

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, merchant, of the City of Chicoutimi,  
*(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) APPELLANT.*

*JALBERT*  
**CASE FOR ~~THE~~ RESPONDENT**

1. This is an appeal from a judgment of the Supreme Court of Canada dated the 2nd of February 1936, reversing a judgment of the Exchequer Court of Canada and ordering that unless appropriate proceedings are commenced within a month, judgment shall be entered declaring the rights of the Suppliant (the present Respondent) and ordering a new trial in the Exchequer Court limited to the ascertainment of the damages or compensation due by reason of interference with Suppliant's rights.

Record.  
Pt. II, p. 1.

10 2. The judgment of the Exchequer Court of Canada which was thus reversed had dismissed the petition of right filed by the present Respondent on the grounds that in the opinion of the trial Judge (Angers, J.) the existence of a public harbour at Chicoutimi at the time of Confederation had been established by the evidence;

Pt. I p. 240.  
p. 267

CASE FOR HENRI JALBERT

Record Pt. 1  
p. 2-5

3. The Petition of right by which the procedures were instituted alleges in substance:

R-1 p.231-2 (A) That Jalbert (the present Respondent) is the owner of a beach lot at Chicoutimi on the River Saguenay, having acquired the same from the Government of the Province of Quebec by Letters Patent dated the 16th of July 1907;

R-3 p.225-9 (B) That he is the owner of a lot of land of approximately 150 feet in width fronting on the River Saguenay in rear of that beach lot;

(C) That His Majesty in right of the Dominion of Canada, acting through his statutory mandatories, the Chicoutimi Harbour Commissioners, has taken possession of the major part of the beach lot which has been filled in thus cutting off access to the River from Jalbert's property and rendering useless the quay built on it; accordingly the value of the land taken is claimed together with damages to the residue of the property through the deprivation of access to the river. The judgment appealed from having directed a new trial for the assessment of the compensation or damages nothing more need be said on this question of damages beyond stating that they are admittedly considerable and that the amount claimed is \$43,125.00;

p. 5

p. 6-7

4. In the statement in defence it is admitted that the major part of Jalbert's beach lot has been taken and that the River has been filled in in front of his property, but his claim to compensation is denied on the following grounds:

(A) That the Letters Patent granting the beach lot would be invalid because the land granted would have been, at the time of Confederation, part of a public Harbour and accordingly, under the provisions of the British North America Act vested in His Majesty in right of the Dominion of Canada;

(B) That Jalbert's lot of land was not bounded to the River Saguenay and that he did not have a right of access thereto;

p. 69

The other grounds of defence appear unimportant being directed to the amount of compensation, or having been abandoned at the trial.

p. 8-9

5. In view of the fact that the statement in defence challenged the validity of the Letters Patent granted by the Province of Quebec, the Attorney General of this Province intervened in the cause to support the grant.

6. The Provision of the British North America Act, on which Appellant relies in support of the contention that the land in question became vested in the Dominion Government, is as follows: "108. The Public Works and Property of each Province, enumerated in the Third Schedule to this Act, shall be the Property of Canada."

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### The THIRD SCHEDULE

Provincial Public Works and Property to be the Property of Canada.

1. Canals, with Lands and Water Power connected therewith.
2. Public Harbours.

7. "Public harbours", in the above schedule, means not merely a place suited by its physical characteristics for use as a harbour, but a place to which

on the relevant date the public had access as a harbour and which they had actually used for that purpose. In this connection the actual user of the site both in its character and extent is material. (Attorney-General of Canada vs Ritchie Contracting & Supply Co. 1919 A.C. 999.) Record Pt. 1

8. In the present case it was proved that the Town of Chicoutimi is built on the south side of the River Saguenay at a point where the River Chicoutimi empties into it. At this juncture a deep bay is formed which is known as Le Bassin; approximately half a mile downstream, the River aux Rats, a very much smaller stream, empties in the Saguenay River; then one and one third mile further down is the outlet of Rivière du Moulin, a much more important water course. The tides are pretty high at Chicoutimi and while the current is not very strong at the flow, it is very rapid at the ebb; therefore, the river outlets just mentioned were likely to appeal as landing places to those who first came to Chicoutimi by water. p. 73  
p. 105  
p. 153

9. There were admittedly no public works or undertakings along the above described stretch of the River before Confederation. It is not in fact disputed that there were then three wharves, or rather landing places: one at La Rivière du Moulin, another at Rivière-aux-Rats and a third still further up the river at Le Bassin. p. 159  
lines 30-40

10. All these were private property and only small boats could possibly dock there because the so-called wharves were only a steep portion of the shore protected by planking where a small boat could be tied alongside at high water, but was left high and dry on the beach when the water receded. One of these, at the outlet of Rivière-aux-Rats is visible on the photograph exhibit P-8. p. 161  
line 45  
p. 155  
p. 161  
line 25  
p. 174  
line 20

11. There is no evidence of any use of the foreshore for purposes of navigation between these three landing places, except of such use as takes place anywhere along a navigable river, namely that boats anchored in mid-stream and that row-boats landed wherever convenient. There is no evidence whatever of any use for purposes of navigation of the foreshore of the river at Jalbert's place before Confederation; on the contrary the site is proved to have been at that time naturally unsuitable as a landing place. A single witness, Eugène Caron, reports having once seen a schooner unloaded on the beach in the vicinity, namely at Méron Tremblay's near the Bassin. Charles Lemieux deposes that he never saw a schooner unloading there, but says that he had seen some wintering at Méron Tremblay's. This is contradicted by Joseph Tremblay "Boise" who resided near Rivière-aux-Rats throughout the material period, and testified that Méron Tremblay's house was not built before 1870. p. 151  
p. 157  
line 38  
p. 177  
line 25  
p. 192  
line 30  
p. 128  
p. 157  
line 35  
p. 191  
p. 194  
line 10  
p. 192  
line 40

