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Reforming the Law on Adverse Possession

PROPOSED CHANGES TO THE LANDS ACT

CANADIAN BAR ASSOCIATION – NEWFOUNDLAND AND LABRADOR BRANCH

Final Report of the Legislation and Law Reform Committee

Canadian Bar Association – Newfoundland and Labrador Branch (CBA-NL)

Subcommittee on Section 36 of the *Lands Act, 1991*

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I. Executive Summary

Based on the historical root of title in Newfoundland and Labrador and the volume of possessory land claims in existence to the current day, the CBA-NL Legislation and Law Reform Committee recommends action be taken to amend section 36 the *Lands Act*.

The status quo is unsustainable and has resulted in a disconnect between law and practice, which is increasingly becoming an obstacle to the proper functioning of real estate law in Newfoundland and Labrador. This has real implications for economic development and government control over public lands. The current system is actively inhibiting economic realization on property rights, particularly in rural areas, by tying up land title indefinitely.

The problems identified in this report are not theoretical. Examples have been provided of instances where these problems have occurred in practice. People in this province have been dispossessed of their legitimate land holdings by government's intervention and by failures of formal title.

We recommend a running limitation period of 40 years of open, notorious, continuous, and exclusive use and occupation, in order to allow land title to vest for those already in possession. This will allow a confirmation of existing title, which has continued undisturbed for many years, which will improve Crown Lands' goals of land use management and planning control. This limitation period should also take into consideration historically-registered title documents at the Registry of Deeds, payment of municipal taxes, and other indicia of *bona fide* claims.

We also recommend that government undertake a reconciliation process to harmonize existing and legitimate private property claims into the Crown Lands records. This would give certainty to both the Crown and the public of title claims, and the scope of private land ownership in this province. This would also assist in the modernization of our land tenure system in Newfoundland and Labrador toward the Land Title system that predominates throughout the rest of Canada. We recommend an administrative body be established, separate from the Crown Lands Administration, to process lawyer-certified title for entry into the Crown Lands system.

We also recommend working cooperatively with the Law Society of Newfoundland and Labrador to establish a uniform standard for divesting the Crown on possessory claims.

We also recommend amendments to municipal legislation to give greater power to towns and cities to dispose of occupied Crown Lands through tax sale procedures. We believe this will improve revenue generation for municipalities and assist in straightening out land title generally.

II. Land Title in Newfoundland and Labrador

All land in Newfoundland and Labrador is held "of the Crown", unless there is proof that the Crown has conveyed its interest in the land or been dispossessed in a manner such that private title interests have crystallized. Such proof is demonstrated in three ways:

- by Crown Grant (a conveyance from the Crown to an individual);
- by a Court process that eliminates all other interests in the land (a Quieting of Title Application); or
- by affidavits swearing to the history of use and occupation of the land for adverse possession.

Adverse possession claims are commonplace in Newfoundland and Labrador, particularly against the Crown. Early settlement of Newfoundland occurred before a proper system of government was established, and longstanding occupation has long been accepted within communities as grounding an individual's claim to own property.[1]

There is a significant amount of land in this province, particularly in rural areas, which is held on "adverse possession", commonly known as "squatters' rights". In brief summary, adverse possession is based upon individuals being in open, notorious, continuous and exclusive occupation of a parcel of land, who can then claim to own the land after a set period of time elapses.

Real estate and property lawyers in this province deal with the question of "good title" on every real estate transaction. "Good title" is title that clearly establishes the ownership of the property and vests ownership into an individual. This means accounting for both private interests in the land and Crown interests in the land. The history by which an individual claims to own land is known as the "chain of title".

A good "root of title" would originate from a Crown Grant or other instrument which accounts for how the land left the Crown's inventory and/or control. There would then be a "chain" of deeds from that originating document, through various owners, to the individual in possession of the land today.

Lawyers in private practice must make the determination, based on the "chain of title", whether an individual has good title, in order to certify ownership to a new purchaser or to certify the title is safe for a bank or lending institution. The role of private practice lawyers in title is paramount in order for real estate to change hands in this province and to obtain financing to develop land. Ultimately, the responsibility for title rests with the lawyer who certifies the title to his or her client. If a lawyer is unsatisfied with an individual's title, they may reject mortgages, or withdraw from purchase and sale agreements, or require clients to go through costly procedures to clear title, which may or may not ultimately be possible.

[1] Gregory French, *The Abolition of Adverse Possession of Crown Lands in Newfoundland and Labrador*, (2020) 71 U.N.B.L.J. 227 at 227-230.

Several statutory instruments affect land titles and conveyancing in the Province of Newfoundland and Labrador, one of the foremost of which is the *Lands Act*, S.N.L. 1991, c. 36. Section 36 of the *Lands Act* addresses the issue of adverse possession of land as against the Crown's interest. The default position is that ungranted lands are "Crown Land" and belong to the Province. Section 36 of the *Lands Act* establishes how an individual can establish a private ownership claim to ungranted land. The section reads as follows:

> ***36.*** *(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 immediately prior to January 1, 1977.*
>
> *(3) The Lieutenant-Governor in Council may, upon being satisfied that*
>
> *(a) a person has acquired an interest in Crown lands under subsection (2); and*
>
> *(b) the lands have been in continuous use for agricultural, business or residential purposes or for a purpose referred to in section 9 for a 20 year period immediately prior to January 1, 1977,*
>
> *instruct the minister to issue a grant to that person in respect of those lands, and that grant may be issued subject to those charges, exceptions or qualifications that the Lieutenant-Governor in Council may direct.*
>
> *(4) Where the Crown lands affected by this section contain 30 hectares or less, the minister may issue a grant, upon being satisfied that*
>
> *(a) a person has acquired an interest in Crown lands under subsection (2); and*
>
> *(b) the lands have been in continuous use for agricultural, business or residential purposes or for a purpose referred to in section 9 for a 20 year period immediately prior to January 1, 1977,and the grant may be issued subject to those charges, exceptions or qualifications that the minister may decide.*

This restriction was first passed by the House of Assembly in May, 1976, taking effect on January 1st, 1977. Prior to that amendment, the period for adverse possession of the Crown was sixty continuous years, a common-law rule which had stood since the early 19th century.[2]

The law of Newfoundland and Labrador, as it stands today, requires a landowner to prove open, notorious, continuous, and exclusive occupation of land from December 31st, 1956 to January 1st, 1977, in order to have good title as against the Crown.

[2] *R. v. Kough* (1819) 1 Nfld. L.R. 172.

III. Investigation and Review Process

Prior to our Committee's meeting, the Government of Newfoundland and Labrador *Lands Act* Review Report of 2015 was reviewed.[3] The Committee approached the matter as what reforms were needed, rather than whether or not reforms were needed. The reason for this approach was based on the advocacy role of the CBA-NL Branch and concerns expressed to the CBA by members over time about the current state of the law. From the perspective of the practicing bar, change is necessary. The purpose of this investigation was to look into the common complaints of the practicing bar in relation to section 36 of the *Lands Act*, and to investigate possible solutions and suggestions offered by members who practice in this area.

In November of 2020, the Committee reached out to the CBA membership by mass e-mail to solicit membership opinion on section 36 of the *Lands Act*, including any reform suggestions that may be made. Members of the Committee also reached out to individual lawyers who practice in real property law, both in urban and rural areas of the province. Comments were received by e-mail, telephone and in-person meetings. The comments and suggestions received from the membership at this stage were anonymized and compiled into the attached Discussion Paper (see **Appendix "A"**).

The compilation of issues and suggestions was circulated to the CBA membership in the form of the attached Discussion Paper by e-mail on January 11th, 2021. The Paper was also forwarded Law Society of Newfoundland and Labrador, which circulated it to the Law Society membership at large in the weekly newsletter of the Law Society on January 12th, 2021.[4]

The Committee met on March 10th, 2021, to review the commentary received, and prepare recommendations to government.

Following our Committee meeting, the Legislation and Law Reform Committee has made its recommendations for reform, which are found at the Conclusion of this Report. The Committee notes and discussions have been drafted together into this Report.

The Report was reviewed by the Executive Committee of the CBA-NL Branch in May of 2021, with further comments added. The within Report subsequently passed unanimously as the official recommendation of our Branch.

[3] Krista Connolly, Tracy Freeman & Paul Pope, *Lands Act Review Final Report, Aug. 2015* (Government of Newfoundland and Labrador, 2015), available online at https://www.gov.nl.ca/ffa/files/lands-lands-act-lands-act-review.pdf.

[4] The Law Society of Newfoundland and Labrador is the professional regulatory body for the practice of law in Newfoundland and Labrador. All lawyers practicing in the province are members of the Law Society. The CBA is a voluntary professional organization. While all CBA members are Law Society members, not all Law Society members are CBA members.

IV. Issues Raised During Member Consultation

From the outset, it should be noted that no comments were received which endorsed the existing state of the law, either at the initial inquiry stage or in response to the Discussion Paper. All comments recommended change, either by statutory reform to section 36, or by policy reforms at the Crown Lands Division, or both. While we began our work from a position of reform, we believe it to be significant that no defence of the status quo was raised in our consultation efforts.

This response differs from the *Lands Act* Review Committee conclusions in 2015, which involved a broader consultation process, including government departments. The Law Society's submission at the time of the *Lands Act* Review in 2015 strongly advocated for reform.[5] The responses received from membership in our inquiry were consistent with the Law Society's 2015 position regarding the need for reform. It therefore appears to the Committee that the need for reform of this law accurately reflects the position of the practicing bar of this province. This finding is contrary to the outcome of the government's 2015 *Lands Act* Review Committee Report. We believe it is significant that the apparent universal view of the practicing bar is contrary to the government's conclusions in 2015. This represents a serious disconnect between the law and the practicing bar, who must put the law into practice.

The major concern raised brought by the membership relates to the restrictive timeframe set by section 36. The period from 1956 to 1977 requires members to find people who would necessarily be in their 80s as of the 2020s, in order to sign affidavits of long possession attesting to the use of property. Members noted that it was becoming difficult, if not impossible, to obtain satisfactory affidavits of possession to land in the present day. The inability to obtain affidavits of possession does not invalidate an individual's possessory title to the land, but makes the process of proving that title more difficult. This has led to more frequent recourse to actions in Supreme Court under the *Quieting of Titles Act* to clear the title, which is a very costly exercise for most Newfoundlanders and Labradorians. Many people simply cannot afford this process.

Related to the above, the change in the law created concerns for both possessory claims which began before the change in the law in 1976 but after the 1956 commencement date, and for land claims that were based on the previous standard of sixty years' adverse possession. This position had existed at law for over 150 years before the legislative change. The law changed in May of 1976, and took effect only seven months later. Individuals selling land that was developed in the 1950s or 1960s, prior to any notice of the law being changed, are left with unmarketable title. At the time of the 1976 amendments, no remedial action was taken by government to confirm titles which existed up to the date of the change in the law. This created a problem with title which was historically recognized, particularly in older settled areas of the province, which may have been "constructively expropriated" by the Crown by the imposition of such a timeline, when the historical usage of such land dates back before 1956. As a matter of public policy, it is noteworthy that many people were resettled throughout the province in the 1950s and 1960s, so a person who would have moved their home because of Resettlement after 1956 likely cannot

[5] 2015 *Lands Act* Review Committee Report, p. 82-85.

acquire possessory title back to that year, or at least cannot do so by their own possession. The effect of the change of the law in 1977 makes no account for such issues.

It is important to note that these problems arise not just with vacant land, but with occupied land. The Crown Lands issues faced by our clients should not be conflated with examples of people applying for undeveloped or vacant land. In many cases, these problems are being encountered in situations where land has been visibly occupied for long periods, including residential and commercial buildings. In municipalities, development of these lands has often been approved by local governments. Problems with the section 36 period frequently do not arise until the landowner attempts to sell or mortgage the land, and only then learns of the title problem when a prospective purchaser identifies the issue. In some cases, this is impacting people who have lived on their land for decades. Title insurance is often used by lawyers as a backstop on certification of title, as added protection for our clients in case there is a title defect or dispute. However, members have complained that in recent years, title insurance companies have refused to provide coverage for Crown Lands claims in Newfoundland and Labrador.

A second area of concern involves how possessory claims are handled by the Crown Lands Division. Members expressed concerns in approaching Crown Lands to resolve title issues, out of concern for objections being raised by the Crown and very lengthy delays in processing applications. This creates uncertainty in accepting title that has been previously certified and deemed acceptable, because members of the bar are wary of the potential for difficulty with the Crown Lands Division. The Committee notes that these are not necessarily legislative issues, but may instead be policy issues. Reform of section 36 of the *Lands Act* would assist in resolving these issues as well.

Concerns could be generally summarised as a disconnect between the practicing bar and the Crown Lands Division on what constitutes good title as against the Crown. Practical concerns necessitate reliance on affidavits of possession and title insurance to proceed with real estate transactions, but private registrations of land on the Registry of Deeds are unknown to the Crown and do not appear in Crown records. The Crown does not keep track of all real estate transactions occurring in the province, nor does it search out registrations at the Registry of Deeds for verification. The practicing bar generally avoids approaching the Crown unless necessary, and real estate transactions occur every day without the knowledge of or notice to the Crown.

There is therefore, in our view, an issue with land titles in Newfoundland and Labrador that extends beyond just section 36 of the *Lands Act*, which it is appropriate to flag in the context of this report. The limitation period against the Crown is noted as an impediment to the ordinary functioning of the land transfer system in Newfoundland and Labrador. However, the "disconnect" between the Crown and the Bar regarding satisfaction of any limitation period is a matter that the Crown should review as well. The Crown and the private bar must agree on the standards by which adverse possession will be measured for there to be certainty of title today. Some of the suggestions below will assist in resolving that concern.

