



**IN THE COURT OF APPEAL
OF NEWFOUNDLAND AND LABRADOR**

Citation: *Eddy v. Newfoundland and Labrador (Fisheries,
Forestry and Agriculture)*, 2023 NLCA 37

Date: December 6, 2023

Docket Number: 202301H0015

BETWEEN:

ALLISTER RANDOLPH EDDY and
CHRISTINE EDDY

APPELLANTS

AND:

HIS MAJESTY THE KING IN RIGHT OF
NEWFOUNDLAND AND LABRADOR, as
represented by the Minister of Fisheries, Forestry
and Agriculture

RESPONDENT

Coram: D.E. Fry C.J.N.L., W.H. Goodridge and D.M. Boone JJ.A.

Court Appealed From: Supreme Court of Newfoundland and Labrador,
General Division 202006G0129
(2023 NLSC 19)

Appeal Heard: October 25, 2023

Judgment Rendered: December 6, 2023

Reasons for Judgment by: D.M. Boone J.A.

Concurred in by: D.E. Fry C.J.N.L. and W.H. Goodridge J.A.

Counsel for the Appellants: Gregory J. French

Counsel for the Respondent: David L. Hearn

Authorities Cited:

CASES CITED: *Wood v. LeBlanc*, [1904] 34 S.C.R. 627; *O'Connor v. Snow* (1916), [1912-20] Nfld. L.R. 203 (Nfld. SC (TD)); *Ezbeidy v. Phalen* (1957), 11 D.L.R. (2d) 660 (NS SC (TD)); *Lessee of Cunard v. Irvine* (1853), 2 N.S.R. 31 (NS SC (AD)); *Harris v. Mudie* (1882), 7 O.A.R. 414 (Ont. CA); *A'Court v. Cross* (1825), 3 Bing. 329 (Ct. Com. Pl.), 130 E.R. 540; *McLeod v. McRae* (1918), 43 D.L.R. 350 (Ont. SC (AD)); *Gough v. Newfoundland and Labrador*, 2006 NLCA 3, 253 Nfld. & P.E.I.R. 1; *R. v. Ring (C.)*, 2013 NLCA 66, 344 Nfld. & P.E.I.R. 23; *Wickham's Estate v. Estates of Wickham and Wickham (No. 1)* (1977), 17 Nfld. & P.E.I.R. 452 (Nfld. SC (TD)).

STATUTES CONSIDERED: *Quieting of Titles Act*, RSNL 1990, c. Q-3, section 13; *Lands Act*, SNL 1991, c. 36, sections 36(1), 36(2).

OTHER: Bill 21, *The Crown Lands (Amendment) Act*, 1976, 1st Sess., 37th Leg., 24-25 Eliz. II, Newfoundland, 1976 (assented to on 11 June 1976), SN 1975-76, No. 20.

BOONE J.A.:

OVERVIEW

[1] This appeal requires the Court to consider the law regarding the acquisition of Crown land through possession. In particular, the issue is whether the doctrine of colour of title is a recognized mode to dispossess the Crown and acquire an ownership interest in ungranted Crown land.

[2] In the context of this matter, colour of title refers to the Appellants' claim of title, based on the deed they hold to the land, and a genuine belief that they own the land described in that deed, even though the chain of title is defective because a large portion of the land was never granted from the Crown (*Wood v. LeBlanc*, [1904] 34 S.C.R. 627).

[3] All land in this province is presumptively owned by the Crown and all legal title to land derives from the Crown. Legal title to land requires, with some recognized exceptions, a chain of title originating in the Crown.

[4] Legal title carries with it the right to exclude all others from the land, and to eject anybody who enters on the land without permission. A legal title holder need not do anything with the land to maintain ownership; however, a failure to eject anybody who enters on the land without permission, could eventually allow that ‘squatter’ to acquire ownership. The common law recognizes ownership of land acquired by long possession of sufficient character. The shorthand, but not precisely accurate, description of this concept is the law of adverse possession. I will continue to use that term in this decision for the sake of convenience. I do note that the law is now clear that the requisite possession need not be adverse in the sense of being directly opposed to another.

