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Gregory French
Mills, Pittman & Twyne

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Gregory French*

On the Operation of the *Quieting of Titles Act* in Newfoundland and Labrador

This paper examines the operation of the Quieting of Titles Act *in Newfoundland and Labrador, and in particular its operation in uncontested matters, from which written decisions do not emanate. Written decisions under the* Quieting of Titles Act*, particularly those at the appellate level, do not accurately reflect the operation of the statute in the uncontested context. This paper examines both reported and unreported decisions under the Act, and compares to Nova Scotia's approach to resolving similar land title challenges, to provide clarity on the proper operation of the Act in practice.*

Dans le présent article, nous examinons l'application de la Quieting of Titles Act *de Terre-Neuve-et-Labrador, et en particulier son application dans les affaires non contestées, dont les décisions écrites ne sont pas publiées. Ces décisions rendues en vertu de la loi, en particulier celles rendues en appel, ne reflètent pas fidèlement l'application de la loi dans les situations non contestées. Nous examinons les décisions publiées et non publiées rendues en vertu de cette loi et les comparons à l'approche adoptée par la Nouvelle-Écosse pour résoudre des contestations similaires de titres fonciers, afin de clarifier le fonctionnement de la loi dans la pratique.*

* BA (Hons), LLB, barrister and solicitor at Mills, Pittman & Twyne, Clarenville, NL. This paper is a companion work to the author's presentation "Quieting of Titles: An Introduction" (Canadian Bar Association, NL Branch, 27 September 2021). The author acknowledges with graditude the assistance of the Hon Garrett Handrigan of the Supreme Court of Newfoundland and Labrador for his work and research with the presentation, which led to the writing of this paper.

Introduction

The *Quieting of Titles Act*[1] in Newfoundland and Labrador provides a mechanism for those with unmarketable land title to obtain certification of their title through the courts. The statute operates in the shadows of the common law: proceedings are begun, and often end, ex parte. There are no reported decisions of successful unchallenged quietings, which constitute the majority of quieting of titles proceedings. Reported caselaw under the *QTA* arises only in contested inter partes proceedings. Decisions of the Court of Appeal dealing with the substance of the Act are rarer, as they arise only when these contested inter partes proceedings are appealed. As a result, the leading cases from the Court of Appeal arise in specific and uncommon circumstances. This gives an inaccurate depiction of the law under the *QTA* that is unrepresentative of the normal operation of the Act in unreported, uncontested proceedings. Part I of this paper explores briefly the history and purposes of the Act. Part II reviews the appellate caselaw, and issues these decisions raise. Part III contextualizes the Court of Appeal jurisprudence within the larger framework of reported and a selection of unreported Supreme Court decisions under the *QTA* to establish the proper operation of the Act. This section also compares the Newfoundland *QTA* process to that under a similar Nova Scotia title

1. RSNL 1990, c Q-3 [*QTA*].

rectification statute as authority and justification for the suggested proper operation of the *QTA* in uncontested proceedings.

I. *The history and purposes of the* Quieting of Titles Act

The *QTA* became part of the law of Newfoundland and Labrador one hundred years ago, in 1921.[2] Its legislative history was concisely set out by Justice of Appeal Marshall in his dissenting opinion in *Bonavista-Trinity-Placentia Integrated School District v United Church of Little Catalina of the Newfoundland Conference of the United Church of Canada (Trustee of)*.[3] In the early 20th century, the Western Union Telegraph Company was attempting to acquire properties in rural areas of the Dominion of Newfoundland, but it found those properties' titles rested on mere occupation and not on any chain of title. Many landowners in possession of those properties either had not met the threshold for obtaining title by adverse possession against the Crown or had otherwise uncertain roots of title. The foreign company, encountering Newfoundland's anarchic system of property law, was disinclined to invest without some mechanism of obtaining title with certainty.[4] The root of these problems was the centuries of unrecognized illegal occupation of the Colony of Newfoundland that predated the creation of its domestic legislature in 1832. Imperial legislation forbade settlement in Newfoundland for centuries, until those restrictions were lifted in the early 19th century.[5] As a result, much of Newfoundland had been settled with no legally recognized titles. The Supreme Court of Newfoundland's decision in *R v Kough* in 1819 confirmed that the English rule of 60 years' occupation would bar a claim of the Crown to recover land.[6] However, this required satisfactory proof of occupation for a period of sixty years. In rural areas, where poverty was rampant and government was largely absent, settlers had neither the means nor the inclination to obtain clear title to their lands from the central government in St. John's.[7] This context led to the passage of the *QTA* in the 1920s.

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2. SN 1921, Cap 21.
3. (1994), 124 Nfld & PEIR 1 at paras 42-54, 49 ACWS (3d) 1332 (CA) [*Bonavista-Trinity-Placentia*].
4. Land title was a matter of little importance in rural areas of the province, where land was plentiful and the population largely impoverished. See Gregory French, "The Abolition of Adverse Possession of Crown Lands in Newfoundland and Labrador" (2020) 71 UNB LJ 227 at 228-230 [French, "Abolition of Adverse Possession"]; Gregory French, "Property Interests in Resettled Communities" (2015) 66 UNB LJ 210 at 211=214 [French, "Property Interests"].
5. See French, "Abolition of Adverse Possession," *supra* note 4 at 228-229.
6. (1819) 1 Nfld LR 172 (SC) [*Kough*]. Newfoundland property law functioned in an uncomfortable legal vacuum from the creation of the Supreme Court in 1792 until the establishment of the legislature in 1832. See *Kough* at 173; *R v Row* (1818), 1 Nfld LR 126 at 127 [*Row*].
7. See generally French, "Property Interests," *supra* note 4 at 211-214.

Given the above, title may be well accepted within communities but fail to meet accepted standards of good and marketable title. The title itself may not be in dispute, but its uncertain state may be unsatisfactory to a prospective purchaser. This uncertainty originates from the historical haphazard patterns of settlement of Newfoundland and Labrador. One would expect the power vested in courts under the *QTA* to be quite broad by necessity, given the social context in which the Act operates. The Act is ameliorative and the standards employed therein are worded in general language. The Act contemplates an applicant having imperfect or defective title that, nonetheless, may not be challenged by those who would have a right to do so. The expectation is that a proceeding under the Act would be commenced only by someone with imperfect title who has a legitimate claim to assert.

The *QTA* permits an applicant to request an investigation of their title and allows the court to either grant or reject the certificate of title. At the outset, the Act itself is expressly investigatory rather than adversarial.[8] Unlike traditional litigation, the Act does not contemplate the appearance of an adverse party when a proceeding is commenced. Proceedings may begin and end without any objection being filed or any adverse party materializing. Because a proceeding under the Act is in rem rather than in personam, the existence of adverse parties in the litigation is immaterial to the effect and scope of the outcome.[9] The land itself is on trial, and anyone contesting the applicant's claim to title is expected to file an adverse claim and appear in court, or else the applicant will receive a certificate of title from the court. The certificate of title is determinative of title and is binding against the world.[10]

A person claiming to be the owner of the land may start a proceeding as of right.[11] A person claiming an interest or estate in the land may apply for an investigation, ascertainment or declaration of title with leave of the court.[12] In both circumstances, the Act does not provide any specific

8. *QTA*, *supra* note 1, ss 3(1)-(2). The process up to s 13 in the Act contemplates no other parties except the applicant, who must prove entitlement to the land. Section 13 permits the applicant to apply for a certificate of title and the granting of same by the court. Adverse parties are not mentioned until s 14 of the Act.

9. *Dyke v Bradley*, 2017 NLTD(G) 109 at paras 27-30.

10. *QTA*, *supra* note 1, s 26.

11. *Ibid*, s 3(1).

