

3, 1938

In the Privy Council.

No. 34 of 1937.

**ON APPEAL FROM THE SUPREME COURT OF
CANADA.**

BETWEEN

HIS MAJESTY THE KING, REPRESENTED BY THE ATTORNEY
GENERAL OF CANADA - - - - (Respondent) Appellant

AND

HENRI JALBERT - - - - (Suppliant) Respondent

AND

THE ATTORNEY GENERAL FOR THE PROVINCE OF
QUEBEC, ACTING FOR HIS MAJESTY THE KING IN HIS
RIGHT OF THE PROVINCE OF QUEBEC - (Intervenant) Respondent

AND BETWEEN

THE ATTORNEY GENERAL FOR THE PROVINCE OF
QUEBEC, ACTING FOR HIS MAJESTY THE KING IN HIS
RIGHT OF THE PROVINCE OF QUEBEC - (Intervenant) Appellant

AND

HIS MAJESTY THE KING, REPRESENTED BY THE ATTORNEY
GENERAL OF CANADA - - - - (Respondent) Respondent

AND

HENRI JALBERT - - - - (Suppliant) Respondent.

(Consolidated Appeals.)

**CASE FOR THE APPELLANT
(HIS MAJESTY THE KING REPRESENTED BY THE
ATTORNEY-GENERAL OF CANADA).**

1. This appeal is brought by special leave of His Majesty in Council from a Judgment of the Supreme Court of Canada, dated the 2nd February 1937, allowing the Respondent Jalbert's appeal from a judgment of the Exchequer Court of Canada, dated the 12th June 1935, which had dismissed a Petition of Right presented by Jalbert and the Intervention of the Respondent the Attorney General for the Province of Quebec, with costs. The Judgment of the Supreme Court, while allowing Jalbert's appeal,

RECORD.

Vol. 2, p. 2.
Vol. 1, pp. 240-267.

RECORD. adjudged that there should be no order with respect to the intervention of the Attorney General for the Province of Quebec. This order is the subject of the second of the above mentioned appeals, which have been consolidated.

2. This appeal raised substantially the following issues :

Whether in 1867 at the time the British North America Act came into force there was a public harbour at Chicoutimi, a town lying at the head of the Saguenay River, Province of Quebec, and if so whether such public harbour included within its limits a beach lot situated on the foreshore (between high and low water marks) which His Majesty in right of the Province of Quebec purported to grant to Jalbert by Letters Patent in 1907. 10

3. The Chicoutimi Harbour Commission which was incorporated by the Act 16-17 George V, Canada 1926, chapter 6, to manage the Harbour of Chicoutimi, acting as statutory agent or trustee for the Dominion of Canada, under the powers of its incorporating Act, made, during the years 1929 and 1930, extensive improvements to the Harbour of Chicoutimi, and for such purpose constructed new wharves, sheds and embankments. These improvements involved the occupation and raising the level of the greater portion of the beach lot claimed by Jalbert (hereinafter called "the beach lot"). 20

Vol. 1,
pp. 2-5.

4. In December 1932 Jalbert filed a Petition of Right alleging ownership of the beach lot under title granted in 1907 by the Letters Patent and claimed damages in the amount of \$43,125 with interest, for deprivation of the beach lot, the value of a wharf built thereon which was rendered useless by reason of the filling and loss of access to the Saguenay River.

Vol. 1,
pp. 6-7.

5. The Appellant delivered a Defence contesting Jalbert's claim and contending that the beach lot formed part of a public harbour in 1867 which passed to the Dominion of Canada the 1st July 1867, under the provisions of Section 108 of the British North America Act. Other matters were put forward in the Defence but are not material for the purposes of this appeal. 30

Vol. 1,
pp. 8-9.

6. The Intervenant put in an Intervention upholding the validity of the Letters Patent granted in 1907 and alleging the beach lot formed part of the property of the Province of Quebec at the date of the Letters Patent, since, he said there was not in 1867 any public harbour at the spot.

