SUPREME COURT OF NOVA SCOTIA

Citation: *Woodlands of Jeremiah Cleary v. Naugle*, 2017 NSSC 98

Date: 20170410
Docket: Hfx. No. 391529
Registry: Halifax

Between:

Thomas G. Cleary, as Trustee of the Woodlands of Jeremiah Cleary

Plaintiff

v.

The Attorney General for the Province of Nova Scotia

Defendant

v.

Brian Naugle

Defendant

Judge:	The Honourable Justice M. Heather Robertson
Heard:	February 6, 7 and 8, 2017, in Halifax, Nova Scotia
Decision:	April 10, 2017
Counsel:	Michelle M. Kelly and Justin D. Morrison, for the plaintiff Colin D. Bryson, Q.C., for the defendant (Naugle) Mark V. Rieksts, for the Attorney General for the Province of Nova Scotia (not participating)

Robertson, J.:

[1] This is a retrial of competing ownership claims in a quieting of title proceeding which arises out of a decision of the Nova Scotia Court of Appeal, 2016 NSCA 272.

Background

[2] The lands at issue are 300 acres near Eastern Passage, Halifax Regional Municipality, Nova Scotia; lands once owned by Malachi Cleary and bequeathed to his two sons Jeremiah and Andrew Cleary by his will dated September 18, 1889.

[3] Thomas Cleary, the plaintiff is Jeremiah Cleary's grandson and current trustee of lands held by the estate of Jeremiah Cleary. Since assuming the role of trustee in 1975, he has made efforts to locate his grandfather's lands, understand the claim of title through his own searches at the registry of deeds, made inquiries at the assessment office and made efforts to contact those he believes to be the abutting owners. He also offered the property for sale, wishing to finally close his grandfather's estate and account for the sale of the property to his heirs at law.

[4] These efforts led to this quieting of title action he commenced in 2012.

[5] The respondent Bryan Naugle is the great grandson of Andrew Cleary and he claims ownership to approximately 100 acres of the 300 acres claimed, relying on the title and survey documentation obtained from the registry of deeds:

> 1. Land that his great grandfather Andrew Cleary received from the will of his father, Malachi Cleary, described as "my northern wood lots bought by me from Thomas Young, Jacob Horne and Ferguson" and
>
> 2. Land that Andrew Cleary and his father Malachi Cleary, received by a deed from James Farquharson.

Abstracts of Title

[6] Both the plaintiff and the respondent have provided the court with abstracts of title relating to these lands. Both have connected the lands claimed to Crown grants made to predecessors in title to Malachi Cleary.

[7] It is agreed by the parties that the origin of titles to these lands arises from a single root, the lands owned by Malachi Cleary at his death and divided between his sons Andrew and Jeremiah. There is not much dispute as to the abstract of the various conveyances affecting these lands. The issue arises in locating the inadequately described parcels of land "the wood lots" on the ground and delineating the divide between the lands of Andrew and Jeremiah, as they were bequeathed in 1889.

The Expert Reports

[8] Thomas Cleary engaged surveyor Garry S. Parker whose affidavit is dated August 28, 2014 and his plan attached (Exhibit 2). It is a plan of lands claimed by Thomas Cleary, prepared by respecting the boundaries of abutting owners. It shows the lands claimed as parcels TC-1, TC-2 and TC-3 as they relate to abutting owners. Mr. Parker's engagement was to prepare this "boundary survey" for the purpose of the quieting titles claim showing the lands as described by Thomas Cleary.

[9] None of these abutting owners have made a claim to any of the lands claimed by Thomas Cleary.

[10] Bryan Naugle engaged surveyor James McIntosh to locate Andrew Cleary's lands in relation to Jeremiah Cleary's lands and to locate the internal boundaries of the multiple lots within the 300-acre parcel claimed by Thomas Cleary. Mr. McIntosh began at the Crown grants and followed the abstract of title of both brothers Andrew and Jeremiah and offered an opinion of the location of these various lots within the Parker survey showing parcels TC-1, TC-2 and TC-3.

[11] Mr. Parker did not testify at the retrial nor would he have been able to express an opinion about the location of various parcels of land acquired by Malachi, Andrew and Jeremiah, as that was not his initial engagement and as he noted in his report:

> It became apparent after an examination of the above documents that it would not be possible to retrace with confidence the boundaries of the "woodlands" mentioned in the will of Jeremiah Cleary. In almost all of the descriptions contained in deeds mentioning woodlands there are no course lengths or bearings and the places of beginning are not described in a manner that enables them to be located, and, except for the Crown Grants noted above, no plans were found showing any of the lands referred to in any of the above mentioned documents.