12. *Ibid,* s 3(2). Jurisprudence refers to this section as creating a "counterpetition," which arises when an adverse claimant asserts an ownership interest in an applicant's property. See *Re Dyer Estate*, 2011 NLCA 81 at paras 12-17 [*Dyer Estate*]. However, one questions whether there is any practical distinction between a petition under s 3(1) of the Act and a "counterpetition" as envisaged by the Court of Appeal in *Dyer Estate*. A "counterpetition" would still involve a claim of ownership, which is a proceeding as of right under s 3(1). The author suggests that the proper application of s 3(2) is to

standard of title. With the exception of specific rules for divesting the Crown at section 13(3), the court's discretion under the Act is quite broad: the judge must be "satisfied respecting the title" and consider that "the certificate may be safely granted without another notice of application other than the published or posted notice."[13] Where the judge "considers that the applicant is entitled to the land," the court may grant the certificate.[14]

The structure of section 13 is somewhat confusing. There are two standards to consider for obtaining a certificate under section 13: a judge may be "satisfied respecting the title" that a certificate "can be safely granted" under 13(1), and the applicant may be "entitled to the land" under 13(2).[15] None of these terms are defined, and no judicial commentary distinguishes these subsections. Nonetheless, such broad terms are harmonious with the legislative history and intent: they reflect the intention that an applicant's claim of "entitlement" should be "satisfactory" and "safely granted."[16]

Courts today are expected to deal with the same complex historical and possessory claims to land that vexed the Supreme Court since its inception.[17] The legislature clearly appreciated the difficulty that land tenure posed to Newfoundland and Labrador's development, as foreign investors did not wish to deal with land ownership in its state of disarray.[18] The same concerns about possessory title arose again in the 1970s, when adverse possession against the Crown became an issue for the legislature to resolve.[19] Thus, it is reasonable to interpret the Act as giving broad power to courts to resolve such matters, in the interest of stabilizing land title. However, two reported cases of the Newfoundland and Labrador Court of Appeal cast doubt on the broadness of the scope of the Act.

II. *Appellate caselaw on the* Quieting of Titles Act: *criticisms and context*

As noted in the introduction, appellate caselaw under the *QTA* has arisen only in exceptional circumstances. The *QTA* contemplates a full proceeding which may involve only the applicant from beginning to end. Written decisions are not released in cases where the applicant is successful and

address other property interests short of ownership. See e.g. *Power Motors Ltd v Irving Oil Ltd* (1993), 110 Nfld & PEIR 290, 346 APR 290 (Nfld SC (TD)) [*Power Motors* 1993 cited to Nfld & PEIR]; *Power Motors Ltd v Irving Oil Ltd* (1996), 146 Nfld & PEIR 330, 456 APR 330 (Nfld SC (CA)).

13. *QTA, supra* note 1, s 13(1).
14. *Ibid*, s 13(2).
15. *Ibid*, ss 13(1)-13(2).
16. *Ibid*, s 13(1).
17. See e.g. *Row*, *supra* note 6; *Kough*, *supra* note 6; *The King v Cuddihy* (1831), 2 Nfld LR 8; *The King v Luke Ryan* (1831), 2 Nfld LR 47.
18. See e.g. *Bonavista-Trinity-Placentia*, *supra* note 3 at paras 43-44.
19. See generally French, "Abolition of Adverse Possession," *supra* note 4 at 231-235.

the claim uncontested. In such circumstances, there is no reason for the court to explain its rationale.

In comparing the number of certificates of title issued and the number of reported decisions citing the *QTA*, it is apparent that the vast majority of proceedings under the Act do not result in written decisions. In searching the Newfoundland and Labrador Registry of Deeds online service by document type back to 1980,[20] one sees that from 1980 to 2020, 2,598 certificates of title have been issued by the Supreme Court and registered at the Newfoundland and Labrador Registry of Deeds.[21] The number of reported decisions citing to the *QTA* is notably lower.[22] Most proceedings that successfully result in the issuance of a certificate of title appear uncontested or resolved short of trial. The reported cases are all contested proceedings, where an adverse party challenges the applicant's claim.

Proceedings under the Act change significantly when an adverse claim arises. In *Newfoundland (Attorney General) v O'Brien*, Justice Goodridge described the shift in process when an adverse claim is filed:

> All such applications are made ex parte in the first instance and assuming no adverse claim is filed the applicant becomes entitled to a certificate of title upon showing that he has complied with the act and satisfied the judge that a certificate of title ought to be issued.
>
> Where, however, an adverse claim is filed the situation becomes adversary.
>
> There is then in whatever form it may appear an action between two persons, one the petitioner, the other the respondent and there would not, in my view, be any justification for relaxing the rules of evidence in such a contest.
>
> It ceases to be investigative. The procedure contemplated by section 8 has terminated and an issue has come into existence which ought to be tried according to the ordinary rules of evidence although some deviation

20. Government of Newfoundland and Labrador, "CADO" (last visited 24 February 2022), online: *Companies and Deeds Online* <cado.eservices.gov.nl.ca/CADOInternet/Main.aspx> [perma.cc/77AH-GUXP]. CADO allows one to search the Newfoundland and Labrador Registry of Deeds index by document type back to 1980. Documents from 1982 onward are available for viewing online.

21. This figure was obtained by searching by document type (as "Quieting of Titles"), in five-year increments from 1 January 1980 to 31 December 2019. For reference, the number of Certificates of Title registered by decade is as follows: 1980–1989: 1,018 Certificates registered. 1990–1999: 938 Certificates registered. 2000–2009: 343 Certificates registered. 2010–2019: 299 Certificates registered.

22. A review of the CanLII database, which (at the time of writing) has continuous coverage of reported decisions of the Supreme Court of Newfoundland and Labrador back to 1 January 1987, discloses only 94 reported decisions citing to the *QTA*. This figure includes any reference to the Act, including cases which were not quieting proceedings. When compared to the number of certificates registered, *supra* note 21, one notes the significant discrepancy.

> from the ordinary rules of procedure is indicated by the act.[23]

This context should be borne in mind when reviewing the appellate caselaw. As the appellate cases are contested proceedings, not investigatory proceedings, the process changes substantially.

In the 1983 case of *Pawlett v Newfoundland*, the Court of Appeal overturned the granting of a certificate of title to the applicants.[24] The applicants' predecessor in title had been approved for a grant of land under an agricultural statute. An Order-in-Council was made for a grant to be issued to the applicants' predecessor in 1918. For reasons unknown, the grant had never been issued. The District Court had allowed the quieting application and issued a certificate of title to the applicants.[25] The Court of Appeal overturned this decision, holding as follows:

> The purpose of the *Quieting of Titles Act* is to confirm title to land in a person (or persons) who is able to prove to a judge's satisfaction that his claim to the land is valid. That title would have to be shown to stem from a legal basis or, in the alternative, be based on possession. As section 2 of the Act states, it is an investigation of a claimed "title" to land. Thus, the legal sufficiency of that title, legal or otherwise, must be demonstrated to satisfy the Court that a certificate should issue declaring the claimant to be the "legal and beneficial owner in fee simple" of the land. In the present case, the respondents clearly had no legal title and neither was there any evidence of possession so as to create an "equitable" title. Thus, the remedy of the *Quieting of Titles Act* is not open to them more especially when, as here, the title claimed stems from an alleged right to a Crown grant that was never issued.[26]

The above reasoning is flawed when considering the origin and legislative purpose of the Act. With respect, it is unreasonable to suggest that an individual with legally sufficient title would avail of cumbersome and costly proceedings under the *QTA*. Were the court's powers limited to granting certificates for legally sufficient title, the *QTA* would be wholly unnecessary. Those with good title would have no need for the Act, and those with defective title would find no benefit under it. The court began with the correct statement of the purpose of the Act: "to confirm title to land in a person or persons who is able to prove to a judge's satisfaction that his claim to the land is valid."[27] That is the extent of what the Act

23. *Newfoundland (Attorney General) v O'Brien* (1979), 27 Nfld & PEIR 269 at paras 44-47, 74 APR 269 (Nfld SC (TD)) [*O'Brien*].
24. (1983), 41 Nfld & PEIR 349, 119 APR 349 (CA) [*Pawlett* cited to Nfld & PEIR]
25. *Ibid* at paras 2-7.
26. *Ibid* at para 9.
27. *Ibid*.

statutorily requires; it imposes no limitation periods, no standards of title, and no restrictions on the nature or origin of title. What follows in the above-cited paragraph exceeds what the statute requires and is a creation of the court. It is, with respect, an unnecessary and burdensome declaration that is at odds with the legislative purpose and intent. If it were applied to all proceedings under the *QTA*, it would have the effect of handicapping the purposes for which the Act was originally introduced.