V. Commentary from the Committee on the Case for Reform

i. Economic Development Concerns

The issue of land title is foundational to economic development. Without certainty of title, people will not invest money into developing land. Lawyers are not able to certify title to purchasers or lending institutions without confidence that the title is sound. This inhibits residential and commercial construction, as people are unwilling to invest in land with uncertain title or unable to obtain financing. Development is tied up for inordinate periods of time while people try to resolve these matters.

Otherwise *bona fide* real estate transactions fall through when title is unclear and cannot be rectified before the closing date. The average real estate transaction may take thirty days to complete in ordinary circumstances, but if an issue is identified with Crown Lands which cannot be satisfactorily resolved, the transaction will often die on the vine. In certain areas of the province, such as Trinity and Port Rexton, there is significant demand for real estate, but available land is effectively unmarketable because of inordinately lengthy delays in obtaining releases from the Crown. It is not possible to provide statistics for the number of transactions that fall through because of a Crown Lands title issue, as opposed to other reasons, such as financing or private land disputes. Within our Committee, we can confirm from our own files that there have been several instances where Crown Lands issues have delayed sales for months, or caused them to fall through completely. This has included requiring recourse to costly and time-consuming court applications, or purchasers walking away from transactions because of the failure of title, leaving the land unmarketable but occupied.

In many cases, it is simply not economical for people to rectify their land title. The value of the land may be equal to the cost of the work required to clear title, and the outcome of such efforts is uncertain. An uncontested Quieting of Titles proceeding costs thousands of dollars. With no efficient or economical method to confirm existing title, land may either be effectively abandoned, or occupied at the perpetual risk of the landowner. Unnecessarily high transaction costs exacerbated by an uncertain land titles issue also places lower and middle-income people out of a property market they might otherwise participate in.

ii. Evidentiary Concerns

As noted above, the law in its current form requires proof of occupation for the defined period from 1956 to 1977. In 2021, this requires proof from 65 years ago. Where lawyers certify title with affidavits of possession, they are required to find individuals who are old enough to remember events from 65 years ago, who have lived in the community from 1956 to 1977, who are still of sound mind today. In many cases, particularly in rural areas, the number of individuals meeting these criteria is very small, and becomes smaller with each passing year. In some small communities, it has already become impossible to find two living deponents of sound mind who fit the criteria to swear affidavits of possession. Within a few short years, this will

become a practical impossibility provincewide. We frame this as a "ticking time bomb" for government's consideration, as this will go off sooner rather than later.

It is becoming increasingly difficult for lawyers to obtain satisfactory affidavits of possession, simply by the passage of time. This does not change the reality of the use and occupation of the land, but only makes it difficult to prove. The Covid pandemic has exacerbated the problem: elderly deponents may be in nursing homes or care facilities and subject to visitor restrictions.

Crown Lands Division also does not, as a rule, consider other types of records as evidence of title as against the Crown. This includes longstanding payment of property taxes or previous registrations on title at the Registry of Deeds. Committee members are aware of Quieting of Title applications at Supreme Court wherein the Crown intervened to object, notwithstanding registered documents evidencing title interests from decades ago.

One member noted that ancient records prepared by the government itself do not seem to resolve Crown Lands claims. For instance, a map of the Town of Trinity prepared by the Surveyor General in the 1830s indicates clear possession and ownership of land, but the evidence from this map was not subsequently sufficient for Crown Lands Division, even though these records indicate possession from almost 200 years ago that could be traced forward.

The type of evidence required by the Crown Lands Division today is not the same type of evidence which was gathered historically. Archival records, ancient surveyor's records, community mapping and old registered deeds are not considered determinative of historical claims. The Crown remains fixated on the discrete 1956-1977 period, even though conveyancing and title standards of that time were different than they are today. Evidence which may have been satisfactory at the time of earlier transactions is not determinative today.

iii. Efficiency Concerns

There is no efficient resolution process at present to resolve claims on Crown Lands. The current process of making an application for the land takes multiple years to resolve. This is not a practical solution in the course of a real estate transaction or a mortgage.

The current practice of lawyers in certifying title with affidavits of possession has been in effect for decades, and is far more efficient than going directly to Crown Lands. It also runs the risk of being rejected on a more extensive investigation by Crown Lands. In practice, it is not practical to obtain releases from the Crown, and transactions generally proceed without the Crown's involvement whenever possible. This solution, while efficient, creates a disconnect between the Crown's records of land holdings and the public's understanding of private land claims.

This disconnect has long existed in the interest of efficiency, and because of the existence of the dual parallel-but-separate title registries: the Registry of Deeds and the Crown Lands Registry. This poses a risk that lawyer-certified title may not be accepted by the Crown. However, this practice has existed for decades, and many thousands of parcels of land in this province have been certified in this manner and are in use and occupation to the present day.

iv. Enforcement Concerns

Crown Lands does not actively enforce the legislative prohibition on unauthorized occupancy of Crown Lands. If individuals do not come forward to Crown Lands to attempt to clear their title, they are unlikely to ever face difficulties in their continued occupation. This disincentivizes fixing the problem, as the public will only ever face a problem if they bring themselves to the Crown's attention.

At present, the government of Newfoundland and Labrador has little knowledge of the extent of private land claims in the province. Private lands held on possessory title are not recorded with the Crown, but are instead recorded at the Registry of Deeds, if they are recorded at all. The loss of many volumes of Crown Grants in the 1892 fire in St. John's, and unmapped grants in the Howley Building vault, complicates the determination of what is and is not Crown Land. These two issues mean that although land may be indicated on government mapping as "Crown Land", such land may not actually be so.

Appended hereto at **Appendix "B"** are screenshots from the province's Land Use Atlas (https://www.gov.nl.ca/landuseatlas/details/) for selected communities:

- Bay Roberts
- Bonavista
- Carbonear
- Conception Bay South
- Harbour Grace
- St. John's (Downtown)
- St. John's (East End)
- Torbay
- Trinity

Areas coloured in beige are granted lands. Areas in green have been resolved by Quieting of Titles proceedings. Areas which are not overlaid with either colour would be Crown Lands, according to the Land Use Atlas.

Based on this mapping, the scope of the problem should be apparent. These areas have been settled for centuries, but Crown Lands identifies large portions of these areas as "Crown Land". This includes almost the entirety of Water Street and Duckworth Street in Downtown St. John's, as an example. It also includes the majority of the Towns of Bonavista and Carbonear, which trace their settlement back for centuries.

Knowing that Crown Lands has lost a number of old grants in the 1892 fire, and the existence of unmapped grants, proving the act of unlawful possession for enforcement purposes may be difficult. The provincial government may acknowledge that the downtown St. John's area is dispossessed, but where does the acknowledgment end? There is a risk of enforcement appearing

(if not in fact being) capricious and arbitrary if enforcement decisions are made based on community of residence.[6]

Prosecution of individuals in longstanding historic possession may give rise to evidentiary challenges if the Crown pursued same as charges under the *Lands Act*. Those charged with unlawful possession of Crown Lands may argue the legitimacy of their possession, or the honest but mistaken belief thereof if challenged. Given the burden on the Crown on a prosecution to prove the wrongful act, individuals prosecuted may be acquitted. Spending resources to attempt enforcement and prosecution will not resolve the issue and may only lead to a further disconnect with the public generally.

Enforcement would also be unpalatable to the majority of the population, especially in rural areas, where the boundaries between what is understood as Crown Land versus private land are unclear. Enforcement action based on the current law would, for instance, encompass any land where occupation began on or after 1957, in the government's opinion. This again runs the risk of being seen as capricious and arbitrary by the public, if the government takes action against a homeowner in a house built 50 years ago or longer. However, the law as it currently stands prevents a homeowner from obtaining title to his or her own property by possession beginning after 1957. It may be considered unlikely that the Crown would prosecute an individual living in a house built in the 1960s or 1970s on what is considered to be Crown Land, yet the Crown will not release such potential claims. Such a circumstance puts the title to such lands in limbo.

This is not an academic or hypothetical problem. Our Committee reviewed experiences of membership with Quieting of Titles proceedings before the Supreme Court. We are aware of at least one instance this year in which the Crown intervened against a homeowner whose house was constructed in the early 1970s, with land title documents contemporaneously certified by a lawyer to the standards of the time. The dividing line for the land the Crown was prepared to concede ran through this house. We are also aware of a recent instance of the Crown intervening on property in a municipality, in which title rested on historical deeds and bills of sale, and for which the municipality had issued a building permit over a decade prior, and on which the town had collected municipal taxes for years.[7] These are Crown Lands interventions on occupied properties with roots of historical possession and title, which had been built up and invested in by owners in good faith reliance on their title.

v. Liability Concerns

The government also takes a risk in attempting to enforce claims on "Crown Land" based on the change in the law in 1976. If the government's interpretation of the law is that all possession existing before 1956 is irrelevant, then there are concerns about effective expropriation of

[6] We note that management and control Crown Lands in the City of St. John's are vested into the City by statute (R.S.N.L. 1990, c. C-17, s. 69-71). This situation exists only in St. John's. Other cities and towns have no such control over Crown Land, notwithstanding similarly long histories of possession of land and urban development.

[7] Cases have been anonymized for reasons of solicitor-client confidentiality, although such cases are public record at the Supreme Court.

privately held land which is based on possession occurring long before the 1970s. For instance, construction and occupation which can be documented back to the 19th century. This has been identified as an area of particular concern for some members in dealing with communities of longstanding settlement. There may be liability concerns if the Crown purports to grant or sell land which has been subject of another individual's adverse possession claim.[8]

There are specific procedures for re-vesting land into the Crown at Part II of the *Lands Act*, which require public notice and a potential Court adjudication of any claims on the land. This includes lands which were unlawfully occupied, where the occupation ended over twenty years ago.[9]

vi. Municipal Concerns

Municipal governments rely on private property owners for generating revenue via property taxes. Municipalities rely on the Municipal Assessment Agency, a Crown corporation, to establish property records and tax rolls. Crown Lands are exempt from municipal taxation. If the Crown asserts claims to private land, this may restrict the amount of municipal tax revenue that may be generated, as land would become untaxable.

Municipalities face difficulties in selling property for arrears of municipal taxes due to the section 36 issue. Municipal records are not determinative of private ownership, and the Crown may assert claims to what is otherwise considered to be private land. Because municipal tax sales do not release the Crown's interest, it falls to a municipality to either obtain confirmation from Crown Lands that the Crown claims no interest, investigate title itself to confirm the Crown has no claim, or proceed with the sale on an as-is basis. One Committee Member advised that his client faces delays of multiple years in obtaining letters from the Crown to confirm no interest, which has prevented one municipality from holding a municipal tax sale. This inhibits municipal revenue collection, as well as further development of the subject parcels.

vii. Remedial Concerns

A major concern in this process is the disconnect between the Crown and the practicing bar relating to certification of title. Lawyers are reluctant to certify title to lenders and purchasers where there is any question about title. Under the current system, there is no practical way for such concerns to be addressed in a timely manner. Real estate transactions must rely on affidavits of possession as proof of dispossession of the Crown because there is no way to confirm a release from the Crown.

As noted previously, there is no mechanism for individuals to safely come forward to obtain releases from the Crown to perfect title to their land. Anyone coming forward with an application

[8] See, e.g. *Miller v. Smith* (1900), 8 Nfld. L.R. 399, where a Crown Grant to land at Topsail was declared null and void as the land had been occupied for a period in excess of 60 years by another party.

[9] *Lands Act*, S.N.L. 1991, c. 36, s. 43.

risks a denial from the Crown and a demand for payment of tens of thousands of dollars to acquire the land they already possess. There is no incentive for the public to be proactive in dealing with land title issues, and problems will only arise when people attempt to sell or mortgage property.

The Committee thus expresses the need to have a remedial process to resolve such outstanding claims. The current mechanism for applications to Crown Lands is too cumbersome and time-consuming to obtain a formal release in the context of a real estate transaction. We reiterate that this is often an issue with occupied lands, wherein the owner has been in possession and developed the land already. The release from the Crown could almost be seen as a formality, were it not for the uncertainty of title and risks associated with Crown Lands enforcement.

viii. Concerns with Previous Government Reform Review

The Committee reviewed the 2015 *Lands Act* Review. While the government's *Lands Act* Review Committee did consider the positions put forth by the practicing bar and the public at that time, the government's Review Committee in 2015 recommended no changes be made.

This conclusion is unsatisfactory in our view. It ignores the reality of the situation in Newfoundland and Labrador and the problems that the status quo has created. The issues raised by the 2015 Committee ignore the following noteworthy concerns:

1. Section 36 was introduced in May 1976 and came into effect in January 1977. Individuals built on their land long before the change in the law had no way of knowing that the law would change. People who built on vacant land in the late 1950s, 1960s or early to mid 1970s had no knowledge or expectation of the change or the effects this would have.

2. Possessory land title has existed in Newfoundland since the 16th century, and traces forward for hundreds of years. Limiting the window of time to 1956 to 1977 ignores the historical title to land, including registered documents at the Registry of Deeds.

3. People built on land in legitimate belief of the historical title of land. Instances of illegal occupation with the knowledge that the occupation is illegal are rare, relative to the number of honestly-held possessory claims based on historical title and community recognition.

4. Possession of "Crown Lands" continues unabated today, as it has for decades. Retention of the law in its current form does nothing to resolve the issue that exists today and will continue to exist *ad infinitum*. Maintaining the law in its current form will not resolve the problem, but will only deepen the divide between Crown Lands and the public.

5. The current state of the law and Crown Lands policy will make certification of possessory title impossible within the next five to ten years. This does not eliminate those possessory claims, but rather inhibits the public's ability to prove those claims.

