

**SUPREME COURT OF NOVA SCOTIA**  
**Citation:** *Parker v Chambers*, 2010 NSSC 90

**Date:** 20100308  
**Docket:** Ken No 314384  
**Registry:** Kentville

**Between:**

*Joyce Parker*

Plaintiff

v.

*George Chambers and Laura Reynolds Chambers*

Defendants

**Judge:** The Honourable Justice Gregory M. Warner

**Heard:** By Written Submissions dated February 25, 2010 and March 4, 2010

**Decisions on Costs:** March 8, 2010

**Counsel:** **Andrew Montgomery**, counsel for the applicant  
**Kelly Richards-Aubé**, counsel for the respondent

**By the Court:**

[1] This is a costs decision respecting a boundary line dispute heard as an Application in Court on February 11, 2010.

[2] The evidence included 18 affidavits (or supplementary affidavits), including affidavits of surveyors for each party. The applicant and her surveyor, Curtis Kimball, were cross-examined. The respondents, Laura Reynolds Chambers and George Chambers, were cross-examined, along with Ms. Reynolds-Chambers' sister, Annie Reynolds. The hearing scheduled for more than one day was concluded, including oral submissions and an oral decision, in one day.

[3] The proceeding involved the location of the boundary line between the home property of the respondents and a residential property owned by the applicant in rural Hants County, Nova Scotia. While the boundary line extends from the front of adjoining properties on Highway 236 for a distance of about 2,500 feet to Highway 215, the primary dispute related to the first 450 feet, which part of the line extends along the driveway to the respondents' home and then to an old well, approximately 100 feet southwest of that residence (called "*front line*"). The portion of the disputed line to the rear of the residences, extending from the old well to Highway 215, is called "*back line*."

[4] In the litigation, the applicant relied upon a survey plan by Curtis Kimball and old deed descriptions that depicted the *front line* as beginning at Highway 236 and running up the middle of the driveway to the respondents' home, then deviating slightly left about five feet from, and around, the home to a placed survey marker behind, but near, the old well located about 100 feet southwest of the respondents' home. The applicant's survey then depicts the *back line* as running in a generally northwesterly direction, with many turns, along old wire fences to Highway 215.

[5] The respondents relied on a survey plan by Alan Cyr depicting only the *front line* (he swore that there was insufficient evidence to place the *back line*). They claimed that the *front line* followed the remains of an old wire fence running from Highway 236 to the same point that Curtis Kimball identified as the end of the *front line* near the old well.

[6] The starting point of the *front line* as claimed by each party were about 25 feet apart. As noted, the applicant's line ran up the middle of the driveway, past the respondents' home by about 5 feet, and "bowed" southwesterly to a survey marker placed by Mr. Kimball near the respondent's well. The respondents' line followed the remains of the old cattle fence to the same survey marker. The two lines were furthest apart (about 30 feet apart) adjacent to the respondents' home.

[7] I rejected the applicant's claim that placed the *front line* in accord with the old legal description (which ran down the middle of the respondents' driveway). Irrespective of whether the Kimball plan reflected the old deed description, I accepted the extensive evidence, in affidavits and aerial photographs, as establishing, on a balance of probabilities, that the respondents had openly, notoriously, continuously and adversely possessed their driveway and some of the land adjacent to that driveway for more than twenty years. I fixed the location of the *front line* as closely as possible to the evidence of that possession, as a straight line that begins at a survey marker placed by Mr.

Kimball on the edge of Highway 236 approximately ten feet south from the centre of the respondents' driveway and runs a distance of approximately 450 feet to the survey marker Kimball placed near, and to the southwest of, the respondents' old well.

[8] It was not possible, or, if possible, practicable, to identify precisely or exactly the limit of the adverse possession. The straight line drawn between the two survey markers is as close as it is possible or practical to identify or represent the extent of the adverse possession.

[9] The *front line*, between Highway 236 and the well, was the focus of the affidavits and of the presentations of the parties; the location of the *back line* took second place.