> In my opinion the documentary evidence related to the "Woodlands" mentioned in the will to Jeremiah Cleary do not provide information required to retrace the boundaries of that woodland. I concluded that a plan prepared as outlined in "Plan Preparation" about should be prepared for use to in attempting to settle the extent of title of the lands.

[12] Mr. James McIntosh did testify at length pursuant to Rule 55 and he was ably cross examined on this report by Ms. Kelly, counsel for Thomas Cleary on his opinion as to the location of lands he identified as Lot 1-B, Lot 2-B and Lot 3-A in relation to parcel TC-1 claimed by Mr. Thomas Cleary and the strength of the paper title to these parcels. The respondent's abstract traces title from Malachi Cleary to Andrew Cleary onto the respondent Bryan Naugle of the lands he claims.

[13] Mr. McIntosh also offered his opinion on the location of the woodlot of Jeremiah Cleary. Despite clearly inadequate descriptions of the woodlands, as Mr. Parker had observed, Mr. McIntosh having reference to the earlier Crown grants was of the opinion that the north boundary of the Benjamin Whitear grant, being the same 100-acre parcel conveyed by Philip Shiers to Malachi Cleary was the north south dividing line between woodlots owned by Andrew Cleary on the north and woodlots owned by Jeremiah Cleary on the south of this line.

[14] In offering these opinions, Mr. McIntosh was fitting pieces of the puzzle together as he attempted to locate each of the various parcels, often having regard to the named bounding property owners and their title documents, as they relate to one another. He drew certain inferences from this information. I will have more to say about this in my analysis of the quality of the evidence before me.

The Relevant Law

[15] My task is to make a determination of which of the two parties before me has a better claim than the other to the approximate 100 acres in contest between them.

[16] *Brill v. Nova Scotia (Attorney General)*, [2010] N.S.J. No. 473 stated at paras. 36-38:

> 36 Mr. Brill's action is for a certificate of title under the *QTA*. Section 13 of the *QTA* says:

> **Burden of proof**
>
> 13 Nothing in this Act changes the burden of proof upon the parties in actions of trespass to land, of ejectment or for the recovery of land, or in the other actions in which a claim for a certificate of title may be joined under this Act, nor is it required that any lesser or greater title or possession be shown than was required on the twenty-fourth day of March, 1961, in such cases, but the claimant may establish under this Act whatever title the claimant has against the Crown and against persons generally. R.S., c. 382, s. 13.

37 The *QTA* does not enable a court to create title. Rather it authorizes a court to grant a certificate that reflects the title, including possessory title, to which the party is entitled by the legal principles that exist outside the *QTA*. *Yeadon v. Nova Scotia (Attorney General)*, [1988] N.S.J. No. 30 (Q.L.) (T.D.); *Palmer v. Nova Scotia (Attorney General)* (1988), 50 R.P.R. 55 (N.S.S.C.T.D.), affirmed (1989), 4 R.P.R. (2d) 285 (C.A.); *Frank Georges Island Investment Ltd. v. Nova Scotia (Attorney General)* (2004), 225 N.S.R. (2d) 264 (S.C.); *Legge v. Scott Paper Co*. (1970), 3 N.S.R. (2d) 206 (T.D.); *Partington v. Musial* (1988), 171 N.S.R. (2d) 228 (C.A.); *Chute v. Nova Scotia (Attorney General)*, 1992 CarswellNS 631, [1992] N.S.J. No. 222 (Q.L.) (C.A.); *Meredith v. Nova Scotia (Attorney General)* (1968), 2 D.L.R. (3d) 486 (N.S.S.C.T.D.). In *Ferguson (R.B.) Construction Ltd. v. Ormiston* (1989), 91 N.S.R. (2d) 226 (C.A.) para. 6, Chief Justice MacKeigan said:

> ... Legal title since the enactment of the Quieting of Titles Act in 1961 can now be more conveniently established and declared by an action such as the present in which all persons interested in the land become joined in a contest to determine who has the best title -- a contest in which the rules as to adverse possession, constructive possession, and limitation of actions ordinarily control the result.

38 The judge should be satisfied that all interested persons have been joined or sufficiently notified, or are before the court. Then, if there is no other apparent title holder and the contest is between just two parties, the court may quiet title based on the better claim. This practical approach reflects that title to land is relative and heirarchical, not absolute: Robert Megarry and H.W.R. Wade, *The Law of Real Property*, 4th Ed. (London: Stevens & Sons Ltd. 1975), p. 1006; Anger & Honsberger, Law of Real Property, by Anne W. LaForest, (Canada Law Book, 3rd ed. looseleaf) para. 28.50; *Ocean Estates Ltd. v. Pinder*, [1969] 2 A.C. 19 (P.C.) at pp. 24-25 per Lord Diplock. . . .

