Improper Property:
Squatters and the Idea of Property in the Eastern Townships of Lower Canada, 1838-1866

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Abstract

Drawing on the manuscript records of the Department of Crown Lands, its published reports, and case law, this thesis examines the illegal occupation of rural land, known as squatting, in the Eastern Townships of Quebec in the period 1838 to 1866. By 1838, demographic pressure in the seigneuries, inflated land prices due to speculation, and inaccessible public land granting practices had made squatting a commonplace strategy for land acquisition. The responses to squatting of the Department of Crown Lands, the Legislature and the judiciary are analysed for what they implied about ideas of property in Lower Canada.

While the Department of Crown Lands' policy of pre-emption affirmed that squatters held rights to public land because they laboured to cultivate and improve it, the legislature refused to acknowledge that squatters could acquire such rights on private land; nine out of ten bills intended to ensure ejected squatters a systematically determined remuneration for improvements made by them on the private property of absentees failed to pass into law during the period. Most were rejected by the Legislative Council which defended the interests of landed wealth.

Lower Canadian courts, meanwhile, struggled to sort out laws relating to squatting. Ultimately they found that while squatters on private property owned their improvements, they had no right to the land itself. Thus the judiciary applied a bifurcated concept of property to rural land in Lower Canada despite the prevalence of liberal theories of absolute property rights during the nineteenth century.

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Chapter One: Introduction and Sources[1]

On October 31, 1838, Lord Durham, governor-general of British North America and head of the Special Council issued the following proclamation:

> Whereas it hath been represented to us, that in various parts of the province of Lower Canada, many persons have actually settled upon, and improved and cultivated, waste lands, the property of the Crown, without having obtained any grant of such land, or any license to occupy the same; and such persons are therefore liable, at the pleasure of the Crown, to be dispossessed of the land they thus occupy, without any compensation for the improvements they may have effected: ...
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> Therefore I do hereby certify and declare, that in any and every case in which any person shall have actually settled upon, improved and cultivated any waste lands, the property of the Crown, in the province of Lower Canada, previously to the tenth day of September last, such person being an actual and *bonâ fide* settler, or his legal representative, shall have an absolute right of pre-emption in respect of the lot whereupon he has so settled, and which he has so cultivated and improved, either at the upset or fixed price of wild land, the property of the Crown, in the neighbourhood of such lot, without being required to pay any additional price for the improvements effected upon the same, and without being exposed to the competition of other purchasers...[2]

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[1] Acknowledgments are due to G. Blaine Baker for help in the initial formulation of this project, and to Brian Young for supervision and extensive editorial assistance. Jack Little provided valuable advice. The staff of the ANQQ were of great help as well.

[2] *British Parliamentary Papers, Colonies, Canada,* v. 10, p. 237; in French in *Le Canadien*, 5 nov. 1838. In detail, the proclamation read as follows.

> Whereas it hath been represented to us, that in various parts of the province of Lower Canada, many persons have actually settled upon, and improved and cultivated, waste lands, the property of the Crown, without having obtained any grant of such land, or any license to occupy the same; and such persons are therefore liable, at the pleasure of the Crown, to be dispossessed of the land they thus occupy, without any compensation for the improvements they may have effected:
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> And whereas the acquisition of Crown lands within the province of Lower Canada, either by grant or purchase, has, in respect of persons of little property or influence, been subject to numerous obstacles and harassing delays, so that it has been always difficult and often impossible for such persons to obtain possession of Crown lands, upon which they might settle themselves, except by an occupation, without any title: And whereas a great number of the persons who have in such manner settled upon the waste lands, the property of the Crown, without title, are most desirous of being admitted to purchase the land, and the uncertainty at present attending their future possession thereof is productive of uneasiness and

Durham's proclamation permitted eligible squatters to purchase the crown lots they occupied, free from the competition of other interested buyers. This proclamation must be contrasted to an 1859 Order in Council established by the Commissioner of Crown Lands as part of the new regulations for the disposal of crown lands stating "that the system of recognising unauthorised occupation of land, commonly known as 'squatting,' be discontinued, [and] that no claim of pre-emption by reason of such occupation will be entertained after the first day of September next..."[3]

This declaratory legislation of 1838 and 1859 is enormously significant in the history of settlement, state formation and property law in Lower Canada.[4] It confirms firstly that squatting on crown land was widespread. Indeed, the Commissioner of Crown Lands reported in 1858 that 15 000 squatters occupied a considerable portion of the 4 797 550 acres of crown lands undisposed of.[5] For his part, Curé M. Marquis, who served in the counties of Drummond

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discontent: And whereas, under the circumstances aforesaid it appears highly expedient and not less just to put an end to all anxiety and dissatisfaction arising from this uncertainty of future possession of the lands which they have improved... Therefore I do hereby certify and declare, that in any and every case in which any person shall have actually settled upon, improved and cultivated any waste lands, the property of the Crown, in the province of Lower Canada, previously to the tenth day of September last, such person being an actual and *bonâ fide* settler, or his legal representative, shall have an absolute right of pre-emption in respect of the lot whereupon he has so settled, and which he has so cultivated and improved, either at the upset or fixed price of wild land, the property of the Crown, in the neighbourhood of such lot, without being required to pay any additional price for the improvements effected upon the same, and without being exposed to the competition of other purchasers: Provided always that no such person shall, under any circumstance, be entitled to the pre-emption of more than one lot of 200 acres; and that no one shall be considered as so entitled unless he shall have actually cleared and cultivated, in the whole, ten acres of land, and shall prove, to the satisfaction of the agent for the sale of the waste lands of the Crown, in the district wherein the lands are situate, that he was an actual settler upon, and commenced the improvement of the lot... before such tenth day of September last; and provided further, that every such claim to pre-emption, and all necessary vouchers and certificates for the authentication thereof, shall be lodged with the agent for the sale of Crown lands aforesaid within six months after the fixed or upset price of lands in the district, shall have been determined and fully certified.

[3] *JLAC* 17 (1859): App. 17. Commissioner of Crown Lands P.M. Vankoughnet's "Regulations for the Sale and Management of the Public Lands", 7 Jan. 1859.

[4] Although Lower Canada became Canada East with the Act of Union in 1841, and remained so up to Confederation in 1867, the term Lower Canada will be used throughout this thesis, as the term remained current through the union period.

and Arthabaska, noted in 1860 that three-quarters of the settlers who had taken up newly opened lands were squatters.[6] Furthermore, the legislation indicates that squatting was a problem which required direct state intervention.[7]

This state intervention in Lower Canada in the three decades between 1838 -- date of the collapse of the Rebellions, establishment of the Special Council and the first squatter proclamation -- and 1866 -- date of the promulgation of the *Civil Code of Lower Canada* -- is the topic of this thesis. The Eastern Townships, officially opened to settlement in 1791 under the English tenure of free and common soccage, and a region settled with a high proportion of squatters to titled settlers, constitutes the geographic boundaries of this study.[8] Although references will be made to other parts of Lower Canada, much of the data and case studies in this thesis are drawn from the Bois Francs, the northern part of the Eastern townships first settled by Canadien[9] squatters during the 1830s.

The Lower Canadian legal, political and economic structure underwent profound transformations during the second third of the nineteenth century. Immigrant labour, industrial production, and new forms of capital challenged a smaller, independent, and often family-based mode of production.[10] Related changes occurred in the legal sector. The Special Council, which governed Lower Canada from 1838 to 1841, instituted fundamental governmental

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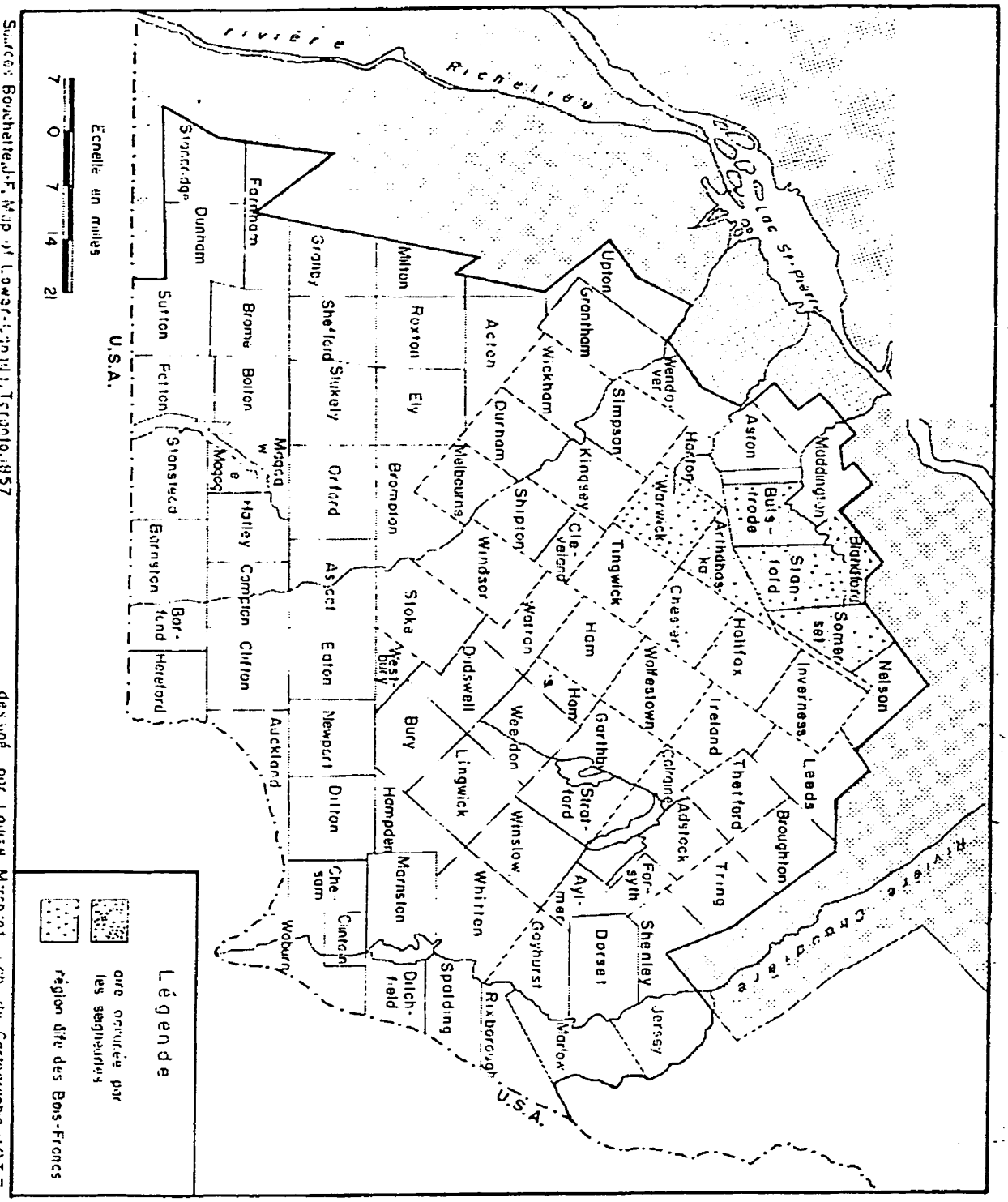
[5] *JLAC* 15 (1857): App. 25. If we assume that squatters occupied an average of one 100 acre lot each, then they occupied 1 500 000 acres of crown land, or 31% of the undisposed crown lands.
[6] Canada (Province). *Rapport du comité spécial sur la colonisation,* p. 31.
[7] Here the term "state" is meant in a broad sense. The state is constituted by the whole nexus of legislative, judicial, and economic power, as well as its discursive and symbolic authority.
[8] The Constitutional Act of 1791 allowed for grants of land in the Eastern Townships to be made under freehold tenure which now co-existed in Lower Canada as a property system with seigneurial tenure.
[9] Following J.I. Little, the term Canadien will be used to denote francophone Canadians.
[10] A. Greer and I. Radforth, eds. *Colonial Leviathan: State Formation in Mid-Nineteenth-Century Canada,* pp. 5-6.



Map 1. The Eastern Townships
Published in M. Carrier *et al.*, "Les squatters dans le canton d'Arthabaska 1835-1866," p. 94.

reform, implemented a universal land registry system in 1841, and began the deconstruction of seigneurial tenure.[11] The Registry Ordinance required that all mortgages, conveyances and other transactions in land be registered in public offices, as opposed to privately documented in the offices of notaries. Registry reinforced the security of capital invested in real property by giving priority to the order of registry rather than to family or other secret arrangements.

The commutation of seigneurial tenure in 1854 purportedly freed up property ownership. While opponents of seigneurialism denounced its obstructionism to market freedom, many Canadiens insisted rather that seigneurialism need only be reformed and that it had a stabilizing effect on land speculation.[12] These opinions were expressed before the committee appointed to examine seigneurial tenure in 1843.[13] As Tom Johnson argues, a theory of property which gave centrality to the role of labour in the creation of ownership was enunciated by the *censitaires* but was rejected by the commission in favour of a Benthamite notion property.[14] This debate was duplicated in the squatter issue: underlying the attempts to eliminate squatting in Lower Canada was an increasingly dominant vision of land as essentially a marketable commodity that could be stripped of its family and cultural implications.

The commutation of seigneurial tenure and the commodification of landed property went hand-in-hand with the rationalization and systematization of law. The consolidation of the

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[11] B. Young, "Positive Law, Positive State: Class Realignment and the Transformation of Lower Canada 1866", in Ibid, pp. 50-63.

[12] See T. Johnson, "In a Manner of Speaking: Towards a Reconstitution of Property in Mid-Nineteenth Century Quebec."

[13] See "Report of the Commissioners Appointed to Inquire into the State of the Laws and other Circumstances Connected with the Seigniorial Tenure..." *JLAC* (1843): App. F. The Commissioners were George Vanfelson, John Samuel McCord, and Nicholas Benjamin Doucet.

[14] T. Johnson, "Perceptions of Property: The Social and Historical Imagination of Quebec's Legal Elite, 1836-1856," pp. 666-670. Bentham argued that ensuring the security of property was the means of achieving the ultimate human goal of happiness. Jeremy Bentham, *Principles of the Civil Code*, in J. Bowring ed., *The Works of Jeremy Bentham*, v. 1, p. 307.

statutes, the emergence of formal legal education, and a codification of Lower Canada's civil law which now emphasized the centrality of the law of contracts were other parts of the creation of a predictable and uniform system of law.

These changes emphasize the penetration of liberal theories of economy and society in the Lower Canadian state structure during the first half of the nineteenth century. At the core of nineteenth century liberalism were the maxims of freedom of contract and security of property. The free exchange of wealth was held to be the basis on which modern society could evolve.

The Critical Legal Studies movement (CLS) and its criticism of classical liberalism provides a useful perspective on state formation and its relation to the phenomenon of squatting in Lower Canada. According to CLS scholars Allan Hutchinson and Patrick Monahan, liberalism pictures society as a "response to an impersonal set of technical imperatives rooted in the market."[15] CLS, which emerged out of American law schools during the 1970s and 1980s, seeks to expose the contradictions and ideological slants within liberal legal theory and jurisprudence.[16] Although CLS is primarily a mode of legal criticism, it provides a useful framework for legal history because it offers a method for uncovering the social and political underpinnings -- Hutchinson's and Monahan's "technical imperatives" -- of both law and liberalism in an historical setting. With some notable exceptions, legal history in Quebec tends to be studied in relation to law only.[17] Accordingly, the CLS approach is particularly suited to the study of squatters in Lower Canada, where the changing status and ultimate fate of the

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[15] A.C. Hutchinson and P. Monahan, "Law, Politics, and the Critical Legal Scholars: the Unfolding Drama of American Legal Thought," p. 216.
[16] For an overview of the Critical Legal Studies project, see R. Unger, "The Critical Legal Studies Movement," and A.C. Hutchinson, ed., *Critical Legal Studies*. For a discussion CLS and legal history, see R. Gordon, "Critical Legal Histories."
[17] V. Masciotra, "Quebec Legal Historiography, 1760-1900," pp. 730-731.

abuses and monopolies which had occurred under the leader and associates system at the turn of the century.[18]

In both his well-known *Report on the Affairs of British North America,* and in the 1838 proclamation quoted above, Durham complained that the public lands -- the colony's greatest resource -- had been vastly mismanaged.[19] He called for administrative reforms that would include overhauling the department and ensuring the establishment of secure titles to land. Professionalization and efficiency were central to his proposed reform: the Surveyor General's Office would be merged with the Crown Lands Department and surveyors would be subject to tighter regulation and more comprehensive certification.[20]

Despite this rationalization within the Crown Lands Department, the land granting process remained inefficient, corrupt, and bureaucratic. Just as counter-productive was the government's failure to impose a coherent and consistent land policy that might have been reflected within the Crown Lands Department. There remained no resolution to the conflicting goals of establishing settlers on the land at a affordable prices and that of raising government revenues from the sale of crown lands.[21] As a result, squatting persisted through the period on a large scale.

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[18] Between 1796 and 1809, 1 099 246 acres of land were granted under the leader and associates system. G.F. McGuigan argues that this land ended up under the control of 34 individuals. The leader and associates system involved the delegation of settlement administration to township "leaders," who fronted the initial costs of obtaining grants for the "associates," or proposed settlers. The associates repaid the leaders by reconveying the majority of their individual grants back to them. The system was inherently conducive to the establishment of a speculative land market, McGuigan argues, because surplus lands were taken by the leaders as payment only under the presumption that they would increase in value, and could be sold. G.F. McGuigan, "Land Policy and Land Disposal under Tenure of Free and Common Soccage: Quebec and Lower Canada, 1763-1809," pp. 217-244.

[19] C.P. Lucas, ed. *Lord Durham's Report*, vol. 2, p. 98.

[20] J.E. Hodgetts, *Pioneer Public Service*, p. 45.

[21] Ibid, p. 128.

The few accounts which we have of squatting in Canada blame the phenomenon on inefficient land policies and on demographic pressure.[22] With massive British immigration after 1815, with the saturation of the seigneurial lands in the Saint Lawrence lowlands, and with seigneurs holding back unconceded land and increasing seigneurial rents, pressures increased for land outside of the seigneuries.[23] Added to this was the complex land granting process and the problem of finding ungranted land that had been surveyed. The result was that legal settlement was extremely difficult. Many potential settlers emigrated to the United States or Upper Canada; others squatted in the Eastern Townships, the Ottawa Valley, and the Saguenay.[24]

Pre-emption then, was instituted to regain control of the settlement process, and to address the issues of distribution of legal title to settlers and of state control generally. But even though the department officially maintained the fiction that legal title was a prerequisite to settlement, pre-emption implied that occupation of land, regardless of title, was a legitimate mode of settlement, and partly constituted a legal right of property. The only way that the squatters' possessions could be converted to a legal form of property was by acknowledging the legitimacy of their non-liberal claims that first occupancy, labour, and use conferred a right of property on them. This was the effect of the proclamation of 1838 and the regulations of 1859. In short, the squatters' type of property had to be legitimated before it could be rejected. Thus

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[22] See M. Carrier et al., "Les *squatters* dans le canton d'Arthabaska, 1835-1836;" D. Larouche, "Le Mouvement de concession des terres à Laterrière," in N. Séguin, ed., *Agriculture et colonisation au Québec;* L. Gates, *Land Policies of Upper Canada.*

[23] F. Ouellet, *Economy, Class and Nation*, pp. 128-130.

[24] See "Report of the Select Committee appointed to Inquire into the Causes and Importance of the Emigration which takes place annually from Lower Canada to the United States", (Chauveau Report), *JLAC* 8 (1849): App. A.A.A.A.A.; M. Séguin, *La 'nation canadienne' et l'agriculture (1760-1850)*; F. Ouellet, *Le Bas-Canada 1791-1840: Changements structureaux et crise.*

a fundamental contradiction was highlighted in Lower Canadian property law and liberalism, and it was one that North America as a whole was unable to avoid.[25]

However, it was expected that once squatters had been converted to proprietors, the right of pre-emption would be retracted. But since no effective crown land policy was ever implemented, squatting persisted, and inevitably, so did the need for pre-emption. Indeed, given the lack of an ideologically coherent land policy, pre-emption remained the one stable element in the myriad of policies applied by the Department of Crown Lands across the period.

ii. The Legislature

Policies and administration of the Department of Crown Lands concerning public property had important implications for private property, where squatting was causing equally troublesome problems. Whereas squatters on crown lands were accorded the right of pre-emption, squatters on private property received relatively little sympathy from the government. Ten legislative attempts were made to regulate squatting on private lands in Lower Canada between 1853 and 1865; only one passed into law and it left much to be desired.[26]

The squatter bills, sponsored in the Assembly by Liberal and Rouges members such as J.S. Sanborn and J.B.E. Dorion, proposed that squatters ejected by proprietors be awarded compensation to the extent to which their labour had increased the value of the proprietors'

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[25] For an analysis of contradictions within American property law, see E.V. Mensch, "The Colonial Origins of Liberal Property Rights," p. 636.

[26] *Statutes of Canada* (1853), 16 Vict., c. 205. This act gave the right of indemnity to dispossessed squatters, but it was far from comprehensive. See J.I. Little "Colonization and Municipal Reform in Canada East," p. 118, and chapter four below. For the titles, dates and debates regarding the numerous bills see *General Index to the Journals of the Legislative Assembly 1852-1866*, "Squatters: Bills relative to :", p. 825.

land, and not be compelled to pay back-rent relative to the increased value. The bills encountered severe opposition among land owners in the Assembly, and in the Council especially, where most of the bills were defeated. Despite the fact that the bills proposed to apply to Lower Canada only, Upper Canadian members voted against their passage in the Council, insisting that legislation which protected squatters represented a corresponding violation of the rights of proprietors. Whereas the Department of Crown Lands had acknowledged that a proprietary right to public land could be acquired by squatting, the legislature refused to acknowledge this right in cases involving private property.

iii. The Judiciary

Given the failure of the legislature to establish coherent land policies, the courts were compelled to sort out the law as it applied to squatting on private land. Squatters were frequently taken to court by proprietors and faced with ejectment suits. By ejecting the squatters, proprietors regained possession of their land, the value of which had been increased by the improvements made upon it by squatters. Proprietors were further compensated with lost rents and damages awarded for the squatters' illegal detention of the property.

