SUPREME COURT OF NOVA SCOTIA

Citation: Cleary v. Nova Scotia (Attorney General), 2015 NSSC 90

Date: 20150324
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.

Bryan Naugle

Defendant

Decision

Judge:	The Honourable Justice Campbell
Heard:	March 3, 4 and 9, 2015 in Halifax, Nova Scotia
Written Decision:	March 24, 2015

Counsel:	Michelle Kelly and Justin Morrison for the Plaintiff Allen Fownes for the Defendant (Naugle) Mark Rieksts for the Defendant (AGNS) watching brief

Campbell, J.

[1] Jerimiah Cleary of Eastern Passage died on August 10th, 1951. People knew him as Jerry Cleary. His will signed in 1944, perhaps less than optimistically, described him as a "gentleman, having passed the allotted span of life, and yet being of sound mind, memory and understanding, and knowing the frailty of mortal life". In that will he provided that his woodlands "situated near Cole Harbour" would be sold and the proceeds divided equally among his six children. It's now over 60 years later. Mr. Cleary's wishes are yet to be fulfilled. In that sense at least, some degree of pessimism might have been justified.

Thomas G. Cleary, as trustee of the Estate of Jerimiah Cleary

[2] The plaintiff in this case is his grandson, Thomas G. Cleary, the son of Simon Cleary. Tom Cleary is 81 years old. He's now the trustee of his grandfather's estate. He was appointed about 40 years ago. He's the third trustee in the succession since Jerimiah Cleary's death in 1951.

[3] His claim under the *Quieting of Titles Act*[1] is to about 300 acres of land in Eastern Passage not far from the Shearwater Airport. It's based on the land being the woodlands of his grandfather Jerimiah Cleary. His will gave it to Tom Cleary's father, and his siblings. Tom Cleary says that his grandfather got it from his father, Tom Cleary's great grandfather, Malachi Cleary through his will from 1898. And that's where things get complicated.

[4] Tom Cleary has always lived in the area. He left home in 1958, went to university and became a social worker. He had a long career that included setting up the social services department for the City of Dartmouth and working in administration of social services for Halifax County. He dabbled in land development for about 10 years in the 1970's then went back to social work with the City of Dartmouth. He retired in 1996 as an administrator of Ocean View Manor. For all of his 81 years he has been close to the lands that he claims are those of his grandfather and great grandfather.

[5] Tom Cleary was about 17 when his grandfather died. He recalled as a young boy hunting on the land. He remembered going with his uncle Angus MacCormack to cut wood. They used to haul it out with a horse. Like a lot of people around the

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[1] R.S.N.S. ,1989, c. 382 as amended

Passage, he used to fish in the Stillwater that is said to form part of the boundary of the land. The family used to cut their own Christmas trees there. He and his father Simon Cleary even did some prospecting for gold and quartz. He was able to locate on a survey map where he undertook those activities. In the 1940's in rural Nova Scotia, it seems people didn't put much stock in exact boundaries and exclusive use of land, particularly this kind of land. A lot of people hunted and fished in that area and no one seemed to care much about it. It was always just wooded land that was never used for agriculture and had nothing much by way of lumber on it either. Evidently there wasn't much by way of gold or quartz either. No one was excluded from the land because there was just no reason to do that kind of thing. It wouldn't have been very neighbourly and it didn't appear as though anyone was diminishing the value of the land or exerting any kind of claim over it. The use of the land wasn't intensive but there was no intensive use that anyone could make of it.

[6] Tom Cleary understood where the land was though. His grandfather's land, as he knew it, was to the north of the old family homestead near where he and his grandfather had lived. He could cross some of Jerry Cleary's land, Jerry's pasture, then follow the train tracks or walk along the boundary of land expropriated for the airport. On the other side the land ran up long the Stillwater River, or the

Stillwater, and bounded on what he knew to be the Hoffman farm. Both Tom Cleary and another long-time resident, "Mossy" Edwards placed the Hoffman farm on the north side of the Stillwater close to what is now the boundary with Clayton Developments.

[7] So anyway, the land just sat there, as land is inclined to do. From 1951 until 1975 not much was done to resolve the issue of ownership and sale. There was no road access to it and it seems no one thought it was worth very much anyway as a landlocked piece of woodland. Tom Cleary at least knew it was his grandfather's land and that was that.