Paper Title

[17] Chipman, J. in *Dawn v. Nova Scotia (Attorney General)*, [2014] N.S.J. No. 90 at paras 14-20 addressed paper title:

14 When there are competing title chains to a parcel of land, the role of the Court is to carefully analyse the underlying title documents to determine which party has a better chain of title (*MacDonnell v. M&M Ltd.* (1998), 165 N.S.R. (2d) 115, (C.A.) at para. 30).

15 In *Metlin v. Kolstee*, 2002 NSCA 81, 207 N.S.R. (2d) 27, at paras. 65-66, the panel considered the principles applicable to interpreting deeds. The Court of Appeal accepted the following recitation from *Saueracker v. Snow* (1974), 14 N.S.R. (2d) 607 (S.C.T.D.), at para. 20:

The general principles applicable to the interpretation of a deed are ...:

> 13. Construction -- General Rule. The Court must, if possible, construe a deed so as to give effect to the plain intent of the parties. The governing rule in all cases of construction is the intention of the parties, and, if that intention is clear, it is not to be arbitrary overborne by any presumption. The intention of the parties is to be gathered from the sense and meaning of the document as determined in the first place by the terms used in it, and effect should, if possible, be given to every word of the document. Where, judging from the language they have used the parties have left their intention undetermined, the Court cannot on any arbitrary principle determine it one way rather than another. Where an uncertainty still remains after the application of all methods of construction, it may sometimes be removed by the election of one of the parties. The Courts look much more to the intent to be collected from the whole deed than from the language of any particular portion of it.
>
> 24. Extrinsic Evidence
>
> Patent and Latent Ambiguities. An ambiguity apparent on the face of a deed is technically called a patent ambiguity -- that which arises merely upon the application of a deed to its supposed object, a latent ambiguity. The former is found in the deed only, while the latter occurs only when the words of the deed are certain and free from doubt, but parol evidence of extrinsic or collateral matter produces the ambiguity -- as, if the deed is a conveyance of 'Blackacre', and parol evidence is adduced to show there are two places of that name, it of course becomes doubtful which of the two is meant. Parol evidence therefore in such a case is admissible, in order to explain the intention of the grantor and to establish which of the two in truth is conveyed by the deed. On the other hand, parol evidence is uniformly inadmissible to explain an ambiguity which is not raised by proof of extrinsic facts, but which appears on the face of the deed itself. A subsequent will cannot be used to construe an earlier deed of settlement nor as evidence that

> testator intended to include an additional person among the beneficiaries under the settlement.
>
> Extrinsic Evidence as to Latent Ambiguities Generally: Extrinsic evidence is always admissible to identify the persons and things to which the instrument refers.
>
> Provided the intention of the parties cannot be found within the four corners of the document, in other words, where the language of the document is ambiguous, anything which has passed between the parties at, prior thereto and leading up to it, as well as that concurrent therewith, and the acts of the parties immediately after, may be looked at, the general rule being that all facts are admissible to interpret a written instrument which tend to show the sense the words bear with reference to the surrounding circumstances of and concerning which the words were used, but that such facts as tend only to show that the writer intended to use words bearing a particular sense are to be rejected.

16 Where there is ambiguity in a deed, the Court of Appeal in Metlin at paras. 65-66, accepted the following passage from *McPherson v. Cameron* (1866-69), 7 N.S.R. 208 at 212:

> ... The question is how he is to get there, for neither the course nor distance given in his grant will take him there, without the alteration of one or the other. The general rule to find the intent where there is any ambiguity in the grant, is to give most effect to those things about which men are least liable to mistake; *Davis v. Rainsforth*, 17 Mass., 2010. On this principle the things usually called for in a grant, that is, the things by which the land granted is described, have been thus marshalled: First, the highest regard had to natural boundaries; Secondly, to lines actually run and corners actually marked at the time of the grant; Thirdly, if the lines and courses of an adjoining tract are called for, the lines will be extended to them, if they are sufficiently established; Fourthly, to courses and distances, giving preference to the one or the other according to circumstances; *Greenleaf on Evidence* p. 441, n. 2, and the case there referred to.

17 In *MacDonald v. McCormick*, 2009 NSCA 12, 274 N.S.R. (2d) 258, the Court of Appeal reaffirmed the discussion found in *Metlin*.

18 Also, at paras. 65-66, the Court accepted:

> ... the principle is clear that where distances and monuments clash, in the absence of special circumstances, the monuments prevail; in such cases the context shows the boundary to be the dominant intent, the distance, the subordinate ...