In a later summary of the purpose of the law in *Bonavista-Trinity-Placentia*, Justice Marshall cited to the debate in the Legislative Council chamber on the passage of the *QTA*.[28] In those debates, Sir Patrick McGrath explicitly remarked that part of the motivation for passing the *QTA* was that "the original owners had got [the land] by squatters' rights and had not occupied it for the period of sixty years necessary for them to get a title as against the Crown."[29] The acknowledged problem at the time the law was passed was that individuals could not meet the requirements for good title but had a legitimate claim that should be adjudicated. This presumes a bona fide claim falling short of being good title. One should note that later application of *Pawlett* in the Supreme Court broadened the interpretation of the restrictive paragraph 9 to a general "legal basis" of title which persuades the Court that a certificate should issue.[30]

The Court of Appeal reached the correct outcome in *Pawlett*, but not for the reasons stated above. The matter could simply have been determined on the basis of section 13(3) of the *QTA*, which is cited later in paragraph 9 of the Court's reasons. Section 13(3) of the Act states that to divest the Crown, the land must either originate in a Crown grant or conveyance, or be based upon adverse possession for the appropriate period of time. Neither of those circumstances arose in *Pawlett*: the land was abandoned after 1920, and the grant to which the applicants' predecessor was entitled had never been issued.[31] These facts would have been sufficient to dispose of the matter without the additional commentary on the general scope of the Act.

The later *Bonavista-Trinity-Placentia* case builds on the *Pawlett* decision, but with notable controversy. *Bonavista-Trinity-Placentia* involved a similar dispute of title where an applicant had sought a certificate of title in the absence of a conveyance from the superior titleholder. A school district sought title to a piece of land on which a school had been

28. At the time, the Legislative Council was the upper chamber of Newfoundland's legislative branch.
29. *Bonavista-Trinity-Placentia*, *supra* note 3 at para 43.
30. *George Quieting of Titles*, 2012 NLTD(G) 196 at paras 4-5 [*George*].
31. *Pawlett*, *supra* note 24 at paras 2-4.

built. Under statute, the religious denomination holding title to school land (in this case, the Newfoundland Conference of the United Church of Canada) was required to transfer the land to the school district. This transfer did not occur, and the United Church Conference refused to transfer the land in deference to the local community church's instructions. The school district sought a quieting of title application in lieu of obtaining a deed from the United Church.[32] The trial judge determined it was premature to seek a quieting, since the applicant could seek specific performance for a conveyance of the land from the United Church Conference.[33] Justice of Appeal Cameron, writing for herself and Justice O'Neill, overturned the trial judge's ruling and remitted the matter for reconsideration, on the basis that the trial judge had failed to consider both the actual possession by the school district and the potential effect of the *Schools Act* provisions on vesting title into the school district.[34] However, Justices Cameron and O'Neill both went further, commenting on the effect of the earlier *Pawlett* decision. Relying on paragraph 9 of *Pawlett*, they wrote:

> In my view, the trial judge has no authority under the *Quieting of Titles Act* to vest an outstanding interest. He would have no power to order specific performance of contractual obligations by the Newfoundland Conference of the United Church of Canada, if he were to conclude that was the only impediment to good title, nor could he ignore the existence of an impediment no matter how insignificant or technical it might seem when determining if the certificate should be granted.[35]

Like *Pawlett*, this statement goes unnecessarily far in restricting the court's powers under the *QTA*. The majority read into the statute limiting words that are not apparent in the Act and that defy the legislative intent. If a trial judge is bound to enforce any impediment, "no matter how insignificant or technical,"[36] as the majority stated, then the *QTA* becomes a dead-letter law. Nobody with title to that standard applies under the Act. Those who apply should be expected to have some manner of title defect requiring recourse to the *QTA*, as was the stated intent at the time of the Act's passage.[37]

Like *Pawlett*, the majority decision reached the correct outcome on the facts but strayed into unnecessary territory to do so. In a contest between two claimants to the land, where an adverse claimant has a superior title to the applicant and is not otherwise dispossessed, the court should defer to

32. *Bonavista-Trinity-Placentia, supra* note 3 at paras 21-32.
33. *Ibid* at paras 33-34.
34. *Ibid* at paras 17-18.
35. *Ibid* at para 13.
36. *Ibid*.
37. *Ibid* at para 44.

the title of the adverse claimant. This is a sensible proposition in a contested proceeding with competing claimants: the party with superior title wins. If the legal titleholder appears and objects to the application, the onus falls to the applicant to demonstrate why the legal titleholder should not succeed. This occurred in *Pawlett*,[38] and the matter in *Bonavista-Trinity-Placentia* was remitted for the trial judge to determine on that basis.[39]

Unlike *Pawlett*, the Court of Appeal in *Bonavista-Trinity-Placentia* was not unanimous in its reasoning. All members of the panel agreed that the matter should be remitted to the trial judge for reconsideration.[40] However, Justice of Appeal Marshall, writing for himself, went significantly further in his examination of the matter. Justice Marshall's reasons extensively canvass the legislative history and purpose of the *QTA* and examine the Act in its current form. His reasons provide useful guidance for the conduct of a quieting of titles application, following both the spirit and letter of the law. In Justice Marshall's view, "[t]he Act affords a complete code for resolution of claims and disputes bearing upon whether a certificate of title is warranted."[41] This is a sensible proposition, since separate proceedings for related relief on the same question of law would "foster an unnecessary multiplicity and prolixity of proceedings which is neither conducive to the timely resolution of issues nor to the operation of justice."[42] While the Newfoundland Conference of the United Church of Canada had not been a party at the trial level, the remedy for this lies in provisions of the *QTA* permitting the Court to direct further notice to non-parties.[43] Such a situation would also fall under the statutory category permitting the applicant to adduce further evidence to address the Court's concerns.[44]

The majority decision rejected Justice Marshall's comprehensive reasoning, due in large part to reliance on the *Pawlett* decision. However, his reasons may be appropriately rejected on the unique facts of the case. Recall that this was a contested application with a superior titleholder who had not been named as a party in the first instance. The majority, citing to *Pawlett*, held that a judge under the *QTA* cannot compel the adverse claimant or a third party to do anything to vest title into an applicant. The applicant either has a valid claim of title at the time of application or

38. *Pawlett*, *supra* note 24 at para 9.
39. *Bonavista-Trinity-Placentia*, *supra* note 3 at paras 18, 110.
40. *Ibid*.
41. *Ibid* at para 81.
42. *Ibid* at para 85.
43. *Ibid* at para 95 citing *Quieting of Titles Act*, RSN 1970, c 324, s 13, which is today *QTA*, *supra* note 1, s 16.
44. *QTA*, *supra* note 1, s 11.

they do not. In both *Pawlett* and *Bonavista-Trinity-Placentia*, the superior claimant holding legal title declined to release their claim to the applicant, leading the applicant to seek, in essence, specific performance through the Act. In both instances, the Court of Appeal is correct that such a proceeding is an improper use of the *QTA*. There is no need for further investigation where the applicant knows they do not have title and knows that the legal titleholder contests the claim. *Pawlett* met both of these criteria, and the Court of Appeal overturned the certificate.[45] *Bonavista-Trinity-Placentia* met only the second criterion, and the Court of Appeal remitted the matter for further consideration of the applicant's title claim.[46] The *Bonavista-Trinity-Placentia* decision was not without controversy, even within the Court itself, hence a 2:1 split of the Court. While the decision is undisturbed, it cannot be said to reflect settled law. The broader application of both decisions should be considered, as well as whether the rules they set out are indeed applicable to all proceedings under the *QTA*.

To date, no appellate authority has expressly reconsidered *Pawlett* or *Bonavista-Trinity-Placentia*. It is the nature of the common law system that a particular constellation of facts and rulings is required to bring the matter forward for express reconsideration. It is also the nature of the system that written decisions rarely emanate from uncontested matters. There is no reason to appeal a successful uncontested quieting or to publish written reasons on an uncontested proceeding.

