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Redressing the Past to Repair the Present: The Role of Property Law in Creating and Exacerbating Racial Disparities in Wealth and Poverty in Nova Scotia

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by

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Dedication

To my ancestors, on whose shoulders I stand.
To my descendants, on whom my decisions will land.

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Abstract

Many individuals of African descent who migrated to Nova Scotia during the late eighteenth and early nineteenth centuries never received fee simple interest to their allotted lands. For over 200 years since, their descendants, African Nova Scotians, have been fighting to clarify and confirm legal title to the land on which their ancestors were settled. Most recently, a government program called the Land Titles Initiative was developed to help residents acquire perfected title to their land through the *Land Titles Clarification Act* (*"LTCA"*). The *LTCA* is remedial legislation that was adopted in 1964 to create a simplified procedure for ascertaining legal title to land in designated communities within Nova Scotia, predominately African Nova Scotian communities. Despite the adoption of the *LTCA*, the land titles issue persists in African Nova Scotian communities.

Over the last 10 years there has been heightened awareness about real property issues in African Nova Scotian communities, with particular emphasis on the land titles issue. In 2020, the Nova Scotia Supreme Court remarked "*the lack of clear title and the segregated nature of their land triggered a cycle of poverty for black families that persisted for generations*."[1] Shortly after, the same court commented, "*African Nova Scotians have been subjected to racism for hundreds of years in this province. It is embedded within the systems that govern how our society operates.*"[2]

Nova Scotia, particularly rural Nova Scotia, has a long history of obscure land titles and boundary disputes, and a general reluctance (or inability) by the government to effectively resolve the problem. However, the ensuing cycle of poverty appears to have disproportionately impacted African Nova Scotians more so than White Nova Scotians. This thesis aims to reframe the African Nova Scotian land titles discourse into a broader understanding about the existence of systemic anti-Black racism and White supremacist ideology embedded within the origins of property law in this province, revealing the land titles issue as merely the tip of the iceberg. Through a critical race theoretical analysis of the early nineteenth century colonial land administration laws, this work reveals the ways in which property laws in this province supported and promoted anti-Black racist and White supremacist ideology, which created and exacerbated racial disparities in land-based wealth in this province. In doing so, the intent is to lay a foundation on which further work can be developed, and meaningful action can be taken, including reparations to African Nova Scotians as a first step towards redressing the consequences of systemic anti-Black racism in the law.

[1] *Beals v Nova Scotia (Attorney General)*, 2020 NSSC 60, 2020 CarswellNS 120 at paragraph 22.

[2] *Downey v. Nova Scotia (Attorney General)*, 2020 NSSC 201, 2020 CarswellNS 488 at paragraph 4.

List of Abbreviations Used

PANS	Public Archives of Nova Scotia

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Many advisors guided me throughout this journey, in both official and unofficial capacities. My gratitude is extended to each of them. I acknowledge Shirley Tillotson for her invaluable guidance on historical research methodologies, particularly at the time when the Nova Scotia Public Archives was operating in limited capacity due to the COVID-19 pandemic, and to Richard Devlin for imparting his enthusiasm for legal scholarship and research methodologies. While advice and guidance were plentiful, all errors and omissions are my own. I thank my colleagues at the Legal Counsel Office, particularly John Hope, for encouraging me to pursue this long-standing aspiration and for their endless support throughout. I also thank the donors who contributed to the scholarships that I received from the Faculty of Graduate Studies and the Schulich School of Law, which enabled me to carry out this work.

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Finally, I would like to acknowledge the bravery, tenacity, and resilience of my ancestors of African descent. I specifically acknowledge William Marsman Sr. and William Marsman Jr., who were among the group of Black Refugees who migrated to Nova Scotia in c.1813. While African-descended genealogy is difficult with the best of resources, I am indebted to my parents for their hard work over the last thirty years tracing the Marsman ancestry, with no prior archival experience. We do not know much about William Marsman Sr., but we know that William Marsman Jr. was born in 1803 and died in 1856 as Deacon William Marsman. His obituary reads:

> His talents were more than ordinary for a man of his advantages, his piety was deep and genuine – of the heart, which was manifest by his general habits, honesty, integrity, industry and devotedness to the cause of God and man. All speak of his as a man of God.

When William Marsman Jr. escaped enslavement in the United States with his father, he was only 10 or 11 years old, and eventually settled in Upper Hammonds Plains. He then married Eliza Jane (last name unknown) and they had three children: William, Dorothy, and Eliza. Their son, William (1835-1917), married Nancy Jackson (1841–1915) and they had (among other children) a son named George Daniel Marsman (1875–1943), who married Beatrice Knight (1890–1966). George and Beatrice had (among other children) William Thomas Marsman (1915–1985), who married Margaret Irene Cox (1923–2011). William and Margaret had (among other children) Joel Everett Marsman (1950–Present), who married Janet Victoria Ryerson (1952–2016). Joel and Janet had (among other children) the author of this thesis, being a fifth generation African Nova Scotian and a proud descendent of the Black Refugees. This work is submitted in honour of them.

Chapter 1: Introduction

1.1 Overview

A legal historian once wrote "*the past is not past … contemporary concerns affect the legal history we produce*."[3] In this instance, racial disparities in wealth and poverty in Nova Scotia are the leading contemporary concerns underlying this legal research. Canada's 2016 Census Data shows that African Nova Scotians[4] experience poverty at twice the rate of White[5] Nova Scotians, being 32.1% and 17.2% respectively. African Nova Scotians also experience a higher rate of poverty than other Black people throughout Canada, which is averaged at 23.9%. When broken down into the 18 to 24 age group, African Nova Scotian youth experience a poverty rate of 50.2%, while 39.6% of African Nova Scotian children under the age of 17 are living in poverty.[6] Multiple reasons may account for Nova Scotia's racial disparities in wealth and poverty, but this research aims to explore the role of the law as a contributing factor, specifically real property law.

Over the last two decades there has been heightened awareness about property law issues in African Nova Scotian communities, particularly in relation to land titles. Many African Nova Scotians hold insecure title to their ancestral lands.[7] While African Nova Scotians have been fighting to perfect their land titles for over 200 years, in 1964 a

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[3] Sarah E. Hamill, "Review of Legal History" (2019) 28:4 Social & Legal Studies 538 at 541 ["Hamill, Legal History"].

[4] The term "African Nova Scotian" will be used herein to refer to those individuals who are descendants of free and enslaved people of African descent, including the Black Planters (African descended people who were enslaved by the British settlers who came from New England to Nova Scotia in the 1760s), the Black Loyalists (African descended people who escaped enslavement in the United States and sided with the British in the American Revolutionary War), the Jamaican Maroons (African descended people who escaped enslavement in Jamaica and deported to Nova Scotia in 1796), the Black Refugees (African descended people who escaped enslavement in the United States and sided with the British in the War of 1812), and the Caribbean Migrants (African descended people who migrated from the Caribbean, especially Barbados, to Cape Breton in the 1920s to work in the steel and coal industries), all of who were settled into roughly 52 land-based African Nova Scotian communities across Nova Scotia.

[5] The terms "Black" and "White" are capitalized in this thesis when referring to race, except in direct quotes of another source using lower case.

[6] Statistics Canada 2016 Census Data, 17-06-2019, online <www.statcan.gc.ca/eng/start> [data table 98-400-X2016211]

[7] The Nova Scotian Supreme Court took judicial notice of this fact in *Beals v. Nova Scotia (Attorney General)*, 2020 NSSC 60, 2020 CarswellNS 120 ["*Beals*"].

legislative regime was established through the adoption of *Land Titles Clarification Act*[8] to clarify land titles in designated areas within the province, particularly in African Nova Scotian communities. The emphasis of this legislation was on simplicity in procedure and reduction in costs, because the affected residents are in “necessitous circumstances as a result of lack of property development in the area.”[9]

The discourse pertaining to African Nova Scotian land title obscurity often attributes blame to the British colonialists who granted inferior land tenure to African Nova Scotians in the form of tickets of location or licences of occupation.[10] What is often missing from this discussion is the colonial context and legal framework in which those decisions were made. The land administration legal system in colonial Nova Scotia was more complex than the individual decisions made by its institutional actors, and the consequences afflicted many Nova Scotians, not only African Nova Scotians.[11] However, in the pursuit of clarifying titles as a problem specific to African Nova Scotian communities, another issue has been subdued.

The subdued issue in the land titles discourse is the role of the law in creating and reinscribing racial disparities in land-based wealth. In *Downey v Nova Scotia*[12], the Supreme Court of Nova Scotia held that anti-Black racism is embedded within the law in this province. Justice Campbell writes:

> *[4] African Nova Scotians have been subjected to racism for hundreds of years in this province. It is embedded within the systems that govern how our society operates. That is a fundamental historical fact and an observation of present reality.*

This thesis explores the anti-Black racism and White supremacist ideology that is embedded within the origins of property law in this province which resulted in, among

[8] *Land Titles Clarification Act*, RNS 1989 c 250, as amended [“*LTCA*”].
[9] *Ibid* Section 3(1).
[10] Land tenure is the legal right that a person holds to with respect to land under English common law.
[11] For example, Nova Scotia, particularly rural Nova Scotia has a long history of obscure land titles and boundary disputes (see discussion in Part 4.2.1), but the ensuing cycle of poverty disproportionately impacts African Nova Scotians.
[12] *Downey v. Nova Scotia (Attorney General)* 2020 NSSC 201, 2020 CarswellNS 488 [“*Downey*”].

other things, the inferior *quantity* of land that was allocated to the descendants of African Nova Scotians, specifically the Black Refugees,[13] as compared to White settlers. Land can be a material capital asset that serves as a springboard toward inter-generational economic wealth.[14] However, while the law created opportunities for land-based wealth accumulation by White settlers, even poor White settlers, the law excluded Black people from those same opportunities.

The existence of anti-Black racism and White supremacist ideology in colonial Nova Scotia is not surprising, and thus it may not be astonishing to find its presence in the origins of law. The world was immersed in slavery at the time of this province's colonial formation and the prevailing attitudes held by colonialists towards Africans and people of African descent were rooted in assumptions of racial inferiority.[15] However, while anti-Black racism may have been common, it was not normal. It did not naturally occur, but rather was socially constructed and legally reinforced. These anti-Black racist and White supremacist beliefs influenced the colonialists' behaviours toward the Black Refugees, as demonstrated, for example, in their flagrant disregard for compliance with the promises that were made to the Black Refugees during the War of 1812.[16] The anti-Black racist and White supremacist attitudes then infiltrated the colonialists' application of ostensibly race-neutral colonial land administration laws,[17] which resulted in, among other things,

[13] See Part 2.2 below for discussion about the Black Refugees.
[14] For the purposes of this thesis, the correlation between land and wealth is assumed. The intent is not to prove whether more land creates more wealth (or to condone the exploitation of land for capitalism or wealth accumulation), but rather to illuminate the racial disparities in *opportunities* to create more wealth from more land. Critical race approaches to scholarship often entail a range of disciplines, and while the focus in this thesis is on historical-legal analysis of property law through a critical race lens, the work expands into other fields such as economics, land surveying, and genealogy. It is hoped that scholars in those fields will contribute to the scholarly discourse from the perspective of their own learned and lived experiences.
[15] See, for example, below in Part 2.2.5 regarding anti-Black racist sentiments expressed by the Nova Scotia House of Assembly in April 1815 regarding the presence of Black people in the province.
[16] See discussion in Part 2.2.3 below regarding the Cochrane Proclamation which promised freedom and land to the Black Refugees in exchange for siding with Britain against the United States during the War of 1812.
[17] See Part 4.2, which discusses how the Surveyor-General of Nova Scotia, the Lieutenant Governor of Nova Scotia, and the Colonial Office in Britain, decided to grant 10-acre lots to the Black Refugees when the applicable law allowed (and encouraged) the Lieutenant Governor to grant up to 500 acres of land to each settler and customary practice was to grant at least 100 to 200 acres of land to each settler.

inferior land allocations to the Black Refugees. If this behaviour occurred today, it would have violated fundamental principles of equally, such as Section 15 of the *Charter of Rights and Freedoms.*[18] And, while it is tempting to counter this argument with assertions that the Charter did not exist at the time, it is important to remember that society was still guided by a moral compass rooted in principles of equality and freedom.

Unfortunately, the racially motivated disregard of contractual promises, and the racially discriminatory application of ostensibly race-neutral laws which gave rise to the inferior land allocations to the Black Refugees, was only the beginning. Shortly thereafter, the racial gap in colonial land allocations was exacerbated when the colonialists adopted colour-blind approaches to law reform which served the interests of newly arrived White pauper immigrants.[19] This law reform created better colonial land acquisition opportunities for White settlers, but excluded Black people from eligibility because of their previous racially discriminatory treatment under the law. Finally, after all of the above, the law further exacerbated the racial disparities in land allocations through the adoption of a unified system of land sales, which (a) required the Black Refugees to pay monetary consideration to have their previously issued (smaller) lots confirmed as grants when ought to have been issued larger lots as free grants, and (b) served to deny the Black Refugees the opportunity to be relocated to better and larger lots when they sought to have these racial injustices redressed.[20] In all of these ways, the law supported anti-Black racism by promoting and protecting the interests of a White supremacist ideology, and in doing so, created and reinscribed the racial disparities in wealth and poverty that exists in this province.

The role of the law in supporting and promoting anti-Black racism and White supremacist ideology through the colonial land administration laws in this province was not the result of overtly racists laws, but rather, the law covertly supported anti-Black

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[18] The *Canadian Charter of Rights and Freedoms*, Part 1 of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), c 11.
[19] See Part 3.5 and Part 4.2.1 for further discussion.
[20] See Part 3.3.6 and Part 4.3.1 for further discussion.

racism and White supremacy through the acceptance of conditions that allowed these attitudes to thrive.[21] The passive ways in which the law supports and promotes anti-Black racism and White supremacy are the more insidious types of racism in law, often referred to as systemic racism. Even when laws are ostensibly race-neutral or "objective", they often result in racially disparate effects that advantage White people and disadvantage Black people, and those effects illuminate the ways in which the law and the structures that support it promote an anti-Black racist and White supremacist ideology. In the context of property law, the anti-Black and White supremacist ideology embedded within the law finds it origins in colonialism, including the colonial land administration laws, which resulted in Black people not only being denied confirmed title to their allotted land, but also, and perhaps more importantly, receiving significantly smaller land allocations than White settlers. This racially disparate effect caused and exacerbated by the law impacted inter-generational wealth opportunities which contributed to present day racial disparities in wealth and poverty among White Nova Scotians and African Nova Scotians.

Now over 200 years later, the required action is more than simply attaining perfected title to land. The economic consequences attributed to the racial disparities in colonial land allocations, including land quantity, must also be redressed. To be clear, it is not the intention here to condone colonialism. The unlawful wide-scale colonial land settlement practices in this province violated the terms of the treaties with the Mi'kmaq and must be rectified. However, the colonial land settlement activities also oppressed a significant group of African Nova Scotian ancestors, being the Black Refugees, and contributed to longstanding and inter-generational racial disparities in wealth and poverty that must also be redressed. The obscurity in land titles is merely the tip of the iceberg. A more comprehensive objective is needed, one that is aimed at dismantling the systemic anti-Black racism in the law *and* redressing the harmful imbalance that the law has caused thus far.

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[21] Barrington Walker, "Introduction: From a Property Right to Citizenship Rights – The African Canadian Legal Odyssey," in Barrington Walker, ed, *The African Canadian Legal Odyssey: Historical Essays* (Toronto: University of Toronto Press, 2012) at 3 ["Walker, Legal Odyssey"].

Through an exploration of the role of the law in creating and reinscribing racial disparities in land-based wealth in Nova Scotia, this thesis aims to reframe the land titles discourse into a broader understanding of systemic anti-Black racism and White supremacist ideology embedded within the origins of property law in this province. Reframing the discourse in this way will provide a foundation on which further work can be developed, and meaningful action can be taken, including reparations to African Nova Scotians as a first step towards redressing the consequences of systemic anti-Black racism in the law.

Chapter 1 of this thesis outlines the methodological approaches used in conducting this research, being doctrinal, legal history, and critical race theory (including critical white studies). Chapter 2 sets the stage of analysis by acknowledging the geography of the subject matter, being the ancestral and unceded territory of the Mi'kmaq, followed by an explanation of who the Black Refugees are and the circumstances that gave rise to their settlement in colonial Nova Scotia. The last two parts in Chapter 2 provide an overview of the recent land titles discourse pertaining to African Nova Scotian communities, along with a review of existing literature on Black Refugee land issues as a foundation from which a broader dialogue can ensue.

Chapter 3 aims to identify the applicable land administration laws and situate those laws within the broader context of colonialism and the origins of Britain's property law system in Nova Scotia, being the area of law that regulates how people within the English common law legal system interact with land. After exploring the imperial framework underpinning the applicable land administration laws, Chapter 4 seeks to explore those laws in more detail through a race-conscious theoretical approach, to highlight the racially discriminatory impact of those laws on the settlement of the Black Refugees that were settled in Upper Hammonds Plains, being one of over 52 historic African Nova Scotian communities in the Province of Nova Scotia.[22] Lastly, Chapter 5

[22] The Black Refugee settlement in Hammonds Plains became known as "Upper" Hammonds Plains to distinguish it from the White community of Hammonds Plains. In 1946 the area was officially named Upper Hammonds Plains. Where practical the term "Upper Hammonds Plains" is used in this thesis to when

proposes a path forward through reparations as a first step towards redressing the systemic anti-Black racism in property law.

1.2 Methodology

Theoretically informed approaches to legal scholarship underpin the kind of research questions one chooses to pursue and informs the method for carrying out the task.[23] Theoretical approaches make the rules of law more coherent and understandable, which then allows legal scholars to evaluate the application of these rules for different cases. The legal research methodologies employed in this thesis are doctrinal, legal-history, and critical race theory (including critical white studies).

1.2.1 Doctrinal

The doctrinal approach to legal research involves the identification and analysis of primary sources of law such as statutes, regulations, and caselaw, as well as the legal actors and legal institutions which support it. This approach to legal research is based on legal positivism and will serve as an important prequel to the critical race analysis of the law. In simple terms, one must first identify the law before critiquing it.[24] The doctrinal aspects of this research are mostly contained in Chapter 3, which describes the applicable land administration laws during the timeframe in which the Black Refugees were settled in Nova Scotia. From this doctrinal launching point, those laws will be critically assessed through a race-conscious frame of analysis, being critical race theory and critical white studies.

1.2.2 Legal History

A doctrinal analysis of nineteenth century land administration laws necessitates a historical-legal methodological approach. Combining the insights and methods of historical research along side legal analysis will enable a better examination of the role of the law in creating and reinscribing racial disparities over a prolonged period. By situating

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referring to the African Nova Scotian community, except, for example, in direct quotes or reference to another source using the term Hammonds Plains.

[23] Robert Cryer et al, *Research Methodologies in EU and International Law* (Oxford: Hart Publishing, 2011) at 2 ["Cryer, Research Methodologies"].

[24] *Ibid* at 38.

the law within its historical context one can better understand the "the very idea of law itself."[25] Law is more than the positivistic view as a "collection of rules or principles of conduct established either by legislative authority, court decisions or established custom."[26] The law articulates values and promotes ideology.[27] It "sets a standard of conduct and morality for the guidance of citizens in a society."[28] Therefore, by unearthing the role of the law through examination of historical legal records, the values that are articulated by the law can be revealed, and consequently, the law itself can be implicated as creating and reinscribing racist values and beliefs *alongside* the administrative institutions and actors that implement and enforce them.

The colonial land administration laws served a purpose rooted in White supremacist ideology which oppressed some people and propelled others into economic prosperity based on race. That discriminatory treatment is not only now embedded within the legal system, but also has had racially disparate financial impacts (a benefit and a burden) that have been handed down from generation to generation. Historical approaches to law can take us back to the beginning of the law's original objectives to expose the root causes of the racial injustices being experienced today. This knowledge informs our present-day decisions and unearths the systemic anti-Black racism that exists within the law. The legal system cannot be fully reformed, or its structures dismantled, if the root causes of the problems are not first identified and understood within the context in which they arose.

1.2.3 Critical Race Theory

The theoretical approach that is used to critique the historical doctrinal research in this thesis is as important as the doctrinal research itself. To that end, the applicable nineteenth century land administration laws that impacted the Black Refugees will be

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25 Hamill, Legal History, *supra* note 3 at 540.
26 Bill Charles, "The Story of Law Reform in Nova Scotia: A Perilous Enterprise" (2017) 40:2 Dal LJ 339 at 344 ["Charles, Law Reform"].
27 John N Turner, "Law for the Seventies: A Manifesto for Law Reform" (1971) 17:1 McGill L J 1 at 2.
28 Charles, Law Reform, *supra* note 26 at 345.

assessed through a race-conscious theoretical lens which will illuminate the role of the law in creating and reinscribing racial disparities in land-based wealth.

Critical race theory is a theoretical approach that was founded by racialized scholars to better reflect the realities of race and racism.[29] Through what is often "complex and multifaceted"[30] work, critical race theorists challenge racial oppression caused by positive law, as well as the tacit ways in which the law creates and reinscribes racial inequalities.[31] Critical race theory situates race at the centre of legal analysis and presumes the pervasiveness of racism within our legal system. It critiques the foundational underpinning of the liberal order,[32] including equality theory, colour blindness, meritocracy, and neutrality, and promotes a more transformative approach to dismantling racially oppressive systems of law. Critical race theory insists on a contextual and historical analysis of the law and highlights the linkages between past and present inequalities.

A guiding approach stemming from critical race theory is to look beyond the law's active role in creating racial inequalities (positive law) and examine the passive ways the law supports racial inequalities through the recognition of seemingly harmless legal doctrines and social customs.[33] Through a race-conscious examination of the law, one can uncover, for example, the ways in which colonial land administration laws passively enabled inferior land allocations to the Black Refugees by, among other things, allowing

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[29] Critical Race Theory scholars include Derrick Bell, Kimberlé Crenshaw, Richard Delgado, Cheryl Harris, Mari Matsuda and Patricia Williams. For introductory readings see Richard Delgado and Jean Stefancic, *Critical Race Theory: An Introduction*, 3rd ed (New York, NY: New York University, 2017) ["Delgado and Stefancic, Critical Race Theory"]; Richard Delgado and Jean Stefancic, *Critical Race Theory: The Cutting Edge* (Philadelphia: Temple University Press, 2013); Kimberlé Williams Crenshaw, "Twenty Years of Critical Race Theory: Looking Back to Move Forward," 43 Conn. L. Rev. 1253 (2011); Dorothy Brown, Critical Race Theory: Cases, Materials, and Problems. 2nd ed., (St. Paul, MN: Thomson/West, 2007); Kimberlé Williams Crenshaw, "The First Decade: Critical Reflections, or "A Foot in the Closing Door," 49 UCLA L. Rev. 1343 (2002); Cheryl I. Harris, "Critical Race Studies: An Introduction," 49 UCLA Law Rev. 1215 (2002); Cornel West, et al. *Critical Race Theory: The Key Writings That Formed the Movement*, (New York: The New Press, 1995).

[30] Carol A. Aylward, *Canadian Critical Race Theory: Racism and the Law* (Halifax, Nova Scotia: Fernwood Publishing Company Limited, 1999) at 25 ["Aylward, Canadian Critical Race Theory"].

[31] Walker, Legal Odyssey, *supra* note 21.

[32] Delgado and Stefancic, Critical Race Theory, *supra* note 29 at 3.

[33] Walker, Legal Odyssey, *supra* note 21 at 1.

ostensibly race-neutral laws to be corrupted by the unfettered application of social customs which categorized people of African descent into a subordinated racial group. This legally sanctioned exercise of racial discrimination in the application of a seemingly race-neutral law *disadvantaged* the Black Refugees (and, consequently, African Nova Scotians), but also *advantaged* the White colonists (and, consequently, White Nova Scotians), being an outcome known as white privilege.

White privilege "refers to the myriad of social advantages, benefits, and courtesies that come with being a member of the dominant race."[34] It is an area of scholarship under critical white studies, which is an offshoot of critical race theory. Critical white studies, like critical race theory, adopts a race-conscious analytical lens but shifts the focus of investigation from racial oppression to racial advantage. In this way, critical white studies examines the *privilege* that race as a social construct confers on the White race as opposed to the *oppression* that race as a social construct confers on non-White races.[35] Critical white studies strives to "interrogate whiteness"[36] and illuminate the ways in which a White supremacist ideology serves to justify discrimination against non-Whites for a variety of White-serving interests, for example, to "facilitate the exploitation of black labour."[37] White supremacy in this sense is not about white supremacist hate groups, but rather:

> a political, economic, and cultural system in which whites overwhelmingly control power and material resources, conscious and unconscious ideas of white superiority and entitlement are

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[34] Delgado and Stefancic, Critical Race Theory, *supra* note 29 at 89.

[35] *Ibid* at 85. For discussion on race as a social construct, see Martha R. Mahoney, "The Social Construction of Whiteness" in Richard Delgado and Jean Stefancic, Critical White Studies: Looking behind the Mirror (Philadelphia: Temple University Press, 1997) at 330; and Tod Olson, "What is Race, Anyway?" in Richard Delgado and Jean Stefancic, *Critical White Studies: Looking behind the Mirror* (Philadelphia: Temple University Press, 1997) at 499 where the author notes the absence of scientific basis for racial categorization and writes "Ironically, racial classification is now used to protect the same groups it has harmed in the past", pointing to the use of race-based data in pursuit of racial equality.

[36] Bell Hooks, *Yearning: Race, Gender, and Cultural Politics* 1st ed (Between the Lines, 1990) at 54. See also Ruth Frankenberg, White Women, Race Matters: The Social Construction of Whiteness (University of Minnesota Press, 1993), where the author argues that race shapes white women's lives.

[37] Derrick Bell, "White Superiority in America: Its Legal Legacy, Its Economic Costs" in Richard Delgado and Jean Stefancic, *Critical White Studies: Looking behind the Mirror* (Philadelphia: Temple University Press, 1997) at 596.

> widespread, and relations of white dominance and non-white subordination are daily re-enacted across a broad array of institutions and social settings.[38]

A critical race theoretical lens of the law, coupled with critical white studies, exposes systemic anti-Black racism in the legal system *and* unmasks the White supremacy embedded within the legal system as a structure that produces White privilege. Understanding both the benefits and the burdens is key to dismantling the anti-Black racism *as well as* the White supremacy. As one scholar explains:

> […] our system of race is like a two-headed hydra. One head consists of outright racism – the oppression of some people on grounds of who they are. The other consists of white privilege – a system by which whites help and buoy each other up. If one lops off a single head, say, outright racism, but leaves the other intact, our system of white over black/brown will remain virtually unchanged.[39]

Exposing and dismantling overt and covert forms of anti-Black racism in the law is only one part of the equation. Equally important is unmasking and deconstructing the overt and covert forms of White supremacy in the law. To be clear, "[t]o eradicate whiteness is not to eradicate those who claim identities as whites but rather their position of dominance in the world and the prescription of their ways of being and knowing as normal, civilized, moral – in short, human".[40] Thus the scope of inquiry is not whether an individual White person holds specific privilege relative to an individual Black person, but rather, whether one racial group benefits by virtue of belonging to the dominant race whereas another racial group is burdened by the structures created to serve the interests of the dominant race. With this critical perspective in mind, "[t]he question that confronts us in Canada is whether, as proponents of critical race theory argue, the very foundation

[38] Frances Less Ansley, "White Supremacy (And What We Should Do about It) in Richard Delgado and Jean Stefancic, Critical White Studies: Looking behind the Mirror (Philadelphia: Temple University Press, 1997) at 592.
[39] Delgado and Stefancic, Critical Race Theory, *supra* note 29 at 90.
[40] Tammie M Kennedy; Joyce Irene Middleton; Krista Ratcliffe, Rhetoric's of Whiteness: Postracial Hauntings in Popular Culture, Social Media, and Education (Carbondale: Southern Illinois University Press, 2017) at (xvi).

of law itself is inherently designed to maintain white supremacy in its myriad material and ideological manifestations."[41]

[41] Walker, Legal Odyssey, *supra* note 21 at 36.

Chapter 2: Setting the Stage

2.1 Mi'kma'ki

The events discussed in this thesis transpire in the ancestral and unceded territory of the Mi'kmaq people, known as Mi'kma'ki. The geographic area of Mi'kma'ki includes what is now known as the Province of Nova Scotia, which has been inhabited by the Mi'kmaq people for thousands of years.

In the early days of European arrival to the area, the Mi'kmaq people had limited contact with the newcomers. In the late 1500s throughout the 1600s, the presence of English fisherman became more prevalent during fishing season, and eventually led to increased trade among the groups. However, by the 1700s, Britain developed an interest in a formal alliance with the Mi'kmaq (as well as the Maliseet and the Passamaquoddy), primarily in attempts to lure the Indigenous communities away from their growing relationships with the French. This led to a series of treaties signed in the 1700s between the British and the three Indigenous communities. The first of the treaties was signed in 1726.[42]

The purported intention of the treaties was to establish basic laws governing the relationship between the English and the Indigenous nations, particularly with respect of land. As one historian explains:

> The most important of the treaty's provisions dealt with land. On the one hand, the Mi'kmaq and Maliseet agreed not to molest His Majesty's subject in their settlements 'already made or lawfully to be made.' By this clause, both communities formally accepted the legality of existing settlements. They also agreed that the British might establish future settlements, though such settlements could only be made 'lawfully.' The treaty, however, did not define

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[42] William C. Wicken, "Fact Sheet on Peace and Friendship Treaties in the Maritimes and Gaspé" (Government of Canada: 2010), online <https://www.rcaanc-cirnac.gc.ca/eng/1100100028599/1539609517566> ["Wicken, Fact Sheet"]. See also William Wicken et al, *Mi'kmaq Treaties on Trial: History, Land, and Donald Marshall Junior* (Toronto: University of Toronto Press, 2002); James Sakej Youngblood Henderson, "Mi'kmaq Treaties" in Siobhan Senier, *Dawnland Voices: An Anthology of Indigenous Writing from new England*, (UNP: Nebraska, 2014) at 82; and Daniel Paul, We Were Not the Savages: A Mi'kmaq Perspective on the Collision between European and Native American Civilizations (Halifax, Nova Scotia: Fernwood Publishing, 2006).

> 'lawfully.' This issue might have been addressed in the treaty negotiations but the minutes of these discussions are not extant. Nonetheless, it is reasonable to assume that the two sides to the agreement agreed that future settlement would be a subject of future negotiations.

At the time of signing the 1726 treaty, Britain did not have a strong presence in Nova Scotia. It was mainly inhabited by the Mi'kmaq and Acadians, hence the enduring alliance between the Mi'kmaq and France during British-French wars throughout the first half of the eighteenth century. However, by 1749, much had changed. In June of 1749, England fortified its presence in Nova Scotia by forceable expansion into the Halifax region with settlement growth under the helm of Governor Edward Cornwallis, the British-appointed Governor in Chief over the Province of Nova Scotia.[43] This led to increased conflict between England and many of the Mi'kmaq communities, resulting in their refusal to sign the 1749 treaty that England signed with the Maliseet and only one Mi'kmaq community. The 1749 conflict led to the 1752 treaty, which "reaffirmed the 1726 treaty but also modified it by formalizing a commercial relationship between the British and Mi'kmaq."[44] Then, after the Seven Years War which ended French colonial forces in Nova Scotia, the British and Mi'kmaq communities signed further treaties in 1760/61[45] and again in 1778/79, primarily to discourage attempts by the United States to recruit Mi'kmaq support in the American Revolutionary War.

With the flood of English settlers into Mi'kma'ki after the American Revolutionary War, Britain's interest in a harmonious relationship with the Mi'kmaq began to fade, as did their compliance with the terms of the treaties. Thus, by the time the Black Refugees arrived in Nova Scotia, the British empire had already forcibly and systematically inched their way through the province without any regard for the legal restrictions on settlement that were outlined in the treaties. As early as 1749, when the British empire sought to

[43] Edward Cornwallis served as the British-appointed Governor in Chief over Nova Scotia between 1749 to 1752 ["Governor Cornwallis"].

[44] Wicken, Fact Sheet, *ibid* note 42.

[45] The issue of which Mi'kmaq communities signed which (or any) treaties has been the subject of much debate and litigation. See, for example, *R v Marshall*, [1999] 3 S.C.R. 456 and *R v Marshall*, [1999] 3 S.C.R. 533. There is also debate as to whether the 1760 and 1761 treaties reaffirmed or nullified the 1752 and 1726 treaties (see *Ibid* note 42).

fortify its ostensible control over Nova Scotia by occupying Halifax[46], an early step in its colonization process was the deployment of military engineers to prepare land surveys and settlement plans. Through these surveys (which defined the boundaries) and plans (which scattered the people), this strategic attack was vital to Britain's "seizure, control, and administration of land."[47] However, at the same time, the land settlement process was perceived as an act of war against the Mi'kmaq in violation of the 1726 treaty.[48]

The British system of land surveying and sponsored settlements on Mi'kma'ki in this manner was an act of White supremacy.[49] British colonialists asserted governance over the land and its resources without consent or inclusion of the Mi'kmaq inhabitants, in violation of their legally defined relationship. As one scholar writes:

> Planners drew up a settlement that was meant to fit beneath the sovereignty of the colonial state, and that was meant to be inhabited exclusively by colonial settlers. There was no place in this

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[46] Writing in 1832, Beamish Murdoch, a lawyer, historian, and political figure in Nova Scotia who represented Halifax township in the Nova Scotia House of Assembly from 1826 to 1830, describes the ideology of the day that was guiding imperial land settlement practices, referred to as the doctrine of *terra nullis*, meaning "[t]he possession of land on the part of any nation to which no other has a prior title, is held to confer a right of ownership – but this possession must be a real and actual occupation […]." (see Beamish Murdoch, *Epitome of Laws of Nova Scotia* (Halifax, Nova Scotia: CIHM, 1832) Volume II, Book II at 55, online: Canadiana by CRKN < https://www.canadiana.ca/view/oocihm.59438/64?r=0&s=1> ["Murdoch, Epitome of Laws"]). The flaw in the application of this ideology, however, is that the land in Nova Scotia was not *terra nullius* (vacant land), it was inhabited by the Mi'kmaq. Dismissing this point most disturbingly, Murdoch writes, "A question has often been suggested by theoretical men, as to the right of the European nations to dispossess the aboriginal inhabitants of America […], where our own nation and that of France took possession of an uncultivated soil which was before filled with wild animals and hunters almost as wild. It might with almost as much justice be said that the land belonged to the bears and wild cats, the moose or the carriboo, that ranged over it in quest of food, as to the thin and scattered tribes of men, who were alternatively destroying each other or attacking the beasts of the forests" at 57. Regardless of Murdoch's views, the Supreme Court of Canada ruled in 2014 that the concept of *terra nullis* (that no one owned the land prior to European assertion of sovereignty) never applied in Canada (See *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44 at para 69). Furthermore, the Truth and Reconciliation Commission of Canada calls upon the Government of Canada to implement the United Nations Declaration on the Rights of Indigenous Peoples regarding land injustices which stem from the concept of *terra nullius* and its related doctrine of discovery, which underlies the legal basis on which the British Crown claimed sovereignty over Indigenous peoples and their territories, lands, and resources.

[47] Ted Rutland, *Displacing Blackness: Planning, Power, and Race in Twentieth-Century Halifax* (Toronto, ON: University of Toronto Press, 2018) ["Rutland, Displacing Blackness"] at 1, noting that the territorial surveys and settlement plans were completed within the first two months after arrival in June 1749.

[48] *Ibid* at 1, citing Daniel Paul, *We Were Not the Savages: A Micmac Perspective on the Collision of European and Aboriginal Civilizations* (Halifax: Nimbus Press, 1993).

[49] See above at Part 1.2.3 and below at Part 3.1.2 for discussion on White supremacy.

> plan for the Mi'kmaw, even as the plan pertained to territory that they had occupied and claimed for millennia.[50]

It is trite to say that colonialism has had long-lasting and devasting impacts on the Mi'kmaq. One impact of particular significance to this thesis is what is referred to as "the legal fiction" of the Crown's original title of tenure in Mi'kma'ki.[51] As this scholar explains:

> In English law, the original title of the Crown is the fundamental starting point for every subdivision of property rights. This maxim asserts that every claimant to an interest in land in England and Canada must show an estate derived from the Crown. All estates must be evidenced by either a direct royal grant or indirectly through the Crown grantee's. These Crown derivative grants must be registered, and are viewed as the fundamental evidence of legitimate historical entitlement to land. **While a grand and fundamental maxim, the Crown's original dominion is a fiction of English law that has no foundation in realty or truth**.[52] [emphasis added]

As concepts such as *terra nullius* and the doctrine of discovery are re-examined through an Indigenous-centred analysis, many legal assumptions that have traditionally supported and promoted the Crown's ostensible right to distribute land in this province, and the transactions that flowed from that, start to destabilize. To that end, decolonization demands renewed analysis of property law principles that are embedded with legal system.

It is important to remember, however, that while the Mi'kmaq did not cede their land, by the time the Black Refugees arrived in Mi'kma'ki, the British had been asserting governance over the land for more than sixty years.[53] At this point, the colonial and local governments were formed, the British-based legal system was established, and the

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[50] Rutland, Displacing Blackness, *supra* note 47 at 2.

[51] James Youngblood Henderson, Mi'kmaw Tenure in Atlantic Canada, 18 Dalhousie L. J. 196 (1995) at 199. See also John McLaren, et al Despotic Dominion Property Rights in British Settler Societies (Vancouver, B.C.: UBC Press, 2004).

[52] *Ibid* at 201.

[53] Philip Girard, et al., *A History of Law in Canada, Volume One* (Toronto: University of Toronto, 2018) ["Girard et al, History of Law"] at 587: "In 1815 all British North American colonies were firmly established political entities and essentially rural societies. Land was far and away the most important economic resource, and most colonies had established procedures for land granting and the confirmation and registration of interests in land."

Crown lands administration process was in full force. From the perspective of the Black Refugees, the British officials overseeing their settlement were empowered to grant the lands that were being allocated to them, and even if that authority was doubted at the time, the Black Refugees had no power to influence or inform that colonial exercise of power. While the impacts of colonial deception must now be reconciled as the Province of Nova Scotia aims to honour its commitments to the Peace and Friendship Treaties through truth and reconciliation, reconciliation must respect and preserve the rich heritage and distinct African Nova Scotian culture which is tied to the geography of African Nova Scotian communities.[54] At the same time, those advocating for land-based racial equity must be inclusive of Indigenous sovereignty, histories, spiritualities, politics, communities, and relationships to the land.[55]

2.2 Black Refugees

2.2.1 Terminology

The Black Refugees were a group of African-descended individuals who fled enslavement in the United States to side with Britain during the War of 1812, in exchange for Britain's promises to give them freedom and land in a British colony. By the end of the War of 1812, at least 3,500 formerly enslaved African-descended individuals had escaped captivity in the United States using this liberation strategy, and of that number, over 2,000 were settled in Nova Scotia by the end of 1818.[56]

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[54] Land settlement is an integral component to the identity of African Nova Scotians as a distinct people in Nova Scotia. The process of settlement facilitated the transition of this group as people enslaved as African Americans into a collective with shared experiences as African Nova Scotians. Harvey Amani Whitfield, *Blacks on the Border: The Black Refugees in British North America 1815 - 1860* (Burlington, Vermont: University of Vermont Press, 2006) at 46 ["Whitfield, Blacks on the Border"] writes "The struggle of settlement exploded any notions among the Refugees that Nova Scotia was a land of unqualified promise. Instead, the shared experience of racial hostility, indecisive government policies, poor employment prospects, and arduous efforts to develop farming communities created the foundations for a new culture and community in British North America".

[55] Zainab Amadahy and Bonita Lawrence, "Indigenous Peoples and Black People in Canada: Settlers or Allies?" in Arlo Kempf (eds) *Breaching the Colonial Contract* (Dordrecht: Springer, 2009) at 116 ["Zainab and Lawrence, Indigenous Peoples and Black People in Canada"].

[56] See Whitfield, Blacks on the Border, *supra* note 54 at 32. However, in Harvey Amani Whitfield, "The African Diaspora in Atlantic Canada: History, Historians, and Historiography" (2017) 46(1) Acadiensis 213 at 213 ["Whitfield, Historiography"] Whitfield suggests 2,500-3,000 Black Refugees escaped enslavement, and, citing in footnote 1, Alan Taylor, *The Internal Enemy: Slavery and War in Virginia, 1772-1832* (New

It is not without hesitation that the term "Black Refugees" is used in this thesis. There have been many labels applied to this group, including 'People of Colour', 'Inhabitants of Colour', 'Chesapeake Blacks', 'Refugee Negroes', 'Negro Refugees', 'Black People', 'African Americans'[57], and 'African British North American'[58] but "Black Refugees" is the most common. When compared to the heroic term used to describe the "Black Loyalists", the term "refugee" is an unfair depiction of those individuals who courageously decided to flee their captors, aid the British armed forces in a war (either directly or through weakening the economy with their departure), and thereafter contributed to the British capitalist economy through, among other things, low-wage labour. Thousands of European immigrants migrated as settlers to this province in the early nineteenth century, and while many were often described as "pauper immigrants" they were not labeled as "refugees" notwithstanding the dire circumstances that caused them to flee their homes, nor their need for (and receipt of) government assistance when they arrived.[59] However, despite these reservations about terminology, the term "Black Refugees" has been embraced by the African Nova Scotian community and reclaimed with pride to describe one of the significant waves of Black migration[60] that form the

York: W.W. Norton, 2013) at 442 who estimates that 2,811 Black Refugees went to Nova Scotia and a further 381 arrived in New Brunswick.

[57] The term "African American" is also used in this thesis, particularly when referred to the Black Refugees when they were enslaved in the United States.

[58] Harvey Amani Whitfield, "Black American Refugees in Nova Scotia 1813 – 1840" (PhD Thesis, Dalhousie University, 2003) at 25 [unpublished] ["Whitfield, Black American Refugees"]; and Harvey Amani Whitfield, "The Development of Black Refugee Identity in Nova Scotia, 1813-1850" (2005) 10(2) Left History 9 ["Whitfield, Black Identity"].

[59] The disbanded soldiers were another group of settlers that depended on government assistance. See John Grant, *The Immigration and Settlement of the Black Refugees of the War of 1812 in Nova Scotia and New Brunswick* (The Black Cultural Centre for Nova Scotia, 1990) at 92 ["Grant, Immigration and Settlement"], citing Dalhousie to Bathurst, 14 August 1817 PANS RG1 Vol 112 Page 27, where Grant writes "Their [disbanded soldiers] were also insufficient to support their families through the winter 'and if the rations were stopt[sic] they must quit'.

[60] John N. Grant, "Black Immigrants Into Nova Scotia, 1776-1815" (1973), 58(3) The Journal of Negro History, 253 at 253 ["Grant, Black Immigrants"]: "The greater portion of the black population of Nova Scotia came not as a result of a trickling immigration but in three main waves. The three waves were similar in that each resulted from events completely external to Nova Scotian affairs and in that the immigrants were driven, not drawn to Nova Scotia. Two wars between Great Britain and the United States and an internal squabble in Jamaica precipitated the immigration of blacks to Nova Scotia." However, Whitfield argues there were five periods of Black migration. See Whitfield, Blacks on the Border, *supra* note 54 at 10: "In examining the experience of people of African descent in early Nova Scotian history, five periods emerge: early Africans

distinct African Nova Scotian identity.[61] The first wave of migration, commonly referred to as the Black Loyalists,[62] and the second wave, commonly referred to as the Jamaican Maroons[63] are beyond the scope of this research, except to note that their presence in this province informed and affected the treatment of the Black Refugees.[64] The third wave, the Black Refugees, are the ancestors of most present-day African Nova Scotians.[65]

While generally considered to be one wave, the Black Refugees can be conceptually divided into two subgroups: those who arrived during the war and are often referred to as the "early arrivals" (approximately 1,200), and those who arrived shortly after the war's conclusion and are often referred to as the "late arrivals"[66] (approximately 800).[67] Another approach to grouping can be based on pre- and post- proclamation, using the date of Sir Alexander Inglis Cochrane's proclamation as the demarcation point.[68] But that is not the approach adopted in this thesis for two reasons. First, when the British government, under the helm of Lieutenant Governor Dalhousie,[69] decided in November 1816 that its support and assistance were only to be made available to those Black

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to 1700; black people in Ile Royale, 1713-1758; blacks in pre-Loyalist Nova Scotia, 1749-1782; the Black Loyalists' and Slave Loyalists' influx, 1783-1793; and the Jamaican Maroon episode."

[61] See *supra* note 4.

[62] See *supra* note 4.

[63] See *supra* note 4.

[64] See Whitfield, Black Identity, *supra* note 58 at 11: "Nova Scotia's experience with black immigrants during the late eighteenth century affected the Refugees from the War of 1812." See also Whitfield, Black American Refugees, *supra* note 58 at 4 where Whitfield notes that by the time the Black Refugees arrived in the autumn of 1813, the colony had already developed pre-existing racial attitudes towards people of African descent based on, for example, previous experiences with the Black Loyalists and Jamaican Maroons. He writes: "[t]he racial badge of slavery continued into the nineteenth century and reinforced a hierarchical society, which placed the black community on the lowest rung of the social ladder."

[65] Grant, Black Immigrants, *supra* note 60 at 261: "The third group of blacks who immigrated into Nova Scotia are the most important because their settlement became permanent."

[66] It is important to distinguish here between the Black Refugee "late arrivals", and the term "later arrivals" which is sometimes used to describe the Caribbean Migrants who migrated to Cape Breton, Nova Scotia in the 1920s to work in the steel and coal industries. (For discussion on "later arrivals" see online, Black Cultural Centre, < https://bccns.com/our-history/caribbean-migrants/>).

[67] John Grant adopts this approach in Grant, Immigration and Settlement, *supra* note 59 at 45 where he explains that Chapter 2 in his book covers the early arrivals and Chapter 3 covers the late arrivals.

[68] Sir Alexander Cochrane, then Vice Admiral, was the Naval Commander-in-Chief of the North American Station during the War of 1812 ["Vice-Admiral Cochrane" or "Cochrane"], and issued The Proclamation by Vice Admiral, Sir Alexander Cochrane, Naval Commander-in Chief upon the American Station 2 April 1814 PANS RG 1 Vol III Pages 97-98 ["Cochrane Proclamation"].

[69] James Andrew Broun-Ramsay, 1st Marquess of Dalhousie, served as the British-appointed Lieutenant Governor of Nova Scotia between 1816 and 1820 ["Lieutenant Governor Dalhousie" or "Dalhousie"].

Refugees who arrived in response to the Cochrane Proclamation and remained settled on the land they were allotted, they effectively divided the group into pre-proclamation Black Refugees and post-proclamation Black Refugees.[70] However, a significant flaw in this approach is that it ignores the possibility of a constructive contract that induced formerly enslaved African Americans to join the British armed forces before the Cochrane Proclamation was issued. Evidence suggests informal representations were made by the British military to the formerly enslaved Black people in the United States, particularly considering the precedent of similar proclamations that were made only thirty years prior during the American Revolutionary War.[71] The early arrivals who were brought to Nova Scotia by the British military ships before the Cochrane Proclamation (April 2, 1814) may have done so legitimately in reliance on implied or verbal representations made on behalf of the British Crown, as opposed to the express representations that were made in the

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[70] Grant, Immigration and Settlement, *supra* note 59 at 91. The census was ordered in response to recommendations by Dalhousie raised in Council that "some line, or regulation were drawn to ascertain what Negroes were entitled to receive rations, Clothing or assistance as there are great numbers wandering about without fixed abode, and Daily claiming relief." See also Grant, Immigration and Settlement, *supra* note 59 at 89, and Grant, Immigration and Settlement, *supra* note 59 at 90: "[t]o be eligible a person had to enter the province 'under the proclamation of Admiral Sir Alexander Cochrane since April 1815' and had to be settled 'and constantly reside' upon the lands they had received either from Government or the individual proprietors." Lastly, Grant, Immigration and Settlement, *supra* note 59 at 99, Grant explains that when the administrator for New Brunswick inquired on August 8, 1815 about eligibility for rations, he was told that only those Black Refugees who were actually settled on lands granted to them, or located on portions of lands to cultivate for themselves were entitled to provisions from the government. See also J.S. Martell, Immigration to and Emigration from Nova Scotia 1815-1838, (Halifax, Nova Scotia: The Public Archives of Nova Scotia, 1942) at 36 ["Martell, Immigration and Emigration"] where Martell writes: "New regulations for rationing refugee Negroes were established by Lieutenant-Governor Dalhousie late in 1816. Only the Negroes who had been sent by Admiral Cochrane since April, 1815, were to be considered refugees. Three principal depots for rations (which were to cease June 1, 1817) were established at Halifax, Nine Mile River, Preston. Negroes at Hammonds Plains, Preston, Refugee Hill (St. Margaret's Bay Road), Waterloo Farm (Colchester Road), and on lands of individual proprietors were to continue to receive rations if they had been receiving them up to this date. But there were to be no rations for Negroes idling on the street of Halifax unless they were too infirm to settle." See also C. B. Fergusson, A Documentary Study of the Establishment of the Negroes in Nova Scotia between the War of 1812 and the Winning of Responsible Government, (Halifax, Nova Scotia: The Public Archives of Nova Scotia, 1948) at 28 ["Fergusson, Documentary Study"].

[71] During the American Revolutionary War, British officials issued proclamations to African-descended slaves inducing them to flee captivity and join the British armed forces in what are referred to as the 1775 Dunmore Proclamation (by Virginia's then Governor, John Murray, 4th Earl of Dunmore known as Lord Dunmore) and the 1779 Philipsburg Proclamation (by British Army General Sir Henry Clinton) [collectively, the "American Revolutionary War Proclamations"].

Cochrane Proclamation.[72] A second reason for subdividing the group based on early arrivals and late arrivals, rather than pre- and post- proclamation, is that it is relatively easy to glean from the literature the approximate number of early arrivals (those who arrived during the war) and late arrivals (those who arrived shortly after the war). However, it is more challenging to determine how many of the early arrivals fled captivity before or after the Cochrane Proclamation, but delayed in their departure from the United States or their arrival to Nova Scotia.[73]

2.2.2 The War of 1812

The War of 1812 is a defining event for the Black Refugees. As is often the case with post-war peace treaties, the strained relations between Britain and the United States after the American Revolutionary War reached a peak on June 19, 1812, when the United States formally declared war against Great Britain. By 1813, and through to 1814, the Chesapeake Bay on the east coast of the United States became a main strong hold for the British army under the direction of Admiral J. B. Warren.[74] Admiral Warren was instructed to not incite a slave rebellion but was authorized to receive aboard the British ships any African American who asked to do so.[75] He was also instructed to receive them "as free men, not as slaves, and send them to any of several of His Majesty's colonies."[76] Thousands of formerly enslaved African-descended Americans seized this opportunity to flee the United States,[77] but it was not until Vice-Admiral Cochrane relieved Admiral Warren on April 1, 1814 that the British actively induced the African-Americans to act in reliance on specific representations.

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[72] See Part 2.2.3 below for discussion on the Cochrane Proclamation as a contract.

[73] Grant, Immigration and Settlement, *supra* note 59 at 46 provides some data on the early arrivals who came after the Cochrane Proclamation, which appears to be a few hundred people.

[74] *Ibid* at 38.

[75] Whitfield, Blacks on the Border, *supra* note 54 at 32.

[76] Grant, Immigration and Settlement, *supra* note 59 at 39.

[77] *Ibid* at 40 cites Captain Robert Barrie to Vice-Admiral J. B. Warren, 14 November 1813, Adm. 1, 506, "The slaves continue to come off by every opportunity and I have now upwards of 120 men, women and children on board, I shall send about 50 of them to Bermuda in the Conflict . . . there is no doubt but the blacks of Virginia and Maryland would cheerfully take up arms and join us against the Americans."

2.2.3 The Cochrane Proclamation

While many African Americans were escaping enslavement long before the British expressly asked them to do so,[78] on April 2, 1814, Vice Admiral Cochrane issued the monumental proclamation during the War of 1812 which formalized the arrangement.[79] While the Cochrane Proclamation was not explicitly directed towards the enslaved African Americans, it was clearly intended for them.[80] It states:

> By the Honorable Sir Alexander Cochrane, K. B. Vice Admiral of the Red, and Commander in Chief of His Majesty's ships and vessels upon the North American station, etc., etc., etc.,
>
> A Proclamation
>
> Whereas it has been represented to me that many persons now resident in the United States have expressed a desire to withdraw therefrom with a view to entering into His Majesty's service, or of being received as free settlers into some of His Majesty's colonies. This is therefore to give notice that **all persons who may be disposed to migrate from the United States, will with their families, be received on board** of His Majesty's ships or vessels of War, or at the military posts that may be established upon or near the coast of the United States, when **they will have their choice** of either **entering into His Majesty's sea or land forces**, or of **being sent as free settlers** to the British possessions in North America or the West Indies **where they will meet with due encouragement**. Given under my hand at

[78] Whitfield, Blacks on the Border, *supra* note 54 at 32 "Although many African Americans absconded to British lines after Cochrane's proclamation, Refugees had helped to initiate this policy by escaping to the British as early as the spring of 1813, with the first African Americans arriving in Nova Scotia that fall." Robin Winks, Blacks in Canada A History, 50th Anniversary Ed., (Montreal: McGill-Queen's University Press, 2021) at 115 ["Winks, Blacks in Canada"] writes "Cochrane's proclamation was meant to deal with a situation that already existed, not with one he created by virtue of it. Already a large number of Negroes had found their way to the British lines."

[79] *Ibid* at 114 notes that there were two issuances of the proclamation, one on April 2, 1814 and another on April 7, 1814.

[80] Whitfield, Blacks on the Border, *supra* note 54 at 34; see also Grant, Immigration and Settlement, *supra* note 59 at 40 where he writes "Cochrane did instruct raiding parties to distribute it among the slave population."

> Bermuda this second day of April, 1814, by command of Vice Admiral.[81] [emphasis added]

Thousands of enslaved African Americans escaped captivity in the United States and fought their way to British vessels after the Cochrane Proclamation, including "those who departed on their own initiative, those who were enticed by their fellows to escape, (sent back for that purpose) and those who had freedom forced upon them as a result of the continuous raids of the British marines."[82] It is important to note that joining the British armed forces was not a pre-requisite to the promises made in the Cochrane Proclamation. The Black Refugees had a choice between joining the military forces *or* being sent as free settlers to a British colony where they will be met with due encouragement.

There is much to consider from a contract law perspective whether the Cochrane Proclamation created an enforceable contract in law. While more research is needed on this issue,[83] for the purposes of this thesis, the starting presumption is that the proclamatory promises were contractually enforceable.[84] When Vice Admiral Cochrane issued his proclamation, it was done with the intent of inducing the African Americans to flee enslavement. From an objective standard of analysis, a reasonable person would interpret those statements to be enforceable, particularly given the severity of risk that the Black Refugees incurred by accepting the offer. Fleeing enslavement, separating from

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[81] Cochrane Proclamation, *supra* note 68.

[82] Grant, Immigration and Settlement, *supra* note 59 at 41.

[83] A similar contractual analysis is needed for the American Revolutionary War Proclamations.

[84] The purpose for discussing the Cochrane Proclamation in this thesis is not to opine on its legal status as a contract, but rather to provide background context leading up to the subsequent property law injustices experienced by the Black Refugees in Nova Scotia. Regardless of whether the Cochrane Proclamation meets the legal test of contract formation, and what legal determination would mean for African Nova Scotians today, the statements in the Cochrane Proclamation at the very least, establish a reasonable standard of expectations held by the parties as to how the Black Refugees should have been treated when they arrived in Nova Scotia, namely, as 'free settlers to the British possessions in North America or the West Indies where they will meet with due encouragement." However, the attitude of indifference toward meeting those expectations prevailed, and the law was (again) ineffective in protecting the legal interests of the Black Refugees. The Cochrane Proclamation sets the stage for race-conscious analysis of the cumulative discriminatory treatment of the Black Refugees up to and including the application of the land administration laws, revealing a recurring theme of race-based injustices and systematic approaches to denying Black people access to opportunities for economic prosperity in this province.

family and friends, making the long journey through the battlefields to reach the shoreline, are all extreme acts of performance and would not have been undertaken without an expectation of enforceable promises. A reasonable person would expect that once the Black Refugees arrived at the vessel, the British military had to accept them onboard and not turn them away. If that aspect of the proclamation is enforceable, then so too are the promises for encouragements.

The basic premise in contract formation under common law (which was in effect at the time of the proclamation) is that a contract arises when there is a meeting of the minds.[85] A meeting of the minds, known as mutual assent, results when one party makes an offer to the other, and the other accepts it. While there are nuances to the basic premise, such as *intention* to make an offer, the applicable standard of review is an objective one, not a subjective one. Thus, the guiding question is whether a reasonable person would conclude that the parties intended the offer to be binding.