Case law reveals a great deal of confusion regarding the rights of squatters to the value of their improvements and the extent to which damages and lost profits should be awarded to proprietors. Although many proprietors lost their suits against squatters in the lower courts, they tended to win upon appeal. This changed in 1856, however, when a squatter appealed a decision against him and won, establishing that in cases in which squatters were ejected, they were entitled to the full value of their improvements, subtracting only the rents and profits that

might have accrued to the proprietor without the squatters' improvements.[27] The judiciary's response to squatting, then, was identical to the solution proposed in the failed squatter bills.

The ultimate effect of the jurisprudence was to entrench in case law a conceptual separation of the labour contained in squatters' improvements on the one hand, and the immoveable property on the other. It became legally possible during the 1850s to have a proprietary right in improvements on another's private property, but no right whatsoever to the land itself. Given the fact that so much private land had been occupied and developed by squatters, Lower Canadian courts found it practical to recognize this bifurcation of property, despite ongoing efforts such as the adoption of the registry system, the commutation of seigneurial tenure and codification to rid property law in Lower Canada of inconsistencies. The only way that contested titles could be purged of imperfection and made absolutely determinant was to acknowledge that naked possession, combined with labour, constituted a legitimate ingredient in real property, regardless of title. It was this compromise in the supposed coherence of the doctrine of liberal, private property, on which the wealth of many of its members was based, which the Legislative Council could not accept.

The issue of squatting in Lower Canada is a large one, and several facets of the topic have remained outside the scope of this thesis. Although a discussion of attitudes toward landed property and their relation to settlement should, no doubt, consider Native attitudes toward land and ownership, and their subjugation to the European paradigm, this issue pre-dates the mid-nineteenth century and is too large and important to be adequately dealt with here. A second topic that receives short shrift here is the issue of competing legal metropolises, and the

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[27] *Lawrence and Stuart, LCR* 6 (1856): 294-311.

Although relevant sources were found in the records of the Provincial Secretary's office,[30] of the Executive Council,[31] of the British American Land Company,[32] and of the Brome County Historical Society,[33] these collections furnished fairly fragmentary evidence. Of more use were the records of the Department of Crown Lands[34] and the Department of Agriculture.[35]

The Department of Crown Lands was created in 1840 by Governor Charles Edward Poulett Thomson, or Baron Sydenham, as part of his effort to consolidate the Canadian bureaucracy. This department replaced the Crown Lands Offices for Upper and Lower Canada, which had in turn in 1826 assumed responsibility for the management and sale of the public lands from the Land Committee of the Executive Council. It was intended that the new department would operate as a single unit, administering crown land sales, the clergy reserves, land claims, and surveys across the united province. But since separate Upper and Lower Canadian heads existed for each of the major branches of the department, in practical terms the department acted in a bifurcated fashion with Upper and Lower Canadian Units.[36]

The Department of Crown Lands grew enormously during the 1850s as it took on responsibility for Indian affairs, fisheries, colonization, forestry, and mining. The Department of Agriculture was created in 1853 as a division within the Department of Crown Lands. Custodian of much of the province's most valuable natural resources, the Department of Crown Lands faced an immense administrative challenge. Inquiries into the department's inefficiency

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[30] NAC RG4, "Civil and Provincial Secretaries' Office, Quebec, Lower Canada, and Canada East."
[31] NAC RG1, "Executive Council Records." For documents relating to lands, see RG1 L3L, "Lower Canada Land Petitions and Records."
[32] NAC MG24 I54, "British American Land Company Papers."
[33] NAC MG8 F13, "Brome County Historical Society Papers"
[34] ANQQ E21, Fonds terres et forêts.
[35] ANQQ E9, Ministère de l'agriculture, des pêcheurs, et de l'alimentation.
[36] J.E. Hodgetts, *Pioneer Public Service*, p. 129.

persisted for at least 25 years, and continually resulted in strong criticism.[37] J.E. Hodgetts concluded that the department's difficulties "were attributable to the semi-autonomous nature of its constituent branches, the tremendous geographic range of its responsibilities, and the infinite opportunities for 'spoils.'"[38]

The records of the Department of Crown Lands and the Department of Agriculture, held in the *Archives nationales du Québec à Québec,* deal directly with the land granting process. They also record conflicts regarding land titles. Much of the material found in these collections was produced by land agents, who administered the department's business locally in areas ranging from one to three townships. Records produced by the Office of the Surveyor General and its local officials are mixed with correspondence within the department. The most valuable of the sources found in this record group are the numerous petitions and memorials of settlers complaining of grievances and praying for redress for difficulties they had experienced during the land granting process, i.e., usually long delays or unjust practices of local agents in granting land.

Among the most useful sources in this collection are the "Demandes de terres." One result of Durham's proclamation of October 31, 1838 was the naming of local officers or forest rangers who, in the period 1838-41 drew up more or less detailed lists of squatters, fourteen of which were found. Conveniently arranged by Township, they outline the squatters' qualifications for pre-emption. Some lists identify the lot number, extent of improvements, size of the resident

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[37] See, for example, "Report of the Commissioners Appointed to Enquire into the State and Organization of the Crown Land Department" *JLAC* 5 (1846): App. E.E. "Report of the Select Committee on the Present System of Management of the the Public Lands" *JLAC* 9 (1854-55): App M.M.
[38] J.E. Hodgetts, *Pioneer Public Service,* pp. 41-42.

family, and years of possession. Others are less complete, indicating only whether the squatters had settled before or after the tenth of September. Nearly all provide names.

The period 1838-1841, then, saw the first formal attempt on the part of the crown lands administration to describe the squatter phenomenon. The next important set of manuscript documents relating to squatters appeared twenty years later when the state renewed its effort to eliminate squatting. According to the regulations of 1859, claims to pre-emption were to be adjudicated on the spot by agents appointed by the Commissioner of Crown Lands, Philip Vankoughnet.[39] This resulted in a long series of adjudication files, ultimately deposited with the Ministry of Agriculture. Squatters, as well as parties holding conflicting interests in the same piece of land, presented evidence to the adjudicators, who forwarded their recommendations to the Commissioner. By this process, previous sales and location tickets awarded to absentees could be cancelled, on condition that the squatter show a possessory right to the land, and a willingness and ability to purchase the land immediately. The cost of the land was set at the fixed price for crown land in the area, and could be paid for on an instalment basis. These documents, along with the squatters' petitions, are our best source as to the intentions and attitudes of squatters toward property.

Given the names of actual squatters, it would have been useful to accumulate additional information through the use of the manuscript censuses. However, the censuses are missing for much of the Eastern Townships before 1871, and especially for the Bois Francs. It was possible to cross reference the lists with the *Terriers*, or land roles.[40] But since these contain the names and locations of legitimate title holders, few squatters turned up here. The same

[39] *JLAC* 17 (1859): App. 17.
[40] ANQQ, E9, Fonds terres et forêts, Anciens terriers, Branche ouest.

the squatter bills of the late 1850's and 1860's, reported thoroughly on the progress of the legislation in both houses of the legislature.

Not to be overlooked are the colonization narratives published in book form through the nineteenth century, which demonstrate that for the average settler, possession of land often took priority over the acquisition of a title. Sometimes these accounts of settlement were fictional, like Gérin-Lajoie's *Jean Rivard.*[44] Others were historical narratives such as Stanislas Drapeau's *Etudes sur les développements de la colonisation du Bas-Canada,* or C.M. Day's *Pioneers of the Eastern Townships* and *History of the Eastern Townships.* All tended to emphasize the heroic character of settlers, and tended to condemn absentee land owners because, as Day observed, their lands "operated very unfavorably toward their permanent settlement..."[45] Settlers are depicted in these books as pioneers of national progress and little distinction is made between legal occupants and squatters. What mattered to the settlers, to adopt Gérin-Lajoie's extended metaphor, was that a battle in the name of civilization was being waged against the forest.

Published legal material provides a perspective on property quite antithetical to that of the colonization narratives. Since squatting could only exist in opposition to a more formal type of property, it must be studied in conjunction with the law that opposed it. Property law on freehold lands in the Eastern Townships had diverse roots. It drew on American and English legal traditions as well as Lower Canadian civil law, particularly the Custom of Paris and case law.[46] Treatises on French civil and customary law, American law, and English common law

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[44] A. Gérin-Lajoie, *Jean Rivard.* This novel was first published in 1862.
[45] C.M. Day, *History of the Eastern Townships*, p. 301.
[46] See J.E.C.Brierley, "The Co-existence of Legal Systems in Quebec: 'Free and Common Socage' in Canada's 'pays de droit civil.'"

were all considered relevant authorities to some extent in Lower Canada.[47] Laws pertaining to squatting were debated in court through much of the period, and many cases against squatters were reported and analysed in the law reports which were regularly published by the 1840s.[48] Case reports clearly document the Lower Canadian legal system's struggle to come to terms with widespread squatting.[49]

Taken together, this source material provides a solid base from which the attitudes and experiences of squatters can be gleaned. The Department of Crown Lands, the government, and the judiciary responded to squatting in different ways, and when these responses are analysed, a full picture of the phenomenon emerges.

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[47] See for example Pothier, *Traité du domaine de propriété* and *Traité de la possession* in M. Bugnet, ed., *Oeuvres de Pothier*, and F.X.P. Garnier, *Traité des actions possessoires*.
[48] See E. Whan, T. Myers and P. Gossage, "Stating the Case: Law Reporting in Nineteenth-Century Quebec" in Donald Fyson, Colin M. Coates and Kathryn Harvey, eds., *Class, Gender, and the Law in Eighteenth- and Nineteenth-Century Quebec: Sources and Perspectives*, pp. 55-80.
[49] On the case law of squatting, see ch. 4.

Chapter Two: Historiography and Historical Background

Squatting in Lower Canada must be considered within the contexts of the history of settlement and crown land policies, the development of the Lower Canadian state, and the history of property law. These aspects of Canadian history have been well studied, and the relevant literature is surveyed below. The existing historiography presents us with a dilemma. On one hand, historians have put forward a developmental process of state formation and rationalization in which complex state bureaucracies and a systematized legal system evolved. At the same time, however, historians have described the settlement process in general and squatting in particular in terms of the failure of government to apply a neutral, coherent, and efficient strategy of land disposal. In the few accounts we have, this inefficiency is the primary explanation invoked for squatting. This leaves the question: if the Lower Canadian state gained increasing powers of regulation, and law became increasingly systematic, why did squatting remain so widespread through much of the period?

The historiography suggests that while the state grew both in terms of its bureaucracy and control over socio-economic life, rural society retained a relatively high degree of autonomy until the emergence of municipal government and local judicial authority during the 1850s.

Despite the presence of local crown land agents, who, as we shall see in chapter five, often worked on behalf of squatters, squatting remained difficult to regulate. Chapter three argues that the Department of Crown Lands lacked the administrative apparatus to solve the squatting problem until 1859 when local adjudicators were appointed to convert squatters to proprietors.

Further, as was suggested in the introduction, squatting persisted as an administrative problem due to the fact that property law in Lower Canada contained an historical contradiction. Both seigneurial and freehold property rights historically derived in part from the use and occupation of land. Even though property law underwent several reforms that intended to subject landed property to a universal, systematic legal regime, and to render it more marketable and secure, squatters could acquire a right to crown land that was implicitly sanctioned by legal principles which maintained that occupation in good faith partly constituted a proprietary right.

A. Accounts of Squatting

Historical studies focusing on squatters in Lower Canada are few. In 1975, Maurice Carrier, Jules Martel, and Raymond Pelletier published "Les *squatters* dans le canton d'Arthabaska, 1835-1866." Having established a list of 74 squatters in Arthabaska, the authors argue that squatting was attributable to three factors: the inefficient land granting process; the crown's exorbitant land grants made at the beginning of the century in favour of unknown, absentee proprietors; and the fact that saturation of the seigneurial lands made migration a practical necessity for the Canadiens.[1] Their implication is that, had procedures for acquiring lands been

[1] M. Carrier *et al.*, "Les *squatters* dans le canton d'Arthabaska, 1835-1866," p. 83.

land speculation and to facilitate settlement by farmers, she identifies five causes of squatting. First, before the establishment of land boards, the only way for actual settlers to obtain land was the slow and inefficient process of petitioning the Governor in Council. Further, too much land had been given to privileged claimants, which resulted in a shortage of surveyed land. Next, there was no means by which prospective settlers could acquire information and be assigned locations in isolated areas. Another problem arose from the administration's retention of large blocks of crown and clergy reserves, often in areas of the most desirable land. This, she suggests, was "a constant temptation to the poor and landless." Finally, she points to Americans who migrated to Canada after the wars of Independence and 1812: "Accustomed to make a living from the land by 'pitching' and 'shifting,'" these "backwoodsmen," Gates writes, "were not disposed to pay attention to the regulations of a monarchical government."[7]

In sum, accounts of squatting in both Upper and Lower Canada emphasize the fact that potential settlers were barred from the land they might have expected from an efficient, rationalized state. Not only was the public lands administration inefficient. It was also impenetrable for those without influence as the state administration represented the propertied.

B. Accounts of Settlement

The settlement process in Lower Canada has been approached from a variety of perspectives. Nationalists such as Maurice Séguin have stressed the role of ethnicity and

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1797-1805." For a follow-up article, see H.P. Gundy, "The Family Compact at Work: The Second Heir and Devisee Commission of Upper Canada, 1805-1841."

[7] L. Gates, *Land Policies*, p. 288.

culture as key factors in the history of settlement. For Séguin, the post-conquest imperative of Canadien settlement, or "reconquest", was complicated by the mediocrity of agricultural markets. Intense competition exhausted the soil, while unconceded land in the seigneuries ran out. These factors combined between 1820 and 1850 to force farmers to spill over into the townships. Here, grants to absentee proprietors, high prices, land reserved for the Protestant clergy, and monopolies given to land companies such as the British American Land Company, effectively blocked poor Canadien settlers. In short, the Canadiens' inferiority was attributable to the presence of the British, and to the colonial administration's failure to grant land on easy terms.[8]

Largely under the aegis of the Institut québecois de recherche sur la culture, a corpus of regional histories has been written.[9] These problematize the issues of geographic situation in internal and external economies, and focus on forms of regional development and underdevelopment.[10] A common thread in these interpretations of settlement and colonization is the state's failure to institute an efficient and fair land disposal policy.

Fernand Ouellet has also emphasized ethnicity. For Ouellet, the obstacles faced by would-be settlers were characterized by "the internal roots of socio-economic problems," not by the universal forces of modernization and industrialization felt throughout North America.[11] In the context of the demographic and agricultural crises he identifies for the early nineteenth century,

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[8] M. Séguin, *La 'nation canadienne' et l'agriculture*, chs. 3, 9, and pp. 223-224.
[9] J.-C. Fortin and A. Lechasseur, *Histoire du Bas-Saint-Laurent*; C. Girard and N. Perron, *Histoire du Saguenay-Lac-Saint-Jean*; A. Laberge, ed., *Histoire de la Côte-du-Sud*; S. Laurin, *Histoire des Laurentides*. See also R. Hardy and N. Séguin, *Forêt et société en Mauricie*.
[10] See G. Massicotte, "Les Etudes régionales;" F. Ouellet, *The Socialization of Quebec Historiography since 1960*, pp. 19-20.
[11] F. Ouellet, *Socialization of Quebec Historiography Since 1960*, pp. 13, 27-28, cited in R. Rudin, "Revisionism and the Search for a Normal Society," p.33.

accommodate the challenges presented by this economic transition.[15] Little demonstrates the emergence of two related but separate economies in the Upper Saint Francis, one generated by the settlers' agricultural production, the other controlled by large-scale forestry interests.[16] The shortcoming of the settlement drives lay in their failure to take full advantage of the timber industry. This was partly the fault of the nationalist proponents of colonization, but was also due to state land policies which withheld timber rights from settlers and awarded monopolies to the large companies such as C.S. Clark's.

In his case study, *Crofters and Habitants: Settler Society, Economy and Culture in a Quebec Township 1848-1881*, Little investigates the role of culture and ethnicity in the settlement strategies adopted by Scots and Canadiens in one Township.[17] Although both groups were faced with common economic constraints, they demonstrated different demographic patterns, adopted rather different roles in the economy, and applied different methods of property accumulation, (although in the long run, both groups acquired nearly equal quantities of land). The Scots tended to accumulate more land by squatting than did the Canadiens,[18] he finds, largely because they tended to occupy neighbouring lots so as to ensure the availability of land for their offspring.

The Scots traditionally held a view of property in which title derived from occupation and improvement. Little explains that "such behaviour was consistent with their Highland heritage, for, insofar as the clan system survived into the nineteenth century, it was an unofficial device to

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[15] J.I. Little, *Nationalism, Capitalism, and Colonization in Nineteenth-Century Quebec*, p. xii.
[16] Ibid, p. 35.
[17] J.I. Little, *Crofters and Habitants*, pp. 3-10, 45.
[18] Ibid, p. 62. Little cites the 1852 census in which most Scots declared possession of 100 acres, whereas the Canadiens most frequently claimed 50.

enforce the usufructory property rights of its members."[19] Little further suggests that the Scots' experience of land closures and clearances in the Highlands led them to distrust officialdom and to question the security of legal title.[20]

Canadiens squatted on additional lots primarily for the purpose of wood cutting, and not so much for the establishment of new farms for their children. These lots tended not to adjoin their farming lots.[21] The Canadiens were discouraged from the accumulation of land because their experience on the seigneuries had taught them that more land meant more rent.[22] Little also effectively shows how both Scotch and Canadien squatters engaged in an extra-legal culture of property. Many squatters exchanged and transferred their holdings among themselves, using non-legal instruments.[23]

Given the poor roads, long distance, and slow postal communications, crown land policies were difficult to enforce in remote areas. As a result, settlers devised their own land acquisition strategies. Although local crown lands agents were often lenient in demanding payments for land, Little finds that in Winslow Township they tended to enforce the "misguided" state policy of limiting free grants to fifty acres per family.[24] Since settler families required more land for agriculture, wood cutting, and for their offspring, many squatted on a second or third lot, to be acquired legally later. Even when payments were made, settlers experienced long delays in acquiring location tickets and letters patent. In short, crown lands policies were so unsuited to

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[19] Ibid, p. 61.
[20] Ibid, p. 59.
[21] Ibid, p. 70.
[22] Ibid, p. 62.
[23] Ibid, p. 57, 70.
[24] Ibid, p. 45.

marriage, community, work, and religion -- to a regime of positive law and an expanding role for the state."[26] Alan Greer, also interested in state formation, argues that while the establishment of police forces in urban Lower Canada was a response to the rebellions, the rise of the urban police represented a more direct attempt at social transformation and moral improvement by the state.[27]

While some historians emphasize that the Lower Canadian state moved increasingly into functions of social regulation, others focus on the development of the state bureaucracy. Although primarily an evaluation of the state's efficiency in serving the "public interest," J.E. Hodgetts' 1955 book, *Pioneer Public Service: An Administrative History of the United Canadas, 1841-1867*, diligently traces the growth of bureaucracy in individual government departments. Hodgetts emphasizes the importance of reform and systematization in the Department of Crown Lands, which became one of the largest and most complex government offices.[28]

Although most historians agree that the power of the state increased during this period, its influence in remote areas undergoing settlement has been questioned. Indeed, squatting presupposes some degree of local autonomy such as is highlighted in Little's case study of Winslow Township.[29] Greer has argued that during the first part of the nineteenth century, when the colonial state in Lower Canada "was rather a primitive entity," rural society was atomistic rather than integrative, and that customary structures of community regulation

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[26] B. Young, "Positive Law, Positive State: Class Realignment and the Transformation of Lower Canada, 1815-1866," in A. Greer and I. Radforth, eds., *Colonial Leviathan*, pp. 52-53.
[27] A. Greer, "The Birth of the Police in Canada," in Ibid, p. 43.
[28] J.E. Hodgetts, *Pioneer Public Service*, p. 128.
[29] J.I. Little, *Crofters and Habitants*, p. 10.

prevailed; full-time agents of government were entirely lacking in the countryside, and the local justices of the peace were subject to local biases.[30]

In the United States, where a broader literature on squatters exists, squatting also coincided with traditions of local autonomy. Alan Taylor, for example, argues that the settlement process on the Maine frontier, where, like in Lower Canada, large grants had been made to absentees, was characterized by a profound ideological clash between the proprietors' vision of hierarchy, social control, and ownership, and the settlers' pursuit of autonomy.[31] Paul Gates, in his *History of Public Land Law Development*, describes similar conditions in the American midwest, where "squatters' associations" were formed to protect lands from purchase by speculators, and in California, where settlement preceded all forms of state administration.[32]

In Australia squatting is well documented, and here again, squatters undertook to protect their autonomy. The key difference between the Australian and Lower Canadian experiences is the fact that Australia was a penal colony where squatters were perceived as an inherently criminal element. This changed in 1836 when the Australian government recognized the squatters and sanctioned their possessions.[33] The squatters had known all along, however, that the state was unable to enforce its policy of restricting settlement to certain areas.[34]

The historiography reveals that while the state extended its realm of influence via law reform, the establishment of police forces, and the growth of bureaucracy and government

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[30] A. Greer, *Patriots and the People: The Rebellion of 1837 in Rural Lower Canada*, pp. 17, 87, 88, 96, 117.
[31] A. Taylor, *Liberty Men and Great Proprietors: The Revolutionary Settlements on the Maine Frontier, 1760-1820*, p. 59.
[32] P.W. Gates, *History of Public Land Law Development*, pp. 116, 156. See also A. Taylor, "'A Kind of Warr': The Contest for Land on the Northeastern Frontier, 1750-1820," and R. McCluggage "The Pioneer Squatter."
[33] S.H. Roberts, *The Squatting Age in Australia, 1835-1847*, pp. 54, 65.
[34] Ibid, pp. 50-51.

incorporation of the cities of Quebec and Montreal. Like Durham, Sydenham was highly concerned with the disposal of crown land because it represented the state's greatest resource. In rejecting Charles Buller's and E.G. Wakefield's theory of systematic colonization, Sydenham believed that the establishment of yeoman farmers on the land was the key to colonial development. This, he felt, was more important than the retention of future settlers in urban areas to provide a labour market for industry while workers earned sufficient money to purchase farms, as Wakefield suggested.[38] Nonetheless, for the crown lands, Sydenham found it "impossible to frame any great plan such as people look for, and which has been hinted at but never fully *explained* in Lord Durham's report."[39]

Sydenham did, however, move to tax absentee land owners, and negotiated the return of 500 000 acres of land in the Eastern Townships from the indebted British American Land Company which had reneged on its obligation to settle and develop the land. While Sydenham appears to have favoured the average settler over the powerful speculator, his application of the utilitarian principles of security in property contributed to the creation of more marketable forms of title. As Radforth makes clear, Sydenham's furthering of the registry project and his contribution to the commutation of seigneurial tenure as well as other reforms were important steps in the liberalization of property as well as the extension of the state apparatus.