7. Section 108 of the British North America Act enacts that :

" The public works and property of each province enumerated in the Third Schedule to this Act, shall be the property of Canada "

The Third Schedule reads in part :

" Provincial public works and property to be the property of Canada." 40

* * * * *

" 2. Public harbours."

8. Section 91 of the British North America Act provides that the Parliament of Canada shall have exclusive legislative authority with reference to the following subjects, amongst others, navigation and shipping. (Head 10.)

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9. The hearing in the Exchequer Court took place before Mr. Justice Angers, sitting at Chicoutimi, on the 16th October 1934 and following days. The evidence on matters relevant to the issue of this appeal was partly written and partly oral: it is reviewed with great care and detail by the learned judge in his Judgment and the following is a summary of the
10 main points upon which there is in our submission no conflict of evidence.

10. Chicoutimi is situate on the Saguenay River in the Province of Quebec, about 75 miles from the junction of that river with the St. Lawrence River. By water, it is about 240 miles from Quebec. It was marked as a Trading Post in an Admiralty Chart of the Saguenay River dated 1830. It appears to have become a village in the eighteen-forties, and by a Statute of Province of Canada passed in 1863 the village of Chicoutimi was detached from the Township of Chicoutimi to which it belonged and was erected as a district municipality. According to the preamble of that Statute it had then upwards of 125 houses and a population of over 800 persons.

Album,
p. 10.

20 11. It was early a centre of the timber business established on the Saguenay River by a Mr. Price. Before 1867 there were three wharves at Chicoutimi, the first (or Easternmost) being about 2 miles distant from the Westernmost, and all on the South side of the river. Each was a wooden wharf situate at the mouth of a tributary of the Saguenay.

Vol 1,
p. 128.

12. The first and last, situate respectively at the mouths of the Rivière du Moulin and Chicoutimi River, were built by or passed into the hands of the Price family. They had sawmills attached to them and a shop. From these wharves timber was exported not only to Quebec and the United States but also to Europe and South America. The ocean-going boats
30 came up the river and lay near the mouth of the Chicoutimi River or the Rivière du Moulin or lower down: the timber was loaded into them off smaller flat-bottomed boats plying from the wharves.

Album,
pp. 3, 11-12,
13, 14-17.

13. The wharf between belonged to a Johnny Guay and was at the mouth of the Rivière au Rat. It was about a mile and a half from the Rivière du Moulin and half a mile from the Bassin, as the mouth of the Chicoutimi River was called. The beach lot in question lay about 300 feet to the West of the mouth of the Rivière au Rat. Johnny Guay had a shop attached to his wharf and two schooners plying to and from Quebec. His wharf seems to have been open to general use by the public. Ocean-going
40 ships, taking timber from his wharf, would lie opposite the Bassin, the Rivière au Rat and lower down the Saguenay River.

Vol. 1,
p. 114.
Vol. 1,
pp. 146, 150,
154-157, 170.
Vol. 1,
pp. 128, 140.

14. People wishing to land at Chicoutimi from rowing boats or canoes landed where it suited them along the shore. In addition to the wharves, boats were sometimes unloaded at a spot between the Rivière du Moulin and the Rivière au Rat which is near where the first Government wharf was

Vol. 1,
pp. 147-
151, 160.
Vol. 1,
p. 151.

RECORD. constructed between 1873 and 1875. One witness remembered seeing a boat
 Vol. 1, beached and unloaded opposite the house of a Meron Tremblay, which was
 p. 128. situate between the beach lot and the Bassin and about 3 arpents from
 Rivière au Rat.

Vol. 1, 15. As early as 1865 there was a Sub-Collector of Customs at Chicoutimi,
 p. 125. on the establishment of the Customs Authorities of the Port of Quebec.
 He used to "clear" the outgoing boats. Also, there was a steam-boat
 Vol. 1, service up the Saguenay River from Quebec to Chicoutimi, run by the
 pp. 215-216. Compagnie de Navigation à Vapeur du St. Laurent. Starting in 1840,
 the service had worked up to 54 trips made in the year 1867.

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16. In addition to documentary evidence afforded by public reports,
 maps and a history, the learned Judge heard the evidence of 9 witnesses
 (8 for the Appellant and 1 for the Intervenant) of ages ranging from 79 to
 95 years as to the conditions ruling at Chicoutimi prior to 1867.