19 As a general rule, the intent of parties to a deed is to be gathered from the words of the deed. If there is any ambiguity, the common sense rules set forth by the Court of Appeal are applied. In *Anger and Honsburger, Law of Real Property*, 3rd ed. (looseleaf), Diana Ginn and Monica McQueen endorse the following summary of the law:

> Where there is an ambiguity in a grant, the object is to interpret the instrument by ascertaining the intent of the parties; and the rule to find the intent is to give the most effect to those things about which things men are least liable to mistake. On this principle, the things by which the land grant is described are thus ranked according to the regard which is to be given them:
>
> 1. natural boundaries;
> 2. lines actually run and corners actually marked at the time of the grant;
> 3. the lines and courses of an adjoining tract, if these are called for, and if they are sufficiently established, to which the lines will be extended;
> 4. the courses and distances, giving preference to the one or the other according to circumstances.

20 The above is often, in surveyor parlance, referred to as the "hierarchy of evidence". In the Anger and Honsburger text, Ginn and McQueen go on to state, following *Diehl v. Zanger*, 39 Mich. 601 (1878), and various Canadian cases citing it:

> The question is not how an entirely accurate survey would locate these lots, but how the original stakes located them. No rule in real estate law is more inflexible than that monuments control course and distance.

Adverse Possession

[18] The accepted test for adverse possession is defined in *Anger and Honsberger: The Law of Real Property*, 3d ed., (Ontario: Canada Law Book, 2006) as:

> The possession that is necessary to extinquish the title of the true owner must be “actual, constant, open, visible and notorious occupation” or “open, visible and continuous possession, known or which might have been known” to the owner, by some person or persons not necessarily in privity with one another, to the exclusion of the owner for the full statutory period, and not merely a possession which is “equivocal, occasional or for a special or temporary purpose”.

[19] In *Spicer v. Bowater Mersey Paper Co.*, 2004 NSCA 39 at para 20, the NSCA stated the test:

> 20 From this review of the authorities it is clear that the claimants of possessory title have the burden of proving with very persuasive evidence that they had possession of the land in question for a full 20 years and that their possession was open, notorious, exclusive and continuous. They must also prove that their possession was inconsistent with the true owner's possession and that their occupation ousted the owner from its normal use of the land. As well, possession by a trespasser of part is not possession of the whole. Every time the owner, or its employees or agents, stepped on the land, they were in actual possession. When the owner is in possession, the squatter is not in possession.

[20] In *Podgorski v. Cook* [2012] N.S.J. 242 the court stated at paras. 21-24:

> 21 I have found as a fact that Ms. Podgorski has legal title to the area to the east of the property line struck by Mr. Berrigan in his 2009 survey ("A" to "B" - Exhibit #13). It is established law that when a party has legal title to their property, the onus is on a party claiming adverse possession to put forth sufficient facts that the true owner has been dispossessed.
>
> 22 The case of *Lynch v. Nova Scotia (Attorney General)*, [1985] N.S.J. No. 456 sets forth the general principles respecting adverse possession. Justice Hallett described the principles as follows:
>
> > There are certain basic principles that must be applied where a party seeks to establish a possessory title against co-tenants.
> >
> > The holder of the legal estate in land is deemed to be in possession until he is dispossessed by another going into possession. The title of the holder of the legal estate is not extinguished until the expiration of twenty years from the time the person claiming the possessory title first went into possession; if the holder of the legal title is outside the province, the period is forty years. It is a question of fact whether a party claiming possessory title has exercised acts of possession with respect to the lands of a kind sufficient to extinguish the title of the legal owner.
> >
> > The acts of possession relied upon must be such that they constitute proof that the possession was actual, continuous, open, notorious, visible, exclusive and adverse for the statutory period, be it twenty or forty years. These words are not an idle litany but describe in detail the nature of the possession that can ripen into a possessory title.
> >
> > The burden of proof is on the person seeking to extinguish the title of the legal owner to prove acts of possession that are capable of extinguishing title considering the nature of the lands and other circumstances.