It is reasonable to conclude that the enslaved African Americans understood the meaning of the statements that were made in the Cochrane Proclamation and intended those statements to be honoured when accepted. They would not have risked their lives otherwise. While some terminology, such as 'encouragements', may not have been precisely understood by everyone, the concept of 'land ownership' would have been known to most enslaved African Americans who, at this point, lived many years on land owned by White settlers in the United States. Likewise, it is trite to say that they would have also known the concept of 'freedom', since they actively fought for freedom throughout their enslavement. There is little doubt that the enslaved African Americans knew what was meant by the promises made in the proclamation, particularly since many would have witnessed the earlier exodus of enslaved African Americans in response to the American Revolutionary War Proclamations. As this scholar explains:

> When the Refugees escaped from the United States, **they believed the British promise** that they would enjoy meaningful liberty,

[85] Halsbury's Laws of Canada (online), Contracts (2021 Reissue) (Angela Swan, Jakub Adamski), "Offer and Acceptance" (II.1) at HCO-6 "Introduction".

> reunify their families, receive land, and be accorded equal treatment. Several observers commented that the Refugees' main objectives revolved around hopes for land and freedom.[86] [emphasis added]

In terms of Britain's intentions, there are two pieces of evidence that suggest Britain also intended the proclamatory promises to be binding. First, When Vice Admiral Cochrane wrote to Nova Scotia's Lieutenant Governor Sherbrooke[87] in October 1814, he reiterated the terms of his proclamation, stating:

> I consider it my duty to acquaint Your Excellency that Lord Bathurst informed me that orders would be sent here, also to Trinidad, to furnish the Refugees from the United States with the [necessaries?] they might require, until they could provide for themselves; which I conclude comprised food, clothing and a place to shelter them from the weather, **also that they were to be admitted as settlers in the Colonies**; **in consequence of this assurance I issued the enclosed Proclamation which has induced them to come over**. I hope it will be in Your Excellency's former to relieve their [present?] [illegible], without which [illegible] must suffer from the approaching season and the [illegible] of every necessary to carry them through the Winter.[88] [emphasis added]

It is clear from this correspondence that Cochrane intended the proclamatory commitments to be binding and that he made the promises with the intention to induce the Black Refugees to act. Some scholars have pointed out that Vice Admiral Cochrane was not authorized by the Colonial Office[89] to issue the proclamation. Nevertheless, from an objective standard of legal analysis, Cochrane had apparent authority to do so.[90] As one of the highest ranking British military officers in the region during the war, Cochrane was presumed to have decision-making authority over military tactics, including

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[86] Whitfield, Blacks on the Border, *supra* note 54 at 36.
[87] John Coape Sherbrooke served as the British-appointed Lieutenant Governor of Nova Scotia between 1811 – 1816 ["Lieutenant Governor Sherbrooke" or "Sherbrooke"].
[88] Cochrane to Sherbrooke 5 October 1814 PANS RG 1 Vol 420 Doc 10. Grant, Immigration and Settlement, *supra* note 59 at 49.
[89] The Colonial Office was a government department in Great Britain that was created to oversee the colonial affairs of British North America ["Colonial Office"].
[90] Whitfield, Blacks on the Border, *supra* note 54 at 33. Writing that "the British government was could not publicly disavow Cochrane."

weakening the opponent by weakening its economy through a mass exodus of enslaved African Americans.

A second evidentiary consideration regarding contractual intention, relates to Britain's use of the word 'encouragement' in the proclamation. An interpretation of this word is found in a letter from Britain's Secretary of State for War and Colonies, Henry Bathurst[91] to Lieutenant Governor Sherbrooke, dated May 10, 1815, which instructed Sherbrooke to provide the Black Refugees with the same "encouragements – *free land, implements, and (for a limited time) provisions* – that had been given in the eighteenth century to disbanded soldiers."[92] It is clear from this letter that Britain knew what was meant by the word 'encouragements', and it is important to note that this interpretation aligned with the Black Refugees' understanding of land and freedom in exchange for accepting Britain's offer.

A third aspect of contract formation is consideration, being something of value in exchange for the contractual promise. While the doctrine of consideration has more historical significance than practical significance, suffice it to mention here that consideration can take many forms, including a promise to do something or to refrain from doing something.

A cursory legal analysis of the Cochrane Proclamation reveals that all three elements of a contract were met: (1) offer (*migrate from the United States in exchange for being allowed to join the British armed forces or settle in a British colony with encouragements*); (2) acceptance (*board the vessel*), and (3) consideration (*the risks of migration, and the benefit attained by weakening the United States economy*).[93]

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[91] Henry Bathurst, 3rd Earl Bathurst, served as Britain's Secretary of State for War and the Colonies between 1812 – 1827 ["Secretary Bathurst", or "Bathurst", except in citations to archival records as "Lord Bathurst"].
[92] Martell, Immigration and Emigration, *supra* note 70 at 17, citing Bathurst to Sherbrooke 10 May 1815 CO 217/96. Note that the treatment of the *eighteenth*-century disbanded soldiers would have been subject to the land administration laws in effect prior to the 1807 Land Administration Laws, and so likely more generously sized land grants than 500 acres (see Part 3.3 for further discussion on land granting practices prior to the 1807 Land Administration Laws).
[93] Whitfield, Blacks on the Border, *supra* note 54 at 33. Writing that "the British government was could not publicly disavow Cochrane."

Ultimately, the law of contracts aims to protect the reasonable expectations of the contracting parties.[94] While there may be other legal issues to consider in the contractual analysis, such as whether enslaved individuals at the time had legal capacity to enter into contracts, it important to remember that equity principles in contract law also existed at the time and served to protect vulnerable parties when the circumstances warranted, for example, promissory estoppel.[95] As mentioned, more research is needed in this area. However, based on the foregoing analysis, it is objectively reasonable that the parties expected the terms of the Cochrane Proclamation to be enforceable.

Lastly, before moving on from the legal implications of the Cochrane Proclamation, it is important to note here that when Britain offered freedom and encouragements to the enslaved African Americans in exchange for their allegiance to the British Crown, it did not compensate them for the free labour and carnage that Britain profited from for the centuries prior. The Trans-Atlantic Slave Trade was a key contributor to the enrichment of Britain's economy through the capitalist-driven exploitation of Black people, which resulted in (among other horrors) the kidnapping, captivity, forced labour, torture, and death of people of African descent in pursuit of a profit-driven slave-based economy.[96] Yet, despite the coerced Black labour at the expense of Black lives, from which Britain derived monetary benefit for centuries, the British government did not compensate or otherwise repair the damage that it caused through its participation in the slave trade when it offered freedom and encouragements in exchange for siding with Britain in the War of 1812. Britain did, however, compensate American slave owners to the tune of $1,204,960, for aiding the Black Refugees in their flee from captivity during

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[94] Halsbury's Laws of Canada (online), Contracts (2021 Reissue) (Angela Swan, Jakub Adamski), "Introduction" (I) at HCO-3 " Purposes of the law of contract".

[95] The doctrine of promissory estoppel provides that one party (the representee) may recover damages from the other party (the representor) when the representee relied to their detriment on a reasonable promise made by the representor that the representor failed to honour. See *ibid* note 94, "Criteria of Enforcement" (III.4.(3) at HCO-58 "Promissory Estoppel".

[96] See, for example, Randall Robinson, *The Debt, What America Owes to Blacks* (New York: Dutton, 2000) ["Robinson, The Debt"]; Hilary Beckles, *Britain's Black Debt: Reparations for Caribbean Slavery and Native Genocide* (Kingston, Jamaica: University of West Indies Press, 2013) ["Beckles, Britain's Black Debt"]; Eric Williams, *Capitalism and Slavery* (New York: Capricorn Books, 1944) ["Williams, Capitalism and Slavery"].

the War of 1812,[97] and again, in 1833, Britain paid £20,000,000 to British slave owners in connection with the emancipation of 800,000 enslaved Africans from which Britain previously enabled, encouraged, and profited from their enslavement.[98] This point is particularly relevant to the discourse pertaining to reparations that are owed to African Nova Scotians, which is discussed in Chapter 5 of this thesis.

2.2.4 Early Arrivals

During the War of 1812, hundreds of Black Refugees from the Chesapeake Bay landing were being directed to Nova Scotia aboard British vessels many months before Alexander Cochrane arrived to issue his proclamation.[99] Archival records indicate that some Black Refugees arrived in September 1813, being fifteen months after the war's commencement, but five months before Cochrane's proclamation.[100] Since the first arrivals in September 1813 and during the ensuing fifteen months before the war's conclusion, approximately 1,200 Black Refugees found their way to Nova Scotia.[101]

With the booming war economy many of the early arrival Black Refugees were sent to the interior parts of the province in search of employment,[102] because Lieutenant

[97] Fergusson, Documentary Study, *supra* note 70 at 33; see also Bennett Ostdiek and John Fabien Witt, "The Czar and the Slaves: Two Puzzles in the History of International Arbitration" (2019), 113(3) The American Journal of International Law 535. Note that in 2021, $1,204,960 is worth $33,913,164, based on an average inflation rate of 1.71% per year between 1824 and 2021.

[98] Grant, Immigration and Settlement, *supra* note 59 at 55: "[i]n 1824 the commissioners decided that the average value of each slave to be allowed as compensation was, from Louisiana $580, from Alabama, Georgie and South Carolina, $390, from Virginia, Maryland and all other states, $280. […] By accepting the responsibility and paying compensation to the United States, Britain assured the freedom of more than 3,000 slaves, 'a fitting prelude to the great Act of 1833 whereby she free 800,000 slaves and paid £20,000,000 for the privilege.'"

[99] Whitfield, Blacks on the Border, *supra* note 54 at 32

[100] Grant, Immigration and Settlement, *supra* note 59 at 45.

[101] *Ibid* at 45, citing Lieutenant-Governor Sir J.C. Sherbrooke to Lord Bathurst 6 April 1815 C.O. 217/96 where Lieutenant Governor Sherbrooke writes to Secretary Bathurst that "Since the commencement of the late war with America [19 June 1812] about 1,200 negroes (including men, women, and children) have been brought into the Province by the King's ships from the United States."

[102] Fergusson, Documentary Study, *supra* note 70 at 13; Whitfield, Black Identity, *supra* note 58 at 14; Whitfield, Black American Refugees, *supra* note 58 at 25 citing Sherbrooke to Bathurst 18 October 1813 PANS RG 1 Vol 111 Pages 66-67 (LG Letter Book, 1808-1816). See also Martell, Immigration and Emigration, *supra* note 70 at 16: "Before the war ended about 1,200 of them were shipped to Nova Scotia". Fergusson, Documentary Study, *supra* note 70 at 13 writes that Sherbrooke informs Bathurst on 18 October 1813 that many Black Refugees arrived, and he ordered them to interior of the province in search of employment. Note this predates the Cochrane Proclamation, *supra* note 68, which was 2 April 1814.

Governor Sherbrooke had "no doubt that they will be able to maintain themselves comfortably by their labours."[103] Many scholars have assumed that the early arrivals found employment. Most of these assumptions rest on the understanding that Halifax had a strong economy at the time. For example, historian J. S. Martell writes:

> [c]oming near the end of the long conflict from military conflict with Napoleon, when the **town was already flush with profits** from military contracts and proceeds from French prizes, the War of 1812 was like an exciting dream.[104] [emphasis added]

However, while employment opportunities may have existed at the time, the corresponding cost of living was likely higher than usual as well:

> Trade was active. Prices rose. The fleet increasing, provisions were in great demand…rents of houses and buildings in the town were doubled and trebled.[105]

Whether the early arrivals were able to sustain themselves sufficiently or not through labour during the economic boom of the war years, and for how long, is not known. The literature only shows that while the early arrivals who arrived between September 1813 through to the Summer of 1814 were sent to the interior of the province in search of employment, the early arrivals who came in the Fall 1814 were often unemployed and in distress.[106] Historian John Grant writes:

> As no evidence exists to the contrary, it is assumed that the refugees who arrived in Nova Scotia before the spring of 1814 were able to obtain sufficient employment or private charity to render government assistance unnecessary during the winter of 1813-

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103 Grant, Immigration and Settlement, *supra* note 59 at 48.

104 J. S. Martell, "Halifax During and After the War of 1812" (1943) 23 The Dalhousie Review 289 at 289 ["Martell, Halifax 1812"].

105 *Ibid* at 290; See also Grant, Immigration and Settlement, *supra* note 59 at 51 where he references "high prices of everything at Halifax" in one of Sherbrooke's letters to Bathurst.

106 Grant, Immigration and Settlement, *supra* note 59 at 48; see also Martell, Immigration and Emigration, *supra* note 70 at 16 and Fergusson, Documentary Study, *supra* note 70 at 14. There has already been a considerable amount of scholarship on the distressed conditions of the Black Refugees (early arrivals and late arrivals), and the deplorable mistreatment and purposeful neglect by both the imperial and colonial governments. That work is not repeated here.

> 1814. This was not the case the following year. By October 1814, many of the black refugees were in distress.[107]

In October 1814, when Vice Admiral Cochrane learned that the Black Refugees he sent were in the "greatest misery and destitute of clothing, food and shelter"[108], he wrote to Lieutenant Governor Sherbrooke in October 1814 expressing his concern for Sherbrooke's inaction, stating:

> I consider it my duty to acquaint Your Excellency that Lord Bathurst informed me that orders would be sent here, also to Trinidad, to furnish the Refugees from the United States with the [necessaries?] they might require, until they could provide for themselves; which I conclude comprised food, clothing and a place to shelter them from the weather, **also that they were to be admitted as settlers in the Colonies**; in consequence of this assurance I issued the **enclosed Proclamation which has induced them to come over**. I hope it will be in Your Excellency's former to relieve their [present?] [illegible], without which [illegible] must suffer from the approaching season and the [illegible] of every necessary to carry them through the Winter.[109] [emphasis added]

The following day, Vice Admiral Cochrane also wrote to Secretary Bathurst informing him of the situation in Nova Scotia and asked him to direct Lieutenant Governor Sherbrooke "to provide for these poor people until they are settled, when they will become valuable subjects."[110] In attempts to defend his (in)actions, and seemingly torn between assurances he made to Vice Admiral Cochrane regarding his proclamation and assurances made to Secretary Bathurst to keep colonial expenses low, Sherbrooke wrote to both Bathurst and Cochrane explaining that he directed to the Poor House of Halifax those Black Refugees who were ill or otherwise in need of assistance and supplied them with provisions on the same basis as those provided to the soldiers and their families.[111] However, despite these claims, between October 1814 and February 1815 there was only

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107 Grant, Immigration and Settlement, *supra* note 59 at 48; see also Martell, Immigration and Emigration, *supra* note 70 at 16.
108 Cochrane to Sherbrooke 5 October 1814, *supra* note 88. Grant, Immigration and Settlement, *supra* note 59 at 49.
109 *Ibid*.
110 Grant, Immigration and Settlement, *supra* note 59 at 49, citing in endnote 51, Vice-Admiral Sir Alexander Cochrane to Lord Bathurst 6 October 1814 C.O. 217/95.
111 *Ibid* at 51.

a daily average of 55 Black Refugees accommodated at the Poor House with 20 on the sick list.[112] This represents only a small fraction of the approximately 1,200 Black Refugees who arrived before the war's end. Thus, it is probable that most of the early arrivals were not given their 'encouragements' as represented in the Cochrane Proclamation, but rather were sent to the interior of the province in search of work that likely profited White settlers in the cultivation of the land that was allocated to them.[113] As Lieutenant Governor Sherbrooke explained to the House of Assembly on February 24, 1815, "[a] great proportion of these people, active, healthy, and endured to labour, have gone to the interior of the Province, affording, I trust, a large accession of useful labour to the agriculture of the Country."[114]

It may never be known whether the British government ever honoured its contractual representations to the early arrival Black Refugees who "indulged the hope that they will be admitted as free settlers" but were instead sent to the interior of the province as active and healthy labourers.[115] Some of them ended up in the Poor House for a period, and some ended up at Melville Island with the special permission of the Lieutenant Governor when "the Commissary of the Poor refused to consider them transient paupers and receive them into the Poor House."[116] Thus, they may have been regrouped with the late arrival Black Refugees and included in the community settlements. However, those who were healthy and found employment may have never received their government rations, nor their land allotments.[117]

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[112] *Ibid* at 52.
[113] This may also be the case for the Black Refugees who were settled in Upper Hammonds Plains, as discussed on Page 175 below.
[114] Grant, Immigration and Settlement, *supra* note 59 at 53, citing endnote 63, PANS RG 1 Vol 288 Doc 101. See also Fergusson, Documentary Study, *supra* note 70 at 17; Murdoch, Epitome of Laws, *supra* note 46 at 380.
[115] Grant, Immigration and Settlement, *supra* note 59 at 53, citing endnote 63, PANS RG1 Vol 288 Doc 101.
[116] *Ibid* at 72. See also Martell, Immigration and Emigration, *supra* note 70 at 16 where Grant writes: "Writing to Admiral Cochrane on October 5 [1814], Lieutenant-Governor Sherbrooke said that a number of the "Black Refugees" who could not get work had become "destitute of Food and Clothing" and in need of "Medical Assistance" and he had, in consequence, been obligated to place them in the Halifax Poor House."
[117] Grant, Immigration and Settlement, *supra* note 59 at 99 explains that on August 8, 1815, when the administrator of New Brunswick inquired about eligibility for rations to the late arrivals that were directed to New Brunswick (discussed below), Sherbrooke informed him that only those who were actually settled

It is also important to note from the literature that while many of the 1,200 early arrivals were sent to the interior part of the province in search for work, many of them ended up at the Melville Island[118] in the face of illness and distress after the war's conclusion. On April 6, 1816, Lieutenant Governor Sherbrooke reported to Secretary Bathurst that "upward of a thousand refugees who arrived previous to the establishment of the Melville Island center, instances of sickness and distress among them had forced some to seek and asylum at the depot."[119] Correspondence from Sherbrooke to Bathurst in July 1815 also suggests there were at least intentions to regroup the early arrivals with the late arrivals before being relocated to their settlements. When Sherbrooke cautioned Bathurst that settlement plans may take a while because "the negro on the first arrival seem to dread so arduous an undertaking as the tilling of ground of this description appears to be," [120] he stated:

> [I am] hopeful, however, that **many of the blacks, after being employed in the country and seeing the potential of the soil, might desire to cultivate it**.[121] [emphasis added]

Thus, it is possible that Lieutenant Governor Sherbrooke meant to include the early arrivals in his settlement plans, assuming (according to Sherbrooke) that the Black Refugees could be convinced of the potential in doing so.

2.2.5 Colonial Marines (Black Soldiers)

A discussion about the War of 1812 is incomplete without the mention of the Colonial Marines. In his seminal book, *A Documentary Study of the Establishment of the Negroes in Nova Scotia*, historian Charles Bruce Fergusson[122] references the Black soldiers

on lands granted to them or located on portions of lands to cultivate for themselves were entitled to receive provisions form the government, but that "where they were employed in agriculture by other proprietors, the employer was obliged to provide for them."

[118] Melville Island was a military prison during the War of 1812 and was used to institutionalize the Black Refugees prior to be sent to their community settlements.

[119] Grant, Immigration and Settlement, *supra* note 59 at 72.

[120] *Ibid* at 77 citing Lieutenant-Governor Sir J.C. Sherbrooke to Lord Bathurst, July 20, 1815, C.O. 217/96.

[121] *Ibid*.

[122] Charles Bruce Fergusson was a historian and archivist at the Nova Scotia Public Archives ["C.B. Fergusson" or "Fergusson"]. See Ian Mckay "Race, White Settler Liberalism, and the Nova Scotia Archives, 1931-1976" (2020) 49:2 Acadiensis 5 ["McKay, Race and Archives"].

who served Britain in the War of 1812. He explains that in response to the Cochrane Proclamation, some of the formerly enslaved Black people in the United States were transported to the Bahamas or other British colonies, "while many remained with His Majesty's Sea and Land forces at their stations and posts in the United States."[123]

Historian John Grant in *The Immigration and Settlement of the Black Refugees of the War of 1812 in Nova Scotia and New Brunswick* elaborates on the origins, accomplishments, and eventual settlement of one significant group of these Black soldiers, known as the Colonial Marines:

> Cochrane was determined to remove the slaves [from the United States], not only to reduce the American work force, but also to employ blacks as active soldiers and marines. In late April or early May 1814, he ordered his second-in-command, Admiral Sir George Cockburn "to endeavor to raise a Corps of Colonial Marines, from the People of Color who escaped to us from the Enemy's shore in this neighbourhood [Chesapeake Bay] and to cause such as . . . may enlist for the purpose to be immediately formed, drilled and brought forward for service…[124]

John Grant proceeds to explain that by May 9, 1814, a "considerable number" of formerly enslaved Black people in the United States had enlisted with the British armed forces, under the leadership of an officer of the Royal Marines, William Hammond.[125] The Colonial Marines "quickly proved a valuable addition to the British fighting force"[126] and "proved to be effective contributors to the triumphant war against the United States of America."[127] However, as the end of war approached in December 1814, Vice Admiral

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[123] Fergusson, Documentary Study, *supra* note 70 at 11.
[124] Grant, Immigration and Settlement, *supra* note 59 at 42.
[125] It is important to note here is that while the Colonial Marines are a familiar group in scholarly literature, John Grant mentions additional Black Refugees who served in the British armed forces. See Grant, Immigration and Settlement, *supra* note 59 at 43: "[t]he Colonial Marines *and the other refugees from the United States who had enlisted in different regiments* served faithfully until peace was signed on Christmas Eve, 1814." It is difficult to know how many other refugees joined the British armed forces, and to where their journeys led them.
[126] Grant, Immigration and Settlement, *supra* note 59 at 42.
[127] See Grant, Black Immigrants, *supra* note 60 at 266 for an account of Black troops as effective spies and guides in the British army.

Cochrane had to find a place to settle the disbanded Colonial Marines. As John Grant explains:

> When news of the signing of the Treaty of Ghent arrived, Cochrane was faced with the problem of dismantling his war machine. Regular troops could be returned to Europe where they were needed to recapture Napoleon, recently escaped from Elba and busily gathering another army. Colonial troops raised for duty only in North America had to be disbanded and provided for. The usual method was to provide incentives for their establishment as settlers in some part of the British possessions, often where they were raised. But in the case of the Colonial Marines, the latter was not possible.[128]

Vice Admiral Cochrane first sent the Colonial Marines to Ireland Island, Bermuda, being "the site of the British naval establishment where, as in the case of Halifax, hundreds of the refugees who had not joined the forces had been sent."[129] There the Colonial Marines assumed the jobs that employed many of the Black Refugees, until their numbers were ultimately reduced, and the Colonial Marines were ultimately settled in Trinidad.[130]

Meanwhile, the arrival of the Colonial Marines at the naval site in Bermuda displaced hundreds of Black Refugees who had already been working there as civilian employees. This presented Vice Admiral Cochrane with a new challenge of what to do with those civilian employees. Since Bermudian law prohibited the settlement of free Black people, Cochrane was forced to find another British colony that could legally permit the granting of land to the Black Refugees.[131] Thus on March 25, 1815, Vice Admiral Cochrane sent correspondence to Lieutenant Governor Sherbrooke informing him of his intention to send between 1,500 to 2,000 Black Refugees from Bermuda to Halifax.[132]

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[128] Grant, Immigration and Settlement, *supra* note 59 at 43.
[129] *Ibid* at 44.
[130] *Ibid* at 44.
[131] *Ibid* at 45.
[132] *Ibid* at 45, citing in footnote 28 Vice -Admiral Sir Alexander Cochrane to Lieutenant-Governor Sir J.C. Sherbrooke 25 March 1815 C.O. 217/96.

2.2.6 Late Arrivals

On April 1, 1815, after Vice Admiral Cochrane wrote to Lieutenant Governor Sherbrooke, but before Sherbrooke received his letter, the Nova Scotia House of Assembly had expressed to Sherbrooke their sentiments regarding the presence of Black people in the province, stating:

> the proportion of Africans already in this country is productive of many inconveniences; and that the introduction of more must tend to the discouragement of white labourers and servants, as well as to the establishment of a **separate** and **marked class of people**, unfitted by nature to this climate, or to an association with the rest of His Majesty's Colonists.[133] [emphasis added]

Thus, the Nova Scotia House of Assembly asked that no more Black people be sent to the colony.[134] However, as Martell explains,

> A day or so later, Sherbrooke received word from Cochrane that, "agreeably to the Instructions" of the Imperial government, fifteen hundred to two thousand of the American Negroes were being sent from Bermuda to Nova Scotia. Realizing that nothing could now be done except to make the best of a bad situation, Sherbrooke hurriedly arranged to send 500 of the new lot of Negroes to New Brunswick and to place the others temporarily under the care of the Collector of Customs at Halifax who, as an Imperial official, was to draw on the Treasury in London for his expense.[135]

The economic situation in Nova Scotia at the time of the late arrivals was much worse than it was during the war when the early arrivals were sent to the interior parts of the colony:

> The earlier arrivals, who generally came in smaller numbers and at scattered intervals, apparently had no trouble in obtaining employment in the booming war economy of Nova Scotia. Those, however, who landed in the year that followed April 1815, were not so fortunate, as peace brought a general decline in business and prosperity. **These refugees were housed at the former**

[133] Martell, Immigration and Emigration, *supra* note 70 at 16.
[134] Fergusson, Documentary Study, *supra* note 70 at 17.
[135] Martell, Immigration and Emigration, *supra* note 70 at 16.

> **military prison on Melville Island until positions could be found for them**.[136] [emphasis added]

There was disagreement between the imperial government in Britain and colonial government in Nova Scotia as to which level of government should satisfy the representations made in the Cochrane Proclamation.[137] Ultimately, they were placed under the care of the imperial government under the charge of Britain's Collector of the Customs to be maintained and provided for in accordance with British regulations which treated Africans as prizes of war or forfeiture to the Crown. John Grants writes:

> Thus, with the authority of Castlereagh's circular of 1808 and with the approval of the Colonial Office, Sherbrooke placed the responsibility of caring for the expected refugees in the hands of the Collector of Customs at Halifax, Thomas N. Jeffery. Jeffery chose Melville Island as the depot to which the black refuges were to be taken for food, shelter, and medical care.[138]

However, the first group of late arrival Black Refugees were not sent to Melville Island, but rather, because of the House of Assembly's refusal to accept more Black people into the province, approximately 500 Black Refugees were redirected by Lieutenant Governor Sherbrooke to New Brunswick instead.[139] The rest were eventually sent to Nova Scotia and institutionalized at Melville Island, a compound for prisoners-of-war, under the charge the Collector of Customs. With the imperial government paying the bills, the Collector of Customs received one guinea per person for his wardenship over the Black Refugees at Melville Island, and additional funds were paid to local merchants who supplied food and clothing.[140]

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[136] Grant, Black Immigrants, *supra* note 60 at 269; see also Whitfield, Blacks on the Border, *supra* note 54 at 51.
[137] See Grant, Immigration and Settlement, *supra* note 59, Chapter 3.
[138] *Ibid* at 62.
[139] *Ibid* at 62. Grant notes at 66, that an additional small number of refugees were landed in New Brunswick, not from Halifax or Bermuda, but directly from the United States. Grant explains further at 102, that land was eventually made available to the Black Refugees a few years later (Spring of 1817) in Loch Lomond, New Brunswick, where 112 lots, mostly containing 55 acres, were allotted to 112 different people held by tickets of location. By 1904 only twenty Black families remained on the settlement, and not all of the refugees took up settlement, and instead remained on vacant land in Saint John.
[140] Fergusson, Documentary Study, *supra* note 70 at 22. See Grant, Immigration and Settlement, *supra* note 59, Chapter 3 for details on amounts paid to merchants for supplies.

Out of the late arrival Black Refugees to be directed to Melville Island, roughly 727 were placed there between April 1815 to July 1815, and another 76 Black Refugees were redirected there at some point from the Poor House of Halifax.[141] Of that number, an average of 39 Black Refugees a day were in Melville Island's hospital, and an estimated 76 Black Refugees appeared to have died during their stay in the facility.[142] Finally, by the Fall of 1815, Lieutenant Governor Sherbrooke's attempts to settle the Black Refugees "were successful to the point that on 18 November 1815, he was able to reduce the Melville Island establishment."[143] Most of the Black Refugees were settled on lands in Beechville, Cobequid Road, Upper Hammonds Plains, Refugee Hill, and Preston.[144] By the following year, in April 1816, there were only 64 Black Refugees still living at Melville Island,[145] and by May 21, 1816 only 26 Black Refugees remained.[146] On June 5, 1816, Sherbrooke, believing that most of the remaining occupants were needlessly relying on the facility to avoid labour, relocated two residents to the Poor House of Halifax to continue their rations in that facility, and six to the military hospital to receive care in the same manner and cost as other sick soldiers.[147] The Melville facility closed on June 20, 1816, and the few remaining soldiers were settled in the Black Refugee settlement in Preston.[148] Sherbrooke's term as Lieutenant Governor came to an end in June of 1816,

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[141] Grant, Immigration and Settlement, *supra* note 59 at 67. Grant, Black Immigrants, *supra* note 60 at 269: "[d]uring the first three-month period that followed Cochrane's letter [25 March 1815], a total of 727 persons were received at the island", and "[d]uring the fourteen months that the establishment [Melville] existed, T. N. Jeffery reported that he had received "about eight hundred negroes of different ages and sexes"". Further at 75, "In the year that followed the reception of Admiral Sir Alexander Cochrane's letter which had warned the Governor to expect from 1,500 – 2,000 refugees, a total of approximately 812 arrived.

[142] Grant, Immigration and Settlement, *supra* note 59 at 69. Grant, Black Immigrants, *supra* note 60 at 270, "of whom many were "in a most distressed state afflicted with small pox, and various other diseases." Of those afflicted many died "not less I believe than one eighth."

[143] Grant, Immigration and Settlement, *supra* note 59 at 69.

[144] There was disagreement among the colonialists on whether the Black Refugees should be settled in communities as a group or scattered throughout the province. See Dorothy Evans, *Hammonds Plains: The First 100 Years* (Halifax, NS: Bounty Print Ltd., 1993) at 56 ["Evans, Hammonds Plains"] where Evans explains that Lawrence Hartshorne (member of the Majesty's Council) thought they should be disbursed but Charles Morris thought best to settle the Black Refugees near each other.

[145] Grant, Immigration and Settlement, *supra* note 59 at 72.

[146] *Ibid* at 73.

[147] *Ibid* at 73.

[148] *Ibid* at 75; See also Grant, Black Immigrants, *supra* note 60 at 270: "On 20 June 1816, Governor Sherbrooke ordered the establishment to be closed; and the few remaining refugees went to one of the

and after a few months under the charge of an interim administrator, Major-General G.S. Smyth (the Administrator of the Government of New Brunswick), the next Lieutenant Governor of Nova Scotia, Lieutenant Governor Dalhousie, arrived in September of 1816 to govern the colony for the following four years.

The cost of institutionalizing the Black Refugees in the Melville establishment for the first three months was significant, totalling over £2320 with an additional £848 to the Collector of Customs "for his trouble".[149] It was primarily local merchants who financially benefited from this arrangement, by profiting from the supply contracts for food and supplies.[150] Two months after the Melville establishment closed in June 1816, an additional group of 36 Black Refugees arrived in August 1816 from Charleston, North Carolina and Wilmington,[151] who appear to have been the last government sponsored influx of the Black Refugees into the colony of Nova Scotia.[152]

During the brief 22-month period between September 1813 and November 1815, roughly 2,000 formerly enslaved African-descended individuals had courageously fled enslavement in reliance upon the contractual representations made in the Cochrane Proclamation. Those individuals are known today as the Black Refugees in Nova Scotia. Some actively fought in the British armed forces, others chose settlement in a British colony, but both decisions triggered Britain's promises to grant them 'encouragements', meaning free land, implements, and (for a limited time) provisions.[153] However, instead of receiving their contractual entitlements, the Black Refugees were met with racial hostility combined with unpreparedness and neglect that was rooted in an anti-Black

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established settlements or, if physically unable, to the Military Hospital for medical attention. Governor Sherbrooke, anxious to increase the population of the province, was determined to settle the blacks in Nova Scotia and proceeded with his plans." Further at 86, Grant explains that the remaining refugees were settled in Preston under the supervision of the issuer of rations, Theophilus Chamberlain, who was ordered to assign them lots of land and grant the usual allowance of provisions.

[149] *Ibid* at 67; see also at 93: "Maintaining the refugees on Melville Island had been expensive. The cost of their settlement was also high." He also provides some financial data in this regard. See also Winks, Blacks in Canada, *supra* note 78 at 119.

[150] *Ibid* at 67.

[151] *Ibid* at 76.

[152] *Ibid* at 77; Girard et al, History of Law, *supra* note 53 at 664.

[153] The word 'encouragements' means free land, implements, and (for a limited time) provisions (see footnote 189 below).

racist and White supremacist ideology that resulted in the Black Refugees first being institutionalized in a poor house or a military prison, and then, finally, on remote small lots of land with insecure title.

2.2.7 Colonial Attitudes Towards Black People

There is considerable scholarship on the racist ideology that influenced White colonialists' treatment toward the Black Refugees, as well as the Black Loyalists and Jamaican Maroons before them.[154] Those racist ideas and attitudes not only shaped the development of overtly racist laws and policies, but also the racist implementation of ostensibly race-neutral ones. British and Nova Scotia laws were formed to serve and facilitate an economic system that relied on Black enslavement. For example, in the royal commissions to Governor Cornwallis in 1749, the Colonial Office wrote to ensure the appeasement of slave merchants as follows:

> Whereas Acts have been passed in some of Our Plantations in America for laying Duties on the Importation and Exportation of Negroes to the great Discouragement of the Merchants Trading thither from the Coast of Africa, […] it is Our Will and Pleasure that You do not give your Assent to or pass any Act imposing Duties upon Negroes imported in Our said Province under Your Government payable by the Importer, or upon any slaves exported that have not been sold in Our said Province and continued there for the Space of twelve Month.[155]

As previously discussed in Part 2.2.2 of this thesis, the primary objective of the Cochrane Proclamation was not the liberation of Black people that were being enslaved, but rather the weakening of the American economy through the exodus of their highly profitable workforce.[156] Likewise, sending the Black Refugees to the British colonies served a purpose that benefited Britain, being to grow the economy as settlers and

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[154] See, for example, the *Act to prevent the Clandestine Landing of Liberated Slaves, and other Persons therein mentioned, from Vessels arriving in the Province,* which passed the Nova Scotia House of Assembly in 1834 prohibiting the importation of further Black people after the Emancipation Act in 1834.

[155] Royal Instructions to Edward Cornwallis, Governor in Chief over the Province of Nova Scotia, dated April 29, 1749, PANS RG 1 Vol 350A at para 137 ["Cornwallis Instructions (1749)"].

[156] The willingness to send the Black Refugees back to their "Masters" in the United States in 1817, indicates that "freeing" them was not the primary objective. See, for example, Afua Cooper et al., "Report on Lord Dalhousie's History on Slavery and Race" (September 2019) ["Lord Dalhousie Report"], which cites Letter from Bathurst to Dalhousie 12 March 1817 LAC CO 218/29 Vol 29.

labourers.[157] As will be elaborated below, the land administration laws are one of the many ways in which the legal system supported and promoted these anti-Black racist attitudes.

2.3 Background on Land Titles Issue[158]

2.3.1 Land Titles Initiative

Many individuals of African descent who migrated to Nova Scotia during the late eighteenth and early nineteenth centuries never received fee simple interest to their allotted lands.[159] For over 200 years since, African Nova Scotians have been fighting to clarify and confirm legal title to the land on which their ancestors were settled. Most recently, a government program called the Land Titles Initiative[160] was developed to help residents acquire perfected title to their land through the *Land Titles Clarification Act* ("LTCA").[161] The *LTCA* is remedial legislation that was adopted in 1964 to create a simplified procedure for ascertaining legal title to land in designated communities within Nova Scotia, predominately African Nova Scotian communities.

The *LTCA* regime was not the first time that Nova Scotia's government sought to clarify land titles in this province. For example, in 1821, colonial officials established a Board of Commissioners to resolve title and boundary disputes that resulted from previous land administration policies that were interfering with Britain's colonization plans.[162] Also, in 1903, the Nova Scotia government created a legislative regime through

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[157] Ida C. Greaves, "The Negro In Canada" (MA Thesis, McGill University, 1930) [unpublished] at 29 ["Greaves, Negro in Canada"] citing Beamish Murdoch, History of Nova Scotia of Acadie (Halifax, Nova Scotia: James Barnes Printer and Publisher, 1867), Volume 3 at 380 "the lieut. governor sent a message to the house suggesting that they should facilitate the settlement of the Negroes upon forest lands, and representing them as bringing a large accession of useful labour to the agriculture of the country."

[158] Portions of the information provided in this section were researched and discussed in a paper dated April 7, 2021 entitled *Finding Clarity: An Interest-Convergence Lens on the Land Titles Clarification Act (Nova Scotia)*, submitted by the author of this thesis in fulfillment of the African Nova Scotians and the Law Course at Dalhousie University Schulich School of Law.

[159] The Nova Scotian Supreme Court took judicial notice of this fact in *Beals v. Nova Scotia (Attorney General)*, 2020 NSSC 60, 2020 CarswellNS 120 [*Beals v. Nova Scotia*].

[160] See Land Titles Initiative, Province of Nova Scotia, online: < https://novascotia.ca/land-titles/> ["Land Titles Initiative" or "LTI"].

[161] *Land Titles Clarification Act*, RNS 1989 c 250, as amended ["*LTCA*"].

[162] See Part 3.5 below for further discussion.

the *Land Titles Act,*[163] which involved the appointment of regional Master of Titles to hear and determine applications for registration of land title, and settle disputes involving other persons claiming interest in the land. While these legislative regimes were not specific to African Nova Scotian communities, they illustrate that Nova Scotia, particularly rural Nova Scotia, has a long history of obscure land titles and boundary disputes, and a general reluctance (or inability) of the government to effectively resolve the problem.[164] For example, in his testimony for the 1839 Buller Report,[165] then Provincial Secretary, Rupert George[166] was asked how he would propose to remedy the "evils" of squatting immigrants. Provincial Secretary George responded:

> In the first place the extent of such irregular occupation of the Crown Lands, and the exact position of every lot held without authority, or under some incomplete title, with the name of the

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[163] *Land Titles Act*, SNS 1903-04, c 47.

[164] Peter Burroughs, 'The Administration of Crown Lands in Nova Scotia, 1827–1848,' (1966) 35 Collections of the Nova Scotia Historical Society 80 at 100 ["Burroughs, Administration of Crown Lands"] highlights the longstanding land titles problem in this province. He writes, "An administrative problem closely associated with the prevalence of squatting was the absence of accurate surveys and adequate titles to land. The boundaries of both public and private lands were so imperfectly ascertained, both in Nova Scotia and in the Canadas, that Lord Durham could write in 1839 that 'with very few exceptions, no man can be said to possess a secure title to his land, or even to know whether the spot upon which he is settled belongs to himself, his neighbour or the crown.' Nor was there any prospect that these deficiencies would be remedied in Nova Scotia without more positive action on the part of the assembly or the British government than either body seemed willing to exert." Burroughs also notes at 98 that "[u]nauthorized occupation was more prevalent in Nova Scotia than in any other part of British North America, because of the inferior quality of disposable land and the poverty of the greater number of immigrants. The facilities for squatting were so great, or rather the means of preventing it were so inadequate, that these newcomers immediately spread themselves over the waste lands of the province."

[165] In connection with the investigation by then Governor General, Lord Durham, into relations between Great Britain and the British North American colonies (see John George Lambton, *Earl of Durham et al, Report on Affairs in British North America (1839) from the Earl of Durham* (Ottawa: s.n., 1839), online: Canadiana by CRKN <https://www.canadiana.ca/view/oocihm.32374/2?r=0&s=1>; see also Sir C.P. Lucas, ed, *Lord Durham's Report on the Affairs of British North America* (Oxford: The Clarendon Press, 1912) ["Lord Durham's Report"], Lord Durham appointed a General Commission of Enquiry for Crown Lands and Emigration that was led by Charles Buller (see Minutes of evidence taken under the direction of a General Commission of Enquiry for Crown Lands and Emigration appointed on the 21st June 1828 by His Excellency the Right Honorable the Earl of Durham, High Commissioner and Governor General of Her Majesty's colonies in North America (Quebec: J.C. Fisher and W. Kemble, 1839), "Nova Scotia" at 236, online: HathiTrust < https://babel.hathitrust.org/cgi/pt?id=aeu.ark:/13960/t1wd4nk27&view=1up&seq=236&skin=2021> ["Buller Report"].

[166] Sir Rupert Dennis George served as the British-appointed Provincial Secretary of Nova scotia between 1813-1827 ["Provincial Secretary George"].

> occupant, should be ascertained, in order that steps may be take to quiet all such possessions, and secure to every settler, so situated, 100 acres of land, including his improvements, on condition of his taking out a title within a specified time, support three years. **The acquisition of this information would be a work of great labour, and attended with much expense; but it must be obtained, or the consequence will be deplorable**.[167]

The warning from Provincial Secretary George appears to have been ignored, since the land titles issue in this province persisted throughout the nineteenth, twentieth, and twenty-first centuries. However, while the problems are not isolated to African Nova Scotian communities, nor do all African Nova Scotians communities experience the same problems, there are racial disparities in the land titles issue that have exacerbated the problems in African Nova Scotian communities.

The land titles discourse often attributes blame for the racial disparities in land titles to the colonial officials who allocated inferior land to the Black residents in terms of quality, quantity, and tenure. However, while racially biased actors no doubt contributed to the racial discrimination experienced by the Black Refugees and their descendants, African Nova Scotians, there is a system of law in which those actors operated which served to legitimize and exacerbate their wrongdoings. That system of law, which continues, is rooted in anti-Black and White-supremacist ideology that resulted in, among other things, the inferior land allocations to the Black Refugees as compared to White settlers. The land titles issue is merely the symptom of a broader existence of systemic anti-Black racism in the law which created and reinscribed racial disparities in land-based wealth in Nova Scotia.

2.3.2 *Beals v Nova Scotia (2020)*

Beals v Nova Scotia[168] is a key judicial decision pertaining to the application of the *LTCA* in African Nova Scotian communities. In this case, the husband and wife who owned the subject property died intestate. After the wife's death, the son and daughter resided

[167] Buller Report, *supra* note 165, Appendix B at 14.

[168] *Beals v Nova Scotia (Attorney General)*, 2020 NSSC 60, 2020 CarswellNS 120 (NSSC) ["*Beals*" or "*Beals v Nova Scotia*"].

on property but without registered title. The Nova Scotia Department of Lands and Forestry[169] denied the son's application under the *LTCA* through the LTI for a certificate of claim in relation to clearing title to the property. The son brought application for judicial review. The court dismissed the application on the basis that the *LTCA* was not intended to clarify title when title was clear but not perfected. Essentially, the court held, the *Intestate Succession Act*[170] and *Probate Act*[171] placed legal title of the land to the mother's estate, which the son could perfect through the probate process. Thus, according to the court, title was clear such that it was reasonable for the responsible minister to deny the application under the *LTCA*. Unfortunately, the court's decision overlooked the underlying problem, being the financial requirements under probate laws that effectively barred the applicant from transferring title from the estate to him and his sister as the estate's beneficiaries. Financial barriers such as this have been raised repeatedly throughout land titles discourse and reflects the cycle of poverty that results from anti-Black systemic racism in law.

Notwithstanding the disappointing outcome in *Beals*, the Supreme Court of Nova Scotia in this case discussed at length the land titles issues affecting African Nova Scotian communities and, in doing so, it took judicial notice of the following facts:[172]

- *Many individuals of African descent who migrated to Nova Scotia during the late 18th and early 19th centuries experienced racism and discrimination upon arrival and after*.

- *While the government of Nova Scotia often provided white settlers with 100 acres or more of fertile land, it gave black families ten-acre lots of rocky, infertile soil. The land given to black families was segregated from that given to white families*.

- *The government of Nova Scotia gave white settlers deeds to their land but did not give black settlers title to their land. Instead, black settlers were given tickets of location or licenses of occupation*.

[169] The Department of Lands and Forestry is the government department responsible for the administration of the *LTCA*.
[170] *Intestate Succession Act*, RSNS, c 236.
[171] *Probate Act*, SNS 2000, c 31.
[172] *Beals*, *supra* note 168 at para 36.

- *Although a limited number of land titles were eventually issued in Preston, and some settlers were able to purchase land, most black settlers never attained clear title to their land*.

- *Without legal title to their land, black settlers could not sell or mortgage their property, or legally pass it down to their descendants upon their death*.

- *Lack of clear title and the segregated nature of their land triggered a cycle of poverty for black families that persisted for generations*.

- *Black communities in rural areas were isolated and remote, lacking typical community developments such as water, sewage, sanitation, garbage removal, road improvements, and other related services regularly provided in white or mixed communities*.

The court based these historical facts on four secondary sources that were submitted to the court as evidence. First, a thesis submitted to Dalhousie University in 2006 by Erica Colter entitled *A State of Affairs Most Uncommon: Black Nova Scotians and the Stanfield Government's Interdepartmental Committee on Human Rights, 1959-1967*.[173] Second, an article by Lindsay Van Dyk entitled *Shaping a Community, Black Refugees in Nova Scotia*.[174] Third, a report prepared for the United Nations Human Rights Council by the Working Group of Experts on People of African Descent setting out its findings following a visit to Canada in October 2016.[175] Fourth, a report prepared by then law student Angela Simmonds entitled *This Land is Our Land: African Nova Scotian Voices from the Preston Area Speak up* dated August 19, 2014.[176] While these sources provide

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[173] Erica Colter, "A State of Affairs Most Uncommon: Black Nova Scotians and the Stanfield Government's Interdepartmental Committee on Human Rights, 1959-1967" (MA Thesis, Dalhousie University, 2006) [unpublished] ["Colter, State of Affairs"].

[174] Lindsay Van Dyk, "Shaping a Community: Black Refugees in Nova Scotia" (updated November 19, 2020), online: *Canadian Museum of Immigration at Pier21* <https://pier21.ca/research/immigration-history/shaping-a-community-black-refugees-in-nova-scotia-0> ["Van Dyk, Shaping a Community"].

[175] United Nations Report of the Working Group of Experts on People of African Descent on its mission to Canada (United Nations Human Rights Council, 16 August 2017), online: *United Nations Digital Library* <https://digitallibrary.un.org/record/1304262?ln=en> ["United Nations DPAD Report"].

[176] Simmonds, Angela, "This Land is Our Land: African Nova Scotian Voices from the Preston Area Speak up" (19 August 2014), [unpublished] ["Simmonds, This Land is Our Land"].

helpful information pertaining to the present-day land titles issues within the scope of the *LTCA*, there remains a dearth of comprehensive consideration of the broader historical-legal context in which those land titles issue arose, and the role of law in creating and reinscribing the racial disparities pertaining to land. The search for secondary sources in the *Beals* decisions reveals a gap in historical knowledge. More importantly, the use of these resources without the historical-legal context sets the African Nova Scotian land issues narrative too narrowly.

2.3.3 *Downey v Nova Scotia (2020)*[177],

Shortly after the *Beals* decision, the Supreme Court of Nova Scotia released a second decision pertaining to the application of the *LCTA* in African Nova Scotian communities, *Downey v Nova Scotia.*[178] In this case, the applicant applied for a certificate of claim under the *LTCA* (through the LTI) for a small portion of larger parcel of land. The Minister of Lands and Forestry denied the application, stating that minimum 20-year limitation period to establish ownership based on adverse possession had not been met. The applicant sought judicial review of the decision. The court overruled the Minister's denial, pointing out that the *LTCA* does not specifically require a period of possession over 20 years, and so the Minister was applying a higher standard than set out in the legislation which made the decision unreasonable. While this was a positive finding in favour of the applicant (as well as all past and pending applicants in the *LTCA* process), the outcome only allowed the applicant to re-submit their application to the Minister for reconsideration under the proper legislative standard. The court did not rule on the title issue. Nevertheless, the court in *Downey* advanced the land titles discourse, particularly the issue of systemic racism in Nova Scotia and its effects on land ownership by African Nova Scotians. Through a reiteration of the historical facts that the court found in *Beals*, the court in *Downey* concluded:

> *[4] African Nova Scotians have been subjected to racism for hundreds of years in this province.* ***It is embedded within the***

[177] *Downey, supra* note 12.
[178] *Ibid*.

> ***systems that govern how our society operates**. That is a fundamental historical fact and an observation of present reality.*
>
> *[5] That has real implications for things like land ownership. 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 to survey boundaries. People may have lived on 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.* [emphasis added]

While the court's finding that racism is embedded within the law is supported by the research contained in this thesis, the court's assumption that African Nova Scotians "are more likely to have unclear title" to their land is not. Nova Scotia has a long history of unclear title to land across the province, and many initiatives over the last 200 years have attempted to rectify the long-term consequences of flawed colonial settlement policies and practices. It is likewise debateable whether African Nova Scotians disproportionately engage in "informal land arrangements" compared to other Nova Scotians, and furthermore, whether those informal arrangements caused the unclear titles issue in African Nova Scotian communities. There is no empirical research to support these claims. The reason these inaccuracies matter is because the court's unsubstantiated claims perpetuate the narrative that unclear land titles is a problem isolated to African Nova Scotian communities, and furthermore, that once the titles are cleared the "cycle of poverty" will be resolved. In actuality, the land titles issue (to the extent it can be isolated to African Nova Scotian communities) is merely a symptom of a larger problem, which is anti-Black racism within the legal system, specifically property law originating with the colonial land administration laws. Until the problem, being anti-Black racism in law, is dismantled and redressed, the "cycle of poverty" will persist even after land titles are resolved. The narrative needs to change and the problem must be redefined.

The failure of the government to confirm land titles for over 200 years no doubt contributed to racial disparities in land-based wealth, but it is not the only reason and likely not a significant one. It is also a difficult factor to quantify because of variables such as demand for resale in the secondary market, as well as the impact of anti-Black racism in collateral-based lending practices such as mortgages. Another symptom of anti-Black racism in property law that likely had greater impact on the racial disparities in land-based inter-generational wealth, is the significant differential in lot sizes, as elaborated in this thesis. This disparity is more quantifiable and hence a viable option to consider for reparatory justice, as discussed in Chapter 5 below.

2.4 Literature Review on Black Refugees and Land

The purpose of this section is to review relevant historiography pertaining to the land settlement of the Black Refugees in Nova Scotia. Since the turn of the twenty-first century, scholarship about the Black Refugees has advanced significantly through contributions by, for example, historian Harvey Amani Whitfield, whose work has fundamentally reframed the scholarly portrayal of the Black Refugees in a more positive light.[179] Prior to this, leading scholarship regarding the Black Refugees, while seminal and monumental, often made “sweeping negative judgments” about the Black Refugees and relied too heavily on the portrayal of the Black Refugees through the biased lens of White colonial officials “rather than carefully mining the documentary evidence to write a more dynamic study of the Refugees.”[180] Prominent historians such as C.B. Fergusson and Robin Winks contributed to this disappointing scholarly foundation in African Nova Scotian historiography, yet at the same time, produced the work from which many subsequent scholars have based their scholarship, including Whitfield.[181] While there is much to be discovered in the African Nova Scotian scholarship beyond the issue of land settlement, this section is limited to literature on land issues pertaining to the Black Refugees.

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[179] Whitfield, Historiography, *supra* note 56 at 229.
[180] *Ibid* at 220.
[181] *Ibid*. See also McKay, Race and Archives, *supra* note 122.

2.4.1 Martell, J.S. (1937)

One of the earliest accounts of land allocation to the Black Refugees can be found in the 1937 work of J.S. Martell regarding military settlements established after the War of 1812.[182] In drawing connections between land promises and military service, Martell writes:

> The officers and men who survived Britain's battles in the 18th and early 19th centuries could count on at least one tangible reward: an offer of free land in the colonies.[183]

Martell proceeds to explain how this offer of land in Nova Scotia was extended to the British soldiers who fought in the War of 1812, but that the offer was not entirely altruistic, writing,

> The advantages of settling disbanded men in the interior of Nova Scotia appealed to both local and Imperial officials in 1815. Attempts had already been made to penetrate the inland forests. […] Given land along the newly surveyed route that ran diagonally across the peninsula from Annapolis to Halifax, they would make a passable forest road which in time might become a main artery of communication.[184]

A key priority for colonial settlement in Nova Scotia was the cultivation of land located in the interior part of the province, including a road between Annapolis and Halifax.[185] Thus when Lieutenant Governor Sherbrooke wrote to the Secretary Bathurst, on March 15, 1815, shortly after the ratification of the Treaty of Ghent ending the War of 1812, he asked London to direct many "active and industrious settlers" to Nova Scotia to help cultivate the land.[186] And, assuming, as many British officials did at the time, that disbanded soldiers made good settlers, Sherbrooke suggested that the disbanded soldiers from the War of 1812 be granted land in Nova Scotia with accompanying provisions,

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[182] J.S. Martell, "Military Settlements in Nova Scotia After the War of 1812" (1938) 24 Collections of the Nova Scotia Historical Society 76 ["Martell, Military Settlements"].
[183] *Ibid*.
[184] *Ibid* at 76.
[185] With respect to the Annapolis Road, J Martell, *ibid* at 80 explains: "With the general increase in population and the renewal of immigration, however, no one questioned the need of a road running through the interior. Such a road had long been under consideration. Even before the Revolution, a route had been marked out."
[186] *Ibid* at 79, citing Sherbrooke to Bathurst 15 March 1815 PANS RG 1 Vol 111.

similar to the discharged soldiers after the American Revolutionary War.[187] However, as historian J.S. Martell explains, unbeknownst to Sherbrooke, Britain recalled its British-born military back to Europe to join the war efforts closer to home. Therefore, Sherbrooke's initial plan to receive a massive influx of disbanded soldiers into the interior parts of Nova Scotia was interrupted.[188] Martell claims that this change in Sherbrooke's plans created an opportunity for the settlement of the Black Refugees on that land instead, writing:

> At the time of writing, March 15, 1815, Sherbrooke did not know that only the week before Napoleon had escaped from Elba and landed in France, and that all available regiments were being recalled from the colonies. […] Soldiers, for the present at least, could not be spared for settlement […]. The refugee negroes, whose fate Sherbrooke had discussed in a later letter, were another matter. Bathurst agreed to follow the Governor's suggestion and grant them the '**Encouragements which at an earlier period were given to military Settlers in the Province**.'[189] [emphasis added]

The "later letter" that Martell is referring to in this statement is a letter from Sherbrooke to Bathurst dated April 6, 1815, wherein Sherbrooke suggests to Bathurst:

> as encouragement to those who are industrious and may be willing to settle and cultivate land, that they should on being located receive rations gratis for themselves and families **in the same proportions and for the same period as was allowed to the**

[187] *Ibid* at 79.

[188] *Ibid* at 77, Martell describes the types of soldiers in Nova Scotia, being the fencibles who were born and raised in the colonies, the regulars, who were may have been born in Britain but spent considerable time in the colonies (or recruited from the colonies), and the pensioners, who came directly from England. See also Grant, Immigration and Settlement, *supra* note 59 at 43: "Regular troops could be returned to Europe where they were needed to recapture Napoleon, recently escaped from Elba and busily gathering another army. Colonial troops raised for duty only in North America had to be disbanded and provided for. The usual method was to provide incentives for their establishment as settlers in some part of the British possessions, often where they were raised. But in the case of the Colonial Marines, the latter was not possible." Also in Grant, Immigration and Settlement, *supra* note 59 at 76.

[189] Martell, Military Settlements, *supra* note 182 at 80, citing in footnote 4 P.R.O., C.O. 218/29. Bathurst to Sherbrooke, May 10, 1815. Later, in Martell, Immigration and Emigration, *supra* note 70 at 17, Martell explains that Bathurst, in this letter to Sherbrooke, states that: "If the Negroes did not wish to become miners, but preferred to be farmers, then they were to be given the same encouragements – free land, implements, and (for a limited time) provisions – that had been given in the eighteenth century to disbanded soldiers."

> **disbanded soldiers and their families who settled in this Province at the Peace of 1783**.[190] [emphasis added]

However, Martell does not discuss the April 6, 1815 letter within the context of settling the Black Refugees, he only cites it in support of his following statement regarding the expected influx of, and perceived inconveniences caused by, the late arrival Black Refugees:

> Sherbrooke was no doubt glad to hear this, for the negroes, who had escaped from southern plantations by boarding British patrol ships, were becoming a serious problem. Employment had been found for the first arrivals, but by the spring of 1815, when 1500 to 2000 more were expected, there was no further call for negro labour. As the late comers were bound to become an immediate burden on the Government, Sherbrooke believed it best to boost them as quickly as possible into a state of self-sufficiency.