On the argument that the Crown needs to maintain planning and development control, this may be a relevant consideration for unoccupied vacant land. However, in many instances lawyers face in practice, the land has already been developed, or is already subject to municipal planning controls. If the land at issue has already been developed, there is no more planning and development control to exercise. If the land is within a municipality, then the municipal government already exercises planning and development control. Amending section 36 of the *Lands Act* does not abrogate from existing development controls, but only confirms existing ownership interests. The status quo does not provide any benefit for planning purposes, because the Crown is left out of the determination of such issues until after development has begun. Whether or not the land belongs to an individual is a different question than what an individual may do with it.

In municipalities, the Crown Lands Division may never become involved with planning issues, because such matters are handled at a municipal level. In several cases, individuals seeking to rectify title to their existing land have already fully developed the property, and the property has been visibly improved and occupied for decades. Avoiding further loss of Crown land to adverse possession can be accomplished while also recognizing existing land claims.

The argument that the law has been fixed in this form since 1976 and should continue to prevent "chaos"[10], is not accepted by the Committee. In fact, "chaos" is a better description of the current situation, in which land title operates in two parallel streams: that which is recognized by the Crown and that which is recognized by the practicing bar of Newfoundland and Labrador. The former does not always recognize the latter, but the latter is the route commonly used on real estate transactions and mortgages.

The law in its current form is a problem that requires resolution, and one which has real and practical consequences for the public. The problems are not academic, but impact everyday Newfoundlanders and Labradorians and ownership of property in general. The problems identified by our membership indicate that the status quo is not sustainable, and is impeding basic land transfers and development. The restrictive period of 1956 to 1977 prevents long-held title from ever vesting. In our opinion, this has made the situation worse than the pre-1976 rule requiring 60 years of adverse possession. Under the old system, possessory title held for that length of time would divest the Crown, and the limitation period would continue to roll. Under the 1976 reforms, we currently require 65 years of adverse possession, and that number increases each year. By 2031, we would require affidavits of possession back 75 years, and require individuals in their 90s in order to be able to swear to the history.

The Committee acknowledges the policy goals of the Crown in seeking to restrict adverse possession of Crown Lands, and the unique obligation on the Crown to manage the whole of the Province of Newfoundland and Labrador. We have also considered the province's fiscal situation when looking at options. These considerations are factored into our proposed recommendations.

[10] *Lands Act* Review 2015, pp. 86-87.

VI. Proposed Solutions and Analysis

i. Revision to the Limitation Period

This suggestion is the most often repeated in the commentary received. Members have made different suggestions as to what the limitation period should be, including:

- The ordinary ten-year limitation period that applies generally to private land claims,[11]
- A lengthier limitation period depending on whether land is within a municipality or not[12]
- Variation of the cut-off date from 1977 to a future date,
- A return to the 60-year possessory period.

The Committee appreciates the tension regarding adverse possession and Crown Lands. It is not in the Crown's interest to allow a "free-for-all" of occupation of land in a province as vast and sparsely populated as ours. Enforcement efforts to protect against illegal occupation of Crown Land would require a significant investment of resources. The Crown is in a unique position regarding adverse possession that distinguishes it from other private landowners, due to the sheer extent of land at issue. A ten-year limitation period may be reasonable for an individual with a single acre of fenced land, for example, but would not be reasonable for a province with 400,000 square kilometers of land.

Based on the foregoing, we agree that the ten-year limitation period would be inappropriate for claims against the Crown.

The failure of the Crown to reconcile historical land claims poses difficulties in cutting off adverse possession against the Crown as well. Use and occupation of land has continued on the honestly-held beliefs of the public and communities, based on historical occupation. There is accordingly a lack of clarity as to where Crown Lands claims end and private claims begin.

A period of sixty years, as existed before 1977, was seen by the Committee as being too long. Individuals would develop and occupy land, but the land title could be in a state of limbo for over half a century without resolution. This would not be substantially better than the status quo, although the movable timeline would at least allow long-held interests to vest. One notes that if section 36 were amended to a sixty-year period today, it would require proof of adverse possession back to 1961. This would at least address the concerns expressed by the Committee on the difficulties associated with use of a fixed date for adverse possession, while maintaining the current length of possession.

Adjusting the cutoff date to a date later than 1977 was rejected as a proposal. This would only "kick the can" on this problem, and would require further review in the future, dealing with the same issues as today. It would also require recognition of adverse possession occurring after 1977, which establishes a rolling limitation period as the goalpost moves. If a rolling limitation period is to be put into effect, it should not be hinged to an arbitrary date.

[11] *Limitations Act*, S.N.L. 1995, c. L-16.1, s. 7(1)(g)
[12] As suggested by the Law Society in 2015, see 2015 *Lands Act* Review Report, p. 82-83

The Committee favoured the recommendation made by the Law Society of Newfoundland and Labrador in its submission to the 2015 *Lands Act* Review Committee, of reinstating adverse possession against the Crown, for a period of 30 to 40 years. The reasons for this recommendation are as follows:

1. Newfoundland and Labrador is unique among provinces in the historical origin of its title. A significant amount of the province's private land is rooted in adverse possession. Most private claims on Crown Land are a result of historical occupation or community acceptance, existing long before the law was changed. They are legitimately held claims and should vest accordingly.

2. It has been 45 years since the current section 36 was introduced in law. Individuals who have maintained their possession since the change in the law without interference from the Crown should be entitled to retain what they have kept. The Crown has taken no timely steps to address those claims and individuals have occupied their land for decades in an honest believe of title. This limitation period would suffice to address those claims.

3. Possession which is open, notorious, continuous and exclusive, exercised for a sufficiently-long period, should be recognized. Forty years is a sufficient length of time for the Crown to monitor for signs of unlawful development, and strikes a fair balance.

4. Technology has advanced significantly since the 1970s. Satellite imagery and aerial photography allow the Crown to monitor the province's lands more efficiently. The Crown Lands Administration today can more easily catch illegal development at an early stage than in the past.

5. Land development practices have changed since the 1970s. People today are more cognizant of the ideas of property ownership than they were in previous eras. Old notions of freely building a house anywhere there was space are relics of history.

6. Individuals today will often require financing to develop land or build structures, which will involve lawyers certifying title. Substantial development is unlikely to occur without prior certification of title.

7. Other government departments are required to be involved for such things as septic and electrical permits. There is sufficient governmental oversight built into modern development rules that would curtail illegal development of Crown Lands.

8. With or without prohibitions on vesting title, illegal occupation of Crown Land commencing in modern times can be dealt with by timely intervention by the Crown.

9. Most claims asserted to Crown Land are founded on some historical basis or belief in title, and community belief. We feel that knowingly illegal occupation of Crown Land is rare,

certainly so compared to the volume of *bona fide* land claims entangled by the section 36 issue.

We note that a change to the limitation period would allow resolution of private property claims to Crown Lands without any government expenditure. Lawyers would be able to certify title as it vests, via registration at the Registry of Deeds, as occurs at present. This change will facilitate resolution of Crown Lands title issues by the private bar, as individuals have lawyers certify their title, parcel by parcel.

The Committee was split on the issue of whether a shorter period should apply in municipalities:

- Some Committee members felt that there was a "distinction without a difference" in terms of being inside or outside of a municipality. Some small municipalities do not maintain tax rolls or keep good records on land ownership. Some non-incorporated municipalities operate under Local Service Districts or have community councils that keep records of property claims. The question of municipal status is immaterial to the issue of actual and historical possession of land. Municipal boundaries may change, and currently unincorporated areas may be incorporated into municipalities.

- Some Committee members felt that municipalities are a level of government in their own right, and vested with land use control authority. They are better situated to enforce development and planning rules and monitor for unlawful use of land. Municipalities are responsible for maintaining property tax rolls and collecting taxes from the owners of land. Paying municipal taxes is an indication of both official recognition of one's claim and a sign of a good faith claim of ownership. Those who pay property taxes and are recognized as owners of land by a municipality should have their ownership recognized by the provincial government.

At a minimum, municipal records should at least be considered in determining dispossession of the Crown's interest, where available. This may be a probative factor to consider in determining whether the limitation period is met, or the notoriety of a claim of ownership.

Recommendation:

1. Section 36 should be amended to vest title based on forty years of open, notorious, continuous and exclusive use and occupation of land.

2. Government should consider whether or not this period should be shortened for land which is contained within the boundaries of a municipality.

ii. Reconciliation of Crown Lands and Private Claims

A matter of equal importance is confirming when the Crown is adversely dispossessed. Adjusting the limitation period without providing a mechanism to confirm title will only continue the existing schism between the Crown and the legal community on the standard of good title.

Whether or not the Committee's recommendations on changing section 36 are followed, we strongly recommend some manner of reconciliation process be instituted to allow private land claims to be recognized and released by the Crown.

Problems with the existing legislation could be ameliorated by opening a pathway to resolve existing claims, without reopening the issue of adverse possession. This avenue of reform would allow efficient resolution for claims premised on existing title certification by lawyers or by existing longstanding possession. We recommend the law be changed, but a resolution process for private land claims is a practical necessity today, with or without any statutory change.

Prior to 1996, individuals could apply for residential grants for already-occupied land for nominal value, under the *Lands Act*, without reliance on section 36 of the Act. However, in 1996, the cost of a grant rose to "market value", meaning that an applicant now has to buy his or her own land for market price from the Crown.[13] The demand for market rates to obtain releases of the Crown's interest deters people from resolving their land claims directly with the Crown, and penalizes those who attempt to properly rectify their title. This, we feel, has had a chilling effect on the willingness of people to approach the Crown to resolve title. Coupled with complaints of multi-year delays in the current application process, the existing policies and procedures of the Crown Lands Division are seen as risky and inefficient. Many real estate transactions in Newfoundland and Labrador today proceed with affidavits of possession or title insurance, whereby the purchaser will assume the vendor's existing title, without ever seeking approval or clearance from the Crown.

As such, there are two parallel tracks of "good title" recognized by the practicing bar currently: title which originates from Crown Lands and title which exists by possessory claims recorded at the Registry of Deeds. The latter is prepared and certified by lawyers. Difficulties arise when lawyers do not agree on whether the lawyer-certified title is satisfactory, particularly regarding dispossession of the Crown. This causes problems for buyers and sellers of real estate, where lawyers argue over whether title is satisfactory. Given concerns about approaching the Crown to resolve the issue, both in terms of time and money, this causes real estate transactions to fall through, making land unmarketable and preventing transfers or mortgages. Increasingly, lawyers are relying on quieting applications in Supreme Court as a solution, whereby a Supreme Court Justice will evaluate title and determine whether it can be safely certified. However, these applications are costly and time consuming.

The problems faced with title in Newfoundland and Labrador will not be resolved by ignoring them. Ignoring the issue has been the *de facto* solution, which has resulted in the "parallel tracks"

[13] 2015 *Lands Act* Review, p. 77.

issue above. Lawyers operate on registered title and affidavits, and accept affidavits of long possession as determinative on their face. Crown Lands Division is never notified of ongoing purchases and sales of land. As long as nobody involves Crown Lands, no problems exist. This is not a sustainable solution, as title to land in Newfoundland and Labrador now operates in two solitudes. For the Crown to exercise meaningful development and planning control, the Crown must know what land is and is not privately held. For the public and the legal profession to have confidence in title, the Crown must offer an efficient method to confirm that the Crown asserts no interest in a given parcel. Whether or not government should change section 36 of the *Lands Act*, we feel there must be a reconciliation of those land claims which exist at present.

As noted in our earlier comments, and in the Land Use Atlas screenshots annexed at **Appendix "B"**, there is a stark disconnect between what the public believes to be private land and what Crown Lands will recognize as private land. It is important, in our view, that the Crown reconcile private land claims with Crown records, if the province is going to maintain land development and planning control.

We have concerns about how determinations of land claims are made. There has been an apparent change in policy at Crown Lands where different standards apply at different times. In the case of *Ring v. Newfoundland and Labrador*,[14] the Applicant on a Quieting of Titles Application had her claim rejected. The parcel of land immediately adjacent to her property, with the same root of title, had been granted a Certificate of Title in a 1986 quieting. The Court of Appeal upheld the denial of Ms. Ring's Certificate of Title, holding (in part) that the government was free to change its policy and take contradictory positions on the adjacent parcels. While legally correct, it creates a public perception of capricious decision making. An individual who acquires their land in accordance with the accepted standards of the day should not lose their land because of a subsequent change in policy.

The only methods to obtain a release of the Crown's interest are to apply to Crown Lands directly or to apply for a Quieting of Title in Supreme Court. The former takes years to be processed and puts the Applicant at risk of denial of the Application. The latter is quicker but more costly, and imports the same risk.

Members raised concerns about approaching the Crown Lands Division for such releases under existing procedures, in part because of concerns that the Crown may intervene on their property claim in the future, or deny a client's ownership of his or her own land. As previously mentioned, an individual in possession of Crown Land at present will rarely face any consequences for occupying the land, unless they bring themselves to the attention of the Crown Lands Division. Looking at **Appendix "B"** of this Report, and canvassing the Land Use Atlas generally, one can appreciate the scope of such concern. If people feel they are at risk of losing their land or of facing penalties, they will not take advantage of any remedial programs offered.

To avoid such concerns, the following suggestions should be considered:

[14] 2013 NLCA 66

- A "without prejudice" amnesty application process to the Crown Lands Division, whereby the Crown will take no action on any claims reported in this process, even if claims are denied. This option presents a circular problem: if the Crown denies the claim but can take no action, is it any different in practice than granting the claim? If Crown Lands can take action where a claim is denied, would anyone risk applying?

