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Greg French*

# The Doctrine of Lost Modern Grant and Prescriptive Easements in Newfoundland

*This article examines the history and development of prescriptive easements in Newfoundland and Labrador, and the legal standards required to find such an easement to exist. The article concludes that the appropriate inquiry is not merely an examination of the length of use, but also the nature and extent of use, and that rigid application of timelines should not apply.*

*L'auteur examine les origines et le développement des servitudes acquises par prescription à Terre-Neuve-et-Labrador ainsi que les normes juridiques nécessaires pour conclure qu'une telle servitude existe. Il conclut que la recherche appropriée ne doit pas se limiter à un simple examen de la durée d'utilisation, mais qu'elle doit aussi porter sur la nature et la portée de l'utilisation et que l'application rigide des délais ne devrait pas s'appliquer.*

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*Introduction*

The legal concept of an easement is well known to anyone who has studied property law: a non-possessory right of use of land, benefitting one parcel of land (the dominant tenement) with a right of use of another parcel of land (the servient tenement). The owner of the dominant tenement who acquires such right does not become the owner of the servient land, but nevertheless maintains an interest in the use of the servient land. It is an incorporeal right—an intangible right that does not convey an ownership interest.[1] Accordingly, it does not require such stringent use as the open, notorious, continuous and exclusive use demanded to obtain an ownership interest in property by adverse possession.[2] Easements by prescription are those that are obtained through adverse use, in much the same way as adverse possession establishes title.

The seminal Newfoundland case on establishing a prescriptive easement is *Henley v. Ryan*.[3] This case involved a dispute relating to the use of a common parking area between two homes in St. John's. In determining whether or not such a prescriptive right arose, Steele C.J.D.C. canvassed thoroughly the texts on the law of real property to provide a thorough analysis of the law on prescriptive easements, which is still relied on today.[4]

*Henley* establishes the rules for establishing a prescriptive easement. Such use must be *nec vi* (without violence), *nec clam* (not secretly), and *nec*

1. See *Black's Law Dictionary*, 8th ed, *sub verbo* "hereditament, incorporeal"; *Dictionary of Canadian Law*, 3rd ed, *sub verbo* "incorporeal hereditament." *Cf* definition of "corporeal hereditament" as "a material object in contrast to a right," and refers to tangible items and property capable of possession in *Dictionary of Canadian Law*, *supra* at 276.
2. Bruce Ziff, *Principles of Property Law*, 3rd ed (Toronto: Carswell, 2000) at 353.
3. (1980), 25 Nfld & PEIR 431 (DC) [*Henley*], per Steele CJDC, as he was then.
4. See *Bussey v Maher*, 2006 NLCA 44, 256 Nfld & PEIR 308; *Skiffington v Linthorne*, 2014 NLTD(G) 103, 374 Nfld & PEIR 10; *Cooper v Dawe*, 2015 NLTD(G) 15, 364 Nfld & PEIR 336.

*precario* (without permission).[5] Such use should be distinguished from the more onerous standards for establishing an ownership interest in land by adverse possession—possession that is open, notorious, continuous and exclusive[6]. A simple point of contrast is exclusivity—ownership requires exclusion of the true owner; an easement simply requires non-permitted use, or as discussed in other case law, "continuous acts of trespass."[7] While adverse possession is said to be a collection of intense and frequent acts of trespass, lesser trespass without exclusivity gives rise to a prescriptive easement. It is not ownership, but a right of use that arises.

In determining whether or not a prescriptive easement is established, Steele C.J.D.C. identified three legal methods by which prescriptive rights can be obtained:

1) Pursuant to a prescriptive statute;
2) Claim based on "lost grants"; and
3) Prescription at common law.[8]

Unlike most other provinces, Newfoundland had no prescriptive statute, neither at the time of *Henley*, nor at the time of writing. The date of reception of English law in Newfoundland has long been established to be 26 July 1832.[9] The first legislation of England to address prescriptive easements was the *Prescription Act, 1832*, which passed on 1 August 1832.[10] By the separation of five days, the *Prescription Act, 1832* was not received into Newfoundland law. The first method thus had no application.