Instead of pointing out that the April 6, 1815 letter from Sherbrooke to Bathurst demonstrates a clear disregard by the government to fulfill its contractual representations that were made to the Black Refugees one year prior in the Cochrane Proclamation, Martell simply attributes the renewed land settlement decision to Sherbrooke's desire to be relieved of the financial burden combined with a vacancy created by the delayed disbanded soldiers. While these rationales may be accurate, the critical race analysis of these historical details is also important. The allocation of land to the Black Refugees should not have depended on the unexpected vacancy of land earmarked for the disbanded soldiers, or fears of economic dependency on government. The contractual commitment to allocate land on terms comparable to White settlers was already established through the Cochrane Proclamation, if not before,[191] and the persistent refusal of government to comply with its terms demonstrates a pattern of racist ideology should have been emphasised in early scholarship pertaining to the land settlement of the Black Refugees.

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[190] Grant, Immigration and Settlement, *supra* note 59 at 76 citing Lieutenant-Governor Sir J.C. Sherbrooke to Lord Bathurst, April 6, 1815, C.O. 217/96.

[191] See discussion above in Part 2.2.3 (Cochrane Proclamation).

Returning to Martell's depiction of the events occurring in the Spring 1815, after explaining that Sherbrooke wrote to Bathurst on March 15, 1815 regarding settlement of the disbanded soldiers, and briefly referencing the April 6, 1815 letter from Sherbrooke to Bathurst regarding the settlement of the Black Refugees, Martell provides an account of Bathurst's response to Sherbrooke on May 10, 1815, which is one of the earliest accounts of Britain's post-war instructions to Nova Scotia's Lieutenant Governor regarding the land settlement of the Black Refugees. Again, seemingly to have forgotten (or ignored) the contractual representations that were made to the Black Refugees one year prior in the Cochrane Proclamation, Bathurst agrees with Sherbrooke's plan to finally grant "encouragements – free land, implements, and (for a limited time) provisions" to the Black Refugees, and, notably, on terms analogous to encouragements that were granted to eighteenth century disbanded solders.[192] It is important to note that, notwithstanding his request for imperial sanction, Sherbrooke was already legally empowered (and encouraged) to grant land pursuant to the 1807 Land Administration Laws.[193] The request for permission, however, may have been more for the supply of rations or waiver of fees then for the land itself.

Notwithstanding the absence of critical race analysis in J.S. Martell's depiction of these historical events, his work helpfully connects the land settlement decisions that were made in respect of the Black Refugees with the land settlement preparations that were made for the disbanded soldiers. As Martell explains, when Sherbrooke wrote to Bathurst on April 6, 1815, informing him that while employment had been found for the

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[192] Fergusson, Documentary Study, *supra* note 70 at 38, citing PANS RG 1 Vol 63 Doc 12.

[193] The 1807 Land Administration Laws are the Royal Instructions that were sent from Secretary Bathurst to Lieutenant Governor of Nova Scotia dated August 29, 1807 (PANS RG 1 Vol 353), which provided instructions on the administration of crown land ["1807 Land Administration Laws"]. See below in Chapter 3.

early arrivals Black Refugees[194] the late arrivals should be settled to not be a burden on the government,[195] Martell claims,

> Having secured the Imperial sanction, he [Sherbrooke] established two negro settlements before the year was over: one at Preston, near Dartmouth, and the other at Hammonds Plains, on the Halifax end of the projected road to Annapolis. **The land along this route had already been recommended by Surveyor General Charles Morris as suitable for the settlement of soldiers, but no soldiers were settled there in 1815**.[196] [emphasis added]

Therefore, according to Martell, the suitable lands at Hammonds Plains and Preston, that were initially earmarked and prepared for the disbanded soldiers, were reallocated to the Black Refugees.

The plans for the disbanded soldiers that Sherbrooke wanted to settle in the interior parts of the province, did ultimately come to fruition. The subsequent three years saw the disbanded soldiers[197] settled (with government support) in three primary locations. In keeping with the vision to populate the interior of the province, and build a road between Annapolis and Halifax, Martell writes,

> Lieutenant Governor Sherbrooke, and his successor, Lord Dalhousie, both military men who had served under Wellington, ordered the land along this route to be laid out for disbanded soldiers, and within the space of three years, three settlements,

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[194] The "early arrivals" are those Black Refugees who arrived in Nova Scotia during the War of 1812. The "late arrivals" are those Black Refugees [soldiers?] who arrived in Nova Scotia after the War of 1812 ended on December 24, 1814. The assumption that the early arrivals found employment is repeated throughout scholarship pertaining to African Nova Scotians. For example, Fergusson, Documentary Study, *supra* note 70 at 13 writes that Lieutenant Governor Sherbrooke informs Secretary Bathurst on 18 October 1813 that many Black Refugees arrived in Nova Scotia, and that he ordered them to interior of the province in search of employment.

[195] Martell, Military Settlements, *supra* note 182 at 80, citing in footnote 5 P.R.O., C.O. 217/96. Sherbrooke to Bathurst, April 6, 1815.

[196] *Ibid* at 80. While large tracts of land in the area was previously granted to loyalists after the American Revolutionary War, the land was abandoned, which prompted Sherbrooke to order new surveys (see *ibid* at 82).

[197] Settlement of disbanded soldiers started with the fencibles, but by 1817 Lord Dalhousie manoeuvred imperial support for land settlement to any discharged soldier, including for example, about fifty Germans settled in Lunenburg County and received rations until the autumn of 1820 (see *ibid* at 92-97). Standard instructions were to allocate 100 acres of land to disbanded soldiers (see *ibid* at 94).

> appropriately named Sherbrooke (later New Ross), Dalhousie, and Wellington came into being.[198]

Interestingly, these three military settlements proved to be a "discouraging experience"[199] which is a detail often absent from the land settlement discourse pertaining to African Nova Scotians communities. African Nova Scotians were not the only people who struggled in colonial Nova Scotia, yet they seem to have been disproportionately impacted by the cycle of poverty that followed.

J.S. Martell's depiction of historical events that gave rise to the land settlement decisions of the Black Refugees in Hammonds Plains and Preston provides a useful foundation from which the experience of the Black Refugees land settlement can be assessed relative to a comparator group such as the disbanded soldiers. Unfortunately, however, while Martell attributes the government decisions to grant land to the Black Refugees on the unexpected vacancy of available land that was earmarked for the disbanded soldiers, along with a desire to abscond from responsibility to properly launch the Black Refugees into financial prosperity after enslavement, his analysis ignores the fact that Cochrane's Proclamation had already promised land to the Black Refugees and that the government seemingly had no intentions to fulfill its contractual commitment. But for the unexpected opportunity to reassign the disbanded soldiers' land, there appears to have been no intentions and no preparations made to grant land to the Black Refugees who acted in reliance on the contractual representations in the Cochrane Proclamation.

Another issue to highlight from Martell's work in *Military Settlements* is the reference to the suitability of the land. According to Martell, Sherbrooke believed the interior parts of the province contained suitable land for settlement, notwithstanding the absence of road infrastructure.[200] This understanding seems to have been based on evidence from Nova Scotia's deputy surveyor, John Harris, who on December 20, 1814, in the course of Sherbrooke's planning to settle the disbanded soldiers, had vouched for the

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[198] *Ibid* at 76.
[199] J Martell, Immigration and Emigration, *supra* note 70 at 17.
[200] Martell, Military Settlements, *supra* note 182 at 81.

quality of the land as "worth settling."[201] This claim was supported by the testimony of his superior, Surveyor General Charles Morris, as Martell explains:

> The Surveyor General, Charles Morris, added his testimony two months later, when he assured the Lieutenant Governor that he was not aware of 'any Range of Country (in every View of it)' more favourable for the settlement of farmers from the surrounding districts or for 'any of His Majesty's German or highland or Fensible Corps' that might be disbanded. In the event of the legislature being disposed from 'a conviction of its great public utility' to open and improve it, he [Morris] recommended that 'the whole of the improvable Lands **be laid out into Compact and regular alotments not exceeding two hundred acres each**, and in the proportion of front prescribed by his Majesty's Instructions – that is one fifth of the length – or one quarter of a mile front to each lot – **and no land to be granted but to those who can give satisfactory proof of their becoming actual Settlers, or who will contribute to its immediate improvement**.[202]

This work helps to explain why Hammonds Plains and Preston were the locations of choice to settle the Black Refugees, as well as describes the quality of that land, which is likely more applicable to the Hammonds Plains settlement than Preston. However, there are two other important points to highlight from this excerpt which Martell did not discuss in his work, being lot size and tenure.

First, in March of 1815, Surveyor General Charles Morris recommends to the imperial government that compact and regular allotments not exceeding **200 acres** each should be laid out and granted to the **disbanded soldiers**. However, a few months later in September 1815, in respect of the Preston lands to the **Black Refugees**, the Surveyor General Charles Morris advises the imperial government that compact lots be laid out so as to form a village, each lot to contain about **10 acres**.[203] The 10-acre model was then replicated in the land allotments to the Black Refugees in Hammonds Plains. The disparity in lot size recommended by Surveyor General Charles Morris' ignores the imperial

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[201] *Ibid* at 82.
[202] *Ibid* at 83.
[203] Letter from Charles Morris to Governor Sherbrooke 6 September 1815 (Fergusson, Documentary Study, *supra* note 70, Appendix I).

instructions to treat the Black Refugees similarly to the disbanded soldiers and is inconsistent with the 1807 Land Administration Laws which empowered (and encouraged) the Lieutenant Governor to grant lot sizes ranging from 100 to 500 acres. Furthermore, at that point, the scarcity of land in Nova Scotia had not yet reached its peak, so there is little motivation for the Surveyor-General to preserve land in the same way that existed in the late 1820s when agricultural land was rare.[204]

A second point to highlight from J.S. Martell's work pertains to Surveyor General Morris' advice regarding tenure to the disbanded soldiers, which was consistent in his treatment of tenure to the Black Refugees.[205] In March of 1815 in respect of the disbanded soldiers, Morris recommends that "no land to be granted but to those who can give satisfactory proof of their becoming actual Settlers, or who will contribute to its immediate improvement." And, in September 1815, in respect of the Black Refugees in Preston, Morris recommends that "no Land be confirmed to them by Grant – until they are actually settled and satisfactory proof afforded to your Excellency of their fixed determination to make a permanent Settlement."[206] Martell does not provide explanation as to why the Surveyor General sought to withhold the fee simple grants that the 1807 Land Administration Laws sought to encourage, but he does shed some light on potential underlying rationales. Although he was writing in respect of settlement decisions that were made seventeen months after Morris' March 1815 advice on tenure for the disbanded soldiers, who had a reputation of deserting their land grants, Martell writes:

> Captain Ross, who was the principal man in that district [New Ross], was apparently concerned about the abandoned lots, for on August

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[204] Martell, Immigration and Emigration, *supra* note 70 at 23 cites a letter from 1827 which states "It cannot, therefore, be a matter of surprise if in this Province, (comparatively small and seabound) you find almost every spot at all calculated for Cultivation, already occupied, and all the best Land in the Country disposed of."

[205] It is important to know that decisions on tenure exceed the scope of responsibility for a surveyor. See the testimony of J.S. Morris (Charles Morris' son and successor Surveyor General) in the Buller Report, *supra* note 165, Appendix B at 1: "It is the duty of the Surveyor General to prepare the plans and description, but it rested with the Secretary of the Province and the Attorney General, to attend to the terms of the grant."

[206] Letter from Charles Morris to Governor Sherbrooke dated 6 September 1815 (Fergusson, Documentary Study, *supra* note 70, Appendix I).

> 28 [1816], the Surveyor General [Morris] wrote to assure him that they were to be given to men who meant 'to become immediate Setlers'. This was a simple process because no grants of lands had yet been made. **Pending the escheat of the old loyalist grants, the Government was giving out temporary tickets of location, for which the men drew lots**.[207] [emphasis added]

This statement suggests a rationale that may have contributed to the issuance of tickets of locations instead of freehold grants to the disbanded soldiers, which could be inferred as a potential rationale for issuing temporary tickets of location to the Black Refugees. If the government needed time to acquire legal title through a land escheatment process[208] then it could explain why the Lieutenant Governor was not in a legal position to issue freehold grants at the time of settlement, and, alternatively issued temporary tickets of location instead. It is not clear whether the land that was allocated to the Black Refugees in either Upper Hammonds Plains or Preston was subject to prior land grants awaiting the escheat process. J.S. Martell's statement refers to land located in New Ross. However, historian Dorothy Evans suggests that the land in Upper Hammonds Plains may have been previously encumbered:

> There was one difficulty about the Hammonds Plains site. It was not ungranted land. True, the first white settlement there, that of Vieth and his men, had failed, and the whole acreage had escheated to the Crown. But it had been re-granted to other white settlers, although they people living on it may not have been the grantees themselves. One of them was John Liddell.[209]

Regardless of the reasons or their validity, J.S. Martell's works shows that the disbanded soldiers were also issued tickets of location, and after a few years of

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[207] Martell, Military Settlements, *supra* note 182 at 91, citing in footnote 32, Morris to Ross, August 28, 1816.

[208] The escheatment process was difficult and costly. In Buller Report, *supra* note 165, Appendix B at 3 Surveyor-General J.S. Morris testified that the expense if uncontested with about £20. He also testified that while non-payment of quit rents made the land liable to escheatment, he was not aware of any payments of quit rents prior to 1827, which suggests it was often not paid, without consequence. Also, in Buller Report, *supra* note 165, Appendix B at 16, the Provincial Secretary testified that the Attorney and Solicitor General recently opined that any improvements made by authorizes settlers barred escheatment (also in Buller Report at 2). While this opinion may be contested, it demonstrates a general reluctance by government officials to escheat land.

[209] Evans, Hammonds Plains, *supra* note 144 at 57.

government rations, many disbanded soldiers abandoned their lots and some never had their tickets of location converted to land grants, prompting J.S. Martell to write "Their merry-making was over, and the day of their departure at hand. Only the industrious could wait long enough to reap their just reward, a permanent grant of land."[210] A noticeable difference between the disbanded soldiers and the Black Refugees, however, is that while the disbanded soldiers had mobility options to move elsewhere when the rations ended and the land proved too difficult to cultivate enough to earn the grant,[211] the Black Refugees did not.[212]

The disbanded soldiers who stayed long enough to improve and cultivate their land ultimately attained freehold grants. J.S. Martell points to one example in Sherbrooke where a grant of 13,000 acres was made to 67 soldiers in October 1819 (average lot size 194 acres), after the government had finally completed the escheat of the loyalists grants.[213] Other examples include the grant of 26,760 acres in 1821 to 179 fencible soldiers in Dalhousie (average lot size 149 acres), 6,900 acres in January 1822[214]to the 50 German soldiers settled in Lunenburg (average lot size 138 acres), and 2,100 acres to 14 soldiers in Wellington in 1822 (average lot size 150 acres).[215] It is important to note that at this point, the land granted to the Black Refugees was still not confirmed, despite being settled on the land before the disbanded soldiers.

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[210] Martell, Military Settlements, *supra* note 182 at 98.

[211] The fear that the disbanded soldiers would migrate to the United States was one reason the colonists sought to encourage their settlement through the provision of rations (see *ibid* at 79).

[212] Grant, Black Immigrants, *supra* note 60 at 256 writing in the context of the Black Loyalists. "The black Loyalists, however, suffered more of a disability than did their white neighbors: they were less likely to flee "Nova Scarcity " and return to the United States and possible slavery"; see also Lord Dalhousie Report, supra note 156 at 69: "the notion that emancipated people of African descent could move as freely as could Europeans in the Atlantic world. The Black Refugees knew differently. Kidnapping and re-enslavement were risks of life in a port town."

[213] Martell, Military Settlements, *supra* note 182 at 101.

[214] The year 1822 was a particularly impoverished year in Nova Scotia, Martell, Halifax 1812, *supra* note 104 at 292 cites Murdoch, Epitome of Laws, *supra* note 46, who wrote in 1860 that "I do not think […] that there was any period in the history of Nova Scotia in which the progress of the country was more thoroughly paralysed than it was in this year, 1822 … the value of buildings and lands in Halifax …had sunk to a low amount; and the stagnation of business had made real estate almost unsaleable at any price. At this time the town of Halifax contained, as nearly as I can judge, less than 2000 dwellings, many of which were then unoccupied."

[215] Martell, Military Settlements, *supra* note 182 at 102.

Lastly, Martell's work also reveals that some early arrival Black Refugee were labourers in the Hammonds Plains area before the Black Refugee settlement. It arises in the context of road construction between Annapolis to Halifax following surveyor John Harris's survey. Martell explains:

> Before the [Assembly] session of 1815 was over, they [Assembly] had made good the expenses of John Harris's survey and voted £135 to start the work of building, besides £950 to improve the three crossroads […]. No soldiers were available in 1815, but John Harris, now in the role of a road builder, pushed through the forest from Annapolis to the Liverpool road, **and the negroes felled trees and built huts at the other end, beyond the well established white settlement of Hammonds Plains**.[216] [emphasis added]

The Black settlement in Upper Hammonds Plains seems to have had some significance to the soldier settlements. For example, when Martell was describing the location of the disbanded soldiers' settlements, he explains:

> Disbanded soldiers, not native farmers or ambitious immigrants, had been given a virtual monopoly of the new road. Two of their settlements, Dalhousie and Sherbrooke, ran from the southern boundary of the Township of Annapolis to the Chester cross road, while the third, Wellington, straddled the short space between the North East River and Indian River, **beyond the black settlement at Hammonds Plains**.[217] [emphasis added]

Additional helpful information from J.S. Martell's work pertains to the land settlement of the Black Refugees comes from his statement about one particular disbanded solider group, the Royal York Ranger. Martell writes:

> How many soldiers, in all, settled along the military road after 1815 will probably never be known. Scores of them came and went within a few weeks. When the Royal York Rangers were disbanded at Halifax in 1819, they probably met many a man from the military settlements strolling the streets of the capital. After hearing the accounts they must have heard, it is small wonder they **unanimously chose cash instead of land**. Despite the statements of the Surveyor General and his deputy, John Harris, poor land was

[216] *Ibid* at 84.
[217] *Ibid* at 88.

> seemingly plentiful in the tract between Halifax and Annapolis. [emphasis added]

It is not mentioned whether the Black Refugees or other disbanded soldiers were given the option to receive monetary payments instead of land.

2.4.2 Martell, J.S. (1942)

Five years after publishing *Military Settlements*, in 1942 J.S. Martell produces his often-cited scholarship pertaining to African Nova Scotians, *Immigration to and Emigration from Nova Scotia 1815-1838*.[218] The purpose of this book was to study archival information about the number of immigrants to Nova Scotia between 1814 and 1838. In doing so, Martell delved into the historical information pertaining to the Black Refugees more than he did in *Military Settlements*.

In *Immigration and Emigration*, Martell situates the Black Refugee experience into the broader context of Nova Scotia's changing attitudes toward immigration generally in the years after the War of 1812. He explains how the Nova Scotia House of Assembly first wanted the imperial government to direct immigrants to Nova Scotia, but then "[t]he opinion was freely expressed in the 1820s that, while small capitalists were always wanted, the province had had its fill of poor people."[219] The "first problems", according to Martell, were the Black Refugees who arrived during and directly after the War of 1812. Martell proceeds to sketch out the migration events of the early and late arrivals of Black Refugees into Nova Scotia, along with the hostility and destitute circumstances they faced once they arrived. Most importantly for the purposes of this thesis, however, is Martell's account of a letter from Secretary Bathurst to Lieutenant Governor Sherbrooke on May 10, 1815, sanctioning the plan to settle the late arrival Black Refugees on terms consistent with the disbanded soldiers, which states:

> If the Negroes, did not wish to become miners, but preferred to be farmers, then, Bathurst continued, they were to be **given the same encouragements – free land**, implements, and (for a limited time)

[218] Martell, Immigration and Emigration, *supra* note 70.
[219] *Ibid* at 15.

> provisions – that had been given in the eighteenth century to disbanded soldiers.[220] [emphasis added]

This is an elaboration of Martell's work from "Military Settlements" when he first references this letter in the context of Sherbrooke's plans to reallocate land that was originally earmarked for the disbanded soldiers. Martell proceeds to explain that:

> [a]ccordingly, the Negroes, who no doubt wisely insisted on being near the centre of Government, were settled at Preston, Hammond's Plains, and along the Windsor and Truro roads.[221]

On the one hand, Martell is suggesting that the Black Refugees had their choice of settlement location, yet, elsewhere, particularly in *Military Settlements*, he suggests the location was a decision made by the Lieutenant Governor and Surveyor-General based on their plans to settle the disbanded soldiers.

Furthermore, as was the case in *Military Settlements*, Martell fails to acknowledge the Cochrane Proclamation as the legal authority which obligated the imperial government to grant land and provisions to the Black Refugees, and not Bathurst's mistaken belief one year later that the Black Refugees preferred land for agricultural purposes instead of labour in the coal mines. However, despite this shortcoming, the archival information produced in Martell's *Immigration and Emigration* provides useful evidence pertaining to land administration policies that aimed to serve the interests of pauper European immigrants, while ignoring the needs of the Black Refugees. In his overview of the problems facing pauper immigrants regarding land scarcity and high costs, Martell notes that by 1819, the Nova Scotia government, frustrated with the inactivity by the imperial government, "was now taking its own steps to facilitate the settlement of immigrants." He writes:

> Escheats, mostly of Loyalist land, freed over 70,000 acres in 1819 and perhaps 20,000 acres in the two years that followed, and thousands of pounds were being spent annually in improving the

[220] *Ibid* at 17, citing CO 217/96, Bathurst to Sherbrooke, May 10, 1815. This instruction to allocate land was repeated in Bathurst's letter to Sherbrooke 13 June 1815 PANS RG1 Vol 63 Doc 12. See discussion below under Part 2.4.3 Fergusson, C.B. (1948).

[221] *Ibid* at 17.

> old highways and making new roads."[222] […] Two years later the government made what was probably its most helpful move. Board of Land Commissioners were set up in the different localities to iron out irregularities in settlement, discourage land-jobbing [the practice of buying and selling land for the purpose of speculation], and **assist poor people and immigrants in becoming established**. Henceforth, instead of petitioning the Governor for land or walking many miles to the capital to make a personal appeal, prospective settlers could apply to their local Board for a **temporary ticket of location**, and **when the time came to take permanent possession, they were allowed to join with others (five was the limit) in one grant for the ordinary fee which was split between them**. This system remained in effect until 1827 when, in reluctant conformity with Imperial instructions, the Surveyor-General of the peninsula ordered that Crown Lands be sold.[223] [emphasis added]

While Martell refers to tickets of location, he draws no connection between the tickets of location that were issued to the disbanded soldiers as discussed in his *Military Settlements* article five years prior, and he appears to be introducing a new rationale behind the issuance of tickets of location. In *Military Settlements* the implied rationale behind tickets of location to disbanded soldiers (and Black Refugees by inference) was either a temporary measure awaiting the escheat process, or due to the Surveyor General's presumptions that soldiers were unreliable long-term settlers. However, in *Immigration and Emigration*, Martell is suggesting that bureaucratic efficiency (ie., the ability to obtain tickets of location more quickly from the local boards than grants from the Lieutenant Governor) and cost savings (ie. allowing groups of settlers to split the cost), caused the issuance of temporary tickets of location to newly arrive pauper immigrants. It is possible that the rationale differs among the different groups, but Martell offers no insight on the matter. There is further discussion on tickets of location and pauper immigrants in the context of the land administration laws below in Chapter 3, but for now it is important to understand that Martell's work lays a foundation from which a comparative experience can be assessed between the Black Refugees, disbanded solders,

[222] *Ibid* at 21.
[223] *Ibid* at 21.

and pauper White immigrants in terms of racially disparate effects of ostensibly race-neutral laws, which disadvantaged Black people and advantaged White people.

2.4.3 Fergusson, C.B (1948)

There is much that can be said about C.B. Fergusson's foundational, yet controversial, archival research that he prepared for the Public Archives of Nova Scotia in 1948. While self-proclaimed as a "study" on the origins and status of the Black Refugees, subsequent scholars have critiqued the lack of depth of Fergusson's analysis on this archival compilation. For example, historian Harvey Whitfield explains:

> In the 1940s, archivist and historian Charles Bruce Fergusson [sic] began research on his history of the War of 1812 Black Refugees. A monumental piece of research, but somewhat thin on interpretation.[224]

The shortcomings in Fergusson's work are not belaboured here but suffice it to mention that other scholars have critiqued, among other things, Fergusson's disregard for the Black Refugees' agency in their migration patterns and settlement,[225] have determined his portrayal of the Black Refugees to be unfair,[226] and argue that he failed to contextualize the Black Refugees' struggles relative to the struggles of White immigrants and in the context of a complex and chaotic colonial atmosphere. Whitfield writes:

> Fergusson emphasized the struggles that the Black Refugees faced and examined the amount of money the government spent on relief. While not denying the discrimination black people faced, **Fergusson did not fully contextualize their struggles with those of other white immigrants who also struggled** – especially if they

[224] Whitfield, Historiography, *supra* note 56 at 218.
[225] *Ibid* at 219 "Fergusson's work is a seminal study in the historiography of the African Diaspora in Atlantic Canada. It is foundational because of the documents it chased down, but also because most scholars, including myself, have consulted his research. Fergusson's study of government policy toward black migrants, though unmindful of the Black Refugees' agency, allowed scholars of the late 1960s and early 1970s to produce significant works about the African Diaspora in Atlantic Canada.
[226] *Ibid* at 219 "Fergusson viewed himself as rather racially progressive for writing this work, but today many readers might find parts of the book rather unfair toward the Refugees. He noted, for instance, that "they had had no preparation for a life of freedom, and no familiarity with conditions in lands and climes which were more demanding than their own." Fergusson argued the Refugees could not have survived without the "private and public assistance of their white neighbours." Yet, this is too simplistic because some of Refugees, such as hotel owner William Dear (also spelled Dair, Dare, and Deer), were successful entrepreneurs or farmers."

> migrated to Nova Scotia with little capital. […] The reality of early settlement in Nova Scotia shows that many settlers struggled regardless of race. For example, in 1817, Lord Dalhousie commented that without government rations a settlement of disbanded white soldiers would completely collapse.[227] [emphasis added]

Other scholars have pointed out that Fergusson's work reflects White settler colonialism embedded within the Nova Scotia Archives itself and that the work was "brought forward to defend the honour of the Crown."[228]

Notwithstanding its flaws, Fergusson's book remains a foundation from which many scholars in the field of African Nova Scotian studies have based their work, including its critics.[229] For the purposes of this thesis, the review of Fergusson's work is limited to the issue of land allocated to the Black Refugees.

2.4.3.1 Lot Size

It will be recalled that historian J.S. Martell attributes the colonial decision to grant land to the Black Refugees on terms similar to the disbanded soldiers to a series of correspondence between Secretary Bathurst to Lieutenant Governor Sherbrooke in the Spring of 1815 (March 15, 1815; April 6, 1815, and May 10, 1815). However, in doing so, J.S. Martell discounts the validity of the contractual representations that were made in the Cochrane Proclamation one year prior. C.B. Fergusson, however, attributes this reawakened proclamatory promise to a different letter, being one from Bathurst to Sherbrooke dated June 13, 1815, which instructs Sherbrooke (again) to allocate "small grants" of land to the Black Refugees but omits the part about analogous treatment to that of the disbanded soldiers. Relying on this letter in isolation misconstrues the royal instructions about land to the Black Refugees and understates the harm caused by ignoring the representations that were made in the Cochrane Proclamation.

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227 *Ibid* at 219.

228 McKay, Race and Archives, *supra* note 122 at 33

229 Whitfield, Historiography, *supra* note 56 at 218: "A Documentary Study of the Establishment of the Negroes in Nova Scotia is a treasure trove of primary source documents. Fergusson unearthed many of these sources himself and without his original research several subsequent works about the Black Refugees could not have been completed, including my own book Blacks on the Border."

Secretary Bathurst's June 13, 1815 letter that Fergusson produces is often cited in land title discourse to support claims that Britain intentionally allocated 10-acres lot to the Black Refugees. However, those conclusions appear to be based on inference from this one letter, absent the benefit of context provided in the earlier correspondence that J.S. Martell produces in his less-often cited work, *Military Settlements*. On June 13, 1815, after both Secretary Bathurst and Lieutenant Governor Sherbrooke had already agreed in earlier correspondence to allocate land and provisions to the Black Refugees on terms analogous to the disbanded soldiers, Bathurst writes to Sherbrooke as follows:

> The only other point in these Dispatches to which it is in any degree [illegible] relates to the disposal of the negroes landed in the colony by Sir Alex. Cochrane, and on this, while I equally approve the [line] adopted by you and the Instructions given in consequence [illegible], I wish merely to call your attention to the advantage which might result from giving to those persons, who are mostly accustomed to agricultural labour, **small grants** of land by the cultivation of which they might in a short time be enabled to provide for their own subsistence and to promote the general prosperity of the province in which they might be settled.[230] [emphasis added]

While Secretary Bathurst instructs "small" grants of land, some have inferred this to mean 10-acres lots. For example, historian Harvey Amani Whitfield cites this letter as support for his following statement:

> In 1815, **at the beset of Colonial Secretary Lord Bathurst**, the Lieutenant Governor Sir John Sherbrooke decided that placing the Refugees **on ten-acre farms** in Preston and Hammonds Plains might allow the government to save money.[231] [emphasis added]

However, Secretary Bathurst did not stipulate 10-acre lots, rather the 10-acre plan seems to have originated with the Surveyor General, Charles Morris, in contradiction to Secretary Bathurst and Lieutenant Governor Sherbrooke's agreement to treat the Black

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[230] Bathurst to Sherbrooke, 13 June 1815, RG 1, vol 63, doc 12, cited in Fergusson, Documentary Study, *supra* note 70 at 39. This letter is also cited in Grant, Immigration and Settlement, *supra* note 59 at 77, without the inference to ten-acre lots.

[231] Whitfield (2003), "Black Refugee Communities" at 93, citing Bathurst to Sherbrooke, 13 June 1815, RG 1, vol 63, doc 12.

Refugees analogous to the disbanded soldiers who were being allocated over 100 acres of land each. As C.B. Fergusson explains, when Sherbrooke received Bathurst's June 13, 1815 letter, he asked the Surveyor General Morris about the availability of land in Preston (there is no mention of Hammonds Plains). It was Morris who, by letter to Sherbrooke dated September 6, 1815, suggests the 10-acre lots and unconfirmed grants:

> I would propose that compact Lots be laid out so as to form a village – **each Lot to contain about ten acres** – and regularly drawn for in the usual manner and that a Reserve of Fifteen hundred acres be made as a Common to afford them fuel, fencing & Building materials when that on their own Lots is exhausted – and that **no Land be confirmed to them by Grant** – until they are actually settled and satisfactory proof afforded to your Excellency of their fixed determination to make a permanent Settlement […].[232] [emphasis added]

In addition to shedding light on the role of the surveyor general in the discriminatory land allocation decisions, Fergusson's work also sheds light on why Surveyor General Morris may have recommended 10-acre lots in the Preston settlement. Fergusson explains:

> Eight years later [1823] Surveyor General Morris stated that 'in the day this settlement [Preston] was forming these people were appraised that there was not land sufficient for half their number but they were so urgent to be placed near each other, that the **Lots were necessarily reduced for their own convenience and accommodation**.[233] [emphasis added]

While this rationale may explain Morris' advice to allot 10-acre lots in Preston, it does not explain why the same method was adopted in other settlements such as Hammonds Plains. This is especially the case when it is remembered that Hammonds Plains was originally planned as a soldier settlement who would have been granted at least 100 acre lots, not 10. One can only assume that Morris or one of his deputies' went through the

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[232] Morris to Sherbrooke 6 September 1815 PANS RG 1 Vol 420 Doc 76 and Fergusson, Documentary Study, *supra* note 70, Appendix I.

[233] Fergusson, Documentary Study, *supra* note 70 at 40, citing PANS Land Papers, Petition of Bazil Crowd, 1823.

added effort of revising the surveys to reduce the lots once it was decided that the occupants would be Black Refugees.

The plan to allow only 10-acre lots in Preston may have originated with Surveyor-General Morris, but the decision was sanctioned by London and later by the law through the property documentation process.[234] Fergusson writes:

> The Earl of Bathurst gave his sanction to the measures being taken in the province for the settlement of the Negroes. 'I entirely approve the measures you have taken with respect to the Location of the Negros (sic), and the means you propose to give them for the Cultivation of the Ground allotted for their Settlement.[235]

It is not clear whether Secretary Bathurst was fully informed of the precise size of the lots or the tenure of holding, but that does not absolve him of accountability. It is also important to note that at this point, it appears from Fergusson's work that the Preston land was already escheated so the rationale that Martell intimates for tickets of location (ie. pending escheatment) is not sensible for the Preston settlement.[236]

2.4.3.2 Proclamation Ignored

Having regard to the pivotal nature of Fergusson's work from which other scholars based their own, Fergusson's reference to the June 13, 1815 letter from Bathurst to Sherbrooke, and the reproduction of the September 6, 1815 letter from Morris to Sherbrooke in Fergusson's book, are important contributions to the discourse on land issues in African Nova Scotian communities, particularly Preston. Equally important, however, is Fergusson's omission to include the Spring 1815 letters between Bathurst to

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[234] Twenty-five years later, imperial instructions against land grants to the Black Refugees were more express. In 1839, Lord Glenelg writing to Lieutenant Governor Campbell about an attempted relocation of some Black Refugees to "better" land, he specifically instructs that "and to prevent their becoming the prey of designing persons, you will not issue to them at least for the present, any title deeds for their Land but will make out the Grant to them in such a way as to prevent its alienation without the express previous consent of the Governor of the Province, acting with the advice of the Executive Council" (see *ibid* at 49).
[235] *Ibid* at 41, citing PANS vol 63, doc 21, Bathurst to Sherbrooke, November 10, 1815.
[236] *Ibid* at 39 where Fergusson writes "By September 6, 1815, Morris reported to the Lieutenant-Governor that he had made 'full enquiry on the Subject'. He stated "that from the tracts of Land which have reverted to the Crown by a regular Course of Escheat and a disposition on the part of proprietors of adjoining Lands I shall be able with your approbation to place two hundred Families in one connected Settlement favourable for Cultivation" (see Fergusson, Appendix I).

Sherbrooke which more clearly defines the parallel between the disbanded soldiers and the Black Refugees, particularly those settled in Hammonds Plains. What is most striking from Fergusson's work, as well as Martell's, is that while both authors point to 1815 imperial instructions on 'encouragements' to the Black Refugees, neither of them drew attention to the fact that these contractual commitments stemmed not from the 1815 letters, but from the Cochrane Proclamation which, seemingly from Martell's and Fergusson's work, the British government had no intentions of fulfilling until subsequent unexpected circumstances compelled it into existence.

In the case of Martell's work and the March 15, 1815 letter from Secretary Bathurst, it appears that but for the change in settling the disbanded soldiers, the Black Refugees may have never received the land in Hammonds Plains. Similarly, from Fergusson's work and the May 10, 1815 letter from Secretary Bathurst, if the Black Refugees had not been so "frequently dependent for subsistence",[237] as Fergusson unfairly portrays them, then they may have never received the 'encouragements' that were promised to them on the battlefield.

2.4.3.3 Quality of Land

C.B Fergusson's work serves as an important early source for present day claims that the land allotted to the Black Refugees was of inferior quality compared to land granted to white settlers. Fergusson writes:

> The small size of their lots and the **sterility of the soil** were major causes of the distress of the people at Preston during these years.[238] [emphasis added]

While Fergusson's statement was based on documents specific to Preston, many scholars have inferred that these challenges existed in other African Nova Scotian communities without confirmation of the same. This is particularly problematic because the quality of the soil varied throughout the province.[239] Similarly, Fergusson is often cited as the source

[237] *Ibid* at 37.
[238] *Ibid* at 45.
[239] See the testimony of Titus Smith in Buller Report, *supra* note 165, Appendix B at 20.

for claims that the Black Refugees petitioned for better quality land.[240] Again, Fergusson's work in this area is specific to Preston, but is often assumed applicable in other African Nova Scotian settlements. This is not to suggest that the quality of land was good in other African Nova Scotian communities, only that Fergusson's work does not support claims of poor-quality land in communities other than for Preston.

The claims of poor-quality land in Upper Hammonds Plains and Beechville is possibly inferred elsewhere from Fergusson's work. For example, he notes that there were discussions in 1837 to relocate some of the residents from Preston, Upper Hammonds Plains and Beechville to "better lands" in the province,[241] suggesting that Upper Hammonds Plains and Beechville may have also experienced barren land. However, this reference is over 20 years after the Upper Hammonds Plains settlement was established, and "better" in this sense may be in reference to the quantity of land, not the quality of land.[242] To support this later interpretation, Fergusson specifically mentions that residents in Upper Hammonds Plains "soon began to ask for more land"[243] suggesting both dissatisfaction with lot sizes, as well as a believed capability to handle more. He is silent, however, about the fertility of the soil in Upper Hammonds Plains.

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[240] See Fergusson, Documentary Study, *supra* note 70 at 45 for information pertaining to petitions from Black Refugees in Preston.

[241] See *Ibid*, Appendix XVI PANS vol 115, pp 56-7 C. Campbell to Lord Glenelg August 25, 1837 wherein Lieutenant Governor Campbell informs Lord Glenelg that 100 to 120 of the 250 families in Preston are "willing" to be relocated within the province "where good land [sic] be provided for them, and where, with the assistance of the wages which they might occasionally obtain as Laborers, they, with industry, might earn a comfortable livelihood." Since LG Campbell was not authorized to grant the new land because of the 1827 regulations, the relocation plan required London's approval and accompanying financial support. Lord Glenelg rejected the proposal, noting it was "open to serious & I fear insuperable objections" and thought the plans was […]. Lord Glenelg wrote "The free gift of any part of the Waste Lands of the Crown would involve a departure from the spirit as well as the letter of the present Land Regulations, to the strict observance of which the faith of Her Majesty's government has been so repeatedly pledged." Lord Glenelg acknowledged that public interest exceptions existed but that this was not one of those instances justifying an exception to be made. (See Fergusson, Appendix XVII).

[242] The relocation plans stalled in large part because, by 1837, the Lieutenant Governor was prohibited by law from granting gratuitous land grants (see *ibid* at 48).

[243] *Ibid* at 51.

2.4.3.4 Tenure

Of particular importance to the land titles discourse, Fergusson is a prominent source for claims that the Black Refugees were issued **tickets of location** and **licences of occupation** rather than freehold grants. While Fergusson does not define either term or distinguish between the two, it is in Fergusson's work where early assertions are made about the Black Refugees' insecure landholdings and delayed conversion of these insecure holdings into fee simple, notwithstanding continual petitions to do so by the Black Refugees. C.B. Fergusson writes:

> […] the settlers at Preston continued to hold their lands by tickets of location and licences of occupation; but their grants had never been confirmed. […] The Negroes continued to request that their grants might be confirmed.[244]

It is in this aspect of Fergusson's work that two crucial documents pertaining to the land titles discourse are exposed. First, a Memorial from the Black Refugees in Preston (undated)[245] in which the writers explain that the residents in Preston were settled in 1815 and 1816, at which time they received "licence tickets"[246] with the expectation that their lands would be granted to them in three years after they had occupied them by licence. The correspondence proceeds to explain that although they repeatedly asked for their grants, they had not received them and are still occupying their lands, "without any title except their possession." A bracketed note at the bottom of this document (also undated) states:

> *(The Lieut. Governor desires that all the Black People who have got Tickets of Location in this Province for lands may immediately be confirmed in the same agreeable to the Directions of the Government.)*

On the one hand, it can be assumed that this document predates the 1827 Land Sale Regulations which ended land grants in favour of sales by public auction.[247] This

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[244] *Ibid* at 50, citing PANS vol 422, doc 46 and Box – "Crown Lands – Peninsula of Halifax 1840-1845" (And see Appendix XX and Appendix XXI).
[245] *Ibid*, Appendix XX ["Memorial"].
[246] Later in the correspondence the term "tickets of location" is used.
[247] See Part 3.6 below for discussion on the 1827 Land Sale Regulations ["1827 Land Sale Regulations"].

assumption is consistent with the general refusal on the part of government officials to contravene the 1827 Land Sale Regulations when asked to do so in 1837 for the purposes of relocating some Black Refugees from Preston to another part of the province.[248] On the other hand, if this document post-dates the 1827 Land Sale Regulations, then an extraordinary exception was being ordered by the Lieutenant Governor to enable the conversion of tickets to freehold grants. Fergusson's work shows that it was unlikely that government officials would contravene the 1827 Land Sale Regulations to grant additional lands to the Black Refugees, even to redress the problem of small lot sizes. For example, Fergusson notes that when Surveyor General John Spry Morris,[249] under the direction of Lieutenant Governor Kempt,[250] began a survey of lots (again) in Preston in 1828 in response to land titles petitions, Morris wrote:

> There can be no doubt that in this severe climate at least 100 acres would be required for each family […]. **I am not aware of there being any authority for passing Free Grants to them**.[251] [emphasis added]

This letter demonstrates the government's strong commitment to a strict interpretation of the law when applying it to the Black Refugees, notwithstanding the unique circumstances which necessitated an equitable interpretation of the law.

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[248] See for example the letter from Lord Glenelg to Lieutenant Governor Campbell in Fergusson, Documentary Study, *supra* note 70, Appendix XVII which describes strict adherence to the 1827 Land Sale Regulations. See also Fergusson at 47: "Indeed, in 1836, E.H. Lowe had visited Preston to ascertain whether any would be disposed to emigrate […] he stated "[…] and they all seem ready and willing to remove to any other part of this Province where the land is more fertile and a larger portion can be given to them." Land policy, however, would have to be changed before these people could even be settled elsewhere in the province." Also see Fergusson at 46, "After 1827, moreover, land was supposed to be sold, not granted; and to the request in 1838 that the Lieutenant Governor should take the case of the Preston Negroes into consideration, the Council reported 'that they have not the means of affording any relief to these unfortunate people'." See also *supra* note 241 and *supra* note 242.

[249] Surveyor General J.S. Morris (J.S. Morris) was the son of Surveyor General Charles Morris, and successor in the position of Surveyor General of Nova Scotia.

[250] Sir James Kempt was the British-appointed Lieutenant Governor of Nova Scotia between 1820 and 1828 ["Lieutenant Governor Kempt"].

[251] Fergusson, Documentary Study, *supra* note 70 at 50. J.S. Morris's conclusion in 1828 that a minimum of 100 acres is needed for each family was not the position taken by John Spry's father, Charles Morris, who twenty-one years earlier recommended ten acre lots to the Black Refugees.

Nevertheless, Fergusson's work also shows that government officials appear to have been willing to contravene the 1827 Land Sale Regulations in at least one instance to redress their previous omissions on confirming titles, being the 1842 Confirmatory Land Grant that was issued in Preston.[252] It is important to note that while Fergusson produces two examples to support his claim that tickets were confirmed as grants, namely the 1834 Land Grant in Upper Hammonds Plains[253] and the 1842 Confirmatory Land Grant in Preston,[254] it is only the Preston document that is a *confirmatory* land grant specifically intended to confirm title to previously allotted land. The 1834 Land Grant in Upper Hammonds Plains is not a confirmatory grant, but rather a land grant that was purchased for consideration, being 60 pounds sterling for 600 acres. Fergusson mischaracterized this document as a confirmatory grant when he relied on it to state ""[l]and was held at Hammonds Plain by tickets of location or licences of occupation until 1834 when a grant of 600 acres was made to 30 men."[255]

A second significant document reproduced by Fergusson in support of his claims that Black Refugees petitioned for confirmatory titles can be found in Appendix XXI to his book, which is a Petition from certain Black Refugees in Preston dated March 1, 1841 where petitioners refer to the barrenness of the land, the smallness of their lots, and requests (again) to have their titles confirmed so "that those who wish to sell and remove to better locations or follow other employments (might) dispose of (their) lands and improvements to those who remain."[256] Fergusson writes, paraphrasing this petition,

> At present, holding under Tickets of location, **(they could not) sell to advantage**, (they are) tied to the land without being able to live upon it, or even vote upon it, without being at every Election questioned, browbeaten and sworn.[257] [emphasis added]

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[252] *Ibid*, Appendix XXIV "Land Grant for People of Colour at Preston, May 23, 1842 ["1842 Confirmatory Land Grant"].
[253] *Ibid*, Appendix XIII "Land Grant at Hammonds Plains, October 20, 1834" ["1834 Land Grant"]. See Chapter 4 below for discussion. A copy is reproduced in this thesis as Appendix E.
[254] *Ibid*, Appendix XXIV.
[255] *Ibid* at 54. See discussion below in Part 4.3.1.
[256] *Ibid* at 50, citing Petition of Coloured People at Preston 23 February 1841 (Fergusson, Appendix XXI) ["1841 Petition"].
[257] *Ibid* at 50, citing Petition of Coloured People at Preston 23 February 1841 (Fergusson, Appendix XXI)

In reference to tickets of location and petitions for conversion, Fergusson (and other scholars) rely on the 1841 Petition from Preston, and often infer that the Black Refugees throughout the province were disproportionately issued tickets of location or licences of occupation.[258] Fergusson relied on this petition to make sweeping remarks such as "from shortly after the arrival of the Refugees of the War of 1812 a large number of the Blacks obtained such tickets."[259] However, Fergusson did not provide any analysis or situate this statement in the context of colonial land administration practices more generally. Consequently, subsequent scholars have adopted this statement as definitive evidence that tickets of location were an endemic within all African Nova Scotian communities, and only within the African Nova Scotian communities, which is not accurate.

2.4.3.5 Upper Hammonds Plains

While Fergusson's information pertaining to land allocation to the Black Refugees relates mostly to the Preston settlement, there are some key aspects of his work that pertains to the Upper Hammonds Plains settlement. For example, Fergusson writes:

> By 1815 a number of the Refugee Blacks had settled at Hammond's Plains. In November of that year George P. Brehm surveyed and ran the lines for the people settled there.[260]

Fergusson's work provides a copy of an undated licence of occupation that was granted to 75 Black Refugees during the administration of Lieutenant Governor Dalhousie (1816-1820), showing that their lands were divided into 10-acre lots,[261] which was consistent with Surveyor General Morris' advice regarding 10-acres lots in the Preston settlement. However, the version of the Hammonds Plains Licence of Occupation that Fergusson includes in his book is incomplete and does not contain the legal terms and conditions of the licence, only the names and assigned lots. A similar licence that was issued to Black Refugees settled in Refugee Hill dated March 27, 1818, which Fergusson

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[258] *Ibid* at 50, footnote 162 and at 66, footnote 225.
[259] *Ibid* at 66.
[260] *Ibid* at 50 and Appendix XXIII (Survey).
[261] *Ibid* at 51 and Appendix XI "Licence of Occupation at Hammonds Plains" ["Hammonds Plains Licence of Occupation"]. See Chapter 4 below for discussion. A copy is reproduced in this thesis as Appendix D.

includes in his book, does include legal terms, including a five year limitation period at which time the licence was to be confirmed as a grant.[262]

Fergusson's work pertaining to Upper Hammonds Plains also references a letter from Dominic De Broker, a Black Refugee settled in Upper Hammonds Plains, and 35 other Black residents who, on December 4, 1819, petitioned the government for more land in the area that was owned by John Liddell and reverted to the Crown.[263] Fergusson writes:

> They [Black Refugees] declared that several of them had built houses and made improvements on the relinquished tract.[264]

This statement suggests that there was some squatting by some Black Refugees in the Hammonds Plains settlement,[265] but also indicates that the Black Refugees desired to have more land. Fergusson also notes that none of the thirty-six petitioners in De Broker's letter had received prior land grants,[266] and that "they [Black Refugees] stated that when the Hammond's Plains people had been settled by John Liddell and others, these landowners did not feel disposed to settle more than eighty families, with ten acres for each family."[267] Without the benefit of Fergusson's analysis of this research, it is not known whether the "maximum eighty families" includes the thirty-six petitioners in De Broker's letter (but that their land had not yet been confirmed), or whether the "maximum eighty families" are the same as the seventy-five settlers listed in the (undated) Hammonds Plains Licence of Occupation.[268]

Perhaps one of the most revealing statements from Fergusson in terms of land located in Hammonds Plains is his claim that "[l]and was held at Hammonds Plain by

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[262] *Ibid*, see Appendix IX "Licence of Occupation to Men of Colour at Refugee Hill, March 27, 1818" ["1818 Refugee Hill Licence of Occupation"].
[263] John Liddell was a key actor in the settlement of the Black Refugees, thus it is not surprising that he would have received land in the area. He was also one of the individuals assigned to issue rations to the Black Refugees in the area.
[264] Fergusson, Documentary Study, *supra* note 70 at 51.
[265] *Ibid* at 51.
[266] Presumably this is based on a statement made in the petition and not Fergusson's search of the land records.
[267] Fergusson, Documentary Study, *supra* note 70 at 51, citing in footnote 167 PANS, Box No. 7, Halifax County Crown Lands Plans, 1819.
[268] *Supra* note 241.

tickets of location or licences of occupation until 1834 when a grant of 600 acres was made to 30 men."[269] In support of this claim, Fergusson reproduces a partial copy of the 1834 Land Grant that was issued to 30 residents in Upper Hammonds Plains,[270] but then proceeds to write:

> In the next year [1835], Joseph Thomas prepared a report on **eighty-two lots** there. He furnished the names of the people to whom they had been originally assigned, the names of those by whom they were then occupied and the names of those by whom they were then owned. In addition to those who had been 'regularly settled by Government' on those lots, Thomas thought they there were about **24 other families settled on lots for which they had no cards**. In 1831 and 1833 surveys had been made at Hammonds Plains; and in 1836 John Spry Morris received payment for office fees relating to **a grant there of 126 allotments containing 1323 acres of land**.[271] [emphasis added]

Fergusson provides a copy of Joseph Thomas' report on lots, which shows that the lot distribution and ownership was still in a state of confusion.[272] However, Ferguson does not produce of copy of the land grant for the additional 126 lots that J.S. Morris received payment for, which would have helped clarify ownership of all the lots and would have confirmed whether the licenses where converted into grants, or purchased for monetary consideration as in the case of the 1834 Land Grant in Upper Hammonds Plains.

Admittedly, it is difficult to reconcile the number of lots (confirmed or unconfirmed) that were allocated to the Black Refugees in Upper Hammonds Plains, based on the information provided to date. But a cursory examination reveals that the 1834 Land Grant did not resolve all tickets of location or licences of occupation in Upper Hammonds Plains as Fergusson suggests. His subsequent information on Thomas's 1835 Report on Lots reveals that more work was needed to ascertain titles to the lots in the community. Furthermore, the calculations from Thomas' report shows that even if the

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[269] Fergusson, Documentary Study, *supra* note 70 at 54.
[270] *Supra* note 253.
[271] Fergusson, Documentary Study, *supra* note 70 at 54.
[272] *Ibid*, see Appendix XIV No. of lots in Hammond's Plains, 17 June 1835 PANS Box – Halifax County Land Grants – 1787-1835, Doc 185 ["1835 Report on Lots"]. See Chapter 4 below for discussion. A copy is reproduced in this thesis as Appendix F.

remaining 126 lots were confirmed as grants, there were at least 20 other lots that remained unconfirmed.

Little is learned from Fergusson's work as to why the Refugees in Upper Hammonds Plains did not have their title confirmed upon settlement or shortly thereafter, only that there were some residents in Upper Hammonds Plains who, by the mid-1830s did not have fee simple title to their land. Fergusson writes that a plan and description for lots laid out in Upper Hammonds Plains was submitted to the Surveyor General sometime in 1835, "but he [J.S. Morris] did not appear to know why the grants were not confirmed."[273]

Fergusson's assertion that the 1834 Land Grant confirmed title to the previously issued licences is problematic, particularly because subsequent scholars relied on his work to perpetuate the misinformation. Unlike the 1842 Confirmatory Grant in Preston, the 1834 Land Grant in Upper Hammonds Plains was purchased for considerable value (sixty pounds), and there was no indication in the document to suggest it was a gratuitous grant intended to confirm title to previously issued land. Furthermore, the 1834 Land Grant was for a different parcel of land than the lots that were assigned with tickets of location. Fergusson and subsequent scholars who relied on his work, have mischaracterized the 1834 Land Grant that was purchased by the Black Refugees in Upper Hammonds Plains as a confirmatory grant. If the grants for the additional 126 lots in Upper Hammonds Plains were structured in the same way, the conclusion is that the Black Refugees who were settled in Upper Hammonds Plains have never received "free" land grants, but rather paid monetary value for the small lots of land that they were allotted through licenses of occupation. This means that not only are the representations in the Cochrane Proclamation still not met, but even the lower standard of instructions to treat the Black Refugees analogously to the disbanded soldiers are also unfulfilled.[274]

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[273] See *Ibid* at 50. However, the uncertainty as to why the grants were not confirmed could have solely been in reference to the land in Preston, for which a plan and description was submitted to the Surveyor General's office one year later on March 4, 1836.

[274] See further discussion in Chapter 4.

2.4.3.6 Surveyors

There is much information to be gleaned from Fergusson's work. In addition to all the above, one crucial aspect from Fergusson's work which has largely escaped scrutiny is the role of the surveyors, particularly Surveyor General Charles Morris, in the land decisions that adversely impacted the Black Refugees in terms of location, size and tenure. Further discussion will follow on this point, but suffice to mention now that, thus far, both Martell's and Fergusson's work shows that the Surveyor General Charles Morris played a significant role in the discriminatory application of the law towards the Black Refugees. In addition, Martell's work provides a possible rationale as to why the surveyor general would recommend issuing tickets of location or licenses of occupation, which is that it could have been a temporary measure pending completion of the escheat process.[275] However, it appears from Fergusson's work that the Preston land was already escheated so this rationale for that community is less convincing.[276] Furthermore, while Fergusson's work reveals a possible rationale for why the surveyor would recommend small lot sizes in townships, being less land to divide among many residents, Martell's work demonstrates this rationale is not relevant for the Upper Hammonds Plains settlement. The Upper Hammonds Plains lands were originally planned for disbanded soldiers and so already determined capable of accommodating larger sized lots.

2.4.4 Grant, John N. (1970)

John Grant's *Immigration and Emigration*[277] is an essential contribution to "the development and dissemination of knowledge on Nova Scotia's black history."[278] While his book was published in 1990 by the Nova Scotia Black Cultural Centre, the research was performed in pursuit of a Master of Arts degree in 1970.[279] Consequently, at the time of

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[275] Other possible explanations could be delays in surveys and land descriptions, or land grant moratoriums (see Chapter 3 for further discussion).

[276] Fergusson, Documentary Study, *supra* note 70 at 39: "By September 6, 1815, Morris reported to the Lieutenant-Governor that he had made 'full enquiry on the Subject'. He stated 'that from the tracts of Land which have reverted to the Crown by a regular Course of Escheat and a disposition on the part of proprietors of adjoining Lands I shall be able with your approbation to place two hundred Families in one connected Settlement favourable for Cultivation" (see Fergusson, Appendix I).

[277] Grant, Immigration and Settlement, *supra* note 59.

[278] *Ibid* at 7 Publisher's Note (Black Cultural Centre).

[279] *Ibid* at 9.

publication, the research was twenty years old and, as Grant writes, “this fact is represented by the material listed in the bibliography.”[280] Grant acknowledges that the work of historians Robin Winks (discussed below) was available to him at the time of publication, but that John Grant’s book was completed before the publication of Robin Winks’ *Blacks in Canada: A History (1971)*.[281]

Unlike Martell and Fergusson, Grant reproduces a copy of the Cochrane Proclamation, explaining that although not issued directly to the African Americans, “Cochrane did instruct raiding parties to distribute it among the slave population.”[282] John Grant’s contribution also reframes the role of many Black “refugees” who ultimately served as British soldiers and fought in the war.[283] However, notwithstanding his inclusion of the Cochrane Proclamation, Grant fails to acknowledge the government’s breach of its contractual promises therein. For example, when discussing the reasons for land settlement, he writes “[a]s additional numbers arrived, with no work available for them, land was procured for settlement.”[284] This statement overlooks that fact that land was already owed to the Black Refugees the moment they accepted Cochrane’s offer, and Britain had seemingly never intended to satisfy this commitment.

Nevertheless, there is much information to be learned from John Grant’s work pertaining to land and the Black Refugees. For example, it will be recalled from C.B. Fergusson’s work that the Surveyor-General, Charles Morris, played a significant role in determining the location, lot size, and tenure of the Black Refugees. Grant’s work builds upon this information by explaining the Surveyor General’s role in decisions to settle the Black Refugees together as a group. Grant writes:

> Land was obtained to settle the blacks together, **as Morris had suggested**, at Preston. It was felt that they would prefer that arrangement to settling among strangers, perhaps far from the market and the public roads, and would be able to ‘assist, comfort

[280] *Ibid* at 9. He also notes that he included a supplementary bibliography for this reason.
[281] *Ibid* at 9.
[282] *Ibid* at 41.
[283] *Ibid* at 42.
[284] *Ibid* at 111.