17. On 12th June 1935 the learned Judge gave judgment dismissing
 the Petition of Right and the Intervention, with costs. After reviewing
 the authorities on the meaning to be attributed to the words "public
 harbour" in the British North America Act and concluding, it is submitted
 quite correctly, that a public harbour for this purpose is a harbour forming
 at the date of Confederation part of the works or public property of a
 province to which the public had access and which the public in fact used
 as such, but that it is not necessary to the existence of a public harbour
 that public money should have been spent on making or improving it,
 the learned Judge reviewed in great detail the evidence before him on the
 question of fact whether Chicoutimi was a public harbour in 1867. The
 onus was on the Appellant, he said, to show that the place where the new
 wharves had been built was part of a public harbour at the date of Con-
 federation. He finally arrived at the conclusion that, taking the whole
 of the evidence together, Chicoutimi was in 1867 a public harbour within
 the meaning of the Third Schedule of the British North America Act,
 and that the site of the Appellant's new wharf, being an integral part of
 Chicoutimi harbour, had belonged to the Appellant since that year.

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18. Jalbert and the Intervenant appealed to the Supreme Court of
 Canada.

19. The proceedings before the Supreme Court of Canada were divided
 into two parts. The Court first heard the parties on the question whether
 there was a public Harbour at Chicoutimi in 1867, and, if so, whether it
 included within its limits the beach lot in question.

20. On May 27, 1936, the Court gave judgment in favour of Jalbert on
 these points and allowed the appeal. The Court then ordered a further
 hearing for the determination of the damages.

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Vol. 2, 21. The Reasons for judgment were given by Davis, J., and were
 pp. 56-59. concurred in by the Chief Justice Duff and Rinfret, Cannon, Crocket, Kerwin
 and Hudson, JJ.

22. Davis, J., stated at the outset :

10 “ It is inexpedient to make general observations that may prejudice questions which may arise and come before us on other appeals, by any attempt to define strictly what sort of locality by its natural formation or constructed works may properly be regarded as susceptible for use as a potential shelter for ships. It is obvious that there must be some physical characteristic distinguishing the location of a harbour from a place used merely for purposes of navigation. The mere fact that there are wharves and commercial activity along an open river cannot in itself constitute great stretches of the river, a harbour. The provisions of the British North America Act dealing with harbours cannot have been intended to include within the expression “ Harbours ” every little indentation or bay along the shores of all the inland lakes and rivers as well as along the sea coast and the shores of the Great Lakes where private owners had erected a wharf to which ships came to load or unload goods for commercial purposes.”

23. The learned Judge concluded this part of his judgment as follows :

20 “ Now having regard to the natural formation of the river in this vicinity, can we say there was a single harbour—from La Riviere du Moulin up to the Basin (a distance of some two miles) including the localities at the mouth of La Riviere du Moulin and at Rat River and at the Basin? Without laying down any criterion or test applicable to all cases I think we may safely say upon the evidence in this case that there is no solid ground for judicially finding that the small piece of land with which we are concerned in this appeal was within any harbour.”

30 “ It is unnecessary in that view to consider whether there was any ‘ public ’ harbour within the meaning to be attributed to that term in the British North America Act . . . and we may conclude that the beach lot in question became vested at Confederation in the Province of Quebec and that the Province had the right to convey it to the Appellant as it did in 1907. The Appellant is therefore entitled to compensation in respect of the taking of the beach lot by the Dominion for the purpose of its public works.”

24. By the judgment of the Supreme Court, dated February 2nd, 1937, Vol. 2, after a second hearing limited, as stated above, to the question of damage, p. 2. it was declared in part :

40 “ that the appeal of suppliant Jalbert is allowed and the judgment appealed from set aside. Unless expropriation proceedings are commenced within one month, judgment shall be entered declaring the rights of the suppliant and ordering new trial in the Exchequer Court, limited to the ascertainment of the damages or compensation.

“ . . . no order should be made with respect to the intervention and appeal of the Province of Quebec.”