[5] The nature and quality of the adverse possession that is sufficient to dispossess a legal title holder and acquire ownership is defined by settled law. It must be open, continuous, notorious and exclusive.

[6] Historically, the Crown could be dispossessed by adverse possession. In 1976 the provincial legislature enacted legislation that changed the law of adverse possession as it applied, and still applies, against the Crown (Bill 21, *The Crown Lands (Amendment) Act*, 1976, 1st Sess., 37th Leg., 24-25 Eliz. II, Newfoundland, 1976 (assented to on 11 June 1976), SN 1975-76, No. 20). The 1976 amendments reduced the period of possession required, as against the Crown, from the 60-year period required under Newfoundland and Labrador common law (based on English limitations statutes). The 1976 amendments also provided that no person could dispossess the Crown and acquire an ownership interest in Crown land by activity occurring on or after January 1, 1977, but the Crown could be dispossessed by adverse possession that was continuous throughout the 20-year period before January 1, 1977.

[7] The law of adverse possession also includes the doctrine of colour of title. In simplest terms, that doctrine deems the person claiming ownership under colour of title to be in constructive possession of all the land described in the deed or instrument, even though he or she is only in actual possession of part of the land.

[8] The question of law raised on this appeal is whether the doctrine of colour of title applied in favour of a person who claimed to have dispossessed the Crown during that 20-year period before 1977. In other words, if a person thought that they had acquired land that turned out to include Crown land, could they possess only a portion of it and yet dispossess the Crown over the entire lot?

[9] The applications judge answered that question of law in the negative. I agree with his conclusion. Neither precedent, nor policy, nor the principles of statutory interpretation support the proposition that the doctrine of colour of title applies as a mode of acquiring ownership of Crown land.

BACKGROUND

[10] The land is located in the Town of George's Brook-Milton. Only part of the land was the subject of a Crown grant; the Appellants' title to, and ownership of, that part is not in issue. The Appellants claim the rest of the property, on which their home is located, by application of the law of adverse possession.

[11] The Appellants claim ownership of the ungranted portion through the doctrine of colour of title. The detailed basis for this claim is set out fully in the decision of the applications judge (*Eddy v. Newfoundland and Labrador*, 2023 NLSC 19 ("Decision")). For the purposes of this appeal, it is sufficient to note two matters of fact: first, that the entire land that the Appellants purchased, consisting of both the granted and ungranted portions, had been the subject of three previous registered deeds, in 1947, 1970, and 1986; and second, that one of the Appellants' predecessors constructed a house on the granted portion in 1946.

[12] The 1986 transfer was to Bradley Chatman and by 2015 he and his partner had constructed a large house on the ungranted portion of land (Decision, at paras. 22, 25-26). The Chatmans commenced the application under the *Quieting of Titles Act*, RSNL 1990, c. Q-3, for a declaration of their ownership of, and a certificate of title to, the ungranted portion of the land after they had listed the property for sale (Decision, at para. 27). The Appellants purchased the property from the Chatmans in August 2022, and were substituted as nominal parties to the application with the consent of the Crown (Decision, at paras. 29-30).

[13] The Appellants conceded that there was no evidence that their predecessors had ever engaged in acts of actual possession on the ungranted portion before or during the 20 years prior to 1977. The ungranted portion of the land remained forested until the 1980's and then the Appellants' predecessor used it for agricultural purposes.

[14] The Appellants argue that they and their predecessors had established and then maintained possessory title to the whole property through the doctrine of colour of title, because the deeds purported to convey the whole property by description and

the house on the granted portion in 1946 remained continuously occupied from the time it was built until 1977.

[15] The Crown objected to the Appellants' application for title to the ungranted land on the ground that the doctrine of colour of title did not apply as against the Crown. The Crown also argued that, in any event, the Appellants' predecessors did not enter onto the land under colour of title but, in fact, before title had been conveyed - the house was built on the land in 1946 and the first operative deed was not executed until 1947.