G.F. McGuigan, in his work on the leader and associates system between 1791 and 1809, locates the shift to market-oriented concepts of property at the beginning of the century with

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[38] I. Radforth, "Sydenham and Utilitarian Reform," in I. Radforth and A. Greer, eds., *Colonial Leviathan*, p. 80. On systematic colonization, see H. Merivale, *Lectures on Colonization and Colonies Delivered Before the University of Oxford in 1839, 1840, 1841.*

[39] Sydenham, dispatch to Russell, 1 Oct. 1840, quoted in I. Radforth, "Sydenham and Utilitarian Reform," in I. Radforth and A. Greer, eds., *Colonial Leviathan*, p. 79.

consideration of expectations of return on investment.[44] Much of the historiography on state formation, then, emphasizes the role of the state in facilitating the free exchange and accumulation of landed wealth. One important instrument of property regulation was the legal system.

D. Legal Historiography and Lower Canadian Private Law Heritages

Quebec legal historiography reflects differeing methodological and ideological perspectives. John Brierley has been most noteworthy among historians who have examined legal doctrine in relation to law itself, often restricting their analysis to the meaning of individual laws within bodies of larger law.[45] Others, like Brian Young and Evelyn Kolish, have focused on the relations between law, economy, and society.[46] A few others have sought the significance of law in legal discourse.[47] Legal administration, education, lawyers, and the institutions of law in Quebec have been examined as well.[48]

Of interest in relation to squatting, however, is the role of law in the commodification of property in Lower Canada, and the increasing judicial insistence on clear, absolute, and

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[44] Ibid, p. 229.

[45] J.E.C. Brierley, "The Co-existence of Legal systems in Quebec"; "The English Language Tradition in Quebec Civil Law"; "La notion de droit commun dans un système de droit mixte"; "Quebec's Civil Law Codification"; and "Quebec's 'Common Laws' (Droits communs)"

[46] See note 49 below. E. Kolish, *Nationalismes et conflits économiques: Le débat sur le droit privé au Québec, 1760-1840* and "The Impact of Change in Legal Metropolis on the Development of Lower Canada's Legal System: Judicial Chaos and Legislative Paralysis in the Civil Law."

[47] See R. Gordon, "Critical Legal Histories."

[48] See for example, G. Blaine Baker, "Law Practice and Statecraft in Mid-Nineteenth Century Montreal: The Torrance-Morris Firm, 1848-1868"; D. Howes, "From Polyjurality to Monojurality: The Transformation of Quebec Law, 1875-1929" and "The Origin and Demise of Legal Education in Quebec"; S. Normand and A. Hudon, "Le contrôle des hypothèques secrètes au XIXe siècle." The best survey of legal history in Quebec remains V. Masciotra, "Quebec Legal Historiography, 1760-1900." For a review of British legal historiography see G.R. Rubin and D. Sugarman, "Towards a New History of Law and Material Society in England, 1750-1914," in Rubin and Sugarman eds., *Law, Economy and Society, 1750-1914: Essays in the History of English Law*, pp. 1-123.

lines of John Locke's labour theory. This conception was widely upheld by the early courts and in colonial land policy for its ability to further settlement. Mensch explains that there was extreme pressure in the towns to prevent the accumulation by absentees of vast tracts of land, and that local conditions were such that the cultivation standard served as a practical basis of title.[53] As Blackstone argued, however, property based solely on use could lead to abuse and republican chaos. New York lawyers shared this view, criticizing the occupation model because it represented the "complete diffusion of property, and therefore of both moral and political authority."[54] The source of all landed property, the lawyers argued, should be the sovereign, as British tradition had insisted.

These two irreconcilable visions of property, each with moral, political and economic implications, competed in early America. When the conflict between these two visions surfaced over issues of settlement requirements for grants, defective grants, boundary disputes, or Native rights, mediating concepts were incorporated into property law. These mediators included the concepts of self interest, freedom of contract, the goals of utility, efficiency, reason, and the invention of a positivistic, objective legal right to property.[55]

Although Mensch's analysis is insightful, and is suggestive of a framework for assessing the relationship between squatters and property law in Lower Canada, there are difficulties. Lower Canada had a tradition of French customary property law, which was later infused with some of the British traditions assessed by Mensch. Secondly, a century elapsed between the

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[53] E.V. Mensch, "The Colonial Origins of Liberal Property Rights," pp. 665-666.
[54] Ibid, p. 652.
[55] Ibid, pp. 636, 694.

American colonial period discussed by Mensch and the settlement of the Lower Canadian townships in the early nineteenth century.

Despite these qualifications, certain parallels are unmistakable. Settlement in both Lower Canada and the Thirteen Colonies was complicated by the existence of large expanses of land owned by absentees, and their administrations were confounded by the conflicting priorities of reserving timber for industry, and establishing settlers on the land. Most importantly, both faced the same conflicting conceptions of property: the settlers and their advocates in both colonies espoused a labour theory of property in contrast to one that emphasized title above all else.

In Lower Canada, grants of crown land had traditionally been made on condition of settlement and improvement, which suggests that use and occupation had initially provided important bases for property. By royal edict in 1664, the Custom of Paris became the exclusive private law of New France. The Custom spelled out the law of fiefs, seigneurial tenure, and legal relations between seigneur and *censitaire*, parent and child, and between husband and wife. Rural *censitaires* held land on the condition that they farmed and improved it and paid their seigneurial rents. The *Arrêts* of Marly, issued by the French crown in 1711 and reaffirmed in 1732, emphasized that land was first and foremost for settlement: the *Arrêts* required seigneurs to concede land on demand to settlers who promised to improve it, and prohibited seigneurs from charging an entrance fee.[56]

After the conquest, British common law began to be applied in Lower Canada. Although the *Quebec Act* of 1774 preserved seigneurial tenure, it introduced English rules of evidence in

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[56] See T. Johnson, "Perceptions of Property," pp. 88-93.

commercial law, at the same time as Lower Canadian lawyers began to look to England and America for jurisprudence on the increasingly contract-oriented economy.[57] The *Quebec Act* of 1774 allowed for grants of land under the English tenure of free and common socage in the Eastern Townships. The early freehold grants stipulated that the land was to be settled and improved within a given time, which, as under the French regime, indicates that use and occupation were key aspects of the legal basis of ownership.

As McGuigan showed, however, the leader and associates system, with its corporate economic structures, had the opposite effect and encouraged the view of property as a commodity. The system fostered a speculative market in land. Seigneurs also found ways of preserving land for speculation. In a petition to the Legislative Assembly in 1832 explaining that they were incapable of obtaining title to their holdings, a group of squatters complained that

> nombreux sont les paysans qui afin de forcer les mains du seigneur, s'établissent sur un lot, le défrichent avec l'espoir de légaliser leur situation par la suite. Certains seigneurs n'hésitent pas à les chasser et d'autres leur imposent des amendes, ce qui les met en bonne posture pour soumettre les paysans à leurs conditions.[58]

Frustrated settlers had no choice but to occupy the land and hope that the seigneurs would later concede seigneurial title. This proved to be of little use, because it was in the seigneurs' interest to have their land settled without granting title; land improved by squatters had an increased value that made it all the more attractive on the market. But despite the rising market in land, the fact remained that settlement was legally a condition of both freehold and seigneurial grants.

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[57] B. Young, *The Politics of Codification*, p. 22. See also J.E.C. Brierley, "The Co-existence of Legal Systems in Quebec: 'Free and Common Socage' in Canada's 'pays de droit civil.'"
[58] Quoted in F. Ouellet, *Le Bas-Canada 1791-1840: Changements structuraux et crise*, p. 229.

in *Stuart and Bowman* in 1853, a case which involved squatters and the role of possession in ownership as well as the issue of legal jurisdiction.[63] In the 1857 case *Wilcox and Wilcox*, the same was upheld,[64] while the legislature put the issue to rest that year with *An Act for settling the Law concerning Lands held in Free and Common Soccage in Lower Canada*.[65]

Efforts to rationalize the legal system were ongoing. The establishment of land registry offices, the commutation of seigneurial tenure, the extension of the judicial bureaucracy into new regions, and the professionalization of the bar and legal education all pointed toward a more liberal and "rational" system of law and legal administration. The codification of Lower Canadian civil law was the last major event in this period, as it sought to sort out, rationalize and blend valid law. The codifiers -- prominent anglophone jurist C.D. Day, powerful commercial lawyer R.-E. Caron, and former Commissioner of Crown Lands A.-N. Morin -- set out, as Young argues, to bring the laws of contract in line with a free market economy emphasizing personal liberty, while maintaining the authority of the traditional Lower Canadian elite and family values.[66]

E. Crown Land Policies for the Townships to 1838

If Lower Canadian property law was diverse during the first half of the century, so too were its crown lands policies, despite ongoing attempts to implement an effective land management system. In 1791 the *Constitutional Act* officially opened the Eastern Townships for settlement, with lands to be granted in freehold tenure, as stipulated by the *Quebec Act*. Inspired by the British Empire's traditional use of the chartered company,[67] and modelled after the proprietor

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[63] 2 *L.C.R.* (1851): 369-439, and in appeal, 3 *L.C.R.* (1853): 309-416.
[64] 2 *L.C.J.* (1857): 1.
[65] *Statutes of Canada* (1857), 20 Vict., c. 45.
[66] B. Young, *The Politics of Codification*, p. 5.

colonization system applied in New England,[68] the imperial government instructed the Canadian administration to institute the settlement policy known as the leader and associates system. The result under this system was that between 1791 and 1896 in Lower Canada, 1 457 209 acres of land were granted to approximately seventy individuals,[69] of which, according to G.F. McGuigan, 1 099 246 acres were awarded to 34 influential merchants and government officials, many of whom held seigneurial lands as well.[70] By 1809, less than one fifth of the land promised to leader and associates companies had been actually settled.[71]

In theory, leaders were entrepreneurs who, inspired by the profit motive, took it upon themselves to assemble settlers or "associates", to acquire investors, and to administer the settlement of a major portion of a township measuring at least six, but usually ten miles square. First, the leader was to petition the land committee of the Executive Council for a grant. Next, leaders were to assemble their associates, and draw up promissory contracts which required the settlers to return to the leader any land they acquired in surplus of their two hundred-acre "pitch lot". The associates were to honour their promises, and the leaders were to distribute the surplus land among themselves and their investors, who had invested the capital necessary to carry out the petition, land distribution and settlement.[72]

Although leaders did not have the authority to subdivide and distribute land to the associates until a patent had been issued, most of the early townships were subdivided without

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[67] G.F. McGuigan, "Land Policy and Land Disposal Under Tenure of Free and Common Soccage: Quebec and Lower Canada, 1763-1809," vol. 3, pp. 6, 209.
[68] T. Johnson, "Perceptions of Property," p. 100.
[69] Langelier, *List of Lands Granted*, p. 7.
[70] McGuigan, "Land Policy and Land Disposal" vol. 3, p. 240.
[71] Ibid, p. 232.
[72] G.F. McGuigan, "Land Policy and Land Disposal" vol. 3, p. 225.

authorization. A government investigation in 1800 showed that 24 townships had been subdivided prematurely; only six townships had been divided according to the proper procedure.[73] Of 106 other petitions for townships, at least 90 were dismissed as inactive. The delay in the issuing of patents which had encouraged leaders to proceed prematurely with subdivision was due partly to the inability of the crown lands administration to agree upon a proper procedure and apparatus for the issuing of full legal title.[74] This lack of systematic administrative structures would continue to plague crown lands policy long after the leader associates system was phased out in 1809.

Aside from Governor Prescott's attempt to adhere to the crown's instructions of 16th September 1791, which required that "all and every person or persons who shall apply for any Grant or Grants of Land... shall previous to obtaining the same make it appear that they are in a condition to cultivate and improve the same," and despite the early delays in the issuing of patents, the government made little attempt to link settlement and the issuing of land patents as contingent upon each other.[75] Some historians have argued that the large grants of the early period indicate the government's desire to set up a British-style landed aristocracy to check the democratic tendencies of the colony.[76] In theory, the administration of settlement was to be delegated to leaders who would consequently exercise considerable local power. Under free and common soccage, the position of leader could be quite profitable since there was no legal or customary limit set on the prices demanded from later settlers. While there were critics in government of the system, the vast amount of land ultimately patented under this system

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[73] NAC RG1 L3L vol. 1, "Report of 30th July 1800" p. 99.
[74] N. MacDonald, *Canada, 1763-1841: Immigration and Settlement*, p. 79.
[75] NAC MG24 I54, IX, "Extracts from his Majesty's Instructions to his Excellency Lord Dorchester," p. 31.
[76] M. Séguin, *La 'nation canadienne,'* p. 189.

illustrates the élite's desire to build a colony ruled by private property, subject to English property law, and in which land could be easily exchanged. Indeed, individuals like Hugh Finlay and John Young used their official positions to acquire huge tracts of land.

Instead of its intended object of furthering settlement, the leader and associates system established a speculative market in land. All that was required of the leader was a signature on a petition, usually at the cost of a guinea, to get a free grant of 1 200 acres. Since potential associates who might actually settle were scarce, names were often invented. Forms for the re-transfer of the land to the leader were pre-printed and sold at local stationery shops.[77] A government committee later found that the forms had actually been drafted by the Attorney-General.[78] Only in rare cases did the associates keep their two-hundred acre lot for themselves.[79] Prescott, who had sought to make the system work in favour of settlers, had been recalled in 1799 because his views on land policy conflicted with those of his colleagues. The leader and associates system brought more confusion than clarity, was a source of political scandal, and was abandoned in 1809. In the words of the Maurice Séguin, it was nothing but "une ruse pour déjouer les instructions [de la couronne]"[80]

Technically, the grantees under the leader and associates system were supposed to fulfil certain conditions of settlement. It was well known that they did not. By imperial legislation, the *Canada Tenures Act* of 1825 established a Court of Escheats at Sherbrooke which had the power to revoke patents for which the conditions had been unfulfilled.[81] Langelier commented

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[77] N. MacDonald, *Canada, 1763-1841: Immigration and Settlement*, p. 78, and "Second Report of the Special Committee appointed to inquire into the causes which retard the Settlement of the Eastern Townships of Lower Canada" *JLAC* 10 (1851): App. V.
[78] Langelier, *List of Lands Granted*, p. 8.
[79] Ibid, p. 8.
[80] M. Séguin, *La 'nation canadienne,'* p. 189.

that since "the majority who were likely to be dealt with by this court were the most influential in the province, they found means to nullify this measure of reform."[82] It was acknowledged at the time that absentees could deceptively use improvements made by squatters on their land as evidence that they had actually accomplished their settlement duties. The two cases heard in this court were dismissed due to informalities in procedure.[83]

In an attempt to promote more efficient settlement, the crown lands administration had begun to institute the location ticket system in 1806, under which free grants were made to prospective settlers. Letters patent were to be withheld until settlement requirements were met -- clearing a specific amount of land, constructing a dwelling, and residing on the land continuously for a specified time. To increase revenues from land disposal, in 1826 the imperial government instructed the Lower Canadian administration to adopt the sales system, by which land was sold at public auctions, with payments due quarterly. A variation of this system required only the payment of interest on the sale price, in perpetuity, with no repayment of the principal.[84]

Another policy involved the sale of vast tracts of lands to private corporations such as the British American Land Company. The British American Land Company, born in 1832 out of the ashes of the failed Lower Canada Land Company, was a major player in land speculation and settlement in the Eastern Townships. Headed by John Galt, a Scottish capitalist who founded the Canada Company and lobbied in favour of the *Rebellion Losses Bill*, the company began with the purchase of 850 000 acres of crown land, made up of all the crown lots in

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[81] United Kingdom (1825), 6 Geo. II, c. 59, ss 10-11.
[82] Langelier, *List of Lands Granted*, p. 11.
[83] Kempt to Hay, 29 September 1828, cited in M. Séguin, *La 'Nation canadienne,'* p. 192.
[84] See T. Johnson, "Perceptions of Property," pp. 102-103, for a concise description of the two latter systems.

Sherbrooke, Shefford, and Stanstead counties, as well as much of the unsurveyed upper Saint Francis district, for prices ranging between 75 and 87.5 cents per acre, at a total cost of 120 000 pounds sterling. The company also promised to settle and develop the area.[85] Governor Aylmer, whose Executive Council had had difficulty obtaining taxation revenues from the Assembly, reluctantly favoured the land sale to alleviate the government's financial needs.

Outwardly, the company was an agent of imperialism and colonization, backed by British investors. It hoped to block American immigration to the townships, as well as to counter the expansion of the French Canadians, who were seen by promoters as claiming "a prescriptive right to all the waste lands of the Crown."[86] Although the company did establish some settlers in the Saint Francis in the 1830s, the area was increasingly neglected and was left unsettled so that its timber stands would become increasingly valuable. Ultimately the company concentrated its land sales activities in more developed areas such as Sherbrooke County, and tended to charge high prices for land. With its settlement activities greatly reduced, forestry in agriculturally marginal areas became the company's main interest.[87] Financially dependent on large-scale British immigration, the company never fully met its ambitious objectives and was regularly attacked for its monopolistic, ethnic-centered, speculative business practices.[88]

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[85] J.I. Little, *Nationalism, Capitalism, and Colonization*, p. 38.
[86] Cited in ibid, p. 38.
[87] J.I. Little, *Nationalism, Capitalism, and Colonization*, p. 37. The British American Land Company has yet to be treated comprehensively by historians. In addition to chapter two in Little's book, important works in which the company is dealt with include O.D. Skelton, *The Life and Times of Sir Alexander Tilloch Galt*; N. MacDonald, *Canada 1763-1841: Immigration and Settlement*; R. Rudin, "Land Ownership and Urban Growth: The Experience of Two Quebec Towns, 1840-1914"; J.-P. Kesteman, "Une Bourgeoisie et son espace: Industrialisation et développement du capitalisme dans le district de Saint-François (Québec), 1823-1879"; P. Goldring, "British Colonists and Imperial Interests in Lower Canada, 1820 to 1841."
[88] For example, the 1838 Proclamation of Independence proclaimed the confiscation of the British American Land Company's holdings.

Generally, the system of public, government sale of lands to individuals formed the basis of Lower Canadian land disposal policy through the 1830s. Like so many other crown policies, however, it was never systematically implemented, and did not succeed to any great extent in establishing settlers on the land. The bureaucratic process remained inefficient and costly; even when payments were made on time, letters patent often took years, sometimes decades, to emerge from the crown lands administration. Furthermore, as Maurice Séguin argues, the sales system was a failure because the prices were beyond the realm of affordability for the average settler, averaging seventy cents per acre to 1837.[89]

To 1840, 4 000 000 acres of Lower Canadian township lands had been alienated by the crown. Only 1 500 000 of these had been acquired directly by actual settlers.[90] Three times as much crown land had been ceded after the leader and associates system had been abandoned, yet there was no marked improvement in the number of settlers who took up land. The problem was particularly pronounced in the Eastern Townships where the British American Land Company had become a huge force with its 850 000 acres. Of the 138 grants in the Eastern Townships contained in Joseph Bouchette's 1831 list of grants for the whole province, only 38 were of a quantity less than 1000 acres. To 1829, the average grant contained 13 201 acres, a far greater acreage than one family could occupy.[91] This made it clear that the crown's need for revenue had dominated over its stated policy of establishing settlers.

This, then, was the context in which squatting emerged in Lower Canada. The massive grants made under the leader and associates system made it possible, even probable, for

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[89] M. Séguin, *La 'nation canadienne,'* pp. 193, 195.
[90] Ibid, p. 202.
[91] Calculated from "General Statement of Lands granted in Free and Common Soccage in the Province of Lower Canada" in Joseph Bouchette, *The British Dominions in North America* vol. 1, pp. 483-488.

Chapter Three: Squatters, Property and Policy: The Crown Lands

Finding that the crown lands of Lower Canada had been managed in such a way that favoured speculators over settlers, Charles Buller explained in 1839 that the "the result of these circumstances has been, that no small portion of the actual settlers are persons who have no title to the soil which they cultivate."[1] The preponderance of squatting signified the state's failure to control the appropriation of the crown lands, and to ensure that every settler held a legal title. Durham's pre-emption proclamation of 1838, which introduced to crown lands policy for the first time a mechanism by which squatters could be converted into proprietors, represented an attempt to regain control of the crown lands.

The significance of the proclamation was manifold. The Department of Crown Lands was growing rapidly, as it took on responsibility for mining, fisheries, forestry, surveying, and Indian affairs.[2] The emergence of pre-emption was an important first step in instilling efficiency and order in its affairs. The administration of the public lands and colonization, however, proved to be the department's most confounding charge because it was burdened with the contradictory mandate which we have already seen: on the one hand, it was to further settlement by

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[1] Lucas, ed. *Lord Durham's Report*, III, App. B, p. 106.
[2] J.E. Hodgetts, *Pioneer Public Service*, p. 122.

distributing land on easy terms, while on the other, it was to produce revenues from the sale of its land and rights to its timber resources.