There is some lack of clarity in *Henley* in distinguishing between the latter two methods, and the two appear almost conflated as one. A "lost grant" claim is premised on the maxim "*omnia praesumuntur rite et sollemniter esse acta*"—such peaceably enjoyed use is presumed to have its basis in lawful origin.[11] What is omitted in *Henley* is the root of

5. *Supra* note 3.
6. The contrast between establishing a prescriptive easement versus establishing adverse possession is discussed at length in *Bussey v Maher*, *supra* note 4, and *Fowler v Atlantic Developments Inc*, 2013 NLCA 58, 342 Nfld & PEIR 189.
7. *Re Ellis*, [1997] NJ No 211, at paras 163-164, 154 Nfld & PEIR 271.
8. *Henley*, *supra* note 3 at para 25.
9. See *Buyer's Furniture Ltd v Barney's Sales and Transport Ltd* (1983), 43 Nfld & PEIR 158, 27 APR 158 (CA); *Roy v Legal Aid Commission (Nfld)* (1994), 116 Nfld & PEIR 232, 363 APR 232 (TD); *Babstock v Atlantic Lottery Corporation Inc*, 2014 NLTD(G) 114, at para 83, 1108 APR 293. This marks the date of the establishment of the colonial legislature in Newfoundland, and thus the date at which Newfoundland was able to legislate independently: see *Young v Blaikie* (1822), 1 Nfld LR 277, as to discussion of the principle (a case which predates reception).
10. (1832) 2 & 3 Will IV, c 71. The date of enactment is noted on the UK Government's legislation website, online: <www.legislation.gov.uk>.
11. *Henley*, *supra* note 3 at para 29, citing *Chesire's Modern Law of Real Property*, 12th ed (London, UK: Butterworth & Co, 1976) at 538-540.

"common law prescription," which rests on use since time immemorial. Under the strictures of law, the phrase "time immemorial" is not merely a poetic turn of phrase for long forgotten use; it is a term of art with a particular legal meaning. Specifically, it refers to the date of "legal memory," which is established by statute as beginning in A.D. 1189 with the commencement of the reign of Richard I.[12] Indeed, the purpose of the passage of England's *Prescription Act, 1832* was precisely to avoid the strictures of prescription at common law, which, by the date of passage of such legislation, would have required tracing the use of an easement back for almost 650 years.[13] Accordingly, since no use in Newfoundland can be traced back to the origin of legal memory in A.D. 1189, common law prescription is unavailable in this province.[14] As noted above, Newfoundland did not receive the *Prescription Act, 1832*, and it does not form part of the law of that province. Thus, its amendment to the legal definition of "time immemorial" was neither received from England nor adopted by domestic enactment. Prescription at common law thus does not exist there. As confirmed by the Newfoundland and Labrador Court of Appeal, the only method by which a prescriptive easement can be established is through the doctrine of lost modern grant.[15]

### I. *The twenty-year period*

In the provinces where prescriptive easements still exist, many provinces have simply opted for a legislative solution through the passage of their own version of the English *Prescription Act, 1832* or incorporation of the terms of the *Act* into limitations legislation.[16] Case law from other jurisdictions thus finds its roots in the *Prescription Act, 1832* or its domestic progeny, which set a strict twenty-year threshold for the establishment of a prescriptive easement.

The origin of the twenty-year standard of measurement for determination of a lost modern grant finds its roots in old English case

12. See the preamble to the *Prescription Act, 1832*, *supra* note 10. The commencement of the reign of Richard I as the date of legal memory was statutorily set: see the *Statute of Westminster* (1285) 3 Edw I, c 39.

13. *Ibid*, at the preamble.

14. *Franklin v St John's (City)* 2012 NLCA 48, 325 Nfld & PEIR 38, at paras 33-34 (CA) [*Franklin*]. Note that this decision confirms the applicability of the *Statute of Westminster*'s commencement of "time immemorial" at AD 1189.

15. *Ibid*, at para 34.

16. See *Easements Act*, RSNB 2011, c 143; *Limitations of Actions Act*, RSNS 1989, c 258, s 32; *Real Property Limitations Act*, RSO 1990, c L-15, s 31. Manitoba inherited the *Prescription Act, 1832* by virtue of its date of reception in 1870, and no legislative alternative has been made: see *Bank of Montreal v Superior Management Ltd*, 2010 MBQB 244 at paras 32-33, [2010] MJ No 337 and cases cited therein. The remaining provinces, apart from PEI, have statutorily abolished prescription.