One should note the more recent Court of Appeal decision in *Re Dyer Estate*, where a unanimous panel held that the requirements of the *QTA* "are designed to provide enough evidence to satisfy the court that it would be appropriate to make an order in rem that binds third parties."[47] *Dyer Estate* involved the appeal of a rejection of a certificate of title to an adverse claimant, who had not filed a counterpetition or originating application seeking title. The trial judge had accepted that the adverse claimants had been in open, notorious, continuous and exclusive occupation of the land at issue, but had only intervened as adverse claimants. The question at issue before the Court of Appeal was the scope of the trial judge's jurisdiction to make a title determination on behalf of an adverse party. The matter before the Court of Appeal in *Dyer Estate* was an uncontested declaration of title by the trial judge in favour of the adverse claimants (as appellants), but one in which the trial judge was procedurally unable

45. *Pawlett*, *supra* note 24 at para 9.
46. *Bonavista-Trinity-Placentia*, *supra* note 3 at paras 8, 18, 21-22, 110.
47. *Dyer Estate*, *supra* note 12 at para 11.

to provide meaningful relief to the appellants.[48] No party appeared on the appeal to challenge either the trial judge's ruling on the appellants' title, or to argue against the appellants' position. In commenting on the complex title issues before the trial judge, the Court of Appeal appeared to accept a more flexible approach to the *QTA*, finding that parcels dealt with on *QTA* applications "raise peculiar difficulties" because they "have passed for many years from person to person in a haphazard, poorly documented fashion. Such parcels of real estate often have been the subject of rounds of casual conveyances, inheritances, and adverse possessions."[49] This case appears to adopt a looser standard than in *Pawlett* or *Bonavista-Trinity-Placentia* that is more consonant with Justice Marshall's historical analysis of the Act. Relying on *Dyer Estate* as an accurate statement of law, claims would no longer be held to a standard of good title as required in *Pawlett* and *Bonavista-Trinity-Placentia*, but instead to a standard of "enough evidence to satisfy the Court."[50] These judicial standards would seem at odds with one another. The Court of Appeal in *Dyer Estate* makes no reference to the prior decisions or the standards they set out. No subsequent decision of the Supreme Court reconciles these positions or comments on the discrepancy.

The reason for the differing standards lies in the context. *Pawlett* and *Bonavista-Trinity-Placentia* are not directly applicable to uncontested proceedings. As Justice Goodridge noted in *O'Brien*, an ex parte quieting is an investigatory proceeding. The *QTA* is a comprehensive code for dealing with the investigatory model. An application may begin and end within the investigatory proceeding. An adverse claim begins a contested inter partes proceeding and generally follows the rules applicable to all such litigation. Once a matter ceases to be investigatory, the court must decide whether or not the applicant has a superior claim in light of the claim raised by the adverse claimant.[51] In that context, the decisions in *Pawlett* and *Bonavista-Trinity-Placentia* make sense. The applicant cannot succeed if confronted by a superior titleholder claiming an interest in the property. The adverse claimant does not even need to have a superior claim to the property; they need only be a party who challenges the applicant's right to the property claimed.[52] Once the applicant's claim of title is directly challenged, the

48. See *infra* note 52.
49. *Dyer Estate, supra* note 12.
50. *Ibid* at para 11.
51. *O'Brien*, *supra* note 23 at paras 43-47.
52. See e.g. *Crowley v Crowley* (1984), 51 Nfld & PEIR 140, 150 APR 140 (Nfld SC (TD)), where the adverse claimant was a trespasser on land claimed by the applicant. Neither party satisfied the court of their own title. However, the applicant's application was dismissed, as the adverse claimant had

nature of the proceeding changes accordingly, and so too does the standard of the court's review.

III. *Uncontested proceedings: putting appellate decisions into context*

As previously demonstrated, courts have set different standards which claimants must meet under a *QTA* application, a difference which can partially be attributed to the decisions' differing factual contexts. However, the context of the dispute accounts for only part of the difference in standards. If the process is different depending on whether or not the application is contested, one must also consider whether or not the standards of title are different when the proceeding is uncontested. Recall that the *QTA* contains no statutory measure of title, and section 13 of the Act affords a broad discretion to the trial judge on the question of title. The appellate caselaw indicates that a strict standard will be applied in examining the applicant's title, but this arises in the context of assessing the applicant's claim against a competing claimant. In such a contest, it is appropriate that the applicant be held to a standard of title that supersedes that of the adverse claimant and survives the challenge posed by the adverse claim. Such a strict standard is unnecessary when dealing with an uncontested claim of title, where there is no other claimant to whose claim the applicant's title can be compared. One could liken the strict standard in the uncontested context to determining the winner of a single-person race. Where the applicant's title rests on a reasonable foundation supporting the claim, and that claim is not challenged, there is no reason why the applicant should not succeed.

The question of what constitutes acceptable title can be vexing to both lawyers and judges. Researching caselaw under the *QTA* to find answers gives the impression that one must already have good title to obtain a certificate of title, based on *Pawlett* and *Bonavista-Trinity-Placentia*. These decisions do not highlight the substantive legal difference between the nature of contested and uncontested proceedings under the *QTA*. The appellate decisions do not express the narrow scope in which they operate. To the outside observer, the appellate rules apply to all proceedings under the *QTA*.

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successfully challenged the applicant's title. The adverse claimant cannot obtain title on the applicant's quieting, thus there is no requirement that adverse claimants prove satisfactory title into themselves. On this point, see also *In Re Coleman* (1934), 13 Nfld LR 149 (SC en banc on appeal) at 159-160. Issues beyond the limited question of the applicant's title are coram non judice. While an adverse claimant cannot get title, an adverse claimant's interests may still encumber the Applicant's title. See *infra* note 64.

The uncontested and unreported nature of successful quietings at the trial level give no guidance to lawyers or judges as to the expectations within the investigatory context. The *O'Brien* decision demonstrates how an investigatory proceeding is distinct from a contested proceeding. However, the nature of the investigatory model means lawyers and courts will not know of the standards and processes employed in uncontested proceedings. The lawyer who examines the *QTA* based only on reported decisions will be left with a misleading impression about the expected standard of title, which may give rise to a reluctance to utilize the Act for its intended purpose, given the impression that a claim based on defective title cannot succeed. However, such an impression is incorrect. Lawyers and judges alike develop an expectation of the Act based on their personal involvement with such proceedings. Both judges and lawyers must consider the common expectation in dealing with Quieting of Titles proceedings: that an applicant has a legitimate claim of title that cannot readily be dealt with by other means. If that claim is uncontested, the expectation should be that the claim is acknowledged and accepted by the community at large.

Strictly applying *Pawlett* and *Bonavista-Trinity-Placentia* on every application, contested or uncontested, would leave no effective way to address title concerns through the courts or rectify the myriad issues that arise. This would be inimical to the purposes of the *QTA*. We will have come full circle, where the same issues that plagued the Western Union Telegraph Company a century ago have re-emerged. Individuals asserting ownership of land would have no effective mechanism to confirm their titles or render them marketable. This cannot be taken as the intent in passing the *QTA*—the legislative purpose would be undone. The Act remains substantially unchanged one hundred years after its initial passage, so no policy interventions could lead one to conclude its initial objective has changed.

The history of the Act indicates that imperfect title is not an impediment to a certificate of title. In fact, the purpose behind the Act is to allow perfection of imperfect title. On a contested proceeding, it is logical that the party with superior title will succeed, and that the true owner cannot be compelled to relinquish their legal claim against their will. However, when there is no adverse claimant and no apparent challenge to an applicant's imperfect title, matters ironically become more complicated for the Court. One must examine the process to determine the scope and timing of the examination of title, and how this impacts the review standard.

1. *The two-stage uncontested process*

Determining the standards of title to apply requires an examination of the uncontested procedure. The *QTA* creates a two-stage process: pre-advertising and post-advertising

At the first stage, an applicant must present a prima facie case on an ex parte basis to advertise the claim. A certificate of title cannot be issued without first publishing notice of the claim.[53] The court must review the materials filed with the originating application to determine if the claim should proceed to advertising. To trigger an investigation of title, the applicant need only show that the claim is not frivolous and should be investigated.[54] A claimant who cannot meet this low threshold should not be permitted to the advertising stage. The applicant's title must rest on some claim of entitlement to the land, be it colour of title or adverse possession, in order to meet this threshold.[55] While the initial threshold for advertising is low, courts should be prepared to grant the certificate of title on the basis of the materials filed if no adverse claims arise.[56] This is a sensible proposition: courts should not set the applicant up for failure by permitting advertising when they know the claim cannot succeed.

At the post-advertising stage, the court then determines whether the applicant's claim of title succeeds. If no adverse claims have arisen, the applicant should expect to succeed. However, if the Court of Appeal's statements on the standard of title in *Pawlett* and *Bonavista-Trinity-Placentia* are binding in the uncontested context, any title defect must result in a failure of the applicant's claim. The Court of Appeal does not make a distinction between contested and uncontested proceedings in these decisions. While it may be technically right to deny an uncontested claim on a technical or insignificant flaw, it is at a minimum inequitable and a disservice to the legislative intent. On a review of the legislative history of the *QTA*, it would seem to be an error to do so, where no objections to the applicant's title are raised.