[8] In the 1970's Tom Cleary became the trustee. His aunt, Jerry's daughter Mary Martin was the original executrix of the will until she died in 1971. She was replaced by Marcella Currie. Marcella Currie, along with all of the beneficiaries of the estate of Jerimiah Cleary then appointed Tom Cleary as trustee in 1975. He seemed like a reasonable replacement. There doesn't appear to have been a chorus of others who wanted to administer what was already a 30 year old estate owning a piece of inaccessible land. At that time Tom Cleary had become involved in land development on his own. He started researching the title. He said that he always had a good idea where the land was anyway. He satisfied himself based on his title search that he was right. From the 1970's he was paying property taxes with

respect to about 2/3's of the land and as of 2010 succeeded in getting the other tax bill directed to him as well.

[9] In 1980 he filed a statutory declaration at the Registry of Deeds confirming that the lands involved in this action had been owned by Jerimiah Cleary and his family for many years. He said that his father, Simon Cleary had told him that they had always paid taxes on it. He then estimated the area to be about 200 acres but it is evident that he was speaking about the entire parcel running up as far north as the "lands of Simeon Dunsworth". He noted that he was not aware of any competing claims to the lands. That's not surprising because it seems that at that time, no one else was aware of any claims that they might have. Tom Cleary confirmed that with another statutory declaration in 1983.

[10] He tried to negotiate the purchase of some land from the Department of National Defence which owns the airport, or from the railroad but had no success in getting any road access. He advertised the land for sale in the Chronicle Herald. Tom Cleary took his responsibility under his grandfather's will seriously. He just didn't get very far.

[11] One of the abutting landowners is Clayton Developments Ltd. There have been discussions with them about a potential purchase of the land. It could be

added to their parcel. Of course they only want it if they can get good title to it. That's given rise to the quieting of titles action and the potential to see light at the end of a 60 year long tunnel.

Bryan Naugle

[12] And that's where Bryan Naugle comes in. He's a 45 year old contractor who does heavy civil contracting on roads and municipal services. He too has lived his entire adult life in and around Eastern Passage. The land in question really wasn't an issue for him growing up. As he quite frankly noted, as a teenager he never much cared who owned what land. He described going to the land in question, and like a lot of people fishing. He knew the family had land in the general area but he had no idea where it was located.

[13] After he saw a notice in the paper about the quieting of titles action, he obtained a deed from his great uncle Leon Henneberry. Bryan Naugle said that the transfer had been in the works for a while before that and there is no reason at all to doubt his word on that. That deed conveys Leon Henneberry's ownership of some land in Eastern Passage which he says is part of the lands claimed by Tom Cleary in this quieting of titles matter. So, until this all came about Tom Cleary had not the slightest idea that anyone else was claiming what he believed to be his

grandfather's land and Bryan Naugle, for his part had not the slightest idea that the land between the Shearwater airport and Stillwater had any connection to him or to his family. Neither it seems did Leon Henneberry.

[14] Leon Henneberry appears to have led an interesting life. He and his family are from Eastern Passage. He left to join the army and served in the Korean War in the early 1950's. He was a paratrooper. He later joined the Foreign Service and was posted to various overseas locations. When he would return to Eastern Passage every few years, Bryan Naugle recalls seeing him. He would have been a memorable character. Mr. Henneberry now lives in Ontario and quite wisely spends the winter in Mexico. He was not called to give evidence. I have made no inferences from that.

[15] It is apparent though that he had no close association with the land. He didn't really know where it was. There is evidence that as late as 1998 he asked the tax assessment office if they could locate the land for him. There is nothing to suggest that he ever got a satisfactory or any answer for that matter. He seemed to know only that it was in the area of Cole Harbour and the Cow Bay River. There is no evidence of his or of his family making any use of the land other than the inference that can be made that like many people they would have gone to the

Stillwater to fish. There is no evidence to suggest that when they did that they were of the belief that they were travelling over land that they owned.

[16] Tom Cleary gave evidence that was both credible and reliable that he believed from the time he was a child that the land involved in this application was the land of his grandfather and before that of his great-grandfather. He made use of it in a way that was about as intensive as use could be made of land that was not accessible by road and not exactly resource rich. He recalled the extent of the land running up to the Hoffman farm which he and Mossy Edwards placed up toward the current boundary with Clayton Developments on the other side of the Stillwater River. Bryan Naugle's evidence was also credible and reliable. But he didn't assert any kind of personal connection to the land. His claim is to legal title to a portion of that land. That title is based on the wording of wills and deeds. And he says, that if he has formal legal title, the kinds of use made by Tom Cleary over the last 60 years, wouldn't be enough to trump or to oust that title.