The department tried during the period a myriad of land policies ranging from the sale of vast tracts of land to the British American Land Company, to the issuing of small free grants of land to settlers. None was a notable success. Access to legal land for the average settler remained complicated by complex granting, sales, and patenting procedures. As demand for land remained high through the period, squatting persisted as a mode of settlement. An estimated 15 000 squatters were deemed to occupy the crown's surveyed land in 1857.[3] Accordingly, pre-emption was somewhat unwillingly retained by the department, despite efforts in 1840 and 1859 to actively revoke it. Pre-emption represented the one consistent aspect of crown land policy through the union period.

When the Department of Crown Lands obtained new powers to implement pre-emption with the appointment of travelling adjudicators in 1859, the processes of state formation, departmental systematization, and liberalization of property came together to expurgate squatting. The 1859 regulations had an unprecedented degree of success. As Durham had understood, pre-emption was the only way in which squatters could be converted from illegitimate occupiers to titled owners of land. But pre-emption contained a fundamental contradiction: the Department of Crown Lands was forced to acknowledge the legitimacy of the squatters' form of property which, at root, contradicted the state's objective of furthering universal, liberal property rights.

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[3] "Report of the Commissioner of Crown Lands" *JLAC* 15 (1857): App. 25.

A. Squatters

For settlers taking up crown land in newly opened townships, the acquisition of legal title to a particular lot was not the first priority. Instead, settlers commonly identified their desired lot, began to improve it, and sought legal title from the crown having first established themselves. This was the usual practice in the townships. Observe B.F. Hubbard's description of settlement in Stanstead County in the 1790's.

> Stanstead Plain.
>
> This settlement, comprising an area of about nine miles square, was begun by Johnson Taplin... Mr. Taplin and his family were fifteen days getting through the woods from Newburry, Vt., where they had previously resided... They went to work, and after clearing away the snow, which was four feet deep, put up a temporary shelter with poles and hemlock boughs, in which they passed the night... at least six miles from any settlement... He afterwards built a small frame house, and his place soon became the resort of emigrants from the south...
>
> In 1797, Capt. Israel Wood settled on No. 4, 10th range, adjoining Mr. Taplin. He *afterwards* received a grant of this lot as an associate... Jacob Goodwin made a beginning on No. 2, 10th range, in 1797, but soon after sold his "betterments," and left the country; some of his descendants settled in other parts of the town... Reuben Bangs made a beginning on No. 5, 11th range, in 1797; cleared some 25 acres, and sold to Phineas Hubbard in 1803. Selah Pomroy pitched lots No. 3 and 4, 11th range, in 1798, and settled adjoining his brother-in-law Reuben Bangs... [4]

In its emphasis on possession above legal title, this account is typical of Hubbard's histories of hundreds of other families. Charles-Edouard Mailhot's account of Charles Héon, the founder in 1825 of the parish of Saint-Louis-de-Blandford, also underlines the importance of possession above title: "Après deux jours de marche très pénible, la neige n'ayant pas la consistance voulue, il planta sa tente sur les bords de la rivière Bécancour, à peu de distance de la ligne séparant les cantons de Blanford et Maddington... Il choisit les lots connus sous les numéros E.-F., du sixème rang de Blandford, et reprit le chemin de sa paroisse natale." A short time later he returned. "Quel beau jour pour notre pionnier que celui de la prise de possession de son

[4] B.F. Hubbard, *Forests and Clearings: The History of Stanstead County, Province of Quebec, with Sketches of more than Five Hundred Families*, pp. 26-27. Emphasis mine.

château."[5] The language used to describe the acquisition of land by settlers indicates that occupation usually preceded legal title. Settlers "chose" a lot on which to "make a beginning," or on which to "pitch," and claimed land by virtue of their "betterments" or clearings. This mode of settlement had frustrated seigneurs and absentee freehold proprietors since at least the influx of loyalist settlers after the American Revolution. Notices forbidding trespass and warning squatters of impending ejectment were frequently published in newspapers.[6]

A consequence of unregulated settlement was that since no records of the squatters' lots were filed in the Provincial Secretary's Office or with the Surveyor General, ungranted land occupied by squatters was often patented to absentees as part of large grants. Around 1800, for example, several American emigrants settled on crown lots in the County of Richelieu. These lands were later granted to Robert Shore Milnes who became one of the largest land owners in the region. Although some of the settlers were able to buy back their lands from Milnes, others were forced to abandon their improvements.[7] The original settlers of Brown's Hill, Stanstead County, were also obliged to purchase from the assignees of Milnes, who had subsequently received a grant of these lands too.[8]

As speculation and population growth during the 1830s made land in the seigneuries increasingly scarce, settlers persisted in taking up township lands without following official procedures. Deputy Surveyor Louis Legendre was surprised in 1835 at the number of people

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[5] C.-E. Mailhot, *Les Bois-Francs*, t. 2, pp. 10-11.

[6] See for example, Gabriel Christie's notice in the *Montreal Gazette*, 12 July 1787. See also F. Noël, *The Christie Seigneuries*, pp. 105-106. Three hundred squatters were known to oocupy the rear of the Beauharnois seigneurie. ANQQ, E21, Demandes de terres, Hemingford, #1343, 9 May 1829. For exapmles of notices relative to township lands, see *Saint Francis Courier and Sherbrooke Gazette*, 22 May 1832 and 14 May 1833.

[7] B.F. Hubbard, *Forests and Clearings*, pp. 3-4, 37. R.S. Milnes succeeded Prescott as Governor. He provided his Councillors with the sizeable land grants Prescott had denied them.

[8] Ibid, p. 37.

who had settled in the townships of Stanfold, Bulstrode and Arthabaska without legal title. He represented their interests to the crown. In a petition to Lord Aylmer, on behalf of people "settled there accidentally," he explained that the crown

> ought for the general advantage of the inhabitants of the Province, to regulate the rights of Seigniors, the greater part of whom gradually increase the rents upon new Concessions, and thereby deprive an immense number of farmers from settling with any advantage upon the Seigniories, which has really compelled these humble individuals to settle with their families in the Townships wheresoever chance led them.[9]

Legendre further requested an accurate survey of the area so that the squatters' lots, identified as vacant in the records of the Commissioner of Crown Lands, would not be granted to absentees.[10]

By the 1830s, then, settlement in the Eastern Townships had become irreconcilable with officially prescribed land acquisition procedures. Accordingly, Durham moved in 1838 to bring the state of settlement up to par with his standards of efficiency and systematization. His proclamation concerning pre-emption represented an attempt to reassert control over the settlement of crown lands and impose systematic standards.

Gathering detailed information on isolated squatters was the first step in converting them to proprietors. Several lists of squatters who filed claims to pre-emption were compiled in 1839 and 1840. Identifying the household head, squatters were enumerated by township, *rang*, and lot number. These lists appear to be incomplete, and individual lists do not always contain the same information, making general comparisons and conclusions problematic. Further, many of

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[9] Petition of Louis Legendre to Lord Aylmer, 2 May 1835, "Documents laid before the House of Assembly,... 5th December, 1835..." No. 7. *JLALC* 45 (1835-36): App. C.C. For the locations of some of the squatters referred to by Legendre, see map 2 in chapter five.

[10] Ibid, Nos. 7, 18. On Legendre and the squatters he represented, see ch. 5 below.

were fairly young settlements, 203 had settled prior to September 10th 1838.[16] In Stanfold, squatter families had cultivated an average of 4.5 acres of land and most had built "good houses."[17]

Settlers do not appear to have been the class of single males that made small clearings on lots, sold the improvements to newcomers, and moved on with the frontier to begin again.[18] Most squatters were family units with family size increasing with the age of settlement. In the younger townships of Somerset and Stanfold, the average family size was respectively 3.8 and 3.9 people; in the older township of Bulstrode the average family had 5.2 members. Squatters also tended to settle near their relatives. Four members of the Roux family, for example, took up neighbouring lots in the ninth range of Stanfold.

One of the most detailed and extensive existing lists of squatters is for the Gore of Chatham, on the Ottawa river. The 109 squatters on this 1839 list, all but three of Irish descent, demonstrated patterns similar to the Eastern Townships. In both the Ottawa region and the Eastern Townships, squatters brought under cultivation an average of two acres per year. Ninety-six of the Irish squatters had built houses, and 87 had erected both barns and stables. Eight of them had been on the land for only one year or less, which accounts for those who had not yet built a house; new settlers either built a temporary shanty or resided with neighbours until enough land had been cleared to allow time and energy for the construction of a permanent dwelling.[19]

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[16] Ibid, "Return of Persons settled in the Townships of Somerset and Stanfold shewing those who have squatted since the 10th Sept. 1838," 14 April 1839. Unfortunately, the local agent who compiled the list neglected to include the exact number of years that the squatters had been in possession.
[17] Ibid. The forest ranger's description of the buildings is generalized for each page of the list.
[18] Charles Buller refers to this "useful" type of settler. Lucas, ed. *Lord Durham's Report*, III, App. B., p. 109.
[19] ANQQ, E21, Demandes de terres, "Return of Squatters in the Gore of Chatham...," 15 Aug. 1839.

As far as can be determined from the lists, squatters exhibited similar settlement characteristics to settlers who obtained some form of legal title prior to settling. They usually occupied full one hundred-acre lots, sought to establish a community by settling near friends and family, and remained in possession for considerable lengths of time.

These lists of squatters included only those who occupied the crown's ungranted lands; if squatters on private property are added, the number jumps dramatically. Although we have few precise quantitative indications, a note at the bottom of the Bulstrode and Stanfold list states that the "number of squatters on private lands in these two townships amounts to 846 souls."[20] Added to the 732 members of squatter families on crown lands in these townships, the total number of squatters in Stanfold and Bulstrode was 1 578 people in 1840.[21] Squatters, therefore, represented a significant portion of the population of the entire County of Drummond -- 3 556 in 1831 and 9 589 in 1844 -- which encompassed not only Stanfold and Bulstrode, but sixteen other townships.[22] That most of the inhabitants of Drummond were at one time squatters is a plausible inference.

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[20] ANQQ, E21, Demandes de terres, "Return of the Number of Squatters in the Townships of Bulstrode and Stanfold," 21 Aug. 1840.

[21] Ibid, "Return of Persons settled in the Townships of Somerset and Stanfold shewing those who have squatted since the 10th Sept. 1838" 14 April 1839; and "Return of the Number of Squatters in the Townships of Bulstrode and Stanfold," 21 Aug. 1840.

[22] *Censuses of Canada 1665-1871*, v. 4, pp. 106, 144. The January, 1839, census of abbé Larue puts the population of Stanfold and Bulstrode at 517 people, which, roughly, is only one third of the 1 578 squatters identified in the pre-emption lists. The irreconcilable nature of these numbers may be explained perhaps by the chance that Larue's census was incomplete, and/or by the fact that many recently arrived squatters may not have resided on their lots through the winter during which Larue carried out his census, obscuring the number of people who had possessory claims to land in the two townships. "Recensement des Bois-Francs" in C.-E. Mailhot, *Les Bois-Francs*, t. 1, pp. 289-296.

B. Pre-emption

Lord Durham's pre-emption proclamation gave squatters the exclusive right to purchase their land provided they had settled before the tenth of September of 1838, had cleared and cultivated ten acres of land, and had lodged their claim to pre-emption within six months following the date on which the price for crown lands in the district was established.[23] The proclamation drew on the American system of pre-emption adopted in the Virginia Pre-emption Law of 1779, a law which provided a model for future American legislation.[24] Durham admired the universal and systematic qualities of American crown land policy and pre-emption was a means by which Lower Canada's inefficient and unregulated settlement could be partly rationalized.

Despite the fact that Colonial Secretary Lord John Russell ordered that Durham's proclamation be repealed in 1840, it did institute the squatters' right to have the first option to purchase their lots as a corner stone in Lower Canadian land policy. That the 1859 regulations for the disposal of crown lands again made clear that the pre-emption system was to be discontinued is evidence that it had survived in practice.

Despite its continuation across two decades, Durham did not envision the entrenchment of squatters' rights as a permanent feature of Lower Canadian land policy. Writing to the Colonial Secretary Lord Glenelg, Durham explained that "I do not conceive that it would be politic on the part of Her Majesty's Government to give any encouragement to squatters in the future..."[25] Rather he intended pre-emption as reparation for the lack of access to land grants, as an attempt

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[23] "A Proclamation," 31 Oct. 1838, *British Parliamentry Papers, Colonies, Canada*, v. 10, p. 236.
[24] P. Gates, *History of Public Land Law Development*, p. 38.
[25] Durham to Glenelg, 30 Oct. 1838, *British Parliamentry Papers, Colonies, Canada*, v. 10, p. 236.

to recapture the public lands from chaos, and as an attempt to further the security and marketability of landed property there:

> It may be stated as a characteristic of the system which has been pursued in the disposal of the waste lands of the Crown in this province, that there was no one by whom land might not be more readily obtained than by the person who desired it for the purpose of actual settlement. Such persons were generally poor and uninfluential, and would probably experience considerable difficulty in obtaining a grant at all; and besides this, there were obstacles presented by the situation of the district within which settlements were chiefly made, and by the policy of the government, which few of them had the ability to surmount. The business of the land-granting department was transacted entirely at Quebec, and any person residing in the townships, who might wish to obtain a grant of land, was compelled to take a journey to that town, a distance of from 90 to 150 miles, and either reside there until his grant or location ticket could be procured, a period of many weeks or even months, or repeat his journey from time to time at an expense manifold greater than the value of the lot he sought to obtain. And when to this expense was added the uncertainty of the success in his application, it can excite no surprise that an individual desirous of establishing himself should have resolved rather to incur the risk of an unauthorized occupation of the first favourable situation he could discover, than to encounter the delay, expense and hazard of an application for a grant at the seat of government.
>
> These squatters, too, are not merely entitled to the favourable consideration of the government upon these grounds, but they are almost the only persons who have ever done any thing [sic] to give them a claim to the land they seek to acquire. The individuals to whom, with such wanton profusion, the waste lands of the Crown have been granted, had done nothing previously to entitle them to a grant, and, though their grants were made subject to conditions which were intended to advance the settlement of the country, yet these conditions were seldom, even practically, and never strictly, performed. This alienation of Crown property has retarded most lamentably the progress of settlement, and has kept the fairest portion of the province a wilderness up to the present time. The settlement that such persons were bound but neglected to perform, these squatters have actually made; ...it appears to me both just and expedient, under the peculiar circumstances which I have described, to secure to these individuals the fruits of their labours, and thus to remove the unhappiness and discontent which the uncertainty of their present position naturally provides.[26]

Pre-emption initially failed to reduce the number of squatters on crown lands. Although determining whether squatters later purchased their lots requires a lengthy search through the sales records of the Crown Lands Department and is therefore impractical for a study of this size, we do have indications that they did not. We have already seen that the list of 1008 squatters who claimed pre-emption across 44 townships was only a small percentage of actual

[26] Ibid.

squatters. When the names of the 169 squatters in Stanfold who claimed the right to pre-emption are cross-referenced with the *Terriers* and Langelier's list of patents, we find that only eight of them received patents to their lands. A further three squatters had patented lots other than the ones they had occupied as squatters in 1839, but their squatter lots were not patented. According to Langelier's list, however, 52 of the Stanfold squatters had relatives in the township who received patents to land.[27] It is possible that several of these relatives were actually the descendants of the squatters named in the 1839 list; eleven of the patents were issued after 1860. Nonetheless, it is clear that the vast majority of those named as squatters in 1839 did not in their lifetime acquire full legal title to their land.

An important reason why the proclamation of 1838 did not succeed in converting squatters into proprietors lies in the fact that before 1849, full payment for land was demanded at the time of purchase. Observe the 1841 petition of a number of squatters in the township of Kildare:

> That your Petitioners having ventured to settle on the waste lands of the Crown in the Township of Kildare, they have for a number of years lived in the firm belief and hope they would never be disturbed, but be able to retain them on the usual conditions of the Settlers, and under this conviction they have made improvements thereon of greater or lesser extent according to their respective means...
>
> That your Petitioners were confirmed in this belief by the right of pre-emption allowed them by the Proclamation of the late Governor General..., trusting as they did the price to be paid on the land and the terms of payment would have been such as to come within the compass of their means;
>
> That your Petitioners have however been wakened from their pleasing anticipations, and the security under which they had lived, by a notice recently published by the Commissioner of Crown Lands, offering for sale the lots on which your Petitioners are settled at prices in many instances far above their actual value and on the condition of immediate payment which puts it utterly out of their power to retain their lands;
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> ...[T]hey now most humbly throw themselves upon you Lordship's mercy, in the hope your Lordship will save them from the impending ruin with which they are threatened.[28]

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[27] Fifty-two people with family names matching those of the squatters on the 1839 list are identified in Langelier, *List of Lands Granted,* "Stanfold."

[28] ANQQ, E21, Demandes de terres, Kildare, "Certain Squatters on the high price required for the land on

Charles Buller, who accompanied Durham and who reported on crown lands in an appendix to the *Durham Report*, was, in theory, a strong proponent of the policy of full and immediate payment. He supported E.G. Wakefield's policy of systematic colonization which had as its goal, in Herman Merivale's words, "that capital and labor might be imported into new colonies in the best proportions; and that communities might thus be founded which should possess at once some of the more valuable characteristics of advanced and well-regulated societies."[29] Squatting, of course, was anathema to this doctrine of settlement. But here Buller faced a dilemma. Having attributed squatting to early large land grants, and to the inefficient means by which settlers could obtain title, Buller commented:

> The result of these circumstances has been, that no small portion of the actual settlers are persons who have no title to the soil which they cultivate. This is not merely injurious, by rendering their mode of husbandry slovenly and exhausting, but it has also rendered them lukewarm in their loyalty to a Government under which they have no security for the enjoyment of the fruits of their labour. It may, perhaps, be argued, that they are not entitled to this advantage, and that they ought to bear the circumstances of their illegal and unauthorized occupation; but without entering into the question of the absolute right of these persons to the enjoyment of the property which they have created, it cannot, I think, be deemed that, under all the circumstances of these colonies, it is expedient to add this great practical grievance to those causes of dissatisfaction which already exist. The habits of the whole population of North America, and the laws of the United States, have given a sanction to the practice of squatting, which has been confirmed in this case by the negligence of the Government, or of the non-resident proprietor.[30]

Buller's post-rebellion fear of disloyalty, and his insistence on the importance of security of property as a pillar of civilized society made it imperative for him that squatters be brought in line with the state-law-property nexus. Reluctantly, Buller approved of Durham's solution of 1838, but he recognized that many squatters, like the Kildare petitioners, would be unable to pay the full purchase price in one instalment. In order that the policy might have more effect,

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which they are squatted," 5 May 1841.

[29] Herman Merivale, *Lectures on Colonization and Colonies Delivered Before the University of Oxford in 1839, 1840, 1841* p. vii.

[30] Lucas, ed. *Lord Durham's Report*, III, App. B, pp. 106-107.

he was willing to concede that squatters should be allowed, "if needful..., a certain period within which the purchase money may be paid."[31] Nonetheless, the principle of full payment prevailed until 1849, and the many petitions of squatters requesting lenient terms of payment were rarely answered.

Full and immediate payment was not the only impractical aspect of the 1838 proclamation. It also required squatters to have cleared and cultivated at least ten acres of land. In Stanfold, a township with perhaps the highest concentration of squatters in the Eastern Townships, squatters had cleared an average of only 4.5 acres.[32] With squatters able to clear two acres a year, they would normally require five years on the land to meet the conditions of pre-emption; this made it difficult for recent squatters in townships like Stanfold to obtain title by pre-emption. To bring about any significant reduction in the number of squatters on crown lands, therefore, the administration found it necessary to virtually ignore the ten acre requirement, and give more weight to the provision requiring occupation previous to September 1, 1838. Despite the administration's lenient attitude toward eligibility, the proclamation still had little success in converting squatters to proprietors.

By 1840 it was clear that the pre-emption policy was not meeting its objectives. In the same year, the government announced regulations for the sale of crown lands at fixed prices and on condition of full and immediate payment. On orders from Colonial Secretary Russell, Governor Sydenham followed with an announcement that no claims to pre-emption under the proclamation of 1838 would be admitted after January 22, 1841.[33]

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[31] Ibid, p. 107.
[32] ANQQ, E21, "Return of Persons settled in the Townships of Somerset and Stanfold shewing those who have squatted since the 10th Sept. 1838," 14 April 1839.
[33] Russell had suggested that only one month be allowed before the the right of pre-emption was to be retracted,

Both Sydenham and Russell agreed that pre-emption had encouraged people to begin squatting after Durham had issued the proclamation, and that it would continue to do so.[34] But the formal retraction of pre-emption did nothing to discourage squatting. Nor did it amount to its elimination from the repertoire of crown lands policies that were applied in practice as crown lands officials found it necessary to continue to honour squatters' claims. Crown lands policy, plagued by the conflicting objectives of settlement and state revenue, never achieved the coherence envisioned by Durham. With its reluctant implication that squatters had acquired a right to their land by virtue of their occupation and labour, pre-emption survived for the lack of a better solution to squatting.

C. Crown Lands Policy after 1841

While settlement progressed, albeit slowly and with little regard for official policy, crown lands policy continued to be debated at the political level. The issue remained the same: the political and economic necessity of encouraging the legal acquisition of lands by actual settlers versus raising revenue for the colonial government from the sale of crown lands. The latter attracted imperial authorities who still held to mercantilist theory that colonies should not be financial burdens on the mother country. Later, the revenue raising approach was popular with those who saw revenues from crown lands as an important means to finance the expanding

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but Sydenham felt that such a severe time restriction would be regarded by the settlers as a breach of faith. See Russell's correspondence with Sydenham, *British Parliamentary Papers, Colonies, Canada*, v. 15, pp. 29-38. Russell had forgot that Durham had suspended sales following the Rebellions and thought that the 1838 proclamation establishing pre-emption was largely responsible for poor revenue from the sale of crown lands between 1838 and 1840. Ibid, p. 30.

[34] Ibid, p. 29.

operations of the Canadian state. It was also favoured by advocates of a free, unencumbered market in land.