If a title issue is identified by the court at either stage, the court must consider whether the title impediment or flaw creates a theoretical legal problem or an actual problem. A theoretical legal problem may arise where there is imperfect compliance with technical legal requirements, but no

53. *QTA*, *supra* note 1, s 12(1).
54. *Re Parsons* (1987), 68 Nfld & PEIR 181 at para 3, 209 APR 181 (Nfld SC (TD)) [*Parsons*].
55. See e.g. *Gosse v Murphy*, 2008 NLCA 26; *George*, *supra* note 30.
56. This has been included in the Judge's Practice Manual for this province for many years. A judge receiving an order for publication should be satisfied that the certificate would be granted, barring an adverse claim. See *Kippens (Town) v Doucette* (1988), 10 ACWS (3d) 69, 1988 CarswellNfld 348 at para 39 (Nfld SC (TD)).

adverse claimants appear to challenge the issue. An actual problem may arise where there is a superior titleholder identified, which may convert the matter from an investigatory proceeding to an adversarial one, if the other titleholder challenges the applicant's claim. Once identified, such a problem requires the court to investigate further by serving notice on other parties, as contemplated by the Act. However, the matter does not cease to become investigatory until an adverse claim is filed. The court must be careful not to create an adversarial proceeding without an adversary. If the legal impediment is not challenged by an adverse party with an interest in the issue, it should not be the court's place to frustrate the process of its own motion. The court is investigating whether the title "may be safely granted," not whether title is perfect. It may well be that the applicant's title is sufficiently well accepted that the title deficiency is not a practical matter in the real world. One should bear in mind the admonition of Justice Green (as he then was) in *Hollett v Hollett*:

> It is important, in my view, before seeking to determine, globally, the application of the legal principles discussed above to the facts of the case, that an attempt should be made to characterize the nature of the interest that was really intended to be created or which best accords with the apparent expectations of the parties. Such a characterization should determine the nature of the analysis to be subsequently undertaken.
>
> ...
>
> This case in many ways typifies the informal arrangements which frequently are involved in land holding in rural Newfoundland. It seems to me that a court ought to be sensitive to the fact that land holding, from a practical point of view, is often based upon arrangements which do not fit neatly into formal legal categories. If courts take too formalistic an approach to the application of property law concepts in such circumstances, the result may be the frustration of normal social expectations. I note that in other contexts relating to real property law in Newfoundland, the courts have in fact modified traditional legal principles to take account of local conditions...[57]

When analyzing a quieting, it is important to start from the proposition that the applicant has a legitimate basis for his or her claim, but that the applicant's claim will fall short of providing clear title on its own. If the applicant could prove title on their own, they would not be before the court seeking certification. Considering the peculiarities of title in Newfoundland and Labrador and the remedial intention of the *QTA*, the court should

57. *Hollett v Hollett* (1993), 106 Nfld & PEIR 271 at paras 115, 117, 334 APR 271 (Nfld SC (TD)) [*Hollett*].

expect to deal with defective title whenever the Act is engaged. Such defective title may well be recognized by all others who could claim an interest in the property. It may be recognized by the community, it may be recognized by other family members, it may even have the cloak of official recognition by municipalities assessing taxes. Taking a pragmatic approach, and bearing in mind the language of the Act, the test is whether or not the applicant can be "safely granted" the certificate, or whether the applicant is "entitled to the land."[58] Thus, a wide latitude is appropriate on title throughout an investigatory proceeding.

Though wide latitude is appropriate, the court must also be "satisfied respecting the title" that the applicant "is entitled to the land".[59] Where the court identifies any concerns on title, section 11 of the *QTA* requires the court to give the applicant an opportunity to produce further evidence or remove defects in the evidence.[60] Section 11 has no temporal limitation, so it can arise pre-advertising or post-advertising. In the case of *Re Parsons*, this issue arose in the context of a claim involving an unprobated estate. The applicant had been permitted to advertise his claim on its own merits, with an opportunity to resolve the estate issue post-advertising.[61] This was not fatal to advancing the applicant's claim, but rather a post-advertising opportunity to "remove defects" in the title.[62] Based on *Parsons*, defects at the initial stage are not fatal to the request for an investigation, but the applicant should be made aware of them and the impediments they may create at the second stage. When in doubt regarding the effect of an impediment, the court should defer to the applicant's claim at the initial stage but bring the impediment to the applicant's attention and perhaps direct specific notice to individuals. This is a matter that warrants further investigation, rather than dismissal, and can be remedied with a targeted advertising order.

If the advertising period passes with no adverse claims arising, whatever concerns there may be about title should be disregarded in the interests of equity and efficiency. It is not for the court to seek out reasons

58. *QTA*, *supra* note 1, s 13(1)-(2).
59. *Ibid*.
60. *Ibid*, s 11.
61. *Re Parsons*, *supra* note 54 at para 29.
62. See *infra* re unprobated estates generally. Note that the applicant in *Parsons* claimed under the husband's estate, but the court held that the title to the property was vested in the wife, so the issue for the applicant to resolve was the necessity of obtaining title from a different estate. Ultimately, the certificate of title was granted in the *Parsons* matter on 29 June 1988 (see registered certificate of title at the Newfoundland and Labrador Registry of Deeds, Roll 542, Frame 1259), but there is no indication in the certificate or in any reported decision about how the matter proceeded after the cited decision.

to deny the certificate of its own motion. To do so would put the court into an adversarial role: the court would raise an issue on behalf of the interested party who has not elected to participate themselves. This would be contrary to the investigatory nature of the uncontested proceeding and the remedial intention of the *QTA*. It bears repeating that the court is not being asked to decide whether title is legally sufficient; it is being asked to determine if the certificate may be "safely granted" to an individual claiming entitlement to the land. One could liken such a failure to file an adverse claim to any other form of default in civil litigation, which would entitle the claimant to an order in his or her favour.[63] Where an adverse claim is filed, the substance of that claim is important. If the adverse claim does not challenge the applicant's ownership of the land at issue, the certificate of title can be granted without addressing the substance of the adverse claim, though the interest raised may be determined within the quieting at the court's discretion.[64]

The reason for the general language of the Act becomes clearer at the post-advertising stage. The title may still be defective, but the applicant will have demonstrated that he or she has some entitlement to the land (which must be demonstrated before advertising), and the degree to which the applicant's claim is contested will be apparent after advertising. If no contest arises post-advertising, the court can find that the title may be "safely granted," as the legislated standard requires.[65]

2. *A comparative approach:* The Nova Scotia Land Titles Clarification Act

One finds an analogous context to the uncontested quieting in the Nova Scotia Supreme Court's decision in *Downey v Nova Scotia (Attorney General)*.[66] This case arises under Nova Scotia's *Land Titles Clarification Act*, a remedial title statute intended to clarify land tenure in predominantly Black areas of Nova Scotia, where undocumented possessory title and

63. See generally rule 16 of the *Rules of the Supreme Court 1986*, SNL 1986, c 42, Schedule D.
64. See e.g. *Power Motors* 1993, *supra* note 12, where Justice Woolridge granted leave to hear options to purchase land in the context of the applicant's quieting. The adverse claims created "equitable interests," though none of the adverse claimants asserted ownership of the applicant's property. This is permissible under s 3(2) of the *QTA*. In *Re Noel Quieting of Titles* (unreported Memorandum of Disposition, 31 December 2018), Grand Bank #2017 06G 0081 (NLSC) [*Noel*], the adverse claimant asserted a public right-of-way through the applicants' land. Justice Handrigan issued the certificate of title without deciding the right-of-way issue, holding that the right-of-way, if valid, would survive issuance of the certificate of title under s 22(1)(e) of the *QTA*, and that the applicants should first be decreed owners of the land in order to respond to the claim.
65. *QTA*, *supra* note 1, s 13(1).
66. 2020 NSSC 201 [*Downey*].

informalities in transfers created uncertainty in property rights.[67] There are direct parallels between Nova Scotia's situation and that in Newfoundland and Labrador:

> Residents in African Nova Scotian communities are more likely to have unclear title to land on which they may have lived for many generations. That is because in those communities, informal arrangements were more common. Financial and other obstacles made it less likely that people in those communities would retain lawyers and surveyors to research title, register deeds or wills, or survey boundaries. People may have lived on the land for generations without having title registered. No one else might claim it and it may be that no one in the community disputes their entitlement to it. But they still have no formal title.[68]