[17] And he's right. If he has good legal title to the land, Tom Cleary's occasional use of it, even coupled with his fervent belief that it was his grandfather's land wouldn't change that. The issue of course is whether either Bryan Naugle, or Tom Cleary as trustee of his grandfather's estate, has title to the land.

The Title Claims

[18] The land that Bryan Naulge says is legally his is the land contained in a deed he got from Leon Henneberry in January 2013.

[19] That's the same land that Leon Henneberry got from his mother Annie Henneberry 30 years before in 1983. Leon Henneberry got the deed but wasn't sure where the land was. That's hardly surprising give the legal description. It makes reference to lands "lately in occupation by James M. Farquharson" and commences at the corner of lands that Mr. Farquharson sold to Malachi Cleary and Andrew Cleary. Malachi Cleary died in the 19th century. The deed also references the "certain woodlots known as the northern woodlots" bought by the same Malachi Cleary from Thomas Young, Jacob Horne and Fergusson. As of 1983, when Leon Henneberry got the deed from his mother, there might have been some understanding of where those lands were, but there's no evidence of that.

[20] Annie Henneberry got the land in 1936 from the Estate of Andrew Cleary. Andrew Cleary was the brother of Jerimiah "Jerry" Cleary, our Tom Cleary's grandfather. So, the land all comes back to being Cleary land, at some point. Mr. Naugle says that the title to his land goes back to one brother, Andrew Cleary and Tom Cleary says that the title goes back to the other brother, his grandfather, Jerry

Cleary. The confusion goes back to before Tom Cleary's grandfather Jerimiah Cleary, and his brother Andrew to the days of Tom Cleary's great grandfather, Malachi Cleary.

[21] The scope of the dispute at least can be fairly easily set out. The land that Tom Cleary is claiming as the trustee under Jerry Cleary's will is about 300 acres. Stillwater Brook forms one boundary, and the lands of the Department of National Defence (Shearwater) another. The two other boundaries are agreed amongst the various land abutters and there is no dispute with them about those boundaries. They are the lands of Clayton Developments on one side, toward the northwest and the lands of MacDonald and of Trider to the southeast. Those abutting landowners have been given notice and no one has raised an issue about the boundaries of the 300 acre parcel of land. The only issue is whether Bryan Naugle owns a portion of the lands claimed, being about 96 acres of the total 300 acre area. Significantly though, the area claimed by Bryan Naugle is the part that abuts the lands of Clayton Developments. If he owns that section, Tom Cleary's property remains landlocked. If Bryan Naugle owns it, he has the land that might just be of interest to the developer.

[22] Once again, the claims come down to the wording of a 125 year old will. Malachi Cleary's will provided that he gave his "northern woodlots" bought from

Thomas Young, Jacob Horne and Ferguson to his son Andrew, Jerimiah's brother. If the portion in question is part of the lands that Andrew got from his father Malachi Cleary, the title would follow through to Bryan Naugle. They would be part of Andrew Cleary's estate.

[23] Malachi Cleary also gave to his son Jerimiah Cleary four separate lots, one to the west of the land given to Andrew, the "house lot"; land to the east of the Cole Harbour Road bounded to the north by the land owned by DeYoung; the wood lot he got form Philip Shiers; and another lot to the east of the Cole Harbour Road, extending down to the shore. The land here is not the house lot, the lot east of the Cole Harbour Road, or the lot running down to the shore. It was argued on behalf of Tom Cleary that the land in dispute here is the land that Malachi Cleary got from Shiers, in 1874.

[24] So, a title dispute in 2015 stands to be resolved by determining whether in 1898, when he died, the land was part of Malachi Cleary's northern woodlots that he purchased from Young, Horne and Fergusson or was the land the Malachi Cleary got from Shiers and gave to Jerimiah Cleary.

[25] It has been generally acknowledged that locating the properties on a current map is extraordinarily difficult. The deeds do not reference lengths, bearings or

places of beginning. They don't even orient the land to transitory landmarks like rocks, fences or blazed trees. They refer only to the people from whom the land was purchased and to the abutting and now long gone neighbours. It can't even be resolved by going back to original land grants and moving forward along the chain of title. Actually locating the land that Malachi Cleary intended for each of his two sons requires the making of a number of inferences. The strength of the legal title depends on the soundness of the inferences.