law.[17] Prior to the passage of the *Prescription Act, 1832*, the twenty-year rule arose as a jury charge: a jury was permitted to find an easement's origin in a grant if use was established for twenty years.[18] This was not a question of looking for an actual deed, but a mere licence to presume one.[19] Nor was it a requirement that twenty years' use would automatically result in a presumptive deed, but that a jury may infer such if not inconsistent with the surrounding circumstances of use and the facts presented.[20]

This criterion was elaborated upon in a later decision, as the proper course of jury instruction would be to advise that a jury was at liberty to presume that, upon proof of twenty years' use, an easement could be of lawful origin.[21] It was not a mandatory determination, but a rule of thumb that allowed a jury a licence to presume lawful origin that could not otherwise be proven. Such an approach is consistent with the general approach to adverse possession that "grants, letters patent, and records may be presumed from length of time. It was so laid down in Lord Coke's time [citing *Bedle v. Beard* (1607), 12 Rep. 4] as undoubted law at that time, and in modern times has been adopted to its fullest extent."[22] However, it is not the mere passage of time that is relevant, but the active use. This has been the law of England for many years, that "no rule that has established that mere length of time will bar," however "every presumption, that can fairly be made, shall be made against a stale demand."[23] Contemporary treatises on evidence from the early 19th-century confirm such understanding, that absent a statutory limitation period, time alone does not bar a claim, but affords such "practical efficacy" on "considerations of policy and convenience."[24] Such an approach remained controversial at law, characterized as "a revolting fiction" that required a jury to disregard its oath and recognize a grant that was understood not to exist in fact, and a "scandal on the administration of justice."[25]

Indeed, in English case law, the approach remained consistent that the circumstances of the case had to be analyzed before making such a

17. An excellent source for the history of the lost modern grant can be found in Alan Dowling, "The Doctrine of Lost Modern Grant" (2003) 38:1 Jur 225. The author is indebted to Dr. Dowling's research in location early cases of point.
18. *Livett v Wilson* (1825), 3 Bing 115, 130 Eng Rep 457.
19. *Ibid* at 459.
20. *Ibid* at 459 per Best CJ.
21. *Tenny d Whinnet v Jones* (1833), 10 Bing 75, 131 Eng Rep 833.
22. *Read v Brookman*, 3 TR 158.
23. *Pickering v Lord Stamford* (1794), 2 Ves Jr 282.
24. Thomas Starkie, *A Practical Treatise of the Law of Evidence*, Vol II, Part II, 7th American ed from the 3rd London ed (Philadelphia PA: T & JW Johnson, Law Booksellers, 1842) at 914.
25. Dowling, *supra* note 17 at 225, citing various 19th-century cases.

presumption.[26] When dealing with such claims as prescriptive easements, the approach has been to look to the circumstances, consider the alleged use and its duration, and determine if such use gives rise to the resumption. Forbearance from a demand to cease and desist affords a presumption that the affected party intended to relinquish it or was satisfied to grant same; thus the presumption of "lost grant" arises.[27] Early cases looked not just to the element of twenty years' use, but as well the "cautious or imprudent character of the supposed grantor [would] be receivable [in evidence]," since if a grant is to be presumed, it is not mere length of such use that is material but the actions surrounding the inference of a grant of right.[28] A grant does not rely on use to be valid; rather, it relies on the intention of the grantor in making same. By extension, the nature of the use that was not interrupted by the landowner would be evidence of intention. A frequent, intensive use which continued without interruption would give rise to the imputation of such intention. A prudent landowner would presumably take action against regular, frequent, intensive trespass. Although early cases do not reflect marginal cases of intensive use for periods of less than twenty years, such an undercurrent can be detected in the early common law, which treats duration of use as a factor, using the twenty-year mark as a convenient legal fiction and "line in the sand" for a jury's guidance.

In Newfoundland, such case law and history likely did not escape notice from those educated in English law, although no citations are made to the same in the reported cases. In the case of *Casey v. Hamlin*, the court dealt with an obstruction to a plaintiff's alleged right-of-way across the defendant's land.[29] In that case, it was the plaintiff who had pled an uninterrupted exercise of the right-of-way for twenty years.[30] It is clear from reviewing the decision that this was a jury trial and the decision recounts the instructions to the jury.[31] If so, this would be consistent with the English approach to the doctrine of "lost modern grant," although such is not expressly stated in the decision—understandably so if the decision reflects a judicial instruction to a jury as finder of fact, which need not be complicated by the legal principles and doctrines animating the instruction. The decision merely notes that there was a verdict entered for the plaintiff and nominal damages awarded. This decision does not reflect an in-depth analysis of the law underpinning the reasons.