The Decision of the Applications Judge

[16] The applications judge dismissed the Appellants' application. He decided as a point of law that constructive possession under colour of title was insufficient to dispossess the Crown and determined that he should dismiss the application on that basis. Nevertheless, he went on to deal in the alternative with the facts and decided that even if constructive possession under colour of title was sufficient to dispossess the Crown, the Appellants had not established a claim under the doctrine. The party who originally 'possessed' the ungranted land (back in 1946) did not enter the land in good faith under deed, which is a necessary precondition to the application of the doctrine. The applications judge stated:

[79] ... As Charles Pelley was in possession well before March 4, 1947, it must follow that he did not enter into possession under the 1947 deed. There is no evidence that when Charles Pelley entered into possession of part of the ungranted lands in 1946 he did so under another paper title honestly believing he was entitled to the entire property referred to in the paper writing. The doctrine of colour of title could therefore not apply to put him in constructive possession of the subject land.

The Grounds of Appeal

[17] The Appellants say that the applications judge erred in law in deciding that a person could not rely on the doctrine of colour of title to dispossess the Crown, and by holding that colour of title did not arise on the facts of this case.

ISSUE

[18] This appeal can be entirely resolved on the issue presented by the Appellants' first ground of appeal: can a person acquire ownership of ungranted Crown land

through application of the doctrine of colour of title during the 20-year period before January 1, 1977?

POSITION OF THE APPELLANTS

[19] The Appellants' argument may be put in the following manner. The 1976 amendments recognized that the Crown could be dispossessed of its land through application of the then current law of adverse possession. That law included the doctrine of colour of title. The Crown is bound by the common law and there is an interpretative presumption that a statute does not alter the common law unless it explicitly says that it does. Therefore, the Crown could be dispossessed, and possessory title established, through the doctrine of colour of title.

POSITION OF THE RESPONDENT

[20] The Crown argued, first, that the applications judge was correct in law in deciding that the doctrine of colour of title did not apply as against the Crown. Second, the Crown characterized the alternative finding of the applications judge as a correct application of the law to the facts. These facts, says the Crown, demonstrated that the Appellants' predecessor did not enter the land in good faith under deed, which is a necessary precondition to the application of the doctrine.

ANALYSIS

[21] I approach the resolution of this appeal in the following manner. First, because it is necessary for an understanding of the Appellants' arguments, I will set out the wording of the governing legislation. Second, I will consider whether any controlling or persuasive precedent supports the Appellants' argument. Third, I will review the policy rationale underpinning the doctrine of colour of title to determine if, in the absence of such precedent, there is nevertheless good reason to extend the doctrine of colour of title so that it applied against the Crown in the relevant period. Finally, I will come back to the legislation and consider whether it should be interpreted as importing the doctrine of colour of title as a mode of dispossessing the Crown and obtaining ownership.

Legislation

[22] The Appellants' application was for a declaration of ownership and certificate of title under the *Quieting of Titles Act*, at section 13:

13. ... (2) Where the judge considers that the applicant is entitled to the land, he or she may grant a certificate to that effect or grant a conveyance, and that certificate or conveyance will apply against all persons except the Crown.

(3) A certificate or conveyance granted under subsection (2) may be made against the Crown where the judge is satisfied, following proper service of the application by the applicant on the Minister of Environment and Lands and after affording the Crown an opportunity of making representation and of being heard,

...

(b) that subsection 36(2) of the *Lands Act* applies to the lands affected by the application.

[23] The *Lands Act*, SNL 1991, c. 36, includes the current version of the legislative amendments first adopted in 1976:

36. (1) Notwithstanding a law or practice to the contrary, no period of possession of Crown lands after December 31, 1976, counts for the purpose of conferring upon a person an interest in the lands so possessed unless the period is permitted to count as against the Crown for the constitution of that interest under or by virtue of an Act of the province, or as a condition of a grant, lease, licence or other document validly made or issued by or on behalf of the Crown under that Act.

(2) The period of possession of Crown lands prior to January 1, 1977, which would, by the application of the law pertaining to the acquisition of an interest in land based upon open, notorious and exclusive possession existing prior to the enactment of this section, have been necessary to confer upon a person an interest in that land is considered to be, and always to have been, 20 continuous years immediately prior to January 1, 1977.

No Precedent Before 1977 Applied the Doctrine of Colour of Title to Crown Lands

[24] The law in this province has long recognized the doctrine of colour of title (*O'Connor v. Snow* (1916), [1912-20] Nfld. L.R. 203, (Nfld. SC (TD))).