- A separate arms-length administrative body to adjudicate issuance of releases, with authority to divest the Crown. Applicants may be more likely to come forward to a separate organization rather than the same body that handles enforcement. Approved claimants can be issued a quitclaim by this body. Denied claimants can avail of other existing remedies, such as quietings or direct application to the Crown Lands Division. Such a body could be established for a set period of time rather than as a permanent office, allowing for the "amnesty window" suggestion. The public could be given a period of years to file private claims for releases, after which they will have to pursue claims through the ordinary channels at Crown Lands Division. At a minimum, this would clear a backlog of claims and reconcile existing registrations on the Registry of Deeds.

- Clear preconditions by which a grant or quitclaim would be issued by the Crown Lands Division, such as pre-existing registration on the Registry of Deeds for a length of time or before a certain date, or paying municipal taxes on land for a certain number of years. Applicants can then determine whether they meet the criteria before applying.

The last point may be important for government in distinguishing legitimately-held land claims from spurious or opportunistic claims. A starting point may be to limit such application procedures to parcels assessed in municipalities, or to title which has been previously certified by a lawyer.

Given the volume of private claims to Crown Land in Newfoundland and Labrador, we recommend some sort of administrative process be established to allow applicants to apply for releases from the Crown. This administrative process would ideally be separate from the Crown Lands Administration, because of concerns that coming forward to Crown Lands will lead to fines, punishment, or orders to remove buildings. Anyone who has been in long possession of Crown lands today takes a significant risk in applying to Crown Lands to confirm his or her own title, which has a chilling effect on self-reporting. The current system disincentivizes people from coming forward, which prevents such a reconciliation from occurring.

One Committee Member proposed a similar process to the *Leaseholds in St. John's Act*,[15] which establishes an administrative process for people to obtain deeds for property held on ancient residential land leases. This Act vests title to ancient residential land leases in the City for the purposes of executing documentation to convey the land.[16] A similar process could be established to allow a Commission or other administrative body to execute releases on behalf of

[15] R.S.N.L. 1990, c. L-10.
[16] Ibid., s. 2.1.

the Crown. Applications to such a body could be limited to defined characteristics, such as existing registered title or title previously certified by lawyers.

Establishing such an administrative body could be done with a minimum of staffing and expense, depending on the standards employed. For instance, if the standard for obtaining a quitclaim was limited to title which, on its face, satisfies the practice standards of the Law Society of Newfoundland and Labrador, then the review process is quite short. Lawyers need only submit their title search and certification of title to the administrative board, and a quitclaim would be issued. This would require a minimum of staffing, perhaps only one or two lawyers, who will review the title and approve or reject same. Further analysis could be done to investigate the cost implications, although one notes that an application fee would offset the cost. Application fees are already charged by the Crown Lands Administration on ordinary applications.

A determination of the standard of "good title" to obtain a release should be determined in conjunction with the Law Society of Newfoundland and Labrador. The Real Estate Committee of the Law Society establishes practice standards and the practicing bar of Newfoundland and Labrador has specialized experience and expertise in determining what is good title. It is recommended that government and the Law Society work cooperatively to establish a fixed title standard for obtaining releases from the Crown. We recommend this occur, whether or not any other reforms of our report are implemented, so that the practicing bar may have greater certainty as against the Crown's interests.

The additional benefits conferred by this approach would make this a worthwhile investment, in our view. The certainty of title will enable people to invest in land, and build and develop their properties. Current practice effectively "freezes" land because of intractable title problems. Tying up land titles in a lengthy and opaque process as currently occurs does nothing to facilitate economic growth and development. This also prevents the government from realizing on potential revenue from the land, as there is no efficient process for anyone to approach Crown Lands to acquire title.

The Committee notes that even if the government refuses to change the period of adverse possession against the Crown, there is still an unresolved problem in Newfoundland and Labrador about people in possession of Crown Lands. Government must take action to address the problem of the thousands of people in possession of Crown Land with uncertain title, in order to perfect those claims which are legitimately held. Otherwise, government cannot engage in proper planning and control of Crown lands. Land titles will remain in a state of flux, and the Crown and public will continue to operate with uncertainty of whether or not any given land is adversely possessed or not.

Recommendations:

1. Government and the Law Society work cooperatively to establish title standards for dispossession of the Crown.

2. Government establishes an arms-length administrative body with authority to quitclaim the Crown's interest to applicants.

3. Quitclaim grants should be issued at a minimal charge, rather than at market rates.

iii. *Reconciling the Registry of Deeds and Crown Lands Registry*

There is a need for reconciliation of both the Crown Lands Registry and Registry of Deeds. At present, the two Registries operate independently of one another. Crown Lands maintains records of grants and crown titles at the Howley Building in St. John's, and maintains the Land Use Atlas which maps out all known and mapped Crown titles. The Aerial Photography Library is also located at the Howley Building, and contains photographs taken of the province by air since the 1940s.The Registry of Deeds, on Elizabeth Avenue in St. John's, contains documents relating to private land transactions, such as sales and mortgages.

This impacts on section 36 of the *Lands Act*, because of the "parallel tracks" of title that currently exist. On one track are the Crown's records of grants and quitclaims. The Crown's view of title is premised on its records and its aerial photography. The practicing real estate bar in this province relies primarily on title in the Registry of Deeds, such as affidavits of possession, to divest the Crown.

Section 36 of the *Lands Act* requires open, notorious, continuous and exclusive possession of land from 1956 to 1977. One of the problems this poses is how this affects land titles registered before the change in the law. There are many thousands of registered deeds at the Registry of Deeds existing before 1977, which record ownership claims of land and transfers of land that were legitimately asserted before the law changed. In some instances, a chain of title can be found back to the 19th century.

Some of these recorded transactions may transfer vacant land or fields, or may be lands that were occupied long before 1977, where actual possession stopped before 1977. An example may be an old house in a rural community, which was torn down or moved in the 1960s, where there is a chain of deeds recording the existence of the house to the 1800s. This is a particular issue in certain areas of the province which were thriving commercial centres in the past, such as Harbour Grace, Trinity and Bonavista. The merchant class in the 19th century tended to appreciate the significance of registering title deeds, leading to a greater likelihood of contemporaneous registration of 19th century land claims in certain areas, which titles were done to the standard of the day. One Committee Member with particular familiarity with the Trinity area noted an instance where he could trace possession back to the 1850s, with possession up to the 1940s, but could not obtain clear title because of the 1956-1977 adverse possession window in section 36.

Committee Members recognize that there is a gap caused by the Crown Lands Registry operating on one set of records to the exclusion of the other. This creates situations where the Crown is either unaware of past registered claims, or refuses to acknowledge claims which are registered at the Registry but not also registered at Crown Lands. One Committee member referred to an instance where a client attempted to obtain a grant to land adjacent to the client's house, but was denied the right to purchase adjacent land because his existing title did not appear on the Land Use Atlas. The client's title had been certified by a lawyer with affidavits of possession over thirty years prior and registered at the Registry of Deeds since the 1980s.

The process suggested in the preceding section for administrative adjudication of lands claims would assist in mapping these Registry of Deeds titles into the Crown Lands system. Quitclaims are mapped on the Land Use Atlas as they are issued, and are recorded at the Crown Lands Registry. If it were possible for lawyers to obtain quitclaim deeds in a timely manner based on existing registered title, then such applications could be processed by Crown Lands and entered into their records. The reluctance of the practicing bar to involve Crown Lands in title issues unless necessary prevents the records from being harmonized. This would need to be resolved.

The Registry of Deeds online database, known as "CADO" (short for "Companies and Deeds Online"), allows for searching of properties by various factors, including owner's name, community and location reference. It appears to the Committee that Crown Grants should be searchable by the same system, and doing so may facilitate investigations into title.

Unless Crown Lands is prepared to defer to claims which are certified by lawyers and issue quitclaims, it is unlikely that the practicing bar will risk Crown Lands intervention by applying for quitclaims directly. Titles which have been previously certified by lawyers, under the existing procedures for title certification by lawyers, are registered at the Registry of Deeds.

If the Crown were to start somewhere on this reconciliation process, a good starting point would be with those titles already certified and registered. Such an approach would begin the harmonization process, with minimal risk to both lawyers and the Crown. Lawyer-certified title in the Registry of Deeds is already accepted in practice by other lawyers, thus it will continue to be used and occupied whether or not the Crown provides a quitclaim. The quitclaim is seen as unnecessary in such circumstances, and the land is already in use. Such quitclaims should be granted by default, having already been certified and accepted by lawyers.

By limiting the process to existing registered titles, the Crown can start by taking stock of the land titles currently claimed. This will prevent opportunistic claims from being asserted as soon as Crown Lands invites applications for such quitclaims.

It should also be noted that other provinces have statutory provisions on the standard of good title. Ontario, Nova Scotia and Prince Edward Island measure good title based on a search of 40 years.[17] CADO currently has search capabilities for registered documents back to 1981.

If, as recommended previously in this report, a 40 year period of adverse possession is employed, it would be appropriate in our view for government to consider a 40 year registered title history as ousting any claims of the Crown. In our view, there are several reasons why this is appropriate:

1. Crown Lands does not consider the effect of registered documents at all in its decision making on section 36 claims. However, this has been the point of registration for private land claims for almost 200 years.

[17] Ontario *Registry Act*, R.S.O. 1990, c. R-20, s. 112(1); Nova Scotia *Marketable Titles Act*, S.N.S. 1995-96, c. 9, s. 4(1); and the Prince Edward Island *Investigation of Titles Act*, R.S.P.E.I. 1988, c. I-10, s. 2(1).

2. Documents registered before the law changed in 1977 are indicative that private claims were asserted at that time. This indicates the legitimacy of private claims to what may be Crown Land.

3. The Registry of Deeds is deemed notice to all the world. Documents registered there are publicly accessible. The forty-year window utilized in other provinces as the standard of good title is a practical measurement for community acceptance of title. The fact that an individual has publicly asserted a claim to land for 40 years or more should weigh in favour of that claim.

4. For decades, lawyers have relied on their own certifications of title by the existing chain of deeds back to the 1820s, or on affidavits of long possession. Titles in the Registry of Deeds are accepted as legitimate by the public and the legal profession.

This suggestion formed part of the Law Society's submissions to the government's *Lands Act* Review Committee in 2015, but for unspecified reasons the Government's Committee "subsequently decided, in consultation with the Advisory Committee, not to include it in further considerations of this option".[18] We recommend that this be reconsidered.

The Committee also recommends merging the Registry of Deeds and the Crown Lands Registry, or at least synchronizing registrations across both Registries.

For the Registry of Deeds, we recommend that Crown Grants be registered and searchable on CADO. At present, Crown Grants are recorded only at the Crown Lands Registry. Unlike CADO, which can be searched by lawyers' offices, there is no way to search the index of Crown Grants without contacting the Crown Lands Registry. This requires a specific request for a document; it is unclear whether or not Crown Lands can or would provide a general listing of all grants issued at a certain community, for instance. As such, it is difficult for members to search Crown Lands registrations generally to find out if potentially relevant records exist, as may be done under the search features on CADO. The Land Use Atlas allows for searching by location, but the mapping does not reflect all grants in the possession of Crown Lands. Several grants are known to be registered, with copies on file at the Howley Building, but which are not mapped. There are also grants which were lost in the Great Fire of 1892.[19] The inability to adequately search these grants raises a section 36 issue as well: the Crown records do not accurately reflect the entirety of private land claims in this province.

For Crown Lands, we recommend that certified title (either certified by lawyers, or by an administrative process suggested above) be mapped onto the provincial Land Use Atlas. This would facilitate government planning and development control, since the Land Use Atlas would

[18] 2015 *Lands Act* Review Report, pp. 82-83.

[19] These include Volumes A, B, C, D, Volumes 1 and 2 of Free Grants, and Volumes 1-7, 10-16, 19, 20 and 28 of Crown Grants. The lost grants number into the hundreds. Records of the issuance of these grants are available, but there are no known surveys for the lost grants. This should be considered in the Crown's assessment of whether or not land may be privately held on historical title.

document the boundaries of private claims asserted today. It would allow the Crown to properly establish development boundaries of individual land claims, to prevent further claims from being asserted against Crown Lands beyond those already asserted. It would introduce certainty into Crown Lands record-keeping and intervention.

As an example, we have attached at **Appendix "C"** copies of the Land Use Atlas mapping of certain communities on the west coast of the island and in Labrador, where settlement was undertaken in more controlled circumstances. These communities include:

- Corner Brook
- Deer Lake
- L'Anse au Clair
- Happy Valley-Goose Bay

Happy Valley-Goose Bay is an example of a community established after the Crown had established development control. The private property claims in the Town rest in direct grants from the Crown, and are mapped individually on the Land Use Atlas. It is possible to establish at a glance whether or not occupation is occurring on private land or Crown Land, and what the precise boundaries of private claims are.

This could be accomplished province-wide by the quitclaim process, by placing onto the map all issued quitclaim deeds. This is currently the practice whenever the Crown issues a grant or quitclaim deed.

The limiting factor to instituting such a system today is the volume of unregistered and unsurveyed land claims that exist. The cost of surveying may be prohibitive to many people whose land title rests on possession or generational transfer (i.e., gifts of land from family members, or bequests in wills). The low value of land in rural Newfoundland up to the 2000s has resulted in many parcels of land being transferred on Bills of Sale with homemade property descriptions. Nevertheless, these parcels are gradually being surveyed and properly titled, which is what gives rise to the concern about the section 36 period today, and this is why we recommend a rolling limitation period rather than a fixed date.