> and support' each other. This arrangement, followed in the military settlements set up by the Nova Scotia government, was used in this the first government-planned community.[285] [emphasis added]

Unfortunately, Grant does not produce any new knowledge on the issue of tickets of location. He relies on the work of C.B. Fergusson, specifically the undated Memorial from Preston residents,[286] when he writes:

> Moreover, the refugees were, in effect, tied to the land. **Possessing their holdings by tickets of location only and not by grant until 1837**, they were **unable to leave** unless they were prepared to give up any improvements they had made. This provision not only kept many where there was little profit to be gained by their remaining, but also proved harmful to those who wished to work the land.[287] [emphasis added]

John Grant, like many scholars, relied on the Memorial from Preston to make assumptions about the existence of the tickets of location, the delayed (but eventual) conversion of them into freehold grants, as well as the presumed adverse impact that tickets of location had on the ability to convey the land. Similarly, in the context of the government's failed attempts to relocate the Black Refugees to Trinidad, Grant writes:

> […] any who did have any interest in emigrating often found that **they would not be able to sell their land and did not wish to leave their improvements to be used by others**. Also, it was reported 'they seem to have some attachment to the soil they have cultivate, poor and baren as it is'. [emphasis added]

Again, unverified assumptions are made about the legal effect of tickets of location. However, it is from this statement that Grant's work begins to connect the importance of the land with the distinct identity of African Nova Scotians,[288] something that years later scholars such as Harvey Amani Whitfield would build upon.

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[285] *Ibid* at 79, citing PANS, vol 420, doc 76 Morris to Sherbrooke, September 6, 1815 and Martell, Military Settlements, *supra* note 182.
[286] *Supra* note 223.
[287] Grant, Immigration and Settlement, *supra* note 59 at 113, citing in footnote 29, the Memorial Petition from Fergusson, Documentary Study, *supra* note 70, Appendix XX (PANS RG 1 Vol 422 Doc 46).
[288] For example, *ibid* at 99 Grant: "Perhaps with the development of this attachment to the land, and the unwillingness to leave the province, the Chesapeake blacks became Nova Scotians."

In terms of land quality, Grant's work begins to situate the quality of the land that was allocated to the Black Refugees within the context of land in the rest of the province. He writes "The land obtained [….] was like much of the land on Nova Scotia's Atlantic coast. It was uncleared, rough, rocky and infertile." However, he offers no critical analysis to explain his subsequent statement pertaining to small lot sizes: "[i]n addition, the ten acre lots assigned were far too small […]." There are no attempts to understand how or why the Black Refugees received only 10 acres, and similar analysis is lacking in respect of land tenure and tickets of location.

Nonetheless, a noteworthy aspect of John Grant's work relevant to this thesis is his comparisons between the Black Refugee settlements and those of the disbanded soldiers. While he does not provide comparative analysis on the land allotments to each group, Grant does compare their relative success and failure, particularly the disappointing outcomes for the disbanded soldier settlements. He writes "Thus, comparatively speaking, the black settlements were not the failure they would first appear to be; but this is not to term the black settlements successful because the others were an even more dismal failure."[289]

It is important to also note that while John Grant's work refers to Martell's *Military Settlements* for his information pertaining to the disbanded soldier settlements, he does not include Secretary Bathurst's May 10, 1815 dispatch to Lieutenant Governor Sherbrooke to settle the Black Refugees on terms analogous to the disbanded soldiers. Like C.B. Fergusson, Grant cites only the June 13, 1815 dispatch from Secretary Bathurst that most scholars rely on regarding "small grants".[290]

While outside the scope of this thesis, Grant's work also lays a foundation by which the land settlement experience of the Black Refugees in Nova Scotia can be compared to that of the Black Refugees who were sent to New Brunswick. While land was eventually made available to those Black Refugees who were sent to New Brunswick in the Spring of

[289] *Ibid* at 119.
[290] *Ibid* at 77.

1817, only 112 lots (mostly 55 acres each) were allotted to 112 different people held by tickets of location. Much of the delay was caused by arguments among the levels of government as to which should pay the expense of professionals such as the surveyors. By 1904 only 20 Black families remained on the settlement in Loch Lomond, New Brunswick.[291] Not all the refugees took up settlement, however, and instead remained on vacant land in Saint John.

2.4.5 Winks, Robin W. (1971)

Robin Winks' *The Blacks in Canada* is heralded as "one of the most significant books about African Canadian history to date."[292] But, it is not without its shortcomings. As one scholar writes:

> Prior to the publication of The Blacks in Canada, Winks authored a series of articles that formed the basis for his book. In these articles, Winks made sweeping negative judgments about the African Diaspora in the Atlantic region and the rest of Canada. In his 1969 overview, Winks argued "The Canadian Negro as a whole does not seem to have shown the cumulative pride, energy, enterprise, and courage that the catalog of individual acts of defiance would lead one to expect." Winks viewed African Canadians as somehow deficient in comparison to their African American counterparts.[293]

In his work, Winks illuminates the existence of slavery and anti-Black racism in Canada, but at the same time negatively portrays the Black Refugees, among other Black people, who fought bravely to escaped captivity. As one scholar points out, "[t]hese sweeping generalizations were incorrect and simplistic. Winks relied too heavily on growing white racism and the words of colonial officials like Lord Dalhousie rather than

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[291] *Ibid* at 102. See also Winks, Blacks in Canada, *supra* note 78 at 132 where he notes that the white community viewed loch Lomond as a 'source of trouble' and proceeds to describe various instances of violence toward the Black residents. See W.A. Spray, The Blacks in New Brunswick (Fredericton: Brunswick, 1972), 47–9 (in respect of New Brunswick), cited in support of Girard et al, History of Law, *supra* note 53 at 665: "New Brunswick's small group of Black refugees received much the same treatment, not receiving proper title to their land until 1836." See also W.A. Spray, The Settlement of the Black Refugees in New Brunswick 1815-1836" Acadiensis: Journal of the History of the Atlantic Region (Spring) 1977, Vol 6, No. 2, pp 64-79.

[292] Whitfield, Historiography, *supra* note 56 at 221.

[293] Whitfield, Historiography, *supra* note 56 at 221.

carefully mining the documentary evidence to write a more dynamic study of the Refugees."[294]

While Winks' work lacks racial scrutiny and ignores the realities of anti-Black racism in this province, his work remains an important contribution to the historiography of African Nova Scotians.[295] Much of Wink's work pertaining to land is in respect of the Black Loyalists, and thus outside of the scope of this thesis except to note the repetitive behaviour of the Crown's unpreparedness, indifference, and malfeasance towards its contractual representations that were made to the ancestors of African Nova Scotians.[296] Whereas Winks often attributes blame to "misunderstandings" and "inefficiencies", and claims that "circumstance, not design, led to these retarded and stunted land grants,"[297] other scholars claim otherwise. For example, George Elliott Clarke writes:

> [I]t is unlikely that any of them were "confused" about the reason for their differential treatment. Nor is it kosher to accuse them of being poor farmers when the best land – in grants of 100 to 200 acres – went customarily to whites, or to castigate them for being lousy fishers when they were permitted no access to anchorage, let alone boats. Where Winks sees Black failure or Caucasian bureaucratic 'inefficiency and circumstance, not design,' leading to 'retarded and stunted land grants', it remains the case that when Black people received land it was on an apartheid-style basis, so that they had to barter their labour for subsistence supplies.[298]

In terms of land grants to the Black Refugees, Winks adds little in terms of new information, but reveals much in terms of his analytical racial bias. He writes:

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[294] *Ibid* at 221. At 222 Whitfield asserts: "Winks took the writings of white observers of black communities seriously with little attempt to scrutinize them carefully."
[295] *Ibid* at 221 Whitfield notes: "t]he shortcomings of Winks' work should not blind scholars to his significant achievement, but as scholars we must be honest about the book's problems." Also at 222, Whitfield adds: "[d]espite these problems, Winks' work gave historians an opening to investigate multiple avenues of black historical research."
[296] For example, see Winks, Blacks in Canada, *supra* note 78 at 35 "when the first company [Black Loyalists] of 1782-83 reached Nova Scotia they found that neither land nor provisions were ready for them, despite promises that they would receive grants in common with the Loyalists and rations and seed for three years." And at 41 "Still settlement did not go well anywhere in Nova Scotia, and misunderstandings over the nature and size of the promised grants of land rather than their segregation lay at the root of much of the Negroes' discontent." It is debatable whether these were misunderstandings.
[297] *Ibid* at 42.
[298] *Ibid* at xvii (Forward by George Elliott Clarke).

> Nor did the plan to place the Refugees on the land succeed. The Surveyor-General Charles Morris was too optimistic about the work habits of the Refugees, and they, in turn were displeased with the fact that they did not receive outright grants; for most held land on tickets of location or licences of occupation. The plots were too small in any case, and the soil was sterile; most lots were of ten acres, even though Morris later estimated that no family, however, industrious, could live on less than a hundred acres and have a proper fuel supply.[299]

As with many other scholars, Winks focused on the Preston settlement and assumed analogous situations in the other Black settlements.

A noteworthy contribution that Winks does make pertaining to land grants is his claim that "In 1828, Lieutenant-Governor Kempt ordered a survey of all holdings so that he might confirm land grants, but after surveying fifty lots and finding the expense higher than expected, the surveyor-general stopped."[300] Winks' claim that Lieutenant Governor Kempt sought to clear titles in Black communities, however, lacks supporting evidence and supplementary analysis. Instead, he simply cites the 1841 Petition[301] concerning Preston to support his claim that all Black Refugees were "tied to their land" by having no money to buy new land and no clear title to the land they occupied. In addition, as with other scholars, Winks points to the 1842 Land Grant in Preston as evidence that all title was converted, prompting Winks to conclude "[m]any must have sold almost immediately and left, for in the next census in 1851, the population of Preston had fallen to its lowest."[302] Thereby, proving his claim that unclear title to land was the only barrier obstructing the Black Refugees' opportunities for "betterment".

Of the scholars reviewed thus far in this thesis, Winks appears to be the first to draw distinctions between Preston and other Black settlements, such as Upper Hammonds Plains. He writes "[b]ut all was not entirely bleak. While Preston declined, the Refugee settlement at Hammond's Plains grew, slowly and painfully, toward a kind of

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[299] *Ibid* at 121.
[300] *Ibid* at 129.
[301] *Supra* note 256.
[302] *Ibid* at 129.

stability."[303] Winks then proceeds to explain how the Black Refugees in Upper Hammonds Plains "had a slightly more favourable location, for they were near the main road to the interior and their timber cover was more varied." He also explains that "[w]hile they too received only ten acres at first, the settlement was smaller, escheated land was granted to them more quickly, and there were more competitive white settlers nearly."[304] In terms of land confirmations, Winks points only to the 1834 Land Grant in Upper Hammonds Plains that many other scholars rely on, and, as with other scholars, misinterprets this as a conversion grant rather than the grant that was purchased by the Black Refugees for valuable consideration.

2.4.6 Whitfield, Harvey A. (2006)

Historian Harvey Amani Whitfield contributes to the land titles discourse by, among other things, exploring possible motivations behind the land settlement decisions that impacted the Black Refugees.[305] He situates the Black Refugees' receipt of inferior land within the context of racial hostility, and in doing so, emphasises two motivations behind the land disparities between the Black Refugees and White settlers. First, Whitfield points to the desire of government to use the Black Refugees "as a captive labor force tied to uneconomical land, with their only option being to work on the larger farms of white neighbours or as domestic servants."[306] Second, Whitfield claims that because the government hoped the Black Refugees (like the Black Loyalists and Jamaican Maroons

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[303] *Ibid* at 130.
[304] *Ibid* at 130.
[305] Harvey Amani Whitfield, "Black Refugee Communities in Early Nineteenth Century Nova Scotia" (2003) 6 Journal of the Royal Nova Scotia Historical Society 92 at 93 ["Whitfield, Black Refugee Communities"] at Whitfield queries "For the historian, the land settlement program raises important questions. How could the Refugees provide for themselves if the land they were assigned did not even produce the most basic level of subsistence? Why did the government place them on such poor land? If disbanded soldiers and experienced farmers failed to produce anything of value at Preston, why did the government believe that a group of impoverished ex-slaves might do any better? The search for answers to these questions requires us to consider the possibility that the government placed the Black Refugees on sterile land in order to use them as a cheap labour supply for white farmers."
[306] Whitfield, Blacks on the Border, *supra* note 54 at 55. "It is very important to note that the land given to the Refugees was poor enough on its own to make one question the motives of the government. One explanation for the government's contradictory policy is that it hoped to use the Refugees as a captive labor force tied to uneconomical land, with their only option being to work on the larger farms of white neighbours or as domestic servants."

before them) would be only temporary settlers, they perceived them as undeserving of comparable amounts of land[307] and did not comprehensively prepare for their settlement.[308] Guided by these motivations, Whitfield concludes, the colonial government intentionally gave inferior land to the Black Refugees in terms of size, quality and tenure.

In terms of size, Whitfield writes: "In 1815, at the beset of Colonial Secretary Lord Bathurst, the Lieutenant Governor Sir John Sherbrooke decided that placing the Refugees on ten-acre farms in Preston and Hammonds Plains might allow the government to save money."[309] The reference to "save money" had less to do with lot size than with the cost of institutionalizing the Black Refugees at Melville Island, and the reference to "10 acres" was not an express direction from Secretary Bathurst but more this scholar's inference from Bathurst's instruction to issue "small grants".

In terms of quality, Whitfield writes "the lands given to the Refugees at Preston and Hammonds Plains were among the worst in the entire colony. Earlier settlements of white Loyalist and former soldiers on these lands had failed miserably, with each group abandoning their farms as unimproved after the Revolutionary War. Rocky and barren, the land at Preston and Hammonds Plains was surrounded by thick forests. The poverty of the soil in these areas was well known, with topographical studies of the time describing the soil as 'inferior and stony.'"[310]

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[307] *Ibid* at 48 "The Nova Scotia government hoped that the Refugees would be temporary settlers like some of the Black Loyalists and nearly all of the Jamaican Maroons. Thus the government developed temporary solutions to serious problems rather than thoughtful policies based on long-term plans for incorporating the newcomers into the colony." And at 54: "Perhaps the government did not want to give comparable amounts of land to the Refugees who might become temporary settlers like the Black Loyalists or Jamaican Maroons."

[308] *Ibid* at 49, ""From the outset of the Refugees' settlement in Nova Scotia, the government wasted critical time fumbling around for a solution to what its leaders perceived as a temporary problem"; and at 49 "a colonial government that spent more time attempting to remove the Refugees from Nova Scotian than developing a comprehensive and serious development program exacerbated these problems."

[309] Whitfield, Black Refugee Communities, supra note 305 at 93, citing Bathurst to Sherbrooke, 13 June 1815, RG 1, vol 63, doc 12.

[310] Whitfield, Blacks on the Border, *supra* note 54.

In terms of tenure, Whitfield cites earlier scholarship in his claim that the colonial government "gave the Refugees tickets of location (licenses of occupation) instead of freehold grants, which they regularly gave to white settlers." [311] However, Whitfield emphasizes the motivational nature of these decisions as deliberate policy decisions that were made to ensure that the Black Refugees "would subsist not as owners of land, but as squatters in constant need of menial employment."[312] While Whitfield does not appear to elaborate on the degree to which the Black Refugees received tickets of location, nor provide a comparative analysis of the Black Refugees' initial land tenure relative to White settlers, he does connect the consequences of tickets of location with the alleged motivations underlying their issuance. He writes, "[t]ickets of location did not allow the Refugees to sell their lands and move to other parts of British North America. Instead, they were forced to remain on their farms whether the land was partly productive or sterile."[313]

Setting aside Whitfield's first explanation for the land disparities, being the government's aim to keep the Black Refugees in a perpetual state of dependency as cheap labourers, his second explanation that the Black Refugees were expected to be temporary residents seems to conflict with the overarching aims of the land administration policies more generally. While there is little doubt that the colonial and local governments sought to relocate the Black Refugees away from Nova Scotia, it is unlikely that the Colonial Office would have allocated *any* land to the Black Refugees, even inferior land, if they expected the Black Refugees to depart shortly thereafter. It was an expensive and arduous task to survey, plot and assign land, and while the Black Refugees may have been denied grants at the outset, efforts were still expended to assign them their 10-acre lots. Why would the colonial government have gone through that effort if they expected the Black Refugees to immediately abandon them? Furthermore, in Nova Scotia, land was scarce

[311] *Ibid* at 54, citing Winks, Blacks in Canada, *supra* note 78 at 121, and Martell, Immigration and Emigration, *supra* note 70 at 7-33
[312] Whitfield, Black Identity, *supra* note 58 at 11.
[313] Whitfield, Blacks on the Border, *supra* note 54 at 54, citing Winks, Blacks in Canada, *supra* note 78 at 121, and Martell, Immigration and Emigration, *supra* note 70 at 7-33.

and so, from London's perspective, all land had value, even that which may have required better tools and more time to cultivate.

Despite this irreconcilable assertion, Whitfield's claim that the application of the land settlement policies to the Black Refugees embodied the "contradictory and indecisive nature of the colonial government's attitude toward the Refugees" is not disputed here. He writes:

> On the one hand, the government expected the African American settlers to provide for their own subsistence by occupying small farms; on the other hand, the government placed them on land that had very limited potential for agricultural production. Moreover, the occupation of ten acres of land simply could not provide enough food for individual families.[314]

2.4.7 Girard, Philip et al (2018)

The African Nova Scotian land-related scholarship reviewed up to this point has been produced by historians. However, legal historians such as Philip Girard, Jim Phillips and Blake Brown add an important legal lens to the historical analysis and helpfully connect the law to the experience of the Black Refugees in relation to land settlement. They write:

> The Black refugees who came after the War of 1812 were granted land but received very different treatment from white settlers. While the standard size of grant in this period when free grants were still operative was 100 acres, and could be more, depending on the size of families and military service, the Black refugees got 10 acres per family, despite the fact that many had indeed served in the army.[315]

In terms of physically inferior land, the authors claim the land "was poor, rocky, and swamp-ridden, unproductive land," that "would be impossible for any person to support families on."[316] In terms of legally inferior land, the authors write:

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[314] *Ibid* at 54.
[315] Girard et al, History of Law, *supra* note 53 at 665.
[316] *Ibid* at 665, citing Memorial of John Chamberlain et al., 8 June 1838, cited in Whitfield, From American Slaves, 39 (in respect of quality of land)

> Blacks' legal tenure was also tenuous; they were not given fee simple grants but tickets of location. Providing a ticket of location initially to a new settler was standard practice, but these were quickly converted for whites by the issuance of a patent for fee simple tenure when one had been applied for and the fees paid.[317]

While dipping their toe into potential rationales for the anti-Black racism, the authors take a similar position to Whitfield in claiming that "differential treatment of Blacks was the result of the government viewing them as a permanent cheap labour pool." Not much is offered, however, in terms of the legal implications of tickets of location or licences of occupation.

2.4.8 Conclusion

There are other scholars in addition to those listed above who have contributed to the African Nova Scotian land discourse. However, most literature to date about the land settlement of the Black Refugees is incomplete in two significant ways. First, it fails to critically assess the legal implications of possessory title through licences of occupation or tickets of location. Many scholars assume that possessory title was insecure and prevented the Black Refugees from capitalizing on their asset which contributed to a cycle of poverty. For example, historian Bridglal Pachai writes:

> The land experience of the black loyalists had been repeated in the instance of the black refugees with even greater severity. While it was common up to 1827 for heads of white families to receive 100 acres of land free of cost, with 50 acres for each dependent, blacks were never accorded this facility. Instead, they were granted "tickets of location" and licenses of occupation" in holdings of 10 acres per family. **This conferred on them the legal status of squatters without the right to sell, lease, mortgage or bequeath their holdings**. Land titles, covering about 1800 acres in Preston were issued to some blacks in 1842, twenty-eight years after they had settled in Preston. Even then hundreds of other blacks never received legal titles to the land apportioned to them in Preston and in other parts of Nova Scotia.[318] [emphasis added]

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[317] *Ibid* at 665.

[318] Pachai, Bridglal (1979) "Dr. William Pearly Oliver and the Search for Black Self-Identity in Nova Scotia", Occasional Paper No. 3 on Studies in National and International Issues, International Education Centre, August 1979 at 5, citing at footnote 4 Fergusson, Documentary Study, *supra* note 70 and B. Pachai, "Blacks in Nova Scotia and Land Settlement to 1842," Grasp, Halifax, September, 1977. Started in the summer of

Similarly, historian James Walker writes:

> The lands assigned to the Black Refugees were given on "licenses of occupation" rather than grants, **which meant that although they had full use of the land they lacked outright ownership and therefore could not sell it or use it for collateral**. In any case the land distributed to them came in tiny plots of only eight to ten acres per family, neither large enough nor fertile enough for subsistence agriculture, and they were clustered in segregated tracts on the fringes of larger white towns, sufficiently close to commute as labourers but sufficiently remote to avoid social contact. And so Black Refugee settlements evolved, as had Black Loyalist settlements beginning a generation earlier, in physical circumstances that consigned them to isolation, poverty and economic dependence, but that at the same time encouraged the development of institutions and cultural styles suited to their own specific needs.[319] [emphasis added]

And further,

> In 1842, following requests and petitions from black settlers and their white sympathizers, legal grants were given to those who were qualified. **This permitted some to sell their land, if a buyer could be found, to finance a move to a more advantageous location. A few families in this way were enabled to relocate closer to Halifax, purchasing about thirteen acres along the shores of the Bedford Basin**. Though no better for farming, the new location was more convenient for Halifax employment, it offered a readier market for produce and crafts, and it provided fishing opportunities in the Bedford Basin. In 1848 the earliest black deeds were registered, and in 1849 a Baptist church was established. The community took the name of Campbell Road, from its thoroughfare, and by 1851 it showed a population of 54. This represented almost exactly one per cent of the African Canadians living in Nova Scotia at that time.[320] [emphasis added]

1970 the GRASP — Growth, Readiness, Advancement, Self-determination, People — was the publication of the Black United Front of Nova Scotia, Halifax. NS Archive (https://archives.novascotia.ca/newspapers/results/?nTitle=GRASP). Issues from 1970 to 1976.

[319] James W. St. G. Walker, "Allegories and Orientations in African-Canadian Historiography: The Spirit of Africville" (1997) 77(2) Dalhousie Review 154 at 156 ["Walker, Allegories"].

[320] *Ibid* at 156.

Even legally trained historians mention the inferior legal status of Black-owned land without digging deeper into the legal implications of their possessory title. For example, these legal historians write:

> The Black refugees were very much aware of the second-class treatment afforded them and campaigned for better terms. As one petition of 1841 stated, **proper tenure mattered**: '**Holding under Tickets of location, we cannot sell to advantage, we are tied to the land without being able to live upon it**.' The government did finally accede, after a number of years of petitioning, and granted the land in fee simple in 1842.[321] [emphasis added]

Scholars in this field often place greater emphasis on the absence of confirmed title as the impediment to capitalist prosperity and less emphasis on the other realities of racism that served to oppress African Nova Scotians despite their land tenure, such as limited mobility for Black people, inaccessibility to quality loans, and the lack of potential buyers in the secondary market who were interested in buying land situated in predominately Black communities. Without factoring in those other elements of capitalist prosperity, it is then easy to assume that clarifying titles through initiatives such as the Land Titles Initiative will lead to economic prosperity for Black people in the same way it does for White people with secure title, which is not necessarily the case.

Secondly, the literature to date about the land settlement of the Black Refugees is incomplete in that it fails to properly situate the colonial land decisions pertaining to the Black Refugees into the broader context of colonial land administration laws, specifically the 1807 Land Administration Laws that were in effect at the time of the Black Refugees arrival, as well as the subsequent amendments in 1821 and 1827. In doing so, the scholarship ignores the role of the law as a system that created and reinscribed the racial disparities in land ownership, which in turn played a pivotal role in the racial disparities in wealth and poverty in this province.

[321] Girard et al, History of Law, *supra* note 53 at 665.

Chapter 3: Land Administration Laws (1807-1826)

3.1 The Law in Nova Scotia

3.1.1 What is the Law?

While it is acknowledged that legal pluralism exists in Canada,[322] English common law will form the doctrinal framework of this thesis. English common law is the legal system that created the colonial land administration framework at the time of the Black Refugees' arrival and is the legal system from which existing property laws in this province are based.[323]

In simple terms, the English common law is a collection of rules and principles established by parliamentary or legislative authority and court decisions. The law is supported by an infrastructure consisting of administrative institutions and actors, which, together with the law, is referred to as the legal system.[324] The legal system, like any system is "an interlocking set of parts that together make a whole."[325] The parts continuously operate within the whole based on its pre-programming, being the "established way of doing something, such that things get done that way regularly and are assumed to be the 'normal' way things get done."[326] In this way, the legal system is an automated system that can operate by itself based on its programming.

However, the law is not simply a collection of rules and principles that serve to regulate human behaviour through an established and self-propelling interlocking system of parts. It also articulates values and sets a standard of conduct and morality. The principles expressed by the law are choices that have been made which serve the interests of lawmakers who created it, and in doing so, reflect the lawmakers' values and beliefs.

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[322] See *ibid* at 5 for a discussion on legal pluralism in Canada.

[323] *Ibid* at 5: "In northern North America, the civil and common law were based on a continuing dialogue between the law of the 'mother country' and the law as it was implemented, adapted, and supplemented in what were originally French and English colonies. Even after the cessation of New France to Britain in 1763, and after the legislative independence of Canada pursuant to the Statute of Westminster 1931, French law and English law continued to exert a degree of persuasive influence upon the development of Canadian civil law and common law respectively."

[324] Charles, Law Reform, *supra* note 26.

[325] Dismantling Racism Works (dRworks), "What Is Racism?" (May, 2021), online: Dismantling Racism <https://www.dismantlingracism.org/racism-defined.html> ["Dismantling Racism"].

[326] *Ibid*.

To explain, if the lawmaker values the monarchy and believes in the supremacy of the Crown, then the laws will reflect those ideals through, for example, the principle of royal assent. If the lawmaker values land exploitation for individual economic profit, then the law will reflect this ideal through, for example, the principle of land tenure and regulated alienation of land, while at the same time, condemn and criminalize squatting and trespassing, being activities which interfere with the land tenure values which the law aims to uphold.

3.1.2 Racism in the Law

Not surprisingly, "Canada's legal system has not managed to escape the racism that permeates Canadian life."[327] The legal system often burdens some and benefits others based on race,[328] and thus, as both a product and a promoter of anti-Black racism, the legal system is also a product and a promotor of a White supremacist ideology. The idea that White people, and the interests, values, and beliefs of White people, are superior to those of another race is an idea that is deeply embedded within the legal system, from its origins.[329] This White supremacist ideology, and consequently, Black inferiority ideology, manifests itself in various ways throughout the legal system and is supported actively through positive law (such as the adoption of overt anti-Black discrimination laws), as well as passively through the acceptance of conditions that allow White supremacy to thrive.[330] As this scholar explains in the context of slavery:

> Slavery was legally supported in one of two ways: through positive law, and more passively through the recognition of the customary

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[327] Esmeralda Thornhill, "So Seldom For Us, So Often Against Us: Blacks and Law in Canada" (2008) 38(3) Journal of Black Studies 321 at 324 ["Thornhill, So Seldom For Us"].

[328] Carol Aylward, Canadian Critical Race Theory, Racism and the Law, (Halifax, Nova Scotia: Fernwood, 1999) ["Aylward, Canadian Critical Race"]; Constance Backhouse, Colour-Coded, A Legal History of Racism in Canada, 1990-1950, (Toronto, Ontario: Osgoode Society for Canadian Legal History, 1999) ["Backhouse, Colour-Coded"]; Walker, Legal Odyssey, *supra* note 21; For advantages of being White, see Cheryl Harris, "Whiteness as Property" (1993) 106:8 Harv L Rev 1707 ["Harris, Whiteness"].

[329] Girard et al, History of Law, *supra* note 53 at 662: "The law served many purposes in British North America, including the creation and reinforcement of the gender, racial, and class differences that permeated all societies. It could hardly be otherwise, for legal history shows us that law is not separable from the society that created it, used it, and adapted it over time to achieve ends that had their origin in extra-legal ideologies." See also Backhouse, Colour-Coded, *ibid*.

[330] Walker, Legal Odyssey, *supra* note 21 at 3.

> use of slaves (including the recognition of the property right that slave-owners held in their slaves).[331]

The passive ways in which the law supports and promotes anti-Black racism (or, conversely, White supremacy), are the more insidious types of racism in the law, often referred to as systemic racism. Even when laws are ostensibly race-neutral or "objective", they often result in racially disparate effects that advantage White people and disadvantage Black people, which illuminate the ways in which the law and the structures that support it promote an anti-Black racist and White supremacist ideology.

While there are examples of positive law in this province that actively support anti-Black racism,[332] legal remedies to address those laws are relatively recent and predominately arose in the mid-twentieth century during the civil rights era. Furthermore, such legal remedies focused mainly on achieving formal equality (ie. treating likes alike), notwithstanding its ineffectiveness in achieving substantive equality for African Nova Scotians (ie. equality in outcomes).[333] As these legal historians conclude:

> It may be doubted that the law could ever prevent people acting out their beliefs that some people were racially, culturally, or socially inferior, and less deserving of the benefits of progress and prosperity. But whether it was or was not possible, extra-legal actions by some better positioned in society were ignored, tolerated, and unmitigated by law. […] **"Yet there was no legal regime to assist Blacks in a positive way in their search for equality, and white society was largely free to discriminate.** Blacks encountered discrimination and unequal treatment in many

[331] *Ibid* at 3.

[332] Aylward, Canadian Critical Race, *supra* note 328; Backhouse, Colour-Coded, *supra* note 328; Thornhill, So Seldom For Us, *supra* note 327.

[333]The *Canadian Charter of Rights and Freedoms*, Part 1 of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), c 11, section 15, protects equality as a fundamental right in Canada. The Supreme Court of Canada has consistently characterized the equality right as one aimed to achieve substantive equality, meaning equality in outcomes. This means "equality does not necessarily mean identical treatment and that the formal "like treatment" model of discrimination may in fact produce inequality" (*R. v. Kapp*, [2008] 2 S.C.R. 483 at 15 citing *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143 at 165). This contrasts with the court's historical approach to equality as one rooted in decontextualized formal equality by treating people the same (see *Bliss v. Attorney General of Canada*, [1979] 1 S.C.R. 183, as renounced in *Brooks v. Canada Safeway Ltd*., [1989] 1 S.C.R. 1219).

> aspects of the application of the law, and even more so in the administration of government policies.[334]

As difficult as it is to dismantle and redress the law when it actively supports anti-Black racism, it is even more difficult to identify, dismantle, and redress the law when it passively supports anti-Black racism through the acceptance of conditions that allow anti-Black racist attitudes and White supremacist ideology to thrive. It is through this latter method, often referred to as systemic racism, that the law tacitly creates and reinscribes racial disparities.

The colonial land administration laws discussed in this thesis were not overtly discriminatory based on race, but the legal system surrounding it created racially disparate effects that disadvantaged the Black Refugees and advantaged the White settlers. In its failure to act in response to these effects, the law supported anti-Black racism and validated White supremacist ideology in the colonial land administration laws, and for over 200 years since, the law has yet to effectively serve the needs and interests of African Nova Scotians. Even in the context of reparations for historical racial injustices, the law fails to provide African Nova Scotians with effective solutions.[335] Until the racial disparate effects of the colonial land administration laws are redressed, systemic anti-Black racism in property law will persist well beyond the land titles issue.

3.1.3 Real Property Law

Real property law is the area of law that governs how people interact with land. It is the system of rules, and supporting institutions and actors, that govern how people acquire, use, and transfer their interest in land. The British landholding system that was enacted through the process of colonialism in Canada is *tenurial*, meaning the Crown owns the land subject to Indigenous treaties, and grants permission for others to “hold” the land in accordance with the rules of the tenurial regime.[336] A holder of an interest in land is thus a holder by permission of the Crown, not an owner of the land per se. The permission to hold land is referred to as an “estate”. Conceptually, the doctrine of tenure

[334] Girard et al, History of Law, *supra* note 53 at 663.
[335] See discussion in Chapter 5: Reparations.
[336] The land tenure regime prescribes the rights and responsibilities of an owner in relation to their holding.

describes *how* a person holds an interest in land,[337] and the doctrine of estates describes the scope and duration of rights tied to that interest in land.[338]

An estate, being an interest in land, encompasses several rights and obligations between the holder and the land, as well as the holder in relation to other people. There are different types of estates that a person can hold. The greatest interest in land is the fee simple estate, often referred to as freehold estate, and is the closest thing to absolute ownership in common law.[339] Keeping in mind the tenurial system, however, even a fee simple interest is subject to the government's right of expropriation,[340] and escheatment.[341]

The legal right to possess land depends on the type of estate one holds in that land and the associated bundle of rights and obligations connected with their estate. The rights and obligations are not static, nor are all estates absolute. They could attach various conditions or, for example, be subject to co-tenancy considerations. [342]

There is ideological significance to the type of estate that one holds in real property. As described by these scholars:

> Like the notion of 'free' tenure, these concepts were invested with considerable ideological significance. Holding a fee simple in a free tenure came to represent the acme of liberty, embodied in the Jeffersonian ideal of the virtuous yeoman farmer who embodied economic and political independence – an ideal that also resonated in the settler colonies to the north. Meanwhile, tenancy was traditionally associated with dependency because of the obligation to pay rent and the insecurity of leasehold tenure.[343]

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[337] Halsbury's Laws of Canada (online), Real Property (2021 Reissue) (Lem, Bocska), "Estates in Land: Types of Interests in Land" I.1.(2) at HRP-2 "Ancient Doctrine".
[338] *Ibid* at HRP-12 "Doctrine defined".
[339] *Ibid* at HRP-13 "Nature of Estate".
[340] Also known as compulsory taking or eminent domain. The government's authority derives from the Crown's authority.
[341] Reversion to the government when an owner dies intestate with no heirs, or in the context of colonial land grant, when grant conditions are unfilled.
[342] Girard et al, History of Law, *supra* note 53 at 342.
[343] *Ibid* at 342.

Thus, holding fee simple interest in land formed an integral part of European liberal ideology, notwithstanding the cost of such liberty to Indigenous peoples,[344] and the connection between land and freedom is one that likely set root into the minds of the enslaved people of African descent in British colonies. Thus, when weighing the risks of fleeing captivity, the offer for 'encouragements' in the Cochrane Proclamation was a significant term enticing the Black Refugees to accept it.

The law of real property today in Nova Scotia is built upon the doctrine of estates in land and reflects the hierarchical structure that values freehold interest above leasehold interest. The law operates to protect freehold interest, for example, by condemning such acts which erode its value such as squatting or trespassing.[345] The law also operates to promote freehold interest, for example, by facilitating access to capital through mortgages and collateral based lending. Thus, it is not surprising that there are some people who benefit from property law, such holders of large quantities of freehold land, and others who are burdened by it, such as those who do not own land but need a place to live.

3.1.4 Land Titles System

A vital component to the estate-based land system in Nova Scotia is the method by which interests in land are registered, confirmed, and recorded with minimal risk of fraudulent activity. Without a trusted system to prove who has the coveted freehold interest, the law would be challenged in protecting those who are privileged enough to hold it. Therefore, as colonialists implemented Britain's land administration laws in Nova Scotia, a corresponding land registry system evolved in this province to serve its distinct interests. As these scholars describe, while many features of England's land laws were

[344] *Ibid* at 342, the authors write: "Holding land in a free tenure was seen as a cornerstone of liberty and thus carried important ideological value for British settlers, though the justice of securing such liberty at the expense of that of the Indigenous peoples was seldom questioned.

[345] While this may be the case for White landowners, history has shown that the law fails to protect the rights of Black landowners. See, for example, the story of Ben Fuller, a Black landowner in Nova Scotia after the War of 1812 who was convicted of assault by an all-White jury and sentenced to a week in jail for defending his property against a White trespasser. (Lord Dalhousie Report, *supra* note 156 at 73).

embraced in British North America, other features that gained little traction in England emerged in the colonies. They write:

> […] deed registration was not nearly as threatening in British North America as in England, such that registries of deeds regularly sprang up alongside the county courthouses established in the colonies of settlement, providing a publicly accessible means of ascertaining the state of title to any given property. They also served, whether consciously or not, to confirm settlers in the view that they, rather than Indigenous inhabitants, were the 'true' owners of the land.[346]

While England had trouble launching its land registry system in the same way, Nova Scotia inherited the English common law doctrine of land registries which underlies its land registry system, specifically the 'chain of title' approach which required backward investigation title searches to prove a landholder's right to convey title in the land. Under this system, land is conveyed by deed, but the deed is not valid unless the grantor had the legal right to convey it, which was established by proving they legally acquired it from the previous holder who had legal right to convey it. This process of confirmation would go back in time until the first "sale" of land, being the Crown grant, or until the longest period under statutory limitations for undiscovered claims. For example, in Nova Scotia, the *Marketable Titles Act*[347] specifies a precise period for a backward investigation of title.[348] The 'chain of title' system in Nova Scotia can be thought of as "a system of dependent titles; that is, a system in which everyone's title to land depended on the validity of the title of all the people who had sold it beforehand."[349]

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[346] Girard et al, History of Law, *supra* note 53 at 348

[347] Anthony Chapman, "Remember When? What Happened to 60 Years of Paper Title Being as Good as Gold", (Presentation delivered at 2006 Real Estate Lawyers Association of Nova Scotia, Halifax, 2 February 2006) at 1 explains: "Because of the difficulty in establishing good and marketable title to many parcels in Nova Scotia, related to a number of factors including poor survey data, tax deeds and many titles passing on intestacies, the province passed the *Marketable Titles Act* (SNS 1996, c. 9). Section 2 of the *Marketable Titles Act* sets out its purpose, which was to remove uncertainties respecting the determination of marketable titles to land in the interest of all present and future landowners, to facilitate the development of the province, and to remove uncertainties respecting the validity of past and future tax deeds."

[348] Greg Taylor, "The Torrens System in Nova Scotia and New Brunswick" (2009) APLJ Lexis 20 at para 19 ["Taylor, Torrens System"].

[349] Greg Taylor, *Law of the Land: The Advent of the Torrens System in Canada* (Toronto, Ontario: University of Toronto Press, Scholarly Publishing Division, 2008) ["Taylor, Law of Land"].

Eventually, the 'chain of title' system was thought to be problematic and rudimentary. Land registry records can be lost or damaged, causing disastrous effects on a landowner's ability to prove title throughout the chain. Also, although this need not be the case, the process of establishing the chain of title has traditionally been very expensive, particularly the costs of hiring a legal professional to search the land registry records, as well as a lawyer's time to examine and assess the validity of the earlier deeds in the chain. Additionally, as this scholar explains:

> [f]laws in earlier titles were carried on down the line even if later purchasers knew nothing of them. And because the documents were in private hands, the potential for fraud and forgery was great. In the nineteenth century, reform of the law in this field was one of the burning issues in all countries that had inherited the English common law. The difficulty was to find a workable replacement.[350]

While mortgage lenders welcomed the idea of a more reliable and efficient land registration system, lawyers and insurance companies have historically resisted this change. Lawyers have financially benefited from a consistent demand for 'chain of title' services, and where title remained uncertain, insurance companies filled that gap with high premium title insurance. From their perspectives, the land registry system was good enough.

Reform eventually found its way to Nova Scotia in 2001, with the adoption of *Land Registration Act*,[351] commonly referred to as the Torrens system. Under the new land registration regime, the relevant information is indexed by land parcel (known as a PID) instead of by the deed holder's name. More importantly, however, registration of the land interest in the public registry certifies legal ownership. Thus, the Torrens system eliminates (or at least reduces) the need to perform backward title investigations in search of possible flaws in title, because the registration process confers good title and cures defects. As one Torrens scholar explains:

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[350] *Ibid* at 6.

[351] SNS, 2001, c.6.

> All that one has to do as a buyer of Torrens system land, therefore, is to check that the person selling the land is the person named in the public register as the owner of it, and get on the register after the sale. There is no need to check whether that seller bought it from someone else who was the 'true' owner of the land, for as long as a buyer does those things the buyer can be quite sure of obtaining a good title upon registration.[352]

While sometimes referred to as a hospital that cures title invalidities,[353] or a conveyor belt that cleanses messy titles into pristine condition,[354] the land registration system does have its flaws. With the promise of guaranteed title comes the rigorous controls and risk management (or risk avoidance) measures that are adopted by legal professionals, in large part due to the professional liability risk imposed on them for errors and omissions. As with all risks, there are times when after due diligence is completed, and risks are identified and mitigated, an educated and experienced judgement call is made as to whether one proceeds despite the remaining risks. In the context of land titles, this means proceeding to the registration stage with imperfect, but adequate, title to the property.

There are misconceptions in Nova Scotia that only perfectly clean titles can be migrated into the Torren's-based land registration system. However, the land registration system accepts messy titles.[355] It only expects that those flaws are transparent in the registry records.[356] It is important to note here the discretionary decision-making power

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[352] Taylor, Law of Land, *supra* note 349 at 9.
[353] *Ibid* at 10.
[354] Writing about his observations during an introductory training session about the new *Land Registration Act*, Nova Scotia's Registrar General of Land Registration sought to address two misconceptions about the new Torrens system: "The first was that the LRA operated as some sort of title cleansing machine, as if messy titles were placed on a conveyor belt, run through the machine, and emerged at the other end in pristine condition. The second represented the other end of the spectrum– that only perfectly 'clean' titles could be registered under the LRA. Neither was correct., […]." Mark Coffin, "Textual Qualifications in the Title Registration System", online: Nova Scotia Barrister's Society <https://nsbs.org/archives/CPD/80286.pdf> at 1 ["Coffin, Textual Qualifications"].
[355] *Ibid* at 2, Coffin notes that in 2005, 6% of migrated properties had title qualifications. In other words, they were "messy", but still migrated.
[356] *Ibid* at 1, citing *Land Registration Act* ss 20(2), which speaks of the registered interest in a parcel register: "the interest defined in the register is a registrable interest subject to any limitations, additions or encumbrances specified when the interest was added to the register or that have been added to the register."

held by lawyers as gatekeepers to clear title through the land registration system. If racial bias (unconscious or not) leads lawyers to assess African Nova Scotian land as higher risk than land in White communities, for example, on the basis that title is imperfect, even though it may be adequate, it could have adverse affects on African Nova Scotian landowners being able to take advantage of the title cleansing and verification benefits that underlie the reformed land registration system. The new land migration system depends on lawyers to certify titles. The decision belongs to them, at their discretion, having regard to the applicable professional standards. Certification involves risk, for which professional liability insurance has its limits. Risk involves risk management, and if those risks are not managed to the lawyer's satisfaction, the outcome will be risk avoidance. It is important to acknowledge the possibility of racial bias in the application of this discretionary power.

3.1.5 Crown Land Grants

It will be recalled that property law regulates interactions involving land. It will also be recalled that property law in Nova Scotia is rooted in the British tenurial system which places ownership of land with the Crown who grants permission for others to hold the land in the form of estates, with a freehold estate being the greatest form of estate that a person can possess. Through the process of colonization and the implementation of British land administration laws, a landowner would typically acquire a freehold estate from the Crown through the receipt of a land grant.[357] The initial land grant from the Crown would then serve as the point of origin from which subsequent legal conveyances are made and present-day estates are determined valid, or, at least valid enough, through a backward investigation known as a 'chain of title'. Changes to the land registration system over the last thirty years in Nova Scotia have since altered this basic reliance on the initial land grant to some extent, particularly for land that has been migrated into Nova Scotia's land registration system, but in most instances, the backward investigation

[357] Murdoch, Epitome of Laws, *supra* note 46 at 59: "All property to lands, therefore, must be commenced as to title in gift, grant or sale from the crown either express or implied, and all landed property to which no such title can be established, remains the land of the crown."

into the chain of title to the initial land grant is still often thought necessary for the purposes of migrating land into Nova Scotia's land registration system.

A land grant is distinct from a property deed. A deed is the document which conveys legal interest in land from one person to another. A land grant is issued by the Crown and is conveyed by letters patent.[358] While colonial Crown land grants are often characterized as gifts, incentives, or rewards, they were often subject to settlement conditions, such as cultivation milestones and quit rent payments, and thus liable to escheatment if those conditions were unfulfilled. A noteworthy example is land that was granted pursuant to the land regulations that were conveyed to Governor Cornwallis in 1979.[359] Those land regulations prescribed conditional grants reserving one shilling per annum for every fifty acres granted, payable at the expiration of ten year from the date of grant. The grantees were also obligated to clear and cultivate one third of their lands within each ten-year period, or otherwise forfeit their land.[360] Thus, at year thirty, a landowner could, in theory, have their land forfeited for failing to cultivate a remaining one third acreage, notwithstanding making two previous payments of one shilling at the ten- and twenty-year marks, as well as the two third acreage that had already been cultivated. This highlights a legal conundrum with those early land grants. The conditions created uncertainty about the title, especially when the conditions were regularly unenforced, or unfulfilled without consequence.[361] A similar conundrum arises when land is occupied before the grant the issued, as this scholar explains:

> Moreover, since the usual practice was to settle on the strength of an informal location ticket, habitants found themselves subject to

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[358] Paul Lordon, *Crown Law* (Butterworths, 1991) at 277 ["Lordon, Crown Law"].
[359] *Supra* note 155.
[360] Cornwallis Instructions (1749), *supra* note 155, para 29.
[361] Enid Campbell, "Conditional Land Grants by the Crown", (2006) 25 U Tas L Rev 44 at 48 ["Campbell, Land Grants"]: ""The fact that so many of the early Crown land grants in fee simple were subject to conditions, complicated the investigation of land titles. Titles, originally thought to be indefeasible, might on closer examination be found to be defeasible titles only. The question then arose whether the conditions annexed to the Crown grant were valid, and if so whether any breach of those conditions in the past affected the title of the grantee and his successors in title."

> tenure terms that were spelled out only after they had invested substantial labor and capital into a piece of seigneurial land.[362]

In any event, it is important to note for the purposes of this thesis that colonial Crown land grants were complicated, not only in the practice of issuing them but also in the legal interpretation of their terms and conditions. It is also important to remember that Crown grants are called "grants" even when they are issued for valuable consideration.[363]

3.2 The Origins of British Law in Nova Scotia

To understand the colonial land administration laws in nineteenth century Nova Scotia, the laws must be situated into the context of the province's colonial formation within the British Empire, and, in doing so, one must look to the colony's constitutional documents.[364] A British colony is formed by constitution, which can arise from parliamentary statute or royal prerogative. In Nova Scotia, it was royal prerogative.[365]

A constitutional framework that arises through royal prerogative, can be established from the royal commissions and instructions that were issued to the colonial administrators who were appointed to lead the colony.[366] In Nova Scotia, these constitutional origins are found in the royal commissions and instructions that were issued to Governor Cornwallis in 1749.[367] These early constitutional commissions and

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[362] Alan Greer, "Property and Dispossession: Natives, Empires and Land in the Early Modern North America" (Cambridge University Press, 2018) at 172 ["Greer, Property and Dispossession"].

[363] Lordon, Crown Law, *supra* note 363 at 279.

[364] Burroughs, Administration of Crown Lands, *supra* note 164 at 79 points out "[…] the administration of colonial waste lands cannot be clearly understood unless it is viewed within a wider imperial contexts."

[365] Mark Rieksts, "The Constitutions of the Maritime Provinces" (2013) 37(3) Law Now 24 at 24 ["Rieksts, Maritime Constitutions"], where he cites the Hon. A. G. Archibald, former lieutenant-governor of Nova Scotia who wrote: "no formal charter or constitution ever was conferred, either on the province of Nova Scotia or upon Cape Breton while that island was a separate province. The constitution of Nova Scotia has always been considered as derived from the terms of the Royal commissions to the Governors and Lieutenant-Governors, and from the instructions which accompanied the same, moulded from time to time by dispatches from Secretaries of State, conveying the will of the Sovereign, and by Acts of the local legislature, assented to by the Crown; the whole to some extent interpreted by uniform usage and custom in the colony."

[366] The vice regal representative in Nova Scotia normally held the rank of Governor, and occasionally, Lieutenant Governor, until 1786 with the appointment of the Governor of British North America, which lowered the rank all existing Governors to the rank of Lieutenant Governor.

[367] Cornwallis Instructions (1749), *supra* note 155.

instructions prescribed, among other things, the following elements of colonial formation. First, they required the governor to comply with the Crown's instructions. Second, they empowered the governor to select and appoint a maximum of twelve people to serve as the Majesty's Council.[368] Third, they authorized the governor, with the advice and consent of the Council, to summon a General Assembly. Forth, they granted the General Assembly legislative power to make, constitute and ordain laws for the public peace, welfare, and good government of the province, provided such laws were not repugnant to the laws and statutes of Britain. Fifth, they authorized colonial officials to make provision for the administration of finance. And, sixth, they empowered colonial officials to make provision for the disposition of Crown lands.[369]

These early instructions on colonial formation reveal the prescriptive nature of Britain's control over the creation and administration of law in Nova Scotia, as well as its colonial activities. This control was exercised through, among other means, the appointment of local and British-born officials to do its bidding. Individual actors, such as the Governor and members of the Majesty's Council and General Assembly, served at the instruction of and in the interest of the Crown, and at the same time, acted on behalf of the Crown. However, as will be evident in the land administration practices, by virtue of distance and time[370], the colonial officials situated within the province (and their staff), were afforded a significant amount of discretion in how they implemented those royal directives, which, when combined with anti-Black racist sentiments, created conditions conducive to the racially discriminatory application of ostensibly neutral laws.

The legal system in Nova Scotia at the time of colonial settlement was rooted in English common law (and still is), but there were some variations in the law applicable to

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[368] J. E. Reid, "The Early Provincial Constitutions" (1948) 26 Can B Rev 621 at 626 ["Reid, Provincial Constitutions"], "It will be notes that the Council had a threefold function. It was a second chamber of the legislature, the Principal Court of Judicature, and an executive. Furthermore, it was "Our Council", and not the Governor's Council."
[369] *Ibid* at 626.
[370] Burroughs, Administration of Crown Lands, *supra* note 164 at 79.

the British colonies to accommodate the specific circumstances as colonies. Legal historians, Girard et al write:

> […] all colonies had legal systems that, while based on English models, were adapted to local circumstances and **were dominated at every level by personnel** who made their life permanently in the colony. All had also created a distinctive local body of statute law […]. There remained, of course, many differences among the colonies. **What law applied and how it was used in particular places at particular times for particular activities was an always complex question, and the history of law in this period cannot be reduced to any simple and overriding theme or formula**.[371] [emphasis added]

While the legal system in colonial Nova Scotia was complex and multi-faceted, the Crown ultimately controlled both the executive and legislative branches of government through the appointment and loyalty of its colonial administrators.[372] In doing so, the Crown dictated not only the creation of colonial laws through its veto power known as royal assent,[373] but also controlled the implementation and administration of all laws in the province (British-imposed and locally adopted) through its command over the executive branch of government.

3.2.1 The Majesty's Council

The Cornwallis Instructions (1749)[374] authorized and empowered Cornwallis to appoint a council to serve the interests of the British crown,[375] and to assist the Governor in the administration of the colonial affairs.[376] This council became known as the Majesty's Council. London retained control over administration through its instructions and dispatches and kept close oversight over the Council's membership and governing activities. For example, the instructions to Governor Cornwallis ordered that the Surveyor

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[371] Girard et al, History of Law, *supra* note 53 at 375.
[372] Rieksts, Maritime Constitutions, *supra* note 365.
[373] *Ibid* at 24: "the pre-confederation constitutions of the Maritime provinces provided the machinery of government for these British colonies of North America, and defined the relationship between the Crown and early legislative assemblies."
[374] *Supra* note 155.
[375] In the instructions from Britain the Council is referred to as "*Our* council".
[376] Cornwallis Instructions (1749), *supra* note 155 at para 59.

General who was selected by London, was required sit on the Majesty's Council in Nova Scotia.[377] Additionally, while the Governor could fill vacancies on the Council, he could not increase or decrease the overall number, nor could he suspend a Council member from service unless the Council member was habitually absent from the province, which was a prescribed prohibition in the royal instructions. Not surprisingly, Council members were expressly permitted "to have and enjoy freedom of debate and vote in all affairs of public concern that may be debated in Council"[378] being a cornerstone of England's belief in liberty of conscience.[379]

3.2.2 Imperial Control Over Legislative Assembly

With respect to the Legislative branch of government, the Cornwallis Instructions (1749)[380] authorized and empowered the governor to summon and call General Assemblies of elected "freeholders and planters" within the province,[381] for the purposes of making laws. As this legal historian writes:

> On the legislative front, Cornwallis's Commission granted the Governor the authority, with the advice and consent of the Council, to summon a General Assembly of the "freeholders and planters within your government according to the usage of the rest of Our colonies and Plantations in America." The Governor, with the advice and consent of the Council and Assembly, was given the full power and authority to "make, constitute and ordain Laws, Statutes and Ordinances for the Publick peace, welfare of our said province and of the people and inhabitants thereof." Through this latter provision, legislative authority for Nova Scotia was vested in the Governor, the Legislative Council, and General Assembly. However, so that "nothing may be passed or done by our said council or assembly to the prejudice of us (the Crown), our heirs and successors", the Governor was given a general veto power over any laws so passed.[382]

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[377] *Ibid* at para 110.
[378] *Ibid* at para 60.
[379] Notably, these principles of free conscience were not extended elsewhere in the royal instructions pertaining to the religious beliefs of the French inhabitants and the Indigenous peoples.
[380] *Supra* note 155.
[381] Cornwallis Instructions (1749), *supra* note 155 at para 86.
[382] Rieksts, Maritime Constitutions, *supra* note 365 at 27.

The royal commission to create an elected General Assembly remained in placed throughout the balance of the eighteenth century and into the nineteenth century. Sir John Coate Sherbrooke, who served as Lieutenant-Governor of Nova Scotia between 1811 to 1816 and George Ramsay, Earl of Dalhousie, who served as Lieutenant-Governor of Nova Scotia between 1816 to 1820, both received similar instructions pertaining to the establishment and operations of the Majesty's Council. As such, the representative government in this province was not the product of statute, but rather royal prerogative. It is also important to note that representative government was not for the betterment of the local residents, but rather, "[i]t was recognized that the new settlements could not be governed effectively from Westminster and that a measure of local representative government was needed."[383] However, as this same author points out, "[a]t the same time there was no room for rival sovereignty. The colonial government had to be limited to local matters and be subordinate to the central government and parliament."[384]

As a result of its origins in royal prerogative, "[t]here were legal limitations upon the colonial legislative power."[385] The prerogative could be revoked or altered by subsequent royal instruction, and furthermore, was subject to political restraint through the exercise of veto power and disallowance of statutes. [386]

3.3.3 Imperial Control Over Laws

While the General Assembly in the eighteenth and early nineteenth century is described as an immature group who "strove somewhat amateurishly and not always consistently to enhance its privileges, powers, and prestige,"[387] it was empowered to pass legislation, albeit subject to royal assent by a colonial representative bound by loyalty to royal instructions.[388] One notable example where this veto power served to protect Black

[383] Reid, Provincial Constitutions, *supra* note 368 at 621.
[384] *Ibid* at 621.
[385] *Ibid* at 623.
[386] *Ibid* at 637.
[387] J. Murray Beck, *The Government of Nova Scotia* (University of Toronto Press, 1957) at ix.
[388] Reid, Provincial Constitutions, *supra* note 368 at 627, citing Letters Patent dated May 6, 1749 to Governor Edward Cornwallis: "And to the end that nothing may be passed or done by our said Council or Assembly to the prejudice of us our Heirs & Successors We Will and Ordain that you the said Edward Cornwallis shall have and enjoy a Negative Voice in the making and passing of all Laws, Statutes & Ordinances as aforesaid."

people from the anti-Black racism of the Nova Scotia House of Assembly relates to the *Abolition of Slavery Act* in 1833. When the British empire was taking steps to emancipate formerly enslaved African-descended people throughout its colonies, including West Indies, Bermuda and the Bahamas, the Nova Scotia legislature was taking steps to ward off an influx of Black migration. In March of 1834, a legislative committee introduced *An Act to prevent the Clandestine Landing of Liberated Slaves, and other Persons therein mentioned, from Vessels arriving in the Province*, which passed the Assembly of Nova Scotia on April 16, 1834. However, the British House of Assembly disallowed the Act and thus it never received royal assent.[389]

While this example served to protect the interests of Black people, the Imperial veto power over Nova Scotian lawmaking has not always had a positive outcome for Black people in this province. For example, in the context of land, the Imperial control impeded the ability to pass local laws which sought to reduce the price of land,[390] and had a detrimental impact on the land issues in Black Refugee communities. Additionally, during attempts to confirm land titles or relocate them to better land in the province it was this veto power that was used as an excuse to prevent the Black Refugees from receiving better opportunities for improved landholdings.[391]

Britain carefully set strict parameters around Nova Scotia's ability to make laws. For example, the Cornwallis Instructions (1749)[392] state:

> You are to observe in the Passing of all Laws, that the Stile of enacting the same be by the Governor, Council and Assembly; You are also strictly to observe in the passing of all Laws, that whatever may be requisite upon each different Matter be accordingly provided for by a different Law without intermixing in one and the same Act such things as have no proper Relation to each other, and You are more especially to take Care that no Clause or Clauses be inserted in or annexed to any Act which shall be foreign to what the Title of such respective Act imports, And that no perpetual Clause

[389] Fergusson, Documentary Study, *supra* note 70 at 57.
[390] R. G. Riddell, "A Study in the Land Policy of the Colonial Office, 1763-1855" (1937) 18(4) Canadian Historical Review 385 at 403 ["Riddell, Land Policy"].
[391] See discussion above in Chapter 2, Part 6.
[392] *supra* note 155.