[25] However, neither party directed the Court to any pre-1977 authority from this province or any Canadian jurisdiction that considered the application of the doctrine of colour of title to Crown lands. Moreover, review of the historical cases demonstrates that the doctrine has been applied as between private individuals.

[26] In many cases, the lack of precedent would be a neutral factor in deciding a legal point. However, in this case it tells against the Appellants because their

argument depends on the position that the common law of adverse possession that was imported into the legislation in 1976 included the application of the doctrine of colour of title against the Crown. The lack of precedent supporting the position for which they advocated detracts from its validity.

The Rationale for the Doctrine of Colour of Title Does Not Support its Extension to This Case

[27] Under the doctrine of colour of title, a person who enters land under colour of title can acquire (after sufficient time) ownership of the whole of the land described in a deed, even though they are in actual possession of only a part of it. In contrast, a person who enters and possesses land without colour of title will only acquire title to the part in their actual possession.

[28] The doctrine has been accepted for such a long time that one must go back to significantly older cases in order to discern the rationale that supports it.

[29] In *Ezbeidy v. Phalen* (1957), 11 D.L.R. (2d) 660 (NS SC (TD)), relying on the decision in *Lessee of Cunard v. Irvine* (1853), 2 N.S.R. 31 (NS SC (AD)), MacQuarrie J. described the rationale in this way, at page 666:

Where the contest is between the true owner on the one hand and a person having colour title on the other hand, that is, a person having a claim which is good on the face of it, such as a prior unregistered deed, that person has a much lighter burden to discharge than a mere squatter, because he always has the mental attitude, or is presumed to have it, which is a necessary ingredient to possession. He does not have to prove that discontinuous acts are not simply disjointed acts of trespass as a squatter must show, and in this case possession of a part is constructive possession of all the land comprised or covered by his colour of title: *cf. Lessee of Cunard v. Irvine* (1853), 2 N.S.R. 31.

[30] Another basis for the doctrine was described by Burton J.A. of the Ontario Court of Appeal in *Harris v. Mudie* (1882), 7 O.A.R. 414 (Ont. CA), at pages 427-428:

His entry, although not knowingly or wilfully so, is an invasion of the rights of the true owner, and it strikes one as somewhat contrary to principle that this wrongful possession should be extended by construction to the metes and bounds of the defective paper title to the prejudice of him who has the legal title. But it has no doubt been treated as settled by a long current of authorities as the general rule, that when a party having colour of title enters in good faith upon the land professed to be conveyed, he is presumed to enter according to his title, and thereby gains a constructive possession of the whole land embraced in his

deed, and the possession so taken may ripen into a title so as to bar the entry of the owner to the whole after the period fixed by the statute. In such a case one of two innocent persons has to suffer, and the entry and possession of a part with acts of ownership of a character to indicate that the claim extended or might extend to the limits of the deed, might well in such case be regarded as notice to the true owner, and the deed be admitted in evidence to define the precise limits of the claim and possession.

[31] The reason why the law gave the benefit of constructive possession to a person who took possession with colour of title was therefore twofold. First, as that person purchased in good faith from someone they believed to be the owner they could themselves act as an owner would. They would not perceive themselves as required to do anything on the land in order to maintain title and a right to possess it.

[32] Second, where someone entered into possession under a defective title, then the interests of two people who had done no wrong were potentially harmed. Faced with this dilemma, the law chose the interest of the person in recent possession rather than the “true” owner, perhaps in recognition that “[l]ong dormant claims have often more of cruelty than of justice in them”, per Best C.J. in *A’Court v. Cross* (1825), 3 Bing. 329 (Ct. Com. Pl.), at pages 332-333, 130 E.R. 540, at page 541.

[33] There may have been situations where both rationales could have supported the application of the doctrine as against the Crown prior to 1977. For instance, a purchaser from a grantee under a Crown grant that was later found defective could perhaps have been recognized as being able to assert the doctrine against a later Crown claim to the land.

