3, 1938

34 OF 1937

In the Privy Council

No 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.*

RECORD OF PROCEEDINGS

PART II

CHARLES RUSSELL & CO.,
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for the Suppliant-Respondent.
and for the Intervenant-Appellant.

In the Privy Council.

Privy Council No. **Of 1937**

ON APPEAL

FROM THE SUPREME COURT OF CANADA

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RECORD OF PROCEEDINGS

PART II

No. 1

JUDGMENT OF THE SUPREME COURT OF CANADA

IN THE SUPREME COURT OF CANADA

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Tuesday, the 2nd day of February, A.D. 1937.

PRESENT:

In the Supreme Court.

No 1
Judgment of the Supreme Court of Canada.

The Right Honourable Sir L. P. DUFF, P.C., G.C.M.G., C. J.
The Honourable Mr. JUSTICE RINFRET
The Honourable Mr. JUSTICE CROCKET
The Honourable Mr. JUSTICE DAVIS
The Honourable Mr. JUSTICE KERWIN
The Honourable Mr. JUSTICE HUDSON

BETWEEN :

HENRI JALBERT, Merchant, of the City of Chicoutimi, (Suppliant),
THE ATTORNEY-GENERAL for the Province of Quebec, acting for his Majesty the King, in His right of the Province of Quebec, (Intervenant), *Appellants*,

AND

HIS MAJESTY, the King, in His right of the Dominion of Canada, *Respondent*.

The appeal of the above named Appellants from the Judgment of the Exchequer Court of Canada, pronounced in the above cause on the twelfth day of June, in the year of our Lord one thousand nine hundred and thirty-five, dismissing the Suppliant's Petition of right and the Intervenant's intervention, with costs, having come on to be heard before this Court on the first and fourth days of May, the twenty-ninth day of October and the twenty-seventh day of November, in the year of our Lord one thousand nine hundred and thirty-six, in the presence of Counsel for all parties, whereupon and upon hearing what was alleged by Counsel aforesaid, this Court was pleased to direct that the said appeal should stand over for judgment, and the same coming on this day for judgment.

THIS COURT DID ORDER AND ADJUDGE that the appeal of the Suppliant Henri Jalbert be and the same was allowed and that the said Judgment of the Exchequer Court should be and the same was reversed and set aside.

AND THIS COURT DID FURTHER ORDER AND ADJUDGE that 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.

AND THIS COURT DID FURTHER ORDER AND ADJUDGE that the Suppliant shall be entitled to one-half of his costs, (including Counsel fees) in this Court and in the Exchequer Court of Canada, together with all other disbursements in full.

AND THIS COURT DID FURTHER ORDER AND ADJUDGE that the costs of the new trial be in the discretion of the trial Judge.

AND THIS COURT DID FURTHER ORDER AND ADJUDGE that no Order should be made with respect to the intervention and appeal of the Attorney-General for the Province of Quebec.

(Signed) J. F. SMELLIE,
Registrar.

No. 2

SUPPLIANT-APPELLANT'S FACTUM

This is an appeal from a judgment of the Exchequer Court of Canada, Angers J., dated the 12th June 1935, dismissing the Petition of Right of Henri Jalbert and the Intervention of the Attorney General for the Province of Quebec, with costs.

PROCEEDINGS

The proceedings in this case were initiated by a Petition of Right by the Suppliant-Appellant, Henri Jalbert, in which he alleges in substance:

1. That he 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 July, 1907;

2. 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;

3. That His Majesty in right of the Dominion of Canada, acting through his mandatories the Chicoutimi Harbour Commissioners, has taken possession of the major part of his beach lot which has been filled in, thus cutting off access to the river from Jalbert's property and rendering useless as such the quay built on it;

4. Accordingly Jalbert claims $8,125.00 for the land taken, $10,000.00 for the quay and $25,000.00 for loss of the access to the river.