> ... The legal concept which allows a person to acquire possessory title good against the holder of the legal title is based on the premise that a legal owner cannot stand aside and allow a trespasser or co-tenant to make improvements to the property and pay the taxes over many years and then come in and claim it, even though he could see the other was in possession.
>
> As a safeguard to the legal owner, the Courts have insisted that the possession be of the quality described before the legal owner's title is extinguished; otherwise there could be great injustices if by doing sporadic, unobservable acts on the land a person could acquire possessory title. Hence the care which should be taken by a Court before a finding is made that the title of the legal owner to wood land, in particular, is extinguished as the acts relied upon are very often sporadic in nature and unobserved by the true owner yet can qualify as being acts that are consistent with the limited use a person who owns land of that nature would make of such land.
>
> As claims for possessory title extinguish the title of the legal owner pursuant to a limitations Act, the Court should only act on very cogent evidence that proves that the person's possession has been visible, exclusive and continuous possession for the required statutory period. Legal owners should not be dispossessed where land is such that the legal owner would not make a great deal of use of the land, such as wood land, particularly if the claim is made not by a trespasser but by one co-tenant or more against others. Section 12 of the Limitation of Actions Act provides that no person shall be deemed to have been in possession of any land within the meaning of the Act merely be reason of having made an entry thereon. Where the acts of possession relied upon with respect to wood land are the occasional unobserved cutting of logs and firewood from the property, such acts do not improve the property even though they evidence the intention of one co-tenant to possess it exclusively. It cannot be too strongly emphasized that evidence of possession to extinguish title must be of a quality that has been required by the Courts for hundreds of years. Each case turns on its own facts.

23 The Nova Scotia Court of Appeal in *Spicer v. Bowater Mersey Paper Co.*, 2004 NSCA 39 discussed adverse possession and acts of mere trespass. Roscoe J.A. stated at paragraph 18:

> In all the provinces the law is well settled that acts of trespass cannot amount to what the law requires to give title under the statute of limitations, that is, the ouster of the true owner. An act of trespass in going on the property amounts to a disseisin for a time, but it is not an ouster; what the law requires is an ouster of the owner for twenty years. Numerous acts of trespass only amount to so many acts of disseisin; when a man trespasses on the land the true owner ceases to have full possession

> for the time being; but the moment the trespass is at an end the trespasser's disseisin is at an end and the complete possession is again in the actual owner. It is therefore required that the party should not only take possession, not only disseise the owner, but that he should continue that dissiesin so as to amount to an ouster, and that ouster maintained for the statutory period. That can only be done by some act of possession not merely by a temporary disseisin, and it must be over every inch of the land of which the party claims possession.

24 The Nova Scotia Court of Appeal in *Fralick v. Dauphinee*, [2003] N.S.J. No. 434 found that evidence relating to playing, grass cutting, gardening and picnicing was not sufficient to dispossess the legal owner. Oland, J.A. stated at paragraph 46:

> [46] When the evidence pertaining to parking, the trailer and the picnic tables are excluded, the acts of possession by the respondent which remain relate to playing, the worm bed and grass cutting. In my view, having in mind the nature of this particular property, the totality of this evidence does not constitute the "very cogent evidence that proves that the person's possession has been visible, exclusive and continuous possession for the required statutory period" required according to Lynch, supra for a claim for possessory title to extinguish the title of a legal owner.

Essentially this decision establishes that mere trespass will not oust the legal owner. Ousting requires acts that are continuous and constant.

Constructive Possession

[21] The concept of constructive possession was described by the Court of Appeal at paras. 93-95 of *MacDonald v. McCormick*, 2009 NSCA 12 as follows:

> 93 In *Mason v. Nova Scotia (Minister of Justice)* (1999), 176 N.S.R. (2d) 321 (C.A.), this court stated:
>
> > [31] In Anger and Honsberger, *Real Property*, 2nd Ed., Oosterhoff and Rayner, 1985, the bases for a claim based on colour of title are correctly set out as follows:
> >
> > > The rule as to constructive possession differs according to whether the claimant has documentary title or colour of title or is a trespasser without colour of title. Where a person having paper title to land occupies part of it, he is regarded in law as being in possession of the whole unless another person is in actual, physical possession of some part to the exclusion of the true owner. To constitute colour of title it is not essential that the title under which the party claims should be a valid one. It is not the instrument which gives the title, but adverse possession under it for the

> requisite period, with colour of title. A claim asserted to property under the provisions of a conveyance, however inadequate to convey the true title to such property, and however incompetent may have been the power of the grantor in such conveyance to pass a title to the subject thereof, is strictly a claim under colour of title, and one which will draw to the possession of the grantee the protection of the *Statute of Limitations*, other requisite of those statutes being complied with.
>
> The person relying upon the doctrine of constructive possession must enter under a real, bona fide belief of title.
>
> ...
>
> A person having clear documentary title may have constructive possession of all land conferred by the title but, if he has not clear documentary title, his possession is limited to such part of the land as is proved to be in his actual possession and in that of those claiming through him.
>
> As a general rule, when a person having colour of title enters in good faith upon land, as where it is proposed to be conveyed to him as purchaser or intending purchaser under what he believes to be good title, he is presumed to enter according to the title, his entry is co-extensive with the supposed title and he has constructive possession of the whole land comprised in the deed. (Underlining mine)