This is why the section 36 matter is pressing today. Land which had little value 20 or 30 years ago is today worth tens of thousands of dollars, and individuals are looking to properly document and preserve their titles before investing in it. Individuals purchasing a house and land today will not accept a homemade Bill of Sale with a rough description of the land conveyed. This was the practice many years ago when such properties were sold for only hundreds of dollars and the cost of engaging a lawyer was prohibitive relative to the value of the land. The intent is not to establish new claims, but to confirm existing claims. New possessory claims can be dealt with by timely enforcement by the Crown.

Subsequent to our Committee's meeting and drafting of this Report, the "Greene Report" was released.[20] Contained in the Report is a recommendation that the Province "revise legislation to require that all unregistered land be registered within eight years. After this period, all

[20] "The Big Reset: The Report of the Premier's Economic Recovery Team", May 2021.

unregistered land would revert to the Crown".[21] We would note that the suggestions made under this part, and indeed throughout this report, come to a similar conclusion. The simplicity of the recommendation in the Greene Report belies the complexity of implementing it. Registration at the Registry of Deeds is not a guarantee of validity, nor is there any requirement for registration at the Registry of Deeds to contain an objectively useful property description.[22] Many thousands of deeds have been registered in the two-hundred-year history of deed registration in Newfoundland and Labrador. There are many registered documents of questionable validity, and many with ancient or vague property descriptions that are of limited utility to the outside researcher. Yet they are all validly registered. At present, the Crown Lands Administration does not recognize registered title for dispossession of the Crown. Implementing mandatory registration, as suggested in the Greene Report, will not resolve any problems, if the Crown is not prepared to recognize registered title at the Registry of Deeds. The purpose of such registration is, ostensibly, to confirm for the Crown what is and is not privately-held land. Our suggestions for reconciling the Registry of Deeds and Crown Lands Registry will allow this recommendation to be implemented in a meaningful way, as it will allow registrants to confirm the validity of their title as against the Crown, and for the Crown to confirm what land is privately owned and what remains Crown land today.

Recommendations:

1. Crown Grants should be searchable at the Registry of Deeds on CADO.

2. Government should institute a process allowing lawyers to obtain quitclaim deeds from Crown Lands on existing certified title. Such quitclaims should be mapped on the Land Use Atlas.

3. Registered title should be considered for adverse possession as against the Crown. Title which can be traced back through the Registry of Deeds for at least 40 years should presumptively oust the Crown.

[21] Greene Report, ibid., p. 207.

[22] See, e.g., *R. v. Stacey*, 2010 NLCA 63, a criminal case which revolved around a property dispute with homemade Bills of Sale for land which had been registered at the Registry of Deeds. See paras. 33-38 for a discussion of this principle in practice.

iv. Municipalities Issues

Multiple comments were received in the consultation process regarding municipal tax sales. Municipalities can seize and sell property for unpaid taxes, and such sales are a source of revenue for Town Councils and allow towns to enforce tax collection and "replace a defaulting property owner with another who presumably will pay property taxes in the future".[23] However, the sale rights are subject to any interest of the Crown.[24]

In rural municipalities, where title may be based solely on adverse possession, there may not be a clear chain of title. Property owners may not have any form of paper title whatsoever. However, properties are assessed by the Municipal Assessment Agency to individuals based on their possession of land, and not on an investigation into their chain of title. One can look to **Appendix "B"** to recognize how much land in densely populated municipalities may be "Crown Land" in the opinion of the Crown, notwithstanding a long history of possession or municipal recognition.

One lawyer indicated problems he encountered in trying to conduct tax sales for rural municipalities. Prior to conducting tax sales for the Town Councils, he requested waivers from Crown Lands, indicating that the Crown asserted no claim to the land at issue. The lawyer encountered delays of over a year in obtaining such letters in a recent effort, which led to tax sales being postponed for two years. The inability to obtain such confirmation in a timely manner either delays municipal efforts to sell the land, or limits the number of willing purchasers who would buy the land with questionable title.

The Supreme Court of Newfoundland and Labrador's recent decision in *Re Hickey* is an example of this problem.[25] The landowner in *Hickey* bought land from the Town of Holyrood in November 2003. In 2019, he applied for a Quieting of Titles Certificate, but the Crown intervened to object. The *Hickey* decision upheld the Crown's interest in the land.

This creates practical problems for municipalities trying to exercise tax sale authority pursuant to the *Municipalities Act*. Prospective buyers are only able to investigate title to land insofar as there is anything to search in the first place. In many cases, especially in rural municipalities, land which is being offered for sale may not have any deeds or surveys connected to it, notwithstanding being occupied by an individual. Title searches are normally done after a purchaser enters into an agreement to buy land, which does not work well within the framework of an auction process. If the auction is to be a final unconditional sale, a prospective buyer bids at his or her own risk. If the bidder at an auction reserves the right to walk away if title is unsatisfactory, then the Town risks losing the sale and having to re-do the auction and incurring additional expenses, such as advertising, or being unable to recover the tax debt at all. If there are delays or difficulties in obtaining releases from the Crown prior to a tax sale, this inhibits a

[23] *Re Hickey*, 2020 NLSC 19, para. 35.
[24] *Municipalities Act*, S.N.L. 1999, c. M-24, s. 147.
[25] *Re Hickey*, supra.

Town's ability to conduct the tax sale or puts a Town through the expense of clearing the Crown's claim by other means, such as obtaining affidavits of long possession.

The simplest solution to the problem faced by municipalities is to make minor amendments to the *Municipalities Act* to extinguish claims of the Crown on a municipal tax sale. Protection for the Crown can be accomplished by serving notice on the Crown Lands Division as other notices are served under the *Municipalities Act*, in a similar manner as notice is served under the *Quieting of Titles Act*. As one member noted, there had been no difficulties in obtaining timely releases from Crown Lands in the past, and the *Municipalities Act* contemplates notice being served on interested parties early in the tax sale proceeding. Any objections from the Crown can be received within the timelines from first notice of the intention to proceed with a tax sale.

The Committee notes that this change is not revolutionary, as the City of St. John's already has authority to vest clear title into a purchaser on a tax sale.[26] This change should also be made to the appropriate statutes for Mount Pearl and Corner Brook, both of which are subject to the same restriction as the *Municipalities Act*.[27]

The Committee also notes that municipal governments are responsible for maintaining better records of land than the province. Municipalities engage in more active enforcement of issues within their boundaries, such as illegal development and occupation. Municipalities also collect tax revenue from individuals who stand as owners of land. Tax assessments are prepared by the Municipal Assessment Agency, a Crown corporation. Crown Lands' positions on ownership of land frequently conflicts with the determinations made by the Municipal Assessment Agency on ownership and municipal records of tax payment. One arm of government is coming into conflict with another, in our view.

We feel that recognition of municipal records should factor into determinations under section 36 and any amendments thereto, and that evidence of possession and ownership established by such records should run against the Crown.

Recommendations:

1. Municipal legislation should be amended to oust the Crown's interest on a municipal tax sale.

2. Municipal records should be considered as part of dispossession of the Crown, including municipal recognition of ownership and payment of municipal taxes.

[26] *City of St. John's Act*, R.S.N.L. 1990, c. C-17, s. 281(13).
[27] *City of Corner Brook Act*, R.S.N.L. 1990, c. C-15, s. 162.11; and *City of Mount Pearl Act*, R.S.N.L. 1990, c. C-16, s. 161.11.

v. Transition to Land Title System

There are two types of land recording systems in operation in Canada: the "Land Registry" system and the "Land Titles" system.

In a Land Registry system, documents relating to land are registered by the government, and a purchaser must investigate title by looking at all related documents in the Registry, in order to determine if there is "good title". Documents of all types may be registered at the Registry, and documents which are registered may or may not be valid or effective. The Registry is a mere depository of documents. It falls to the individual lawyer reviewing a title search to decide if title is good based on the documents received. Searches are conducted by searching backward from the name of the current owner, to identify the document which transfers title to that owner. The search continues, name by name, to the origin of the title. This system has the benefit of minimizing government's responsibility for title and allowing ease of recording private transactions. This is the system currently in effect in Newfoundland and Labrador and Prince Edward Island.

In a Land Titles system, title to property is centralized in a government database. Parcels are searched by Parcel Identification Number, which produces a Certificate of Title. Searches can be conducted on the parcel itself, rather than by the name of the owner. When a parcel of land is recorded in a Land Titles system, the entry is determinative of title. It is not necessary to search behind the Land Title record. The owner stated on the Land Title is the owner, as guaranteed by statute. This system has the benefit of being very efficient and easy to use, but this requires certainty of title in order to enter onto the Land Title system. This is the system in effect in British Columbia, Alberta, Saskatchewan and Manitoba, as well as the Territories.

Ontario, New Brunswick and Nova Scotia have hybrid systems, as all three are transitioning from the Land Registry system to the Land Title system. At present the Land Registry system and Land Titles system operate in tandem in these provinces, with properties being converted into the Land Titles system as new transactions occur. New Brunswick began the transition in 1981 and Nova Scotia began in 2003. Ontario has always had a Land Titles system in later-settled parts of the province, while earlier-settled areas have been converting to Land Titles for some time.

The ability of the province to transition to a Land Titles system is worthy of further exploration in order to modernize the property law system in this province. We are one of the last provinces still using a solely Registry-based system. Government may wish to investigate the experiences and systems of Ontario, New Brunswick and Nova Scotia, as provinces that have transitioned from the Registry system to the Title system. Particular attention should be paid to the legal consequences arising from the changeover, given the determinative nature of the Land Title system, and how these provinces have addressed such issues.

The main problems arising in making such a transition in Newfoundland and Labrador are the volume of unregistered land claims in the province, informal methods of transferring land, absence of comprehensive surveying, and the ubiquity of land disputes between private individuals. Other remedies canvassed herein would provide the groundwork to begin such a

transition. The necessary first stage of such a proposal would be for the Crown to acknowledge what is and is not privately held land.

For the benefit of government, the guarantee of title provided by the Land Titles system would provide better control over ungranted Crown Land and would provide certainty of title. Boundary lines could be fixed upon entry of a parcel into the Land Titles system. This would accord with government planning control goals, and contain development activities within those parcels which are entered into the Land Titles system, preventing development beyond those defined boundaries. This would protect Crown Land from further encroachment by adjacent property owners, and prevent future claims from arising. The Crown can effectively control development and land holdings by knowing the extent of what property owners claim today.

This will also make land transactions more efficient for the public. Instead of needing to conduct Registry searches back to the 1800s on every transaction, the title investigation can be completed instantaneously by a check of the Title Register. This saves transaction time and costs.

On this point, we note that the Covid pandemic has demonstrated the weakness of our existing Registry system. The pandemic has led to reduction in capacity at the Registry of Deeds and limited access to the deeds vault for examination of deeds registered before 1981. This has significantly slowed real estate practice, and led to increased reliance on title insurance in lieu of a fulsome investigation of title.

We note that the transfer process of moving parcels from the Land Registry to the Land Titles system in those provinces making the change (Nova Scotia, New Brunswick and Ontario) appears to be the responsibility of the practicing bar, rather than of government. Coordination between the bar and the government could allow such a transition to occur here, employing some of the suggestions made elsewhere in this report. Under such a system, once a lawyer certifies title to his or her client, it would be unnecessary to search behind that certification. Implementation of such a system here would require the Crown to recognize those certifications as well.

Further investigation on such a transition is recommended, as this would be a major undertaking for the province. However, we feel that this could be accomplished in Newfoundland and Labrador with relatively low cost, if done in cooperation with the Law Society of Newfoundland and Labrador and with the assistance of the practicing bar. It appears to the Committee that if the Crown Lands title issues can be resolved, then it is not a difficult jump to certify title by confirming the boundaries of each parcel and the root of ownership.

Recommendation:

1. Review the transition process in Nova Scotia, New Brunswick and Ontario to determine feasibility of implementing a Land Titles System in Newfoundland and Labrador.

VII. Conclusion

The Committee recommends as follows:

1. Section 36 of the *Lands Act* be changed to allow for dispossession of the Crown after 40 years of open, notorious, continuous and exclusive use and occupation.

2. Government should establish an administrative body to review existing registered land title and issue quitclaims where appropriate, in order to confirm existing titles.

3. Government and the Law Society should work together to establish common standards of good title as against the Crown's interest.

4. Registered title and municipal records should be included in consideration of the ousting of the Crown's interest under section 36 or any successor legislation.

5. Registrations at the Crown Lands Registry should be merged into the Registry of Deeds.

6. The limitation on title conveyed in a municipal tax sale should be lifted.

7. Government should investigate a transition to a Land Titles System.

For discussion purposes, we have prepared draft legislation for your review that reflects some of our recommendations.

VIII. Draft Legislation and Explanatory Notes

The appended "Act to Amend Adverse Possession Against the Crown" is a draft intended to implement our recommendations, and how such legislation would operate in practice.

The existing section 36(1) of the *Lands Act* would be eliminated, and the remaining sections (36(2) through (4)) would be renumbered.

The new section 36(1) would confirm that title would vest after a period of forty continuous years.

The newly-numbered subsections 36(2) and (3) would address the issuance of grants by the Minister or Lieutenant-Governor in Council, where adverse possession of the Crown is proven in one of three ways:

- By adverse possession for the 40 year period,
- By registered title for at least 40 years,
- By paying municipal property taxes for 20 years.

Section 36.1 would create an administrative process allowing the Minister to delegate authority to issue quitclaim deeds on existing registered title. Such applications would be accompanied by a title search and survey, for the Minister's delegate to review. If an application is denied under this part, it is denied without prejudice to any rights to apply for an ordinary grant or to seek a Quieting of Titles Application at Supreme Court. The draft legislation presented sets a ten-year window to harmonize existing registrations into Crown quitclaims.

Consequential amendment of the *Quieting of Titles Act* would mirror the provisions for issuance of a grant, allowing the Court to issue a Certificate of Title where the Applicant proves compliance with those conditions.