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26. *Tenny d Winnett v Jones*, *supra* note 21 at 836, per Gaselee J.
27. *Pickering v Lord Stamford*, *supra* note 23; *Tenny d Whinnett v Jones*, *supra* note 21 at 835.
28. *Doe d Fenwick v Reed* (1821), 5 B & Ald 234, 106 Eng Rep 1177 at 1178.
29. (1859), 4 Nfld LR 285.
30. *Ibid* at 285.
31. *Ibid* at 286.

By the same token, the decision of Kent J. in *Murphy v. Murphy*[32] follows both the facts and the approach of the *Casey* decision. In dealing with an obstructed right of way, the plaintiff pled use of the right of way by himself and his predecessors in title for a period of over twenty years; evidence adduced at trial indicated that the use alleged may have gone on for some sixty years.[33] It is noteworthy that there is no discussion of the law or the particular length of time required to establish a prescriptive easement in *Murphy*; rather, the court simply notes that "this passageway has been used by the plaintiff and his predecessors in title *for a period sufficiently long* to entitle him to the right he claims in this action."[34]

Neither *Casey* nor *Murphy* expressly hold that the twenty-year period is determinative in and of itself. Neither was a case on the margins—both involved acknowledged use for at least twenty years. There is no indication in *Casey* that the defendant argued against the period of the plaintiff's alleged use; rather, the defendant's argument dealt with licence and permission.[35] In such circumstances, and quite sensibly, there was no need to delve into the question of whether a period of less than twenty years would suffice to vest the plaintiff with a right-of-way; nobody appears to have asserted that the plaintiff's use was for any shorter period. For the purposes of charging the jury, application of the standard twenty-year period would suffice. Similarly, in *Murphy* (which was not a jury decision, but a trial by judge), the evidence established use for sixty years or more; whether or not a period of less than twenty years would suffice was of no relevance to the court's decision.

There has been some indication in more recent case law that a period shorter than twenty years may suffice. In *Henley*, Steele C.J.D.C. endorses the following excerpt from Halsbury's:

> Unexplained user of an easement or other incorporeal right for a period of twenty years is also held to be presumptive evidence of the existence of the right from time immemorial; but the rule is not inflexible, the period of twenty years being only fixed as a convenient guide.[36]

This passage is relied upon by Steele C.J.D.C. in his determination on the facts of *Henley* that a fourteen-year period of usage was insufficient to give rise to a prescriptive easement.[37] This decision is reached "*notwithstanding*

32. (1933), 13 Nfld LR 132 [*Murphy*].
33. *Ibid* at 133.
34. *Ibid* at 135 [emphasis added].
35. *Supra* note 12 at 285.
36. *Henley*, *supra* note 3 at para 48.
37. *Ibid* at para 49.

*the fact that every presumption is made in favour of long user. I am fully aware that the courts are slow to draw an inference of fact which would defeat a right that has been exercised during a long period.*"[38] To some degree, *Henley* should be looked at in its context—Justice Steele makes reference to "the circumstances of the present case" in finding that a fourteen year period is insufficient.[39] However, the circumstances of *Henley* demonstrate good reason for exercising caution in finding a prescriptive easement on the facts. These include periods of vacancy of the dominant and servient tenements, successions of owners of the servient tenement who may have had no knowledge of the plaintiff's purported easement, lack of evidence of the treatment of the purported easement by previous owners, and insufficient evidence of the actual duration of the plaintiff's use of the easement as a user as of right.[40] Justice Steele held that while the maximum period for the plaintiff's claim of use as of right was fourteen years, "in all probability that period of time may be less."[41]

What, then, should we make of the conclusions in *Henley*? It is evident that Steele C.J.D.C. approached the twenty-year period with an open mind, but that on the facts before him, the use of the alleged easement was too sporadic and insufficiently notorious (based on the evidence presented) to be satisfied with only a fourteen-year period. This is not an endorsement of an all-or-nothing twenty-year approach, but rather a finding of fact relative to the specifics of this case. Fourteen years may have been acceptable, had the use been more intensive and frequent. Since the use as demonstrated at trial did not rise to a relevant level of intensity, more time would have been required. While not explicitly stating this, Steele C.J.D.C.'s analysis and conclusions lead one to conclude that this is the proper approach.[42]