> be part of any Temporary Law, and that no Act whatever be suspended, Altered, continued revived or repealed by Gen' Words, but that the Title and Date of such Act so suspended, altered, continued, revived or repealed be particularly mentioned and expressed in the enacting Part.[393]

These early royal instructions prohibited legislative practices such as omnibus bills, which has notably been on the rise in the last few decades.[394] Similarly, Britain prohibited the passing of any laws to be enacted for less than two years,[395] any laws which a royal predecessor refused,[396] or any laws "of an unusual and extraordinary nature and importance."[397]

3.3.4 Imperial Control Over Revenue

The imperial control over Nova Scotia's executive and legislative branches of government, and consequently the laws in this province, was fortified through its power over the public finances. All public money had to be spent by warrant under the seal of the governor[398] and the early Assembly was prohibited from passing any law that collected revenue from colonists, unless the funds were paid to the British crown.[399] Britain prioritized the need to defray the costs of colonization through revenue that was generated in and from the colony, at the same time prioritizing the needs of British capitalists.[400] Britain's primary objective was to ensure its own paramountcy. For example, the early commissions to Governor Cornwallis stated:

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[393] Cornwallis Instructions (1749), *supra* note 155 at para 88.
[394] Adam M. Dodek, "Omnibus Bills: Constitutional Constraints and Legislative Liberations" (2016) 48 Ottawa L. Rev. 1.
[395] Cornwallis Instructions (1749), *supra* note 155 at para 92.
[396] *Ibid* at para 92.
[397] *Ibid* at para 94.
[398] *Ibid* at para 105.
[399] *Ibid* at para 90. "You are not to permit any Clause whatsoever to be inserted in any Law for levying Money or the Value of Money, whereby the same shall not be made liable to be accounted for unto Us and to Our Commissioners of Our Treasury or to Our High Treasurer for the Time being, and audited by Our Auditor General of Our Planations or his Deputy for the Time being; and We do particularly require and enjoin You upon Pain of Our highest Displeasure to take Care, that fair Books of Accounts of all Receipts and Payments of all publick moneys be duly kept, and the Truth thereof attested upon Oath […]."
[400] For example, Cornwallis Instructions (1749), *supra* note 155 at para 57: "And it being Our Intention to give all possible Encouragement to the Trade of all Our Subjects, You are to Use Your best Endeavours to that end, taking Care that no Trade be carried on or Manufacture set up in Our said Province that may interfere with the Trade or Manufactures of this Kingdom."

> It is Our Will and Pleasure that you do not upon any pretense whatsoever on Pain of Our highest displeasure give your assent to any Law wherein the Natives or Inhabitants of the Province of Nova Scotia or Island of Prince Edward and Cape Breton are [put] on a more advantageous footing than those of this Kingdom or whereby Duties shall be laid upon the Shipping or upon the Product or Manufactures thereof upon any pretense whatsoever.[401]

3.3.5 Legacy of Imperial Control

The paramountcy of the British Crown was heavily embedded within the early legal structures of Canada, and consequently, remnants persist today in Nova Scotia's legal system. Not surprisingly, this is evident in the way anti-Black racism is effectuated through the law. When compared to the more overt racist laws in the United States, Nova Scotia inherited Britain's more subtle, subconscious, and covert types of racism that are deeply embedded within our legal system and thus more difficult to identify and even more difficult to dismantle. For example, on its face, the applicable land administration laws in effect at the time of the Black Refugees arrival to Nova Scotia did not explicitly discriminate against the Black Refugees based on race. However, a closer examination of the effect of those laws on the Black Refugees reveals the covert and systematic ways through which the government oppressed one racial group and benefited the other. Anti-Black racism (or, conversely, White supremacist ideology) may not have been the express intent of lawmakers, but the effect remains that Black people were disadvantaged by the law and White people were advantaged law. Disparate racial outcomes such as this are the result of subtle, shifting, and systematic circumstances that are complex, varied, and difficult to detect and dismantle, more so than the explicit racially discriminatory laws that are more prevalent in the United States.

Systemic racism in law is the result of a carefully crafted colonization process that spanned time and distance of enormous magnitude. In Nova Scotia, this colonization process ultimately formed the basis of law in this province stemming from the province's

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[401] Instructions to Sir John Coape Sherbrooke Lieutenant Governor of Nova Scotia 12 April 1816 PANS RG1 Vol 349A at para 23. Instructions to Lord Dalhousie Lieutenant Governor of Nova Scotia 27 April 1820 PANS RG1 Vol 350 Doc 22.

colonial constitution which was derived from royal commissions, instructions, and dispatches to colonial governors. These instructions and dispatches from Britain to Nova Scotia were prescriptive, not optional. Their terms "required the Governor to comply with its provisions, and to govern according to the Instructions therewith, or thereafter given."[402] Furthermore, "the Governor was the King's servant, acting for and in the name of the Crown."[403] "'Pure' self-help was not condoned, and this may explain why a vigilante tradition never evolved in British North America."[404]

It is tempting to think that this imperial influence ended with Confederation, but that is not the case. While colonial Nova Scotia was granted representative government in mid-eighteenth century, it was not until almost 100 years later that self-government arose through responsible government in mid-nineteenth century. The 1839 Lord Durham's Report[405] is thought to have played a significant role in that constitutional shift, as one author writes "[w]ith the publication of Lord Durham's Report the era of colonial self-government officially began, and with self-government the idea that the colonies should control their own land policy and land revenues."[406]

While the *British North America Act* played an integral role in the growth of law in this province, the roots were laid long before 1867. As Mark Rieksts points out, "[t]he early constitutions of the Maritime provinces are still relevant to the post-Confederation constitutional framework, since they were retained (with only slight modifications) as

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402 Rieksts, Maritime Constitutions, *supra* note 365 at 28.
403 Reid, Provincial Constitutions, *supra* note 368 at 633.
404 Girard et al, History of Law, *supra* note 53 at 367, also noting: "In contrast to the traditional understanding of the British Constitution as 'unwritten,' the Constitutional Act 1791 , influenced to some extent by the new American Constitution, provided the Canadas with a written constitution. It was an important advance over the 'hip-pocket' constitutions granted to the Maritime provinces and, eventually, Newfoundland. Often overlooked as part of the 'constitutional moment' of the late eighteenth century, it was the building block upon which the British North America Act 1867 would eventually be based. While traditional accounts have stressed the backward-looking nature of some provisions of the 1791 Act, our interpretation emphasizes the ways in which it looked forward, by strengthening the representative element of the Constitution, the assembly, in its provisions regarding the franchise, the timing of elections, and the creation of new constituencies."
405 *Supra* note 165.
406 J. Holland et al., Editors Rose, *Cambridge History of the British Empire* (New York: Macmillan Co., 1929-1959) at 471.

each province entered confederation."[407] When Nova Scotia joined with other colonies to form Canada, the colonial constitution remained, albeit modified by the *British North America Act*. Mark Rieksts writes:

> The colonial constitutions of Nova Scotia, New Brunswick and P.E.I were continued after their admission to the Canadian union, subject to the provisions of the BNA Act, 1867. […]. There have been other changes to the constitutional machinery of the government in the Maritime provinces over the years, but the broad outlines of the colonial constitutions have remained. By virtue of the nature and scope of their provincial constitutions, in the Maritime provinces, it can truly be said that the choices of the future are rooted in the decisions of the past.[408]

It is within this context of imperial control over the creation and implementation of the legal system in Nova Scotia that the early nineteenth century land administration system can be better understood.

3.3 Pre-1807 Land Administration Laws

To better understand the land administration laws that the Black Refugees arrived into, it is important to go back to the beginning of Britain's process of colonization through land regulation in this province. As one historian writes,

> since land was the most valuable natural resource of a colony, the way in which crown lands were administered had a profound effect, not simply on colonial prosperity and the progress of settlement, but also on the successful promotion of current imperial designs.[409]

However, the system of granting lands in this province has "long been a source of much dissatisfaction."[410] It was complex and messy, and the problems were exacerbated with time and distance between London and Halifax. As explained by legal historians Girard et al:

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[407] Rieksts, Maritime Constitutions, *supra* note 365 at 24.
[408] *Ibid* at 27.
[409] Burroughs, Administration of Crown Lands, *supra* note 164 at 79.
[410] Richard Brown, *A History of the Island of Cape Breton* (London: S. Low & Marston, 1869) at 444 [reissued by Mika Publishing, 1979] ["Brown, Cape Breton"].

> […] land granting and settlement was not a simple or tidy process, and the eighteenth century bequeathed a variety of land administration problems to its successor, while at the same time the nineteenth threw up new challenges. […] [c]entral to all these controversies was the question of title to land. […] In the Maritimes and Newfoundland it was the need to deal with those who were without formal titles or who had 'imperfect' ones but occupied and developed the land nonetheless.[411]

Two primary considerations influenced colonial settlement decisions in British North America. First, a settled population in the colonies would create an economic market for manufacturers in England.[412] Second, using colonial lands as a source of revenue would help defray the costs of imperial administration.[413] However, after the loss of the more valuable American colonies during the American Revolutionary War in 1783, British attitudes towards the remaining colonies in the region began to change. Historian Riddell writes:

> [t]he remaining colonies were thought to be of little value for settlement, and the expense of administering them was a constant source of concern. […]. In this mood of indifference and preoccupation the imperial government after 1783 accepted its responsibility for the administration of the land of the colonies.[414]

The attitude of the imperial government toward the distribution of "waste lands" in its colonies, was one guided by self serving interests. Riddell explains:

> No policy in regard to land was ever formulated by the British government in the period between 1783 and 1825. If, however, the whole set of regulations and instructions applying to land in the various colonies is taken and considered, it is possible to **discern four general objectives** that were more or less consistently present These are, first, that land should be distributed in such a manner as to **encourage settlement**; second,

[411] Girard et al, History of Law, *supra* note 53 at 587.
[412] Riddell, Land Policy, supra note 390 at 386. This is evident, for example, in Cornwallis Instructions (1749), *supra* note 155 which prohibit competing manufacturers.
[413] *Ibid* at 386.
[414] *Ibid* at 387.

> that it should be distributed in such a manner as to **produce revenue**; third, that it should be **regarded as an asset** upon which the crown could draw to subsidize special projects, to **reward officials, or to pension servants**; and, fourth, that land should be **used to endow either the government itself, or institutions** which it desired to establish.[415] [emphasis added]

Ironically, as Riddell also points out, "The fact that these objectives are inconsistent or mutually incompatible was no cause of concern to a government only dimly aware that it had a policy at all."[416]

The colonial administration of land in British North America "was a process driven by economics and politics but effected and legitimized by law."[417] In this way, the law, and the legal institutions and legal actors that support it, facilitated the allocation of land in Nova Scotia.

As described above, the origins of British law in Nova Scotia derive from a series of royal commissions, instructions, and dispatches issued to colonial governors. These documents were "rules of law", accepted as such and acted upon by those who administered crown lands. J. Murray Beck writes:

> After the session, [LG] Kempt forwarded Chief Justice Blowers' opinion that colonial constitutions should rest on statute [of the UK parl.] rather than on the governors' instructions which the assemblies considered to be binding on the governors only and not on themselves. But Kempt strongly disagreed. Many colonists, he said, **believed the instructions to be the more secure foundation of a constitution**. Although the British Parliament could always change a statute, it would be difficult for His Majesty to repeal any rights which he had granted by his instructions.[418] [emphasis added]

[415] *Ibid* at 387.
[416] *Ibid* at 387.
[417] Girard et al, History of Law, *supra* note 53 at 374 "The settlement of tens of thousands of Europeans on Upper Canadian land once occupied by Indigenous peoples was a process driven by economics and politics but effected and legitimized by law."
[418] J. Murray Beck, *Politics of Nova Scotia*, 1st ed., vol 1 (Four East Publications, 1985) at 92.

Thus, the "law" that the Black Refugees arrived into were the royal instructions and dispatches which empowered the governor to grant land at his discretion, but subject to the prescriptive details instructing him how to do so.[419] In this way, the law instructed the actors to allocate the land in a prescribed manner but gave discretionary authority to determine the suitability of eligible recipients.

3.3.1 Instructions to Governor Cornwallis (1749)

To better understand the legal framework through which the Black Refugees were being allotted land in the early nineteenth century, it is helpful to first look at the colony's land policies that emerged sixty years prior to their arrival, in the late eighteenth century. The early land regulations instructed the governor to distribute colonial lands through an administration system set up in the colony. While these regulations were detailed and prescriptive, the "governors were given discretionary power to make extensive grants to worthy settlers, and this power was used with great freedom."[420]

The British primary objective in distributing land in Nova Scotia to British colonialists through the Cornwallis Instructions (1749)[421] was to assert dominance through supported settlement of "better people".

> for the **better Peopling** Our said Province **with British Subjects** and improving and extending the valuable Fishery thereof We have thought fit **to give certain Encouragement to** such of the **reduced Officers and private Men lately discharged** Our Land and Sea Forces, and **others Our Subjects as are desirous of** accepting Grants of Land and **settling** with or without their Families in Our said Province.[422] [emphasis added]

The goal was to populate the province, with British settlers, to develop the land for economic profit. To this end, surveying the land and describing its quality to London was a primary task for the new governor of Nova Scotia.[423]

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[419] Riddell, Land Policy, *supra* note 390 at 388.
[420] *Ibid* at 388.
[421] *Supra* note 155.
[422] Cornwallis Instructions (1749), *supra* note 155 at para 3.
[423] *Ibid* at paras 54 and 55.

The early land grants were generous in size and low in cost. The prescribed amounts varied (based on rank in military service) from 630 acres for captains of the sea force with families to 60 acres to private soldiers or seaman with families, all grants in fee simple free from the payment of any quit rent or taxes for a term of ten years,[424] and at the end of ten years they were required to pay no more than one shilling per annum for every fifty acres of land granted. [425] There was extensive discretion in the size of land grants to other non-military settlers,[426] provided the governor did not grant more than 1,000 acres to one individual.[427]

In terms of cultivation milestones, grantees were obligated to clear and cultivate one third part of their lands within 10 years, another third part within the 20 years, and the remaining third within the 30 years. [428] Land surveyors played a significant role in the province's land administration process and continue to do so today. The appointment of

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[424] *Ibid* at para 25: "An Whereas for the Encouragement of such of the reduced Officers and private Men lately dismissed Our Land and Sea Service and other Our Subjects as shall be willing to settle in Our said Province of Nova Scotia, We have thought fit to cause Our Royal Will and Pleasure to be made publick, that fifty acres of Land shall be granted in Fee Simple to any private Solider or Seaman free from the payment of any Quit-Rents or Taxes for the Term of 10 Years at the Expiration whereof no Person to pay more than one Shilling P Annu[m] for every fifty Acres so granted."

[425] *Ibid* at para 29: Once the appointed surveyors "set apart" the lands, the Governor is instructed to "pass property Grants for the same in Fee simple […] in which said Grants as well as in all others hereafter to be made by You, You are to take Care that there be a Reservation of One Shilling Sterling P Annum for every 50 Acres payable at the expiration of ten Years from the Date of each Grant."

[426] *Ibid* at para 34: "And it is Our further Will and Pleasure that all such Persons as shall become Settlers in Our said Province as aforesaid shall have further Grants of Land made to them as their Families or their Ability to cultivate the same shall increase, and that all New Comers have likewise Grants made to them on the like Conditions of Land remaining ungranted within the said Townships or in such others as You shall by and with the Advice and Consent of Our Council think proper to lay Out in any other Parts of Our said Province."

[427] *Ibid* at para 30: "… taking Care that in all the above-mentioned Grants or any other hereafter to be made by You, as aforesaid, it be a Rule strictly to be observed that no one Person possess more than 1000 Acres in his own Name."

[428] *Ibid* at para 30: "And it is Our further Will and Pleasure that the Grantees be likewise obliged by these said Grants to clear and cultivate one third Part of their Lands within the Space of ten Years, another third part within the Space of twenty Years, and the remaining third within the Space of thirty Years, from the Date of their Grants, or otherwise to forfeit their Right to such Land as shall not be actually under Improvement and cultivation at the time the Forfeiture shall be incurred, taking Care that in all the above mentioned Grants or any other hereafter to be made by You, as aforesaid, it be a Rule strictly to be observed that no one Person possess more than 1000 Acres in his own Name."

surveyors[429] and the commencement of survey activities[430] were among the top priorities in the Cornwallis Instructions (1749).[431] There was special emphasis instructing surveyors to create townships sized at 100,000 acres on the "best and most profitable Land", and the surveyors were given strict orders to return surveys "as soon as possible, with a particular Description of each Township and the Nature of the Soil within the same, distinguishing the profitable and unprofitable part thereof."[432] The work of surveyors was so essential that they were exempt from juries and military so as to focus solely on the task of surveying, describing and preparing the land for allocation.[433]:

The Surveyor General in Nova Scotia was appointed by Britain and had a designated seat on the Majesty's Council.[434] The first Surveyor General in Nova Scotia was Charles Morris (1711-1781), who served as surveyor-general from 1749 until 1781, when he was succeeded by his son, Charles Morris (1731-1802), who served as surveyor-general

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[429] *Ibid* at para 28: "You are to oblige all such Persons as You shall appoint to be Surveyors of the said Lands in each District to take an Oath for the due performance of this Office and for obliging him to make exact Surveys of all Lands required to be set out."; and at para 7: "You are therefore hereby Authorized and required to appoint such proper Persons as You shall find there fully qualified or carry along with You forthwith to survey and mark out the said Townships in such Manner and at such Places as is herein directed […]."

[430] *Ibid* at para 55: "You are to endeavour to get a Survey made of Our said Province of Nova Scotia as soon as conveniently may be, and in the mean time You are to send by One of Our Principal Secretaries of State and to Our Commissioners for Trade and Plantations the best Description of that Country You are able to get with Relation to its Extent and Situation."

[431] *Supra* note 155.

[432] Cornwallis Instructions (1749), *supra* note 155 at para 9.

[433] *Ibid* at para 109: And Whereas several Complaints have been made by the Surveyor General and other Officers of Our Customs in Our Plantations in America, that they have been frequently obliged to serve on Juries and Personally to appear in Arms whenever the Militia is Drawn out, And thereby are much hindered in the Execution of their Employments, Our Will and Pleasure is, that You take Effectual Care and giver the necessary Directions that the several Officers of Our Customs be excused and exempted from serving on any Juries or Personally appearing in Arms in the Militia […]."

[434] *Ibid* at para 110: "And Whereas We have thought it for Our Royal Service that all the Surveyors General of Our Customs in America for the time being should be admitted to sit and vote in the respective Councils in the several Islands and Provinces within their Districts as Councillors extraordinary during the time of their Residence there; Now We do hereby constitute and appoint Our Surveyor General of Our Customs in the Southern District of Our Dominions in America and the Surveyor General of Our Customs within the said District for the time being to be Councillors extraordinary in Our said Province of Nova Scotia." In addition to the Surveyor General of Lands, there was a Surveyor General of Woods who had ultimate oversight of the timber reserves and was charged with ensuring that the best timber was set aside for the royal navy, particular the masting of royal ships. The Surveyor General of Lands was prohibited from certifying any plots of land ordered and surveyed until the Surveyor of Woods certified that the lot did not contain military timber reserves (see *Ibid* at para 14; and 1807 Land Administration Laws, *supra* note 193 at para 14).

from 1781 until 1802, when he was succeeded by his son, Charles Morris (1759-1831), who served as surveyor-general from 1802 until 1831, when he was succeeded by his son, John Spry Morris who held the position from 1831 until the position merged with the Commissioner of Crown Lands in 1851. The Morris family held the position of Surveyor General of Nova Scotia for its entire existence, spanning over four generations.[435] Land surveying is a leading cause of unclear land titles in this province, with problems dating back to original land surveying practices.[436]

Another important element of the early land administration laws was the need to uphold the legal principle of tenure in land. Early instructions to Governor Cornwallis prescribed severe penalties for "squatting" on land,[437] being a practice that England often sought to discourage, despite its repeated failures in being able to so. The early land administration laws also reflected principles of colonialism. It promoted the use of land grants as a tool to incentivise intermarriages between Indigenous peoples and White settlers,[438] and to convert French settlers from Roman Catholicism to the Protestant church.[439]

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[435] Donald F. Chard, Biography - Morris, Charles (1759-1831) – Volume VI (1821-1835) (biographi.ca).

[436] Greer, Property and Dispossession, *supra* note 362.

[437] Cornwallis Instructions (1749), *supra* note 155 at para 45: "…that You do immediately upon Your Arrival in Our said Province cause a Proclamation to be published strictly forbidding any Person or Persons whatsoever to possess themselves of any uncultivated Lands within Our said Province without a Grant from You or the Commander in Chief of the said Province for the time being first had and obtained under such severe Penalty as You by and with the Advice and Consent of Our Council shall think proper."

[438] *Ibid* at para 52: "as a further Mark of Our good Will towards the said Indian Nations, You shall give all possible Encouragement to Intermarriages between Our Protestant Subjects and them, for which Purpose You are to declare in Our Name that every White Man who shall marry an Indian Women Native of Our said Province and every White Woman being Our subject who shall marry an Indian Man shall have a Grant of 50 Acres of Land free from the Payment of any Quit Rent for 10 years at the Expiration of which Term they shall pay One Shilling for every 50 Acres so granted." However, this "good will" must be understood in the context of assimilationist ideals, like those expressed later in the Instructions at para 123: "An You are also with the assistance of the Council and Assembly to find out the best Means to facilitate and encourage the Conversion of Negroes and Indians to the Christian Religion."

[439] *Ibid* at para 50: "And it is Our further Will and Pleasure, that such of the French Inhabitants as shall from time to time embrace the Protestant Religion shall have such Lands as they have in actual Cultivation confirmed to them by Grants under the Seal of Our said Province free from the Payment of any Quit Rents for ten Years at the Expiration of which Term they shall be put upon the same footing, with regard to Quit Rents and Taxes, as our other Protestant Subjects, and shall likewise have a further Grant of 10 Acres on the same Conditions for each Person, being a Protestant, of which their families shall consist; and, as a

3.3.2 Moratorium on Free Land Grants (1790)

After 1783, the generous land granting practices of the mid eighteenth century gave way to smaller land grants and a renewed emphasis on "actual settlers." Historian R.G. Riddell writes:

> The instructions that were issued to governors after 1783 regularly made provision for small grants to actual settlers. As a protection against the engrossing of large quantities of land, and to guarantee that the land-holder had both the ability and intention to improve his holding, elaborate lists of settlement duties were set forth in the instructions.

The revised land administration system was one based on the theory of meritocracy. A genuine hardworking colonist could obtain land "free of any cost other than a small annual quit-rent a grant of 100 acres plus 50 acres for each member of his family" but disingenuous or lazy colonists were to receive no land at all. However, in practice, the application of this system succumbed to the neglectful oversight of the British government and widespread chaos in the allocation of and settlement on land in this province.[440]

Eventually, amidst the chaos of lavish land allocations to underserving colonists, and upon realization that the cultivation conditions were not enough to curb land speculation, England placed a moratorium on large freehold grants in March 1790.[441] The Colonial Office instructed colonial governors to refrain from further grants of land.[442] This

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further means of brining the said Inhabitants to a due Obedience to Our Government, You are also hereby directed to give all possible Encouragement to Intermarriages between them and Our Protestant Subjects."

[440] Riddell, Land Policy, *supra* note 390 at 387. "In practice, however, the British government paid very little attention to the application of this system. The settlement regulations were cumbersome and unpractical, and they were included in the instructions to governors without any apparent intention that they should be enforced."

[441] Brown, Cape Breton, *supra* note 410 at 404. "…the issuing of grants had been discontinued since the month of June 1790, when instructions were received from the Secretary of State 'to restrain further grants except completing those for which warrants had been issued'."

[442] Girard et al, History of Law, *supra* note 53 at 240: "In 1790 London instructed its British North American governors to refrain from further free grants of land and did not lift this fiat until 1807. This policy, which arrived 'like a bolt from the blue,' was influenced by the U.S. example of charging a dollar an acre for lands granted in the western territories. Dorchester refused to apply it in Canada, and in Nova Scotia most of the good lands had already been granted."

dramatic shift in colonial land administration laws created a serious disconnect between possession and title of many occupants in the province, particular in the Cape Breton region, causing situations of occupation by licence or unauthorized settlement.[443]

3.4 The 1807 Land Administration Laws

As many legal scholars can attest, changes in the law are often the result of shifts in strategic planning. The changes to laws governing the distribution of Crown lands in 1807, exemplifies this statement. To explain, the 1790 moratorium on land grants created more problems than it sought to resolve. Rather than halting the distribution of colonial lands to reign in bad behaviour, it created an underground system of governor-issued licenses of occupation and settler-initiated squatting. This resulted in situations where the lands were occupied and cultivated without ownership, on the hope that one day a grant would be issued, or in other instances, the lands fell into the hands of land speculators with no intentions to occupy and cultivate it.[444] Consequently, by the turn of the nineteenth century, the distribution of colonial land to settlers was in a state of disarray. It is within this context that Secretary Bathurst sent to the colonial governor of Nova Scotia royal instructions dated August 29, 1807,[445] with the opening paragraph as follows:

> Whereas in order to prevent irregularities in the mode of passing Grants of the Waste Lands of the Crown, and to the end that we might avail ourselves of the advantages which would arise to Us Our Heirs and Successors by the introduction of some further Regulations to be observed in the disposal of the said Lands.[446]

The royal instructions proceeded to describe how the Colonial Office had earlier sought fit to suspend until further notice the governor's power to grant lands vested in

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[443]See 1807 Land Regulations about previous "irregularities" in land granting practices.
[444] Gates, L. F., *Land Policies of Upper Canada* (Toronto: University of Toronto Press, Scholarly Publishing Division, 1968) at 124: "The Colonial Office had continually tried to prevent the evil of land speculation, which had beset the thirteen colonies, from arising in Canada."
[445] The 1807 Land Administration Laws, *supra* note 193.
[446] *Ibid* at para 1.

him for disposition,[447] but they had since decided to lift the suspension in the hope that the population in the province would grow, and, consequently, Britain's financial investment in the colony would improve.[448] Thus, upon reflection of the earlier land grant moratorium and the renewed desire to increase settlement in the colony, the Colonial Office thought fit to revoke the March 6, 1790 restraining order, and furnish new instructions for the disposal of Crown lands in the province.[449] With that change, the 1807 Land Administration Laws in Nova Scotia were adopted.

3.4.1 Objective of Regulations

The 1807 Land Administration Laws were designed to rapidly increase settlement and promote the economic progress of the colony and, in turn, Britain.[450] With the 1790 restraining order lifted, the power of the governor to issue free land grants to settlers was revived, but with some notable restrictions. The Colonial Office, still uneasy with the failed settlement policies of the eighteenth century, writes:

> And whereas **great inconveniences** have arisen in some of Our Colonies **from granting large quantities of Land to persons who have been unwilling or unable to settle and cultivate the same** whereby the prosperity of the Colony has been checked and retarded to the manifest injury of the active and industrious settlers and of the publick Interest.[451] [emphasis added]

[447] *Ibid* at para 1: "[…]; We thought fit by Our Order and Instructions under our Signet and Sign Manual bearing date the sixth day of March 1790 to suspend until Our further pleasure should be signified the execution of certain Powers for granting Lands then vested in Our Captain General and Governor in Chief of Our Province of Nova Scotia."

[448] *Ibid* at para 1: "And whereas it has been represented to Us that by authorising the further allotment of such Lands as still remain vacant and unsettled the population and improvement of the Colony may be rapidly promoted and increased."

[449] *Ibid* at para 1: "We taking the circumstances before mentioned into Our consideration have thought fit to revoke and annul and we do hereby revoke and annul Our restraining Order and Instruction of the sixth of March before recited as far as the same relates to the Province of Nova Scotia and to furnish you with these Our present Instructions for the disposal of such Lands as may be our property within Our said Province."

[450] Burroughs, Administration of Crown Lands, *supra* note 164 at 80, commenting also about the correlation between cultivation and perceptions of economic progress, writing "[a]s far as the imperial authorities were concerned, the amount of land under cultivation was considered a reliable index of colonial economic progress[…]."

[451] The 1807 Land Administration Laws, *supra* note 193 at para 3.

This undertone of caution and restraint prompted the Colonial Office to lift the ban on land grants, but subject to the precise instructions and a strengthened bureaucratic administration to ensure compliance in the application of law. Note, however, despite this short leash aimed at protecting its financial investment, the imperial oversight neglected to implement measures that would curb the impacts of racial discrimination in the application of those laws.

3.4.2 Bona Fide Settlers

It is important to note that while the 1807 Land Administration Laws did not expressly exclude Black people from eligibility to receive land grants; land grants were available only to those persons "as shall be desirous of improving and cultivating the same." The interpretation of this concept likely had less to do with the individual's desire, and more to do with colonial administrator's idea as to the individual's capability to accomplish the objective. Britain had pre-conceived notions as to who was a *bona fide* settler,[452] which likely did not include African descended individuals who recently fled captivity and enslavement. As this concept evolved over the 30 years following the 1807 Land Administration Laws, the *bona fide* settler was understood to be resident colonists and emigrants from the British Isles, both voluntary capitalists and government assisted pauper emigrants. There was special emphasis on encouraging Britain's poor and working class to emigrate to the colony, primarily to alleviate Britain's population during peak unemployment periods.[453]

3.4.3 Land Grant Process

The legally prescribed process of obtaining land grants under the 1807 Land Administration Laws started with a person filing a written petition in the office of the provincial secretary, addressed to the governor, pointing out the property they desired to receive. In keeping with the eligibility requirements to improve and cultivate the land,[454] the petitioner would need to state their ability to do so, either through their own

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[452] Burroughs, Administration of Crown Lands, supra note 164.
[453] *Ibid* at 92.
[454] The 1807 Land Administration Laws, *supra* note 193 at 2: "It is Our Will and Pleasure and we do hereby authorize you by and with the advice and consent of Our Council of Our Province of Nova Scotia to issue

capability or with the help of servants. The land petitioner would also need to produce proof of loyalty to the Crown, by oath of allegiance, and, having regard to the overarching fear of land speculation and absentee landowners, the land petitioner would have been required to show (by oath) that they were not seeking the grant with the intention of selling the land immediately thereafter, but rather with a genuine intent to cultivate and improve.

The land petition was then submitted to the governor and council for deliberation, and if approved, a record was made in the journal of executive business describing the number of acres to be allotted to the land petitioner. A warrant of survey was then signed by the governor, directed to the surveyor general of the province, authorizing and requiring him or his deputies to survey to make a "faithful and exact" survey of the land in such warrant, and to return it within six months with surveyed lot and plan description annexed thereto.[455] Meanwhile, the petitioner had six months to apply for and take out the grant for the lands surveyed by virtue of the warrant of survey,[456] which the petitioner was incapable of doing until the survey was complete, hence the practical outcome that many petitioners took possession of their land years before receiving confirmed title through the grant.[457] It is possible that at this point a colonial administrator granted a licence of occupation (express or implied) to the settler pending completion of the formal process.

Warrants of Survey for such Lands as shall be vacant and ungranted to such Person or Persons as shall be desirous of improving and cultivating the same Provided that all and every person and persons who shall apply to you for any Warrant or Warrants for Lands shall previously to their obtaining the same make it appear to you in Council that they are in a condition to cultivate and improve the Lands according to the conditions specific in these Our Instructions or by establishing thereon a sufficient number of Settlers either servants or others according to the proportion herein after prescribed and shall at the same time produce such proof of their loyalty to Us and attachment to Our Government as shall be required by you and Our Council and also take several Oaths required by law."

455 *Ibid* at para 2.

456 *Ibid* at para 2: "And it is Our further Will and Pleasure that the several persons to whom you with the advice and consent of Our said Council shall grant such Warrants of Survey shall within six months apply for and take our Grants for the Lands surveyed by virtue of such Warrants."

457 Murdoch, Epitome of Laws, *supra* note 46 at 242: "Upon the survey taking place, the settler usually took possession of his lot, and sometimes many years would intervene, before he could meet the further expenses of a grant."

When the surveyor general made a return of his survey to the governor, it then had to be directed to the surveyor general of woods and forests to confirm that the land was not included in the timber reserves that were under his care for use in the royal navy.[458] If the land was not included in the timber reserves, then the return of the survey and the confirmatory certificate from the surveyor general of woods and forests were sent to the provincial attorney-general who was responsible for preparing the draft grant in prescribed form and in strict compliance with the terms and conditions of the law.[459] The provincial secretary then finalized the grant, which was signed by the governor and affixed with a seal, and then recorded in the provincial secretary's office[460] with a plan signed by the surveyor-general annexed both to the grant and the record.

The completed and recorded grant was then sent to the office of the receiver-general of quit-rents and the auditor of grants, in each of which offices the grant was entered into their records or deemed void and of none effect.[461] Along the exchange through the many offices from the provincial secretary to receiver to auditor, each would sign an accompanying certificate confirming their recording or docketing of the grant. Finally, it was then given to the grantee as complete, upon payment of any requisite fees.[462]

[458] The 1807 Land Administration Laws, *supra* note 193 at para 14.
[459] *Ibid* at para 2: "[…] which Grants shall be made out in due form and the terms and conditions required by these Our Instructions be particularly and expressly mentioned therein."
[460] *Ibid* at para 2 "[…] and the said Grants shall be Registered in the Secretary's Office of Our said Province to which Registry shall be attached a duplicate of the Plan annexed to the Original Grant and a Docket thereof be entered in Our Auditor's Office and also in the Office of Our Receiver General of Quit Rents within three months after signing the same otherwise such Grant's shall be void and of none effect."
[461] Murdoch, Epitome of Laws, *supra* note 46 at 242
[462] *Ibid* at 242, noting at 243: Much of this method was dependant on the king's instructions, which underwent several variations in minor points, greater and more laudable strictness having been latterly introduced. It was found in an early period, when the governors were less restricted in granting land, that influential persons obtained immense tracts of land under various pretensions, which they did not afterwards improve. Thus the land was kept out of the reach of settlers in many places, who would have cultivated it, but could not buy it (except at extravagant prices) from those the crown had entrusted with it, and who had got it for nothing upon promises of making settlements. Recently [presumably referring to the 1827 Regulations] the crown has put a stop to granting land upon petition, and now crown lands are from time to time sold at auction in small lots not exceeding a few hundred acres. The grant must however be passed with all legal formalities, to confer a title on the purchaser."

A copy of the land registries entries was required to be sent regularly by the treasury commission, and an abstract of all grants had to be transmitted to the Colonial Office, with a duplicate to the Privy Council for Trade and Plantations, every six months through the provincial secretary.[463]

The land granting process under the 1807 Land Administration Laws was cumbersome and inefficient and had many touch points that were vulnerable to mistakes along the way. Furthermore, as with most laws that are passed by individuals who are removed from the realities of the circumstance, the 1807 Land Administration Laws presupposed a land administration infrastructure that simply did not exist in the colony of Nova Scotia. It was unrealistic for London to expect land surveys to be completed within six months, and that interim occupancy by its prospective owners would not end in permanent occupancy under colour of title. In this way the Instructions created the conditions conducive to permitted occupancy on Crown land without fee simple.

3.4.4 Lot Size Constraints

The land grant instructions, based on lessons learned from the past,[464] required the governor to "take special care" that the quantity of land issued by a grant be in proportion with the ability of the applicant to cultivate the same.[465] Thus the 1807 Land Administration Laws required the governor to strictly observe the following regulations in all grants that are to be made by him:

> **One hundred acres** of land be the proportion to be allotted to any person being Master or Mistress of a Family and **fifty acres for each of their children** actually present at the time of making out the Grant.[466] [emphasis added]

The governor was further authorized to grant a larger tract of land to a person if it appeared to the governor and the Council that the applicant is "of sufficient ability to

[463] The 1807 Land Administration Laws *supra* note 193 at para 2.
[464] *Ibid* at para 3: "And whereas great inconveniences have arisen in some of Our Colonies from granting large quantities of Land to persons who have been unwilling or unable to settle and cultivate the same whereby the prosperity of the Colony has been checked and retarded to the manifest injury of the active and industrious settlers and of the publick Interest [...]."
[465] *Ibid* at para 3
[466] *Ibid* at para 3

cultivate", provided, however, that any grants over 500 acres required express permission of the Crown,[467] upon recommendation by the governor and Council with supplementary reasons submitted to one of the secretaries of state.[468]

The maximum number acres permitted to be issued through the 1807 Land Administration Laws was 500 acres per grantee, but 200 acres was the "ordinary allotment to a settler who was possessed of the average means of cultivation."[469] At the very least, 100 acres of land was needed to be self sufficient. Twenty years after the 1807 Land Administration Laws, testimony in connection with the Lord Durham's Report[470] indicates that successful settlement required at least 100 acres of land, being at least 25 acres for cultivation, 25 acres for wood, and 50 acres for pasture.[471] These minimum standards for lot sizes (100 – 200 acres) were in effect at the time of settling the Black Refugees, yet the Black Refugees received only 10 acre lots. Furthermore, these were *minimum* standards. The governor was authorized to grant up to 500 acres of land and did so regularly to White settlers.

3.4.5 Quit Rent Requirements

While the governor was authorized to issue land grants above 100 acres (but below 500 acres), a land grant exceeding 200 acres triggered additional quit rent amounts.[472] The 1807 Land Administration Laws required that all grantees be required to pay to the Receiver-General quit rent in the amount of two shillings sterling for every hundred acres, to commence two years after the date of the Grant, and to be paid yearly

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[467] *Ibid* at para 3: "And in case it shall appear to you and our said Council that the person applying for such Warrant of Survey shall be of sufficient ability to cultivate a larger quantity of land than the real number of persons in his or her family would entitle such person to take up you are hereby allowed to grant an additional number of acres according to the circumstances of the case. Provided always that no greater quantity than five hundred acres in the whole shall be granted to any one person without our express permission."

[468] *Ibid* at para 3: "[…] nevertheless should any case arise in which from special circumstances you with the advice and consent of Our said Council should think fit to recommend a Grant of Lands to any person over and above the quantity of five hundred acres you are to represent the same to us through one of our principal Secretaries of State together with your reasons for such recommendations in order that our pleasure may be signified to you thereupon.

[469] Murdoch, Epitome of Laws, *supra* note 46 at 242

[470] *Supra*, note 165.

[471] Buller Report, *supra* note 165, Appendix B at 18.

[472] Quit rent is rent that was owed to the Crown after a land-grant recipient settled on the land.

and every year, or, in default of such payment, the Grant to be void.[473] However, if the grant exceeded 200 acres, the 1807 Land Administration Laws required the grantee to pay to the Receiver-General quit rent in the amount of five shillings for every fifty acres granted over and above the quantity of 200 acres.[474]

The collection of quit rent was an integral component of the legalized land administration system. It will be recalled that Britain's primary objective for colonial settlement was financial gain to Britain. To accomplish this, the costs of administering colonialism were best paid through what little revenue the colony could generate. Land revenue was a key source revenue generation. Therefore, it was imperative that the governor establish and maintain effective financial controls, a vital responsible that the Secretary of State of War and Colonies emphasized in his concluding instruction to the Governor of Nova Scotia in 1807, as follows:

> And it is Our further Will and Pleasure that you do consider of a proper and effectual method of collecting, receiving and accounting for Our Quit Rents when the same shall become payable whereby all Frauds, Concealment, Irregularity or Neglect therein may be prevented and whereby the receipt thereof may be effectually checked and controlled. And if it shall then appear necessary to pass an Act for the more speedily and regularly collecting Our Quit Rents you are to prepare the heads of such a Bill as you shall think may most effectually conduce to the procuring the good ends proposed and to transmit the same to us through One of Our Principal Secretaries of State for Our further directions therein.[475]

3.4.6 Cultivation Conditions

In addition to the payment of quit rent, land grants were subject to occupation and cultivation conditions that endangered the legality of their status as land grants. For every fifty acres of "plantable" land, each grantee had up to five years to clear and work

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[473] The 1807 Land Administration Laws, *supra* note 193 at para 6. Campbell, Land Grants, *supra* note 361 at 51 points out: "In some respects, the drafting of the early Crown land grants in eastern Australia left much to be desired. Frequently the grants of conditional fees contained a clause declaring that on breach of condition the grant should be 'null and void' and the premises forfeit and escheat to the Crown. However, breach of a condition in a grant of a proprietary interest does not *ipso facto* determine either a private or a Crown grant on condition subsequent, but merely renders it voidable."
[474] *Ibid* at para 3
[475] *Ibid* at para 19.

at least three acres of that part of the land which the grantee shall judge most convenient. Alternatively, the grantee could clear and drain three acres of swampy or sunken grounds or drain three acres of marsh if any such lands were on their tract. For every fifty acres of "barren" land, each grantee was required to, within three years of the grant, put and keep on his land "three neat cattle which number he shall be obliged to continue on his land until three acres of every fifty of the improvable land shall be fully cleared and improved."[476] It is interesting to note here the expectation that grantees would acquire both plantable and barren lands on their lot. However, contingencies were in place in the event the entire lot was barren. The 1807 Land Administration Laws stipulate that if no part of the grantee's tract of land was fit for immediate cultivation, the grantee was obligated to erect upon the barren lands a "habitable dwelling house" within three years from the date of grant and at the same time keep "three neat cattle" for every fifty acres of granted land.[477] Furthermore, if the granted land was "so rocky or strong as not to be fit for culture or pasture" than the grantee could satisfy the cultivation conditions by employing within a reasonable time from the date of grant and for a duration of at least three years, "one able hand for every hundred acres in cutting wood clearing the land or in digging any stone quarry."[478]

The determination of plantable or rocky and barren land, and the quantity of both on each tract of land, was required to be made by the land surveyor upon instruction from the governor in the warrant of survey, and described by the surveyor in the plan description.[479] It is important to note that the 1807 Land Administration Laws required

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[476] *Ibid* at para 4.

[477] *Ibid* at para 4: ""[…] if any persons shall take up a tract of land wherein there shall be no part fit for present cultivation every such person shall be obliged to erect thereupon within three years from the date of his grant an habitable dwelling house and also to put on his Land the like number of three neat cattle for every fifty acres […]."

[478] *Ibid* at para 4: ""if any person shall take up land which shall be so rocky or strong as not to be fit for culture or pasture such person employing within a reasonable time from the date of his Grant and continuing to employ for the space of three years then next ensuing one able hand for every hundred acres in cutting wood clearing the Land or in digging any stone quarry it shall be deemed a sufficient cultivation."

[479] *Ibid* at para 4: "[…] and in order to ascertain the true quantity of plantable or rocky and barren Land contained in each Grant to be issued in our said Province you are to take special care that in all Surveys hereafter to be made every Survey be required to take particular notice according to the best of his judgement how much of the Land so surveyed is plantable and how much is barren rocky or otherwise unfit

the governor to evenly spread out the plantable and barren lands among the grantees. They state:

> […] And Our Will and pleasure is that in all Grants of Lands to be made by you as aforesaid [,] regard be had to the profitable and unprofitable acres that each Grantee may have a proportionable number of one sort and the other as as[sic] far as local circumstances may admit.

It is probable that the Lieutenant Governor, on the advice of the Surveyor General, violated this aspect of the law when deciding the location of the Black Refugee settlements. There have been many concerns expressed about the poor quality of land that was allocated to the Black Refugees, and while much of the land in Nova Scotia was difficult to cultivate, particularly in the interior parts of the province, having regard to the racial context in which these decisions were being made, the Black Refugees were likely settled on disproportionate amounts of barren lands relative to White settlers. This racial disparity in land quality would have then exacerbated the inability of the Black Refugees to meet the terms of the grant (had the grants been issued as they should have been). Demonstrating to the government that the cultivation conditions were met was a necessary step toward finalizing a land grant, but the legal process for proving completion was not simple nor straightforward. When a grantee reached their cultivation milestones, they then had to attend their local county court to have the proof certified by the judge and jury foreman, which certification then had to be filed with the registrar's office to be recorded into the registry with the corresponding grant, or otherwise risk forfeiture of the land.[480]

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for cultivation and to insert in the Survey and Plot by him to be returned as aforesaid the true quantity of each kind […]"

[480] *Ibid* at para 5: ""And when any persons who shall hereafter take out Grants for any Land shall have settled planted and cultivated or improved the said Land or any part of it according to the directions and conditions above mentioned such persons may make proof of such seating, planting, cultivation and improvement in the general Courts of the Counties or Districts where such Lands shall be and such proof shall be certified by the Judges and Foremen of the Grand Juries of the said Courts to the Registers Office and be there entered with the Record of the said Patent a Copy of which shall be admitted on any Trial to prove the seating and planting of such Land, and every three acres which shall be certified to be cleared and worked as aforesaid shall be accounted a sufficient seating, planting, cultivation or improvement to save from forfeiture fifty Acres of Land in any part of the Tract contained with the same Grant or Patent."

Colonial land in Nova Scotia was granted with the expectation that the recipient would occupy and cultivate their property. Land cultivation milestones were often expressed as conditions in the land grants, or in the paperwork that preceded the grant such as a ticket of location. Historian Lillian Gates writes: "[I]t was generally understood that land was granted on condition of cultivation. The location tickets which preceded the patents contained this condition."[481] However, as Gates also points out, while land had been granted on condition of occupation and improvement "the requirement had neither been defined nor enforced.'[482] This lack of clarity often meant that cultivation expectations were not met, despite them being conditions precedent to the grant. In addition, the cultivation requirements were often unenforced by government officials. To this end, Gates writes: "It took time to perform settlement duties and if settlers could not receive their patents until these duties were proved by the filing of a proper certificate […] the land officers could not receive their fees until the patents were passed.[483] This created an incentive for government officials to confirm grants event though conditions remained unfulfilled.

3.4.7 Prescriptive Nature

While the 1807 Land Administration Laws did not prescribe the form of land grant document *per se*, they did give precise instructions on some of its terms. For example, there was specific instruction that the terms and conditions must be specified in every land grant, along with an express clause that if the terms and conditions were not fulfilled within five years from the date of the grant then the grant shall be void and of no effect and the lands reverted back to the Crown.[484] It is important to note here the injustice of occupying and cultivating land for five years with permission, only to have it forfeited when one or more of the strict conditions remained unfulfilled or perhaps fulfilled but

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[481] Lillian F. Gates, *Land Policies of Upper Canada* (University of Toronto Press, 1968) ["Gates, Land Policy"] at 125.
[482] *Ibid* at 124.
[483] *Ibid* at 126.
[484] The 1807 Land Administration Laws, *supra* note 193 at para 7.

not demonstratable as such through the legalized bureaucracy of the courts and government offices.

There were other areas where precise wording was prescribed by law, such as the requirement that each grant specify the county and parish in which the granted lands were situated,[485] and the requirement that all grants of land contain a clause which reserve to the Crown and its heirs and successors all mines and minerals.[486] There were also requirements to insert a clause which deems the grant null and void if the lands contain timber that should be reserved for the royal navy.[487] Lastly, to ensure the settler population were aware of the new land laws, the governor was required to publicly announce the terms and conditions by proclamation.[488]

3.4.8 Surveyors

As previously mentioned, land surveyors formed an integral part of the colonial land administration process. They were relied upon to lay out the lots and mark the boundaries, which comprised an essential component of every land grant. Land surveyors were given extraordinary discretionary power to describe the lands and distinguish between plantable land and barren land and to allocate which sort to which grantee. The Surveyor-General was an esteemed member on the Majesty' Council, and the position that was held in its entirety by the influential Morris family spanning four generations.[489] However, notwithstanding the surveyor's immense power, they too were not spared from imperial instruction which, among other things, prescribed the rules by which land surveyors conducted their surveys. For example, the 1807 Land Administration Laws required surveyors to run the boundary lines in such manner that the length of land tract did not extend along the shoreline or riverbanks but rather into the mainland so that the grantees would have "a convenient share of what accommodation such Shores or Rivers may afford […]" and further, that sufficient space be marked out and reserved for roads

[485] *Ibid* at para 11.
[486] *Ibid* at para 13.
[487] *Ibid* at para 14.
[488] *Ibid* at para 17.
[489] See above at Part 3.3.1 for discussion on the Morris family in the position of Surveyor-General.

from the interior settlements to the shoreline and riverbanks, and the front of every lot not exceed eighty rods.[490]

The land surveyors were trusted colonial administrators, appointed under the Surveyor General, and obligated to swear an oath for the due performance of their office and return of their exact surveys.[491] Yet, despite their immense discretionary power over the administration of land in this province, they were not authorized by law to decide lot sizes. This power was reserved for the governor with the advice and consent of the Majesty's Council. It is important to remember this point when examining the circumstances that resulted in the Black Refugee's receiving only ten acres lots of land, on the advice of the Surveyor General.

3.4.9 Escheatment

The 1807 Land Administration Laws were instrumental in carrying out the land administration policies of the early nineteenth century. The end of the 1790 restraining order on land grants opened a new era of gratuitous, albeit conditional, land grants. It also paved a new road for the governor to reclaim the much-needed land that was being tied up in previously issued land grants but abandoned or otherwise unimproved. In this regard, the Secretary of State of War and Colonies wrotes to the Governor of Nova Scotia:

> And whereas considerable bodies of Land within Our said Province are claimed or held by persons who have not improved and cultivated the same nor otherwise complied with the Terms and Conditions of their respective Grants and in most instances no Quit Rents reserved to Us have been paid thereupon. And whereas many loyal Subjects who may hereafter come into Our said Province may be desirous of settling and improving the Lands which are under the circumstances aforesaid. It is Our Will and

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[490] The 1807 Land Administration Laws, *supra* note 193 at para 8. Other examples of precise instructions applicable to surveyors are requirements to establish townships with specific elements of construction (para 10) and the requirement to divide the Province into counties, parishes and towns, and reserve five hundred acres of land for churches and schools (para 11)

[491] *Ibid* at para 12. "And you are to give strict orders to the Surveyors who may be employed to mark out the said Townships and Towns to make returns to you of their Survey as soon as possible with a particular description of each Township and the nature of the soil within the same, and you are to take care that the Surveyor General and the several persons who may be appointed under him to survey the Lands in Our said Province do take an Oath respectively for the due performance of their Officers and for obliging them respectively to make and return exact Surveys and Plots of all such Lands as may be by them laid our as aforesaid."

> pleasure that **you do give directions to the proper Officers that such legal steps be taken as may effectually revest in Us Our Heirs and Successors such Lands as by Law are liable to be escheated and forfeited** within Our said Province either by non improvement, non payment of Quit Rents, or non performance of any other conditions of the Grants and thereupon to grant the same to such persons in such quantities and upon such conditions as by these Instructions you are directed and authorized.[492] [emphasis added]

The escheatment process proved to be more difficult and costly than the Colonial Office thought it to be, and so it was many years before the province took meaningful steps to recover escheatable lands for redistribution.

3.4.10 Legalizing Prior Land Grants

It will be recalled that the 1790 land grant embargo created an underground system of informal land allocations because the governor was prohibited from issuing free land grants. This resulted in many British immigrants settling on lots of land with informal permission from the governor to occupy it on the hope that one day he would be permitted to grant title, or in other situations, settlers adversely possessing land without authorization from either Crown or the absent landowner. Despite the Colonial Office's attempt to curb the "irregularities" of the eighteenth-century land laws with the 1790 restraining order, those irregularities in land grants persisted, just in a different form. Whereas the legal grant of large tracts of land to speculators may have discontinued,[493] illegal grants of land were issued with ostensible authority and promises of title, without any controls in place to assess the validity of the government decision making. Thus, one of the key objectives of the 1807 Land Administration Laws was to legalize title to previously issued land grants by prioritizing the processing of their applications. This was one of the first of many land titles clarification initiatives that the province of Nova Scotia would undertake over the next 200 years.

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[492] *Ibid* at para 18.

[493] It is debateable whether the 1790 embargo was followed in practice. In his testimony in the Buller Report, the Provincial Secretary comments that the 1790 moratorium "does not appear to have been very strictly attended to"). See Buller Report, *supra* note 165, Appendix B at 11.

The 1807 Land Administration Laws aptly describe the problem, and the government's approach to resolve it:

> And whereas it is understood that many Persons since the date of Our restraining Order of the sixth day of March 1790 have been **induced to settle** upon portions of the Waste Lands within our Said Province **in the expectation of receiving regular Titles** thereto when the above mentioned Restrictions should be withdrawn. It is Our Will and pleasure that all due preference and encouragement should be given to the applications of persons so circumstanced for Grants of the Lands upon which they may have actually settled or which they had received permission to occupy subject however to the restrictions contained in these Instructions with respect to the number of Acres to be granted and provided they do within twelve months after publication notice given by you of Our gracious intention in this respect apply for and take our Grants in proper form for the same.[494] [emphasis added]

Unfortunately, the problem of irregular titles and squatting persisted in Nova Scotia, despite many attempts by government to rectify the situation. Thus, the land titles issue was not and is not unique to African Nova Scotian communities, yet the cycle of poverty that is often attributed to this problem, seems to have disproportionately affected African Nova Scotians.

3.4.11 Tenure

It is important to note that the 1807 Land Administration Laws made no mention of tenurial concepts such as fee simple or licences of occupation. When the Secretary of State for War and Colonies communicated the 1807 Land Administration Laws to the Governor of Nova Scotia, there was reference to settlers who "received permission to occupy" land during the land grant moratorium, but the terms 'licence of occupation' or 'tickets of location' were not used and the implication appears to be that the occupancy with permission was an oddity, and not the intended normal course of colonial settlement. Likewise, while a land grant conveyed fee simple interest in the land, such terminology did not form part of the 1807 Land Administration Laws. It wasn't until fourteen years later that the term 'tickets of location' finds its way in the Nova Scotia land

[494] *Ibid* at para 9.

administration laws, through the 1821 Land Board Regulations[495] established by then Lieutenant Governor Sir James Kempt.

3.4.12 Additional Instructions (1811-1820)

Within the 15 years after the 1807 Land Administration Laws, which were released during the time of Sir John Wentworth as the British-appointed Lieutenant Governor Nova Scotia (1792-1808), the colony of Nova Scotia experienced three changes to the role of Lieutenant Governor, Lieutenant Governor Sir George Prevost (1808-1811), Lieutenant Governor Sherbrooke (1811-1816), and Lieutenant Governor Dalhousie (1816-1820). With each appointment came new instructions from the Colonial Office, but the 1807 Land Administration Laws were preserved throughout the entirety of their terms.

There is much to be learned from critical assessment of the imperial instructions that were sent to newly arrived colonial governors in Nova Scotia. They are a harsh reminder of the systematic and subtle methods that were employed by Britain in the process of colonialization that are now so deeply entrenched in the fabric of this province that change seems impossible. The rigid establishment and elitist administration of the legal system through these royal instructions is but one example of inherited colonial structures in this province. The royal instructions are detailed and prescriptive and demonstrate a high degree of experience in systematically dominating the space of others. However, for the purposes of this thesis, the royal instructions in their entirety will not be examined in detail, except what has already been discussed pertaining to the constitutional framework derived from the royal commissions that were sent to Governor Cornwallis in 1749.[496] Suffice it to mention that the royal instructions dated October 22, 1808 that were sent to Lieutenant Governor Prevost, the royal instructions dated April 12, 1816 that were sent to Lieutenant Governor Sherbrooke, and the royal instructions dated April 27, 1820 that were sent to Lieutenant Governor Dalhousie, add little more in

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[495] A description of the 1821 Land Board Regulations can be found under "Board of Land Commissioners" in Farmer's Almanack for the year of our Lord 1826 (Halifax: C.H. Belcher, [1825], no pagination at canadiana.org. See Part 3.5 for discussion ["1821 Land Board Regulations"].

[496] Cornwallis Instructions (1749), *supra* note 155.

terms of historical records which describe the land administration laws, policies, and practices at the time of the Black Refugees' arrival.

