 at 99.

Where there is a title issue, which may be theoretical or distant, the opinion of the Purchaser's solicitor must prevail in light of the foregoing.

A vendor's offer of title insurance may not suffice to address the concerns of the Purchaser, even if a title insurer will offer full coverage. It was said by a senior practitioner, Graham Wells, KC that "Title insurance is a good band aid, but it isn't a cast." This is to say that title insurance offers some protection in the face of identified title defects, but it does not fix the underlying problem. Title insurance is not a replacement for providing good title. It affords an avenue by which a Purchaser may agree to proceed at their election, based on the Purchaser's consideration of the title issue identified. It is not a basis to compel a purchaser to proceed over their objections.

Such circumstances may be considered a "voidable" transaction: the purchaser may elect to proceed but is not compelled to submit himself or herself to the potential of litigation. Where proceeding in such circumstances, it is best practice that title insurance should be obtained.

Even where title insurance will insure and may be defined as "marketable", it is the professional obligation of the solicitor to ensure that his or her client will have peaceful and uninterrupted possession of the property for the purposes for which the client intends to acquire the property. That title insurance may agree to cover an issue does not mean that a client should be subjected to the risk and unpleasantness of being involved with litigation or hostile parties. Insurance coverage for the cost of the legal process will be cold comfort to the client who must personally endure the legal process and hostile parties. **Do not use title insurance in lieu of complying with professional obligations to examine title and to be satisfied respecting title**. Title insurance is a **supplement** to solicitors' obligations to their clients, not a **replacement** therefor.

A solicitor may be held negligent or face professional discipline for failure to inform a client of title issues, even where a transaction is insured by title insurance. Where proceeding with defective but insured title, client consent should be obtained in writing, confirming that the client is aware of the issue and agrees to proceed. Such confirmation will be necessary to avoid a complaint or potential liability in the future if a later transaction fails because of the title issue. It is the duty of a solicitor to ensure that a client makes an informed decision to proceed with title insurance if a title issue is noted: see *Code of Professional Conduct*, rules 3.2-1 and 3.2-2.

Solicitors must review the title insurance policies being obtained and should explain to

clients what the coverage will and won't provide. Clients must make an educated decision to proceed with title insurance. Issues have arisen where clients have understood coverage to provide more than it does. One example brought to the Committee's attention is "forced removal" coverage which may cover the removal of an identified structure but will not cover the replacement of the structure.

Title insurance may be acceptable to cover documents which would otherwise be requested, such as Tax Certificates and Letters of Tolerance. Solicitors may make individual determinations to proceed with title insurance in such instances, which do not go to the issue of title itself.

The Committee has considered the potential obligation of solicitors to obtain title insurance coverage for clients. We do not consider it to be a professional obligation for solicitors to recommend title insurance in all circumstances, such that it would be negligence to fail to do so.

Firstly, title insurance comes at a cost to clients. As matters of title remain the responsibility of solicitors exercising professional judgment, clients are entitled to rely on the professional certification of their solicitors. It is not for solicitors to "pass the buck" on professional responsibility at the client's expense. The Committee's view is that a potential conflict is created between solicitor and client if the solicitor must take on the role of insurance salesman to convince a client to purchase coverage at the client's expense to cover the solicitor's professional obligations on title. Secondly, multiple title insurance companies operate in this province, providing varying degrees of coverage. In the absence of standardized coverage or Law Society guidance for minimum coverage requirements, we are concerned that mandatory title insurance leaves too much ambiguity as to what such mandatory coverage must cover. Conflicts may arise where a solicitor obtains coverage, but the coverage does not cover particular issues or title fixes. Such coverage may not be acceptable to future purchasers, such as a promise to insure over an issue rather than pay to fix the issue.

The Committee appreciates the value of title insurance, but we are not prepared to recommend it as a mandatory requirement of real estate practice. The Law Society does not currently mandate title insurance. If the Law Society were to consider a requirement for practitioners to obtain title insurance on every transaction, it would be necessary for the Society to engage with the title insurance industry to create minimum coverage standards. Nevertheless, the Committee recommends that solicitors advise clients of the availability of title insurance, particularly in circumstances where there is any element of doubt about title, and in cases where title rests on adverse possession.

In light of current policies of Crown Lands, any deficiency of title against the Crown

must be considered to be a serious title impediment requiring resolution. Even where the land is historically occupied, changes to the property or future development may trigger long-dormant Crown Lands issues. Solicitors in the last several years have reported issues of Crown objections to possessory title when engaged with new development of land, such as septic and electrical connections, or for applications to the Crown to acquire adjacent land.