12. The trial judge was of opinion that on the testimonial and documentary evidence the existence of a public harbour at Chicoutimi before Confederation was established. He appears to have largely relied on a statement found in the report of the Minister of Public Works of Canada for the years 1868 to 1882. Respondent objected to the production of this report because it was secondary evidence based on unverified information collected by the

Record Pt. 1 Appellant's own servants. Furthermore, this report showed indiscriminately  
 p. 215- the number of trips of the boats to the various ports on the Saguenay river,  
 216 but supplied no definite information with respect to Chicoutimi.

p. 267 13. The trial Judge did not stop to consider whether any use of the fores-  
 shore at the particular place had been proved; having come to the conclusion  
 that the existence of a public harbour had been established, he proceeded to  
 declare the provincial grant void and to dismiss the Petition of right, without  
 considering the claim for loss of the right of access to the river.

Record pt. II 14. In the Supreme Court of Canada it was unanimously held that the 10  
 trial Judge had proceeded on an erroneous basis and that in order to ascertain  
 whether the land at the site in question formed part of a public harbour, the  
 actual user of the site had to be considered. Mr. Justice Davis speaking for  
 the Court said: "The mere fact that there are wharves and commercial activity  
 p. 58 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 har-  
 bours cannot have been intended to include within the expression "harbours"  
 every little indentation of 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 20  
 goods for commercial purposes."

p. 58 15. After considering the evidence and the configuration of the river,  
 Mr. Justice Davis came to the conclusion that it could not be said that there  
 was one continuous harbour from La Rivière du Moulin to the Bassin and  
 that there was no evidence on which it could be found that the piece of land  
 with which we are concerned in this appeal, was within any harbour. For this  
 reason, the Supreme Court found it unnecessary to decide whether there was  
 a public harbour at Chicoutimi at the time of Confederation.

p. 59 16. Mr. Justice Davis also came to the conclusion that independently  
 of his ownership of the beach lot, Jalbert enjoyed as owner of the land lot a 30  
 right of access to the River Saguenay: "The evidence leaves it perfectly plain  
 that there was the right of access to the river from this land lot. A strip of  
 land, about 40 feet in width, marked Street No. 1 on the Ballantyne plan of  
 1845, lying originally between the river and the land lot, was as a matter of  
 fact never opened up as a street because in early days it disappeared by erosion  
 and the river at high water came right up to the appellant's land lot." There-  
 fore, independently of the validity of the grant of the beach lot, Jalbert, as  
 owner of riparian property, was entitled to compensation for the deprivation  
 of this right of access. (Tétrault vs Montreal Harbour Commissioners, L. R.  
 (1926) A.C. 299). It is no doubt because they considered the point settled 40  
 against the present Appellant that the Judges of the Supreme Court did not  
 find it necessary to pass upon the contention set forth in the factum filed on  
 behalf of the Federal Government that Jalbert was disentitled to compensation  
 by reason of the reservation of the right of navigation contained in the grant.

p. 59 17. After having announced its conclusion that Jalbert was entitled to  
 relief both in respect of the ownership of the land taken and of the loss of the  
 right of access, the Supreme Court of Canada directed a second hearing on the  
 question of damages, but having come to the conclusion that this second

question could not be decided without a new trial, judgment was rendered as above stated. Record pt. II

Respondent submits that both as to the validity of the grant of the beach lot and the right to compensation for loss of access to the land lot, the judgment of the Supreme Court is right and should be affirmed for the following (amongst other):—

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## REASONS

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1. The public harbours vested in the Dominion Government by the British North America Act included only places then actually used for that purpose and actual user of the site for purposes of navigation must be proved to establish the title of the Dominion Government.
2. Because the existence of a few widely separated and isolated landing places does not constitute a long stretch of river a public harbour.
3. Because the trial Judge erroneously considered solely the question as to whether there was a harbour, overlooking the only proper test, namely evidence of actual user of the site.
4. Because the trial Judge in coming to the conclusion that the existence of a public harbour had been proved, improperly admitted documents in evidence and erroneously construed certain such documents.
5. Because the existence of a public harbour at Chicoutimi before Confederation was not proved; the three quays then existing being private properties and not accessible to the public;
6. Because Respondent as owner of riparian lands on a navigable river enjoyed a right of access from which he has been deprived by Appellant.
7. For the reasons appearing in the judgment of Davis J. concurred in by Duff C.J., Rinfret, Crocket, Kerwin and Hudson JJ.

JULES-ARTHUR GAGNE.

# In the Privy Council.

No 34 of 1937.

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*On Appeal from the  
Supreme Court of Canada.*

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HIS MAJESTY THE KING represented by the  
Attorney General of Canada,

*(Respondent) APPELLAN*

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HENRI JALBERT, merchant, of the City of  
Chicoutimi,

*(Suppliant) RESPONDEN*

AND

THE ATTORNEY GENERAL FOR THE  
PROVINCE OF QUEBEC acting for His  
Majesty the King, in his right of the  
Province of Quebec,

*(Intervenant) APPELLAN*

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*JALBERT*  
CASE FOR ~~THE~~ RESPONDENT

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