Consequential amendments to municipal-level legislation would require notice of a municipal tax sale to be served on the Crown where there is no express release of the Crown's interest already, and for the tax sale to provide clear title to a purchaser.

AN ACT TO AMEND ADVERSE POSSESSION AGAINST THE CROWN

1. Section 36 of the *Lands Act* is repealed and the following substituted:

36. (1) The period of possession of Crown land, 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, 40 continuous years.

(2) The Lieutenant-Governor in Council may, upon being satisfied that

(a) a person has acquired an interest in Crown lands under subsection (1);

(b) evidence of a bona fide claim on the lands has been registered at the Registry of Deeds for a period of at least 40 years; or

(c) the lands have been assessed for municipal property taxes other than as Crown land by a municipal government for a period of at least twenty years;

instruct the minister to issue a grant to that person in respect of those lands, and that grant may be issued subject to those charges, exceptions or qualifications that the Lieutenant-Governor in Council may direct.

(3) Where the Crown lands affected by this section contain 10 hectares or less, the minister may issue a grant, upon being satisfied that

(a) a person has acquired an interest in Crown lands under subsection (1);

(b) evidence of a bona fide claim on the lands has been registered at the Registry of Deeds for a period of at least 40 years; or

(c) the lands have been assessed for municipal property taxes other than as Crown land by a municipal government for a period of at least twenty years;

and the grant may be issued subject to those charges, exceptions or qualifications that the minister may decide.

2. The *Lands Act* is amended by adding immediately after section 36 the following:

36.1 (1) An individual in possession of land pursuant to a title document registered at the Registry of Deeds prior to the date of coming into force of this section, or whose claim of ownership of such land is rooted in a title document registered at the Registry of Deeds prior to the date of coming into force of this section, may apply to the Minister for a quitclaim deed from the Crown within ten years of this section coming into force.

(2) An application under this section shall be accompanied by an abstract of title and a survey to current standards.

(3) Where the Minister is satisfied that the abstract of title defeases the Crown of the land, the Minister may issue a quitclaim deed to the applicant, releasing any interest of the Crown in the land, which shall be recorded at the Registry of Crown Lands.

(4) The Minister may conduct any further investigation of any application as he or she may deem appropriate, and the Applicant shall be given notice of any questions, issues, challenges or objections raised by the Minister and provided an opportunity to reply.

(5) The Minister may issue a quitclaim deed on such terms and by such standards as the Minister may deem appropriate, and subject to such charges, exceptions and qualifications as the Minister may decide.

(6) No appeal lies from the decision of the Minister under this section.

(7) A determination against an Applicant under this section shall not prejudice any further application made under this Act or the Quieting of Titles Act.

(8) The Minister may delegate the powers and duties conferred on him or her by this section, and that person or those persons to whom such powers and duties are delegated may exercise the Minister's authority under this section, and all references to the Minister in this section shall include any delegate of the Minister.

3. Section 13(3)(b) of the Quieting of Titles Act is repealed and the following substituted:

(b) that subsection 36(1), (2) or (3) of the *Lands Act* applies to the lands affected by the application.

4. The Municipalities Act is amended by adding immediately after section 140(1)(b) the following:

(c) Where title to the real property is not rooted in an instrument from the Crown releasing the Crown's interest or a Quieting of Titles Certificate, written notice of the sale of the property shall be served upon the Crown.

5. Section 147 of the Municipalities Act is repealed and the following substituted:

147. The conveyance referred to in section 146 shall be conclusive evidence that the provisions of this Act with reference to the sale of the real property described in that conveyance have been fully complied with, and everything necessary for the legal perfection of that sale has been performed, and shall have the effect of vesting the real property in the purchaser, his or her executors, administrators or assigns absolutely free from encumbrances except an easement.

6. The City of Corner Brook Act is amended by adding immediately after section 162.4(1)(b) the following:

(c) Where title to the real property is not rooted in an instrument from the Crown releasing the Crown's interest or a Quieting of Titles Certificate, written notice of the sale of the property shall be served upon the Crown.

7. Section 162.11 of the City of Corner Brook Act is repealed and the following substituted:

The conveyance referred to in section 161.10 shall be conclusive evidence that the provisions of this Act with reference to the sale of the real property described in that conveyance have been fully complied with, and everything necessary for the legal perfection of that sale has been performed, and shall have the effect of vesting the real property in the purchaser, his or her executors, administrators or assigns absolutely free from encumbrances except an easement.

8. The City of Mount Pearl Act is amended by adding immediately after section 161.4(1)(b) the following:

(c) Where title to the real property is not rooted in an instrument from the Crown releasing the Crown's interest or a Quieting of Titles Certificate, written notice of the sale of the property shall be served upon the Crown.

9. Section 161.11 of the City of Mount Pearl Act is repealed and the following substituted:

The conveyance referred to in section 161.10 shall be conclusive evidence that the provisions of this Act with reference to the sale of the real property described in that conveyance have been fully complied with, and everything necessary for the legal perfection of that sale has been performed, and shall have the effect of vesting the real property in the purchaser, his or her executors, administrators or assigns absolutely free from encumbrances except an easement.

IX. Appendix A

Discussion Paper: CBA-NL Legislation and Law Reform Committee, Subcommittee on Section 36 of the *Lands Act, 1991*

I. Introduction

The section under examination in this Committee is section 36 of the *Lands Act*, which reads as follows:

> ***36.*** *(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 immediately prior to January 1, 1977.*
>
> *(3) The Lieutenant-Governor in Council may, upon being satisfied that*
>
> *(a) a person has acquired an interest in Crown lands under subsection (2); and*
>
> *(b) the lands have been in continuous use for agricultural, business or residential purposes or for a purpose referred to in section 9 for a 20 year period immediately prior to January 1, 1977,*
>
> *instruct the minister to issue a grant to that person in respect of those lands, and that grant may be issued subject to those charges, exceptions or qualifications that the Lieutenant-Governor in Council may direct.*
>
> *(4) Where the Crown lands affected by this section contain 30 hectares or less, the minister may issue a grant, upon being satisfied that*
>
> *(a) a person has acquired an interest in Crown lands under subsection (2); and*
>
> *(b) the lands have been in continuous use for agricultural, business or residential purposes or for a purpose referred to in section 9 for a 20 year period immediately prior to January 1, 1977,and the grant may be issued subject to those charges, exceptions or qualifications that the minister may decide.*

Of particular concern to the Committee is section 36(2), which sets the period of adverse possession against the Crown as a set period of twenty continuous years prior to 1977, being a fixed period from December 31st, 1956 to January 1st, 1977.

This restriction was first passed by the House of Assembly in May of 1976, taking effect on January 1st, 1977. Prior to that amendment, the period for adverse possession of the Crown was sixty continuous years, a rule which had stood since the early 19th century.

II. Issues identified in membership inquiry

In November of 2020, the CBA-NL reached out to the membership at large, and also to specific members in real estate practice, to obtain general opinions on the section 36 matter. The major issue faced by membership is that a substantial amount of land in Newfoundland and Labrador is rooted in adverse possession against the Crown. This section creates a strict limitation period that can be difficult to prove and, in some cases, may be impossible to meet. Among comments submitted from the membership:

- The current system penalizes those who try to rectify their title, while those who take no action can continue to possess land without hindrance. Crown Lands does not investigate all land title, but only those which are brought to its attention. It is more hazardous for people to attempt to fix their problems than to ignore them.

- The lack of past prosecution or efforts by the Crown to enforce against unlawful possession has led thousands of people to develop land in an honest belief in the acceptance of their own ownership of it. The Crown only takes issue if approached due to a title defect, and, but for these inquiries, would never become involved otherwise.

- The public at large is not aware of the extent of the Crown Lands problem, until they are required to sell or mortgage land. Only at that time do people learn of any issue with their title. The public does not understand why the Crown is "taking their land" which neither the occupier nor the community believe to be Crown Land.

- The current system imposes high transaction costs on basic real estate transactions. This frustrates development and the purchase and sale of property, and creates an inefficient use of land where the cost of certifying title is high or the likelihood of success is uncertain.

- In many small communities, there are few people alive and of sound mind who can give affidavits for the period from 1956 to 1977. Being able to give affidavits for that period requires an individual to be old enough in 1956 to appreciate the nature of land possession at that time. It also requires the individual to be familiar with the land for the full twenty year period, which can be difficult in smaller towns where people had gone away to work over the years.

- There is a tension between individuals' beliefs in their own land claims, community knowledge and acceptance of private claims, and Crown recognition of private claims. Many communities suffer from private land disputes between neighbours which arise primarily from the lack of surveying and record keeping, which hinders the ability to fully resolve land issues on a private level. This complicates resolving Crown lands issues.

- Crown title issues are impeding both the development and alienation of property. Lawyers appear to differ between themselves about what constitutes sufficient proof for divesting the Crown, and there appears to be reluctance in some cases about accepting affidavits of possession without first obtaining a release from the Crown or a Quieting.

- Communities have been settled in this province for 500 years, and have rich histories of occupation and community acceptance of title, which are disregarded by the 1956-77 period. The history of ownership and occupation of land may be understood and appreciated at a community level, but not recognized at a provincial level.

- The cutoff period of 1956 to 1977 was only imposed in 1976. Many people throughout Newfoundland built on their land prior to the legislative changes, and would now be dispossessed of their own properties by a strict application of the 1976 amendments.

- The former system of 60 years possession allowed title to vest where ownership is exercised openly, notoriously, continuously and exclusively. Possession exercised for that long without objection should be recognized. One member noted that going back 60 years from the current date would only require history back to 1960, as opposed to the current requirement of 1956.

- Land claims which are documented and recorded in the Registry of Deeds may not be based on actual possession, such as the sale of vacant land. Claims premised on a chain of paper title may be defeated by requiring possession for the 1956-1977 period, notwithstanding that the title work may have been done to the standards of the time.

- There are concerns about "constructive expropriation" of private land based on the old standard of 60 years' possession against the Crown, as the law existed before 1976. People whose land claims are based on possession for a 60 year period prior to 1976, where possession ended before 1977, would lose their interest in the land which would have vested prior to 1977.

- Crown Lands claims do not accord with municipal records. Many private land claims, which are being assessed for taxation by the Municipal Assessment Agency and municipal governments, are often rooted in possessory title. One member highlighted a recent case where the Crown intervened to object to title held by an individual who bought land from a municipality on a tax sale twenty years ago. Crown Lands objections to private claims create tension between the municipal and provincial levels of government. This undermines the ability of municipal governments to deal with property tax arrears via tax sales.

- Individuals have also run into the opposite problem applying for Crown Grants for unoccupied land because in some cases the Crown will acknowledge being dispossessed by an unknown individual, but the community cannot agree on the existence of the

historical claim. In these instances, it is not the Crown asserting title against an occupier, but the Crown will also not acknowledge itself as owner.

- A number of Crown titles were destroyed in the 1892 fire, and a number of grants that are in Crown Lands' possession are unmapped today. The Crown may be uncertain of its own land holdings due to uncertainty about interests conveyed in the past, which may lead to inappropriate intervention.

- Individuals pursuing Quieting of Titles Applications based on their honest belief in their own title are faced with unanticipated Crown objections. The Crown will not relinquish its claim without a discontinuance of the Quieting, into which applicants have sunk thousands of dollars in pursuit of their reasonably held claim, and which has passed an initial review by the Court prior to the advertising notice.

- Current policies and determinations of Crown Lands are at odds with past practice, creating circumstances where adjacent parcels of land will be treated differently. One member referenced a situation involving two adjacent Quieting Applications in the St. John's area where an earlier quieting was granted but a later quieting was denied, both having the same root of title.

- One member raised concern about the Crown not recognizing lawyer-certified title for grant application purposes. The individual reported that Crown Lands would not recognize title which was certified and registered 30 years ago because it did not appear in the Crown Lands mapping as a quieting or a grant.

- Title insurance has become increasingly common in real estate transactions, but members report that title insurers are reluctant to cover against claims of the Crown.