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25. It is respectfully submitted that this judgment is against the weight of evidence and is wrong; that the true view is that there was a public harbour at Chicoutimi at the material date, stretching at least from Riviere du Moulin on the East to the Basin on the West and including all the foreshore of the South bank between those points. It must follow that Jalbert had no right to recover damages for the actions of the Harbour Commission, since the beach lot did not belong to him and if it did not he had no right of excess to the Saguenay River.

26. The Appellant therefore submits that the judgment of the Supreme Court of Canada allowing Jalbert's appeal should be reversed and that the judgment of the Exchequer Court of Canada dismissing Jalbert's petition and the Intervention, should be restored, for the following, among other 10

R E A S O N S

- (1) Because the Saguenay River from the Rivière du Moulin on the East to the Bassin on the West including as a constituent part the beach lot which the Letters Patent of the Province of Quebec purported to grant to Jalbert in 1907 was a public harbour in 1867 and vested in the Dominion of Canada by the British North America Act.
- (2) Because the Respondent's title to the beach lot, if valid which 20 is denied was limited by its own terms and subject to be defeated in the contingency of improvements to the Harbour under the powers and rights of the Dominion of Canada under Section 91 (ss. 10) which must be read together with Section 108.
- (3) Because with regard to Jalbert's claim for damages in respect of the beach lot he is not entitled to recover any damages because the beach lot in question was not vested in him but belonged to the Dominion of Canada as forming part of the Chicoutimi Harbour. 30
- (4) Because having regard to the facts of the case and the law applicable thereto the judgment of the Exchequer Court of Canada dismissing Jalbert's petition and the Intervention of the Attorney General of the Province of Quebec is right and ought to be restored.

SECOND APPEAL.

27. This is an appeal of the Intervenant by special leave of His Majesty in Council from the same Judgment of the Supreme Court of Canada dated 2nd February 1937. The Reasons for Judgment of that Court concluded as follows:— 40

“The Attorney-General for the Province of Quebec intervened in the proceedings in the Exchequer Court and took an independent appeal

to this Court from the judgment of the Exchequer Court. Section 31 of the Exchequer Court Act provides that when the legislature of any province has passed an Act agreeing that the Exchequer Court shall have jurisdiction in cases of controversies between the Dominion and such province or between such province and any other province or provinces which shall have passed a like Act, the Exchequer Court shall have jurisdiction to determine such controversies and an appeal shall lie in such cases from the Exchequer Court to this Court. Provinces which have passed such legislation have more than once resorted to this jurisdiction of the

10 Exchequer Court and have brought actions in the Exchequer Court to recover on claims against the Dominion, as for instance in the *Province of Ontario v. the Dominion of Canada*, 42 S.C.R. (1910) p. 1. The Province of Quebec however has never passed the enabling legislation provided by Section 31 of the Exchequer Court Act. But in any case it is plain that the Exchequer Court has no power to give relief to a province in a Petition of Right of a subject against the Dominion, and although no exception was taken to the intervention or to the independent appeal the proper course is that no order should be made with respect to the appeal of the Attorney-General for Quebec."

20 28. The relevant provisions of the Exchequer Court Act (Revised Statutes of Canada 1927 c. 34) appear to be :—

18. The Exchequer Court shall have exclusive original jurisdiction in all cases in which demand is made or relief sought in respect of any matter which might, in England, be subject of a suit or action against the Crown, and for greater certainty, but not so as to restrict the generality of the foregoing terms, it shall have exclusive original jurisdiction in all cases in which the land, goods or money of the subject are in the possession of the Crown, or in which the claim arises out of a contract entered into by or on behalf

30 of the Crown. R.S., c. 140, s. 19.

* * * * *

31. When the legislature of any province of Canada has passed an Act agreeing that the Exchequer Court shall have jurisdiction in cases of controversies

- (a) between the Dominion of Canada and such province;
- (b) between such province and any other province or provinces which has passed a like Act;

the Exchequer Court shall have jurisdiction to determine such controversies.

40 2. An appeal shall lie in such cases from the Exchequer Court to the Supreme Court. R.S., c. 140, s. 32.