3.5 The 1821 Land Board Regulations

While the 1807 Land Administration Laws ushered in a new era of gratuitous land grants, with annexed conditions to ensure productivity, colonial land administration challenges endured. Nevertheless, the responsibility for the administration of colonial lands which was, in practice, delegated to the governor and his colonial officials by virtue of royal instructions from London, persisted until the 1815 when "[t]hereafter an interest in the waste lands of the colonies gradually revived in the colonial office."[497] Historian R.G. Riddell points to a number of reasons for the imperialists' renewed interest in the colonies, including the economic distress after the War of 1812 and the over-population and unemployment in Britain. It was thought, Riddell writes, that "emigration would become 'a safety valve' by which the unwanted poor could be let escape"[498] and by that by this process "a pauper, for whose labour no renumeration can be afforded at home, will be transmuted … into an independent proprietor."[499] While the Colonial Office sought to use land policy as a means to promote and assist emigration, they encountered resistance by settlers in Nova Scotia, which contributed to "prevalent dissatisfaction amongst colonial officials over the existing regulations."[500] Riddell writes:

> In every colony governors found that **effective control of the land** had fallen into the hands of a group of **local office-holders** with **little inclination to let land serve the purposes of emigration**, and that all **efforts at reform ran foul of local vested interests**. A further argument for change appeared when Bathurst in the colonial office **gradually became aware of the fact that land was of value only in relation to capital**. Waste lands in the hands of colonists without capital to develop them was valuable as a speculation only, and no amount of supervision could alter this fact. Bathurst, therefore, **set himself to devise a system by which**

[497] Riddell, Land Policy, supra note 390 at 389.
[498] *Ibid* at 389.
[499] *Ibid* at 389.
[500] *Ibid* at 389.

> **land would be given only to settlers with the means to develop it**.[501] [emphasis added]

Thus, the general dissatisfaction with the ineffectiveness of the 1807 Land Administration Laws as a tool to facilitate emigration was a reason for change in the land administration system, and a divide between capitalists and labourers was beginning to take form. By 1818 the colonial government in Nova Scotia accelerated its efforts to facilitate the settlement of European immigrants.[502] For example, the government took more proactive measures to liberate land that was tied up in abandoned land grants and invested more resources into the province's transportation infrastructure.[503] However, most European immigrants did not have the financial means to buy or rent property, or to pay the associated fees and conditions of the "free" land grants. [504]

As European immigration peaked after the War of 1812, and post war recession plummeted most employment opportunities, a growing group of pauper immigrants were descending upon the shores of Nova Scotia and, amid the disorder of accepting them, the land administrations laws were becoming more difficult to administer and enforce. The colonial scheme to distribute land was not working for the pauper immigrants and so land squatting became rampant, especially in Cape Breton.[505] Thus, fourteen years after the adoption of the 1807 Land Administration Laws, and only five

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[501] *Ibid* at 389.
[502] This is not to suggest that colonists in Nova Scotia did not want more settlers. They wanted settlers, but settlers with capital or other contributions of value. See Grant, Immigration and Settlement, *supra* note 59 at 76: "During the first two decades of the 1800s, Nova Scotia was hungry for immigrants to settle on the waste lands of the province. In 1814 when the war in Europe seemed about to end, the Council and Assembly of Nova Scotia, speaking as was their want for all British North America, "humbly' told the Imperial Government that henceforth immigration from Britain should be directed to the colonies. The colonies, they said, had already been deprived of too much strength by British immigrants flocking to the United States. Lieutenant-Governor Sherbrooke wanted regiments of soldiers disbanded and settled in Nova Scotia; but, with the news of Napoleon's return to the field, all regiments were recalled to Europe and none were available for settlement."
[503] J Martell, Immigration and Emigration, *supra* note 70 at 21 "Escheats, mostly of Loyalist land, freed over 70,000 acres in 1819 and perhaps 20,000 acres in the two years that followed, and thousands of pounds were being spent annually in improving the old highways and making new roads."
[504] Martell, Immigration and Emigration, *supra* note 70 at 21.
[505] In the Buller Report, *supra* note 165, Appendix B it was estimated that 20,000 individuals, or half the population of Cape Breton, were settled on land to which they had no title. See also Burroughs, Administration of Crown Lands, *supra* note 164 at 98.

years after the settlement of the Black Refugees in communities such as Upper Hammonds Plains, Nova Scotia's Lieutenant Governor Kempt established new land granting procedures to help curb the problems that were being experienced by many White settlers across the province.

In 1821 Lieutenant Governor Kempt established the Boards of Land Commissioners in each county [506] for the purpose of "facilitating the settlement of emigrants and other poor persons on the Crown Lands in this Province with the least possible trouble and expense."[507] Through these regulations, which supplemented but did not supersede the 1807 Land Administration Laws, a person desirous of obtaining land within the county limits could submit a petition, addressed to the Lieutenant Governor, containing a description of the land applied for,[508] along with "usual declarations" including an oath that that the petitioner had no knowledge of any person being located on the land. What was changed, however, is that a two-tiered land distribution system was then triggered. Those who could afford the costs of the land granting process could proceed through the normal course prescribed in the 1807 Land Administration Laws. Those who could not afford such costs were directed to the Boards of Land Commissioners who were empowered by the Lieutenant Governor to grant tickets of location for temporary permitted occupancy, rather than land grants. In doing so, historian J.S. Martell writes:

> the government made what was probably its most helpful move. Board of Land Commissioners were set up in the different localities to **iron out irregularities** in settlement, discourage land-jobbing, **and assist poor people and immigrants in becoming established**. Henceforth, instead of petitioning the Governor for land or walking many miles to the capital to make a personal appeal, prospective settlers could apply to their local Board for a **temporary ticket of location**, and when the time came to take permanent possession,

[506] Brown, Cape Breton, *supra* note 410 at 444. See also Buller Report, *supra* note 165, Appendix B at 16 where Provincial Secretary Sir Rupert George opined that the Board of Commissioners was not beneficial.
[507] A description of the 1821 Regulations can be found under "Board of Land Commissioners" in Farmer's Almanack for the year of our Lord 1826 (Halifax: C.H. Belcher, [1825], no pagination at canadiana.org ["Farmer's Almanack (1826)"].
[508] A plan for each county was made available, and one deputy surveyor (and his appointed assistants) was made available for each county.

> they were allowed to join with others (five was the limit) in one grant for the ordinary fee which was split between them. This system remained in effect until 1827 when, in reluctant conformity with Imperial instructions, the Surveyor-General of the peninsula ordered that Crown Lands be sold.[509] [emphasis added]

While the objectives of the 1821 Land Board Regulations were three-fold, being (1) to iron out irregularities in settlement, (2) discourage land-jobbing , and (3) assist poor people and immigrants in becoming established, the focus in this thesis as it pertains to the Black Refugees is that the 1821 Land Board Regulations facilitated assistance to poor White immigrants to acquire more land, but at the same time, denied the Black Refugees from accessing this benefit under the law by excluding them from eligibility.

3.5.1 Tickets of Location

Under the 1821 regulations, the Board of Land Commissioners were directed to appoint a secretary and meet at least once a month to receive petitions from persons desirous of obtaining land with the limits of the commission. The petitions had to be addressed to the Lieutenant Governor, (which was likely a workaround to ensure compliance with the 1807 Land Administration Laws) and were required to contain a particular description of the land applied for, as well as the usual declarations to be made in land petitions. For example, petitioners were required to make oath that they had no knowledge of any person being located on the land applied for or making any claim thereto. The petitions were then taken into consideration by the commissioners at their general meeting, and “if upon a careful inquiry into their character and circumstances” the commissioners thought the petitioner would be a good settler and faithful subject of his Majesty, then the commissioners were authorized to grant the petition tickets of location in varying lot sizes. To unmarried men, they were authorized to issue a ticket of location for 100 acres, and to married men, 200 acres. But they were not allowed to issue tickets of location for land exceeding 200 acres without special authority from the Lieutenant Governor. Once the tickets were in hand, the recipients had to immediately cultivate and erect a house upon the land that was allotted to them, or risk not having

[509] Martell, Immigration and Emigration, *supra* note 70 at 21.

the grant confirmed. The tickets were merely an authority to settle on the lands and were valid only for twelve months, but to make the taking of grants as easy as possible, the regulations allowed up to five settlers to be included in one grant.[510] The ticket holders had to pay the usual fees to have their tickets confirmed as grants, which were roughly 70 shillings on 200 acres, and after the grant issue, they had to pay annual quit rent of 2 shillings per 100 acres, which was consistent with the 1807 Land Administration Laws. However, as with the quit rent obligations under the 1807 Land Administration Laws, in practice, the quit rents "had never been paid or collected."[511]

3.5.2 Black Refugees Ineligible

At this point, one may wonder why the Black Refugees who, by 1821 were settled in the province for more than five year (hence proved to be "good and faithful subjects") and had been already burdened with similar possessory title (licences of occupation) but to smaller lots of land (10 acres), could not avail themselves of better tenure and larger lots through this new system of efficiency and affordability. However, two key features of the 1821 land regulations served to exclude the Black Refugees from this land settlement incentive, notwithstanding their ostensible fit with the aim of the regulation's objective. First, before the commissioners could grant tickets of location, they had to be satisfied that the petitioner had not previously received land from the government and did not possess any land by purchase of otherwise. By reason of the colonial settlement decisions made five years prior that placed the Black Refugees on mediocre land in terms of size, quality, and tenure, they were once again denied an opportunity for economic growth through government-based initiatives. Second, the 1821 land regulations expressly prohibited the granting of any tickets of location to any person who resided in the province for a period longer than six months. The resident settlers, which at that point included the Black Refugees, had to forward their land petitions through the Board of Commissioners to the Lieutenant Governor who processed the petitions in the same manner prescribed in the 1807 Land Administration Laws. Thus, not only were the Black

[510] Farmer's Almanack (1826), *supra* note 507.
[511] Burroughs, Administration of Crown Lands, supra note 164 at 82.

Refugees excluded from the less costly and more efficient land allocation scheme in the 1821 Land Board Regulations, the procedures under the 1807 Land Administration Laws became more cumbersome and expensive with the insertion of yet another administrative office in the land granting process, being the Board of Land Commissioners. The fees payable to the secretary of the Land Board by every person presenting a petition to be transmitted for consideration of the Lieutenant Governor and Council was 1s 6d.[512]

3.5.3 Racially Disparate Impact

More research is needed to understand the degree to which pauper White immigrants seized their legal advantages to acquire crown land by sidestepping the "trouble and expense" of the usual land grant process. While over 28,000 immigrants arrived in Nova Scotia with government assistance between 1815 and 1831,[513] the 1821 Land Board Regulations appear to have not fully resolved their struggles with insufficient capital to acquire land,[514] nor the colonists' attitudes which discouraged their arrival.[515] The struggle to acquire quality land, combined with a lack of surveys and administrative processing and fees, is likely a leading reason why so many poor White immigrants resorted to land squatting. Historian Peter Burroughs comments,

> [u]nauthorized occupation was more prevalent in Nova Scotia than in any other part of British North America, because of the inferior quality of disposable land and the poverty of the greater number of immigrants. The facilities for squatting were so great, or rather the means of preventing it were so inadequate, that these

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[512] See Farmer's Almanack (1826), *supra* note 507 for breakdown of fees payable pertaining to Land Board for tickets of location and plan searches, as well as fees payable to surveyors and fees on grants of land. For example, the total fees payable on a grant of land for 100 acres payable to the governor, provincial secretary, surveyor general attorney general, auditor and quit rent amounted to 11£ 6s 6d (approximately $2,000 in present-day Canadian currency), and for 500 acres was 12£ 16s 6d (approximately $2289 in present-day Canadian currency).

[513] Burroughs, Administration of Crown Lands, *supra* note 164 at 95.

[514] *Ibid* at 96: "There is ample evidence to indicate, however, that the overwhelming majority of individuals who did arrive during this period continued to be impoverished and in great distress, and many of them found it extremely difficult to adjust themselves to the rigorous conditions of settlement in pioneering communities."

[515] *Ibid* at 92.

> newcomers immediately spread themselves over the waste lands of the province.[516]

Elsewhere, Burroughs points out that in the 1842 inquiry commission led by Lord Durham, it was estimated that 20,000 individuals, or half the population of Cape Breton, were settled on land to which they had no title.[517]

However, the effectiveness of the 1821 Land Board Regulations in resolving the troubles experienced by pauper White immigrants is not the point. The point is that the law responded to the realities of their impoverished situation and created a special pathway to prop them up, while at the same time, prevented the Black Refugees from availing themselves of the same advantage despite their impoverished circumstances that placed them squarely within the objectives of the law. And, while it may not have it easy for pauper White immigrants, with or without the wind at their backs, they were still provided advantage under the law as compared to the Black Refugees in terms of accessing crown land. The 1821 Land Board Regulations provided them with simplified access to larger lots of land, and unfairly excluded the Black Refugees from the same.

Unfortunately, despite the attempts to revive the gratuitous land granting system in 1807, including the 1821 Land Board Regulations to better accommodate the financial realities of pauper White immigrants, the land administration problems in colonial Nova Scotia endured. Historian Peter Burroughs explains that "past regulations, despite their complexity and frequent amendment, had failed to prevent large tracts of land from falling into the hands of speculators, absentee proprietors and others who were not *bona fide* cultivators of the soil."[518] However, the problem was not only the law itself, but also the institutions and actors that supported it. As one historian writes, "the real problem, however, was not to devise regulations but to enforce them."[519] The quit rents often went uncollected and unpaid without recourse,[520] and cultivation conditions were regularly

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[516] *Ibid* at 98.
[517] *Ibid* at 98.
[518] *Ibid* at 87.
[519] Gates, Land Policy, *supra* note 491 at 130.
[520] Burroughs, Administration of Crown Lands, *supra* note 164 at 88: "The colonial government had never enforced their payment with sufficient determination to overcome the natural reluctance of the settlers to

unfilled, yet the escheatment of land rarely occurred. Eventually the weaknesses in the law, combined with abuse and corruption by the actors[521] within the system, were exposed and by 1827, a radical shift in land policy reached the shores of colonial Nova Scotia.[522]

3.6 The 1827 Land Sale Regulations

On May 8, 1827[523], under the direction of the Colonial Office, Nova Scotia adopted a uniform system of land distribution through auction sales.[524] Pursuant to these laws, all Crown lands were required to be sold by auction with a minimum upset price as determined by the surveyor-general, instead of being issued as gratuitous land grants from the governor.[525] Much like the 1807 Land Administration Laws, the 1827 Land Sale Regulations were designed to advance specific economic and political policies, described as follows:

> The policy change was inspired by the ideas of a lobby group in Britain known as the colonial reformers, who looked to partially recreate the British class-based social structure of a small group of landowners and a substantial pool of tenants and labourers. It was also intended to raise revenues for colonial governments, for Britain in the 1820s was also implementing a policy of retrenchment in colonial spending.[526]

The class-based system of landownership referred to here is known as the Wakefieldian system of colonization, named after Edward Gibbon Wakefield, a convicted

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meet their obligations. The practice in Nova Scotia had been to allow settlers to build up considerable arrears which had then periodically been commuted."

[521] *Ibid* at 88: "Finally, the practice of making free grants of land had, almost unavoidably, given rise to frequent complaints of favouritism because governors had possessed a discretionary power of deciding what claims were admissible."

[522] *Ibid* at 83.

[523] May 8, 1827, is the date of the Provincial Secretary's Office publication in the 1828 Farmer's Almanack announcing the new land sale regulations. See C.H. Belcher, The Farmer's Almanack (Halifax, Nova Scotia, 1828) ["Belcher's Almanack (1828)"].

[524] A uniform system of land sale by auction was introduced much earlier in the United States, circa 1774. See Riddell, Land Policy, *supra* note 390 at 386. For a comprehensive discussion on the various circumstances leading up to the change in land policy across the British empire, including the United States' influence and the impact of the Edward Gibbon Wakefield theory, see Burroughs, Administration of Crown Lands, *supra* note 164.

[525] Burroughs, Administration of Crown Lands, *supra* note 164 at 82.

[526] Girard et al, History of Law, *supra* note 53 at 601.

convict who was imprisoned for three years in 1827 for kidnapping a fifteen-year-old girl in a scheme to inherit her family wealth. Afterwards, Wakefield was appointed a colonial officer who was known for his colonization scheme which aimed to populate a colony with a class-based combination of capitalists and immigrant labourers, financed by the sale of land to the capitalists who would in turn support the immigrant labourers through employment. The essence of his scheme required land to be sold by auction at a sufficiently low enough price to draw capitalists' investment, but high enough to exclude labourers as landowners. The revenue derived from land sales would serve to finance the administration of the scheme and used to promote the emigration of more labourers. Wakefield's scheme and techniques were very controversial but managed to influence the Colonial Office in their policy decisions that were ultimately implemented in colonies such as Nova Scotia in the 1827 Land Sale Regulations.[527]

3.6.1 Land Sales by Auction

Pursuant to the 1827 Land Sale Regulations, the lieutenant governor was required to issue a public notice in the Royal Gazette (or another widely circulated newspaper) detailing the time and place appointed for the sale of Crown lands in each district, along with the upset price at which the lots were proposed to be offered. The upset price was determined by the surveyor general and was roughly two shillings per acre.[528] The lots were then sold to the highest bidder, and if no offer was made at the upset price, then the lands would be reserved for future sale in a similar manner at a later auction. The maximum lot size available for auction was set at 1,200 acres, and the purchase money could be spread across four payment instalments, without interest. The first instalment was due at the time of the sale, and the second, third, and forth instalments were due in each subsequent year thereafter. If any of the instalments were not paid, the amounts

[527] See Riddell, Land Policy, *supra* note 390 at 398. However, Burroughs, Administration of Crown Lands, *supra* note 164 at 86 points out that the Wakefieldian theory alone did not cause the shift in land policy, writing "[…] the reforms of 1831 were not a sudden innovation wrought by Wakefieldians. They were rather the natural consummation of a trend which had gradually been developing during the previous decade as a result of experience and experiment in North America, as well as in various parts of Australia. Nevertheless, the new imperial policies exhibit certain distinct similarities to the Wakefield land programme."

[528] Burroughs, Administration of Crown Lands, *supra* note 164 at 82.

already paid were forfeited, and the land reverted to the Crown for sale again by auction.[529]

3.6.2 Law Reform for Poor Settlers

As with the 1821 Land Board Regulations, exceptions were made for the impoverished White resident settlers, in attempts to advantage their economic prosperity. Where a purchaser could not afford to advance the purchase money by installments, the commissioner of crown lands could allow them to purchase up to 200 hundred acres of land through lease-to-own type of arrangement. Rather than paying the purchase money in four installments with the first installment due upon sale, under the alternative payment plan the purchaser could occupy the land upon payment of a quit rent equal to five per cent of the purchase price, with one year's quit rent to be paid at the time of sale and annually thereafter. The purchaser then had twenty years to pay off the purchase price through the annual quit rents or pay it off entirely through up four installments of the net balance within the twenty-year timeframe. As with purchase money installments, upon failure to pay the annual quit rent the lands would be forfeited and referred for sale by auction.[530] Thus, after 1827, Crown lands in Nova Scotia could be either purchased on installments (up to 1,200 acres) or rented on terms almost identical to free grants (up to 200 acres).[531] However, as already pointed out, quit rents in practice were often not paid, nor collected. Thus essentially, this law provided a significant advantage to wealthy settlers who could purchase significant amounts of crown lands (up to 1,200 acres), at a price substantially equivalent to rent, but also advantaged poor settlers who could rent a moderate amount of Crown land (up to 200 acres) without ever having their rent collected.

An additional advantage was extended to the impoverished settlers who were also recent immigrants. While the 1827 Land Sale Regulations prescribed that Crown land could only be purchased during the regularly schedule annual auctions, recent pauper

[529] Belcher's Almanack (1828), *supra* note 523 at 1828.
[530] *Ibid*.
[531] Burroughs, Administration of Crown Lands, *supra* note 164 at 82.

immigrants who had not been in the province for more than six months preceding the last annual sale, could purchase up to 200 acres of land at interim periods throughout the year, at the same upset price as the offered at the last annual auction, and choose between the purchase installment option or the payment plan through quit rents over twenty years. [532]

It is not known the degree to which any of the Black Refugees purchased land under the 1827 land administration laws, either through the more expensive route of four payment plans for up to 1,200 acres, or through the more affordable payment plan option for up to 200 acres. There are a few land grants in Hammonds Plains from 1830s to 1850s which suggest that the Black Refugees did purchase some land through the 1827 Land Sale Regulations, but these acquisitions have often been mischaracterized as gratuitous land grants. However, it would not be surprising to find that the procedural aspects in the administration of these regulations impeded their participation in this land scheme, such as publication of the scheme in the Gazette as the means of communicating the details, or the racial hostility that the Black Refugees would have encountered had they arrived at the auction house to make a bid for land during the scheduled times. Unlike the newly arrived pauper White immigrants, the Black Refugees were more than six months in the province and so were not extended the advantage to purchase the land privately during interim opportunities, without the hostility of the crowd.

As is the case with the 1821 Land Board Regulations, which created a less costly and more efficient process for pauper White immigrants to acquire land under the 1807 Land Administration Laws, it is also not known the extent to which the modified land regime in the 1827 Land Sales Regulations effectively made a difference in assisting resident or recent pauper White immigrants in acquiring Crown land through the payment plan option or at the interim auction time slots. Some evidence suggests that the 1827 land sales regulations benefited resident settlers more so than new settlers. For example, Historian Peter Burroughs points out that between 1839 and 1841 only 18

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[532] Belcher's Almanack (1828), *supra* note 523.

immigrants bought 1,596 acres, as compared with 206 resident colonists who purchased 24,569 acres.[533] However, what this law does demonstrate it that, once again, the law attempted to respond and adapt to the impoverished circumstances of White people but failed to account for the unique circumstances of the Black Refugees who, at this point, were still waiting for their licenses of occupation to be confirmed as grants in fee simple.

3.6.3 No Patent Until Payment

It is important to note that while the 1827 Land Sale Regulations sought to distribute Crown land in exchange for valuable consideration, the payment plans, whether by four consecutive annual installments or quit rents spread over two years, meant that few purchasers left the auction with their land grant in hand. Not only were the usual land grant fees still payable to administrative officers such the governor, provincial secretary, surveyor-general, and attorney general, and the purchase money and quit rents were payable to the commissioner of crown lands, the 1827 Land Sale Regulations prescribed that "No Patent will be granted until the whole of the purchase money shall have been paid, nor any transfer of property made, except in case of Death, until the whole of the Arrears of the Instalments or Quit Rent shall have been paid."[534]

3.6.4 Commissioner of Crown Lands

With the adoption of the 1827 Land Sale Regulations came a newly created position, the Commissioner of Crown Lands. J.S. Morris was the inaugural appointee, who at the time of his appointment worked in the surveyor-general's office under the direction of his father, Charles Morris. Upon the resignation of his father as surveyor-general in 1831, J.S. Morris became the Surveyor General as well as the Commissioner of Crown Lands.[535] The Commissioner of Crown Lands was responsible for submitting annual reports to the Governor informing him of the quantity and quality of Crown lands in each district, together with his opinion as to which lands should be offered for sale and at what price. If the Governor agreed, the sale by auction process would begin.

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[533] Burroughs, Administration of Crown Lands, *supra* note 164 at 99.
[534] Belcher's Almanack (1828), *supra* note 523 at 4.
[535] Buller Report, *supra* note 165, Appendix B at 1.

3.6.5 Campaign to Convert Unperfected Grants

The 1827 Land Sale Regulations were a dramatic shift in land policy designed to attain uniformity across the British colonies by stripping the lieutenant-governor of their authority to issue "free" grant lands in the same way that had occurred for the preceding seventy years since the arrival of Governor Cornwallis. With the passing of the 1827 Land Sale Regulations, the lieutenant-governor no longer accepted applications for land grants either at his office (or through the Boards of Land Commissioners established under the 1821 Land Board Regulations), and no longer possessed the legal authority to issue free land grants to Crown lands in the province.[536] The change in law was inspired by Britain's relentless need to receive financial profit from the exploitation of land and other resources in its colonies. However, something had to be done about the land administration chaos that had resulted from decades of flawed and poorly managed previous land administration laws. Therefore, as with the 1807 Land Administration Laws that sought to "clean up" the land titles problems resulting from the 1790 land grant moratorium, the 1827 Land Sale Regulations aimed to do the same. At the same time as announcing the new land sales regime, the 1827 Land Sale Regulations encouraged all unperfected grant holders to convert their interests into fee simple grants with the following announcement:

> all persons holding Lands under Warrants of Survey, Tickets of Location, Crown Leases, or other authority from Government, will be allowed to obtain Grants in the accustomed manner, provided the fees for the same be lodged at the proper Office in Halifax, or with Henry W. Crawley, Esq. of Sydney, previously to the 1st of January next, after which time they will not be permitted to complete their Titles to their Lots, except by purchase, in conformity with the new Regulations.[537]

To put this into perspective, if a landowner acquired 100 acres of land under a free land grant from a lieutenant-governor under the 1807 Land Administration Laws (as modified by the 1821 Land Board Regulations which required the land petition to flow

[536] Belcher's Almanack (1828), *supra* note 523 at 4.
[537] *Ibid* at 4.

through the Board of Land Commissioners), they could be in occupation of land under a Warrant of Survey (with or without surveyed boundaries) for any number of years paying quit rent and improving their lot, without fee simple title pending the grant approval and documentation process through the many administrative offices and corresponding payment of fees. However, if one of those offices (including the surveyors) did not complete the processing of the grant within the six month timeframe between May 8, 1827 and January 1, 1828, being the date of the 1827 Land Sale Regulations and deadline for the landowner to perfect title, respectively, then the landowner would purportedly lose their chance to acquire title to their land by a free grant, notwithstanding their improvements and paid quit rent, and need to purchase the land at a public auction under the 1827 regulations.

However, assuming the landowner was able to meet this deadline and convert their interest into fee simple, the quit rents that would have otherwise been payable under the 1807 Land Administration Laws were essentially accelerated under the 1827 Land Sale Regulations such that the landowner had seven years to pay out twenty-years-worth of annual quit rent at 2 shillings per 100 acres, being a total payment of 40 shillings per 100 acres over the seven year period.[538] Note, however, that 40 shillings is still much lower than the cost to purchase land by public auction at an upset price ranging from 4 to 10 shillings per acre under the 1827 Land Sale Regulations.[539]

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[538] *Ibid* at 5: "And Whereas His Majesty's Government have further directed that the Quit Rents due to His Majesty, upon grants of Land, be collected from the 1st January last, the Net produce of which will be applied to such local charges or improvements as may receive His Majesty's approbation. Notice is therefor also given, that the said Quit Rents will be collected accordingly. […] all persons holding Lands from the Crown, in perpetuity, upon the payment of Quit Rents; as well as to all persons holding Lands upon lease for terms of years; for the payment of the rents which may be due from them respectively; to commence from the first of January, 1827; and the Commissioner of Crown Lands will at any time within seven years from the date hereof, sell to the Proprietor of any Lands held in free and common socage (but to no other person whatever) at twenty years' purchase, any Quit Rents which may be payable by them respectively, provided that all arrears, up to the end of the year preceding the time of purchase, be previously paid. If the Quit Rents were not purchased by the Proprietor within seven years from January 1, 1827, the lands were subject to sale by auction."

[539] Gates, Land Policy, *supra* note 491 at 131.

Testifying a few years later for the Buller Report,[540] then Provincial Secretary of the Province of Nova Scotia, Sir Rupert George, reported that approximately 1,820 people in Nova Scotia availed themselves of the 1827 campaign to convert land titles, covering about 200,000 acres. An additional 1,120 people in Cape Breton attempted to do the same, but as at Sir Rupert George's testimony, many of those grants remained incomplete for want of surveys, which most settlers were unable to pay.[541] It is unclear exactly what impact this land titles conversion campaign had on the land titles in Upper Hammonds Plains. Many scholars point to the 1834 Land Grant in Upper Hammonds Plains[542] as evidence to support claims that the lots allocated to the Black Refugees in Hammonds Plains were confirmed as grants.[543] However, as discussed throughout this thesis, the 1834 Land Grant was not a confirmatory grant but rather a grant purchased by the Black Refugees for monetary consideration.

3.6.6 More Barriers for the Black Refugees

The unified land sales system was not well received in Nova Scotia, nor administered with much success. For example, Surveyor General J.S. Morris testified in the 1838 Buller Report that only 120,000 acres of land had been disposed of through the land auctions, at an average purchase price of two shillings per acre, and that in many instances payment installments were not made.[544] It is possible that the new regulations compounded the title obscurity problems in the province by removing the flexibility of a lieutenant-governor to correct the title problems by confirming title to the previously issued, but unperfected, grants. The Nova Scotia government quickly realised that complete uniformity was not practicable and that local exceptions were needed, and with

[540] Buller Report, *supra* note 165, Appendix B.
[541] *Ibid*, Appendix B at 13.
[542] *Supra* note 253.
[543] Fergusson, Documentary Study, *supra* note 70 at 54: "Land was held at Hammond's plains by tickets of location or licenses of occupation until 1834 when a grant of 600 acres was made to 30 men.", citing the Copy of a Land Grant to William Day and a Number of other Black Refugees at Hammonds Plains (undated) PANS RG 1 Vol 419 Doc 120 (See also Fergusson, Documentary Study, *supra* note 70, Appendix XIII).
[544] Buller Report, *supra* note 165, Appendix B at 3.

this realization the push to get land policy into the hands of colonial legislatures was accelerated.[545]

It seems that the "inept land policy of the Imperial government was a source of grief to both the local officials and the immigrants themselves."[546] Requirements to pay fees on land grants or purchase crown land at auction sales, created barriers for most immigrants,[547] and as early as 1817 the Assembly of Nova Scotia proposed to the Colonial Secretary that "the newcomers should be given land 'free from any expense' and a few 'Implements of Husbandry'."[548] Tracts of land were occasionally made available by means of escheat, but at too slow of a pass to keep up with demand.[549] However, gradually land policies were reformed to better reflect the harsh realities of pauper immigration. Archivist with the Nova Scotia Public Archives, D.C. Harvey, notes there was an emerging reformist perspective that "every newcomer, though at first he might appear a burden, if put readily to work on the land, by preserving industry he would soon lay the foundation of a happy home."[550] But, sadly, those attitudes were not extended to the Black Refugees in the way they were to White settlers, including pauper White immigrants.

While the change in land laws to a uniform system of public auction sought to create equal opportunities for settlers to acquire land through competition in a "neutral" market, as with most neutral laws, the race-neutral approach to the uniform land sales system neglected to factor in anti-Black racism as a variable impact on the outcome. From the Black Refugees' perspective, being the group who were denied equal access to 1807 Land Administration Laws that could have rapidly "promoted and increased" their landholdings, as well as to the 1821 Land Board Regulations which could have granted

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[545] Riddell, Land Policy, *supra* note 390 at 403: "The uniform system was found inapplicable in all cases, and after a short period of general prosperity had passed, the system began to press heavily on the settlers. […] Gradually the demands of the colonists for reform became identified with a demand for local control."
[546] Martell, Immigration and Emigration, *supra* note 70 at Preface by D.C. Harvey.
[547] *Ibid* at Preface by D.C. Harvey.
[548] *Ibid* at 20 citing *Journal of Assembly*, Feb 27, 1817.
[549] *Ibid* at 20 citing *Journal of Assembly*, Feb 27, 1817.
[550] *Ibid* at Preface by D.C. Harvey.

them land with the "least possible trouble and expense",[551] the uniform approach of the 1827 Land Sale Regulations not only failed to serve the needs of the Black Refugees but ultimately had a discriminatory affect on their situation. When it came time to correct the meagre land possessions of the Black Refugees at various junctures in the land administration reforms, the 1827 Land Sales Regulations were used as legal justifications to block the Black Refugees from obtaining more prosperous land opportunities in exchange for the inferior ones that were thrusted on them upon their arrival. For example, when Lieutenant Governor Campbell suggested to Lord Glenelg in 1837 that the Black Refugees in Preston should be relocated to better land,[552] the request was denied.[553] The rejection was not for lack of desire (alone),[554] but rather based on a formal application of the law. Glenelg writes:

> The mode however in which you propose that this should be done is open to serious & I fear insuperable objections. **The free gift of any part of the Waste Lands of the Crown would involve a departure from the spirit as well as the letter of the present Land Regulations**, to the strict observance of which the faith of Her Majesty's Government has been so repeatedly pledged. Her Majesty's Government feel that they **would not be justified in sanctioning any infringement** of those Regulations **excepting in cases where satisfactory proof could be adduced that the Public interest imperatively required their relaxation**. **In the present instance, no such proof is afforded**. On the contrary the measure is merely an expedient for the relief of these People, the principle as well as the success of which seems to be very doubtful. […]. The proposed scheme appears to me directly calculated to cherish the mistaken & mischievous notion, that if they are to subsist at all, it

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551 These stated objectives are similar to those made in land titles clarification laws which aimed to "expediate" and "reduce cost" but often failed to accomplish those goals once a bureaucratic administrative system is established to implement the law.

552 C. Campbell to Lord Glenelg, 25 August 1837, PANS, Vol 115, pp 56-7, (Fergusson, Documentary Study, *supra* note 70, Appendix XVI)

553 In this correspondence, Lord Glenelg claimed to have insufficient information to make a final decision, but the tone suggests that he could not be persuaded to change his mind.

554 Journals of the Assembly of Nova Scotia 1838, Appendix 32 Lord Glenelg: "I need not assure you that it would afford me such pleasure to have it in my power to improve the unhappy condition of these Black." but then also writes: "the mistaken and mischievous notion that if they are to subsist at all it must be a proprietors of land, and not as labourers for hire."

> must be as proprietors of Land and not as Laborers for hire.[555] [emphasis added]

A rigid application of the law combined with anti-Black racist ideology led to an outright refusal to apply an exemption under the 1827 Land Sales Regulations, notwithstanding the purpose for doing was to redress an injury caused by the same office being asked to grant the exemption. Thus, also driven by fear of setting a bad precedent for expenditures,[556] Glenelg relied on the 1827 Land Sale Regulations to deny the Black Refugees an opportunity to improve their landholdings.

3.7 Conclusion

While a lot of information was covered in this chapter, it is hoped that one can better understand the **colonial context** in which the Black Refugees were settled upon their arrival to Nova Scotia after the War of 1812. More importantly, it is hoped that the **role of the law** is better understood in the creation and exacerbation of racial disparities in land-based wealth and poverty in this province. This chapter demonstrates how Britain imposed British law into the colony (without any regard for Indigenous existence), and how British law empowered the institutions and colonialists who administered the law to operate unchecked, which allowed the law to be applied in a racially discriminatory manner. That law, which Nova Scotia inherited, combined with the colonial institutions and actors appointed to administer it, created a legal system that asphyxiated the economic opportunities for African Nova Scotians and bolstered the economic opportunities for White Nova Scotians.

The next chapter explores in greater depth the precise ways in which the law created and exacerbated racial disparities in land-based wealth, particularly in the context of the Black Refugees settled in Upper Hammonds Plains. This work will demonstrate how the law, in addition to allowing the flagrant disregard of contractual promises combined

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[555] Glenelg to Campbell 25 October 1837 PANS RG 1 Vol 75 Pages 255-262, also Vol 422 Doc 50 (Fergusson, Documentary Study, *supra* note 70, Appendix XVII).

[556] *Ibid* where Glenelg writes, "The adoption of your proposal I perceive would be attended by another difficulty. I refer to the Expenditure. […]. Her Majesty's Government feel that they could not consistently do so, without establishing a most inconvenient precedent."

with a racially discriminatory application of the law, further exacerbated the racial disparities in land allocations through colour-blind approaches to law reform.

Chapter 4: Anti-Black Racism in Land Laws

4.1 The Impact of Land Laws on the Black Refugees

The underlying research question in this thesis asks: *what is role of the law in creating and reinscribing racial disparities in land-based wealth?* The intention is to reframe the land titles discourse into one that explores anti-Black racism and White supremacist ideology embedded within the origins of property law in this province, that resulted in, among other things, the inferior *quantity* of land that was allocated to the Black Refugees as compared to White settlers.

The following race-conscious legal analysis is guided by two vital questions pertaining to each of the 1807 Land Administration Laws, the 1821 Land Board Regulations, and the 1827 Land Sale Regulations. First, does this law exclude, underserve, financially exploit, oppress, or invalidate Black people? Second, does this law include, serve, financially resource, uplift, or validate White people?

The intention is to demonstrate three precise ways in which the land administration laws created and then exacerbated the racial disparities in land-based wealth in this province. First, the law allowed a racially discriminatory application of seemingly race-neutral laws (the 1807 Land Administration Laws) which disadvantaged the Black Refugees in terms of, among other things, smaller lot size. Second, the law aggravated the situation through the adoption of a colour-blind approach to law reform (1821 Land Board Regulations) that not only exacerbated the disadvantage to the Black Refugees by excluding them from eligibility because of the prior racial discrimination, but also launched pauper White immigrants into greater land-based economic opportunities. Third, the law (1827 Land Sale Regulations) intensified the land-based injustices against the Black Refugees by not only (again) creating opportunities for pauper White immigrants that excluded the Black Refugees from eligibility, but also through the adoption of a unified system of land sales, which (a) required the Black Refugees to pay monetary consideration to have their previously issued (smaller) lots confirmed as grants when ought to have been issued as (larger) free grants, and (b) on the basis of a strict interpretation of the law, served to deny the Black Refugees the opportunity to be relocated to better and larger lands when they sought to have these racial injustices redressed. In these ways, combined with its failure to protect the Black Refugees from Britain's flagrant disregard for compliance with the Cochrane Proclamation, the law created and then exacerbated the racial disparities in wealth and poverty that is exists in this province today.

4.1.1 Background Events

It is important to situate this critical race legal analysis into historical context of slavery. When the Black Refugees arrived in Nova Scotia between 1813 - 1815, slavery was still legal in the British empire, including Nova Scotia. The prevailing attitudes among colonists were that Africans and people of African descent were inferior to White people. The enslavement of Black people was vital to the global economy, including the economic prosperity in the United States.[557] Britain's military tactic to entice the African Americans to flee enslavement during the War of 1812 was strategic and effective. Yet, because of the prevailing anti-Black racist attitudes, Britain felt empowered to renege on its contractual commitments to the Black Refugees in the Cochrane Proclamation. These attitudes of anti-Black racism and White supremacist ideology persisted throughout the entire settlement process of the Black Refugees, including in the application of ostensibly race neutral laws and the adoption of colour-blind law reform.

It will be recalled that Vice Admiral Cochrane issued a proclamation during the War of 1812 which induced the enslaved African Americans to flee enslavement and join the British in exchange for freedom and 'encouragements' (see Part 2.2.3 above). This proclamation set a reasonable expectation that the Black Refugees would be treated like other 'free settlers' in the colony in terms of land grants (size, tenure, and quality). However, Britain reneged on this obligation and did not settle the Black Refugees as promised, but rather, sent them to the interior parts of the province in search of employment. On March 25, 1815, Vice Admiral Cochrane informed Lieutenant Governor Sherbrooke that he intended to send an additional 1,500 to 2,000 Black Refugees to

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[557] For example, see Robinson, The Debt, *supra* note 96; Beckles, Britain's Black Debt *supra* note 96; and Williams, Capitalism and Slavery *supra* note 96.

Halifax.[558] In the midst of a post-war economic recession, and inspired by his early desires to settle the disbanded soldiers,[559] Lieutenant Governor Sherbrooke then wrote to Secretary Bathurst on April 6, 1815, suggesting:

> as encouragement to those [Black Refugees] who are industrious and may be willing to settle and cultivate land, that they should on being located receive rations gratis for themselves and families **in the same proportions and for the same period as was allowed to the disbanded soldiers and their families who settled in this Province at the Peace of 1783**.[560] [emphasis added]

Lieutenant Governor Sherbrooke's suggestion to grant land to the Black Refugees was not a novel one. It was already a contractual representation[561] that was made one year prior in the Cochrane Proclamation which promised 'encouragements', meaning free land, implements, and provisions. However, based on the colonial correspondence in the Spring of 1815, the government had no intention to comply with this contractual representation. It wasn't until unexpected events revived their White-serving interests in doing so,[562] but on a reduced basis, being terms comparable to the disbanded soldiers instead of the average settler per the Cochrane Proclamation.

At this point, Sherbrooke had two pending land settlement requests awaiting Secretary Bathurst's approval, despite already having the legal capacity to grant land under the 1807 Land Administration Laws.[563] One dated March 15, 1815, asking to have the disbanded soldiers directed to Nova Scotia for settlement in the interior parts of Nova

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558 Grant, Black Immigrants, *supra* note 60 at 268.

559 See Martell, Military Settlements, *supra* note 182 at 79, citing Sherbrooke to Bathurst 15 March 1815 PANS RG 1 Vol 111, where Sherbrooke asks Bathurst to settle disbanded soldiers in Nova Scotia.

560 Grant, Immigration and Settlement, *supra* note 59 at 76 citing Lieutenant-Governor Sir J.C. Sherbrooke to Lord Bathurst 6 April 1815 C.O. 217/96.

561 See Part 2.2.3 above for discussion on the contractual nature of the Cochrane Proclamation.

562 See discussion above under Martell, Military Settlements, *supra* note 182. See also Derrick A. Bell, "Brown v. Board of Education and the Interest-Convergence Dilemma" (1980) 93:3 Harv. L. Rev. 518 for discussion on "interest convergence theory" which posits that perceived racial progress only occurs when White-serving interests align with Black-serving interests, and furthermore, that the progress fades when those measures stop serving the interests of Whites or threatens the superior societal status of White people.

563 As previously mentioned, the approval from the Colonial Office may have had more to do with the expense of rations and waiver of land grant fees, than the allocation of land itself which Sherbrooke was legally empowered to grant pursuant to the 1807 Land Administration Laws.

Scotia,[564] and one dated April 6, 1815, suggesting settlement of the late arrival Black Refugees.[565] It is important to note that by the end of 1814, Sherbrooke had made plans to receive the disbanded soldiers into the Hammonds Plains area in hopes of building a road to Annapolis Royal,[566] but no similar plans were yet arranged for the Black Refugees, including the early arrivals who had been in the province for over a year and a half at this point. However, knowing that the disbanded soldiers were needed in Europe and so could not be spared for settlement yet, Bathurst addressed Sherbrooke's two requests with one response on May 10, 1815, instructing him to settle the Refugees instead of the disbanded soldiers, with the encouragements analogous to the disbanded soldiers.[567]

Secretary Bathurst's sanction of Lieutenant Governor Sherbrooke's plans to settle the Black Refugees comparably to the disbanded soldiers was not immediately implemented by Sherbrooke, since on June 13, 1815, while approving Sherbrooke's plans to keep the Black Refugees at Melville, Secretary Bathurst again instructed Sherbrooke to settle the Black Refugees. This time, specifying "small grants" with no mention of the comparable treatment to the disbanded soldiers, Bathurst writes:

> The only other point in these Dispatches to which it is in any degree [illegible] relates to the disposal of the negroes landed in the colony by Sir Alex. Cochrane, and on this, while I equally approve the [line] adopted by you and the Instructions given in consequence [illegible], I wish merely to call your attention to the advantage

[564] See Martell, Military Settlements, *supra* note 182 at 79, citing Sherbrooke to Bathurst 15 March 1815 PANS RG 1 Vol 111, where Sherbrooke asks Bathurst to settle disbanded soldiers in Nova Scotia. On December 20, 1814, deputy surveyor John Harris reported that the tracts of land in the area was worth settling, and two months later, in February 2015, the Surveyor General Charles Morris testified that "he was not aware of 'any Range of Country (in every View of it)' more favourable for the settlement of farmers from the surrounding districts or for 'any of His Majesty's German or highland or Fensible Corps' that might be disbanded." Morris proceeded to recommend that compact lots not exceeding 200 acres each be laid out for the disbanded soldiers. But that "no land to be granted but to those who can give satisfactory proof of their becoming actual Settlers, or who will contribute to its immediate improvement."

[565] Grant, Immigration and Settlement, *supra* note 59 at 76 citing Lieutenant-Governor Sir J.C. Sherbrooke to Lord Bathurst, April 6, 1815, C.O. 217/96.

[566] Martell, Military Settlements, *supra* note 182 at 82.

[567] *Ibid* at 80, citing in footnote 4 P.R.O., C.O. 218/29. Bathurst to Sherbrooke, May 10, 1815. In his later work, "Immigration & Emigration" at 17, Martell explains that Bathurst, in this letter to Sherbrooke, states that: "If the Negroes did not wish to become miners, but preferred to be farmers, then they were to be given the same encouragements – free land, implements, and (for a limited time) provisions – that had been given in the eighteenth century to disbanded soldiers."

> which might result from giving to those persons, who are mostly accustomed to agricultural labour, **small grants** of land by the cultivation of which they might in a short time be enabled to provide for their own subsistence and to promote the general prosperity of the province in which they might be settled.[568] [emphasis added]

Sherbrooke replied to Bathurst on July 20, 1815, and as John Grant points out, while Bathurst's approval was a welcomed one, Sherbrooke cautioned in his reply that:

> the barren appearance of this country before it is cleared operates with other causes **against the immediate execution of it**, as the negro on the first arrival seem to dread so arduous an undertaking as the tilling of ground of this description appears to be.[569] [emphasis added]

However, he was:

> hopeful, however, that **many of the blacks, after being employed in the country and seeing the potential of the soil, might desire to cultivate it**. To those so inclined, he [Sherbrooke] promised to give every encouragement and informed the Colonial Office that he had '**already directed the Surveyor-General to look out for and reserve the most favourable situations now unappropriated** for the purpose of locating such of the free Negroes as are willing to become settlers.'[570] [emphasis added]

Thus, by July 1815, Sherbrooke had instructed the Surveyor General Charles Morris to find land suitable to settle the Black Refugees.[571] Both Sherbrooke and Morris seemingly forgot about (or were still hoping to reserve for the disbanded soldiers) the lands already deemed suitable at 100 acres each in Hammonds Plains through to Annapolis Royal, which Bathurst instructed him to give to the Black Refugees in his letter of May 10, 1815. It wasn't until November 1815 that the issue of land in Hammonds Plains

[568] Grant, Immigration and Settlement, *supra* note 59 at 77 citing Bathurst to Sherbrooke, 13 June 1815, RG 1, vol 63, doc 12.
[569] *Ibid* at 77 citing Lieutenant-Governor Sir J.C. Sherbrooke to Lord Bathurst, July 20, 1815, C.O. 217/96.
[570] *Ibid* at 77, citing Lieutenant-Governor Sir J.C. Sherbrooke to Lord Bathurst, July 20, 1815, C.O. 217/96.
[571] While Preston and Hammonds Plains were the two larger settlements established by the refugees, there were a number of smaller establishments. One of these was Refugee Hill where, like elsewhere, the lots were limited to "an uneconomical ten acres and held by tickets of location." *Ibid* at 85.

was revisited by Sherbrooke and Morris as a settlement option, this time for the Black Refugees at 10 acre lots instead of the disbanded soldiers in 100 acre lots.[572]

Writing to update Secretary Bathurst on November 21, 1815 with an update on the settlement in Preston, Sherbrooke informs him that "[a]nother Situation has been discovered well suited for the Negroes, and with which they appear to be much pleased [,] at Hammond Plains about twenty miles from Halifax."[573] Sherbrooke proceeded to explain that "one hundred eighty of the refugees were at work, clearing the land and building houses and that he hoped to have them and their families under shelter before the 'severe weather sets in." [574] Thus, in November 2015, Sherbrooke instructed the surveyors to run lines in preparation for lots.[575] It is not known whether the boundary lines would have already drawn in late 1814 in the preparations to settle the disbanded soldiers in the area, but if they were they would have been laid out in 100 acre lot sizes per Morris's testimony in February, 2015. However, by November 1815, when it came time to settle the Black Refugees on these lots instead of the disbanded soldiers, Morris had changed his position on lot size and instead applied his 10-acre lot size approach that he used a few months earlier to settle the Black Refugees in Preston.[576]

It makes sense that some Black Refugees were residing in the Hammonds Plains area before formally being settled there by the British government, some of whom were likely living on private lands owned by John Liddell.[577] It appears that by October 2, 1815,

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[572] *Ibid* at 82. "Other smaller communities were established at the North West Arm, on the Cobequid Road at Dartmouth, the Shubenacadie Road, and around the major settlements of Preston and Hammonds Plains."

[573] *Ibid* at 81, citing Lieutenant-Governor Sir J.C. Sherbrooke to Lord Bathurst, November 21, 1815, C.O. 217/96.

[574] *Ibid* at 82.

[575] *Ibid* at 82. "To further assist the refugees Sherbrooke requested that the items recommended by Council – axes and implements of husbandry, potatoes and seeds for two years, surveyors to run lines, issuers of rations, and conveyance of provisions – could be provide.

[576] When Sherbrooke then asked Charles Morris, the Surveyor General, for information about available land in the summer of 1815, recommended escheated lands in Preston and suggested compact lots of ten acres each. He also suggested that no land should be confirmed to them by grant until they had actually settled and furnished satisfactory proof "of their fixed determination to make a permanent Settlement" – see Fergusson, Documentary Study, *supra* note 70 at 39.

[577] *Supra* note 263.

British agents were appointed to issue rations to the Black Refugee in the area, and that John Liddell was a designed agent at Hammonds Plains.[578] At least one historian referred to John Liddell as the superintendent of the Hammonds Plains settlement.[579] The literature also shows that some Black Refugees were "settled on the estates of private landowners by the proprietor of the estates."[580] One scholar references a letter from Dominic De Broker and thirty-five other residents in Hammonds Plains who on December 4, 1819 petitioned for more land in the area that was owned by John Liddell but had since reverted to the Crown.[581] They stated that when the people had been settled by John Liddell and others in the Hammonds Plains area, "these landowners did not feel disposed to settle more than eighty families, with ten acres for each family.[582] They further declared that since then, several of them had built houses and made improvements on the abandoned lands.

The work of historian, J.S. Martell in *Military Settlements* lays a foundation from which the land settlement decisions experienced by the Black Refugees can be compared to that of the disbanded soldiers. This is especially the case in Hammond's Plains where the land was originally earmarked for a disbanded soldier settlement and then repurposed into smaller lots for the Black Refugees. First, it can be gleaned from Martell's work that Surveyor General Charles Morris recommended 200-acre lots for the disbanded soldiers in March of 1815, but only 10-acre lots for the Black Refugees in Preston a few

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[578] Grant, Immigration and Settlement, *supra* note 59 at 82. John Liddell owned land in Hammonds Plains. For example, he and two other men purchased 500 acres of land in Hammonds Plains for £20 in 1815. https://archives.novascotia.ca/african-heritage/archives/?ID=140&Page=201112291&Transcript=1. Grant, Immigration and Settlement, *supra* note 59 at 87. Biscuits, salt beef, pork rice, peas, fish hooks. "Rations continued to be issued during the spring and summer of 1816. […]. To receive rations it was necessary for those concerned to obtain a certificate which attested to their industry from either the agent in charge of them or the proprietor of the land on which they had settled."

[579] *Ibid* at 88.

[580] *Ibid* at 88. One example provided by historian John Grant shows a landowner, Laurence Hartshorne, agreeable to grant fee simple interest to thirty acres of land to each Black Refugee family on his estates in Parrsboro, Addington, and Antigonish provided they "actually 'sit down and cultivate' the land they received, and they could not sell it, without Hartshorn's permission, until seven years after he had deeded it to them, 'after which period they may be at liberty to dispose of it as they like'". Note that thirty acres is more than the ten acres that government unfairly provided to the Black Refugees at the time.

[581] *Supra* note 263.

[582] Fergusson, Documentary Study, *supra* note 70 at 51, citing in footnote 167 PANS, Box No. 7, Halifax County Crown Lands Plans, 1819.

months later in September 1815. The 10-acre lot sizes were then replicated for the Black Refugees in Hammonds Plains in November 1815, notwithstanding that Hammonds Plains was likely already prepared for 200-acre lots to receive the disbanded soldiers earlier that year.[583] Martell's work also refutes a common misunderstanding that all Black Refugee settlements were on disproportionately poor-quality land. The quality of land in the Black Refugee settlement in Hammonds Plains may have been not much worse than the quality of land elsewhere in the province. However, that is not to say that the land was not rocky or barren. Lastly, it appears that the Surveyor-General Charles Morris played an instrumental role in the land tenure decisions which resulted in the Black Refugees receiving licenses of occupation instead of fee simple land grants, which was a similar approach that he adopted for the land allocated to the disbanded soldiers around the same time, but which was later confirmed as grants in fee simple.

4.1.2 Hammonds Plains Settlement

After being institutionalized for eight months at the former military prison known as Melville Island, several Blacks Refugees were settled on lands at Hammond's Plains by the end of 1815. In November of that year George P. Brehm surveyed the boundaries for their settlement, and John Liddell and Thomas Johnston were the issuers of their provisions.[584] The exact number of Black Refugees first residing in Hammonds Plains is unclear. According to C.B. Fergusson, who based his numbers on lists of people entitled to rations (which is not determinative of people actually on the lands), the number of recorded Black Refugees in Hammonds Plains started somewhere between 42 and 80 in 1815.[585] However, in one archival record dated November 17, 1815, it shows that Mr. Liddell ordered provisions for 360 men for six months.[586] Also, in another (undated) archival record from 1815, there are 122 "people of colour" in Hammonds Plains listed as

[583] See discussion above under Martell, Military Settlements, *supra* note 182.
[584] Fergusson, Documentary Study, *supra* note 70 at 51.
[585] *Ibid* at 51
[586] "Memo of Provisions issued to Black Refugees at Hammonds Plains to 17 November 1815" 27 November 1815 PANS RG 1 Vol 420 Doc 90 ["1815 Memo of Provisions"].

entitled to receive rations by order of Lieutenant Governor Sherbrooke.[587] The latter list includes names of the Black Refugees residing in Hammonds Plains and has been reproduced in this thesis as **Appendix A**.

In terms of recorded lots of land, one (undated) archival record dated between late 1815 or early 1816, lists 293 Black Refugees (113 men, 81 wives, 111 children) in Upper Hammonds Plains, showing each house number and lot of land.[588] The list has been reproduced in this thesis as **Appendix B**. On June 8, 1816, it was reported that 307 Black Refugees (Men 129, Women 89, Boys over 12-7, Girls over 12 – 15, Boys and Girls under 12 – 71) were settled in Hammonds Plains.[589] However, in September 1816 the number of recorded residents was 321, and by December 30, 1816, the census of the refugees entitled to receive rations reports 504 refugees at Hammonds Plains (201 men, 131 women, and 172 children).[590]

It is important to note that not all the names listed as entitled to receive rations in Appendix A (1815 Rations Return) are listed as receiving lots in Appendix B (1815 Lot List), despite both lists covering similar timeframes. The differences could be that a greater number of Black Refugees were receiving rations in the area but did not receive their lots of land. More research is needed to reconcile the names on the two lists. The discrepancies are further complicated by different names listed in another settlement return, dated sometime around 1817,[591] which is reproduced in this thesis as **Appendix**

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[587] "Return of People of Colour in Hammonds Plains entitled to Rations by order of His Excellency Sir John Coape Sherbrooke from (undated) to 1815 inclusive" (undated) PANS RG 1 Vol 420 Doc 92 ["1815 Rations Return"].

[588] "List of Black Refugees at Hammonds Plains, showing the number of houses and lots of land" (undated) PANS RG 1 Vol 422 Doc 111 ["1815 Lot List"]; see also Grant, Immigration and Settlement, *supra* note 59 at 83.

[589] "Return of Black Refugees Settled at Hammonds Plains" 8 June 1816 PANS RG 1 Vol 421 Doc 9 ["1816 Settlement Return"]; see also Grant, Immigration and Settlement, *supra* note 59 at 87 (Grant incorrectly dates it June 10).

[590] Grant, Immigration and Settlement, *supra* note 59 at 91. The census was ordered in response to recommendations by Dalhousie raised in Council that "some line, or regulation were drawn to ascertain what Negroes were entitled to receive rations, Clothing or assistance as there are great numbers wandering about without fixed abode, and Daily claiming relief." (see Grant, Immigration and Settlement, *supra* note 59 at 89). Fergusson, Documentary Study, *supra* note 70 at 51.

[591] "A Return of the Number of Black Refugees and their Families Settled at Hammonds Plains" (undated) PANS RG 1 Vol 422 Doc 19 ["1817 Settlement Return"]; see also Grant, Immigration and Settlement, *supra*

C, as well as in the (undated) Licence of Occupation,[592] which was issued sometime between 1816 and 1820 (likely 1818).[593] The Licence of Occupation is reproduced in this thesis as **Appendix D**. For example, William Marshman is listed in the 1815 Rations Return (Appendix A) and the 1817 Settlement Return (Appendix C) but is not listed in the Lot List (Appendix B) nor the 1818 Licence of Occupation (Appendix D).[594] Additionally, note that William Marshman is not listed in the 1815 Lot List (Appendix B) or the 1818 Licence of Occupation (Appendix D), but William Marshman and William Marshman Jr. are later listed as two of the 35 people in the 1834 Land Grant[595] that was purchased by some of the Upper Hammond Plains residents, which is reproduced in this thesis as **Appendix E,** but then not listed in the number of lots listed in the 1835 return,[596] which is reproduced in this thesis as **Appendix F**. Genealogical research is difficult in the best of circumstances. It is especially challenging for African Nova Scotians, who's ancestors were rarely afforded the privilege of proper record keeping.