In his defence the Respondent admits having taken possession of the major part of the beach lot, and having filled in the river in front on Jalbert's property and pleads in substance:

1. That the Letters Patent granting the beach lot are invalid because the land granted was at the time of Confederation part of a public harbour;

2. That the quay was built in contravention to the Navigable Waters Protection Act. (This point was abandoned at the trial, Case page 69);

3. That Jalbert's lot of land was not bounded to the river Saguenay;

4. That Jalbert suffered no damages on account of being deprived from the access to the river, because he could use the Harbour Commission's Piers for his trade.

The Attorney General of the Province of Quebec intervened in the case to support the validity of the Letters Patent for the beach lot, alleging that at the time of Confederation those lands were not part of a public harbour.

The learned trial Judge has found that there was a public harbour at Chicoutimi in 1867 and on this sole finding has dismissed the Intervention and the Petition of Right.

On account of the fact that the questions raised on this appeal, with respect to the validity of the Letters Patent, are fully discussed in the factum

In the Supreme Court.

No 2
Suppliant-Appellant's Factum. (Continued.)

fyled by the Intervenant, it appears unnecessary in this factum to say anything on those questions, except that Suppliant-Appellant, for the reasons stated in Intervenant's factum, respectfully submits that the findings of the trial Judge with respect to his ownership of the beach lot are erroneous, and that he should be awarded compensation for the land.

Apart from that question, we submit that the Suppliant is entitled to recover damages for the loss of access to the River, this claim being based on the principles stated by the Privy Council in the case of Tetrault vs Montreal Harbour Commissioners (1926, A.C. 299).

POINTS IN APPEAL

Therefore, Suppliant-Appellant submits:

1. That as owner of land bounded to the River Saguenay he is entitled to compensation for loss of access to the river, this loss including the value of the quay.

2. That he is entitled to compensation for the land taken.

FIRST POINT

Damages for loss of access

As above stated, though this is the most important claim urged on behalf of Suppliant in his petition of right, the learned trial Judge has dismissed it without in any way discussing the claim as if his finding that there was a public harbour at Chicoutimi disposed of the case in favor of the Respondent. On account of this oversight, the question is not at all dealt with in the notes of the trial Judge.

As already mentioned this claim is based on the principles stated by the Privy Council in the well known case of Tetrault vs Montreal Harbour Commissioners (1926, A.C. 299) following the anterior decision in North Shore Railway vs Pion (14 A.C. 612). In that case (we are quoting from Viscount Haldane's judgment):

> "Tetrault alleged that he was and had been for a number of years possessor as proprietor by valid titles of three contiguous immoveable properties in the parish of Longue Pointe in the Island of Montreal, of a width of about four arpents and a half, bounded by the river St. Lawrence, and that since he purchased these immoveables he had always peacefully enjoyed them with the advantages and servitudes that belong to riparian proprietors **ex jure naturæ,** including the use of the water in front of his properties and access to and egress from the river; that the Harbour Commissioners were executing works opposite these properties which have encroached on them and have deprived him of his access to the river and of the privileges mentioned; that the harbour authorities had no right to carry on these works without previous expropriation, and that no Federal legislation could be operative to take away his property.

He claimed damages to a total of $133,020. and declarations as to his title and right to peaceful possession. The Harbour Commissioners asserted in answer a superior title and denied responsibility for what they had done."

The Privy Council decided that Tetrault was entitled to compensation and that though the Parliament of Canada could authorize the Harbour Commissioners to make the works complained of, nevertheless it could not do so to the extent of permitting the Harbour Commissioners to take possession of property or to injure property rights without compensation.