The *LTCA* uses an administrative process to confirm title, so the *Downey* decision is a judicial review of an administrative body's decision. Nevertheless, it sets out the appropriate standard for evaluation of land titles under the *LTCA*. The notable parallel between the *LTCA* and the Newfoundland *QTA* is the absence of specific criteria for granting a certificate of title. Neither act specifies absolute rules for obtaining or denying title. As noted by Justice Campbell in *Downey*:

> [The *LTCA*] does not require that a claimant establish a period of 20 years of adverse possession or provide information that would allow the Department to assess whether the property had been occupied for 20 years. It contains no reference at all to adverse possession or facts that would establish a claim of adverse possession. ...The legislation is silent on the basis upon which entitlement is established. There are no regulations. The legislation does not specifically require a period of possession for 20 years, but it may be presumed that entitlement must be based on some objective criteria in order for that issue to be assessed.[69]

Newfoundland and Labrador's *QTA* is similarly silent on what is required for a certificate of title, leaving it to the discretion of the court to be "satisfied" with the applicant's title.[70] It would be open to the legislature to impose requirements and benchmarks for the issuance of title. That would not be desirable, given the legislative purpose. The *QTA* is broadly written for a reason.

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67. RSNS 1989, c 250 [*LTCA*]. See also the detailed history of the *LTCA* in *Beals v Nova Scotia (Attorney General)*, 2020 NSSC 60 at paras 20-39.
68. *Downey*, *supra* note 66 at para 5. Compare to the similar context in Newfoundland and Labrador: see generally discussion of title in French, "Property Interests" and French, "Abolition of Adverse Possession," *supra* note 4.
69. *Downey, supra* note 66 at paras 27-28.
70. *QTA*, *supra* note 1, ss 13(1)-13(2) .

Justice Campbell went further in *Downey*, holding that looking for adverse possession would be inimical to the purposes of the *LTCA*.[71] Adverse possession may arise as a defence to an adverse claim, if an adverse claim is asserted. Failure to meet the prescribed limitation period is not fatal when looking at a remedial statute for the rectification of title. Indeed, as noted by both Justice Campbell in *Downey* and Justice Green in *Hollett*, the methods of land transfer and peculiar practices of land holding in their respective jurisdictions mean the decision-maker must look at the application contextually and not remain hidebound to strict rules of establishing good title.[72] Both provinces' processes contemplate title not being in order and applicants presenting claims that may be recognized and uncontested that nevertheless fall short of the standards of good title. This is consistent with the rule in *Perry v Clissold*, long applied in Newfoundland and Labrador, that one in peaceable possession of land is presumed to have good title against the world unless another person can demonstrate better title.[73]

Downey was an uncontested application for title. The Downeys' application was denied by the administrative decision maker on its own motion. There is no indication that the Crown or any other party intervened to object to the Downeys' title at the adjudicative stage. The Nova Scotia Supreme Court overturned the administrative decision maker's ruling denying the uncontested title application. The approach of the Nova Scotia Supreme Court provides an appropriate parallel case for the Newfoundland courts to consider in the context of uncontested quietings. The Newfoundland and Labrador Supreme Court should follow the largely unfettered discretion in the *QTA* to grant title where the claim to title is uncontested.

3. *Unreported and uncontested outcomes under the* QTA

In practice, there are many examples of the Supreme Court of Newfoundland and Labrador following a *Downey*-like procedure for title examination. However, those decisions proceeded ex parte, with no adverse claims, and thus no written reasons. It is a quirk of the operation of the *QTA*: the uncontested cases that flow successfully do not set written precedent, they are resolved with the issuance of a certificate of title. These cases demonstrate how the process works in everyday practice and routine

71. *Downey*, *supra* note 66 at paras 32-35.
72. *Ibid* at para 5; *Hollett*, *supra* note 57 at para 117.
73. *Perry v Clissold* (1906), [1907] AC 73, 4 CLR 374. For its application in Newfoundland and Labrador, see *House v Glovertown (Town)* (1977), 17 Nfld & PEIR 416 at para 71, 46 APR 416 (nfld SC (TD)); *Re Chaytor* (1980), 27 Nfld & PEIR 310 at para 78, 74 APR 310 (Nfld SC (TD)).

matters, but they are undiscoverable by traditional research methods. Practitioners and judges who are familiar with the *QTA* operate from an understanding of the *QTA* based on experience, but that experience is not reported. The reported caselaw under the *QTA* gives an erroneous impression of how the *QTA* operates in practice. The cases that reach the Court of Appeal will only arise in narrow contested circumstances. Those who rely only on legal research into the *QTA* will find the standards too daunting to effectively employ the Act for its intended purpose.

Consider the estate context as an example. In *Re Parsons*, an intra-family dispute arose about entitlement to a property as between the claimants through a husband and wife.[74] The applicant's predecessor in title was the husband, and the applicant claimed through the husband's unprobated will. The possession at issue ended long before the passage of the *Family Law Act*, which would have created a statutory joint tenancy in the matrimonial home.[75] Justice Cameron ruled that the wife was entitled to the subject property by adverse possession, rather than the husband; and the applicant, applying under the will of the late husband, was given an opportunity to present the chain of title from the wife. However, Justice Cameron did provide that "[i]f the will of [the husband] is not admitted to probate leave is granted to the applicant to apply for a determination of his interest on intestacy of [the husband]."[76] This ruling is somewhat unclear: does this statement permit the applicant to seek a declaration of his interest in the absence of probate, or does it allow for a determination of the interests of the applicant only upon seeking administration of an intestate estate on failure of the will? Justice Cameron's reasons are ambiguous. Earlier in her reasons, she states: "The fact that the will has not been probated will be relevant to a determination of whether or not a declaration should be made at this time but is not fatal to the application."[77] This case does not hold that probate is a requirement under the *QTA*. Rather, it leaves the determination of that point to the future. A strict application of *Pawlett*, the leading case at the time *Parsons* was decided, would hold that such a failure was fatal to the application, and the applicant could not seek a certificate of title without either a legal or possessory estate. Yet Justice Cameron does not dispose of the matter on that basis or state that it is a requirement. Notably, there is an adverse claim in this matter, but it is

74. *Parsons, supra* note 54.
75. RSNL 1990, c F-2, s 8(1). The statutory joint tenancy in the matrimonial home was created by the *Matrimonial Property Act*, SN 1979, c 32, effective 1 July 1980. The possession at issue in *Parsons* ended around 1945: see *Parsons*, *supra* note 54 at para 5.
76. *Parsons*, *supra* note 54 at para 29.
77. *Ibid* at para 3.

not an adverse claim on the wife's estate, it is an adverse claim by the descendants of the wife's siblings. The court held that the wife was the proper locus of title, and neither the applicant nor the adverse claimants claimed directly through her. Had the wife's estate been engaged and opposed the application, the outcome may well have mirrored *Pawlett*. That it did not is telling. Ultimately, the certificate of title was issued to the applicant in *Parsons*, though no written decision clarifies how the matter was resolved.[78]

The recent decision of our Court of Appeal in *Power Estate v Hayward* raises further confusion.[79] *Power Estate* involved an appeal of a rejected application for a portion of land north of St. John's, which had belonged to the applicant's father previously, and which was divided into four parcels for the purposes of the application. The application was contested by nine adverse claimants, including siblings of the applicant. At the trial level, Justice Adams rejected the application for title to two parcels of land, indicating that the applicant had failed to establish either documentary or possessory title as against his siblings.[80] The applicant appealed and the trial judge's decision was upheld. It is noteworthy for the purposes of this section that the majority of the Court of Appeal commented briefly on the failure to administer the father's estate.[81] The majority merely notes that the father's estate was unadministered, and the legal interests of the siblings as beneficiaries of the father's estate "have not been judicially determined."[82] The concurring reasons of Justice Butler go further, indicating that the legal title being vested in the estate and not adversely possessed could not sufficiently ground title.[83] In the context of the *Power Estate* case, these comments are not determinative of the lis inter partes: the appeal turned on the question of whether the applicant had sufficiently divested his siblings by possession. No allegation appears to have been asserted that the father's estate was the proper owner of the title. Rather, it was a question of whether the applicant had sufficiently divested the adverse claimants. When one considers the context of a contested quieting, as distinct from an uncontested quieting, it stands to reason that the applicant's failure of possessory title and absence of legal title causes the application to fail when it is actively contested. It is not a question of technical adherence to rules establishing title, it is a question of the

78. See *supra* note 62.
79. 2021 NLCA 58.
80. *Power Estate (Re)*, 2020 NLSC 85, paras 77-78.
81. *Supra* note 79 at paras 17-19.
82. *Ibid* at para 18.
83. *Ibid* at paras 32-42.

prejudice to the interests of adverse claimants. The adverse claimants were not dispossessed by the applicant, and thus had as much of an interest in the property at issue as the applicant himself, based on the principles of intestate succession. The Court of Appeal's comments in this case indicate a troubling adherence to technical strictures of law, but this should not be seen to apply in the uncontested quieting context. The comments on the failure to administer the estate and the interests of the adverse claimants was obiter to the matter at hand. The appeal concerned the interest of the applicants against his siblings as adverse claimants, and not of the parties generally as against the uninvolved estate.