Several years later, the Supreme Court of Newfoundland had the opportunity to review *Henley* in *Bayside Enterprises Ltd. v. Boulos*.[43] There, the plaintiff sought an injunction against the defendant regarding the defendant's use of a roadway. The defendant's use of the subject roadway as of right for a period of thirteen years was held to be insufficient to give rise to a prescriptive easement.[44] However, as in *Henley*, Mahoney J. took a contextual approach and found that "in the circumstances of the present case, 13 years is not enough," and went on to note that he was not even

38. *Ibid.*
39. *Ibid.*
40. *Ibid* at para 51.
41. *Ibid.*
42. *Ibid* at paras 47-51.
43. (1983), 39 Nfld & PEIR 451, 11 APR 451 (TD).
44. *Ibid* at paras 26-27.

satisfied that the defendant had been a user as of right for a thirteen-year period.[45] This again is a contextual inquiry, determined in large part on the facts of the easement claimant's use of the property, to determine whether or not the alleged use rose to a level that could justify a shorter period of use than twenty years.

Some time later, the Supreme Court of Newfoundland had yet another opportunity to review the periods of use necessary to give rise to a prescriptive easement. In *Carew v. Rockwood*, L.D. Barry J. notes that "Steele C.J.D.C. left open whether twenty years of use was necessary at common law or whether it should only be regarded as a convenient guide."[46] Justice Barry conducts a contextual analysis of the alleged use (in that case, a parking easement in a common driveway) to determine if the use alleged would suffice in the period of time during which it occurred. However, further along in the decision, Barry J., in *obiter*, notes that even if there was such use without permission, such use "would have been less than 15 years, an insufficient period to establish an easement," citing to *Henley* and *Bayside* as authority.[47] Perhaps this is intended in the spirit of a contextual analysis, based upon the sporadic and necessarily temporary use alleged (in this case, parking on a disputed six-foot strip of common driveway). However, a statement that use for fifteen years is "an insufficient period to establish an easement" indicates that the twenty-year period may be developing into more of a rule and less of a guideline. Indeed, as recently as 2011, the Supreme Court continued to hold that there was no set time period for use to give rise to a prescriptive easement and that a contextual inquiry relating to use was required to determine an appropriate period.[48]

However, in 2012, the Court of Appeal's decision in *Franklin v. St. John's (City)* seems to indicate a move toward a stricter approach, adhering to the twenty year period of prescription. In *Franklin,* the court states:

> In this province, therefore, the fictional presumption of lost modern grant has now matured into a clear rule, on analogy with limitations legislation: that evidence of uninterrupted user, of the nature described in *Henley v. Ryan*, for a period of at least twenty years with acquiescence (knowledge of the user, coupled with the power to stop it or sue in respect of it, and abstinence from such action or suit) of the owner of the land, will result in an easement by prescription.[49]

45. *Ibid* at para 29.
46. (1993), 112 Nfld & PEIR 299 at para 21, 350 APR 299 (TD).
47. *Ibid* at para 44.
48. *Kennedy v Hickey*, 2011 NLTD(G) 120, 313 Nfld & PEIR 13 at paras 42-44 (TD).
49. *Franklin v St John's (City)*, *supra* note 14 at para 35.