The finding of the Privy Council is expressly based on their decision in the case of North Shore Railway vs Pion, which is referred to in Viscount Haldane's judgment in the following terms:

"This question came into consideration by this Board in the case of North Shore Railway Company v. Pion (14 A.C. 612). The railway company had made a railway on the foreshore of a tidal and navigable river along the frontage of the landowner's property, and had substantially interfered with his access to the river. It was held that by the French law prevailing in Quebec the land owner as riparian owner had the same rights of *accès et sortie* as he would have had if the river had not been navigable; and that the obstruction of these rights without Parliamentary authority was an actionable wrong. In the present case the St. Lawrence opposite the neighbourhood of Montreal is not tidal like the river St. Charles in Pion's case (14 A.C. 612). It is only navigable. But their Lordships think that this makes no difference, for the case of a river which is non-tidal, although navigable, is one to which the principles laid down by Lord Selborne in Pion's case must apply *a fortiori*.

In delivering the judgment of the Judicial Committee, consisting of Lord Watson, Lord Bramwell, Lord Hobhouse and Sir Richard Couch besides himself, Lord Selborne said that the view of the Court of Queen's Bench could not be maintained, that, inasmuch as the beach of the river was public property, the landowner had no individual right, but only one to use it in common with other inhabitants of the country and that the Supreme Court of Canada was right in taking a contrary attitude. He adopted, as applicable as much in Quebec as in England, the principle laid down by Lord Cairns in Lyon vs Fishmongers' Co. (1874, I A.C. 662, 671) that the right belonging to the owner of riparian land is different from the mere public right of navigation. "When this right of navigation" said Lord Cairns, "is connected with an exclusive access to and from a particular wharf, it assumes a very different character. It ceases to be a right held in common with the rest of public, for other members of the public have no access to or from the river at the particular place; and it becomes a form a enjoyment of the land, and of the river in connection with the land, the disturbance of which may be vindicated in damages by an action or restrained by an injunction."

Lord Selborne went on to point out that although the bank of a tidal river of which the foreshore is laid bare at low water is not always in contact with the flow of the stream, it is in such contact for a great part of every day in the ordinary and regular course of nature. This is an amply sufficient foundation for a natural riparian right. Moreover, although the solum of the river is in someone else than the riparian owner, that can make no difference. Lateral contact with the riparian land is sufficient.

Their Lordships have had their attention directed to the reservation, inserted in the grant of Tetrault's predecessors in title, in which the grantors, the Company of New France, in 1640, declared that the concession should not cause any prejudice to the freedom of the navigation, which is to be common to all the inhabitants of New France, and throughout all the places therein above conceded, and for this purpose that there should be left a royal highway of twenty toises in width all round the Island of Montreal, from the river to the granted lands, and a similar distance on the river St. Lawrence from the brink of the same to the granted lands, the whole for the use of the said navigation and of passage by land. This was a mere reservation of a right of highway which, in the view their Lordships take of the case, cannot affect Tetrault's right of access, even if it extended beyond the foreshore to his land."

We have cited these observations at rather great length because they apply so directly to the present case as to eliminate the need of further argument on the legal basis of this claim for damages. Furthermore, the last paragraph quoted disposes of the contention put forward on behalf of Respondent that Jalbert had no legal right of access on account of the fact that in the original grants by the Crown of his lots of land these lots had been, according to the original plan of survey of the townsite of Chicoutimi (Exhibit D-1) described as bounded not to the river Saguenay, but to Street No. 1 shown on the plan.

Nevertheless, we think we should point out that this argument fails for another reason. It has been proved that between 1855 and 1870, the strip of land laid out for the street was at the place in question completely eroded and that the street was abandoned (Boise Tremblay, page 194). Thus the lots came to be bounded to the river, as they are shown to be on the official cadastral plan made in 1882 in which also shows that the erosion had eaten up much more than the width of the street. According to Boise Tremblay born in 1849, who resided nearby, on the shore of the Saguenay, some 150 feet had been eaten up in 1870. The lines at various dates are shown on the plan Exhibit R. 12 as well as on the plan Exhibit D-16.