III. Possible solutions

Several suggestions were offered by members, including:

1. A return to the 60 year limitation period that existed before 1977;

2. Treating the Crown no differently than any other landowner, and applying the ten-year limitation period under the *Limitations Act*;

3. A rolling limitation period of greater than 10 years but less than 60 years, with different periods applicable for land within municipalities (e.g. 10 year dispossession period within a municipality, and 30 years outside);

4. Fixing a later cutoff date for the abolition of adverse possession against the Crown (e.g. for any 20 year period prior to January 1st, 1997);

5. A "constructive notice" system, where documents or municipal records registered for a certain length of time or before a certain date will be recognized as dispossessing the Crown;

6. Recognition of dispossession of the Crown on municipal tax sales;

7. A policy of deference to private land claims asserted in areas of longstanding settlement;

8. Setting a deadline for the public to survey and register land claims;

9. A similar process to the *Leaseholds in St. John's Act*, creating a statutory administrative process for Crown quitclaims for nominal payment;

10. A general amnesty for those already in possession of property to apply for a free grant where title is already registered or certified;

11. Creating a procedure for acquiring land via quitclaim in Quieting of Titles Applications where the Crown objects;

12. Synchronizing the Registry of Deeds and Land Use Atlas to map out all known land claims in one system;

13. Movement toward a Land Title system.

X. Appendix B

Newfoundland and Labrador Land Use Atlas Screenshots

- Bay Roberts
- Bonavista
- Carbonear
- Conception Bay South
- Harbour Grace
- St. John's (Downtown)
- St. John's (East End)
- Torbay
- Trinity

Places, Locations and Address

Amies Pond

Shearstown Pond

Beachy Cove

Bay Roberts Harbour

Beachy Cove

The Coish

Bay Roberts

North West Arm

Coley's Point

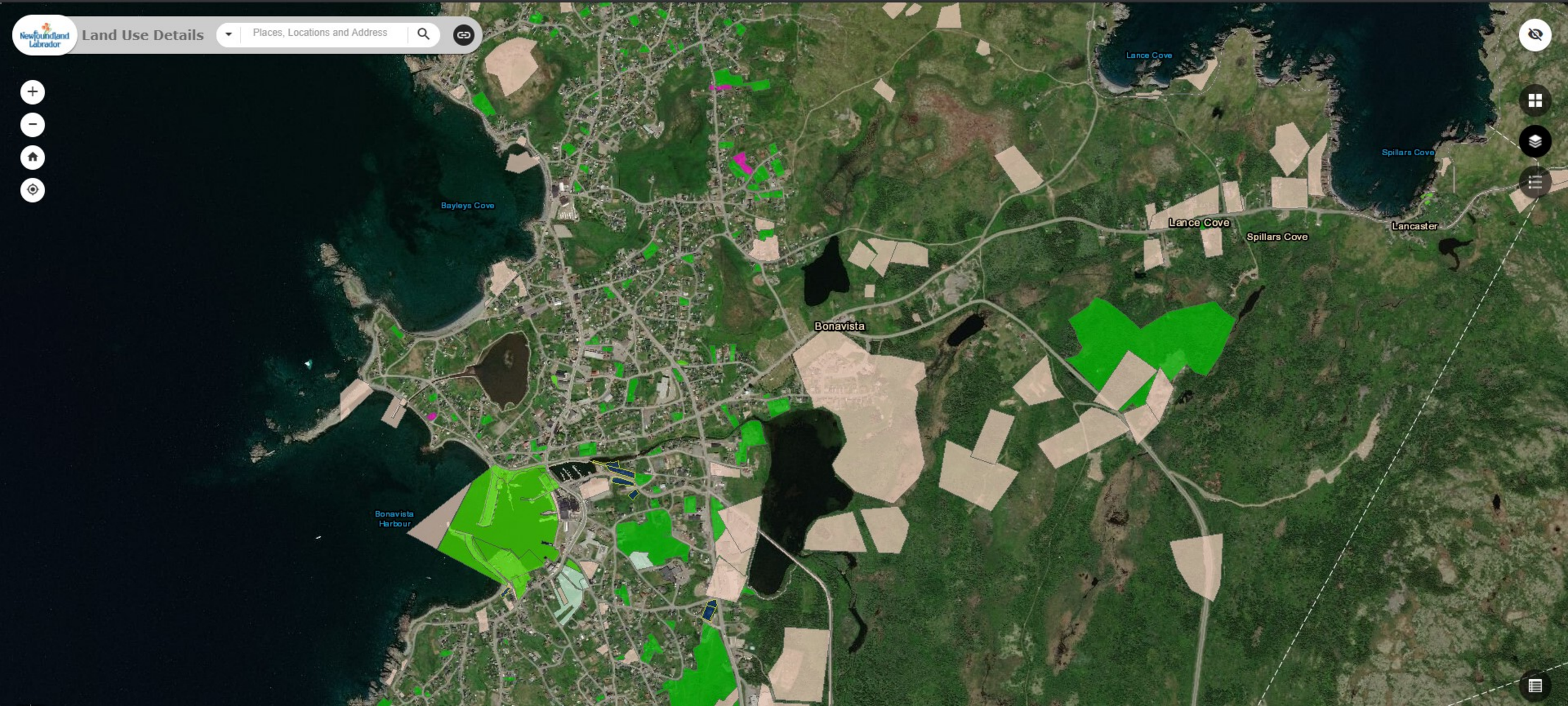
South West Bay

Long Beach

Long Beach Pond

Country Road

Earthstar Geographics | Province of Newfou


Land Use Details
Places, Locations and Address
Lance Cove
Spillars Cove
Bayleys Cove
Lance Cove
Spillars Cove
Lancaster
Bonavista
Bonavista Harbour