[34] However, neither rationale would have supported application of the doctrine to a person who purchased vacant land from someone whose claim was based on possession and who, as in this case, had not already dispossessed the Crown (according to the law then prevailing) by the time of the conveyance. Where the vendor did not have any semblance of legal title or any obvious possession of vacant land, the purchaser could not have had a *bona fide* belief that the vendor had title to sell and that the Crown had no interest in it. As Burton J.A. put it in *Harris*, at page 428, the claim of colour of title is based on a *bona fide* belief, and “ought not lightly to be extended to a purchaser from a squatter or other person having no title”.

The 1976 Amendments Did Not Import the Doctrine of Colour of Title

[35] The Appellants argue that the 1976 amendments incorporated the entire law of adverse possession, including the doctrine of colour of title. The validity of that

proposition requires that the words used in the 1976 amendments that imported “the law pertaining to the acquisition of an interest in land based upon open, notorious and exclusive possession” necessarily included the doctrine of colour of title. The Appellants’ argument is not supported by a plain reading of the statute.

[36] Before 1977 the law did not treat the doctrine of colour of title as a mode of open, notorious and exclusive possession. Application of the doctrine did indeed require possession with those qualities over the occupied portion of the claimed land and allowed for the claim of possessory title based on constructive possession of the unoccupied land. However, constructive possession was not a species of open, notorious and exclusive possession; it was a substitute for it.

[37] The distinction was noted by the Appellate Division of the Supreme Court of Ontario in *McLeod v. McRae* (1918), 43 D.L.R. 350 (Ont. SC (AD)), at page 353:

... This is not a case where acts of ownership may be relied upon to give a title by possession, as where colour of title goes with possession. In the case of a man receiving, in a *bonâ fide* transaction, the conveyance of land by metes and bounds, the acts of ownership upon the land have relation to the whole, and may support a claim by possession under a defective title, where the same acts of ownership without colour of title would afford very slight, if any, evidence of possession. What in the one case may well be regarded as evidence of acts of ownership and possession of the whole would in the other be simply isolated acts of trespass.

In the present case, the defendant has no colour of title; it is a case where he must shew “open, obvious, exclusive, and continuous possession,” to make title against the true owner.

[38] Both parties referred the Court to our previous decisions in *Gough v. Newfoundland and Labrador*, 2006 NLCA 3, 253 Nfld. & P.E.I.R. 1, and *R. v. Ring (C.)*, 2013 NLCA 66, 344 Nfld. & P.E.I.R. 23. Neither of those decisions considered the doctrine of colour of title. *Gough* involved a claim for ownership of Crown land by a different form of constructive possession. *Ring* considered the question of whether the 20-year period of possession required for adverse possession against the Crown needed to be the 20-year period immediately before the 1976 amendments or could it be any 20-year period prior to 1977.

[39] In *Gough*, this Court considered the interpretation of the 1976 amendments in a case where the trial judge had granted the Respondents a certificate of title under the *Quieting of Titles Act* to land adjacent to other land that the Respondents owned, which the Respondents had used for a long time as a woodlot in conjunction with the

use of their own land. At issue in *Gough* was a form of constructive possession, different from colour of title, that had been previously recognized in this jurisdiction in *Wickham's Estate v. Estates of Wickham and Wickham (No. 1)* (1977), 17 Nfld. & P.E.I.R. 452 (Nfld. SC (TD)). In that case, the Court decided that acts that fell short of being acts of possession could nevertheless result in the recognition of possessory title over land (a woodlot) used to support activities on adjacent land.

[40] This Court in *Gough* rejected the argument that such a form of constructive or extended possession applied to Crown land, deciding at paragraph 41 that: "Assuming, without deciding, that such an approach may be taken in any case where a judge considers, pursuant to subsection 13(2) of the *Quieting of Titles Act*, that '... the applicant is entitled to the land ...', for the reasons explained above it clearly cannot be applied against the Crown." That conclusion was based a plain reading of the 1976 amendments, which clearly said that a person could only acquire ownership of Crown lands by actual, and not constructive, possession:

[29] On the plain meaning of the words employed, the only conclusion to which I can come is that the legislature is authorizing the issuing of a certificate against the Crown where the land that is the subject matter of the application is found to be in the "open, notorious and exclusive" possession of the claimant, in accordance with the common law relating to acquisition of title by such possession, for the required period prior to the date after which such possession is no longer permitted to be counted. Nothing else in either of the statutes satisfies me that the legislature intended a certificate to be issued for Crown land in respect of which such possession was not shown, but which was entered upon occasionally in order to take and use resources from the land. On the contrary, the use of the phrase "possession of Crown lands", at the beginning of subsection 36(2), coupled with the phrase "that land" when identifying the land in respect of which an interest may be conferred, would lead me to conclude that the legislature intended actual possession of the character described, to the exclusion of occasional usage ancillary to actual possession of adjacent land, in order for it to be considered to be Crown land in respect of which an interest may have been conferred.

(Underlining in original.)

[41] The Appellants urged the Court to depart from the interpretative approach which they say informed the position in *Gough* and that was explicitly stated by this Court in *Ring*, in which this Court found (speaking of the legislative purpose behind the 1976 amendments):

[16] In addition, the legislative objective of section 36 may be gleaned from the two changes made to section 134B in 1976. These were to abolish thenceforth adverse possession as against the Crown and to change the required period of open, notorious, exclusive and continuous possession from sixty to twenty years. The first of the changes,

abolishing claims where possession occurred after December 31, 1976, indicates an intention by the legislature to significantly limit future claims by preventing an adverse claim from succeeding based on possession occurring after the critical date. The second change, reduction from sixty to twenty years of possession, must be interpreted in this context. It could not reasonably be inferred that the legislature intended to make establishing adverse possession as against the Crown easier. That is the result that would follow if the claimant had only to demonstrate adverse possession for any continuous twenty rather than sixty years prior to January 1, 1977. The only reasonable interpretation consistent with the legislative intention restricting future adverse possession claims is that the twenty-year period means those years immediately preceding January 1, 1977.

[42] The Appellants, relying on statements made in the House of Assembly when the amendments were adopted, argue that the intention of the 1976 amendments was to facilitate claims of adverse possession and to provide certainty through the recognition of title to lands where people had lived for some time. This statutory purpose, the Appellants argue, supports their position that the doctrine of colour of title was intended to have been imported from the common law into the statute. However, even if the Court accepted the Appellants' position regarding the purpose of the 1976 amendments, that would not require a departure from the approach in *Ring*. The point made in *Ring* was that the legislature intended to significantly limit future claims by preventing an adverse claim from succeeding based on possession occurring after the critical date, and to reduce the time period (before 1977) required to establish adverse possession against the Crown, but otherwise not to change the requirements to establish adverse possession.

[43] Moreover, and in any event, the decision in *Gough* was based on a plain reading of an unambiguous statute. In describing the quality of possession required under the statute, the words used are clear: only actual possession of Crown land could result in dispossession of the Crown. An assertion of colour of title depends on an exception to the requirement to show open, notorious and exclusive possession; colour of title is not, and was not, a mode of such possession.

[44] Consequently, even if I had been persuaded that the common law had previously allowed for application of the doctrine of colour of title against the Crown in a case such as this, the 1976 amendments did not include it as a means of acquiring an interest in Crown lands.

[45] Both parties in this matter noted that the application of the current law regarding acquisition of title to Crown lands sometimes leads to seemingly unfair results. They also advise that there are efforts within Government, encouraged by interested members of the Bar and the public, to bring forth legislative changes to

alleviate that situation. In this case, however, the Court is restricted to the interpretation of the language of the current statute.

DISPOSITION

[46] The doctrine of colour of title is not a recognized mode to dispossess the Crown and acquire an ownership interest in ungranted Crown lands. I therefore find no error in the determination by the applications judge that proof of constructive possession during the requisite 20-year period before 1977 was insufficient to demonstrate the acquisition of an interest in Crown land.

[47] There is no need to consider the alternative finding of the applications judge that, on the facts of this matter, the Appellants did not demonstrate an entitlement to a certificate of title based on the doctrine of colour of title.

[48] I would dismiss the appeal, with costs to the Crown on Column 3.

D.M. Boone J.A.

I Concur: _____
D.E. Fry C.J.N.L.

I Concur: _____
W.H. Goodridge J.A.