The "Report of the Commissioners Appointed to Inquire into the State and Organization of the Crown Lands Department" in 1846 highlighted financial pressures on the department. Having tabulated the department's finances and operations, the committee concluded that the costs of managing the public lands were extremely high and that it was bogged down with an unnecessary amount of work. Twenty-six percent of the department's revenues were deemed to be consumed by its operating costs, a percentage on the increase.[35] Three-quarters of the department's staff consisted of local agents, many of whom were blamed for usurping much of its returns.[36] They filed reports to headquarters, whose staff was overwhelmed in processing them and conducting correspondence with many frustrated parties.[37]

While the revenue-raising function of the crown lands brought together the ideologies of both mercantilism and liberal property, the Catholic Church, which increased its authority during the union period, its colonization societies, and Catholic politicians lobbied in favour of a policy conducive to settlement.[38] The squatters' cause and their ability to open new lands was upheld by the Rouges beginning in the 1850s, and later by the Liberals.

These conflicting pressures led to a myriad of policy changes and compromises. Despite these continual variations, a few general descriptions of crown lands policies apply for the

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[35] *JLAC* 5 (1846): App. E.E.

[36] For a description of the duties of local agents see "General Instructions to the District or Resident Agents of the Department of Crown Lands, Agents' Duties", *JLAC* 13 (1854-55): App. M.M. Generally, agents were responsible for sales, collection of payments, advising purchasers and settlers, and providing information on local affairs to the central government.

[37] J.E. Hodgetts, *Pioneer Public Service*, p. 136.

[38] On the colonization movement of the mid-nineteenth century, see J.I. Little, *Nationalism, Capitalism and Colonization*, and M. Séguin, *La "nation canadienne."*

period. In June of 1838, Durham suspended sales of Crown lands.[39] When sales resumed under Sydenham in 1840, the relatively high fixed price of 1.2 *piastres* per acre was charged for land in the Ottawa and Saint Francis districts, and 0.8 *piastres* elsewhere, with full payment due at the time of purchase. In 1849, fixed prices were dropped to 80 and 40 cents respectively, with payments made in annual instalments.[40] In reality, however, the land situation in Lower Canada was much more complex. Between 1838 and 1866, crown land was sold at both high and low prices, on terms immediate and full payment, and on an instalment basis. In other instances, it was granted for free in fifty acre blocks along colonization roads, was awarded as compensation for civil and military service, or was sold *en masse* by land companies. The result was that much land remained in the hands of private, absentee proprietors, while significant tracts of both private and crown land were occupied by squatters.

Crown lands officials also had to contend with the failure of the earlier policy of granting large blocks of land to land companies; In 1841, for example, unable to meet its payments to the government, the British American Land Company was forced to rescind 500 000 acres of the Saint Francis tract to the government in exchange for the elimination of its debt. However, administered by Alexander Tilloch Galt, the company remained an important force in determining land and timber policy through the period. As a corporate absentee landlord which

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[39] Sales of crown lands in Lower Canada, 1838-1841: In 1838, 100 acres; in 1839, 12 acres; in 1840, 200 acres; and in 1841, 44 197 acres. "Report of the Commissioners Appointed to Inquire into the State and Organization of the Crown Lands Department," *JLAC* (1846): App. E.E. Durham's June 18th proclamation is referred to in documents enclosed in Sydenham to Russell, 16 May 1840, *British Parliamentary Papers, Colonies, Canada*, v. 15, p. 28. Durham likely suspended sales so that a more systematic and politically safe land policy might be devised in the aftermath of the rebellions.

[40] M. Séguin, *La "nation canadienne,"* pp. 194-195. Although Séguin offers no explantion for the price differences by region, one might hypothesize that prices were higher for the Ottawa and Saint Francis districts because these areas were well endowed with timber resources and higher prices would discourage speculation. Lower prices were charged for more remote and marginal land in regions such as the Gaspé and Saguenay.

withheld land from settlers of modest means for speculatory purposes, the British American Land Company created conditions highly conducive to squatting.

The British American Land Company's settlement scheme having failed in the Saint Francis district, the government, with the support of the Catholic church, began distributing free grants of fifty acres each along colonization roads in 1848. Unlike the British American Land Company's focus on British immigrants, these grants were directed at Canadiens emigrating from seigneurial lands. Although roads were neglected and the settlers' subsistence was often meagre, the project did attract a significant number of settlers. By 1851, 1 254 people had settled in the townships of Lambton, Forsyth, Aylmer and Price, while a number of settlements had been established in Winslow as well.[41] The small size of the grants and the crown's reservation of timber rights in favour of external forestry interests encouraged settlers along colonization roads to squat on additional lots. In the end, the free grant project was not a full solution to the colonization problem in the Eastern Townships.

The 1846 committee concluded that much of the department's inefficiency could be blamed on the fact that too much land was held under incomplete titles such as location tickets and scrip, which were certificates issued by the government redeemable in land. "Their existence is the cause of endless correspondence; it gives rise to many ill-founded claims on the consideration of the Government made by squatters, and it prevents the Department shewing clearly the whole of the public lands at their disposal."[42] The committee recommended that all existing scrip and location tickets be completed with patents or else invalidated within two years.

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[41] J.I. Little, *Crofters and Habitants*, p. 47.
[42] *JLAC* 5 (1846): App. E.E.

Despite the department's financial concerns, the 1846 committee further recommended that the system of prompt payment for lands, theoretically in place since 1826,[43] be replaced by sales on credit, with either one-third or one-quarter of the price to be paid in cash at the time of purchase. Making land available on more lenient terms was expected to further settlement and increase sales at the same time.

The newly elected Lafontaine government was under considerable pressure to institute the change. It had been elected with the support of the Catholic Church, and, as Little notes, the emergence of responsible government made the new administration "more susceptible to popular-nationalist influences."[44] The instalment policy was accordingly adopted in 1849 on even more lenient terms than were suggested in 1846. The first instalment was not due until five years after the date of purchase, free of interest.

The move backfired. Only ten percent of the purchasers made the first payment on time.[45] By 1855, only 350 payments had been made on 3000 sales executed in Lower Canada between 1849 and 1852.[46] Further, many purchasers used the regulations to strip lots of their timber before making any payments, despite the crown's prohibition of commercial cutting by locatees. That the department was habitually lax in demanding payments did nothing to discourage this. Laxity also led to a bureaucratic nightmare with many files on the same lot being repeatedly reopened and closed. The department's laxity encouraged squatters to feel secure despite their illegal tenure. Perfection of legal title thus remained a long term process.

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[43] A significant amount of land in the Eastern Townships was sold by the government on a four instalment basis during the 1830s, however.
[44] J.I. Little, "Colonization and Municipal Reform," p. 98.
[45] J.E. Hodgetts, *Pioneer Public Service*, p. 134.
[46] *JLAC* 13 (1854-55): App. M.M., Evidence of W.F. Collins.

The department's leniency in demanding payment appears not to have furthered legal settlement to any great extent. A committee appointed to investigate the slow process of settlement in the Eastern Townships, chaired by Thomas Fortier, reported in 1851 that the primary obstacle to settlement remained the high price demanded for lands, both by government, and by speculators.[47] The committee emphasized that the raising of revenue, by the government or by private interests, was incompatible with settlement. In the committee's second report, it was explained that squatting was so widespread that legislation should be enacted to protect squatters from losing the fruits of their labour.

The issue was complicated by the fact that selling land at low prices encouraged not only settlement, but also speculation. In their pamphlet entitled *Le Canadien émigrant, ou pourquoi le Canadien-Français quitte-t-il le Bas Canada?* which, in translation, constituted the core of Fortier's first report, Reverend James Nelligan and others spoke out against speculation:

> Many of the great landowners are unknown... .
>
> How many of [sic] there... who are not satisfied with merely evading their due share of statute labour, with the results of that slow-moving process by which the working man adds value to their domains! In the hands of certain of them a farm becomes a very pitfall. A man takes possession of it, in good faith, buoyant with hope, heedless of the fate which awaits him. Too soon, after a few years' occupation, does he find the trap into which he has fallen, and is driven forth in rags and poverty. Another succeeds to his hopes, and to his disappointments. These, we may be told, are the exceptions, such barbarity is not the common law. Unhappily facts in our possession which we will cite, vouch but too well for its prevalence.
>
> What is the price of lands in Stanfold, Somerset, Halifax, Chester, etc.? Usually from twelve to seventeen shillings per acre; one proprietor... in Arthabaska, [makes] the exorbitant and impudent demand of forty-six shillings and eight pence per acre... Several, who had occupied some of these lands for years, were thus obliged, by the enormous price asked, to abandon their improvements. It is right to observe, by the way, that the owner holds no less than 10,000 acres, a grant from Government, dated 30th September, 1802...

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[47] *First Report of the Special Committee appointed to inquire into the causes which retard the Settlement of the Eastern Townships of Lower Canada*, p. 21; *Second Report of the Special Committee... JLAC* 10 (1851): App. V.

A.T. Galt strongly favoured a land policy that could finance the growing state's industrial and economic infrastructure.[51]

In 1855, the "Select Committee appointed to examine and report upon the present system of management of the Public Lands," chaired by Galt, who still headed the British American Land Company, pressed its liberal view of property rights. The committee's central concerns were timber regulations, the integrity of local agents' accounts, supply of money to the department, modes of sale, and the overall efficiency of the Department of Crown Lands. A.T. Galt was familiar with the problems of real estate financing, and took a hard-line approach to land policy. He argued that the instalment plan, or sale of lands on credit, should be discontinued. "That in cases where poverty prevents a party from making a payment on his land, it is better both for the individual and the country, that he should continue in the labor market, until he has acquired the necessary means," he explained.[52]

Squatting was by no means to be tolerated, as it represented an affront to the rights of property, and contributed nothing to the government's purse. Galt did believe it prudent, however, to allow squatters the right of pre-emption on unsurveyed lands only, so as to further the opening of remote districts, and to increase their potential value.[53]

William Spragge, an official of 25 years in the department, argued that squatting had to be eliminated entirely.

> A desultory manner of settling the public lands, is to be carefully avoided... The better class of settlers, it is true, will endeavour to avoid those localities where there is little prospect of education and religious instruction being attainable; while the lawless and profane who must need both the influence and example of persons of orderly habits, and well regulated minds, are indifferent to the localities they select...

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[51] *DCB* 12, pp. 348-356.
[52] *JLAC* 13 (1854-55): App. M.M., Evidence of A.T. Galt.
[53] Ibid.

> This is the practice generally known as "squatting."... If it can be discontinued effectually, it ought to be... That were an additional charge of (say) twenty-five per cent. added to what under ordinary circumstances would be the amount of purchase money made in regard to land of which possession had been assumed in that unauthorised manner, and with an addition of five per cent. for each year's occupancy, these interlopers would be deterred in future from attempting to forestall the public lands.[54]

A.N. Morin, a former Commissioner of Crown Lands, and leader of the Lower Canadian government which sought to phase out seigneurial tenure, took a more moderate approach before the committee. He had met with squatters at the 1836 commission on seigneurialism. Like Galt and Spragge, however, Morin felt that full ownership of land was the key to a civilized society. "The public lands of this country ought to be disposed of with a view to their speedy settlement by actual farmers, being proprietors of the soil, and not with the view of making money by the sale," he pointed out.[55] Although he recognized the government's pressing need of revenue from land sales, Morin explained that a "proprietary population" was "a guarantee of peace and order for the future." These were the ideals of bourgeois liberal society nonetheless, and "peace and order" was the foundation upon which the Lower Canadian state was to be built. For Morin, squatting did not mix well with this recipe for civilized society, even though he was sympathetic to agrarian concerns.[56] Unsure of how to root out squatting, Morin approved of the system of pre-emption, primarily for the lack of a better solution.

> The difficulties of squatters, and squatters among themselves, are one of the evils of a new and rapidly filling country... I do not mean that Government ought to encourage squatting, nor to meddle in the quarrels of squatters as long as the lands are not open for sale..., But as those evils must exist, government should in all events have in its power to give the right of pre-emption to the *bonâ fide* improver... I confess great improvements may be introduced in the settlement of those difficulties... I indicate an evil and don't know the remedy.[57]

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[54] Ibid. Evidence of William Spragge.
[55] Ibid. Evidence of A.N. Morin.
[56] *DCB* v. 9, pp. 568-572.
[57] *JLAC* 13 (1854-55): App. M.M. Evidence of A.N. Morin.

Frustrated by the department's costly operations, inefficient title completion procedures, and especially its inability to solve the squatter problem, the 1855 committee looked to the United States where administrators had succeeded in implementing a relatively efficient public land management system.[58] In the United States, all crown land was sold at auction beginning from the uniform price of $1.25 per acre, for cash. Squatters claiming pre-emption were allowed 12 months to purchase. When a prominent settler in Michigan was questioned as to the efficacy of the right of pre-emption, he explained that

> [t]here can be no doubt that the conflicting rights of squatters have caused great difficulty, and even bloodshed, but as it is impossible to prevent people from squatting on lands, there does not appear any mode of avoiding these disputes. Our pre-emption system is such as to interfere as little as possible with our general system, and I am not prepared to suggest any other course. [59]

In the belief that pre-emption combined with prompt payment might instil some of the American efficiency into the Canadian system, several people such as W.F. Collins who appeared before the committee reasoned that a strict time limit should be enforced with regard to the squatters' payment.[60] With such a policy, both revenue and the proliferation of legal title could be effected.

But by the end of the 1850's, it was clear that pre-emption still had not succeeded in converting squatters to proprietors. For 1857, the Commissioner of Crown Lands, Joseph Cauchon, an administrative expert, proponent of infrastructure development, and promoter the North Shore Railway project,[61] reported that in Lower Canada 4 797 550 acres of surveyed and unsurveyed crown land remained undisposed of. This land, he said, was partly occupied by 15

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[58] On American land policy, see P.W. Gates, *History of Public Land Law Development.*
[59] *JLAC* 13 (1854-55): App. M.M. Evidence of Jonathan R. White.
[60] Ibid, Evidence of W.F. Collins.
[61] Cauchon broke with his colleagues in cabinet over the North Shore Railway issue.

000 squatters.[62] The problem was particularly pronounced in the Eastern Townships, where, "[o]f the surveyed lands undisposed of, much is occupied by squatters, and of the remainder, which is scattered through many townships, a considerable part is residuary land of an inferior quality... Thus a portion only of this large quantity of public land is really available for settlement."[63]

The existence of the squatters, and the consequential persistence of the right of pre-emption, indicated that serious obstacles interfered with the processes of liberalization and rationalization represented by reforms in property law and in the growth of the administrative state during this period. That pre-emption failed to transform squatters into legal proprietors indicated that stronger measures were required. The problem was how to convert the squatters to proprietors without further acknowledgement that occupation and improvement gave squatters a *de facto* legal title independent of the sanction of the state. Regarding the 15 000 squatters, Cauchon lacked a solution, and had only this to say.

> The case of the Squatters has also to be dealt with, as it is inconsistent with the dignity of the Government, or of the people themselves, that a continual contest should be going on between them and the Government, and between each other, as regards one who, having made a small clearing, considers himself entitled to a whole lot, and another who has come on after him and made a larger clearing, and a third who has done likewise, &c., &c., These Squatters should be forced to become purchasers within a given time.[64]

The persistence of squatting had symbolized the administrative state's failure to implement its goals of order and efficiency in settlement, the raising of revenue from the sale of crown lands, and systematization in administration. Politicians, government officials, and capitalists from Durham, to Galt, to Cauchon, had pointed out the extent to which squatting contradicted the

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[62] "Report of the Commissioner of Crown Lands" *JLAC* 15 (1857): App. 25.
[63] Ibid.
[64] Ibid.

values of bourgeois society. But a solution to squatting had remained elusive. The pressure put on the Department of Crown Lands to put an end to squatting had risen concurrently with the growth of the administrative state during the period. With the appointment of local adjudicators to process squatters claims in 1859, however, the department attained a new level of bureaucratic efficacy. When squatters were once again threatened with the retraction of pre-emption the Crown Lands Department would have unprecedented success in converting squatters to proprietors.

D. Professionalization, State Formation, and the Conversion of the Squatters

P.M. Vankoughnet's regulations for the disposal of the crown lands in 1859 declared that "the system of recognising unauthorised occupation of land, commonly known as 'squatting,' be discontinued," and that "no claim of pre-emption not now in a state to be admitted can be made good by any act of the party hereafter, and that therefore his labor will be thrown away."[65] The reasoning behind this renewed attempt to revoke pre-emption was that if pre-emption had not succeeded in expurgating squatting, then perhaps a decisive discontinuation of the system would.

The force of this second attempt to eliminate squatting lay in the threat that, unless squatters appeared before travelling adjudicators to have their claims assessed, their lots would be sold at public auction on pre-set dates. Squatters had to present themselves to the adjudicators during the three days prior to the sale, with proof of possession and ownership of improvements to the extent of at least five percent of the lot cleared and fenced, or else the lots would be sold to the

[65] *JLAC* 17, (1859): App. 17. Commissioner of Crown Lands P.M. Vankoughnet's "Regulations for the Sale and Management of the Public Lands."

highest bidder at the upcoming auction, with no compensation for their improvements.[66] If the conditions were met, squatters could purchase at sixty cents per acre.[67] Under the old system, conversely, squatters applied to the department for pre-emption, and their lots would be withdrawn from sale. In theory, payment was required, but the leniency of the department combined with the backlog of many settlers' outstanding payments meant that the squatters were not compelled to make their payments; they felt secure in the fact that their lots would not be sold.[68]

Central to the effectiveness of the 1859 regulations was the role of the travelling, neutral adjudicator, which may be likened to the function of the mid-nineteenth century inspector described by Bruce Curtis. Inspection and information gathering were fundamental to the formation the Canadian state, which accelerated during the 1840s and 1850s. Registry offices, public health bodies, boards of works and statistics, a bureau of agriculture, district and municipal governments, educational offices, and penal and psychiatric institutions were established during this period. As Curtis explains, the state administration extended its increasingly centralized authority into more remote localities via these new institutions of social and economic regulation. The central administration relied upon what Curtis labels the "inspective function," by which departmental inspectors oversaw local affairs and conveyed intelligence to the central administration, much as the travelling adjudicators filed reports and recommended decisions on squatters' claims to the Department of Crown Lands. Inspection, writes Curtis, was intended "to identify sources of conflict, to discover and generalize

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[66] Ibid.

[67] "Report of the Select Committee on the Colonization of Wild Lands in Lower Canada," *JLAC* 20 (1862): App. 1.

[68] The squatters of Kildare expressed this confidence in their petition of 1841. See note 28 above.

administrative innovation, and to intervene to overcome barriers to the realization of policy or the success of policing. At the same time, the practical activity of inspection would educate inspectors and would lead to the creation of a certain kind of expertise."[69]

The addition of the adjudicators constituted a later step in a larger process of professionalization and bureaucratization undergone by the Department of Crown Lands over the entire period, and it is worth reviewing at this point. The priority of rationalizing the department's affairs had been clearly spelled out by Durham and Buller in their report of 1839, and beginning with Sydenham, subsequent governments adopted their recommendations.[70] Sydenham had attempted to concentrate all land management operations within one department for both Upper and Lower Canada. The new body was to work closely with the Surveyor General's office. Henceforth, the size of the department grew dramatically. In 1842, six officers worked at headquarters, while 45 were engaged in the field. By 1852 the department had grown to 33 and 110 officers respectively.[71]

The Surveyor General's office, which Buller had blamed for the fact 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 or to his neighbour, or to the Crown," underwent a thorough professionalization, and was absorbed into the Department of Crown Lands in 1845.[72] Statutes of 1849, 1851, 1855, and 1857 established rigorous training, examination, apprenticeship and certification requirements.[73] The process culminated in 1860

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[69] B. Curtis, *True Government by Choice Men?*, p. 19.
[70] See Hodgetts, *Pioneer Public Service*, chs. 2, 8.
[71] Ibid, p. 36.
[72] Lucas, ed., *Lord Durham's Report*, III, App. B, p. 105. The survey office was amalgamated with crown lands by *Statutes Of Canada* (1845), 8 Vict., c. 11.
[73] *Statutes of Canada* (1849), 12 Vict., c. 35; (1851), 14-15 Vict., c. 4; (1855), 18 Vict., c. 83; (1857), 20 Vict.,

with the incorporation of the Association of Provincial Land Surveyors and the Institute of Civil Engineers and Architects.[74]

In 1856 and 1857 Cauchon had introduced further reforms to the structure of the Department of Crown Lands. Local land agents were to pay their receipts directly into a bank. Blamed again for the inefficiency and inaccuracy of the department's business, and the "source of confusion, antagonism, and ill-feeling, as well as undue speculation on a large scale," the local agents were to be replaced by a much smaller number of travelling district agents.[75] Although the reduction of their number was not achieved during the period, the idea of travelling agents did provide a model for the hiring of the adjudicators to deal with the squatting problem.[76]

The 1859 regulations asserted that no claim to pre-emption would be entertained after September first. The threat of seeing their lands sold at public auction, however, motivated high numbers of squatters to purchase their lands, forcing the adjudicators to admit squatters' claims to pre-emption beyond September 1859. In 1860, a further incentive to claim pre-emption immediatley was added when it was ordered that squatters be charged five dollars rent on every 200 acres, for each year they had occupied their land illegally, on top of the purchase price. This policy was universally carried out.[77] During the decade 1859-1869, some

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c. 37. See Hodgetts, *Pioneer Public Service*, pp 45-46.

[74] *Statutes of Canada* (1860), 23 Vict., c. 139.

[75] "Report of the Commissioner of Crown Lands" *JLAC* 15 (1857): App. 25.

[76] Ibid.

[77] "Report of the Select Committee on the Colonization of Wild Lands in Lower Canada," *JLAC* 20 (1862): App. 1. After the first seven years of occupation, ten dollars per annum was to be charged. The back-rent was charged in all examined adjudication files involving squatters.

5000 adjudications across Lower Canada were decided on the spot by these travelling agents.[78] This system remained in use well into the twentieth century.