This quoted authority from Anger and Honsberger has not changed: see Anne Warner LaForest, Anger and Honsberger, *Law of Real Property*, 3d ed. (Aurora, Canada Law Book, 2008), page 29.22-23. See as well Donald Lamont, *Lamont on Real Estate Conveyancing*, 2d ed. (Toronto: Thomson Canada, 2008) at p. 6-22 and C.W. MacIntosh, *Nova Scotia Real Property Practice Manual* (Markham: LexisNexis, 2008) at 7-11(4), 7-11(5).

94 Since paper title is an essential element of constructive possession - only a party with paper title to land can claim constructive possession; the constructive possession is limited to the property described in the deed. *Wood v. LeBlanc* (1904), 34 S.C.R. 627 (SCC) at para. 47-51. Here too the respondents' claim would fail because they did not have a paper title.

95 Neither would the respondents be entitled to claim constructive possession of the disputed parcel merely because they believed that their deed encompassed the parcel. The extent of a deed is not altered by the subjective belief of a party: see *Knock, supra*. In *Duggan v. Nova Scotia (Attorney General)* (2004), 222 N.S.R. (2d) 229 (S.C.), the plaintiffs' deed showed a depth of 775 feet, but they claimed they owned land beyond that. Moir, J. found that their claim of constructive possession was limited to the distance shown on their deed. See as

well *R.B. Ferguson Construction Ltd. v. Nova Scotia (Attorney General)* (1989), 91 N.S.R. (2d) 226 (C.A.).

Analysis

[22] To get one's bearings in reviewing the abstracts of title, it is useful to look at Exhibit 4, the plan prepared by James McIntosh.

[23] The inset plan shows many significant boundaries and features referred to in the deeds, and referenced by the testimony of Thomas Cleary as he describes what he believed to be Jeremiah Cleary's lands.

[24] The inset plan shows the location of the Eastern Passage baseline. Malachi Cleary owned land on either side of this baseline. Essentially the homes in which Malachi, Jeremiah, Andrew and their families lived were on the west side of the baseline on the shores of Eastern Passage, arising out of earlier Crown grants made to the west of the baseline. The "woodlots" were located to the east of the Eastern Passage baseline, arising out of later Crown grants. Mr. McIntosh cautions that the grants given on the east side of the baseline do not always match or line up evenly with grants given on the west side of the baseline and the metes or distances along the baseline cannot be assumed to be same, even though they may appear to be even distances on the Crown grant sheet.

[25] The Stillwater Brook is also a significant land mark and is the eastern boundary of the lands claimed by the plaintiff. It is also sometimes referred to as Cow Bay River in early deeds.

[26] In 1913 the railway cut through these lands. It too is a significant land mark as both Andrew and Jeremiah conveyed land to the railway.

[27] The Caldwell Road is also noted on the plan Exhibit 4 and assessment records often describe lands located between the Caldwell Road and the Stillwater Brook. Caldwell Road runs up along De Said Lake, which is to the north of the lands in question.

[28] In 1956 and 1958 another significant landmark was created when Shearwater Airport was developed, through expropriation and subsequent conveyances. Both Jeremiah's and Andrew's families deeded lands to Her Majesty the Queen – to the east of the Eastern Passage baseline, that were a part of their respective woodlots. The establishment of the north south line dividing their properties in the late 1950's at the time of expropriation of the airfields is one clue

to what each of Andrew's and Jeremiah's families understood they owned at that time.

[29] Annie T. Henneberry grandmother of Bryan Naugle and daughter of Andrew Cleary sold a portion of the Andrew Cleary woodlots for the airport (Exhibit 9, Item 15, Bryson abstract, for the respondent).

[30] Mary J. Martin, sole executrix and trustee under the will of Jeremiah Cleary, his daughter, sold a portion of Jeremiah Cleary's woodlot for the airport (Tab C, Item 21 of the Sean Glover abstract, for the plaintiff).

[31] Now shown on Exhibit 4 is the expropriation line running north/south which intersects east/west with the Whitear grant line. This too helps define the location of the woodlots.

[32] Mr. Thomas Cleary also referred to a significant landmark, the Hoffman Farm, located to the east of the Stillwater Brook. He testified that he remembered the farm buildings being just across the brook from the northwest portion shown as Lot 1-B on Exhibit 4.