In considering this debate, one should note that the Supreme Court of Newfoundland and Labrador has repeatedly granted certificates of title to land in uncontested proceedings where estates were never probated but beneficiaries had released their interest, or where an unprobated will accounted for the transfer without adverse possession divesting the estates' interests. Recent examples of this include *Re Dyke Quieting of Titles*;[84] *Re Smart Quieting of Titles*;[85] *Re Churchill Quieting of Titles*;[86] *Re Ducey Quieting of Titles*;[87] *Re Smith Quieting of Titles*;[88] and *Re Cull and Pike Quieting of Titles.*[89] These recent unreported cases reflect the appropriate

84. *Re Dyke Quieting of Titles* (unreported, certificate issued 14 November 2020), Grand Bank #2015 06G 0177 (NLSC). Property at Eastport was contained in a Crown grant. The applicant claimed title through the unprobated will of his grandfather, who died in 1965. The land had been vacant from 1965 to 2013, when the applicant built a home on it.

85. *Re Smart Quieting of Titles* (unreported, certificate issued 13 October 2017), Grand Bank #2017 06G 0036 (NLSC). A property at Glovertown was contained in a Crown grant. The property was possessed until 2008, when the applicant's predecessor in title died. The applicant proceeded with deeds of release from the next of kin of the decedent.

86. *Re Churchill Quieting of Titles* (unreported, certificate issued 3 January 2017), Grand Bank #2016 06G 0081 (NLSC). A property at Hodge's Cove was contained in a Crown grant. It had been vacant for at least 30 years; the last occupant of the land had died in 1990. An unprobated will left the property to one George Churchill, who died in 2000 without entering into possession. The Estate of George Churchill was not probated, but the applicant proceeded with deeds of release from the next of kin of George Churchill.

87. *Re Ducey Quieting of Titles* (unreported, certificate issued 7 June 2017), Grand Bank #2017 06G 0019 (NLSC) [*Ducey*]. A property at Garnish was not contained within a Crown grant. Usage of the property for agricultural purposes traced from pre-1949 until the early 1970s. Buildings on the property were removed by the late 1970s, and no subsequent use was made of the property thereafter. Its last user died in 1986, and the land was deeded to the applicant by the deceased's son without probate of the last user's estate. No registered documents relating to the property were found.

88. *Re Smith Quieting of Titles* (unreported, certificate issued 29 June 2018), Grand Bank #2017 06G 0157 (NLSC). Property at Port Rexton was contained in a Crown grant. The applicant claimed title by deeds of release from great-great-grandchildren of the original grantholder, who had died in the 1920s. The property had never been occupied by anyone.

89. *Re Cull and Pike Quieting of Titles* (unreported, certificate issued 24 October 2019), Grand Bank #2017 06G 0133 (NLSC). Property at Bonavista contained in a Crown grant had been used as farmland for at least twenty years prior to the death of its occupier in 2014. The occupier's widow and children executed deeds of conveyance to the applicants in 2017.

outcome envisaged by the *QTA* on uncontested matters and are correct at law, as they accurately reflect the legislative standard of the applicant's "entitle[ment] to the land."[90] Such deeds of release would not constitute good title in the marketplace due to the provisions of the *Chattels Real Act*.[91] Nevertheless, they do provide a "legal basis" for an applicant to proceed with a claim to a given property by grounding the applicant's "entitlement" to the property.[92] This is consistent with the Act and with the ruling in *Re Parsons*.

The author has reviewed cases on which he has personal knowledge and experience from the Supreme Court's Judicial District of Grand Bank in the last ten years. The Judicial District of Grand Bank handles an outsized number of *QTA* proceedings for its size: 35 per cent of the quieting of title certificates which were registered at the Registry of Deeds since 2012 are from matters filed in the Grand Bank District, the second-highest percentage in the province, behind only the Judicial District of St. John's.[93] The majority of these cases are unreported, but they demonstrate a flexible and pragmatic approach in keeping with the principles underlying the *QTA* and appropriately treating matters of uncontested title. These cases are examples of how titles have been granted where title may be defective or uncertain in practice but is nevertheless valid and accepted by the community.

Such unreported cases have dealt with longstanding historical title that was premised on unregistered legal conveyances but recognized in

90. *QTA*, *supra* note 1, s 13(2). Note Justice Marshall's concurring reasons in *Russell v Blundon*, 2002 NFCA 20 at para 43, wherein he held that "colour of title" includes an entitlement to seek legal title, which includes a right to claim an interest through an unprobated estate in that case.

91. RSNL 1990, c C-11. See also *Mugford v Mugford* (1992), 103 Nfld & PEIR 136, 326 APR 126 (Nfld SC (CA)), holding that the beneficiaries of an estate have an interest only in the estate, not specific estate property.

92. The "legal basis" reference has been read conjunctively with the statutory requirement for satisfaction of the court that a certificate should issue, on a standard of a balance of probabilities. See *George*, *supra* note 30 at paras 4-5.

93. A search of the Registry of Deeds' CADO system (*supra* note 20) by document type "Quieting of Titles" for the ten-year period prior to publication of this paper (1 January 2012 to 10 March 2022) discloses 264 results. Each certificate identifies the court file number, which identifies the court centre in which it was filed. On review of these 264 certificates, 135 are from the St. John's centre, 93 are from Grand Bank, 14 are from each of Gander and Corner Brook, 5 are from Grand Falls–Windsor, and one is from Happy Valley–Goose Bay. The remaining two results are late registrations from the defunct Brigus centre. Using the number of sitting judges per district as a proxy for court activity, the judicial district of St. John's has 22 resident justices. The judicial district of Grand Bank has one, although four different justices have acted as resident justice for Grand Bank in the last ten years. Judiciary By Region (last visited 1 June 2022), online: Supreme Court of Newfoundland and Labrador <court.nl.ca/supreme/general/jregion.html> [perma.cc/3MPY-M6AT]. 73% of the justices of the Supreme Court of Newfoundland and Labrador are in the judicial district of St. John's, versus 3% in Grand Bank. Despite this vast discrepancy, 50% of quietings went through St. John's, and 35% went through Grand Bank.

the community without accompanying possession. In *Re Maybee Quieting of Titles*, the applicant claimed title to two parcels of land at Trinity.[94] One parcel was rooted in an 1850 Crown grant and an 1862 registered conveyance, followed by a century of unregistered transactions by bills of sale without accompanying use. The second parcel was recorded on a Crown Lands map of the area from 1852 and had been used until approximately 1970 with no deeds of conveyance. The latter parcel was not known to have been granted. Neither parcel was contested, and a certificate of title was issued to the applicant for both parcels notwithstanding the title defects and long absences of possession.

Long periods of vacancy following longstanding use were also not bars to obtaining certificates of title in *Ducey*[95] and in *Re Nancy Joanne Ltd Quieting of Titles*.[96] Both cases involved vacancy of the land for a period of over thirty years. While both cases rested on adverse possession which had ended long before proceedings commenced in either of these matters, the ownership claim was still recognized in the community as demonstrated by affidavits of possession. No issues were raised as to possible abandonment, and the long vacancy of the land was not a hindrance to obtaining title, even though title in both cases did not arise from a Crown grant. In the case of *Ducey*, no documentary title existed in relation to the land at all.