In an unprecedented drive to force squatters into legal norms of land ownership, the Department of Crown Lands moved in the early 1860s to offer at auction all the lots which, according to the department's records, remained the property of the crown. At one 1862 sale in the Township of Stanfold, for example, 70 lots were advertised.[79] The evidence suggests that the strategy was effective. J.B.E. Dorion, an advocate of squatters' rights and sponsor of legislative bills in their favour, covered quite thoroughly in his newspaper the process of adjudication that led up to one sale for the County of Arthabaska:

> L'examen des réclamations des occupants s'est commencé mercredi de la semaine dernière et nous doutons qu'on ait pu terminer à temps pour la vente tant est considérable le nombre de colons établis sur les terres de la courronne.
>
> Tous les jours il y avait foule chez l'agent des terres et M. Collins, spécialement chargé de la vente, aidé de M.M. Gagnon et Bourgeois prolongèrent leurs traveaux jusqu'à neuf heures du soir pour faciliter la transaction des affaires.
>
> Le gouvernement a agi avec libéralité tout en sauvegardant l'intérêt public, et, sur le tout, les colons ont lieu d'être satifaits. L'argent est très rare et l'on pouvait en avoir une idée en assistant au réglement de ces ventes de terres. Un bon nombre de pauvres sont dans l'impossbilité [sic] de faire leur premier paiement, mais nous avons la certitude que personne ne sera dépossédé. La comté d'Arthabaska contenait plus de 400 colons sans titres sur les terres de la courrone.[80]

As *Le Défricheur* had predicted, the sale had to be postponed until all the claims could be ruled upon. The sale for the County of Drummond occurred the next week with similar results. Since most of the crown land had been occupied by squatters, and, it appears, nearly all of them appeared before the adjudicators to purchase their lots on time, very little land was actually sold at auction.[81]

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[78] ANQQ, E9, Adjudications. The files are numbered sequentially, with case # 5000 being decided in 1869.
[79] J.B.E. Dorion, *Le Défricheur*, 4 déc. 1862.
[80] Ibid, 18 déc. 1862.
[81] Ibid, 1 jan. 1863.

Some of the cases with which the adjudicators had to deal were more complex than a simple case of pre-emption, as settlers used the adjudication process to arbitrate conflicting claims to land. In one case, heard before the adjudicators at a sale in 1860, Pierre Poirier, an early settler of Stanfold, loaned money to Hubert Bourgeois in 1854 so that the latter could obtain a location ticket for the north east half of lot 8 in the 12th range. Bourgeois left the province in 1858, having never repaid Poirier. He did, however, leave the location ticket in Poirier's possession as security for his debt. Poirier applied to purchase the lot shortly after Bourgeois left. Meanwhile, a squatter named Prudent René dit La Liberté had taken possession of the lot, and had made improvements to it.[82] Poirier attested that he used the location titcket and the adjudication system to acquire title to the land so that La Liberté's rights would be protected. Thus the possession of La Liberté was upheld by the community as a valid claim to land. La Liberté filed three affidavits to this effect.[83]

The legal heirs of Bourgeois, to whom the location ticket had been originally issued, however, petitioned the Assistant Commissioner of Crown Lands arguing for the right to purchase the lot by virtue of "le premier droit acquis." They concluded their petition with an appeal to the moral imperative of inheritance rights: "De plus, je crois devoir vous informer que Hubert Bourgeois a ici une fille légitime qu'il sera injuste de priver des droits de son père."[84]

The adjudicators took little notice of the claim of the heirs, deciding that,

> As the original purchaser never occupied or improved the half lot in question and Prudent René dit La Liberty [sic] is in possession with considerable improvements, the undersigned would suggest that the sale to H. Bourgeois be cancelled, the Inst. paid forfeited and La

[82] See map 2 in chapter five.
[83] ANQQ, E9, Adjudication # 1909, 22 Dec. 1860.
[84] Ibid.

> Liberty allowed to purchase at 3/3 per acre including back rent - one Inst. to be paid in two months from this date. Int. on purchase money from same period.[85]

With the department's approval of the decision, the squatters' labour and occupation were upheld over the rights of those claiming on the basis of the first grant.

The success of the 1859 regulations in reducing the number of squatters was pleasantry to the Department of Crown Lands. For 1861, it reported that 39 899 acres of land had been sold in Lower Canada according to the new regulations instituted in 1859. Of these, 21 000 "were claimed by squatters who had occupied their respective holdings for periods varying from three to thirty years."[86] The report for the following year conveys the significance of the transformation.

> A large portion of the land sold during the past two or three years in Lower Canada was previously in the occupation of squatters, who had held it so long without title or payment, or demand of payment, that they had come to regard themselves as proprietors, and evinced great unwillingness to purchase even at the small price fixed for the public lands in Lower Canada. My predecessor, Mr. Vankoughnet, took steps to compel these squatters to become purchasers, by offering their lands for sale at public auction,... I have adopted the same course, and, I am happy to say, with the best results, both to the public, and to the settlers. Upwards of twenty townships have been thus dealt with; the squatters have become proprietors, and feel more secure and more happy in their new relation; the revenue has been increased, and the Department has been relieved from a constant stream of petitions for reduction of price, abatement of interest, free grants, &c., by individuals and public bodies, often supported by members of the Legislature, and generally on no better grounds than that the people were poor, and had occupied so many years without paying that it would be hard to make them pay now![87]

That it was perceived that the ex-squatters were now "secure and happy in their new relationship," the catchwords of utilitarian political philosophy, indicates the extent to which forms of liberal property were central in the ideas of the Department of Crown Lands. By forcing squatters to buy, and by regulating those who were seen as the usurpers of the public domain, the government felt it had converted a backward, immoral situation into one that was

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[85] Ibid.
[86] "Report of the Commissioner of Crown Lands," *JLAC* 20 (1862) Sessional Papers No. 11.
[87] "Report of the Commissioner of Crown Lands,"*JLAC* 21 (1863) Sessional Papers No. 5

synonymous with a civilized, well regulated society. The task of the department had been to infuse the public lands with a system of universal property rights, and during the 1860s it succeeded to an unprecedented extent. The only way, however, that the squatters could be made proprietors was to implicitly acknowledge the legitimacy of squatting and rights deriving from labour and occupation. This was the fundamental function of pre-emption and the adjudication process, even if it contradicted the liberal idea of property that the Crown Lands Department, the judiciary, and the government sought to further in Lower Canada.

But squatting on private property was a different matter. Here the government found itself unable and unwilling to protect squatters. In the private domain, the same imperatives of property ownership that had compelled the government to transform the squatters into proprietors on crown lands were too strong to permit any legislation that might legitimize squatting and rights deriving purely from occupation.

Chapter Four: Squatters on Private Property: The Legislature, The Judiciary, and the Bifurcation of Property

By 1856, Lower Canadian courts had awarded to squatters the right to the full value of their improvements.[1] Their decision acknowledged that the law applying to freehold land in Lower Canada contained two conceptually separate ingredients. The first was the legal title to the land itself. The second was an independent right in the ownership of improvements on that same property.

Between 1853 and 1865, however, ten bills for the protection of squatters on private property were introduced in the Legislative Assembly. Advocates of squatters' rights persisted beyond 1856 to attempt to entrench squatters' rights in legislation to protect them from the unpredictable and expensive legal battles that had resulted from squatter conflicts for decades. Further, a consistent and systematic way of determining compensation due to squatters and proprietors had yet to be applied by the courts. Before 1856, the courts had often decided that squatters were legally bound to compensate proprietors according to the increased value of the land. At the core of the bills, therefore, was the stipulation that squatters should not be compelled to pay back-rent according to the value added to the land by their own

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[1] *Lawrence and Stuart, LCR* 6 (1856): 294-311.

before the Circuit Court, or before any Circuit or Superior Court judge if the courts were not in session, and empowered that judge to rule and award damages. Cases would now go to the Superior Court only on appeal or on the request of either party when the defendant produced a title that conflicted with that of the plaintiff. In such cases the lower court was to reserve decision for the Superior Court.[3]

The hostile 1851 act set the stage for a series of bills for the "protection" of squatters. The first and only successful bill in this vein was an amendment to the 1851 act.[4] Although this amendment allowed squatters to demand compensation for improvements, it also entitled plaintiffs to demand in cases initiated under the 1851 act "such sums or sum of money as he or they may be entitled to by law, for rents, issues and profits, *fruits et revenus*, as well as for damages for the illegal detention of such property."[5] The amendment did not specify how the damages and compensation were to be determined. As a result, the question of whether a squatter should pay back-rent according to the value of the lot without the squatter's improvements, or whether rent should be based on the increased value of the improved land, became a topic of ongoing debate in the legislature. Indeed, rent and damages demanded by the plaintiff often equalled or exceeded the compensation awarded to the defendant for the value of the improvements, leaving the ejected squatter empty handed.[6] This vague law would remain

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[3] For examples of reported cases heard under this legislation, see *Stuart v. Eaton, LCR* 8 (1858): 113-121, and *Osgood v. Kellam, LCR* 10 (1860): 22-27.

[4] The amendment to the 1851 act was introduced in the Assembly by T.L. Terrill, a "moderate" supporter of the Reform government as member for Stanstead County, who sat with the Liberal opposition after the political realignment of 1854. P.G. Cornell, *The Alignment of Political Groups*, p. 103.

[5] *Statutes Of Canada* 16 Vic. c. 205, s. III and IV. Plaintiffs could demand damages and profits before the passing of the 1851 act in cases against squatters heard in the Superior Court. The amendment made this legal in cases initiated under the 1851 act and heard in the lower courts. The initial act and the amendment were reaffirmed in the *Consolidated Statutes for Lower Canada* (1861), c. 45, *An Act respecting redress for the illegal detention of Soccage Lands.*

[6] *DLA* 12 (1854-55): 689. To cite one example, in *Stuart v. Lawrence*, heard in the Superior Court in Montreal

the only legislation applicable to Lower Canada that said anything about ejected squatters' rights to compensation.

Nonetheless, John Sewell Sanborn was persistent in his efforts to pass a more comprehensive law. Sanborn was elected in Sherbrooke in an 1850 by-election on a specifically annexationist platform. His political alignment was fairly erratic during his lengthy residence in the Assembly, but he was generally found on the Liberal oppositionist side of the House.[7] With his election to the Assembly in 1854, J.B.E Dorion joined Sanborn's effort to legislate a clearer form of protection for squatters. Brother of Antoine-Aimé Dorion and co-founder of the Institut Canadien and its organ *L'Avenir*, Dorion inherited a strongly nationalist, liberal political outlook. He, like Sanborn, espoused trade and industry, "the regulator of material progress, the vanguard of civilization," but not at the expense of agriculture and colonization, which he saw as a deterrent to Canadien emigration.[8] Dorion was elected along with eleven other members of the Institut Canadien, and thus formed part of the first important contingent of the *Parti rouges* in the Assembly.[9]

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in 1853, the court ruled that Stuart's demand for rents and profits was equalled and extinguished by the value of Lawrence's improvements. Upon Lawrence's appeal in 1856, the court found that Lawrence was entitled to further compensation. The appeal case was reported in *LCR* 6 (1856): 294-311.

[7] P.G. Cornell, *The Aligment of Political Groups*, p. 28; *DCB* v. 11, p. 643. Sanborn retired from politics when he was appointed to the Superior Court for the District of Saint Francis. When in his private practice, however, Sanborn prosecuted at least three cases against squatters: *Stuart v. Eaton, LCR* 8 (1858): 113-121; *Hart v. McNeil, LCJ* 4 (1860): 8; *Osgood and Kellam, LCR* 10 (1860): 22-27.

[8] *DCB* v. 9, p. 211.

[9] Dorion spelled out his political platform before the election of 1851, which he lost, in his *Manifeste électoral.* Appended to J.-P. Bernard, *Les Rouges*, pp. 341-374. He advocated the repeal of the *Act of Union*, representation by population, universal male suffrage, and free trade. He was anticlerical, and condemned the seigneurial system as exploitative. His manifesto explained the benefits of annexation to the United States, but he, along with other *Rouges*, gradually de-emphasized this stance as it became less popular toward the end of the 1850's. In terms of settlement, he insisted that uncultivated lands should be easily accessible to impoverished settlers. F. Roy, *Histoire des idéologies au Québec*, p. 41.

Unsatisfied with the state of the law concerning squatters' compensation for improvements, Sanborn introduced a bill in 1853 that proposed to determine compensation due to squatters by taking "the difference between the estimated value of the lands... in a state of nature adding such revenues as would have occurred to the proprietor while the land remained in a state of nature, and their actual value after the improvements that had been made upon them, allowing [the] difference as compensation."[10] Thus squatters would be entitled to the full value of their improvements. Sanborn explained that a large portion of settlement in the Eastern Townships had been accomplished by squatters on isolated, private lands who had expected to be permitted to purchase the land when the anonymous absentee proprietors made themselves known. Sanborn's 1853 bill was the first to have stipulated that squatters should not be required to pay back-rent on the increased values resulting from their own labour.

Debate on the bill struck at the very definition of the rights of property. In response to Sanborn, Provincial Secretary Morin argued during the second reading that the bill was "at variance with the whole principles of equity and justice, and its effect would be contrary to all established laws of the rights of property, by assuming that possession of the land gave a right to it."[11] Morin pointed out that since the bill appeared to give proprietary rights to squatters of relatively few years' occupation, it was contrary to the law of prescription which required thirty years of uninterrupted possession before any proprietary right accrued to the possessor. Francis Hincks backed up his ally Morin, stating that the bill was "a mere attempt to confiscate the properties of certain individuals."[12]

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[10] "Bill for the better securing to Occupiers compensation for ameliorations made by them upon Lands in certain cases." *DLA* 11 (1852-53): 1777.
[11] Ibid, p. 1777.
[12] Ibid, p. 1777.

Sanborn replied with an appeal to natural law. The bill "contained no more than the rules of natural right... The land was nothing: the labour gave it sole value." He was appalled by "the sympathy felt for the proprietor who had done nothing for the country, while no sympathy was shown for the man, who had gone through the toils of a labourer's life in the forest, in order to improve the country."[13] Nor did Sanborn accept the idea that his bill introduced a new principle. The existing law "admitted the right of the settler to his ameliorations; but practically neutralized that right by setting against it, the issue and profits... If thirty years possession gave a man a claim, it showed that possession was supposed to establish a claim."[14]

When his bill was delayed and then killed by the government majority, Sanborn returned with a new bill in 1854.[15] This bill specified clearly how compensation was to be awarded to squatters and proprietors respectively. As his previous bill had stipulated, in cases where squatters were to be ejected, the proprietor would be compelled to pay the squatter the full value of his improvements, without charging rent on the same improvements. New in this bill was that appointed evaluators were to determine increases in the land's value.

The bill further proposed to give squatters on private property the right to retain their land by paying to the proprietor only the natural value of the land, that is, before the squatter had improved it. This last aspect of the bill was particularly unpopular among proprietors because it appeared to attribute to squatters a proprietary right in the land.[16] In the debate it became clear that many absentee proprietors had intentionally remained anonymous until their land had been improved by squatters, at which time they "pounced down upon the unfortunate settlers" to

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[13] Ibid, p. 1778.
[14] Ibid, p. 1778.
[15] "A Bill to improve the Law relating to Betterment." Ibid, v. 12 (1854-55): 687.
[16] Ibid, p. 687.

profit from the squatters' labour.[17] Other proprietors argued that the bill might force land owners to sell their land at prices determined by arbitrators. Although he ultimately voted in favour of the bill, the Liberal Lewis Drummond found this facet of the bill to be particularly unjust. Drummond believed it important to protect the value of the squatters' labour, since, he pointed out, "the very settlement of the Eastern Townships was owing to the efforts made by the squatters."[18] But he saw the bill as a violation of the principle of freedom of contract. He objected that "under any circumstances a man should be compelled to divest himself of his property at any price, which he cannot stipulate, or that under any circumstances a man who holds a good title to land should be compelled to submit to arbitration the price at which he should sell..."[19]

Although the bill applied only to Lower Canada, Upper Canadian politicians clearly identified the relationship of squatter compensation to the rights of private property, freedom of contract, and finance. J.H. Cameron of Toronto spoke out in defence of fellow Upper Canadians who owned land in Lower Canada. He insisted that if the measure were put to Upper Canadians, it would be rejected by two-thirds of them.[20] The Attorney General for Upper Canada, J.A. Macdonald, thought the bill "contained direct attacks upon the rights of private property." He argued that the bill did little for the marketability of land. "Such a measure would be to destroy the whole value of the wild lands of the country. Were it made applicable to Upper Canada, it would raise a rebellion there."[21] Further concerns were raised by Macdonald regarding

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[17] Attorney General Drummond, Ibid, p. 688.
[18] Ibid, p. 688.
[19] Ibid, p. 688. See also, J.I. Little, "Colonization and Municipal Reform," pp. 118-119.
[20] *DLA* 12 (1854-55): 3442.
[21] Ibid, pp. 3537-38.

Canada's foreign credit.[22] If the bill were to pass, wealth invested in land would appear less secure to international financiers.

Sanborn's betterment bill passed 52 to 25 in the Assembly on the third reading, with most of the negative votes having been cast by members from Upper Canadian constituencies. The bill was rejected in the Legislative Council, however, by a combination of Upper Canadian and conservative Lower Canadian members establishing a pattern of failing squatter legislation that would last through 1865.

As Sanborn's bills had been twice defeated, J.B.E. Dorion took up the cause introducing legislation for the protection of squatters almost annually from 1856. An ardent advocate of squatters' rights and Canadien settlement in the Eastern Townships, he expressed his anti-speculation, nationalistic views regularly in his newspaper *Le Défricheur*.[23] He published correspondence on the squatter issue, and editorials in their favour. "Ce sont eux qui deblaient la route, qui ouvrent un passage à ces fortes populations qui la suivent dans les établissements... Ce sont les fortes-étandards de la civilisation dans les forêts."[24]

Like Sanborn's, Dorion's squatter bills stipulated that the indemnity awarded to ejected squatters for their improvements should be determined by a panel of experts, and that squatters should not be forced to pay back-rent on the value of their own improvements. These bills were consistently rejected by the Legislative Council. In March of 1863, his bill was before the Council for the sixth time. Dorion was optimistic, he pointed out in *Le Défricheur*, because his previous bill had been defeated in the Council by only three votes. Further, following the

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[22] See the remarks of the Upper Canadian Solicitor General Smith, Ibid, p. 3538.
[23] See his four-part article, "Colonisation du Bas-Canada," *Le Défricheur*, 27 nov. - 18 déc. 1862.
[24] *Le Défricheur*, 5 fév. 1863.

demise of the Macdonald-Cartier government in 1862, the membership of the Council had turned over and included 25 new members. Several who had been appointed for life had vacated their seats. Dorion had modified the content of the bill so that it had no effect for the future, and was relevant only for squatters who had been settled for at least five years. But the bill still faced strong opposition from Upper Canadian councillors. "La chambre haute comprendre [sic] nous en sommes certain, qu'un projet de loi qui reçoit tous les ans le concours presqu'unanime de tous les représentants du Bas-Canada devrait reçevoir sa sanction, d'autant plus que le projet de loi,... dans sa forme présente, se trouve être en accord avec la décision de la cour d'appel du Bas-Canada," he exhorted.[25]

Despite Dorion's appeal that Upper Canadian councillors not oppose a measure that had no direct effect on Upper Canada, the political and ideological implications of the bill were too important to them to ignore. During the debate in the Council, W.H. Boulton made no effort to conceal his opinion regarding the role of the Council in protecting vested interests. "This House has always been noted for its tendency to conserve the rights of property, and it would no doubt preserve its traditional character. The members were not so likely to be influenced by local feeling as the members of the other House who sometimes voted against their convictions out of deference to the prevailing opinions in their constituencies."[26] Boulton concluded that it "should be called a Bill for the confiscation of other people's property."[27]

The Council considered the bill's full implications for land owners, several of whom sat on the Council, and had been troubled by squatters. J. Dickson explained that of his 400 acres of

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[25] Ibid, 19 mars 1863.
[26] *DLAC*, 29 April 1863.
[27] Ibid.

land in the Eastern Townships, 40 had been seized for the non-payment of taxes, and the remaining 360 had been claimed by squatters.[28] When the second reading of the bill was moved, it was pointed out that "an influential petition against the measure was in course of preparation in Montreal," and it was agreed that the reading should be postponed a week.[29] After the petition had arrived in the hands of two lobbyists on behalf of Montreal speculators,[30] the bill was read the second time.

During the ensuing debate, Dorion's bill enjoyed its highest degree of popularity in the Council. Many landowners in the Council were attracted to the bill because it would reduce the time and cost incurred in ejecting squatters and settling titles. U.J. Tessier, for example, explained that in one instance an ejectment suit had cost him more than the land was actually worth. Although he had won his suit, he "knew from [his] own experience that it was of little use in going to law to eject squatters."[31] When the scenario whereby a proprietor could not afford to pay the amount awarded to a squatter was put to the seignuer and Rouge L.-A. Dessaulles, the bill's chief proponent in the Council, he responded that "he would still be in a far better position by this Bill, in consequence of its economical machinery, than under the present law."[32]

Nonetheless, the bill was defeated by two votes, 29 to 27. Sixteen of the 19 life members voted against it. Representatives who, after 1856, had been elected to the Council, voted 24 to

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[28] *DLAC*, 4 May 1863.
[29] Ibid, 16 April 1863.
[30] *Le Défricheur*, 7 mai 1863.
[31] Ibid, 30 April 1863.
[32] Ibid, 4 May 1863. Dessaulles was elected to the Legislative Council in 1856, the first time that councillors had been elected rather than appointed. Of the twelve councillors elected in Lower Canada that year, Dessaulles was the only "democrat" to win. *DCB* 12, p. 254. On Dessaulles, see Y. Lamonde, *Louis-Antoine Dessaulles, 1818-1895: Un seignieur libéral et anticlerical.*

13 in favour of the measure. Of the 26 Upper Canadian representatives who were present, only seven supported it. Lower Canadian members, on the other hand, voted 20 to 10 in favour of the bill, with most of the negative votes being cast by life members. Dorion's *Le Défricheur* commented that, had three supporters of the bill not been absent, it would have passed by one vote.[33]

While the close vote on Dorion's bill was symptomatic of the political deadlock of 1863,[34] it also represented important geographical divisions. Nor can the division between elected and appointed members be easily overlooked. At root were issues of established property rights and perceptions of the bill's potential effects on them. Upper Canadian members, especially appointed ones, blocked legislation perceived as a violation of property rights. John Ross, an appointed member from Belleville, for example, could not conceive how other members understood the bill to be just. He, along with Dickson and McCrae, insisted that the bill was contrary to the established laws of property, and it was even suggested that the bill was unconstitutional.[35] Lower Canadian members, such as Taché and Dessaulles, on the other hand, insisted that the legal basis of the bill did not contradict the principles of the civil law or recent jurisprudence on the issue.[36] In sum, however, the arguments of the bill's Upper Canadian opponents relied on a rhetoric of property rights that was rather devoid of substantial content. By focusing on the issue of whether or not the squatter bills represented an innovation in Lower Canadian property law, the council hoped to ground this fundamentally ideological

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[33] *Le Défricheur*, 7 mai 1863.
[34] See P.G. Cornell, *The Alignment of Political Groups*, pp. 53-60.
[35] *DLAC*, 30 April 1863; 4 May 1863.
[36] Ibid, 30 April 1863; 4 May 1863.

issue in positivistic legal substance. In the end, however, the real issue remained the legitimacy of existing rights and privileges enjoyed by property owners.