[33] Mr. Cleary recalled in his testimony that he understood Jeremiah's woodlot to run as far north and east as the Hoffman Farm.

[34] With these landmarks in mind, it is necessary to attempt to overlay the various parcels owned by Andrew and Jeremiah Cleary on the plan Exhibit 4, using deed references and plans available and shown in the abstracts of title.

[35] To begin, we know that Andrew Cleary was left five pieces of land by Malachi in his will, the dwelling Andrew lived in and another property at Eastern Passage by the shore and the Cow Bay Road, not a concern for this quieting of title.

[36] And he left three relevant woodlots to Andrew "my northern wood lots bought by me from Thomas Young, Jacob Horne and Ferguson."

[37] The Bryson abstract and McIntosh report assert these woodlots are respectively the DeYoung (Young) Lot 2-B, Exhibit 4, the Horne Lot 3A, Exhibit 4 and the Farquharson lots (Ferguson) Lot 1-B, Exhibit 4.

[38] We know that Jeremiah Cleary was left four parcels of land through Malachi's will, his dwelling lot at Eastern Passage and another lot west of the

baseline both parcels not the subject of the quieting of title, and also a well-defined woodlot purchased by Malachi from Philip Sheirs (at least or part of the 100 acres Benjamin Whitear grant) and also a lot of land described as follows:

> The lot on the east side of the Cole Harbour Road bounded north by DeYoung and south by Naugle.

[39] It is this last description that is the poorest not having any metes or bounds or any clue as to area of land bequeathed.

[40] Thomas Cleary, a social worker by profession, suggests that DeYoung on the north is a reference to the Forsyth grant line of 1785 shown on Exhibit 4 and says that the land ran east to the Stillwater Brook and abutted the Hoffman farm and south down to the shore road. He testified to his and other heirs use of the lands for hunting, some woodcutting and passage across to go fishing in the Stillwater Brook.

[41] However, on cross-examination Mr. Bryson referred Mr. Cleary to Tab 42 of Exhibit 1, a right-of-way agreement, wherein Thomas Cleary the plaintiff released a right-of-way to L.I. Fredericks Investments Limited (a 15-foot strip of land) previously reserved in favour of Jeremiah Cleary.

[42] L.I. Fredericks Investment Limited had acquired a portion of a 43-acre parcel Jeremiah Cleary sold to his daughter Mary J. Martin by deed dated November 5, 1941 (Exhibit 11).

[43] That description identified land on the eastern side of the said road from Eastern Passage to Cole Harbour south of the lands owned by Edward DeYoung and north of lands owned by William Naugle and west by the Easter Passage baseline.

[44] Surveyor McIntosh believes this to be the fourth lot bequeathed to Jeremiah by Malachi “on the north by DeYoung and south by Naugle” and not therefore lands that are a part of this quieting of title, lands that are outside the boundary of TC-1, 2, 3, and actually located west of the baseline. Mr. McIntosh locates this parcel as HCLRO Plan #24662 shown on Exhibit 4 and also references it on p. 21 of his report.

[45] If one accepts that the fourth lot bequeathed to Jeremiah is not a lot in dispute, part of TC-1, 2, 3, then the only woodlot that Jeremiah would have passed onto his family is the Philip Shiers’ woodlot.

[46] Mr. McIntosh began his Rule 55 report (Exhibit 12) referring to Crown Grant Index Sheets No. 66 and 67 referring to grants to Benjamin Whitear 1786, John Forsythe 1786, Nathan Young 1786, Richard Monday, John Porter and other 1726 and finally the remainder of lands in between granted to Jacob Horne Sr. and 10 others in 1811.

[47] He positioned these grants on a diagram on p. 4 of his report. This shows all the landmarks I have earlier referenced including the Eastern Passage baseline, the Benjamin Whitear grant line and the railway.

[48] Mr. McIntosh proceeds to identify all of the Malachi Cleary woodlots which he lists granted by six deeds and dealt with from pp. 5-13 of his report.

[49] Thomas Cleary testified that in his family there was no mention of his grand uncle Andrew Cleary ever owning woodlots. He also opined that Andrew Cleary had somehow released any interest he may have had in woodlots owned by Jeremiah by the payment of $80 from Jeremiah to Andrew, for which Jeremiah received a release. However, I am fully satisfied that this recognition of a debt owing of $80 and arrangement for payment as per the terms of Malachi's will did not in any way disentitle Andrew, to the five lots of land he was bequeathed.

[50] Clearly, Malachi's will devised three northern woodlots to Andrew, which were deeded on to Annie T. Henneberry by all her brothers and sisters, upon the death of her mother Mary Theresa, wife of Andrew and now vest in Bryan Naugle.