THE FACTS

Henri Jalbert acquired in 1906 from Elie Tremblay, by the deed which is filed as Exhibit R-3 (page 225) a piece of land forming part of lots 225, 226, 227 and 228 of the cadastre of Chicoutimi, bounded to the north to the

river Saguenay and to the south to Racine Street, and having a frontage of approximately 155 feet on the river Saguenay. That piece of land is plainly shown on the plan Exhibit R-12 as well as on the plan Exhibit R-1.

Jalbert established at that site an important lumber business. His mill and the lumber piles are quire visible in the left hand foreground on the photograph Exhibit D-8 (album page 4), which was taken before the works complained of were commenced.

The site was particularly advantageous for that purpose, because the lumber came by water from Jalbert's own timber limits which were not conveniently accessible otherwise and was unloaded directly from the boats to the wood piles on the quay. A boat can be seen alongside on the photograph.

The previous owner had built with slabs a cheap quay which held back the eath. This quay is the one marked on the plan Exhibit R-1. It was not very convenient: trestles had to be used. In 1907, intending to build a better quay, Jalbert acquired from the Provincial Government the beach in front of his property, that is all the land between high and low water marks (Letters patent, exhibit R-1, page 231, and plan annexed thereto, album page 9). The new quay was built in 1908 or 1909, at the place marked "quai" on the plan Exhibit R-12 (album, page 16) (Henri Jalbert, page 13).

It was not a deep water wharf. At very low tide, the water receded some distance from the quay; but, for the flat bottom boats used to bring wood to Jalbert's place, this was by no means an inconvenience. The shore of the river slopes very gently in front of the quay, and the boats were quite secure when left dry at low tide. The quay was 14 feet high (some witnesses say 19), its top being 20 feet above low water mark. Since the tides are pretty high, ranging between 16 and 18 feet, there was, at high tide, plenty of water for the kind of boats used, drawing some 6 feet when loaded.

The fact that the boats could dock only at high tide was not detrimental because, on account of the current in the river, the boats could not anyway come to the spot except at high tide, and therefore were always navigated so as to come with the flow.

When some witnesses say that boats could dock at this quay even with low tides, they do not mean that the boats could dock when the water was at its lowest, but they mean that they could come to the quay with the flow even at the time of the year when the tides are lowest. To them, boats coming at the ebb is simply unthinkable.

Therefore, Jalbert suffered no inconvenience from having a quay which was accessible only at high tide and at which boats were left dry at low tide. Far from it, this was a distinct advantage to him, because on account of the boats resting on the bottom, their deck remained always but a few feet lower than the top of the quay, thus making the unloading easy at all times (Jalbert, pages 15-18). One man on the boat would lift up the lumber which another man standing on the quay would easily pick up, sort and pile at once on the lumber piles which were on the quay itself.—This could be done at any time irrespective of tide condition. Thus, boats docked at Jalbert's quay could be unloaded without any machinery, with very little labour, without having to cart away the lumber and without any loss of time, delay or inconvenience.

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Suppliant-Appellant's Factum. (Continued.)

The quay being at the same time the lumber yard and the mill yard, no supervision was required, and there was very little risk of theft.

The situation is entirely different at the Harbour Commissioners' piers. There, one finds deep water wharves with the result that the deck of the boats at low tide is at something like twenty feet from the top of the quay as against 4 or 6 feet at Jalbert's quay (Jalbert, page 16). A derrick is required for unloading the boats, thus greatly adding to the cost by reason of the expenditure for power to operate the derrick, for the mechanic to run it and increased labor. Furthermore, the wood must be carted away immediately, and almost as much labor is required to load it on the wagons and pile it in the yard, as was necessary for taking if from the boat, sorting and piling it when the boats could dock at Jalbert's quay. Supervision is necessary in order to prevent pilfering and, in spite of all that additional expense and trouble, the boats are detained much longer at the Commissioners' piers than they used to be at Jalbert's quay.