Land Use Details

Places, Locations and Address

Newfoundland and Labrador

Carbonear

Crockers Cove

Crockers Cove

Burnt Head Cove

Carbonear

Long Beach

The Ponds

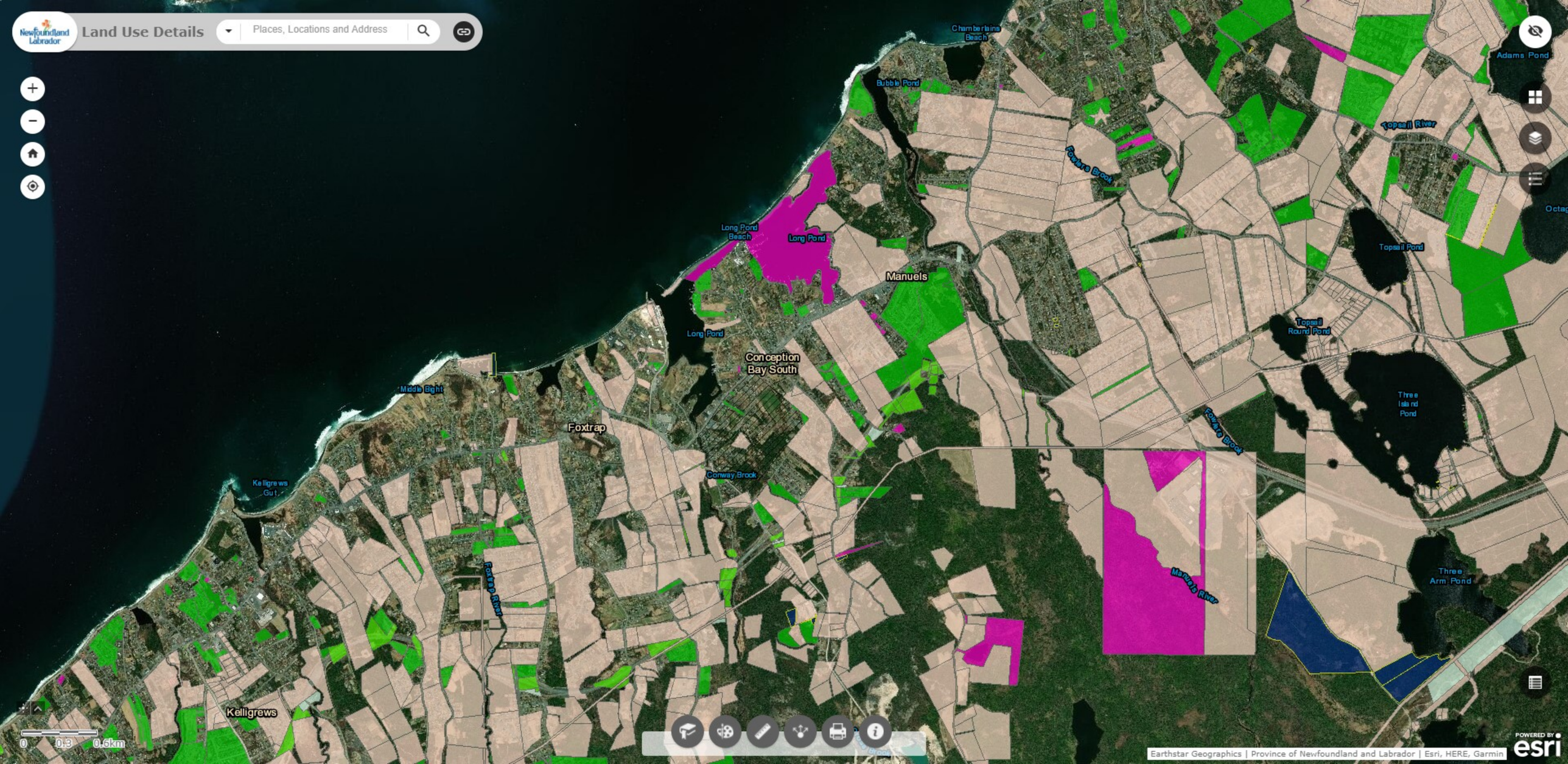
Carbonear Bay

Island Pond Brook

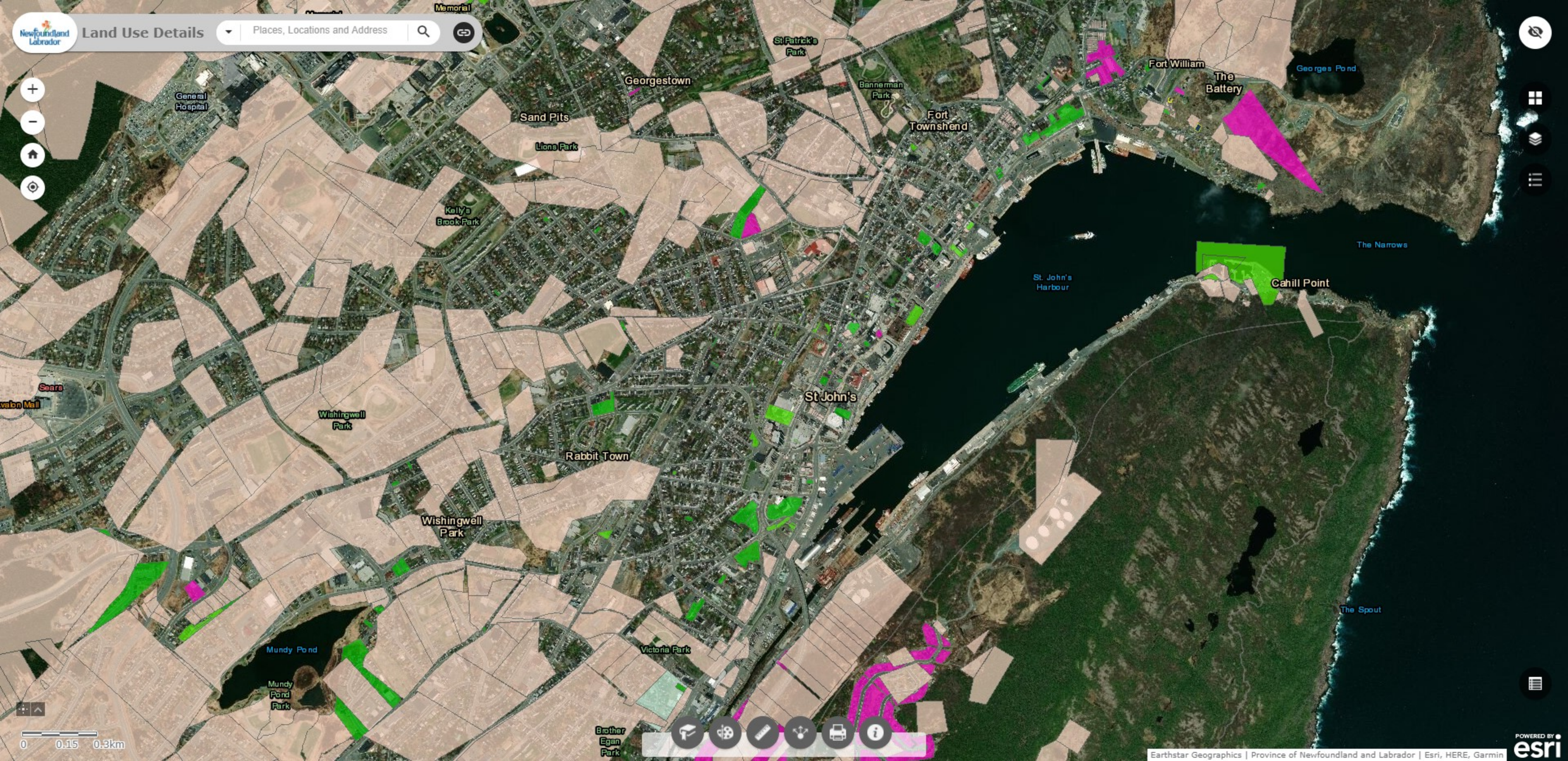
Pynns Beach

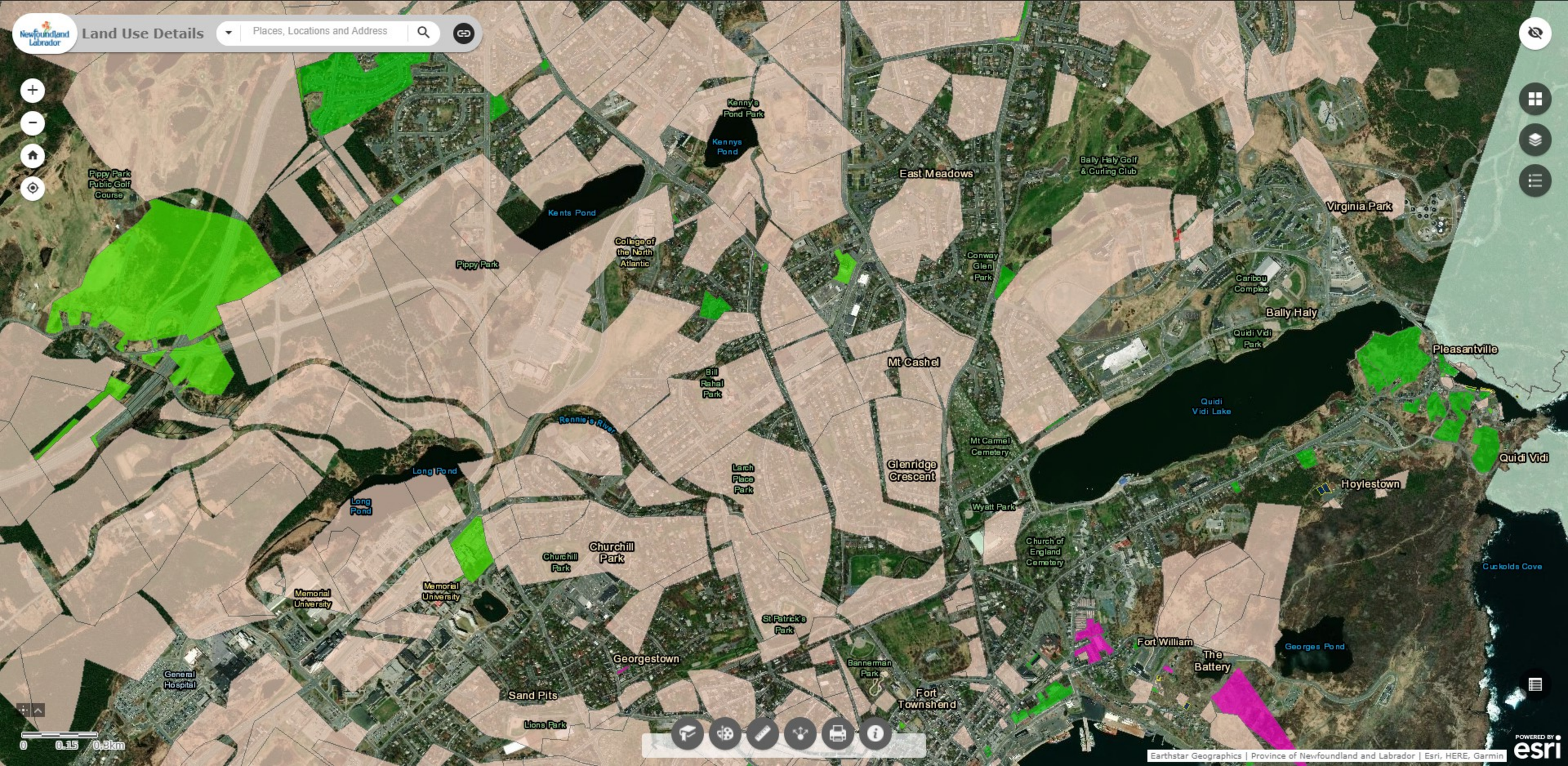
Carbonear General Hospital

Powells Brook

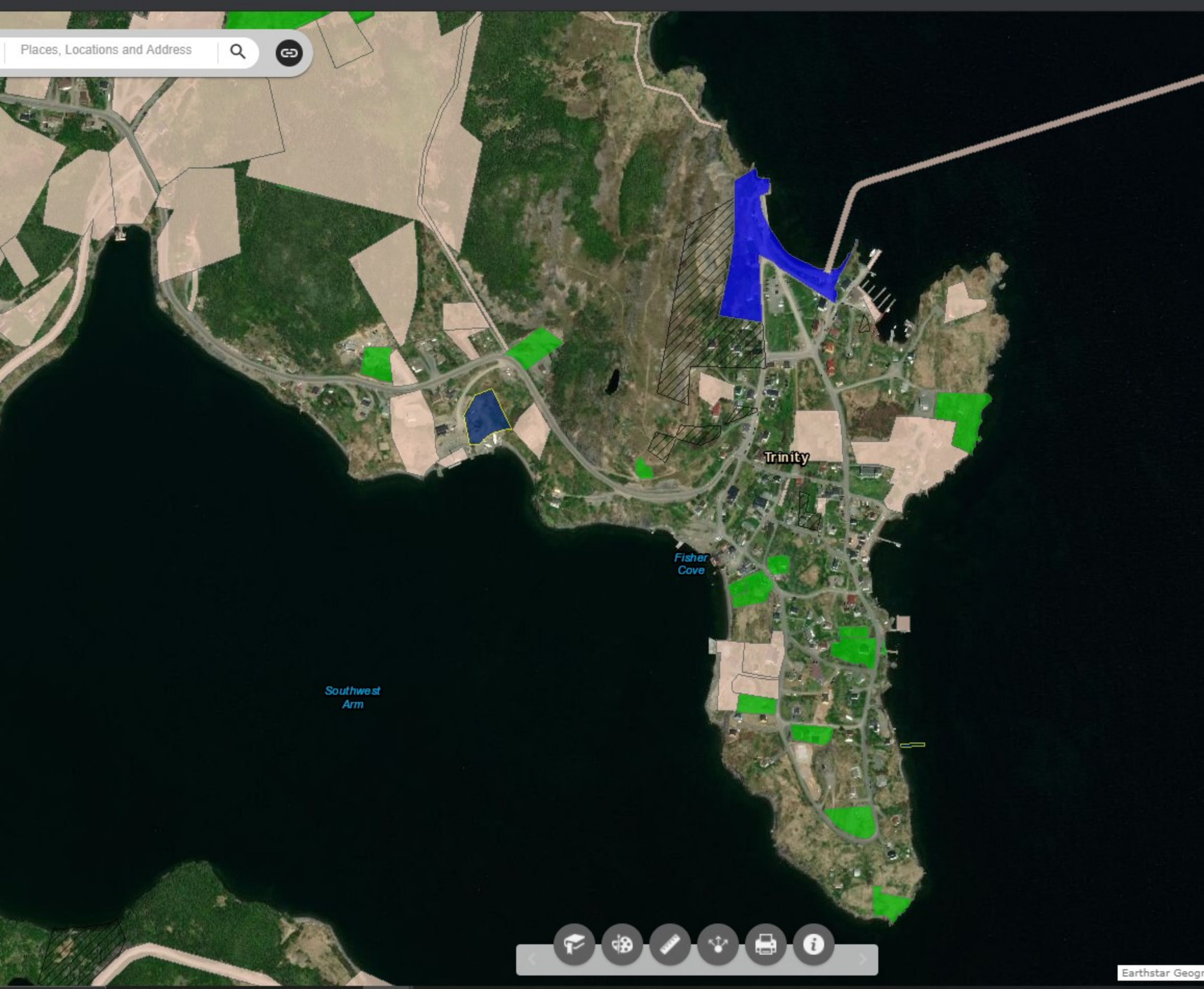

Land Use Details
Places, Locations and Address
Chamberlains Beach
Bubble Pond
Adams Pond
Topsail River
Fowlers Brook
Octag
Long Pond Beach
Long Pond
Manuels
Topsail Pond
Topsail Round Pond
Long Pond
Conception Bay South
Three Island Pond
Middle Bight
Foxtrap
Fowlers Brook
Kelligrews Gut
Conway Brook
Foxtrap River
Manuels River
Three Arm Pond
Kelligrews
0 0.3 0.6km
Earthstar Geographics | Province of Newfoundland and Labrador | Esri, HERE, Garmin
POWERED BY esri


Land Use Details
Places, Locations and Address
Mosquito Brook
Doyle's Brook
Bears Cove
Caplin Cove
Lady Lake
Bowe's Brook
Harbour Grace
Lady Lake
Stevensons Village
Courages Beach
Harbour Grace
Harbour Grace South
Parsons Cove
0.15
0.3km
Earthstar Geographics | Province of Newfoundland and Labrad


Land Use Details
Places, Locations and Address
Memorial
St Patrick's Park
Georgestown
Bannerman Park
Fort William
The Battery
Georges Pond
General Hospital
Sand Pits
Fort Townshend
Lions Park
Kelly's Brook Park
The Narrows
St. John's Harbour
Cahill Point
Seara
Wishingwell Park
St John's
Rabbit Town
Wishingwell Park
The Spout
Mundy Pond
Victoria Park
Mundy Pond Park
Brother Egan Park
0 0.15 0.3km
Earthstar Geographics | Province of Newfoundland and Labrador | Esri, HERE, Garmin
POWERED BY esri


Land Use Details
Places, Locations and Address
Kenny's Pond Park
Kennys Pond
Pippy Park Public Golf Course
Kents Pond
College of the North Atlantic
Pippy Park
East Meadows
Bally Haly Golf & Curling Club
Virginia Park
Conway Glen Park
Caribou Complex
Bally Haly
Quidi Vidi Park
Pleasantville
Mt Cashel
Bill Rahal Park
Quidi Vidi Lake
Rennie's River
Mt Carmel Cemetery
Glenridge Crescent
Larch Place Park
Long Pond
Hoylestown
Quidi Vidi
Wyatt Park
Church of England Cemetery
Churchill Park
Memorial University
Cuckolds Cove
St Patrick's Park
Fort William
The Battery
Georges Pond
Bannerman Park
Georgestown
General Hospital
Sand Pits
Fort Townshend
Lions Park
0 0.15 0.3km
Earthstar Geographics | Province of Newfoundland and Labrador | Esri, HERE, Garmin
POWERED BY esri


Land Use Details
Places, Locations and Address
Watts Pond
Tor Bay
Great Pond
Withrod Pond
Torbay Bight
Kinaman Ballfield
Whiteway Pond
Torbay
North Pond Brook
North Pond Heights
Newton
Birchy Nap
Torbay
Robins Pond
Jones Pond
Middle Cove
Island Pond Brook
Outer Cove
0 0.15 0.3km
Earthstar Geographics | Province of Newfoundland and Labrador | Esri, HERE, Garmin
POWERED BY esri


Places, Locations and Address
Trinity
Fisher Cove
Southwest Arm
Earthstar Geogr

XI. Appendix C

Newfoundland and Labrador Land Use Atlas Screenshots

- Corner Brook
- Deer Lake
- L'Anse au Clair
- Happy Valley-Goose Bay


Land Use Details
Places, Locations and Address
Corner Brook
O'Rourke Brook
Western Memorial Regional Hospital
Glynmill Pond
Corner Brook
Blomidon Golf & Country Club
St. Mary's Brook
Deep Gulch Brook
Memorial University-Grenfell Campus

Land Use Details

Places, Locations and Address

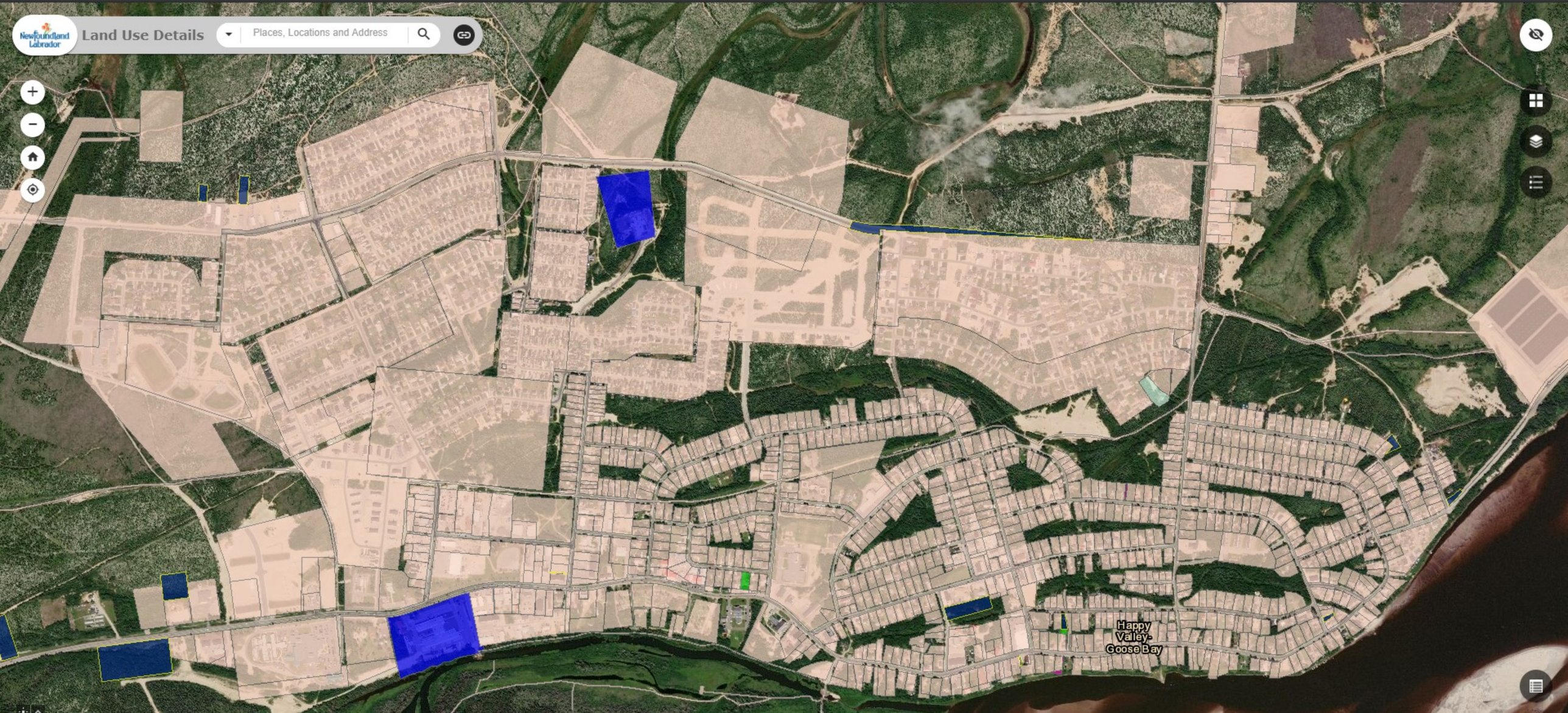
Nicholsville

Deer Lake

Deer Lake

Newfoundland and Labrador


Land Use Details
Places, Locations and Address
L'Anse-
au-Clair


Land Use Details
Places, Locations and Address
Happy Valley-Goose Bay

Contact: Ashley Woodford, Executive Director

Canadian Bar Association – Newfoundland and Labrador Branch

107 - 55 Elizabeth Avenue

St. John's, NL A1A 1W9

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