[51] Both Andrew and Jeremiah conveyed land to His Majesty the King for the railway; Jeremiah conveying Lot 53 in 1913 and Andrew conveying Lot 51 in 1914 (McIntosh report Exhibit 12, pp. 21-22). The lands Andrew conveyed are located north of Jeremiah's. (Also, see Book of Survey Plans, Tab 12, filed by the defendant Bryan Naugle.)

[52] Mr. McIntosh also documents the portions of lands of both Andrew and Jeremiah Cleary, sold by their respective daughters for the Shearwater Airport in 1958 and 1961 (Exhibit 12, pp. 24-25 and Exhibit 1, Tab 34, pp. 1-2).

[53] These conveyances are important. Annie T. Henneberry was conveying a portion of Andrew's northern woodlots to the east of the Eastern Passage baseline. This conveyance is the western half of the Lots 1-4 shown as a part of BN on Exhibit 5.

[54] Ms. Kelly challenged Mr. McIntosh on the various assumptions he made in locating the lots at issue, as depicted on Exhibit 4. She mentioned the presence of the name Simeon Dunsworth on the railway plans (Exhibit 1 Tab 34 pp. 1-2). No deeds out of or into Dunsworth could be found. She referred to the possible interest of the Dort estate in lot 1 as shown at p. 28 of the expert report. She referenced a confusion in the length of the eastern boundary of the Otho Hamilton grant (30 or 20 chains) as it might affect the Jacob Horne grant of 1811. She referenced the unknown relationship of Paul Batist DeYoung to Thomas Young, and the issue of Farquharson/Ferguson lot and the fact that certain titles simply disappearing such as Lot 5, the George Hawkins lands.

[55] Mr. McIntosh acknowledged that in fitting this puzzle together there are certain unanswered or unresolved questions due to the deficient descriptions, disappearance of titles long ago, or mere references to a name on a plan never evidenced by a title deed.

[56] But notwithstanding these challenges I accept that Mr. McIntosh was able to locate Andrew Cleary's northern woodlots as he demonstrated in his report and that the Farquharson land was later referred to as Ferguson. The absence of any deeds in the area to any Ferguson supports this change of name.

[57] Frequently Mr. McIntosh demonstrated in his report that having reference to the titles of abutting land owners, he was able to locate each of the woodlots, as he has laid them out on Exhibit 4. In other words, some of the information could be wrong (the metes) but the bounds were right. The original grant lines also factored in.

[58] Mr. McIntosh was confident that for example although Thomas Young was not the same person as Paul Batiste DeYoung, it was the same land.

[59] The reality is there are title flaws, possible missing deeds through the various claims of title but the pieces of land have, I am satisfied been located as depicted on Exhibit 4. In particular, Mr. McIntosh was convincing in demonstrating the original Lots 1-4 of the Jacob Young grant and its later subdivision by various successors in title, now remain as Andrew Cleary's northern woodlots and the Farquharson/Ferguson lot.

[60] I also accept that it is more than likely that the Philip Shiers' lot is the only land that Thomas Cleary could document by deed as forming Jeremiah's wood land, about 100 acres.

[61] However, it is not my task to determine who has perfect paper title and recognize ownership on that basis.

[62] Thomas Cleary and the heirs of Jeremiah Cleary lay claim to 300 acres of land as shown on the Parker plan (Exhibit 3). Abutting owners have not intervened in the proceeding except for Bryan Naugle who has in my view succeeded in demonstrating that he has clear paper title to all the woodlots formerly owned by Andrew Cleary, minus the lands acquired by the Federal Crown for the railway and the Shearwater Airport extension.

[63] Therefore, but for the parcel of land shown as Block BN on Exhibit 4, Thomas Cleary on behalf of the heirs of the Estate of Jeremiah Cleary will be granted a certificate of title to the balance of the lands, as he was demonstrated by paper title and acts of possession that he has extinguished all other potential or actual competing claims. However, I do not find his acts of possession sufficient to extinguish the interest of Bryan Naugle in Block BN.

[64] With respect to the title of Bryan Naugle to the block referred to as BN on Exhibit 4, comprised of the various woodlots of Andrew Cleary and the Farquharson/Ferguson lot, he will be granted a certificate of title to the whole of Block BN, also extinguishing all other potential or actual competing claims, within. I do so being convinced on all the evidence before me that the lands or woodlands of Jeremiah Cleary lay to the south of those woodlots of Andrew Cleary.

[65] As the result is almost even as between the two claimants, I would be inclined to allow each party to bear their own costs, but I will hear submission on costs if the parties do not come to an agreement.

Robertson, J.