This excerpt from *Franklin* seems clear: the twenty-year period has evolved into a "clear rule." In the earlier cases, the twenty-year period is expressly stated to be a useful guideline, and previous decisions of the District Court and the Supreme Court left open the question of where the line would be drawn. However, later in *Franklin* the court reviews the claim of another easement claimant, Sonco, whose use continued for eleven years prior to the commencement of legal proceedings. Citing to *Carew v. Rockwood*, which in turn is citing to *Henley v. Ryan*, the court seems ready to acknowledge that the twenty-year period is merely a suggested guideline, before dismissing the claimant's claim of easement in one sentence: "Clearly, the 11 years of use of the Laneway by Sonco is not sufficient to establish a prescriptive easement over the whole of the Laneway."[50] The citation to the paragraph from *Carew* is to the fact that while Steele C.J.D.C. in *Henley* left open the question of whether twenty years of use was mandatory, he determined that fourteen years was not sufficient in that case. However, a principled review of *Henley* would indicate that the question is more open than whether a person has made use of an easement for fourteen years, but rather that *on the facts* of that given case, fourteen years of such use as alleged would not give rise to a presumption of an easement by prescription. Fourteen years is not fixed as a hard and fast rule in *Henley*. Rather, it was determined that on the facts presented, the use as proven in court would not suffice to create a prescriptive easement after fourteen years of such use. The *Carew* citation oversimplifies the *Henley* discussion and omits the contextual inquiry, notwithstanding that Barry J. conducts a contextual inquiry as to the nature of the use in *Carew*. The Court's statement in *Franklin* that "[c]learly, the 11 years of use…is not sufficient" seems to rigidly apply the periods of time in prior cases without alluding to the nature of use in a comparative sense. This approach is in line with the court's previous statement some fifteen paragraphs earlier in *Franklin* that twenty years is the period of use required. However, it raises the question, if the twenty-year period is to be so rigidly applied, why does the Court later return to the *Carew* statement in determining whether Sonco's use for eleven years would give rise to a prescriptive easement? No citation is necessary to determine that eleven is less than twenty, yet the court takes the additional step to imply that shorter periods of time may succeed. On this further review, the Court dismisses Sonco's claim on the basis that a fourteen-year period was found to be insufficient in *Henley*. Surely this analysis would be unnecessary if twenty years was a hard and fast requirement; it would be a complete

50. *Ibid* at para 50.

answer to the claim if the number of years of alleged use was under twenty. Yet the court also dismisses Sonco's claim by indicating that a period of fourteen years had been found insufficient in *Henley*, and strictly applies that guidepost with no comparative discussion of relative use, such as how Sonco's use for eleven years contrasts with the fourteen years of use in *Henley*. In determining whether or not a prescriptive easement exists, are we to rigidly apply a minimum period of twenty years, as suggested at paragraph 35, or is some amount greater than fourteen years sufficient, as suggested by paragraph 50? Is fourteen years even meant to act as a minimum period, regardless of use alleged? Should any minimum period apply?

The confusion in these approaches is evident in *Labrador Investments Ltd. v. White Bear Construction Ltd.*[51] There, the court had to determine an easement claim relating to the use of a driveway, which use was alleged for a period of less than twenty years. Citing to *Franklin* as authority that the twenty-year threshold is the measurement point, Stack J. further relies on *Franklin* as determining that eleven years is insufficient.[52] This again reflects a reliance on fixed timelines as determining claims. However, Justice Stack notes that the court was not provided with an analysis of the historical origins of prescriptive easements in this province, or the reasons for or origins of the twenty-year period. Quite reasonably, he questions the application of limitations periods to prescriptive claims, but felt bound to apply the twenty-year period in *Franklin* notwithstanding his questions on point. As such analysis was not before the court, Stack J. took the law as he found it from the higher court and found twenty years to be required and eleven years' use insufficient.

A principled review of the history and evolution of prescriptive easements in Newfoundland would suggest that the period of time, expressed as an absolute period of years, is not determinative—it is and remains a contextual inquiry based on the nature of use. On a contextual approach, one could conceive of circumstances where a period less than twenty years would be appropriate. For instance, in *Henley*, fourteen years was insufficient based on the use that was alleged.[53] Periods of heavy, regular and frequent use of an alleged easement for a period less than twenty years would, perhaps, give rise to a claim of "lost modern grant." It was not necessary to so decide in *Henley*, *Bayside* or *Carew*, because the

51. 2013 NLTD(G) 95, 338 Nfld & PEIR 227 (TD).
52. *Ibid* at paras 22-26.
53. See *Henley*, *supra* note 3 at para 49: "In the circumstances of the present case fourteen years is simply not long enough."

use did not rise to such a level on the facts and the court noted in all three cases that there was some question as to whether or not the claimants could even demonstrate use for the shorter period as alleged. Yet these decisions leave the door open that, with the right constellation of facts, a period of less than twenty years could meet the requirements of demonstrating a lost modern grant of easement.