In several known examples, missing deeds would perfect title to land, but certificates of title were nevertheless issued in the absence of any adverse claim. These examples include cases where pedal possession related to a part of the larger undeeded whole[97] and instances of missing written conveyances.[98] In these cases, the absence of written deeds was

94. *Re Maybee Quieting of Titles* (unreported, certificate issued 2 May 2019), Grand Bank #2019 06G 0006 (NLSC).

95. Ducey, *supra* note 87.

96. *Re Nancy Joanne Ltd Quieting of Titles* (unreported, certificate issued 10 February 2016), Grand Bank #2015 06G 0106 (NLSC). Property at Twillingate. The concise statement of facts records that the property had a dwelling house present on it from 1854 to 1979, and the property was recorded in deeds registered in the 1940s and 1960s. There was no Crown grant to the land, and there were no transfers from certain titleholders named in the 1960s deeds. The property was vacant since 1979.

97. See e.g. *Re Butt Quieting of Titles* (unreported, certificate issued 26 February 2018), Grand Bank #2017 06G 0134 (NLSC); *Noel*, *supra* note 64; *Re Martin Quieting of Titles* (unreported, certificate issued 29 October 2018), Grand Bank #2016 06G 0175 (NLSC); *Re Jewer Quieting of Titles*, (unreported, certificate issued 10 February 2016), Grand Bank #2015 06G 0152 (NLSC) [*Jewer*]; *Re Moody Quieting of Titles*, (unreported, certificate issued 7 June 2021), Grand Bank #2015 06G 0023 (NLSC); *Re Perry Quieting of Titles*, (unreported, certificate issued 7 April 2016), Grand Bank #2014 06G 0186 (NLSC). These cases all involved a dwelling house on one part of a larger parcel of land, whereby use and possession of the larger surrounding land was recognized by the community as relating to the residential portion.

98. *Re Brothers Services Inc Quieting of Titles*, (unreported, certificate issued 15 December 2020),

coupled with possession and occupation and supported by affidavits of possession confirming that the larger parcel was subsumed into the use of the smaller portion thereof. In at least one known instance, a certificate of title was issued in the absence of a deed and without accompanying possession of sufficient length.[99]

The success of these quietings is in keeping with the admonition of Justice Aylward in the contested case of *Shea v Shea*: there must be some evidence of seisin, or of a legal estate in the land.[100] *Shea* involved the wrongful inclusion of another individual's land in the applicant's quieting, but no adverse claim was filed during the quieting investigation, and the applicant received title uncontested. The other landowner commenced an action to reopen the applicant's quieting and recover his land on the basis that the applicant had no entitlement to that portion of land notwithstanding the successful quieting. Justice Aylward held that the *QTA* was not intended to give title to an individual with no basis for their claim and removed the contested portion from the applicant's certificate of title.[101] This rule would seem to be of general application given the language of sections 3 and 13 of the *QTA*. The applicant must prove some entitlement to the land, whether the claim is investigatory or contested, though the entitlement need not rise to the level of perfect title.

If there are deeds to the land, the applicant may have a deemed legal estate by colour of title, regardless of whether the underlying title is valid or the deeds defective.[102] Even where a deed may be missing, colour of title may still be relied upon if there is a sufficient evidentiary basis to support the claim and existence of such an instrument.[103] If there is actual

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Grand Bank #2019 06G 0131 (NLSC); *Re Newhook Quieting of Titles*, (unreported, certificate issued 24 October 2019), Grand Bank #2018 06G 0156 (NLSC); *Jewer*, *supra* note 97. These cases involved land aggregated into a single parcel by multiple separate transactions, but with missing deeds of such transfers.

99. *Re Crawford Quieting of Titles* (unreported, certificate issued 3 March 2022), Grand Bank #2020 06G 0029 (NLSC) [*Crawford*]. The applicant purchased the subject property from the Crown in 1972 on public tender, but the deed of the transfer was unregistered and lost. The applicant occupied the subject property for only four years before leaving the property. The tendering advertisement from 1972 was located, and affidavits filed indicating that the applicant had entered into possession following his purchase.

100. 1986 CarswellNfld 383 at para 27, 1 ACWS (3d) 147 (Nfld SC (TD)).

101. Such authority for the trial judge to reopen the proceeding after issuance of the certificate of title is provided for. See *QTA*, *supra* note 1, s 34 .

102. If an individual entering into possession of land based on documentary title is in possession of part of it, he or she is deemed to be in possession of the whole, even if the title underlying the document is defective or the title invalid. See *Boyd v Luscombe and Hicks* (1986), 57 Nfld & PEIR 242 at para 36, 170 APR 242 (Nfld (DC)); *Stringer v Stringer*, 2006 NLCA 64; *Walsh v Greeley*, 2011 NLTD(G) 2; *Rendell v Steele*, 2016 NLTD(G) 24 at paras 33-34.

103. *Murphy v Gosse*, 2007 NLTD 161 at paras 17-18. The court can infer the existence of the deed if there is sufficient factual basis to establish its existence, such as in *Crawford* (*supra* note 99), where

possession to run out the limitation period, then the applicant may have acquired title by adverse possession regardless of documentary title. In all of the cases referenced in this article, one or the other instance applied. In taking a pragmatic approach to the evidence on an uncontested proceeding, the court can give effect to the legitimate expectations of the applicant claiming title while also complying with the standards set out in law. However, the author would go further and suggest that an individual in possession of land may still be successful on an uncontested quieting where the limitation period for their possession has not run out, as seen in the Nova Scotia Supreme Court's decision in *Downey*. *Shea* must be put into context: the decision arose in a contested proceeding rather than an uncontested investigation. The rule in *Perry v Clissold* would apply to an individual in possession, and the court can address limitation period concerns by requiring additional notice under section 12 of the Act. The *Shea* case is authority preventing an illegitimate "land grab," whereby an individual attempts to seek title to land for which they have no legitimate claim, and an issued certificate of title may be vulnerable on that basis. It does not stand for a hard and fast requirement that an applicant run out the full limitation period to obtain a perfected legal estate in the land. Depending on the context of the application, the applicant's title may be presumed by acquiescence or based on some other evidence that the legal titleholder has satisfactorily given title to the applicant. The approach at the uncontested level must always be contextual, but the court must also be satisfied that anyone with a potential adverse claim has been duly notified.[104] Failure to pursue an adverse claim where notice has been served should give rise to a presumption that the applicant is indeed entitled to the land and has an accepted legal estate in same.

As can be seen from the foregoing examples, courts have not elected to impose technical requirements for compliance with legal title where such steps are perfunctory. The Court of Appeal has endorsed such an approach, holding in *Dyer Estate* that "judicial economy is a good reason for an efficient procedure that is also fair."[105] This approach should be borne in mind in every quieting: the court need not stand in the way of advancing a meritorious claim on its own motion and insist on strict compliance with legalistic requirements where no harm or prejudice is occasioned thereby.

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the public tendering advertisement was filed, with accompanying affidavits confirming the applicant entered into possession. Continued possession may be sufficient as well: see cases at *supra* note 98. In such cases, service on the prior owner can address any concerns about missing title documents, if a prima facie claim of title is made out by the applicant.

104. *Downey*, *supra* note 66 at paras 27-28.

105. *Dyer Estate*, *supra* note 12 at para 36.

It is necessary that the court take a flexible and practical approach where title is uncontested, due to the social conext in which the *QTA* operates. This is what the legislature has intended for one hundred years and what is expected to do justice under the *QTA*. To do otherwise would be, in the words of Justice of Appeal Hoegg, "to apply the law in a rigid and technical manner to a pointless or possibly unjust end."[106]

Conclusion

Courts and practitioners must be cautious when looking at reported caselaw under the *QTA*. There is a distinction between operation of the Act in uncontested investigatory proceedings versus contested proceedings going to litigation. All reported caselaw arises from the second type of proceeding, so courts must be cautious about its application to uncontested proceedings. When considering statutory purpose and unreported decisions, uncontested proceedings operate on a much more flexible basis, which best serves the legislative intent. This is consistent with the letter and the spirit of the law. Unfortunately, in the absence of reported decisions on investigatory proceedings, this approach remains invisible in jurisprudence, and there remains a risk that courts and practitioners may take an erroneous interpretation of the Act in uncontested proceedings based on caselaw from contested proceedings. It is hoped that this paper will assist those applying the law in the future to better understand the intended application of the *QTA* and the conduct of uncontested proceedings.

106. *Paro Enterprises Ltd v Murphy*, 2015 NLCA 33 at para 39.