A census dated December 30, 1816, shows the number of Black Refugees entitled to receive rations in Upper Hammonds Plains at 504,[597] which is an increase from the 122

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note 59 at 92, where Grant, while discussing a ration's return in August 1817, writes "another return about the same time" in respect of the 1817 Settlement Return.

[592] *Supra* note 239.

[593] To explain the date estimation, the Black Refugees were settled in Hammonds Plains under the direction of Lieutenant Governor Sherbrooke in November 1815, who remained Lieutenant Governor until June 1816 and it wasn't until September 1816 that Lord Dalhousie arrived to assume the position. Since the licence was issued by Lord Dalhousie as Lieutenant Governor, it must have occurred after September 1816, but before he ceased being Lieutenant Governor in 1820. Furthermore, the licence specifically states, "the following Lots of Land on which they are respectively settled, …]." However, notwithstanding Lord Dalhousie's commencement as Lieutenant Governor in September 1816, the licence likely wasn't issued until 1818. This estimated date is based on a similar licence that was granted to the Black Refugees settled at Refugee Hill, which is dated March 27, 1818 (*supra* note 262).

[594] It is possible there was an error in the name recording, or the translation, for example the Licence of Occupation (Appendix D) lists a William Hausman, which could be William Marshman.

[595] *Supra* note 253.

[596] "Report on Lots at Hammonds Plains by Joseph Thomas" 17 June 1835 PANS Box – Halifax County Land grants 1787-1835 Doc 185, "Nova Scotia Lands and Forests — Crown Lands series Nova Scotia Archives RG 20 series C volume 88 number 185 ["1835 Lot List"].

[597] Grant, Immigration and Settlement, *supra* note 59 at 91. The census was ordered in response to recommendations by Dalhousie raised in Council that "some line, or regulation were drawn to ascertain what Negroes were entitled to receive rations, Clothing or assistance as there are great numbers wandering about without fixed abode, and Daily claiming relief." Grant, Immigration and Settlement, *supra* note 59 at 89.

recorded as entitled to receive rations in the 1815 Rations Return (Appendix A). The 1818 Settlement Return (Appendix C) shows a total of 469 blacks dwelling at Upper Hammonds Plains in 1817, but another record shows that only 388 persons at Upper Hammonds Plains received rations in August 1817, which, again, suggests a disparity between receiving rations and land.[598]

As with the rest of the province, the number of Black Refugees residing in Upper Hammonds Plains fluctuated over the years. At its peak in the years shortly after the war, the population was 504 on December 30, 1816. However, by 1838, the settlement of Upper Hammonds Plains had a population of less than 200, and by 1861 the population had increased again to 770.[599] Over 170 years later in 1964, the population fell again to 500.[600] Presently, the African Nova Scotian population is roughly 300 people, but modern development is now a leading threat to the community's cultural landscape and population.[601]

4.2 Application of 1807 Law to Black Refugees

4.2.1 The Hammonds Plains Licence of Occupation (1818)

It will be recalled that after a seventeen-year moratorium on free land grants at the turn of the nineteenth century, the 1807 Land Administration Laws re-empowered the Lieutenant Governor to issue gratuitous land grants ranging from 100 to 500 acres in size, to persons desirous of improving and cultivating the lands. It was customary to grant between 100 to 200 acres of land and known to government that at least 100 acres of diverse quality of land was need for successful settlement. However, while Black people were not expressly excluded under the law from receiving land grants, they were not treated with equality under the law and thus granted inferior land holdings. This racially discriminatory application of the law supported and promoted an anti-Black racist and White supremacist ideology that excluded the Black Refugees from accessing equal

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[598] Grant, Black Immigrants, *supra* note 60 at 92.
[599] Whitfield, Blacks on the Border, *supra* note 54 at 116.
[600] Dr. W.P. Oliver, "A Brief Summary of Nova Scotia Negro Communities", Nova Scotia Department of Education, 1964 at 5.
[601] See footnote 654 below.

benefit under the law as compared to White settlers, including disbanded soldiers. The racially discriminatory application of this ostensibly race-neutral law, particularly in terms of smaller lot sizes in the application of the law, financially disadvantaged the Black Refugees and financially advantaged White settlers, including pauper White immigrants and disbanded soldiers, through the allocation of more land, being a springboard to wealth accumulation.

The Cochrane Proclamation was a contractual representation that induced the Black Refugees to perform, despite significant risk in doing so, in exchange for "encouragements", being free land, implements, and (for a limited time) provisions.[602] It set a reasonable expectation that the Black Refugees would be treated the same as the White settlers in the colony in terms of land grants (size, tenure, and quality), meaning, among other things, the Black Refugees ought to have received the customary amounts of 200 acres of land, or up to 500 acres of land, under the 1807 Land Administration Laws. However, the Cochrane Proclamation was ignored until the Spring of 1815, and then the promise was downsized to terms that were comparable to the disbanded soldiers, who on average received 150 acres each.[603] But then, ultimately, on the advice of the Surveyor General, whose discretionary authority was accepted without question and without restraint or supervision by the Colonial Office, the Black Refugees received only 10-acres of land, which resulted in an even further discrepancy between the amount of land they received compared to what was promised.

It is within this context that the Black Refugees were issued the 1818 Licence of Occupation (Appendix D) to 10-acre lots of land in Hammonds Plains, notwithstanding their legal entitlement under the 1807 Land Administration Laws to receive at least 100-500-acre lots in fee simple, which was customary for 'free settlers'. Once again, the legal

[602] See discussion above under Part 2.2.3 (Cochrane Proclamation).
[603] Martell, Immigration and Emigration, *supra* note 70 at 17, citing CO 217/96, Bathurst to Sherbrooke, May 10, 1815.

system failed to effectively enforce the law that would have benefited the Black Refugees had those laws "been applied with rigour."[604]

When Lieutenant Governor Dalhousie granted the 1818 Licence of Occupation to the Black Refugees in Hammonds Plains, they were already settled on their lots for at least one year, possibly three. They were settled in that location under the direction of Lieutenant Governor Sherbrooke in November 1815, who remained Lieutenant Governor until June 1816 and it wasn't until September 1816 that Lord Dalhousie arrived to assume the position. Since the licence was issued by Lord Dalhousie as Lieutenant Governor, it must have occurred after September 1816 but before he ceased being Lieutenant Governor in 1820. Furthermore, the Licence of Occupation specifically states, "the following Lots of Land *on which they are respectively settled*, […]." However, notwithstanding Lieutenant Governor Dalhousie's commencement as Lieutenant Governor in September 1816, the licence likely wasn't issued until in 1818. This estimated date is based on a similar licence that was granted to the Black Refugees settled at Refugee Hill, which is dated March 27, 1818.[605]

The 1818 Licence of Occupation granted permission to 75 Black Refugees to occupy, possess and enjoy during the term of the licence, the 10-acre lots of land on which they were already settled. The version of this licence that is available at the Nova Scotia Archives is incomplete, but assuming the term is the same as the licence that was granted to the Black Refugees at Refugee Hill, the term was five years. At the end of the term, the licence stipulates, the licensees shall be approved to receive grants of confirmation from the government provided they conducted themselves as industrious peaceable and loyal subjects. However, the licences were never confirmed as grants. Many scholars point to

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[604] Girard et al, History of Law, *supra* note 53 at 662. A similar situation evolved with the Black Refugees in New Brunswick. In 1816, after the government failed to implement Secretary Bathurst's instructions to settle the Black Refugees on land, the Black Refugees applied to the Executive Council for land allotments in the Loch Lomond area. The Executive Council, upon advice from a local judge, decided to grant 50 acre lots to the Black Refugees who had to pay for the surveys and were permitted to receive only licences of occupation for a period of three years. Spray, Settlement in New Brunswick at 67.

[605] Licence of Occupation from Lieutenant Governor Dalhousie for Lots at Refugee Hill 27 March 1818 PANS, RG 1 Vol 419 Doc 36. See also Fergusson, Documentary Study, *supra* note 70, Appendix IX.

the 1834 Land Grant as the confirmatory grant, but upon closer examination, that is not the accurate. The 1834 Land Grant was *purchased* by the Black Refugees at a cost of sixty pounds and covers different parcels of land than what was described in the licence.

The present-day land titles discourse centres around historical licenses of occupation such as the 1818 Licence of Occupation that was issued in Upper Hammonds Plains. But it important to note that the Black Refugees were not the only people to receive licenses of occupation. Permitted occupancy on Crown lands was common throughout the colonial settlement era as a precursor to a grant in fee simple. For example, British settlers after the American Revolutionary War were often issued licenses of occupation until the lands were surveyed, or on land awaiting completion of the escheatment process.[606] Similarly, as was discussed in Chapter 3, licenses of occupation were issued during the land grant moratorium between 1790 and 1807. The colonial land administration system was complex and inefficient. The resulting circumstance of authorized occupancy, but unperfected land titles, was an inevitable outcome. As were instances of unauthorized occupancy, known as adverse possession or squatting. It will be recalled that, for example, due to a variety of historical circumstances, such as land grant moratoriums and an influx of pauper immigrants, obscure land titles afflicted much of Cape Breton.[607]

This is not to suggest that anti-Black racism was not a contributing factor to the land tenure decisions that impacted the Black Refugees. It likely was. As it was likely a contributory factor causing the significant delay in confirming those licences into grants (or not at all). The legal entitlement under the 1807 Land Administration Laws were to receive fee simple land grants, not licenses of occupation, but the practice of granting

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[606] John Garner, The Franchise and Politics in British North America 1755-1867 (Toronto: University of Toronto Press, 1969) at 20: "Many licenses of occupation had been issued to the loyalists on unsurveyed land or on land which the Crown had already alienated but on which the grants were to be revoked. These licenses of occupation were to be replaced by freehold grants once the lands were surveyed or the process of escheat had been completed."

[607] Girard et al, History of Law, *supra* note 53 at 601 write "The moratorium on granting freehold land was the origin of large-scale squatting on Cape Breton, but the cause of its substantial increase was another imperial policy, the change from free land granting to land sales in 1827."

licences continued, and became a specific element of land administration that the colony had to contend with. However, while the Black Refugees may not have been alone in their receipt of occupancy licences, the delay (or denial) in having their licences formally confirmed as grants sets them apart from the experience of the disbanded soldiers, for example, who had their licences confirmed within five years.[608] The Black Refugee experience with licences of occupation also varies from that experienced by White settlers in Cape Breton. Over the centuries, many attempts have been made to clarify title to lands in Cape Breton. For example, after the reannexation of Cape Breton in 1820, colonists were anxious to have Cape Breton represented in the new House of Assembly. However, conscious of the fact that Cape Breton had few freeholders,[609] Nova Scotia passed special legislation which gave holders of Crown leases and licenses of occupation in Cape Breton the right to vote, and in doing so, "[r]esidents of Cape Breton had been officially encouraged to treat their tenures as equivalent to grants in fee simple, and conveyances had been made on lands held by lease or license."[610] Those statutory privileges were not extended to the Black Refugees who, at this point, were still awaiting confirmation of their land titles. The 1824 legislation concerning Cape Breton was not the only time that Nova Scotia sought to clarify land titles in that region, as these legal historians explain:

> From the late 1830s through the 1850s the colony also devoted considerable legislative and administrative resources to trying to regularize the legal problems caused by British policy going back to the moratorium. The land occupied pursuant to the original licences did not pose long-term problems because the occupiers, and others, thought they did have good title, and a market in land operated as if they did.[611]

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[608] See discussion above under "Martell, Military Settlements".
[609] John Garner, The Franchise and Politics in British North America 1755-1867 (Toronto: University of Toronto Press, 1969), ["Garner, Franchise and Politics"] at 22: "Cape Breton had been annexed to Nova Scotia in 1763, but the Board of Trade had ruled, in order to reserve the coal and fisheries to the Crown, that no freehold grants should be given to settlers. In consequence the settlers in Cape Breton possessed their holdings on certificates of occupation." See also Gates, Land Policy, *supra* note 491 at 177.
[610] Garner, Franchise and Politics, *ibid* note 609 at 220, footnote 63, citing N.S. Stat., 4 & 5 Geo. IV, c. 22 (1824).
[611] Girard et al, History of Law, *supra* note 53 at 602.

And further,

> A process was put in place for those with Crown leases or licences to convert to fee simple title, but not every-body took the time or was willing to spend the fees necessary to do so. **After the failure of these attempts to regularize the position administratively, two short statutes of 1850 fixed the problem legislatively**. The first declared that anything done by the government of the independent colony between 1784 and 1820 that had to do with 'the Descent, Distribution, and Conveyance of Real and Personal Estate' was valid. The other stated that anybody who had gone into possession under a Crown lease, or had derived title from such a person, 'shall respectively have, hold, and enjoy all such Lands and Tenements in Fee Simple.'[612]

While the administrative and legislative schemes to regularize land titles for White landowners in Cape Breton did not completely resolve the land title issues in that region,[613] the response appears to have had more success than that in African Nova Scotian communities.[614] More importantly, however, notwithstanding the insecure title held by White Nova Scotians *and* African Nova Scotians, the ensuing cycle of poverty appears to have disproportionately impacted African Nova Scotians more so than White Nova Scotians.

In addition to the common issuance of licenses of occupation, albeit noting the distinct disadvantage that was experienced by the Black Refugees in terms of the delay or denial of having those licences confirmed as grants, it is also important to note that the legal effect of a licence of occupation to Crown lands is uncertain, and so the potential financial impact caused by possessory title over confirmed title is difficult to ascertain.

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612 Girard et al, History of Law, *supra* note 53 at 602, citing SNS 1850, c. 11 and c. 41; and SNS 1840, c.12, preamble.

613 See, for example, https://novascotia.ca/natr/land/release.asp, (2017-12-10) where the Department of Natural Resources announces that it is working to clear up outstanding claims associated with unacknowledged ungranted lands in the province. The release states "The Certificate acts to release the Crown's interest in the lands but does not transfer the ownership of the lands to any particular individual or company." The release also provides a map of unacknowledged ungranted Crown land released in various counties. [accessed April 6, 2021].

614 See, for example, https://www.cbc.ca/news/canada/nova-scotia/province-clears-ungranted-lands-1.4638557. For a media report dated April 30, 2018, announcing the province cleared up land titles on the last 28,000 properties on ungranted Crown land. The report states the project began about 10 years ago and involved a total of 100,000 hectares of ungranted Crown land.

Many scholars have assumed that a licence of occupation limited the Black Refugees ability to sell their land. While the status of licence holder may have been a contributing factor to this impediment, when the licence of occupation is considered within the context of the complicated land administration practices of the time, this assumption may not be entirely accurate. Historian Shirley Tillotson recovered a story from the Nova Scotia Archives which suggests that holders of tickets of location, who did not have completed title, could still sell and mortgage their lands. The story involves Samuel Cowling, a mortgage holder who lent £25 to a disbanded soldier in 1828 as a mortgage on the soldiers two lots that were held by tickets of location in the Dalhousie and Sherbrooke settlements. The soldier failed to repay the loan and so when he died in 1832, Cowling expected the title in the land to pass to him. He later discovered that the soldier only had a ticket of location and so he petitioned the governor who allowed the grant to pass to Cowling provided he paid the usual fees.[615] This example suggests that ticket holders were able to mortgage and sell their lands despite their imperfect title. Additionally, lawyer and historian Beamish Murdoch writes in circa 1832:

> Lands have frequently been granted to the colonists by what are called licenses of occupation, being written licenses signed by the governor, to occupy a particular piece of land. **These according to the practice of the government and the usage of the colony are considered as absolute grants in fee simple**, although expressed simply as permission to the individual to occupy the ground. They were frequently granted in the early periods of the settlement, but more rarely afterwards, and I believe have not been given for many years.[616]

Murdoch proceeds to explain the absence of any judicial guidance on the matter but elaborates on his legal analysis and opinion, and states:

> I am not aware of any decision by which the nature of the title, held in Nova Scotia by virtue of licenses of occupation, can be accurately settled. Where there has been a continuance of possession an improvement made under them, it has been (as far as I can learn) the invariable practice of the government to consider them as fee

[615] A summary was provided by Historian Shirley Tillotson, citing Petition of Samuel Cowling to Lieutenant Governor Maitland, 1832, NS, RG 20 Series C., vol. 94C file 167.
[616] Murdoch, Epitome of Laws, *supra* note 46 at 78.

> simple titles; and no difficulty has ever been made in obtaining regular grants in the usual form, under the great seal of the province, in favor of the party who received such a licence or his heirs or assigns.[617]

Thus, while a strict application of common law principles may lead one to conclude that the licenses of occupation gave only an "estate at will" (being revocable permission to occupy the land), the continued possession and the labour and expense of improvements that were made by the occupants may have legally entitled them to a fee simple interest in the land.[618] This legal determination is important because many people involved in the land titles discourse often assume that the absence of legal title was the root cause of the cycle of poverty for the Black Refugees.[619] However, it appears that something more was at play than legal title. The colonists were functioning within a system of insecure land titles, but what was preventing the Black Refugees from being able to do the same? Imperfect titles alone were not impeding their ability sell land in a secondary market, or use the land as collateral for loans, no more so than imperfect title would impede such activity today. It comes down to risk, and how much risk a prospective buyer or a prospective lender is willing to absorb. For the Black Refugees, regardless of how perfect their land titles were in fact or at law, other circumstances such as anti-Black racism, quantity of land, and the location of the lots within predominately Black communities are more plausible explanations for their exclusion from economic opportunities than the land titles issue alone.

To be clear, the point in highlighting the common use of tickets of location, warrants of surveys, licenses of occupation, or some other form of possessory title as a precursor to a grant in fee simple, is not to discontinue the work being done to clarify land titles in African Nova Scotian communities. As it has been discussed above, the Black Refugees were disadvantaged with the delay or denial of having their land interests

[617] *Ibid* at 81

[618] See also Gates, Land Policy, *supra* note 491 for further discussion on emerging market in land rights (including rights under tickets of location) and on the ability to vote with tickets or location.

[619] See for example, *Beals*, supra 168 at para 36 "Lack of clear title and the segregated nature of their land triggered a cycle of poverty for black families that persisted for generations."

confirmed as fee simple, whereas many White settlers such as the disbanded solders and the settlers in Cape Breton were advantaged by the administrative and legislative measures implemented to confirm their land titles. That disparity must continue to be addressed. Nor is it the intention here to suggest that the licenses of occupation, despite their legal effect, did not impede the Black Refugees' mobility options or their ability to derive monetary profit from their land. But rather, the point here is that the emphasis on land titles issue alone, has subdued a more pressing racial disparity in colonial land administration, being lot sizes, and furthermore, both issues are the result of broader systemic anti-Black and White supremacist ideology that is embedded within the origins of property law in this province.

The lot sizes that were allocated to the Black Refugees as compared to White settlers, including the disbanded soldiers, created a significant disadvantage/advantage resulting from the racially discriminatory application of the law combined with colour-blind approaches to law reform, both of which were rooted in anti-Black racist and White supremacist ideology. It will be recalled that the modified instructions from the Colonial Office were to grant land to the Black Refugees on terms analogous to that issued to the disbanded soldiers, but the instructions were later stipulated "small grants" of no specific size.[620] It is possible that "small grants" in this context could have meant the customary 100 to 20 acres of land, as opposed to the 500 or more acres that troubled the colony before the adoption of the 1807 Land Administration Laws, yet for the Black Refugees, it has been inferred to mean 10 acre lots.[621]

It is not known with any certainty why Morris recommended 10-acre lots for the Black Refugees, but this was not the first time that colonial administrators ignored the law regarding land allocation to Black residents in the colony. When the land promises

[620] *Supra* note 230.
[621] The Black Refugees that were sent to New Brunswick also received more than ten acres. Grant, Immigration and Settlement, *supra* note 59 at 102, citing at footnote 166 PANB, Assembly Petitions, 1818, Petition of Ward Chipman, February 19, 1818. In New Brunswick, the settlement of Black Refugees at Loch Lomond under licence of occupation shows 112 lots, mostly 44 acres. "The lands of Loch Lomond were held by tickets of location for a number of years. The first grant was lot 35 to Hannah Flood dated 28 July 1837."

that were made to the Black Loyalists during the American Revolutionary War remained unfulfilled, colonial administration was reprimanded. Historian John Grant describes the situation of one Black Loyalist, Sergeant Thomas Peters, who after being denied land stemming from representations made in the Dunmore Proclamation filed a petition to the imperial government in London. The Colonial Office reprimanded Governors Parr of Nova Scotia and Carleton of New Brunswick for their neglect and ordered an immediate inquiry, "and if the complaints were found true, to take the necessary steps to atone for the injustice."[622]

Many scholars point to anti-Black racism as the underlying motivation behind Surveyor General Charles Morris' decisions to allocate only 10 acre lots to the Black Refugees, connecting it to a larger scheme aimed at maintaining the Black Refugees as an economically dependent source of low wage labour for the White settler economy. While these claims are not disputed here, it is also important to recall that Charles Morris was part of a family dynasty of surveyors, who was a third generation Surveyor-General in Nova Scotia when he succeeded his father and his grandfather before handing the role over to his own son, J.S. Morris, as the last Surveyor-General before the position merged with the Commissioner of Crown Lands in 1851. A cursory read of J.S. Morris' testimony in the Buller Report leaves one with the impression that the Morris surveyors regarded themselves as the ultimate caretakers (or, at times, overseers) of the land in this province.[623]

While the Morris' may have respected the authority of the governor, and more importantly, the Colonial Office to determine land policy, the views and experience of the Surveyor-General informed and shaped those policies and decisions, and they had a significant amount of discretion in the application of those laws. Thus, if the Surveyor General was concerned about the scarcity of available land in the province and thought he could preserve land by granting smaller lots to vulnerable groups who would not have the means to complain to his superiors in London, then the Surveyor General would have

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[622] Grant, Black Immigrants, *supra* note 60 at 256. See also Greaves, Negro in Canada, *supra* note 157 at 22.
[623] Buller Report, *supra* note 165, Appendix B.

the means and discretion under the law to implement those ideas. Similarly, if the Surveyor General believed that Black people and disbanded solders were flight risks, then he would have the means to grant them temporary occupation as a precautionary measure to protect his primary concern, being the preservation of land as a capitalist asset. Or, if frustrated at the unwillingness of the government to escheat large tracts of land sitting idle in the hands of abandoned landowners, the Surveyor General had the breadth of discretionary power needed to devise alternative methods to complete his primary task, being getting people on their lots as quickly as possible through the issuance of licences of occupation until land was available for fee simple grants.

Regardless of his motivations, the advice of the Surveyor General to grant 10-acre lots to the Black Refugees was implemented, notwithstanding the representations in the Cochrane Proclamation which set a reasonable expectation that the Black Refugees would be treated the same as the White settlers in the colony in terms of land grants (size, tenure, and quality), meaning, among other things, the Black Refugees ought to have received the customary amounts of 200 acres of land, or up to 500 acres of land, under the 1807 Land Administration Laws. While the law 1807 Land Administration Laws were ostensibly race-neutral, the actors within the system decided to apply the law in a racially discriminatory manner and the law failed to protect the Black Refugees from the consequences of this racially discriminatory application of the law.

4.3 Application of Law to Black Refugees (1821-1827)

The impacts of the racially discriminatory application of the ostensibly race-neutral 1827 Land Administration Laws discussed above, were exacerbated by the 1821 Land Board Regulations which excluded the Black Refugees from opportunities to acquire more land because of the previous racially discriminatory treatment under the law.[624] Then, the 1827 Land Sale Regulations further exacerbated the racial disparities in land allocations by (1) creating opportunities for pauper White immigrants that excluded the Black Refugees from eligibility, and (2) adopting of a colour-blind approach to a unified

[624] See discussion above in Part 3.5.2.

system of land sales, which (a) required the Black Refugees to not only then pay monetary consideration to have their prior lots confirmed as grants, and (b) served to deny the Black Refugees opportunities to be relocated to better and larger lands to redress the prior racial injustices.[625]

4.3.1 The Hammonds Plains Land Grant (1834)

With respect to item 2(a) above, many scholars have pointed to the 1834 Land Grant in Hammonds Plains (Appendix E) as evidence to support claims that the Black Refugee lots under the 1818 Licence of Occupation were confirmed as grants.[626] However, upon closer examination of the 1818 Licence of Occupation and the 1834 Land Grant, this assumption appears to be incorrect for the following reasons. First, unlike the 1842 Confirmatory Land Grant that was issued for lands in Preston,[627] which specifically recites the intention to confirm land titles and was issued without monetary consideration, the 1834 Land Grant in Upper Hammonds Plains does not recite confirmatory intentions and was purchased for consideration, being sixty pounds[628] to purchase six hundred acres of land. Secondly, in reviewing the map outlining the lots of land in the 1818 Licence of Occupation compared to the land descriptions in the 1834 Land Grant, the land that was purchased in 1834 Land Grant was a different parcel of land (surrounding Lizard Lake) which was not included in the 1818 Licence of Occupation. Third, the 1834 Land Grant was purchased by only 30 Black Refugees, whereas the Licence of Occupation was issued to 75 Black Refugees. Fourth, only 7 of the 30 names on the 1834 Land Grant are also listed on the 1818 Licence of Occupation.

It will be recalled that 75 Black Refugees were allotted 10-acre lots under the 1818 Licence of Occupation. However, based on the records pertaining to rations, lots, and

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[625] See discussion above in Part 3.6.
[626] Fergusson, Documentary Study, *supra* note 70 at 54: "Land was held at Hammond's plains by tickets of location or licenses of occupation until 1834 when a grant of 600 acres was made to 30 men", citing Copy of a Land Grant to William Day and a Number of other Black Refugees at Hammonds Plains (undated) PANS RG 1 Vol 419 Doc 120 (See also Fergusson, Documentary Study, *supra* note 70, Appendix XIII).
[627] Nova Scotia Lands and Forests - Petitions series Nova Scotia Archives RG 20 Series A Volume 129. See also Fergusson, Documentary Study, *supra* note 70, Appendix XXIV.
[628] This purchase price is consistent with the post-1827 upset price of 2 shillings per acre.

settlement (Appendix A, B and C, respectively) there were between 113 – 144 families residing in Hammonds Plains at the time of the licence. This means that only half of the Black Refugees in Upper Hammonds Plains received a licence of occupation to their lots in circa 1818. Furthermore, now that it has been established that the 1834 Land Grant was not a confirmatory grant for the 1818 Licence of Occupation, those who did receive a licence in circa 1818, never had their title confirmed as grants.[629] **Therefore, it is likely that none of the government-issued lots in Upper Hammonds Plains were ever confirmed as grants and so, aside from the Crown lands that the Black Refugees (and their descendants) *purchased* after the 1827 Land Sale Regulations, it is likely that the Black Refugees in Upper Hammonds Plains have never received the gratuitous land grants that were promised to them in the Cochrane Proclamation.[630]**

Despite never receiving their gratuitous land grants as promised, many of the Black Refugees (and their descendants) acquired legal title to land in the community through the purchases with monetary consideration. In addition to the lands in the 1834 Land Grant that was purchased, in 1846, John Jackson, William Marsman, Robert Jackson, and Charles Jackson purchased 100 acres of Crown land surrounding Lizard Lake, at a purchase price of ten pounds, eighteen shillings and nine pence. In 1859, Eliza Marsman (widow of William Marsman) and her children, William, Dorothy, and Eliza, purchased fifty-five acres of crown land on the other side of Lizard Lake, at a purchase price of ten pounds, eighteen shillings and nine pence. This parcel of land (combined with other land subsequently acquired) was passed through the generations of the William Marsman lineage until 1974, when it foreclosed through what appear to be unethical lending practices. More research is needed to ascertain how much land was purchased by the Black Refugees in Hammonds Plains because of the shift to a uniform land sales system,

[629] This conclusion assumes that there were no other confirmatory land grants pertaining to the 1818 licenses besides the 1834 land grant that CB Ferguson includes in his book (see discussion above in Part 2.4.3).
[630] This may also be the case for the early arrival Black Refugees who were sent to the interior parts of the province in search of labour, as discussed on Page 31 above.

but often assumed to be issued as "free" land grants in fulfillment of the Cochrane Proclamation.

4.4 Upper Hammonds Plains 200 Years Later

When Justice Campbell in *Downey* connected anti-Black racism in this province to the land-based injustices experienced in African Nova Scotian communities, he wrote:

> African Nova Scotians have been subjected to racism for hundreds of years in this province. It is embedded within the systems that govern how our society operates. […] That has real implications for things like land ownership.[631]

While the racially discriminatory application of the colonial land administration laws, combined with the colour-blind approaches to reform, sparked a sequence of land-based injustices in Upper Hammonds Plains, there were many other instances of land-based racial injustices experienced within African Nova Scotian communities over the 200 years that followed. This section discusses only two of those instances, in relation to Upper Hammonds Plains.

4.4.1 Pockwock Watershed Expropriation[632]

In 1974 a large tract of communal land in Upper Hammonds Plains, known as the Melvin Lands,[633] was expropriated by the Nova Scotia Department of Lands and Forests[634]

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[631] *Downey*, *supra* note 12 at 4.

[632] Portions of the information provided in this section were researched and discussed in a paper dated December 13, 2020 entitled *Releasing Robin Hood? The Untapped Potential of Expropriation Law*, submitted by the author of this thesis in fulfillment of a Directed Research Course at Dalhousie University Schulich School of Law.

[633] The "Melvin Lands" is a tract of approximately 1,500 acres of land that was acquired by the community in the mid-nineteenth century. In 1913 the community members transferred the land into a land trust vehicle known as the Melvin Land Tract Protection Society (see deed dated April 25, 1913 and recorded in Registry of Deeds at Halifax in Book 429 Page 133 (Document No. 1285)). It is interesting to note that expropriation officials, overly concerned about the validity of title to the Melvin Lands, paid for court proceedings to confirm title to the lands in the Melvin Society before expropriating the lands. This is contrasted with the expropriation proceedings a few years prior in Africville, another African Nova Scotian community, when many Africville residents were denied compensation for their inability to prove (or pay to confirm) their land titles. This demonstrates that government officials, when motivated by self-interest, often find ways to wield the benefits of the law.

[634] Portions of the expropriated land were in Hants County, which exceeded the Public Service Commissions expropriation jurisdiction. To avoid necessary amendments to its enabling statute, the Province effected the expropriation over the two counties and transferred ownership to what is now the Halifax Regional Water Commission.

and the Public Service Commission (now Halifax Regional Water Commission) in connection with the development of the Pockwock Watershed, being a main water supply for the Halifax Regional Municipality. In total, approximately 9,600 acres of land was expropriated for the project, from approximately 28 landowners with holdings ranging from 0.3 to 1,345 acres (no residential holdings).[635] Roughly 300 acres of the Melvin Lands were expropriated during the process, being the only tract of communal land involved in expropriation.[636] The expropriation was legalized by filing the expropriation documents in the land registry system. There was no advance notice, no opportunity to be heard, and the amount of compensation was "negotiated"[637] after the expropriation had taken place and based on appraisal reports that were procured on behalf of the Province.[638]

The expropriated property on the Melvin Lands were appraised at $88,500, and the Province offered $75,000 plus interest and an additional 15% of market value for disturbance damages under the *Expropriation Act*, for a total of $97,250. The offer was accepted by the trustees of the trust entity that owns the land on behalf of the community, but there is strong likelihood that the trustees did not receive legal advice as to matters of compensation,[639] and consequently, not informed of their right to appeal the compensation under the recently modernized *Expropriation Act*.

The landowner adjacent to the Melvin Lands, however, Provincial Realty Co. Ltd., appealed its expropriation compensation and was awarded additional compensation as a result.[640] The *Provincial Realty* decision shows that the Province's expropriation appraiser

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[635] Nova Scotia Human Rights Investigation Report dated January 17, 2002 at page 8 (copy obtained from community records) ["Humans Rights Investigation Report"].
[636] Some records indicate it was 283 acres of land expropriated. Other records suggest it was 365 acres of land expropriated.
[637] African Nova Scotian community members testified that the expropriation offer was presented on a "take it or leave it" basis with the message being "this is the best you get". (see Nova Scotia Human Rights Investigation Report, supra note 635 at 8.
[638] Appraisal of the Market Value of the Department of Lands and Forests Land Parcels A and B, Pockwock, Halifax County, as of April 30, 1974 by Patrick King, FRI, AACI, MAI Accredited Appraiser (copy obtained from community records).
[639] Humans Rights Investigation Report, *supra* note 635 at 10 discussed the confusion around the community's legal representation during the expropriation.
[640] *Provincial Realty Co. Ltd. v Nova Scotia* 23 N.S.R. (2nd) 347, 1977 CarswellNS 358 (Nova Scotia Expropriations Compensation Board) ["*Provincial Reality*"].

assessed the expropriated lands much lower than the landowner's appraiser, being $175/acre and $300/acre, respectively. The Expropriation Compensation Board in *Provincial Realty* set compensation at $230/acre, being $130/acre more than what was paid for the Melvin Lands. More importantly, the *Provincial Realty* decision reveals that the Province's expropriation appraiser valued the neighbouring Melvin Lands lower than the Provincial Realty lands ($100/acre versus $175/acre, respectively), notwithstanding the Melvin Lands had property improvements that increased it value relative to the Provincial Realty lands.

Additionally, the Compensation Board in *Provincial Realty* awarded injurious affection damages to Provincial Realty equal to 10% of the market value of the lands. The injurious affection was based on severance or distortion in the configuration of the claimants remaining lands.[641] Thus, the Compensation Board concluded that "a purchaser of the remaining lands would insist on a price reduction because of the peculiar shape."[642] The distorted shape is the effect of the pipeline that runs between the Melvin Lands and the Provincial Realty lands as a result of the expropriation. While the Board agreed with the Province's appraiser that no injurious affection results from the installation of the pipeline itself, it disagreed that the pipeline constitutes a betterment as a source of water to service a future development.[643] In summary, if the Province's expropriation appraiser had valued the Melvin Lands at $175/acre, like he did for the neighbouring Provincial Realty lands, it could have resulted in additional compensation of approximately $18,600 to the Melvin Society for the expropriated lands. Furthermore, if the Melvin Society received legal advice encouraging them to appeal the compensation, like its neighbour Provincial Realty did, it could have resulted in additional compensation of approximately $35,000, or more.[644]

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[641] *Ibid* at para 19.
[642] *Ibid* at para 19.
[643] *Ibid* at para 18.
[644] There were additional compensation claims advanced by the community in its human rights complaint, including damages for lost timber and logging operations, loss of the use of the lake for recreational and religious purposes, which have yet to be resolved.

The lasting effect of the Pockwock Watershed expropriation on the community of Upper Hammonds Plains is best described by a community elder who explains:

> [n]o greater issue has been so deeply-rooted in the memories of the residents than the expropriation of some 365 acres of land and Pockwock Lake to provide water service for the municipality. Most remarkably and ultimately most hurtful, was the fact that the water pipes were not routed through the hosting community, but rather, away from the community.[645]

There is little doubt that the sacrifice made by the community of Upper Hammonds Plains facilitated the economic boom experienced by the Halifax Regional Municipality resulting from sustainable water supply, as well as the housing developments that run along Dunbrack Street, Halifax, under which the water pipelines run.

Expropriation is another example of racially disparate effects of ostensibly neutral laws, which suggests the existence of systemic anti-Black racism within the legal structures that support it. The extraordinary power of expropriation has been used many times with disadvantage Black communities for the benefit of White-serving interest, [646] but when has expropriation been used with disadvantage White communities to benefit Black-serving interests?

4.4.2 Water Fight[647]

Perhaps the most egregious aspect of the Pockwock Watershed expropriation of the Melvin Lands was the government's decision to exclude the community of Upper Hammonds Plains from the water supply. Supporters of this decision argue it was not racially motived, but the result of jurisdictional scope of Public Service Commission, now Halifax Regional Water Commission (HRWC). They claimed that HRWC was empowered

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[645] Upper Hammonds Plains Community Development Association, "A Lake and a Community" (undated) (copy provided) ["A Lake and a Community"].

[646] Anneke Smit, "Expropriation and the Socio-economic Status of Neighbourhoods in Canada: Equal Sharing of the Public Interest Burden?" Oñati Socio-legal Series [online], 5 (1), 258-279 at 261.

[647] Portions of the information provided in this section were researched and discussed in a paper dated December 13, 2020 entitled *Releasing Robin Hood? The Untapped Potential of Expropriation Law*, submitted by the author of this thesis in fulfillment of a Directed Research Course at Dalhousie University Schulich School of Law.

to supply water to the City of Halifax only, not Halifax County where Upper Hammonds Plains was located. This argument was officially debunked in 2002 by a Human Rights investigator who, after reviewing the evidence presented by the community's then lawyer, states "[…] the Public Service Commission did have the power to develop the water supply for the benefit of communities outside the City of Halifax, and, more specifically, had the power to do so for the Upper Hammonds Plains area."[648]

In addition to the denial of water supply from the nearby watershed, the community of Upper Hammonds Plains experienced water problems for many years following the installation of the Pockwock Watershed. In 1996, water testing revealed harmful bacteria in 47% of the wells tested in the community. Thus, the community engaged HRWC to install a central water system. The initial cost of the project was estimated at $4.3 million, of which $2.85 million would require contribution by property owners through frontage fees of approximately $49 per foot.[649] This cost was prohibitively high for many community members, particularly the elderly residents. Negotiations ensued for roughly three years, with modifications to the project scope in efforts to reduce the cost. In addition, the community sought municipal, provincial, and federal funding, and the frontage fees were further reduced. During negotiations, HRWC informed the community that any costs savings from reduced construction tender prices would be used to further reduce the frontage fees. However, when the project tenders came under budget because of community-led action, HRWC instead used the savings towards servicing a new housing development in the adjacent area known as English Corner, and none of the savings were used to benefit the community of Upper Hammonds Plains.

This resulted in long and costly litigation.[650] Ultimately, the court ruled in favour of the community of Upper Hammonds Plains and awarded $267,400, together with costs

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[648] Humans Rights Investigation Report, *supra* note 637 at 7.
[649] *David et al v Halifax Regional Municipality et al,* [2003] 216 NSR (2d) 325 ,2003 NSSC 171 (CanLII) ["David et el Final Decision"] at 22.
[650] *David et al v Halifax Regional Municipality et al*, [2003] 211 NSR (2^{nd}) 283, 2003 NSSC 3 (CanLII) ["David et al Preliminary Decisions"].

($31,092, plus disbursements) for negligent misrepresentations made by government officials.[651] The litigation, which is referred to by the community as the "water fight", is yet another example of African Nova Scotians being induced to act on representations made by government officials and then having to fight to have them fulfilled. Government apathy towards fulfilling representations it makes to the African Nova Scotian community is a constant theme in the African Nova Scotian lived experience, as pointed out by Justice Nathanson, stating:

> I have difficulty understanding why HRM Council dealt in a somewhat shallow manner with the complaint of the leader of the UHP community, Daniel Norton. One would think that it would want to investigate Norton's claim that the UHP community had attached explicit conditions to its acceptance of the project, that the conditions had been communicated in writing to officials of HRM, and that the conditions had not been dealt with or even acknowledged by HRM or any of its officials. One would also think that HRM Council would be even more interested in allegations that a senior official of HRWC and, to a lesser extent, some of its own officials had represented that savings from the tender process would lower frontage charges to the UHP community. Its interest in ascertaining the truth appears to have been low and of short duration.[652]

He proceeds to state:

> The Province is not without blame. It did not authorize its appointed representative to police the scope and performance of the project. It appears to have accepted HRWC's uninformative invoice at face value and without question. The responses of Marvin MacDonald and Deputy Minister Darrow reflect poorly upon the Province […] He showed no interest in discovering whether there was truth to a complaint of the UHP community about the project for which the Province was on the verge of expending $500,000 of public money. […] It is obvious that neither considered that the Province had a higher obligation to ascertain the truth.[653]

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[651] *David et al v Halifax Regional Municipality et al*, [2003] 218 NSR (2d) 188, 2003 NSSC 201 (CanLII) ["David et al Supplemental Decision"].
[652] David et el Final Decision, *supra* note 649 at 96.
[653] *Ibid* at 97-98.

As with the experiences surrounding the Pockwock Watershed expropriation, the Water Fight has had a long-lasting impact on the community of Upper Hammonds Plains and is a painful reminder of the accumulated unfulfilled representations made to the community, dating back to the Black Refugees in the Cochrane Proclamation.

The Melvin Lands remain one of the largest African Nova Scotian community owned properties in the province, notwithstanding other expropriations that have further reduced its size. Furthermore, while environmental designations in the area create some land-use restrictions, there is hope that with financial support and other resources, the land can be leveraged to benefit the community in sustainable and innovative ways, such as affordable housing, community heritage preservation, and recreational landscape. Additionally, there are plans in the community to create a community land trust aimed at providing affordable housing in the community while at the same time, protecting its cultural heritage.[654]

4.5 Conclusion

When the Black Refugees arrived in the autumn of 1813, Nova Scotia had already developed pre-existing racial attitudes towards people of African descent based on, for example, previous experiences with the Black Loyalists and Jamaican Maroons. Historian Whitfield notes "[t]he racial badge of slavery continued into the nineteenth century and reinforced a hierarchical society, which placed the black community on the lowest rung of the social ladder."[655] Regardless of whether formal slavery was practiced in Halifax at the time or not, these racial attitudes "still shaped the opinions of the white population."[656] These opinions, being anti-Black racism and White supremacist ideology, infiltrated the legal system in this province at its origins, by allowing attitudes of racial inferiority toward Black people prevail over honouring principles of contractual

[654] See CBC https://www.cbc.ca/player/play/1897395267703; CBC https://www.cbc.ca/player/play/1900262979849; *Liberals Commit to Funding Affordable Housing Initiative In Historically African Nova Scotian Upper Hammonds Plains* <https://liberal.ns.ca/affordable-housing-upper-hammonds-plains/>
[655] Whitfield, Black American Refugees, *supra* note 58 at 4.
[656] *Ibid* at 5.

compliance and equal treatment under the law, which created disadvantages for Black people and advantages for White people. Then, through to a series of colour-blind approaches to law reform, exacerbated existing the racial injustices.

The Cochrane Proclamation (Part 2.2.3 above) set a reasonable expectation that the Black Refugees would treated the same as the White settlers in the colony in terms of land grants (size, tenure, and quality). This means that, among other things, the Black Refugees ought to have received the customary amounts of 200 acres of land, or up to 500 acres of land, under the 1807 Land Administration Laws. Then Britain reneged on its promises and, eventually, downsized the land promises to terms that were comparable to the disbanded soldiers, who on average received 150 acres each. This means that, among other things, the Black Refugees ought to then have received 150 acres of land, under the authority of the 1807 Land Administration Laws. But then, ultimately, on the advice of the Surveyor General, the Black Refugees received only 10-acres of land, which resulted in an even further discrepancy between the amount of land they received compared to what was promised. What is important to note here is that the 1807 Land Administration Laws did not exclude the Black Refugees from eligibility to receive the customary amounts of 200 – 500 acres of land (or the 150 acres of land) through crown grants. It was in the *application* of this law that precluded their opportunity to receive the land, and the law failed to protect them from that discriminatory application of the law. As legal historians point out,

> rare were the instances of formal discrimination [...]. But in virtually every case where Blacks needed or came into contact with government action, and in all too many court proceedings, Blacks encountered discrimination in the applications of laws or policies that appeared neutral on the surface. Insofar as these actions contributed to Black impoverishment and economic dependence, these results seemed only to confirm white stereotypes that equated Blacks with cheap labour and lack of initiative, members of a group who could never aspire to positions above the bottom of the social hierarchy[657]

[657] Girard et al, History of Law, *supra* note 53 at 212.

While the 1807 Land Administration Laws were not overtly racist, they were applied in a manner that was rooted in anti-Black racism and White supremacist ideology. This racially discriminatory application of the ostensibly race-neutral 1807 Land Administration Laws, specifically in terms of smaller lot sizes, invalidated the Black Refugees as citizens who are capable and desirous of improving and cultivating the land, and thus precluded their participation in economic benefits under the law. At the same time, the law, by granting larger lots of land to White settlers, validated White people as *bona fide* settlers and thus facilitated their uplifting through the allocation of more land, being a capital resource in wealth accumulation.

Then, the 1821 Land Board Regulations exacerbated the racial oppression by ignoring the realities of anti-Black racism, again, by excluding the Black Refugees from eligibility to receive larger lot sizes comparable to White pauper immigrants, because of their prior coerced participation in a racially discriminatory application of the law which placed them on smaller lots. Yet, at the same time, the 1821 Land Board Regulations served White pauper immigrants by acknowledging their impoverished situation and creating special allowance under the law to facilitate their better access to greater quantities of land than what was made available to the Black Refugees. In doing so, the law uplifted the pauper White immigrants and validated them as *bona fide* settlers while reinforcing the invalidation of Black people as citizens who are capable and desirous of improving and cultivating the land.

And, finally, the 1827 Land Sale Regulations intensified the land-based injustices against the Black Refugees by not only (again) creating opportunities for pauper White immigrants that excluded the Black Refugees from eligibility, but also through a colour-blind approach to the adoption and application of a unified system of land sales, which required the Black Refugees to then pay monetary consideration to have their prior lots confirmed as grants, and also served to deny the Black Refugees opportunities to be relocated to better and larger lands to redress the prior injustices.

As a result of all the foregoing, systemic anti-Black racism and White supremacist ideology in Nova Scotia's property law choked the economic opportunities of the Black

Refugees which triggered an inter-generational cycle of poverty for African Nova Scotians spanning over 200 years.

Furthermore, this all stems back to the breach of contractual obligations in the Cochrane Proclamation which induced the Black Refugees to risk their lives fleeing enslavement in exchange for freehold land grants in Nova Scotia, and those contractual obligations likely remain unfulfilled today because of the monetary consideration that the Black Refugees had to pay for their "confirmatory grants" to smaller-than-average lots.

System anti-Black racism is more than the racially prejudice attitudes held by its individual actors. When racial bias is combined with social and institutional power it produces a system of advantage and disadvantage based on race and involves one group having "the power to carry out systematic discrimination through the institutional policies and practices of the society while shaping the cultural beliefs and values that support those racist policies and practices."[658] Systemic racism is not always straight-forward. It is often more insidious, proceeding gradually and subtly without detection until its harmful effects are rooted deep within the institution. This stealth infiltration makes anti-Black racism within the legal system especially challenging to pinpoint and dismantle. But, through knowledge and exposure comes the opportunity to redress the harm it has caused and repair (or dismantle) the systems moving forward.

[658] Dismantling Racism, *supra* note 325. For more on systemic racism, see Ontario Human Rights Commission, Policy and Guidelines on Racism and Racial Discrimination (9 June 2005), online: Ontario Human Rights Commission <http://www.ohrc.on.ca/en/policy-and-guidelines-racism-and-racial-discrimination>, and Margaret Gittens and David Cole, "Report of the Commission on Systemic Racism in the Ontario Criminal Justice System" (30 May 2011), online: *Ontario Legislative Library eArchive* http://govdocs.ourontario.ca/node/7558.

Chapter 5: Reparations

The Black Refugees were not passive participants in a British North American migration story. They were not "people to whom history happened" but rather people "who made history themselves."[659] What are often depicted as self-defeating choices of geographic and social isolation, were ingenious survival tactics made by a self-reliant and mutually supportive community.[660] Had the Black Refugees been socially, politically, and economically included within the broader community, or otherwise offered the chance to feel the wind at their backs as many White settlers had, the Black Refugees too could have soared to higher levels of economic prosperity throughout the generations. This is not to suggest that every White settler in Nova Scotia thrived economically or did not struggle, but comparatively, group to group, White settlers were economically advantaged through the legalized exclusion of Black Refugees from land-based economic opportunities. This historical disadvantage (and corresponding advantage) contributed to present-day racial disparities in wealth and poverty in this province.

The Black Refugee migration story is one that historically has been told through a White colonialist lens, which has understated the contractual nature of the proclamatory representations (implicit and explicit) that induced the Black Refugees to act. The Black Refugees acted in reliance on the representation that they would "be meet with due encouragement,"[661] meaning free land, implements, and (for a limited time) provisions.[662] A contextual interpretation of the Cochrane Proclamation, relative to the applicable land administration laws in effect at the time, calls for a presumptive starting position that the land to be distributed to the Black Refugees in satisfaction of the proclamatory representation ought to have been granted on terms equivalent to that which was being granted to White settlers in Nova Scotia at the time, pursuant to the

[659] McKay, Race and Archives, *supra* note 122 at 29.
[660] *Ibid* at 29.
[661] Cochrane Proclamation, *supra* note 68.
[662] Martell, Immigration and Emigration, *supra* note 70 at 17, citing Bathurst to Sherbrooke 10 May 1815 CO 217/96.

1807 Land Administration Laws. Those contractual terms were not fulfilled, and because of this breach, the Black Refugees incurred damages for which restitution is owed.

In similar ways that the Transatlantic Slave Trade bankrolled the industrial revolution,[663] colonial land grants contributed to the accumulation of capitalist wealth in Nova Scotia. Furthermore, although elite White settlers may have benefited more than pauper White immigrants in this regard, pauper White immigrants and disbanded soldiers benefited from more land grant opportunities than the Black Refugees. The law created these racial disparities in lot sizes through the establishment of a legal system which enabled its actors to apply the law in a racially discriminatory manner. Then, the law exacerbated the racial disparities in lot sizes through the creation of laws that advantaged pauper White immigrants and disadvantaged the Black Refugees. In doing so, the nineteenth century land administration laws triggered a cycle of poverty for African Nova Scotians through a systematic strangling of their wealth-generating opportunities.

5.1 Utility of Conventional Law

Despite the role of the law in creating and exacerbating the harm inflicted on the Black Refugees, the legal system in its present form is not equipped to effectively deal with these types of historical racial injustices, nor repair the inter-generational damage that it has caused to the African Nova Scotian community. While there may be multiple legal avenues that, in theory, could be available to the descendants of the Black Refugees for the land-based injustices, there are practical barriers within the legal system that would significantly impede the likelihood of success, or, even if successful, fail to restore the injured parties to what ought to have been their original condition.[664] Barriers such as statutes of limitations, judicial standing, rules of evidence, *stare decisis*, and principles governing the eligibility and quantification of pecuniary and non-pecuniary damages, all add layers of complexity which would cause delay and expense to an already long and

[663] Williams, Capitalism and Slavery, *supra* note 96.

[664] Rooted in its Latin term, *restitutio ad integrum* (remedies at law) strive for restoration to original condition.

costly litigation regime.[665] For example, after identifying instances of racial discrimination experienced by African Nova Scotians during the Halifax Explosion relief efforts, authors Mark Culligan and Katrin MacPhee examine four legal avenues to redress the historic claims of discrimination. They considered a claim under section 15 of the *Charter of Rights and Freedoms*, a claim under human rights legislation, a suit for unjust enrichment, and an action for breach of fiduciary duty. Ultimately, they conclude that each legal avenue is unlikely to succeed because of structural barriers within the legal system, which exemplifies "how the development of Canadian law has effectively served to bar many claims for redress for historic claims of discrimination."[666]

Similarly, Corrine Sparks explores the utility of conventional legal actions and corresponding relief that could be available to the former Africville residents, specifically unjust enrichment, and unconscionable transactions.[667] Before doing so, Sparks situates the legal analysis within the context of accumulated distrust and apprehension that African Nova Scotians have towards the legal system, and writes:

> Recourse through the courts, at times, has caused frustration, bitterness and disappointment. […] Black Nova Scotians are sceptical about the ability of the justice system to respond fairly and equitably to racial and social injustice. This distrust is […] more broadly based as Nova Scotian Blacks do not believe that the White judicial system has the capability to conceptualize and understand the burden of racism in society. […] This is in contrast to others such as White males, for example, who may have an inherent and unquestioning belief in the ability of the judicial system to respond to their conflicts.

[665] Corrine Sparks, "Africville: Reparation in the Paradoxical Legal Construction and Deconstruction of an African Canadian Community (LLM Thesis, Dalhousie University, 2001) [unpublished] ["Sparks, Africville Reparations"] at 137 discusses the restrictions imposed by statutory limitations, but also the discretionary opportunities which may allow the court to proceed even after the normal limitation periods, particularly pertaining to land-based causes of action. At 181, Sparks writes "Overall, the limitations imposed by the Statute of Limitations are arguably surmountable when considered in relation to the *K.M. v. H.M*. case and its interpretation of the rule of 'reasonable discoverability'."
[666] Mark Culligan and Katrin MacPhee, "Racism and Relief Distribution in the Aftermath of the Halifax Explosion" (2019) 31 Journal of Law and Social Policy 1 at 19.
[667] Sparks, Africville Reparations, *supra* note 586 at 130.

Whereas Sparks ultimately determines that with a contextual approach to the law, grounded in critical race theory, "an action of unjust enrichment and the doctrine of unconscionability are flexible enough to hold promise for Africville residents", since the commencement of a class action lawsuit in 1996, litigation pertaining to Africville remains unresolved to the satisfaction of the African Nova Scotian community.[668] To this end, Sparks explains:

> [f]rom my research, litigation, while always an alternative for resolving redress conflicts, may not be the complete answer for reparation and compensation, however. It was not the answer for Japanese Canadians […].

While the conventional legal system may not yet be equipped to effectively respond to racial injustices, historic or present, "judicial leadership and innovation should not be underestimated."[669] It is hoped that the judiciary will find innovative approaches towards a more effective redress for historic racial injustices in this province that have had long-lasting impacts afflicting African Nova Scotians today.[670] In the meantime, however, it seems political mobilization offers the most promising strategy for redress, as was the case for reparations to the Japanese Canadian community after World War II.[671]

5.2 Reparations Movement

While, in simple terms, reparation is a form of redress to atone for a wrongdoing, reparations in the context of human rights violations connotes something more nuanced

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[668] *Williams v. Halifax Regional Municipality*, 2015 NSSC 228; *Carvery v. Halifax (City)*, 2018 NSSC 204 (CanLII); *Carvery v. Halifax (City)*, 2019 NSSC 253 (CanLII).

[669] Sparks, Africville Reparations, *supra* note 586 at 132.

[670] *Ibid* at 132 writes "to achieve this goal it is important, however, to transform the judiciary itself, through judicial social context training, as well as the adoption of legal realism and Critical Race Theory as legitimate jurisprudential approaches to the law." Since this scholarly contribution in 2001, there has been an increase in the number of African Nova Scotians appointed to the bench in Nova Scotia. Justice John Bodurtha, the first African Nova Scotian judge appointed to the Supreme Court of Nova Scotia presided over the *Beals* case (*Beals*, *supra* note 168). Time will tell whether these efforts will result in the emergence of "better precedents, better approaches and better results which are more responsive to the amelioration of social and racial injustice." (*Ibid* at 132).

[671] Canada paid reparations to Japanese Canadians for the forcible relocation and internment of over 22,000 Japanese Canadians during World War II. The $300 million compensation package included direct payments to claimants. See Maryka Omatsu, Bittersweet Passage: Redress and the Japanese Canadian Experience (Toronto, Ontario: Between the Lines, 1992).

and comprehensive. What can be understood as a form of transitional justice[672] or reparatory justice,[673] reparations entail both the victims (and their descendants) right to receive reparations *as well as* the perpetrators (and their benefactors) duty to give reparations. The United Nations prescribes five principles underlying a full and effective reparations framework, namely restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition.[674] Reparations programs can be monetary and non-monetary and owed to individuals as well as collectives.[675]

The global slavery reparations movement is long-standing and multifaceted,[676] and has gained stronger momentum during the United Nations Decade for People of African Descent (2015 – 2024).[677] Stemming from the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, held in Durban in 2001, the United Nations adopted the Durban Declaration and Programme of Action which requested the Commission on Human Rights to establish a United Nations working group to study, and make proposals for the elimination of, the problems of racial discrimination faced by people of African descent living in the African Diaspora.[678] The Working Group of Experts on People of African Descent, established the following year, visited Canada in

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672 See *What is Transitional Justice Factsheet*, online: International Center for Transitional Justice, <https://www.ictj.org/about/transitional-justice>.

673 See *CARICOM Ten Point Plan for Reparatory Justice*, online: CARICOM Reparations Commission <https://caricom.org/caricom-ten-point-plan-for-reparatory-justice/>.

674 United Nations General Assembly Resolution 60/147 *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Laws and Serious Violations of International Humanitarian Law*, (United Nations, 16 December 2005) at paras 19-23, For an overview of events leading up to the Resolution 60/147 see *General Assembly Resolution 60/147* (United Nations, 2008), online: Audiovisual Library of International Law <https://legal.un.org/avl/pdf/ha/ga_60-147/ga_60-147_ph_e.pdf>.

675 Theo van Boven, United Nations Special Rapporteur on the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms (Geneva: UN, 2 July 1993) at 8.