The Surveyors

[26] Two expert witnesses provided reports. They are both surveyors. Garry Parker, of Longstaff-Parker, plotted out the lands as claimed by Tom Cleary. He set out three separate lots which he designated as Lots TC-1, TC-2 and TC-3. There isn't much issue about TC-2 and TC-3. Mr. Naugle doesn't make any claim to those and no one else seems to dispute them either.

[27] Mr. Parker traced the title from the will of Malachi Cleary but he could not say with any certainty that the land was indeed the Shiers lot that Malachi Cleary willed to Jerimiah Cleary. As Mr. Parker notes 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 Jerimiah 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.
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> In my opinion the documentary evidence related to the "woodlands" mentioned in the will of Jerimiah Cleary do not provide information required to retrace the boundaries of that woodland. I concluded that a plan prepared as outlined in "Plan Preparation" above should be prepared for use to (sic) in attempting to settle the extent of title of the lands.

[28] That's a pretty fair assessment of the situation. Mr. Parker's report in other words, makes no representation and expresses no opinion as to the ownership of the lands. He can make plan setting out the Tom Cleary's claim, but that's about it. Malachi Cleary gave the Shiers woodlot to his son Jerimiah who willed it to his children. Tom Cleary's claim is that the disputed lands are part of that Shiers lot from 1874. There is no evidence of Malachi Cleary or Jerimiah Cleary ever having disposed of land identified as being the lot that was acquired in 1874 from Shiers.

[29] The report of H. James McIntosh of Servant, Dunbrack, McKenzie and MacDonald Ltd. is rather less tentative. Mr. McIntosh expresses the opinion that at least some of the land claimed by Mr. Naugle within the larger area claimed by Mr. Cleary can indeed be traced back to the will of Malachi Cleary. In his opinion Lots 1B, 2B and 3A on his plan are the northern wood lots that Malachi Cleary bought from Young, Horne and Fergusson and gave in his will to his son Andrew.

[30] Mr. McIntosh, like Mr. Parker, was entirely forthright in his evidence. When he didn't know something, he was quite prepared to say that. His conclusions are based on some title search inferences. He, like Mr. Parker, had to operate on the assumption that through the period from the 1800's and into the last century, farmers and fisherman passed land from one to another sometimes without registering the deed and sometimes without even bothering to have a deed at all.

[31] Mr. McIntosh attempted to place the Shiers lot from an 1874 deed granting land from Philip Shiers to Malachi Cleary. That would be the "Shiers" lot that Malachi Cleary gives to his son Jerimiah Cleary in his will. That deed references land as being abutted by lands of Dr. Reid Prevost and Edmund Fraser. There is no record at all of land having been owned by either of those two people anywhere in the area. That makes it harder to exclude the inference that the land here is indeed the Shiers lot.

[32] Mr. McIntosh's report suggests that Bryan Naugle would have title to the lots that he identified as having come from Fergusson or Farquharson. It is not unreasonable to infer that the names might have been confused. I accept that as a reasonable inference even though the 1936 deed into Annie Henneberry makes reference to James M. Farquharson, by his full name and also makes reference to "Ferguson", which might suggest that they were two different people. That

however was at the very least 40 years after the fact, so that the knowledge of who those people were might well have been lost by that time.

[33] But there is another inference that is less sound. Thomas Horne granted land to James Farquharson in 1869. James M. Farquharson conveyed land to Malachi Cleary and his son Andrew Cleary in 1878, 9 years later. The legal description is different, which would suggest that the land that Andrew Cleary got, was really not all of what his father got from James Farquharson. Mr. McIntosh attributed that to a clerical error. While that is possible of course, the same assumption could be used to explain any discrepancy that was required to make the pieces fit. There are of course times when other evidence makes it reasonable to assume that a clerical error has been made. It is not safe to conclude that a clerical error has been made simply because it points to a convenient solution to the puzzle.

[34] With regard to another lot, Mr. McIntosh had to make perhaps an even more emphatic logical stretch. Malachi Cleary's will references land that he got from Thomas Young. In order to make the pieces fit, Mr. McIntosh had to assume that Thomas Young and Paul Baptiste DeYoung were indeed the same person. While 19th century naming conventions might have permitted some degree of flexibility the difference is too great to permit the inference to made that the reference is to the same person. There are a number of references throughout the title searches to

Paul Baptiste DeYoung and nothing to suggest that he was also known as Thomas Young.