II. *Limitation legislation*

Although it is clear that the *Limitations Act*[54] does not apply to incorporeal hereditaments,[55] it may be useful to consider its application to the theoretical principle of a lost grant. If the root of a prescriptive easement is in the legal fiction of a "lost modern grant," then one must consider the (fictional) contractual basis by which it is deemed to exist. The presumption at law is a grant made in fee simple.[56] Furthermore, at least one Newfoundland decision has employed the relevant limitations legislation to the determination of whether or not a prescriptive easement is available. In *Imperial Oil Ltd. v. Young*,[57] Puddester J. had to decide whether or not a prescriptive easement for the parking of vehicles arose between termination of a lease in 1985 and the request for parking activity to cease in 1994. In determining that twenty years was the appropriate period of time to apply, Justice Puddester points to the twenty-year limitation period in the *Limitation of Realty Actions Act*[58] as the relevant source of the "maximum statutory time period in which the true owner of land may bring action to recover possession from an occupant or user."[59] Pursuant to the limitations legislation in effect at the time, "[a] person shall make an entry or distress or bring an action to recover land or rent, within twenty years after the time at which the right to make the entry or distress, or to bring the action, first arose to a person through whom he or she claims."[60]

While from the perspective of the dominant tenement, limitations legislation of Newfoundland does not apply to set a timeline for creation of an incorporeal hereditament, under the rationale in *Imperial Oil*, one must question if the present *Limitations Act* applies in a form of estoppel to bar a landowner from attempting to recover property from a prescriptive easement. If the decision in *Imperial Oil* is correct, and the root of the

54. SNL 1995, c L-16.1.
55. *Abbott v Delaney* (1987), 64 Nfld & PEIR at para 37, 197 APR 121 (TD).
56. *Carew v Rockwood*, *supra* note 46 at para 21; *Henley*, *supra* note 3 at 438.
57. [1996] NJ No 217, 142 Nfld & PEIR 280 (TD) [*Imperial Oil*].
58. RSNL 1990, c L-16.
59. *Supra* note 57 at para 53.
60. RSNL 1990, c L-16, s 3(1). This section is unchanged from RSN 1970, c 207.

twenty-year rule is in limitations legislation on land interests, then as of 1995, the period for establishment of a prescriptive easement would be ten years.[61] Given the later decisions of the courts subsequent to *Imperial Oil*, it is clear that this cannot be correct. However, if the presumption at law is a lost modern grant, why would we not apply the limitation period for recovery of land as with any other grant or conveyance? The answer is twofold: firstly, as noted previously, limitations legislation in this province applies only to corporeal herediatments (i.e. ownership interests), rather than incorporeal hereditaments.[62] Secondly, the language of Newfoundland's current limitations legislation bars an action "to recover land" after ten years.[63] While not considered in Newfoundland case law, the Ontario Court of Appeal recently considered the meaning of "recover" in the property law context in *McConnell v. Huxtable*.[64] On review of the Ontario decision, the concept of recovery of land is inexorably linked to the concept of ownership of land. Since an easement does not bestow an ownership interest, and the servient tenement remains the property of its original owner, there is no land for the owner of the servient tenement to recover. There has been no change of possession that requires an action for recovery.

*Conclusion*

As can be seen on a review of first principles and the evolution of the common law, the proper approach to determination of the existence of a prescriptive easement in Newfoundland is entirely contextual. This depends on both (1) the nature and extent of the use alleged and (2) the length of such use. While jurisprudence has moved toward a firm application of fixed periods of use, this has not stopped applicants from coming forward to claim prescriptive easements alleged to have arisen in shorter periods of time. Courts and practitioners should not feel bound by the twenty-year rule for establishing prescriptive easements, and greater reliance should be placed on analysis of the particular use alleged in a given case. Rather than treating the length of use as an absolute rule, more strenuous, regular,

61. *Limitations Act*, *supra* note 54, s 7(1)(g). Note that this section is far more simplified than its predecessor and refers only to an action "to recover land."

62. *Abbott*, *supra* note 55 at para 37; note that this decision referred to the *Limitation of Realty Actions Act* of 1970, which was substantially the same legislation as included in the 1990 consolidation which was before the court in *Imperial Oil*. See also *Hugh W Simmons Ltd v Foster*, [1954] 3 DLR 524 at para 8, 32 MPR 243 (Nfld SC *en banc*), where Walsh CJN notes the inapplicability of the then-current *Statute of Limitations* on an easement claim over water, in part due to the fact that the claim was not for "land or any corporeal interest in land."

63. *Limitations Act*, *supra* note 54, s 7(1)(g).

64. 2014 ONCA 86 at paras 17-23, [2014] OJ No 477.

frequent and evident use should be considered as requiring a shorter length of use than more transitory, infrequent and irregular use. It is hoped that courts going forward will take a more individualized approach to the analysis of use in prescriptive claims and consider shorter periods of use as giving rise to prescriptive easements in cases of clear and intensive use.