* * * * *

36. The practice and procedure in suits, actions and matters in the Exchequer Court, shall, so far as they are applicable, and unless it is otherwise provided for by this Act, or by general rules made in pursuance of this Act, be regulated by the practice and

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procedure in similar suits, actions and matters in His Majesty's High Court of Justice in England, on the first day of October, One thousand eight hundred and eighty-seven. R.S., c. 140, s. 37.

* * * * *

82.—(1) Any party to any action, suit, cause, matter or other judicial proceeding, in which the actual amount in controversy exceeds five hundred dollars, who is dissatisfied with any final judgment, or with any judgment upon any demurrer or point of law raised by the pleadings, given therein by the Exchequer Court, in virtue of any jurisdiction now or hereafter, in any manner, vested 10
in the Court and who is desirous of appealing against such judgment, may, within thirty days from the day on which such judgment has been given, or within such further time as a judge of such Court allows, deposit with the Registrar of the Supreme Court the sum of fifty dollars by way of security for costs.

* * * * *

83. No appeal shall lie from any judgment of the Exchequer Court in any action, suit, cause, matter or other judicial proceeding, wherein the actual amount in controversy does not exceed the sum or value of five hundred dollars, unless such appeal is allowed by a 20
judge of the Supreme Court, and such action, suit, cause, matter or other judicial proceeding,

(a) involves the question of the validity of an Act of the Parliament of Canada, or of the legislature of any of the provinces of Canada, or of an ordinance or act of any of the councils or legislative bodies of any of the territories or districts of Canada;

(b) relates to any fee of office, duty, rent, revenue or any sum of money payable to His Majesty, or to any title to lands, tenements or annual rents, or to any question affecting any patent of invention, copyright, trade mark or industrial design, or to any matter or thing 30
where rights in future might be bound. R.S. c. 140, s. 83.

84. Notwithstanding anything in this Act contained, an appeal shall lie on behalf of the Crown from any final judgment given by the Court in any action, suit, cause, matter or other judicial proceeding wherein the Crown is a party, in which the actual amount in controversy does not exceed five hundred dollars; if

(a) such final judgment or the principle affirmed thereby affects or is likely to affect any case or class of cases then pending or likely to be instituted wherein the aggregate amount claimed or to be claimed exceeds or will probably exceed five hundred 40
dollars; or

(b) in the opinion of the Attorney General of Canada, certified in writing, the principle affirmed by the decision is of general public importance; and

(c) such appeal is allowed by a judge of the Supreme Court.

2. In case of such appeal being allowed by a judge of the Supreme Court, he may impose such terms as to costs and otherwise as he thinks the justice of the case requires. R.S., c. 140, s. 84.

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29. The Intervenant in his Intervention confined himself to challenging the right claimed by the Appellant to the actual site mentioned in the Petition of Right, and pleaded that (a) at the date of Confederation neither the water nor the foreshore at that spot was a public harbour (b) in 1907 the lot in question belonged to the Crown in right of the Province of Quebec and could be granted by it to Jalbert, (c) therefore the Letters Patent of 1907 were valid and effective as a grant and (d) the Appellant's Defence was on these points unsustainable in fact and law. The Intervenant never pleaded nor proved that he had raised objections or claims adverse to the ownership rights exercised by the Appellant since Confederation over the harbour of Chicoutimi.

30. The Appellant submits that on the question of the right of the Intervenant to be heard on the Petition of Right or to appeal from the Judgment of the Exchequer Court thereon the Judgment of the Supreme Court is right and ought to be affirmed for the following among other

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R E A S O N S

- (1) Because the Intervenant was not a party to the Petition of Right, had no right to appear or be heard thereon, and in any event had no right of appeal from the Judgment of the Exchequer Court.
- (2) Because it is now too late for the Intervenant to assert adverse claims against the ownership rights exercised by the Dominion of Canada over the Chicoutimi harbour, since Confederation.

CYRIL RADCLIFFE.

LOUIS A POULIOT.

In the Privy Council.

No. 34 of 1937.

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CASE FOR THE APPELLANT
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