[35] While it is conceivable that the lots plotted by Mr. McIntosh as being the current locations of the Horne, Fergusson /Farquharson and Young properties acquired by Malachi Cleary, and given to his son Andrew Cleary it is very far from certain. Those properties simply cannot be located on the ground with a reasonable degree of confidence.

[36] That uncertainty is compounded by another piece of evidence, of which Mr. McIntosh was not aware at the time his report was done. It does not arise from deeds, grants or wills but does come from other recorded information.

[37] Andrew Cleary signed a will in June 1924. His will was located at the registry of probate. In that will he gives everything to his "dear wife Mary Theresa". It is from his estate, through his wife Mary Theresa and later his son Thomas W. Cleary, that Annie Henneberry, Leon Henneberry and now Bryan Naugle would trace their ownership. The inventory of Andrew Cleary's estate at the time of his death is signed by two appraisers, Edward DeYoung and Simon Gregoire and by his son and executor Thomas W. Cleary. It establishes that he had personal property at the time of his death being household furniture, a horse, a cow

and farming equipment. Each of the items of personal property was assessed value. His real estate is noted as consisting of a house and lot valued at $75 and a "field lot" valued at $200.

[38] It is significant that there is no mention at all of any woodlot or woodlots or wooded land. The land in question is now wooded. In 1889 when Malachi Cleary signed his will, it was apparently a woodlot. There is no evidence that it was ever under cultivation. Everything "on the ground" suggests that it was always wooded land. Bryan Naugle's claim to the land is traced back to the land that Andrew Cleary devised to his wife, under his will. That estate included no mention at all of any woodland or woodlots. It is reasonable to infer that if the land was wooded in 1889 and there is no evidence of it having been a field within living memory that when Andrew Cleary died, sometime after 1924, the land in question was wooded and not the field lot referenced in the inventory of his estate. It is also reasonable to infer that if the horse and the cow were each individually accounted for, it is unlikely that Andrew Cleary died possessed of woodlots, which escaped the notice of the appraisers.

[39] Yet, in 1936, when Annie Henneberry got land from the estate, the legal description appears to be a recitation of the much older descriptions. It does not reference the current use or condition of the lands. The deed referring woodlots is

very difficult to square with the inventory that confirms that at the time of his death Andrew Cleary had no woodlots to leave to anyone. Once again, it could be argued that there was an error, as indeed there could have been. But, clerical errors are not a particularly firm foundation for a claim to legal title.

[40] To summarize then, Tom Cleary traces his ownership of the land to the will of his father Jerry Cleary and to his grandfather Malachi Cleary as the lot that Malachi Cleary got from Philip Shiers. Locating that land on a plan, as Mr. Parker has noted, would be a speculative exercise. The land that Malachi Cleary got from Philip Shiers is somewhere. Wherever it is there is no record of Malachi Cleary of Jerimiah Cleary having sold it, using that description, to anyone. Tom Cleary appears to have a good claim to legal title, as trustee of his grandfather's estate. The problem is locating it. But, even with that uncertainty, Tom Cleary's claim, for the most part, is not disputed. Of the 300 acre parcel, no one is contesting his title to about 200 acres of it. While it is virtually impossible, using the old deeds to locate the Shiers lot on the ground, Tom Cleary's claim to 200 acres is, at this point, better than anyone else's.

[41] As for the other 100 acres, Bryan Naugle's claim rests on it being the lands of Andrew Cleary. That assertion relies on the acceptance of some title searching

inferences that are a stretch beyond reasonable and also require some explanation for the absence of woodlots in Andrew Cleary's estate inventory.

[42] No one's legal paper title is particularly good, if that title has to be associated with land that is locatable and identifiable on a map. Good legal "paper" title to a piece of land that is somewhere, but no one knows where, is I suppose, only as valuable as the paper itself.

[43] Reference was made to the *Marketable Titles Act.* [2] Under that act is a person has marketable title if he has a good and sufficient chain of title going back 40 years, beginning with an instrument other than a will. Mr. Naugle argues that he has a deed into Annie Henneberry from 1936. All Mr. Cleary has is Jerimiah Cleary's will. He has marketable title. Tom Cleary doesn't. The problem with that logic is that we wouldn't even be resorting to the *Marketable Titles Act* if it were reasonably clear that the land mentioned in the 1936 deed is the land that is involved with this case. The legislation requires that a person have a good and sufficient title going back 40 years. It doesn't help much if it's a good and sufficient chain of title to a piece of land that might be somewhere else.