[10] In my oral decision at the end of the hearing, I stated that neither party had been successful with respect to their claim for the location of the *front line* - that success was almost equally divided between the parties.

[11] Respecting the *back line*, the primary evidence relied upon was contained in affidavits with regards to the use of a pathway running from the parties' respective residences, to other residences on (or accessed from) Highway 215, together with the aerial photographs that went as far back as the 1930's. Annie Reynolds was cross-examined on her affidavit evidence about the location of the pathway in relation to fences and claims of possession. Mr. Kimball's survey depicts the *back line* as following old wire fences, which enclosed an area from which one of the applicant's predecessors had on one occasion removed top soil. The Kimball survey appears to have depicted as part of the applicant's land a field to the north of where the Court concluded the pathway running from the rear of the residences to Highway 215 was located.

[12] Initially the Court hesitated to find sufficient evidence to conclude positively where the *back line* was situated. However, upon further reflection on the contents of the affidavits, aerial photographs and the evidence of Annie Reynolds, I concluded that the pathway to Highway 215 was the location of the *back line*, and that pathway did not follow the old wire fence shown on the plan of Curtis Kimball and did not include the field from which one of the applicant's predecessors had once removed top soil.

[13] Recognizing that the primary efforts and hearing time were focussed on the location of the *front line*, and not the *back line*, and based upon the divided success of the parties respecting the location of the *front line*, together with my concern about the likely small value of the lands in dispute as compared to the cost of litigation, I advised counsel that I was inclined not to award costs to either party unless either party had made a formal offer to settle that was as favourable to the other party as the Court's eventual decision.

[14] Counsel advised that settlement offers had been exchanged, and the respondents asked for permission to make written submissions on costs based on those offers.

[15] Written submissions, enclosing the offers exchanged, have now been filed.

[16] On January 13, 2010, the applicant made a non-monetary offer to settle with the following key provisions:

- a) To relocate the *front line*, as shown on the Curtis Kimball survey plan, that ran down the middle of the driveway by ten feet to the southwest, and adjacent to the respondents' home, to a point that was 20 feet southwest from the home.
- b) To extinguish whatever right of way over the respondent's driveway and whatever right of access to water from the respondents' well that the applicant had.
- c) To settle costs by agreement, or failing agreement by having them determined by a judge.
- d) To require the new boundary line to be surveyed at the respondent's expense.
- e) Implicitly, to retain the *back line* (from the area of the old well to Highway 215) as shown on the Kimball survey plan.

[17] The respondents countered on January 20, 2010 with an offer containing the following key provisions:

- a) The respondents accept the applicant's position with respect to the location of the *back line*, in exchange for the applicant accepting the respondents' position (as shown on the Cyr survey plan) with respect to the location of the *front line*.
- b) The extinguishment of the right of way over the respondents' driveway and right of access to water from the old well on the respondents' land.
- c) The parties share the cost of a boundary line agreement and its registration.
- d) The respondents pay the applicant \$1,250.00.

[18] Both offers provided for the exchange of Quit Claim Deeds.

[19] My observations with respect to the offers are:

- a) The applicant's offer of compromise with respect to the hotly contested *front line* is not as good as, but is much closer to the Court's eventual decision than, the respondent's offer.
- b) The respondents' offer to concede the applicant's claim respecting the *back line* (which apparently involves seven to eight acres of land) was more favourable to the applicant than the Court's decision on the *back line*.

c) The applicant sought that the costs of a new survey be the respondents' responsibility; the respondents were silent on this but offered to pay costs of \$1,250.00 and share in the cost of a boundary line agreement and its registration.

[20] My conclusion is that, balancing the closeness of the applicant's offer to settle the *front line* to the Court's eventual decision on the location of the *front line* with the respondents' offer to concede the *back line* (in respect of which I found for the respondents) and pay some costs, neither party's offer to settle was as favourable to the other as the decision. The offers do not change the basic analysis made in the oral decision: that the likely value of the land in dispute was less than the legal and other costs associated with this litigation, and that both parties were partly successful; therefore, each should bear their own costs.

[21] The Court orders that each party pay their own costs.

J.