B. Squatters and the Courts

While squatter bills floundered in the legislature, Lower Canadian courts continued to deal with squatters' cases. Case law reveals a great deal of confusion regarding the rights of squatters to the value of their betterments and the extent to which damages should be awarded to proprietors. Although many proprietors lost their suits against squatters in the lower courts, they tended to win damages from the squatters upon appeal. In 1856, however, a squatter won in appeal, establishing that when ejected, squatters were entitled to the full value of their improvements, minus rents and profits that might have accrued to the proprietor without the squatters' improvements.[37] This was similar to the aim of Dorion's bills.

Other litigated issues included the relative status of squatters in good versus bad faith, and whether grantees of the crown or their vendees were required to take physical possession of the land to ratify their titles. The latter, known in French civil law as *tradition*, was the requirement that possession follow the acquisition of title. *Tradition* was an area in which the applicability of French civil law and English common law to lands held in free and common socage was debated.[38] The issue was crucial in squatter cases. If the titles of absentee proprietors were invalid because the proprietors had failed to take possession of their lands, then the squatters might have a proprietary right to both the land and their improvements. This would have made their rights on private land similar to those implied by the policy of pre-emption on crown lands.

[37] *Lawrence and Stuart*, *LCR* 6 (1856): 294-311.
[38] See principally J.E.C. Brierley, "The Co-existence of Legal Systems in Quebec."

Squatters lost this legal avenue in 1853 when the courts found that *tradition* was not necessary to validate a title, either under English or French rules.[39] Henceforth, symbolic delivery sufficed to convey title to wilderness land, bolstering the idea of land as a marketable commodity which could be freely exchanged.[40]

Legal action against squatters took two similar, but technically different legal forms. Proprietors could institute an action of *revendication* which asserted the proprietor's title. In these suits, the onus was on proprietors to prove the legality of their ownership. Squatters could respond by producing titles of their own. For example, a squatter could oppose a proprietor's action by pleading prescription of thirty years of "public and uninterrupted possession of the land in question by himself and by his predecessors."[41] In 1820, the first reported case against a squatter in Lower Canada was successfully defended using this form.[42]

A petitory action, on the other hand, tended to assume the plaintiff's title; it could be instituted against a squatter in order to extinguish all claims that the squatter might have on the proprietors' land, and to reinstate the proprietor in possession with compensation for lost rent, profit, and damages. Here again squatters could plead prescription or produce an opposing title, prove that the plaintiff's title was defective, or demand compensation for improvements if the plaintiff's title was found to be legal.[43]

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[39] *Stuart and Bowman*, *LCR* 3 (1853): 309-416.
[40] B. Young, *The Politics of Codification*, pp. 170-72.
[41] *Seminary of Quebec v. Patterson, Stuart's Reports*, p. 146. See Pothier, *Traité de la prescription*, seconde partie, art. 1.
[42] Ibid. For a later case, see *Stoddart v. Lefebvre*, *LCR* 11 (1861): 286-288.
[43] See for example, *Stuart and Ives*, *LCR* 1 (1851): 191-212. "A mere natural possession, such as that of a *squatter*, without title or colour of title, raises no presumption of a right of property, and therefore, it is not necessary that a purchaser [Stuart], claiming under a valid title, should rebut such possession, by shewing a title in his vendor."

deed.[48] The appellant was declared proprietor, but his demand for rents, profits and damages was not awarded in this case; the appellant was to adopt the future legal recourse he saw fit.[49]

That actual and physical possession was not necessary to convey a title was upheld in *Stuart and Ives* in 1851, *Stuart and Bowman* in 1853, *Stuart v.Eaton* in 1857, and *Bilodeau and Lefrançois* in 1861, each a case involving squatters.[50] These cases, which involved the validity of previous conveyances of property, were particularly problematic given confusion concerning the applicability of French or English property law on township lands. While the *Canada Tenures Act* of 1825 had apparently declared English law to have governed freehold conveyances since 1791, the courts, in at least two cases concerning squatters, had held that the French principle of *tradition* was indeed necessary to validate a conveyed title.[51]

In the celebrated *Stuart and Bowman*, the introduction of English law in the townships and the question of *tradition* were thoroughly examined.[52] The case was the first step in settling that French law had governed all issues relating to property law in lands held in free and common soccage, except those specifically mentioned in the *Canada Tenures Act*, i.e., matters of alienation, descent, and marital property rights. In *Wilcox and. Wilcox*, a case involving dower, the same principle was upheld on appeal. In 1857 the issue was settled politically with passage of the *Act for settling the Law concerning Lands held in Free and Common Soccage in Lower Canada.*[53]

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[48] Pothier, *Traité de la vente*, No. 321; Ibid, p. 113.
[49] *Bowen and Ayer, RLJ* 2 (1846-47): 119. No compensation for betterments was demanded by Ayer.
[50] *LCR* 1 (1851): 193-212; *LCR* 3 (1853): 309-416; *LCR* 8 (1858): 131-121; *LCR* 12 (1862): 25-33. For a report of the lower court's decision in *Stuart v. Bowman*, see *LCR* 2 (1852): 369-439.
[51] J.C. Brierley, "The Coexistence of Legal Systems in Quebec," p. 283. *Mallory and Hart, LCR* 2 (1852): 345-352; *Brochu v. Fitzpatrick, LCR* 2 (1852): 7-9.
[52] *Stuart and Bowman, LCR* 3 (1853): 309-416.
[53] *Wilcox and Wilcox, LCJ* 2 (1857): 1; *Statutes of Canada* (1857), 20 Vict., c. 45.

Sir James Stuart instituted by far the majority of reported cases against squatters. Although by no means one of the largest proprietors of his period, he and his wife Elizabeth Robertson owned significant tracts of land in Buckingham, Stukley, and Compton townships, a large portion of which they had purchased from François Languedoc in 1835. Stuart held positions on the Executive Council and the Special Council. After serving as Solicitor General and Attorney General, he was named Chief Justice of Lower Canada. An opponent of seigneurial tenure and French property law, he was the author of the Registry Ordinance.[54] He died in 1857 as Chief Justice, midway through the last of his numerous suits against squatters.[55] Stuart's contentious manner may partly explain his affinity for suits against squatters. Also important was his desire for private gain combined with his familiarity with the courts.[56] Indeed, he had been criticized as a lawyer for unnecessarily taking cases to the upper courts where fees were higher, and while Chief Justice he appealed lower court decisions on his squatter cases.[57]

Stuart sought in several instances to capitalize on the labour of the many squatters on his family's lands. In *Stuart and Ives* (1851), Stuart endeavoured to recover rents and profits for a hundred-acre lot, held illegally according to Stuart for twelve years by Eli Ives. Ives had purchased improvements to the extent of 50 cultivated acres from previous squatters. Stuart was awarded from Ives three pounds for each of the first three years of occupation, and ten pounds for each of the remaining nine, totalling 99 pounds, an amount which greatly exceeded the value of the whole lot, had it remained unimproved.[58] For his part, Ives' demand for

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[54] *DCB* 8, pp. 842-845.
[55] *Stuart v. Eaton, LCR* 8 (1858): 113-121. The reported cases instituted by Stuart against squatters which are not discussed here are *Stuart v. Langley, LCR* 1 (1851): 338-340; *Stuart and Blair, LCR* 6 (1856): 433-445.
[56] *DCB* 8, pp. 842-845.
[57] Ibid, 844.
[58] *Stuart and Ives, LCR* 1 (1851): 197. The court considered this a low evaluation.

compensation for his betterments was rejected due to improper form, as he could not in the same plea file a title of his own as well as demand betterments. Ives would have had to initiate his own action for betterments against Stuart, a costly and risky undertaking.[59] Ives' right to the value of his betterments was not rejected in the case, but since the court had evaluated the compensation due to Stuart in relation to the land's improved value, Ives would have done no better than to break even and be ejected from his land.

Only in rare cases did squatters appeal unfavourable decisions. In *Lawrence and Stuart* (1856), however, Lawrence appealed a ruling in which Stuart was awarded rents and profits equal to the value of Lawrence's improvements. Stuart argued that Lawrence's long and illegal possession compensated him for his ameliorations. The court ruled first that "a defendant who has made permanent and durable improvements upon a lot of land sought to be recovered by petitory action, has a right to be indemnified to the extent of the increased value given by such improvements to the lot, before being compelled to abandon the same."[60] Unlike *Stuart and Ives*, however, the court found that Stuart was entitled only to rents and profits calculated independently from the value that Lawrence's betterments added to the lot. The amount to be awarded to both parties, it was decided, was to be determined by arbitrators appointed by both parties.[61] *Lawrence and Stuart* upheld exactly the same points that Dorion later sought to enact in legislation, and established for the first time that squatters were not compelled to pay back-rent according to the value of their own improvements.

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[59] Ibid, pp. 211-212.
[60] *Lawrence and Stuart, LCR* 6 (1856): 294.
[61] Ibid, p. 310.

> in my judgment, the peculiar circumstances of this country, the manner in which large tracts of land have been granted, by which great uncertainty and difficulty attend in many cases the ascertaining of titles, and the encouragement always extended by our government to actual settlers, afford sufficient reasons to render the possession "*excusable*" to the extent necessary to enable the possessor to receive compensation for the excess of his improvements beyond the rents.[68]

By 1858, then, it was settled that squatters, whether in good faith or bad, were to receive an indemnity, determined by arbitrators, for their improvements. Although the titles of absentee proprietors were confirmed, the squatters' right to the product of their labour was recognized. In sorting out the law relating to squatters, the courts had recognized that the ownership of improvements on real property was conceptually divisible from the ownership of the land itself.

C. The Bifurcation of Freehold Property

Although it was probably not his intention, James Stuart had litigated a sufficient number of squatter cases to clearly establish in Lower Canadian jurisprudence that squatters had a legal right to their improvements without having to pay rent on them. Despite the persistent efforts of J.S. Sanborn and J.B.E. Dorion, however, the Legislative Council, whose power base was the interests of landed property, refused to legislate this.[69] The debates indicate that many members, especially the pro-British from Upper Canada, were convinced that any pro-squatter legislation constituted an automatic infringement of property rights.[70]

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[68] Ibid, p. 118. The only alteration made on appeal of the lower court's decision was the ruling that the compensation entitled to both parties should have been determined by a board of experts. Proponents of the squatter bills also frequently argued that squatting was excusable. See, for example, E.-P. Taché in *DLAC*, 29 April 1863. "...it was impossible to meet the demand for lands in the Seigniories, hence the people had pushed into the backwoods. Surveys had been made, but they were mere outlines, and not divided into lots. The Clergy Reserves were scattered throughout much as the squares on a chess board, and it was not easy to tell to whom the land belonged. It was in fact very difficult to get information from the Public Officers for the officials were not remarkably affable especially to poor French Canadians."

[69] J.I. Little points to the strength of property rights in explaining that proprietors preferred taxation by hostile municipal councils above the admission of squatters' rights. "Colonization and Municipal Reform," p. 120.

Another explanation of the Council's reluctance lies in what the jurisprudence on squatters implied about freehold property in Lower Canada. The cases had entrenched in case law a conceptual separation of the labour contained in squatters' improvements from the immoveable property itself. During the 1850s it became legally possible for squatters to have a right to property in improvements even if they had no right to the land itself. Since the opening of the townships, squatters had acknowledged in their conveyances of betterments among themselves that a *de facto* proprietary right existed in the ownership of improvements without any certain right to the property on which the betterments were situated. No doubt they hoped to acquire title to the land at a later date, an expectation somewhat better grounded in the case of crown lands, to which the policy of pre-emption applied.

Because squatting was so widely practiced, Lower Canadian courts found it practical to recognize this bifurcation of property, despite the ongoing legislative efforts to rid Lower Canadian property law of inconsistencies through measures like the registry system, the commutation of seigneurial tenure, and codification.[71] The only way that contested titles could be purged of imperfection and made absolutely determinant was to acknowledge that regardless of title, possession combined with labour constituted a legitimate ingredient in real property. Title, therefore, did not simply descend from the sovereign, free of the influence of those who had created value in that same property.[72] It was to this compromise with the doctrine of liberal, private property to which the Council could not concede.

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[70] J.S. Sanborn had acknowledged in 1855 that his "Betterment Bill" was contrary to the British common law, but he persistently insisted that it did not contradict Lower Canadian civil law. *DLA* 12 (1854-55): 3442.
[71] Sanborn was the only one to have hinted at the fact that property law in Lower Canada, as in parts of the United States, was required to recognize the separation of property in improvements and property in land. *DLA* 12 (1854-55): 3442.
[72] See E. Mensch, "The Colonial Origins of Liberal Porperty Rights."

Chapter Five: Squatters, Local Agents, Incomplete Titles in Stanfold, and Conclusion

Thus far, we have seen that a large degree of settlement occurred outside of the sanction of the state administration. Attempts to devise and implement a systematic and coherent crown land policy remained confounded by the competing goals of settlement and the raising of revenue. The policy of pre-emption persisted for the lack of a better solution, and so, therefore, did squatting. Inroads against squatting on crown lands were made only when it was acknowledged that the nature of settlement in Lower Canada had been such that possession was emphasized above the acquisition of title. Possession, therefore, had to be accepted as an important basis of ownership, despite the prevailing liberal philosophy of absolute property rights. At the same time, while the Legislative Council refused to legislate protection for squatters on private property, the judiciary did at least establish that squatters held a legal right to the property in their improvements. To state that several economies of property operated in Lower Canada during the union period would not, therefore, be an inaccurate conclusion.

What remains to be explored, however, is the way in which competing forms of property, i.e., the squatters' property in improvements and the proprietors' property in title, interacted. Of particular interest here is the role of the state as an apparatus for dispute resolution,

especially in conflicts regarding land for which no patent had been issued, but for which an incomplete title had been purchased from the crown by an absentee in the form of a location ticket.[1] Cases of this type were numerous, as they were a consequence of the multiplicity of systems under which land was held in Lower Canada. We shall see that, at the beginning of the period, conflicts involving purchased crown land occupied by squatters, but for which a final patent had yet to be issued, were resolved relatively independently from the state. After the 1859 regulations instituted a system of conflict resolution by which incomplete, non-patented titles such as location tickets could be annulled, the state took on an increasingly central role.[2] The role of local land agents and surveyors also remains to be investigated.[3] Being more in tune with the local realities of settlement, these functionaries often acted independently of the central administration even though they were theoretically in the employ of the state.

To convey the profoundly critical nature of land conflicts for squatters and the conditions of their existence, two individual cases, one occurring in the early part of the period, the other in the later, are discussed below. Both conflicts involved land in the Township of Stanfold, today part of the of County of Arthabaska, a township that was first settled beginning in the late 1820s almost entirely by squatters. In 1831, Joseph Bouchette described Stanfold as "being very low and extremely swampy, not much of the land is fit for cultivation."[4] The township leader Jenkin Williams received a grant of roughly half of Stanfold in 1807, amounting to 26

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[1] Although location tickets carried with them the condition of actual settlement, this requirement was frequently not met.

[2] Conflicts regarding patented land had to be settled in court, unless, as frequently occurred, the squatter and proprietor came to an independent agreement.

[3] On local agents, see J.I. Little, *Crofters and Habitants*, esp. ch. 2.

[4] J. Bouchette, *The British Dominions*, v. 2, "Stanfold."

810 acres in the northern eight ranges of the township.[5] The population of Stanfold was 425 (106 male heads of household) in 1839,[6] and 1418 in 1851.[7]

In November of 1832, Louis Héon, Hubert Poirrier, Olivier Réau dit Alexandre and seven other settlers who had had difficulty acquiring fertile lands in the seigneuries, went in search of land in the Bois Francs. These three squatters travelled to Quebec in 1835 to put their case before A.N. Morin, chairman of the Standing Committee on Lands and Seigneurial Rights.[8] Héon began their story.

> "We then opened a road beginning at the River Bécancour, at the end of the Blandford road.... We opened this road the whole depth of the line between Stanfold and Bulstrode, a distance of four leagues; there were eight or ten of us, and we worked for nine days. Five of us hoping that sooner or later we should succeed in obtaining from Government, lands upon which to settle, located ourselves in the rear of Stanfold upon the River du Loup, one of the branches of the River Nicolet.[9]

When Héon arrived at the river, he found that a small building had been erected by David Prince, from whom he purchased the existing improvements. The other members of the expedition took up nearby land in the neighbouring townships of Bulstrode and Arthabaska.[10]

These early settlers paved the way for numerous families who followed them, and with their assistance, settled as squatters in the area. Hubert Poirrier estimated in 1835 that there were sixty families settled without title in the area.[11] Thirty of these did not know in what township

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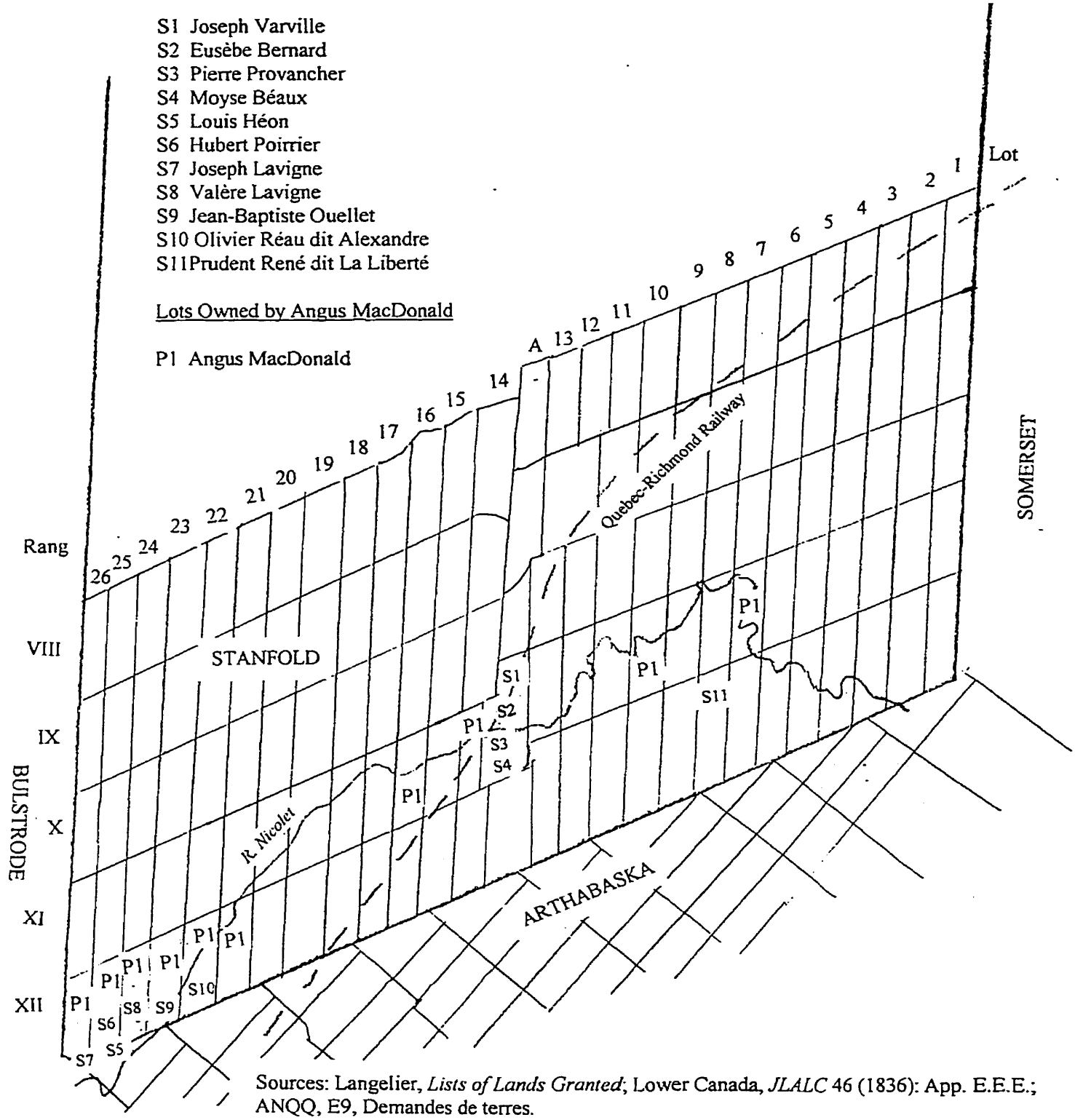
[5] Ibid, p. 486.
[6] "Recensement des Bois-Francs, par l'abbé Larue, en 1839," in C.-E. Mailhot, *Les Bois-Francs*, t. 1, pp 290-293.
[7] Canada, *Personal Census*, 1851.
[8] On the Morin Commission, see T. Johnson, "Perceptions of Property," ch. 5.
[9] "First Report of the Standing Committe on Lands and Seigneurial Rights," *JLALC* 45 (1835-36): App. E.E.E., evidence of Louis Héon. Héon's neighbours were Hubert Poirrier, Joseph Lavigne, Valère Lavigne, Jean-Baptiste Ouellet, and Olivier Réau dit Alexandre. See map 2.
[10] Ibid.
[11] Ibid, evidence of Hubert Poirrier.