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[2] S.N.S. 1996-1996, c. 9

[44] So, as far as legal title is concerned, it only matters if you can locate in real life what you have legal title to. Despite efforts to make the pieces fit, the puzzle can be solved only with the application of a bit too much blunt force. It's not just a matter using the imagination to fill in missing pieces. It amounts to forcing pieces together in the face of evidence that says they just don't fit.

The Quieting of Titles Act

[45] The *Quieting of Titles Act* provides a way by which title conundrums can be resolved. The fact that the paper legal title is unclear is precisely why the act applies. Its purpose is to provide a way to deal with title problems.[3] Justice Moir in *Frank Georges Island Investments v. Nova Scotia (Attorney General*)[4] set out the historical context of the legislation. He noted that it resulted from the work of the uniformity commissioners in the late 19th century. It responded to the familiar situation in Nova Scotia where the conventional land titles system had broken down with respect to some pieces of land. Owners of land or the location of land just couldn't be ascertained with certainty. The scheme, as Justice Moir describes it, provides a remedy to successful claimants by way of a certificate of title. That

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[3] *Baker v. Nova Scotia (Attorney General)* NSCA

[4] 2004 NSSC 136

certificate extinguishes potential or actual competing claims and gives the plaintiff clear title.

[46] It doesn't enable a court to "create" title. [5] It does allow the court to grant a certificate that takes into account some things other than paper title found in deeds duly registered at the Registry of Deeds. The court can consider principles like possessory title in granting that certificate.

[47] That involves a party following the legislated requirements with respect to notice to other potentially interested parties. That process is particularly important. It narrows the dispute and the parties to it. The issue is about a well-defined piece of land and the claimants to it. The process winnows out anyone else. The issue can then be about, not whether a person has a strong or weak legal claim to the land but, whose claim is best amongst those involved in the action. Chief Justice MacKeigan in *Ferguson (R.B.) Construction Ltd. v. Ormiston* [6] said that since the enactment of the legislation in 1961 legal title could be "more conveniently"

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[5] *Brill v. Nova Scotia (Attorney General)*, 2010 NSCA 69, *Dawn v. Nova Scotia (Attorney General)* 2014 NSSC 48

[6] [1989] N.S.J. No.190, 91 N.S.R. (2d) 226 (C.A.)

established and declared by an action in which all those interested in land become joined in a contest to determine who has the best title.

[48] Here, for example, each of the abutting landowners have been notified and have been properly served with documents setting out the nature of Tom Cleary's claim to the land in question. The Attorney General has been served. Notice of the application was published. Once that was done, the scope of the dispute can be defined. The Attorney General has taken no issue. There has been no indication that the plaintiff's Statement of Claim, title abstract, plans and affidavits are not in compliance with the requirements of the *Quieting of Titles Act*.

[49] None of the abutting landowners have taken issue. Bryan Naugle has taken issue, with respect to about 100 acres. That means the dispute is between Tom Cleary, as trustee of the estate of Jerimiah Cleary and Bryan Naugle. It is with respect only to the land claimed by Bryan Naugle. And, it is resolved by determining who, of the two of them, has the better claim.

[50] As Justice Fichaud noted in *Brill,* "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 hierarchical, not absolute."[7]

[51] Even if there had been no dispute Tom Cleary would be required to meet the civil burden of proof to establish the claim. He would have to show some legal title or a possessory interest in the land.

[52] The starting point is whether either of the parties has a good or even a superior chain of legal title. If one were the legal owner the other would have to have evidence of adverse possession to displace that interest. There a two good chains of title tracing back to the lands of Malachi Cleary. The problem is that neither of them can be reliably located on the ground.

[53] As between the two legal titles then, neither is much better than the other. Tom Cleary has the Shiers grant from 1874 into his great grandfather Malachi Cleary. There is uncertainty as to exactly where it is located. Bryan Naugle has the woodlots of Andrew Cleary. Again, the location of those lots is far from clear. While there is nothing to suggest that the lands involved are <u>not</u> the Shiers lot, there is some documentary evidence to suggest that they are <u>not</u> the Andrew Cleary

[7] Para. 38

woodlots. The probate records indicate that when Andrew Cleary died in 1924, he had no woodlots. All his estate had to convey to Annie Henneberry was a house lot and a field. That is a weakness in Bryan Naugle's chain of title unlike any of the weaknesses in Tom Cleary's chain. In that sense, Tom Cleary's legal claim in somewhat stronger.