676 For example, see Robinson, The Debt, *supra* note 96; see also Beckles, Britain's Black Debt *supra* note 96.

677 See also African Nova Scotian Decade for People of African Descent Coalition www.ansdpad.ca.

678 For more information on the United Nations Working Group, see https://www.ohchr.org/EN/Issues/Racism/WGAfricanDescent/Pages/WGEPADIndex.aspx

October 2016 which resulted in the Report of the Working Group of Experts on People of African Descent on its mission to Canada.[679]

Organizations such as the African Nova Scotian Decade for People of African Descent Coalition and the Global Afrikan Congress Nova Scotia Chapter have been instrumental in leading the global reparations movement in Nova Scotia, as well as representing Nova Scotia in the global discourse. Across the country there have been calls for an *African Canadian Reparations Act*,[680] which would include an African Canadian Reparations Commission to iron out the details and implement the recommendations set out in the Report of the Working Group of Experts on People of African Descent on its mission to Canada. Locally, African Nova Scotians have been calling for an African Nova Scotian Reparations Commission to focus on reparations for matters coming under the constitutional jurisdiction of the provincial government, which includes property matters.[681]

5.3 Quantifiable Loss from Smaller Lot Sizes

The racial disparities caused by the early nineteenth century land administration laws must now be rectified if Nova Scotians are to reconcile the injustices from the past with the promise of the present. The systemic anti-Black racism in this area of property law excluded, underserved, financially exploited, oppressed, and invalidated the Black Refugees, and at the same time, included, served, financially resourced, uplifted, and validated White settlers. Whether this was the intent or not, the effect remains that the law created and reinscribed racially disparate effects in opportunities for land-based economic growth which set into motion a different wealth trajectory for the Black Refugees compared to White settlers. This racial disparity in land possessions set the foundation on which present-day racial disparities in wealth and poverty are based. The enormity of the disparity is such that clarification of land titles, at this point, will have

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[679] United Nations DPAD Report, *supra* note 175.

[680] Anthony Morgan, What's Wrong with a Cheque? A Call for Slavery Reparations in Canada, March 21, 2019.

[681] *Constitution Act*, 1982, s 92(13), being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

limited impact on the cycle of poverty within the African Nova Scotian community. Even with legal title, African Nova Scotians face barriers in accessing quality loans and other financial resources that are needed to derive financial profit from their land, assuming capitalism is the desired route. Furthermore, the opportunity for significant inter-generational accumulation of land-based wealth has passed and so now African Nova Scotians are 200 years behind their White counterparts in that respect. Therefore, drastic and proactive approaches are needed to, among other things, make up for lost time.[682] To date, the land issue in African Nova Scotian communities has been mischaracterized, which has led us to misplace our efforts in the solution. A significant, albeit insufficient, amount of time and resources have been put into addressing the land titles issue, which is a worthy pursuit, but has come at the expense of diverting attention away from the bigger picture – land reparations.

When one party wrongs another party, that party ought to make amends for the harm they caused. Whether the promises in the Cochrane Proclamation are characterized as misrepresentations (fraudulent, negligent, or innocent), or an intentional breach of contract (offer, acceptance, and consideration), damages are owed to the heirs of the Black Refugees. And while it may be challenging (though not impossible) to quantify damages associated with land tenure, that is not the case for lot sizes. In simple terms, at the time of the Black Refugees arrival, land was being granted in lot sizes ranging from 100 to 500 acres. At the low end, being a comparison to the disbanded soldiers who were receiving on average 150 acres each, there is a disparity of 140 acres compared to the 10 acres that the Black Refugees were receiving. At the mid range, being a comparison to married pauper White immigrants under the 1821 land regulations who could obtained 200 acres, there is a disparity of 180 acres compared to the 10 acres that the Black Refugees were receiving. At the high end, being the opportunity to receive the maximum

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[682] Cheryl I. Harris, "Whiteness As Property" (1993) 106:8 Harv L Rev 1707 at 1779 writes: "Rereading affirmative action to de-legitimate the property interest in whiteness suggests that if, historically, the law has legitimated and protected the settled expectations of whites in white privilege de-legitimation should be accomplished not merely by implementing equal treatment, but by *equalizing* treatment among the groups that have been illegitimately privileged or unfairly subordinated by racial stratification."

lost size grant that the Lieutenant Governor was legally empowered to issue under the 1807 Land Administration Laws, which was 500 acres, there is a disparity of 490 acres compared to the 10 acres that the Black Refugees were receiving.

In terms of value per acre, while it may be difficult (though not impossible) to determine the value of land in 1814, but by 1827 monetary value was be attributed to the land for the purposes of calculating the upset price under the land sale regulations. In the Buller Report, Surveyor-General J.S. Morris testified that the upset price was two shillings per acre.[683] It is important to note here that the upset price is merely the starting point for the auction, and so the final purchase price per acre may have been much higher depending on the location and quality of the land being auction. Nevertheless, for the purposes of this simple calculation, the two shilling per acre will be used.

5.3.1 Table of Quantifiable Loss from Smaller Lot Sizes

-	Black Refugees 10 Acres	Disbanded Soldiers 150 Acres	Pauper White Immigrants 200 Acres	White Settlers 500 Acres
Land Value 1827 (2 shillings per acre)	20s (£1)	300s (£10)	400s (£20)	1,000s (£50)
Land Value 2020 ($2,332[684]/£1,339[685] per acre)	£13,390 $23,320	£200,850 $349,800	£267,800 $466,400	£669,500 $1,166,000
Difference in loss/gain per Black Refugee	-	($326,480)	($443,080)	($1,142,680)

Note that these calculations do not account for lost investment opportunities or other missed opportunities that could have been gained by leveraging the additional land as a capital asset. There are likely more sophisticated methods for calculating the financial loss attributed to smaller lot sizes, but it is hoped that these crude calculations will at least illuminate the need for calculating this information. Organizations such as Property Valuation Services Corporation, being the legal entity responsible for assessing all

683 Buller Report, *supra* note 165, Appendix B at 3.
684 Note this is the value per acre of farm land and buildings. https://www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=3210004701.
685 Converted at 2020 conversion rate.

property in Nova Scotia under the *Assessment Act*,[686] likely have the resources capable of carrying out this valuation more precisely.

Based on the calculations set out in the above table, each of the 2,000 or more Black Refugees are owed, at a minimum, damages ranging from $326,480 to $1,142,680[687] for the systemic anti-Black racism in property law which resulted in their receipt of substantially reduced lot sizes compared to their White counterparts. These amounts should be paid to the descendants of the Black Refugees to make amends for this wrongdoing. And, as with typical instances of legal damages for personal injury, those amounts are owed directly to the claimants, being the descendants of the Black Refugees who are living with the consequential inter-generational trauma and cycle of poverty, and not paid into government programming. African Nova Scotians need the economic security and independence to make their own financial decisions which serve their unique individual and collective financial circumstances.

Reimbursing African Nova Scotians for their inter-generational loss attributed to smaller lot sizes and acknowledging the corresponding inter-generational gain advantaging White Nova Scotians, is only one aspect of a larger system of redress for slavery and egregious injustices against people of African descent. The reparations movement, dating back to at least 1783,[688] is longstanding, deep-rooted, and multidimensional, but in simple terms, "reparations is a program of acknowledgement, redress, and closure for a grievous injustice."[689] To elaborate,

> Acknowledgement is the admission of wrong and the declaration of responsibility for restitution by the culpable party. Redress is the act of restitution—compensation for the wrong—carried out by the culpable party. Closure is the settling of accounts between the

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[686] R.S. 1989, c. 23, as amended.
[687] In aggregate, the loss to the Black Refugees and gain to White settlers ranges from $652,960,000 to $2,285,360,000.
[688] Davis, Allen (May 11, 2020). An Historical Timeline of Reparations Payments Made From 1783 through 2021 by the United States Government, States, Cities, Religious Institutions, Universities, Corporations, and Communities, University of Massachusetts Amherst. online: <https://guides.library.umass.edu/reparations>. Retrieved August 5, 2021 ["Allen, Reparations Timeline"].
[689] William Darity, Jr. and A. Kirsten Mullen, *From Here to Equality, Reparations for Black Americans in the 21st Century*, (University of North Carolina Press, 2020) at 2 ["Darity, Reparations"].

> victimized community and the culpable party—the arrival at conciliation. Closure means that the debt has been paid and that the victimized community will make no further claims for restitution, barring the occurrence of new atrocities or the recurrence of old atrocities.[690]

What is particularly noteworthy about the reparation's movement is the emphasis on direct payments to the injured party. In this regard, the "reparations" decision by the City of Evanston in Illinois, United States is a cautionary tale to consider in the structuring of reparations to African Nova Scotians for smaller lot sizes. In 2019, Evanston City Council passed Resolution 58-R-19, "*Commitment to End Structural Racism and Achieve Racial Equity*" which triggered a process aimed at addressing the historical wealth and opportunity gaps that Black residents experienced compared to White residents. Through this process, the City identified actions that it could take to implement a meaningful repair and reparations policy. The first initiative for restorative relief that was identified was housing reparations for the city's part in housing discrimination arising out of early to mid-twentieth century city ordinances that were in effect during a city ban on housing discrimination. Thus, on March 22, 2021, Evanston, Illinois City Council approved what is called a "Local Reparations Restorative Housing Program" under which qualifying Black residents can receive up to $25,000 grants for repairs or down payments on homes.[691] The city has earmarked $10 million over ten years for fund, using revenue from recreational cannabis taxes, and has called upon citizens, businesses, and organizations to make private contributions to the reparations fund.

While touted as the first city in the United States to issue racial reparations for slavery, it has been pointed out that this is more a housing voucher program than reparations[692] because, among other reasons, cash payments are not made directly to the recipients to be used at their discretion, which is a hallmark of the reparations movement and consistent with reparations that were paid to other groups for historical injustices,

[690] William Sandy Darity, A. Kirsten Mullen, "True Reparations Are a National Debt: Localities and Individuals Should Not Foot the Bill and Cannot Build Systemic Remedies Alone." February 25, 2020.
[691] "A good start: Evanston takes on racial reparations" Chicago Tribune (IL) [1085-6706] Chapman yr: 2021
[692] See, for example, The Washington Post "Evanston, Ill, approved 'reparations.' Except it isn't reparations".

such as German payments to Holocaust victims and United States' payments to Japanese descendants for their internment during World War II. Likewise, Canada paid reparations to Japanese Canadians for the forcible relocation and internment of over 22,000 Japanese Canadians during World War II. The $300 million compensation package included direct payments to claimants.[693]

5.4 Promise of the Present: Count Us In Report

On May 8, 2018, Nova Scotia joined the United Nations General Assembly in proclaiming 2015 to 2024 as the International Decade for People of African Descent, with the theme "*People of African Descent: recognition, justice, and development*." In doing so, the Province of Nova Scotia committed to addressing the issues facing African Nova Scotians and called on all Nova Scotians to "take action in support of our African Nova Scotian communities in their efforts for full inclusion in all facets of Nova Scotian society."[694] One aspect of this work included the development of an action plan which, building upon earlier reports and recommendations by African Nova Scotians, proposes "a system-wide blueprint for lasting change" [695] by promoting the three pillars: recognition, justice, and development. The then Premier of Nova Scotia wrote:

> This action plan is designed to recognize the important contributions of people of African descent living in Nova Scotia, while at the same time working to tackle the unique challenges impacting the community. […] This action plan will be our guiding document. It will provide government with specific actions, direction and strategic priorities to steer decision making using the three pillars: recognition, justice and development.[696]

While there are visionary gaps between the United Nation's calls for reparations which entails "acknowledgement, redress, and closure", as compared to Nova Scotia's pillars of "recognition, justice, and development", there is an expressed commitment in

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[693] See Maryka Omatsu, Bittersweet Passage: Redress and the Japanese Canadian Experience (Toronto, Ontario: Between the Lines, 1992). For more examples of reparations paid by countries, see Allen, Reparations Timeline, *supra* note 688.
[694] Proclamation by Honourable Stephen McNeil, Premier of Nova Scotia, dated May 8, 2018.
[695] Government of Nova Scotia, Count Us In: Nova Scotia's Action Plan in Response to the International Decade for People of African Descent, 2015-2024 at 6 ["Count Us In"].
[696] *Ibid* at 1.

Count Us In toward the "journey of healing and resolution" which underscores its mandate and aligns it closer to the spirit and intent of reparations.

The vision for Nova Scotia's *Count Us In Action Plan* is for African Nova Scotians to prosper and equitably and respectfully access and participate in all facets of Nova Scotian society.[697] To that end, the "Recognition" pillar in the Action Plan strives to recognize and celebrate the important contributions of African Nova Scotians, "while also recognizing the long-standing prejudices and unfair treatment endured for generations."[698] Actions such as education and data governance are items listed under this pillar. It is important to note here that while employment income is a common data collection item, data on net worth and other data points that would capture the percentage and value of Black-owned capital assets (such as land) compared to White-owned capital assets, are not readily available. Bridging the income gap is a worthwhile pursuit but bridging the wealth gap will require a more comprehensive data collection strategy.

The "Justice" pillar of the Action Plain strives to bridge the gap between what the law promises and what law enforcement and the justice system deliver.[699] To that end, one goal is for African Nova Scotians to have access to a fair and equitable justice system, including systems which impact African Nova Scotian children, youth, and families, as well as environmental justice, and land-based issues affecting African Nova Scotian communities.[700]

The third pillar in the *Count Us In Action Plan*, "Development", endeavors to create healthier and more prosperous African Nova Scotian communities through goals such as closing the education gap and supporting health and well being of African Nova Scotians of all ages. [701] Another key goal of the "Development" pillar is to bridge the income gap through economic development strategies. In this regard, the *Count Us In* report incorporates the work of another Government of Nova Scotia report that was published

[697] *Ibid* at 8.
[698] *Ibid* at 9.
[699] *Ibid* at 11.
[700] *Ibid* at 13.
[701] *Ibid* at 14.

in 2014 entitled *Now or Never: An Urgent Call to Action for Nova Scotians*, commonly known as the "*Ivany Report*".[702] Stemming from the *Ivany Report*, the Government of Nova Scotia developed a 10-year plan to help achieve the goals established in the *Ivany Report*, known as *One Nova Scotia*.[703] While one of the key mandates of the *Ivany Report* was "to better understand the circumstances and opportunities for different regions, economic sectors, and cultural communities across the province"[704] the *Ivany Report* does not investigate the realities of anti-Black racism nor acknowledge its consequences on the African Nova Scotian community. African Nova Scotians are mentioned nine times throughout the 84-page *Ivany Report*, and four of the nine references situate African Nova Scotians as unemployed or underemployed labourers.[705] To that end they write "[t]he birth rate for these communities is higher than in the general population so they represent an important potential source of young new entrants to the labour force.[706] Once again, African Nova Scotians are being relegated to the role of labourers in support of White-serving economic pursuits. Thus, not surprisingly, Goal #8 in *One Nova Scotia* is employment rate equality, not racial wealth gap reduction. Nevertheless, even with this narrow vision, as of August 6, 2021, Goal #8 is not progressing on track and achieved only 16% towards its target.[707]

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[702] In 2012 the Province of Nova Scotia under the helm of New Democrat Leader, Darrell Dexter, created a Commission on Building Our New Economy who prepared a report entitled *Now or Never: An Urgent Call to Action for Nova Scotia* (February 2014) ["Ivany Report"]. By the time the report was published in February 2014, a new Liberal government was elected in Nova Scotia, under the helm of Stephen McNeil. The Chair of the Commission was Ray Ivany, then President of Acadia University, and the other commissioners included Irene d'Entremont, President (ITG Information), Dan Christmas (Senior Advisor, Membertou), Susanna Fuller (Marine Conservation Coordinator, Ecology Action Centre), and John Bragg (Founder and CEO of Oxford Group of Companies).
[703] Attempts were made in the Nova Scotia Legislature to entrench the 10-year action plan into statute. A Private Members Bill "*An Act Respecting the Entrenchment of the Goals Set Out in the Report of the Nova Scotia Commission on Building Our New Economy*" had its First Reading October 9, 2014 but did not proceed. The One Nova Scotia dashboard is available at https://www.onens.ca/.
[704] Count Us In, *supra* note 695 at 16.
[705] There is brief recognition of African Nova Scotians as entrepreneurs at 40, but in the context of present entrepreneurship and no mention of the industrious, resourceful, and innovative entrepreneurship that has existed in the African Nova Scotian community for over 200 years.
[706] Ivany Report, *supra* note 702 at 24.
[707] *Ibid* at 48; (the status of goals are at https://www.onens.ca/goals/goal-8-employment-rate-first-nations-and-african-nova-scotians).

The vision for improving the financial health of African Nova Scotians that is embedded in the *Ivany Report* is too narrow and fails to address the racial disparities in personal net worth (assets minus liabilities) which will undermine any success in attaining employment rate equality. Unfortunately, with this narrow vision now incorporated into *Count Us In*, the action items under the "Development" pillar equally fall short of what is needed to bridge the racial wealth gap in this province. More work is needed to better understand the extent of racial disparities in personal net worth, that include inter-generational wealth accumulation from real estate, followed by concrete action to bridge the gap. What is also missing from *Count Us In* is a reparations strategy that would not only settle the accounts of historical debts associated with the colonial land administration laws, but also situate many African Nova Scotians into positions of stronger financial health.

5.5 Recommendations

The work in this thesis supports the need for an African Nova Scotian-led reparations commission to develop and implement a reparations strategy for, among other things, the historic racial injustices caused by the colonial land administration laws. In Canada, the provinces have constitutional jurisdiction over property matters, thus while the colonial land administration laws pre-existed confederation, a constitutional decision was made which places legal responsibility with the Province of Nova Scotia.

Additionally, this work highlights the need for a multidisciplinary African Nova Scotian research institute. The systemic racism in the colonial land administration laws is merely a subset of systemic racism in property law, which itself, is a subset of systemic racism in law. However, there are many areas of law which actively create or passively support anti-Black racism, all of which need to be explored, dismantled, and redressed. Furthermore, the systemic anti-Black racism extends beyond the field of law, and even within law, often cuts across multiple fields of discipline. Properly structured, a multidisciplinary African Nova Scotian research institute would be well suited to engage scholars and practitioners in various fields of study who could work collaboratively to serve the interests of the African Nova Scotian community at large.

Lastly, in terms of systemic racism in property law, more research is needed to investigate the scope and degree of racial disparities in land-related matters such as land titles, but also the tenure, size, and location of land owned by African Nova Scotians as compared to non-African Nova Scotians. As a starting point, Nova Scotia's online system which provides access to land ownership and related information managed by Nova Scotia's Land Registration Office, referred to as Property Online, needs reform. The financial costs associated with accessing Property Online (minimum $80/month) is prohibitive to many citizens, as well as academic researchers. Additionally, the data currently collected and organized within this system is not conducive to empirical or other research activities. The collection of race-based data pertaining to land, and equitable access to that data, is instrumental to the identification and redress of systemic racism in property law.

Chapter 6: Conclusion

A guiding perspective under critical race theory is to look beyond the law's active role in creating inequalities (positive law) and examine the covert ways in which the law supports racial inequalities through the recognition of seemingly harmless laws and social customs.[708] Critical race theorists challenge these tacit ways in which the law creates and reinscribes racial inequalities.[709] The role of the law in supporting and promoting anti-Black racism and White supremacist ideology through the colonial land administration laws in this province was not the result of overtly racists laws, but rather, the law covertly supported anti-Black racism and White supremacy through the acceptance of conditions that allowed these attitudes to thrive.

This thesis sought to reframe the African Nova Scotian land titles discourse into a broader understanding about systemic anti-Black racism and White supremacist ideology embedded within the origins of law in this province, specifically real property law. Through a critical race theoretical analysis of the early nineteenth century colonial land administration laws, this work reveals the ways in which anti-Black racist and White supremacist ideology embedded within the origins of law created and exacerbated racial disparities in land-based wealth in this province.

Despite promises to receive land as 'free settlers', which induced the Black Refugees to risk their lives fleeing captivity and side with the British during the War of 1812, the law allowed anti-Black racist and White supremacist ideology to infiltrate its early origins in this province by failing to protect the Black Refugees when the colonialists flagrantly disregarded, without consequence, their obligations under the Cochrane Proclamation. The law further failed to protect the Black Refugees when it allowed anti-Black racist and White supremacist ideology to subvert the colonialists' application of an ostensibly race-neutral law, which resulted in, among other things, inferior land allocations to the Black Refugees as compared to White settlers. Then, the law exacerbated the racial gap in colonial land allocations through a colour-blind approach to

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[708] Walker, Legal Odyssey, *supra* note 21 at 1.
[709] *Ibid*.

law reform which served the interests of newly arrived pauper White immigrants. This law reform created better colonial land acquisition opportunities for pauper White settlers but excluded the Black Refugees from eligibility because of their previous racially discriminatory treatment under the law. Finally, after all of the above, the law again exacerbated the racial disparities in land allocations through the adoption of a unified system of land sales, which (a) required the Black Refugees to pay monetary consideration to have their previously issued (smaller) lots confirmed as grants when ought to have been issued larger lots as free grants, and (b) served to deny the Black Refugees the opportunity to be relocated to better and larger lands when they sought to have these racial injustices redressed. In all of these ways, the law supported anti-Black racism by promoting and protecting the interests of a White supremacist ideology, and in doing so, created and reinscribed the racial disparities in land-based wealth and poverty that exists in this province.

In the context of property law in this province, systemic anti-Black racism finds it origins in colonialism, including the colonial land administration laws which resulted in the Black Refugees receiving significantly smaller land allocations than White settlers. This racially disparate effect in law had an impact on inter-generational wealth and poverty disparities among White Nova Scotians and African Nova Scotians. The importance of highlighting this racially disparity, and its longstanding financial impact, is not to condone or legitimize colonialism or capitalism. The intent is to acknowledge the realities of systemic anti-Black racism and to lay a foundation for which further work can be developed and meaningful action can be taken, including reparations to African Nova Scotians as a first step towards redressing the consequences of systemic anti-Black racism in the law.

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Instructions to Sir John Coape Sherbrooke Lieutenant Governor of Nova Scotia 12 April 1816 PANS RG 1 Vol 349A (Royal Instructions to LG Sherbrooke).

Instructions to Lord Dalhousie Lieutenant Governor of Nova Scotia 27 April 1820 PANS RG1 Vol 350 Doc 22 (Royal Instructions, 1803-1841).

Instructions to Governor Edward Cornwallis (transcript) 29 April 1749 PANS RG 1 Vol 350A

Instructions on the Granting of Land in Nova Scotia 29 August 1807 PANS RG 1 Vol 353.

Licence of Occupation from Lieutenant Governor Dalhousie for Lots at Refugee Hill 27 March 1818 PANS, RG 1 Vol 419 Doc 36 (Negro and Maroon settlements, 1790-1834; PANS online).

License from Lieutenant Governor Lord Dalhousie to Sampson Butler and a number of other Black Refugees to occupy certain lots of land at Hammonds Plains (undated) PANS RG1 Vol 419 Doc 119 (Negro and Maroon settlements, 1790-1834; PANS online).

Copy of a Land Grant to William Day and a Number of other Black Refugees at Hammonds Plains (undated) PANS RG 1 Vol 419 Doc 120 ((Negro and Maroon settlements, 1790-1834; PANS online).

Letter from Admiral Sir Alexander Cochran to Sir J. C. Sherbrooke regarding the condition of Black Refugees recently brought from Virginia 5 October 1814 PANS RG 1 Vol 420 Doc 10 (Negro and Maroon settlements, 1813-1816; PANS online).

Letter from Hon. Charles Morris, Surveyor General, to the Lieutenant Governor JC. Sherbrooke, regarding the settlement of the Black Refugees and the best location for that purpose 6 September 1815, PANS RG 1 Vol 420 Doc 76 (Negro and Maroon settlements, 1813-1816; PANS online).

Memo of Provisions issued to Black Refugees at Hammonds Plains to 17 November 1815 27 November 1815 PANS RG 1 Vol 420 Doc 90 (Negro and Maroon settlements, 1813-1816; PANS online).

Return of People of Colour in Hammonds Plains entitled to Rations by order of His Excellency Sir John Coape Sherbrooke from (undated) to 1815 inclusive (undated) PANS RG 1 Vol 420 Doc 92 (Negro and Maroon settlements, 1813-1816; PANS online).

Return of Black Refugees Settled at Hammonds Plains 8 June 1816 PANS RG 1 Vol 421 Doc 9 (Negro and Maroon settlements, 1816-1818; PANS online).

A Return of the Number of Black Refugees and their Families Settled at Hammonds Plains" (undated) PANS RG 1 Vol 422 Doc 19 (Negro and Maroon settlements, 1818-1819; PANS online).

A list of Black Refugees at Beech Hill (Beechville) settlement who wished to go to Trinidad (undated) PANS RG 1 Vol 422 Doc 20 (Negro and Maroon settlements, 1818-1819; PANS online).

Petition from Black settlers at Preston to the House of Assembly praying for a grant of the land they occupied by licence PANS RG 1 Vol 422 Doc 46 (Negro and Maroon settlements, 1818-1819; PANS online).

Copy of a letter from Lord Glenelg to the Lieutenant Governor, Sir Colin Campbell, regarding the removal of Refugee Blacks to better lands 25 October 1837 PANS RG 1 Vol 422 Doc 50 (Negro and Maroon settlements, 1818-1819; PANS online).

List of Black Refugees at Hammonds Plains, showing the number of houses and lots of land (undated) PANS RG 1 Vol 422 Doc 111 (Negro and Maroon settlements, 1818-1819; PANS online).

PANS RG 20 Series

Report on Lots at Hammonds Plains by Joseph Thomas" 17 June 1835 Nova Scotia Lands and Forests — Crown Lands series Nova Scotia Archives RG 20 series C volume 88 number 185 (PANS online).

Appendix A: (1815) Rations Return

[Copy] The Return of People of Colour in Hammonds Plains entitled to Rations by order of His Excellency Sir J.C. Sherbrooke from [blank] to 1815 inclusive.[710]

1. Francis Butler
2. Geo. G Butler
3. Wm. D. Butler
4. Isaac Butler
5. George Butler
6. Abraham Butler 1st.
7. Hector Butler
8. William Butler
9. Cato Butler
10. James Butler
11. Juba Butler
12. Joe Butler
13. Abraham Butler 2nd
14. Henry Butler
15. Sampson Butler
16. Gabriel M Butler
17. Jeffrey Butler
18. John Butler
19. Patrick Butler
20. William Marshman
21. Frederick Bailey
22. Simon Cochran
23. Jack Hamilton
24. [Shed] Hamilton
25. Reuben Hamilton
26. Joe Wiley
27. July Hamilton
28. Henry Hamilton
29. Deal Wiley
30. Luben Wiley
31. April Cooper
32. July Cooper
33. Isaac Grant
34. Brutus W Nish
35. Charles Gekie
36. Francis [Rofs]
37. Francis Grant
38. Richard [Rofs]
39. Henry Bailey
40. Scipio Cooper
41. Moses Maysey
42. Sandy Cooper
43. Duncan Moysey
44. Sandy Poisco
45. Thomas Horseman
46. [Caityny] Hamilton
47. Dominic de Broka
48. Jack Hamilton 1 st
49. [Brafs] Hamilton
50. Tony Hamilton
51. Richard Hamilton
52. James Hamilton 1st
53. [Quashy]] Hamilton
54. Peter Glasgow
55. Jack Hamilton 2nd
56. James Hamilton 2nd
57. Godfrey Darcy
58. Jeremiah Johnson
59. Newman Brookenberry
60. Robert [Roicee]
61. Andrew Smith
62. Robert Hamilton
63. Joesph Grimes
64. Alexander Cooper
65. Benjamin Jackson
66. Samuel Cooper
67. London Cooper
68. Colly Copa
69. [Listing] Cooper
70. John Morris
71. Quash Cooper
72. Robert Bingle
73. Peter Hamilton
74. George Johnston
75. Solomon Boling
76. Adam Nero
77. Mark Taylor
78. Jack Watt
79. Dick Hamilton
80. Ebo Hamilton
81. James Groce
82. John Butler
83. Lewis Stuben
84. Peter Bain
85. Cogo Butler
86. Charles Jackson
87. Cuffe Drake
88. Mark De Young
89. Lindo W Intosh
90. John Cooper
91. Lory Mathews
92. Apollo Mathews
93. Mark Murphy
94. Lawrence Murphy
95. George Johnston
96. Harry Edwards
97. Aaron Bailey
98. Dick McCarty
99. Solomon Boullen
100. Joe Johnston
101. Simon Cochran
102. Mark Taylor
103. Nassau Jackson
104. Jack Watts
105. William Griffin
106. John Rogers
107. Mary Mart [or Mast?]
108. John Alexander
109. James Watson
110. Timothy Williams
111. Abel Harding
112. Geral Saunders
113. Moses Senior
114. Philip Watkins
115. Pompey Joseph
116. John Lewis 1
117. John Lewis 2
118. Quash Mantly
119. John Baptist
120. Petion Jean Pierre
121. John Hamilton
122. John Cooper

[710] (undated) PANS RG1 Vol 420 Doc 92). Note, the names appear as listed in the record available at PANS online https://archives.novascotia.ca/african-heritage/archives/?ID=245.

Appendix B: (1815) Lot List

[Copy] List of Black Refugees at Hammonds Plains, showing the number of houses and lots of land.[711]

No.	Name	No. of the House	No. of the Lot of Land	Wife	Children
1.	Richard Fitzue	1	-	1	2
2.	Peggy Butler	2	-	-	3
3.	Charles Stewart	3	-	1	1
4.	Henry Butler	4	-	1	2
5.	Wm P Butler	5	-	1	1
6.	Francis Butler	6	-	1	2
7.	George G Butler	7	-	1	2
8.	Joseph Davis	8	-	1	3
9.	Dominica DeBruce	9	-	1	2
10.	Samson Butler	10	-	1	1
11.	March Butler	11	-	1	1
12.	Caesar Wiley	12	-	1	1
13.	Joe Wiley	13	-	1	1
14.	Henry Hamilton	14	-	1	3
15.	Reuben Wiley	15	-	1	1
16.	July Cooper	16	-	1	2
17.	March Christopher	17	-	1	2
18.	Emanuel Griffin	18	-	1	1
19.	Lewis Willis	19	-	1	1
20.	Lewis Stuben	20	-	1	2
21.	Robert Cooper	21	-	1	2
22.	Charles Gekie	22	-	1	1
23.	Francis Ross	23	-	1	1
24.	Richard Ross	24	-	1	2
25.	Scipio Cooper	25	-	1	2
26.	Sandy Cooper	26	-	1	2
27.	Sandy Pascoe	27	-	1	1
28.	Robert Hamilton	28	-	1	1
29.	John Hamilton	29	-	1	1
30.	Toney Hamilton	30	-	1	2

(continued)

[711] (undated) PANS RG 1 Vol 422 Doc 111. Note, the names appear as listed in the record available at PANS online <https://archives.novascotia.ca/african-heritage/archives/?ID=525>.

No.	Name	No. of the House	No. of the Lot of Land	Wife	Children
31.	Shed Hamilton	31	-	1	2
32.	Diana Hamilton	32	-	-	2
33.	Reuben Hamilton	33	-	1	3
34.	Jerry Johnstone	34	-	1	3
35.	Robert Rowe	35	-	-	-
36.	Godfrey Davies	36	-	1	1
37.	Benjamin Jackson	37	-	1	-
38.	Samuel Hamilton	38	-	-	-
39.	Qualley Cooper	39	-	1	1
40.	Quash Cooper	40	-	1	2
41.	Samuel Cooper	41	-	1	2
42.	Samuel Jenkins	42	-	-	-
43.	George [Mars?]	43	-	-	-
44.	James Pierrie	44	-	1	-
45.	Landon Cooper	45	-	-	-
46.	Lusten Cooper	46	-	1	1
47.	Alexander Cooper	47	-	-	1
48.	George Graham	48	-	-	-
49.	Newman Bronkenbury	49	-	1	1
50.	Quash Hamilton	50	-	1	2
51.	Richard Hamilton	51	-	1	3
52.	[Brafs?]Hamilton	52	-	1	-
53.	Thomas Osman	53	-	-	-
54.	Peter Hamilton	54	-	1	-
55.	George Hamilton	55	-	-	-
56.	Quash Mantley	56	-	1	-
57.	Duncan Massey	57	-	-	-
58.	Charles Jackson	58	-	-	-
59.	Henry Bailey	59	-	1	3
60.	Frank Grant	60	-	1	-
61.	Isaac Grant	61	-	1	-
62.	Brutus McNish	62	-	1	-
63.	Charles Stubenfield	63	-	1	1
64.	Joe Cooper	64	-	1	1
65.	April Cooper	65	-	1	2
66.	Deal Wiley	66	-	1	1
67.	Quash Cooper	67	-	1	-
68.	Patrick B Butler	68	-	1	2
69.	John Jenkins	69	-	-	-
70.	Jeffery H. Butler	70	-	1	3

(continued)

No.	Name	No. of the House	No. of the Lot of Land	Wife	Children
71.	Grant M. Butler	71	-	1	1
72.	John Brown	72	-	-	-
73.	Abraham Butler	73	-	1	
74.	George Butler	74	-	1	1
75.	Cato Butler	75	-	1	1
76.	Joe Butler	76	-	1	3
77.	Hector Butler	77	-	1	1
78.	William Day Butler	78	-	1	1
79.	Isaac Butler	79	-	1	1
80.	Simon Cochran	80	-	1	-
81.	John Butler	81	-	1	1
82.	Susan Fowler	82	-	-	-
83.	John Lamone	83	-	-	-
84.	March Movis	84	-	-	-
85.	March Cooper	85	-	1	1
86.	Larama Vindra	86	-	-	-
87.	Cuffy Mattis	87	-	-	-
88.	Nero Mattis	88	-	1	-
89.	Babtiste Mattis	89	-	-	-
90.	Peter Ryan	90	-	1	1
91.	John Thomas	91	-	1	2
92.	Roger Cooper	92	-	-	-
93.	John Lewis	93	-	-	-
94.	John Massey	94	-	1	-
95.	John Watts	95	-	-	-
96.	Jesse Parker	96	-	1	-
97.	Andrew Smith	97	-	1	-
98.	Philip Hamilton	98	-	-	-
99.	Peter Pierrie	99	-	-	-
100.	John Gregory	100	-	1	1
101.	Bristo Ryan	101	-	1	-
102.	John Peachong	102	-	-	-
103.	Daniel Goffigan	103	-	1	2
104.	Jesse Carter	104	-	1	2
105.	George Francis	105	-	1	1
106.	George Appoling	106	-	-	-
107.	John Babtiste	107	-	1	3
108.	John Hamilton	108	-	1	1
109.	James Hamilton	109	-	-	-
110.	Apollo Mattis	110	-	-	-
111.	Bristo Mott	111	-	-	-
112.	Charles Butler	112	-	1	2
113.	Richard Cunard	113	-	-	-
				81	111
				Total:	293

Appendix C: (1817) Settlement Return

[Copy] A return of the number of Black Refugees and their families settled at Hammonds Plains[712]

Names	Women	Males Under 7 yrs. of age	Do. Under 14 yrs. of age	Do. Above 14 yrs. of age	Females Under 7 yrs. of age	Do. Under 14 yrs. of age	Do. Above 14 yrs. of age	Total	Names of those desirous of going to Trinidad
Parry Brown	1		1		2			5	
Richard Fitzhue	1		3		3	1		9	
John Butler	1		1					3	
Simeon *Cochran	1							2	
John Tyson	1	2						4	
Henry King	1		1					3	Trinidad
William Palmer	1					1		3	
Isaac Butler	1	1	1	1			1	6	
Francis Butler	1				4			6	
Willm Days	1				2			4	
Charles Stewart	1	1			1			4	
George *Gingham	1	1	2	4				9	Trinidad
John Carolina								1	Trinidad
Joseph Davis	1	2			1			5	
Hector Butler	1	1			2			5	
Joseph Butler	1	2						4	Trinidad
Kato Lee	1	1			1			4	
George Butler	1	2						4	
Simpson Fox	1						1	3	
York Forrester	1							2	Trinidad
Joseph Pencil								1	
Aplo Solmit	1	2						4	
Charles Arnold	1			1		1	1	5	
Abr. Butler	1						1	3	
George Tailor	1	2						4	
Brister Mot	1			1				3	
Dom De Broker	1	1				2	1	6	
John Newton	1							2	
John Hamilton 2d	1		1					3	

712 (undated) PANS RG 1 Vol 422 Doc 19. Grant, Immigration and Settlement, *supra* note 59 at 92 cites this document in footnote 125 and dates it as "about the same time" as another report dated August 1817 report. He also states at 95 that Sherbrooke wrote to the Colonial Office on February 2, 1816 that he would "inform himself" of the number of refugees who desired to remove to Trinidad and that he would report this information as soon as possible. However at 96, Grant references another Trinidad "return" by Richard Inglis which, if dated close to the similar return for Beechville (PANS RG 1 Vol 422 Doc 20), would place the date of this return as somewhere close to August 20, 1820. Note, the names appear as listed in the record available at PANS online < https://archives.novascotia.ca/african-heritage/archives/?ID=432>.

Antwine Goodry	1							2	Trinidad
Dolly Lee				1	1		4	1	
Jubah Wallace				1			1	3	
Andw Smith	1	1				1		4	
Hope Maxwell									
James Sanders	1	2						5	
Brister Webb	1							2	Trinidad
Aplo Pier	1							2	Trinidad
John Grigaw	1							2	Trinidad
John Mersy	1							2	
							Total	143	arrived for

(continued)

Names	Women	Males Under 7 yrs. of age	Do. Under 14 yrs. of age	Do. Above 14 yrs. of age	Females Under 7 yrs. of age	Do. Under 14 yrs. of age	Do. Above 14 yrs. of age	Total	Names of those desirous of going to Trinidad
John P. Petion	1	1			1			4	
James Mitchell	1				2			4	Trinidad
Charles Randle								1	
Brister Wearing	1					1	1	4	Trinidad
Jesse Parker	1	1						3	
Rodger Cooper	1							2	
Peter Ryan	1	2						4	
Nasseus La Coss.	1							2	
George Copy	1	1						3	
John Battist	1	1			2			5	
John Larama	1				1			3	
John Lewie								1	
John Cooper	1							2	
Peter Hamilton	1	1						3	
Peter Verrice								1	Trinidad
James Allison	1							2	
March Movile	1						1	3	Trinidad
Samuel Jenkins	1							2	
John Hamilton 3d	1							2	
John Thomas	1	1						3	
Nora Mathews									
Dolly Mathews	1	1			1			5	
George Fransiva	1							2	Trinidad
Benj Days								1	
Robn Cunard								1	
———Jessama								1	

Josh Pollodore								1	
Ab Cunard								1	
Richd McIntosh								1	Trinidad
Rosa Glostling	1							2	
MIDDLE STREET								1	
Fredk Bailey								1	
Quashy Cooper Sr.	1	1	2					5	
Colly Cooper	1	2			1			5	Trinidad
John Lamo	1	1				1		4	
Samuel Cooper	1	2						4	
Lennon Cooper	1							2	
Benj Jackson								1	
Liston Cooper	1	1						3	
Phoebe Cooper								1	
Josh Grimes	1		1					3	
							Total	241	carried forward

(continued)

Names	Women	Males Under 7 yrs. of age	Do. Under 14 yrs. of age	Do. Above 14 yrs. of age	Females Under 7 yrs. of age	Do. Under 14 yrs. of age	Do. Above 14 yrs. of age	Total	Names of those desirous of going to Trinidad
Toney Hamilton	1		1	1		1		5	
Godfrey Davis	1	1						3	
Newman Brookinbery	1	1						3	
Robert Rowe Judith Parker	1	1						4	
Josh Johnson Mary Parker	1	1			3			7	
Peter Peir								1	
Ruben Hamilton	1	1	1	1		2		7	
Nassau Jackson	1	1	1		1			5	Trinidad
Quashy Hamilton	1			3	2	1	2	11	
Richard Hamilton					1	1	1	4	Trinidad
Shed Hamilton	1	1	1					4	
Brass Hamilton	1						1	3	
Thoms Hosterman	1							2	
Chs Stubberfield	1				2			4	
John Hamilton 1st	1		1					3	
Ketmes Hamilton	1			2				4	
Robt Hamilton	1			1				3	
Alex Harrison	1	1					1	4	Trinidad
George Hamilton	1							2	
Robert Bingley								1	
Peter Basama	1	1						3	

Quashy Mantly	1				2	1		5	
Michl William								1	Trinidad
John Watts								1	
Richd McCarty								1	
Charles Jackson	1	1						3	
Duncan Meroy	1							2	
Henry Baily	1		2		1			5	
Sandy Cooper	1							2	
Sippio Cooper	1	2	1					5	
Richd Ross	1				2	1		5	
Cock Ross								1	
Frank Grant	1							2	
Isaac Grant Sr.	1	1						3	
Judith Been			1				1	3	
Frank Ross	1	1			2			5	
Charles Giggy	1			1				3	
Thos McNeish	1			1				3	
Isaac Grant Jr.	1							2	
							Total	376	carried forward

(continued)

Names	Women	Males Under 7 yrs. of age	Do. Under 14 yrs. of age	Do. Above 14 yrs. of age	Females Under 7 yrs. of age	Do. Under 14 yrs. of age	Do. Above 14 yrs. of age	Total	Names of those desirous of going to Trinidad
Robert Cooper	1							2	
Lewis Stewband	1				2			4	
Danl Goffigan	1	1			1			4	
Jesse Carter	1	2						4	
William Griffin	1			1	1		1	5	
Robert Grant	1							2	
Mark Young	1							2	Trinidad
Jos McClew	1	1			2			5	
April Cooper	1				1	1		4	Trinidad
March Cooper								1	Trinidad
July Cooper	1	1			1	1		5	
Ruban Wiley	1	2						4	
Deal Wiley	1		1		1			4	
Quashy Cooper Jr.	1	1			1			4	
Josh Wiley	1		1			1		4	
Henry Hamilton								1	
Patk Bailey	1	1			1			4	
Gabriel Jenkins	1	1						3	

Cesar Wiley								1	Trinidad
John Jenkins	1		1				1	4	
William Marshman	1				1			3	
Jeffrey Howe	1	1			1	3		7	
Sampson Butler	1	1			1			4	
Gabriel Manigo	1			1	1	1	1	6	
John Brown								1	
								___	
						Total		464	
Wally Wiley								1	Trinidad
La Fortune								1	Trinidad
George Rantham								1	Trinidad
Rose Rushley							1	2	
								___	
						Total		**469**	

Appendix D: (1818) Licence of Occupation

[Copy] License from Lieutenant Governor Lord Dalhousie to Sampson Butler and a number of other Black Refugees to occupy certain lots of land at Hammonds Plains (estimated 1818).[713]

****

Dalhousie By His Excellency Lieutenant General the Right Honorable George Earl of Dalhousie Baron — Dalhousie of Dalhousie Castle, Knight Grand Cross of the most Honorable Military Order of the Bath Lieutenant Governor and Commander in Chief and over his Majestys Province of Nova Scotia and its dependencies

License is herby given to the following men of Color to occupy possess and enjoy for and during the term of ____ years from the date here of (their [sic] [then] if their conduct as industrious Peaceable and Loyal-Subjects, shall be approved to receive Grants of confirmation from Government) the following Lots of Land on which they are respectively settled, situate lying and being at Hammonds Plains in the County of Halifax in the following Shares and proportions to wit unto **Charles Gigge** the Lot Number one (in the Western division of ten acre Lots, letter **C**) containing ten acres unto **Frank Ross** the Lot Number two in said division unto **Dick Ross** the Lot Number three in said division, unto **Cephas Cooper** the Lot Number four in said division, Unto **Sandy Cooper** the Lot Number five in said division, Unto **Sandy Pares** the Lot Number Six in said division, Unto **Robert Hamilton** the Lot Number Seven in said division, Unto **Richard Hamilton** the Lot Number Eight in said division, Unto **Kitness Hamilton** the Lot Number nine in said division, Unto **Jack Hamilton** the Lot Number ten in said division, Unto **Anthony Hamilton** the Lot Number Eleven in said division, Unto **Shead Hamilton** the Lot Number twelve in said division, Unto **Henry Williams** the Lot Number Thirteen in said division, Unto **Reuben Hamilton** the Lot Number fourteen in said division, Unto **Jeremiah Johnston** the Lot Number fifteen in said division, Unto **Rob Roe** the Lot Number Sixteen in said division, Unto **Godfrey Davis** the Lot Number Seventeen in said division, Unto **Ben Jackson** the Lot Number Eighteen in said division, Unto **Samuel Cooper** the Lot Number Nineteen in said division, Unto **Caleb Cob** the Lot Number twenty in said division, Unto **Quack Cooper** the Lot Number twenty one in said division, Unto **Maranette Cooper** and **Pedro Nero** the Lot Number twenty two, Unto **March Murvill** the Lot Number twenty three in said division, and unto **John Thomas** the Lot Number twenty four in said division. And unto **Brutus Maquish** the Lot Number One (in the Eastern division of ten acre Lots letter **C**) containing ten acres unto **Isaac Grant** the Lot Number two in said division, Unto **Francis Grant** the Lot Number three in said division, Unto **Henry Bailey** the Lot Number four in said division, Unto **Charles Jackson** the Lot Number five in said division, Unto **Donkin Massey** the Lot Number Six in said division, Unto **Quack Mantle** the Lot Number Seven in said division, Unto **Robert Bingley** the Lot Number Eight in said division, Unto **George Hamilton** the Lot Number Nine in said division, Unto **Thomas Mashorman** the Lot Number ten in said

[713] (undated) PANS RG1 Vol 419 Doc 119. The Black Refugees were settled in Hammonds Plains under the direction of Lieutenant Governor Sherbrooke in November 1815, who remained Lieutenant Governor until June 1816 and it wasn't until September 1816 that Lord Dalhousie arrived to assume the position. Since the licence was issued by Lord Dalhousie as Lieutenant Governor, it must have occurred after September 1816, but before he ceased being Lieutenant Governor in 1820. Furthermore, the licence specifically states, "the following Lots of Land on which they are respectively settled, […]." However, notwithstanding Lord Dalhousie's commencement as Lieutenant Governor in September 1816, the licence likely wasn't issued until 1818. This estimated date is based on a similar licence that was granted to the Black Refugees settled at Refugee Hill, which is dated March 27, 1818. Note, the names appear as listed in the record available at PANS online <https://archives.novascotia.ca/african-heritage/archives/?ID=141&Page=201112295&Transcript=1>.

division, Unto **Brass Hamilton** the Lot Number Eleven in said division, Unto **Richard Hamilton** the Lot Number twelve in said division, Unto **Quack Hamilton** the Lot Number thirteen in said division, Unto **Pierre Vance** the Lot Number 15 in said division, Unto **Peter Piere** the Lot Number fifteen in said division, Unto **Newman Brackenbury** the Lot Number Sixteen in said division, Unto **Joseph Graham** the Lot Number Seventeen in said division, Unto **Alexander Cooper** the Lot Number Eighteen in said division, Unto **Liscomb Cooper** the Lot Number Nineteen in said division, Unto **Lonnie Cooper** the Lot Number twenty in said division, Unto **Lash La Cort** the Lot Number twenty one containing ten acres) Unto **George Coppey** the Lot Number twenty two containing ten acres Unto **Samuel Jenkins** the Lot Number twenty three in said division, and unto **Nero Matthias** the Lot Number twenty four in said division. And unto **Maringo Butler** the Lot Number one (in the Northern division of ten acre Lots letter **B**) containing ten acres, Unto **Jeffrey Howe** the Lot Number two in said division, Unto **John Jenkins** the Lot Number three in said division, Unto **Patrick Bailey** the Lot Number four in said division, **Unto Quack Copper** the Lot Number five in said division, Unto **Deal Wiley** the Lot Number Six in said division, And unto **April Cooper** the Lot Number Seven in said division. Unto **Sampson Butler** the Lot Number one (in the Southern division of ten acre Lots — letter **B**) containing ten acres Unto **William Hausman** the Lot Number two in said division, Unto **Cesar Wiley** the Lot Number three in said division, Unto **Joseph Wiley** the Lot Number four in said division, Unto **Henry Hamilton** the Lot Number five in said division, Unto **Reuben Wiley** the Lot Number Six in said division. And unto **July Cooper** the Lot Number Seven in said division — Unto **William Butler** the Lot Number one (in the Western division of ten acre Lots letter **A**) containing the ten acres — Unto **Frances Butler** the Lot Number two in said division, Unto **George Gigge** the Lot Number three in said division, And unto **Joseph Davis** the Lot Number four in said division. – Unto **William Butler** the Lot Number three (in the Eastern division of ten acre Lots letter **A**) containing ten acres, Unto **Isaac Butler** the Lot Number four in said divisions, Unto **William D. Butler** the Lot Number five in said division, Unto **Hector Butler** the Lot Number Six in said division, Unto **Joseph Butler** the Lot Number Seven in said division, Unto **John Lee** the Lot Number Eight in said division, Unto George Butler the Lot Number nine in said division and unto **Abraham Butler** the Lot Number ten in said division – All which several divisions and Lots of Land aforementioned are a butted and bounded according to the Plan hereto annexed.

Appendix E: (1834) Land Grant

[Copy] Land grant to William Day and a number of other Black Refugees at Hammonds Plains.[714]

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NOVA-SCOTIA.

C. Campbell

WILLIAM the FOURTH, by the Grace of God, of the United Kingdom of Great-Britain and Ireland, King, Defender of the Faith, and of the United Church of England and Ireland, on Earth the Supreme Head.

TO ALL TO WHOM THESE PRESENTS SHALL COME,

GREETING.

KNOW Ye, that We, of our Special grace, certain knowledge and mere motion, have given and granted, and do by these presents, for Us, our Heirs and Successors, **in consideration of the Sum of Sixty pounds Nova Scotia currency to us paid**, Give and Grant unto, William Day, Abraham Smith, Hector Johnson, Cuffee Gray, Sampson Brown, Jack Harris, S. Hamilton, Gabriel Manigo, Cato Manigo, Andrew Smith, James Ellison, Joseph Holmes, Newman Brackenbury, Joseph Graham, Thomas Brunt, Charles Jackson, Alexander Emerson, Lawrence Hamilton, Patrick Bailey, Joseph James, William Marshman, July Cooper, Deal Wiley, Frederick Davis, Lewis Stewben, Israel Mott, Edward Price, William Marshman Junr., Peter Jenkins and Reuben Davis, all of Hammonds Plains, in the County of Halifax. People of Colour and severally known by the names above written. **Six hundred acres of land**, which said land is situate lying and being contiguous to the Black Settlement at Hammonds Plains aforesaid, and is contained in five separate allotments marked B. C. D. E. & F. on the annexed Plan, which said lots of land are abutted and bounded according to said plan which said lots, pieces and parcels of land is particularly marked and described in the annexed Plan, as also in a Plan or Survey of the said lots of land made by Titus Smith Deputy Surveyor together with all Hereditaments and Appurtenances whatever thereunto belonging or in any wise appertaining ; To have and to hold the said Lots, Pieces and Parcels of Land, and all and singular the premises hereby granted, with their appurtenances, unto the said Granteees as tenants in common their Heirs and Assigns for ever, they or them yielding and paying for the same, to Us, our Heirs and Sucessors, one Peppercorn of yearly Rent on the 25th day of March in each year, or so soon thereafter as the same shall lawfully demanded ; and we do hereby SAVE and RESERVE to Us, our Heirs and Successors, all and singular the Mines of Gold, Silver, Coal, Iron Stone, Lime Stone, Slate Stone, Slate Rocks, Tin, Copper, Lead, and all other Mines, Minerals, in or under the said Land, with full liberty at all times to search and dig for, and carry away, the same and for that purpose to enter upon the said Land, or any part thereof.

Given under the Great Seal of our said Province of Nova-Scotia. Witness our Trusty and Well-beloved His Excellency Major General Sir Colin Campbell Th. C. B Lieutenant Governor and Commander in Chief, in and over our said Province, this twentieth day of October in the fifth year of our Reign, and in the Year of Our Lord One Thousand Eight Hundred and thirty four.

(Duplicate)

Grant to the Blacks

[714] 20 October 1834 RG 1 Vol 419 Doc 120. Note, the names appear as listed in the record available at PANS online < https://archives.novascotia.ca/african-heritage/archives/?ID=142>

Appendix F: (1835) Lot List

[Copy] Report on Lots at Hammonds Plains Nova Scotia Lands and Forests — Crown Lands series Nova Scotia Archives RG 20 series C volume 88 number 185.[715]

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Sirs

The within is a list of the names who has been regularly settlers by Government in which time I believe about 24 Families has Settled themselves on lots for which they have no card neither are they included in this — You will find in the first column the names of the persons who was Settled by Government in the Second you will find the names of those that now lives on the lot with the number of the lots vacant and on the third Column you will find the names of the person owning the lot whether vacant or otherwise — The people are well satisfied to assist in turning the lives wherever it will please you to call upon them.

NB if there should be any other information wanted I shall be very happy to attend to any call from you I am Sir your most humble servant

Joseph Thomas

Hammonds Plains

June 17th 1835

Hammonds Plains Lots 1835 No. 185

No of Lots in Hammonds Plains

No. of lot	Originally assigned to	By whom occupied	By whom owned
1	Richard Fitsrie	do	do
2	Joseph Pence	William Leigh	do.
3	Charles Steward	none	Easter Steward
4	Henry King	none	John Butler
5	Samuel Butler	none	William Days
6	Francis Butler	none	Mrs. Gingam
7	George Gingam	Mrs. Gingam	do
8	Joseph Davies	none	Edwd Brice
9	Samuel Brown	do	do
10	William March	do	do
11	Ceaser Wily	do	do
12	Joseph Wy	none	Hannah Wily
13	Henry Hamilton	none	William Sawyers
14	Rubin Wily	Charles Parker	do
15	July Cooper	do	do
16	March Christopher	none	Mrs. Fowler

[715] 17 June 1835, PANS, Box – Halifax County Land grants 1787-1835, RG 20 series C volume 88 number 185. Note, the names appear as listed in the record available at PANS online <https://archives.novascotia.ca/african-heritage/results/?Search=Joseph+Thomas&SearchList1=all&TABLE1=on>.

17	Emanuel Griffin	none	Deal Wily
18	Daniel Goffagan	do	do
19	Lewis Stuban	do	do
20	Robert Cooper	Henry Piles	do
21	Charles Giggy	do	do
22	Francis Ross	none	Agnes Ross
23	Richard Ross	do	do
24	Scipio Cooper	none	Scipio Cooper
25	Alexr Cooper	none	Scipio Cooper
26	Alexr Pasco	none	Rose Hamilton
27	Robert Hamilton	none	Mrs. Jinkins
28	Richard Hamilton	none	Lawrence Hamilton
29	Kindness Hamilton	Rose Hamilton	do
30	John Hamilton	do	do
31	Anthony Hamilton	Lawrence Hamilton	do
32	Shed Hamilton	do	do
33	Henry Hamilton	Esau Jackson	do
34	Rubin Hamilton	do	do
35	Jeremh Johnson	do	do
36	Robt Roe	George Jackson	do
37	Godfrey Davis	do	do
38	Benjn Jackson	do	
39	Sami Cooper	do	do
40	Edd Cup Senr	Edd Cup Junr	do
41	Squash Cooper	none	Saml Cooper
42	Nearo March	none	William March
43	March Movil	none	Esau Jackson
44	John Thomas	none	Rynah Thomas
45	Robt Nory	Thos Brunt	do
46	George Coppy	Jesse Parker	do
47	Naseus Lampeat	none	Rynah Thomas
48	Leonard Cooper	James Watts	do
49	Lestan Cooper	Ester Steward	do
50	Alexr Cooper	Phoebe Lee	do
51	Joseph Grimes	do	do
52	Newan Brokenberry	do	do
53	Peter Peer	none	Rubin Hamilton
54	Squash Hamilton	none	Andrew Smith
55	Richd Hamilton	none	Liddy Hamilton
56	Brass Hamilton	none	Hector Johnson
57	Charles Stubblefield	Esau Jackson	Abraham Smith
58	George Hamilton	Henry Bailey	do
59	Robt Bingly	none	Charles Jackson
60	Duncan Masse	none	July Cooper
61	Charles Jackson	none	Charles Jackson
62	Henry Bailey	none	Pompy Bailey
63	Francis Grant	none	Deal Wily

64	Isaac Grant	none	Isaac Grant
65	Brittus McNish	none	Isaac Grant Junr
66	April Cooper	Kato Manago	do
67	Deal Wily	do	do
68	Quash Cooper	Charles Jackson	Henry Piles
69	Pat. Bailey	do	do
70	John Jinkins	Joseph James	do
71	Jeff ry Howe	William Brown	Alexr Howe
72	Gabriel Butler	none	Gabriel Manago
73	Abraham Smith	do	do
74	George Butler	John Worrell	William March
75	Kato Lee	none	William Arnold
76	Joseph Jerry	Edward Price	do
77	Hector Johnson	do	do
78	William Days	do	do
79	Isaac Butler	none	William Days
80	Simon Cochrane	none	Simon Cochrane
81	John Butler	do	do
82	Susanah Fowler	none	John Butler