Names and Locations of Some Squatters in Stanfold

S1 Joseph Varville
S2 Eusèbe Bernard
S3 Pierre Provancher
S4 Moyse Béaux
S5 Louis Héon
S6 Hubert Poirrier
S7 Joseph Lavigne
S8 Valère Lavigne
S9 Jean-Baptiste Ouellet
S10 Olivier Réau dit Alexandre
S11 Prudent René dit La Liberté

Lots Owned by Angus MacDonald

P1 Angus MacDonald



Sources: Langelier, *Lists of Lands Granted*; Lower Canada, *JLALC* 46 (1836): App. E.E.E.; ANQQ, E9, Demandes de terres.

complained that the sale was not announced in "Stanfold, Arthabaska, nor in Blandford upon the River Bécancour, where there is a House which a Priest visits occasionally to perform service... I am also sure that the sale was not announced at Gentilly, whence we receive religious assistance, and which is the place by which we go out, and is the nearest Parish to the place where we are settled."[15]

The purchaser had been Angus MacDonald. On October 3, 1835, he had bought the eastern-most six lots in the rear range of Stanfold from the crown.[16] Héon, Poirrier and Alexandre travelled to Quebec to put their case before Morin only two months after the sale, but their voyage appears to have had no immediate effect. Both MacDonald and the squatters continued to petition the government. In a letter to Felton, MacDonald declared his innocence.

> When I went to the sale at Three Rivers I had no intention of buying any lands in Stanfold or elsewhere. I had understood for some years that the lands in that quarter were good, and when at the sale, I made up my mind to buy some at a venture, not knowing the good lots from the bad as I had never been in that part of the Township of Stanfold nor within two miles of it, neither did I know what lots or even Ranges those people were settled upon.[17]

The squatters complained that the sale was advertised in newspapers only, and took place forty miles distant from the location of the lands in question. This mode of crown land disposal, they argued, "facilite les agioteurs de terres d'en prendre avantage et par ce moyen de profiter des travaux de pauvres misérables reclus dans le bois ignorant les mesures que prend le Commissaire des terrres de la Couronne."[18] The squatters asked that the sale to MacDonald be annulled.

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[15] Ibid. The sale of these lands explains why these settlers did not appear on the list of squatters eligible for pre-emption in 1839.
[16] See map 2 for the locations of these and MacDonald's other lots in Stanfold.
[17] ANQQ, E9, Demandes de terres, Stanfold, 3190, 9 Nov. 1835.
[18] Ibid, 3192, 5 Nov. 1835.

Two separate economies of property were in operation here. One functioned at the administrative level, and involved the sale of lands to absentees via advertisements in urban areas. The other was based on the independent actions of isolated settlers. The two economies collided as both parties insisted they had acquired a right to the land. Both parties enlisted the support of local crown lands agents and surveyors and petitioned the central administration. The local functionaries were the only ones to involve themselves at an official level. The role of these intermediaries is particularly interesting because they attempted to act on behalf of both parties.

Louis Legendre, the local crown surveyor, for example, delivered the squatters' petitions to the government, advised them on their course of action, and wrote letters to Felton on their behalf. Joseph Prince, the local land agent, further urged that the squatters should have their land surveyed, and promised to help them purchase their lands. Prince looked into the situation, only to discover that the lands had been sold to MacDonald at a sale of which he was also ignorant. Legendre, meanwhile, had been hired to survey MacDonald's lots. Even though Legendre had lobbied on behalf of the squatters, he did not know that they were settled on the same lots that MacDonald had purchased, and which he was to survey. He discovered this only when he arrived at the sight to survey the lots.[19]

In his petition to Felton regarding his newly acquired lots, MacDonald insisted that "if there is now any trouble about them Legendre is the cause of it."[20] Upon returning from the Stanfold lots, Legendre told MacDonald that he would inform the governor of the unfairness of the sale.

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[19] "First Report of the Standing Committe on Lands and Seigneurial Rights," *JLALC* 45 (1835-36): App. E.E.E., evidence of Louis Legendre.
[20] ANQQ, E9, Demandes de terres, Stanfold, 3190, 9 Nov. 1835.

acres of each of the six original 200 acre lots, indicating that the squatters retained portions of each.[26] We do not know at what cost the squatters were able to purchase titles from MacDonald. MacDonald, meanwhile, acquired several other lots in Stanfold, and became one of the larger land owners in the township.[27]

The striking feature of this land conflict in the early part of the period is that it unfolded independently of the central, but not local, lands administration, and arose in the first place because of the administration's ignorance of the actual state of settlement in the area. Felton, the Commissioner of Crown Lands, showed no inclination to intervene on behalf of the squatters, and denied that they had any right to the lands.[28] The petitions evoked no response, and the squatters' trip to Quebec had no effect. Legendre, an employee of the crown, but one who was familiar with local affairs, consistently championed the rights of the squatters, and operated independently from the crown lands administration. Ultimately, the conflict was settled with no intervention by Quebec.

After 1859, when a system for the local adjudication of land conflicts was implemented by the Department of Crown Lands, the state administration took a much more active role in dispute resolution. On the recommendation of local adjudicators, the department could revoke sales to absentees to whom patents had not yet been issued.[29] Since the conflicts were

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[26] ANQQ, E21, *Anciens terriers*, Stanfold. Relatives of the the squatters later settled on both sides of the Stanfold-Arthabaska boundary line. See the biographies of Joseph Rivard-Lavigne and Jean-Baptiste Ouellet in C.-E. Mailhot, *Les Bois-Francs* t. 1, pp. 304, 308-309. Joseph and Valère Lavigne are identified as squatters on lands straddling the Arthabaska-Stanfold line on a map drawn by Louis Legendre in 1841. Reproduced in M. Carrier et al., "Les *squatters* dans le canton d'Arthabaska," p. 86. Hubert Poirrier, however, did not return from his mission to Quebec. He drowned on his way back to Stanfold, leaving his wife and several children on the land. "First Report of the Standing Committe on Lands and Seigneurial Rights," *JLALC* 45 (1835-36): App. E.E.E., evidence of Louis Legendre.

[27] MacDonald is recorded as owning 800 acres in the 11th range as well. ANQQ, E21, *Anciens terriers*, Stanfold.

[28] Ibid.

systematically examined in detail, with reports being sent to the crown land office, the administration played a much more knowledgeable part in the conflicts.

In 1862, Joseph Varville, Eusèbe Bernard, Pierre Provancher, and Moyse Béaux appeared before a committee of adjudicators intending to acquire title to lot A in the 11th range of Stanfold, a property which they had occupied for twenty years.[30] Location tickets for both halves of lot had been issued to Joseph Lallier dit Marchatière and Alex Bernard respectively in 1849, on the conditions of settlement and the payment of four shillings per acre over eleven years with interest from the date of sale. No payment was ever made.[31] The four occupants asked that the sale be cancelled. Pointing out that "ils ont eu à supporter toutes les misères et les privations qui accompagnent presque toujours les colons dans les nouveaux défrichements," the squatters asked that they be permitted to purchase at a reduced price, with no back-rent.[32] They insisted that three quarters of the land was too swampy to cultivate, that one of them was reduced to relying on charity having been injured by a falling tree, and that they would sell their cattle in order to purchase the land to avoid having the land sold out from underneath them at the impending public sale. Previous to occupying this lot, they had been forced to abandon another on which they had worked, presumably due to an ejectment suit.[33]

Varville and the others had won the support of the new local land agent, F.-X. Pratte, in much the same fashion as Louis Héon and his neighbours had been aided by Legendre. Pratte wrote to Andrew Russell, Assistant Commissioner of Crown Lands, on their behalf. In support

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[29] See ch. 3.
[30] ANQQ, E9, adj. no. 2364, 30 June, 1862. See map 2.
[31] Ibid, "Report on Gore lot A in 11th Range, Stanfold," 30 June 1862.
[32] Ibid, "Pet. of Joseph Varville and others," 22 April 1862.
[33] Ibid.

of the squatters' request for a reduced price, he emphasized their poverty, extreme labour, and isolation.[34] Russell had previously asked Pratte for a detailed report on the case, and interpreting this letter as that report, wrote back condemning Pratte's lack of detail.[35] Surprised at the criticism, Pratte responded that he simply meant to convey his opinion and recommend that the squatters be protected by the government.[36]

Somewhat distrusting of Pratte, Russell proceeded to examine the lot in question during a stopover while travelling from Huntingdon to Quebec. Surprised at what he found, he filed his own report to the adjudicators. Russell reported that the land in question was of good quality, and amenable to cultivation. Straddling both the Nicolet River and the Quebec-Richmond railway, the lot included a bridge where the latter crossed the former. A "considerable" clearing had been made and 18 buildings erected. These included "a saw mill about 40 x 20 feet in perfect order, heavy timber, and in every respect well and substantially built, with one upright saw," a smaller saw mill, a grist mill, four houses, several barns, and stables.[37] Given that the lot was indeed cultivable and contained mill sights, Russell deemed Pratte's evaluation of 65 cents per acre to be exceedingly low. Russell was "forced to the conclusion that he [Pratte], with a full knowledge of the particulars of the case, has been in collusion with the four persons he puts forward in his report as the owners of the land, to deceive the Department... in his letter recommending that the lot be resold to [the] petitioners for less than one tenth of its present and real value exclusive of improvements."[38] Russell reasoned that, based on the prices of private

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[34] Ibid, Pratte to Russell, 2 June 1862.
[35] Ibid, Russell to Pratte, 10 June 1862.
[36] Ibid, Pratte to Russell, 16 June 1862.
[37] Ibid, "Report on Gore lot A in 11th Range, Stanfold," 30 June 1862.
[38] Ibid. Pratte lived within 2.5 miles of the lot, and "could walk to it from his own house, take note of the nature and extent of the improvements on it and return in less than three hours," Russell reported.

property created by the labour of the first occupant as squatters implied? Or, as the land owners who sat on the Legislative Council believed, was the state the only source of legitimate property? What role did authorized legal title play in the creation of new property? Was title without occupation, it was asked in the judiciary, sufficient to defeat the claim of first occupancy? These questions underlay debates about settlement in Lower Canada generally, and about squatting in particular.

We have explored the way in which these questions were answered by the Department of Crown Lands, the government, and the judiciary. Each group's response to squatting had important ideological implications, and varied in accordance with the economic and political makeup of its members and the group's role within the larger Lower Canadian state structure.

For politicians and officials in the Department of Crown Lands, squatting signified the failure of the department to accomplish its goals. Lower Canada's greatest resource was land, and the department was expected to generate revenues from its sale. Instead, the department found that settlers commonly took up lands on their own accord, paying nothing. Hoping to eliminate the settlers' need to occupy land illegally, the department attempted to make land easily available to the average settler by introducing the instalment plan in 1849, and by issuing free grants in some areas.[40] But squatting persisted. In 1860, a local priest in the Bois Francs told a government committee on colonization that "les trois quarts des colons dans les nouveaux établissements sont des *squatters*."[41]

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[40] These measures were recommended as a means of preventing squatting in the Chauveau Report, *JLAC* 8 (1849): App. A.A.A.A.A., and "Second Report of the Special Committee appointed to inquire into the causes which retard the Settlement of the Eastern Townships of Lower Canada," *JLAC* 10 (1851): App. V.

[41] Canada (Province), *Rapport du comité spécial sur la colonisation*, Evidence of M. Marquis, p. 31.

Despite the efforts of the Catholic church, colonization societies, and Liberal and Rouges politicians such as J.S. Sanborn and J.B.E. Dorion, the department's role as fund-raiser for the Lower Canadian state continued to prevail over its responsibility to make land available to settlers. The history of crown land in the Eastern Townships had begun with the alienation of vast tracts of land to absentee speculators. It continued with the British American Land Company sale, and in the end, prices for what was left of the crown lands remained unaffordable for cash hungry farmers. The result was that squatting continued unabated.

As the Lower Canadian state grew in size and power, so too did its departmental bureaucracies. For the Department of Crown Lands, the expansion and professionalization of its bureaucracy meant an increased ability to implement its policies in the countryside. In 1838, when Durham introduced the right of pre-emption for Lower Canadian squatters, the crown lands administration was unable to convert many squatters to proprietors because it continued to demand full immediate payment for lands. The department's reports persistently complained of squatting through the 1840s and 1850s, and no better solution to squatting than pre-emption was conceived during that period. However, in the 1859 regulations for the disposal of crown lands, it was declared that the right of pre-emption would be retracted once and for all and that the squatters' land would be auctioned off; squatters would be forced to become proprietors within a short period of time. With newly-appointed local adjudicators who wrote concise reports on squatters' claims, recommending they be allowed to purchase on an instalment basis, the expanded bureaucracy found a way to drastically reduce the number of squatters on crown lands. In a sense, the department's contribution to state formation had paid off; it had acquired the means to eliminate a problem that had plagued the department from its beginning.

In its prioritization of revenue raising and its ongoing attempt to eliminate squatting, the Department of Crown Lands demonstrated an attitude toward land in which market value and legal title were key ingredients. But in granting to squatters the right to pre-empt the purchase of their lands, the department implicitly acknowledged that the squatters held a proprietary right in their land by virtue of their illegal occupation. What made them squatters originally, however, was that they had failed to acquire a proprietary right from the department. Pre-emption, therefore, plainly contradicted the department's own policy, as well as the liberal idea of property that the Crown Lands Department sought to further in Lower Canada, and which was a key impetus for the ongoing attempts to eliminate squatting on crown lands in the first place. For possession to become a secondary aspect of property, its primacy had to be acknowledged in the case of the squatters. Only then could marketable legal title, independent of occupation, become the central ingredient in proprietorship.

To acknowledge that one could acquire a proprietary right to land by squatting proved impossible where private property was involved. The same imperative of security of property that forced the Department of Crown Lands to acknowledge rights deriving from occupancy and labour was too strongly entrenched in the Legislative Council to allow its violation. Not surprisingly, the squatter bills were perceived in the Council as a threat to the security of wealth invested in landed property, and as a violation of the doctrine of freedom of contract. The Legislative Council, made up of many large land owners, steadfastly represented the interests of private property. In the more popularly based Assembly, the squatter bills received considerable support; seven of ten bills for the protection of squatters passed in the lower house, only to be rejected in the Council. That most of the opposition in the Council came

improvements. Title did not stem from improvements as it had in the case of crown lands. Rather the improvements were ancillary to the title, and completely separable from it.

This was an instrumental statregy to deal with the fact that so much of Lower Canada's wilderness had been domesticated by squatters. As Justice Short decided in *Stuart v. Eaton* in 1857, "the peculiar circumstances of this country, the manner in which large tracts of land have been granted, [and] by which great uncertainty and difficulty attend in many cases the ascertaining of titles," rendered the illegal occupation of land excusable.[44]

In sum, while the legislature was unwilling to affirm that squatters had an inherent right to the value of their labour, the Department of Crown Lands and the judiciary both acknowledged that squatters did indeed acquire some proprietary rights. For crown lands, it was politically uncomplicated for the department to attribute to squatters the exclusive right to purchase their land; crown land had not been alienated to private interests. In the case of private property, on the other hand, where the vested interests of landed wealth were at stake, law and liberal theory insisted that the proprietor had more rights than the illegal possessor. But because so much land had been developed by squatters -- who, after all, had vastly increased the value of that land -- the courts applied a mediating strategy by declaring that squatters owned at least the full value of their improvements, but not the title.

It must not be forgotten, however, that the underlying motive in the attempts of the Crown Lands Department, the legislature, and the judiciary to solve the squatter problem was to entrench in Lower Canada a system of property ownership in which titles were secure, marketable, and determinant. Because squatting contradicted these imperatives of liberal,

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[44] *Stuart v. Eaton, LCR* 8 (1858): 118.

bourgeois society, squatters had to be either converted to proprietors or ejected from their illegal occupation. In the case of crown lands, the only way to further absolute property rights was to acknowledge that squatters held a right to their land and allow them to purchase it. For private lands, the courts found it necessary to declare that squatters had a proprietary right to the value of their improvements. In both cases, an inconsistency in the very doctrine of property that the state sought to render universal by eliminating squatting was admitted. Occupation of land combined with labour was an essential ingredient in property and could not be denied. Only by admitting this could universal, liberal property be made supreme.

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Abbreviations

ANQQ	Archives nationales du Québec à Québec
DCB	*Dictionary of Canadian Biography*
DLA	*Debates of the Legislative Assembly of United Canada*, 1846-1855
DLAC	*Debates of the Legislative Assembly and Council of United Canada.* Microfilm copy of newspaper clippings, 1860-1864
JLAC	*Journals of the Legislative Assembly of the Province of Canada*
JLALC	*Journals of the Legislative Assembly of Lower Canada*
L.C.J.	*Lower Canada Jurist / Collection de décisions du Bas-Canada*
L.C.R.	*Lower Canada Reports / Décisions des tribunaux du Bas-Canada*
NAC	National Archives of Canada
R.L.J.	*Revue de législation et de jurisprudence et collection de décisions des divers tribunaux du Bas-Canada*

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-- MG24 I54, "British American Land Company Papers."

-- MG8 F13, "Brome County Historical Society Papers"

Archives nationales du Québec à Québec. E21, Fonds terres et forêts.

-- E9, Ministère de l'agriculture, des pêcheurs, et de l'alimentation.

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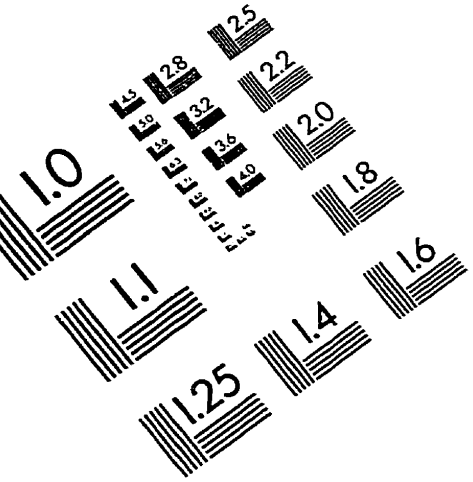

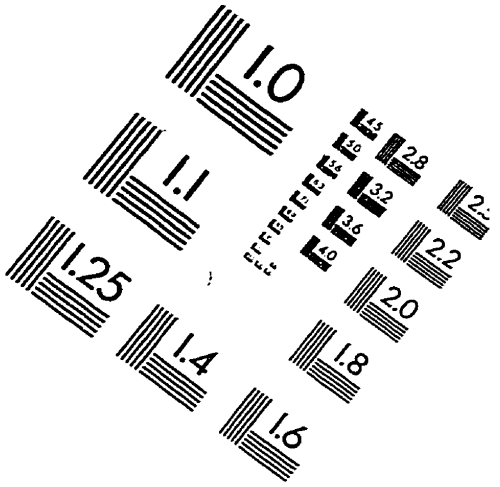

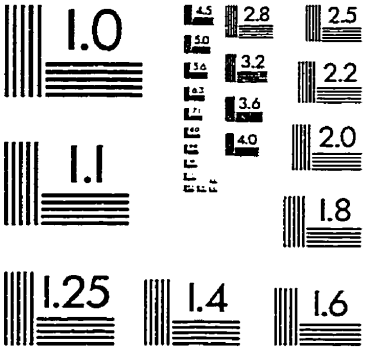

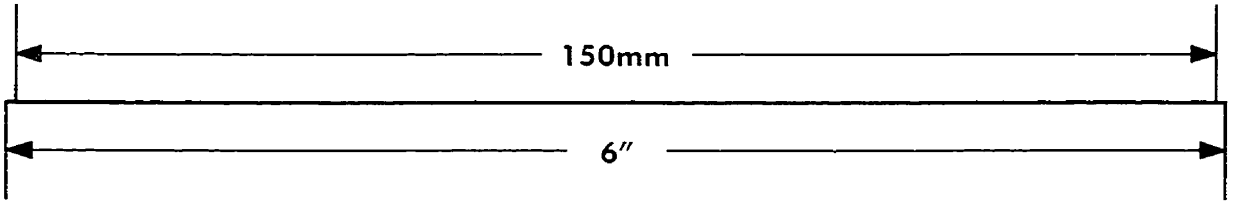

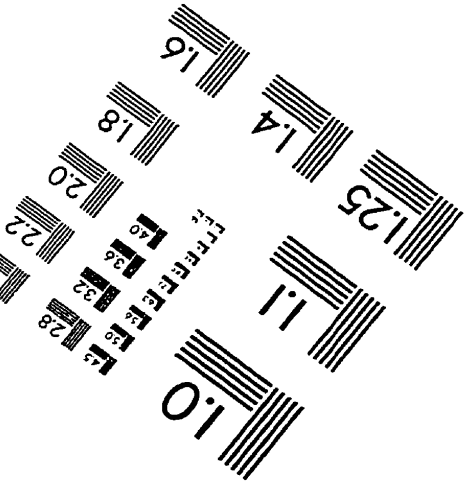

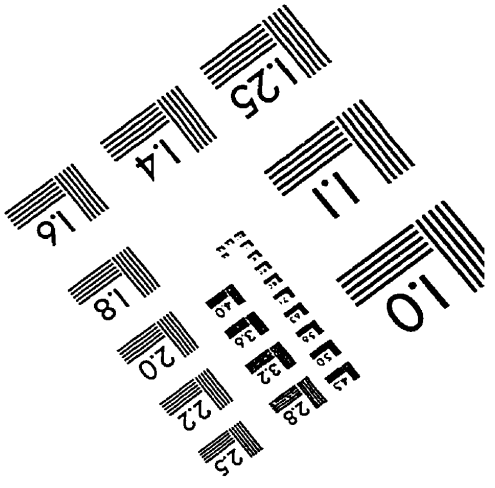

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