[54] There is another practical difference in the two claims. Tom Cleary believed that his grandfather's land ran from the Shearwater airport over to the Stillwater River and up to the northwest as far as the Hoffman farm. He and Mossy Edwards both place that farm on the other side of the river but up close to the current line with Clayton Developments. Whether he had clear paper title to the land or not, Tom Cleary has been operating on the assumption since he was a teenager that it was his grandfather's land. He made at least some use of it and perhaps given the kind of land that it is, the only real use that could be made of it. Since the 1970's he has been acting on the belief that it belonged to the estate. He has negotiated with the abutting landowners and publically advertised the land for sale.

[55] Leon Henneberry at that time was trying to figure out where his land was. There was no evidence of use or possession by Leon Henneberry of Annie Henneberry and beyond the absence of such evidence there is evidence that Leon Henneberry didn't even know where it was.

[56] Tom Cleary believed, in good faith and with some reason, that the land belonged to his grandfather and as was part of his estate. He and his family used it to the extent that anyone would use a landlocked piece of wooded land, then has been trying to sell it since the 1970's. His claim would not be based on adverse possession because his legal title to the land is at least as good as that of the only other person claiming an interest in it.

[57] The law of course presumes that the legal owner has possession of the property. That simply means that a person with legal title to the property possesses it, even if he or she has in fact never seen it. To oust that legal owner another person has to establish actual adverse occupation that is "*nec vi, nec clam, nec precario"* or exclusive, continuous, open and notorious for a period of 20 years.[8] The conduct of the person claiming the land in that way has to be that of an owner which would exclude the true owner from the land. Both parties here claim to be the true owner.

[58] Where the property is woodland, as it is here, the kind of possession required should be considered practically having regard to the purpose of the legislation.

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[8] It really doesn't matter if they do it in English or in Latin but, "*Quidquid Latine dictum sit, altum videtur"*.

The issue is contextual, so that what might give rise to a possessory interest for one piece of land might not for another. The use that can be made of a woodlot would be quite different from the normal use that an owner might make of a cultivated field. It might be said as well that all woodlots are not the same. A woodlot that contains commercially valuable or even commercial useable wood might be different from a woodlot that just happens to have mostly small trees of various kinds growing on it. A woodlot that is accessible by road might be different from one that is landlocked and can only be accessed by going over someone else's land.

[59] It is significant here that this dispute arises in the context of a quieting of titles. Notice has been given so that Tom Cleary, as the plaintiff, has to make his case against Bryan Naugle, not against the world. He has to establish not that he has a valid legal title to the land, or that he has established a possessory interest sufficient to oust a true owner. No one else has come forward. Tom Cleary has to show that his claim to the disputed 100 acre portion, as trustee, is just better than Bryan Naugle's claim. That's all.

[60] Here, Tom Cleary has a deed that he believes establishes ownership over the entire 300 acres. With respect at last to 200 acres of it, no one disputes that. As for that 100 acres, his legal title is no worse and perhaps just a bit better than that of Bryan Naugle.

[61] Tom Cleary, in his capacity as the trustee of the estate of Jerimiah Cleary has something more. The family made use of the land in the way that an owner of that kind of land would use it. They did not use it as people who believed they were using someone else's land but as people making use of their own albeit rather useless land. It was landlocked woodland, not suitable for much other than hunting, fishing, occasional woodcutting, and very occasional prospecting. The family knew where it was paid taxes on it and used it. As limited as that use was, even for the kind of land that it was and is, it was more intensive use than was made of the land by the only other claimant and his predecessors in title.

[62] This is not an action by Tom Cleary to extinguish the legal title of Bryan Naugle based on adverse possession. It is a contest between Tom Cleary as trustee of Jerry Cleary's estate and Bryan Naugle to determine who has the better claim to 100 or so acres. Mr. Cleary, as the trustee of his grandfather's estate has a far better claim based on his possession and dealing with the land than does Bryan Naugle.

[63] I find that Thomas Cleary, in his capacity as trustee of the estate of Jerimiah Cleary has a better claim than Bryan Naugle to all of the 300 acres property as set out in the plan prepared Garry Parker. A certificate of title should issue accordingly.

[64] Costs are awarded to the plaintiff. If the parties cannot agree on the amount of costs they may make written submissions with 30 days of this decision.

J.