Thus, it will be seen that the damage caused to Jalbert by depriving him of the access to the river from his property is very great indeed. The manner in which this damage was caused is graphically depicted in the remarkable photograph filed as exhibit R.9. Jalbert's quay is shown in the right hand foreground with the lumber piled on it, and in the river are seen the pile drivers building the retaining wall and the dredges filling in the space formerly occupied by the river between the retaining wall and the shore.

On exhibit R. 10, one sees the large area filled in where the river Saguenay used to flow in front of Jalbert's property. That is also visible on the photo Exhibit R.6. the man between the lumber piles is standing where the edge of the water used to be.

Exhibit R.7. shows the same fill seen from the river looking towards Jalbert's lumber yard.

Exhibit R.8. shows the present condition of Jalbert's quay. It is very apparent that it has become completely useless as such. Contrast this picture with the photos Exhibit R.4 and D.8., taken before the works complained of were commenced.

The plan, Exhibit D.21 shows the extent of the area filled in by the respondent. Jalbert's quay stood approximately between the points marked "A" and "B" on that plan. The shed marked "Shed No. 1" is quite visible on the photograph Exhibit R.10.

The exact location of Jalbert's property in relation to the new wharf is shown on the plan made by Surveyor McConville, Exhibit R. 12.

It is apparent that by the works complained of, Jalbert was deprived of the natural advantages of his property which on one side fronted on Chicoutimi's main commercial street and on the other on the river Saguenay.

It is clear that the location is now depreciated to a great extent. That is proved by the evidence of the Suppliant himself and of J. W. Jacques and J. E. McConville.

What is the amount of those damages? The witnesses heard in this case have estimated the damages on the increased cost of handling the wood which they have capitalized. It has been proved that Jalbert, before the construction of the new wharves, received on an average 1,000,000 F.B.M.

of wood per year at his quay, that is the quantity of wood coming by boats. This amount has been disputed by the Respondent who has fyled statements made by the Harbour Commission showing 551,268 F.B.M. in 1928, 580,642 F.B.M. in 1929, and 361,500 F.B.M. in 1930. Objections have been made to the fyling of these statements, because the Harbour Commissioners are in fact the Respondent's mandatories, and the books kept by them should be considered as the Respondent's books, and accordingly not admissible as evidence in his favour under Article 1227 of the Civil Code:

> "Family registers and papers do not make proof in favor of him by whom they are written."

Furthermore, it appears in this case that as long a Jalbert received wood at his quay, he was not paying any wharfage dues to the Harbour Commissioners, so that no verification was being made of the quantity received by him (Euclide Monfette, page 186). When reports were collected by the employees of the Harbour Commission, they were undoubtedly incomplete, because the man in charge of Jalbert's boat during those years says that only a part of the cargoes received were declared by him to the Harbour Master. (Severin Talon, p. 183). Thus, it will be seen that the statements made up by the employees of the Harbour Commissioners are nothing else than a compilation made from entries in the books based on unverified information: In the end they are nothing but hearsay, and for that additional reason should be cast aside. On the contrary the statement made up by Jalbert's accountant (Euclide Monfette, p. 48) shows the result of his personal verification of the quantity of wood received by Jalbert. (Exhibit R-11, p. 238).

Concerning the figures given for 1930, we submit that these should not be taken into account. The reduction in Jalbert's volume of business is a natural result of the damages caused to him and also, to a certain extent, of temporary unfavorable market condition. We therefore submit that the quantity of wood given by Jalbert and his accountant Euclide Monfette, who are corroborated by the evidence of Séverin Talon as to the number of trips made per year, should be taken as a basis for the computation of damages.

It now remains to be ascertained what is the increase in the cost of handling the wood per thousand feet board measure. This increase is made up of various items. The first item is obviously the cost of carting away the wood from the Harbour Commissioner's piers to Jalbert's lumber yard.

Though the distance is not very great, this carting involves quite a lot of labor for loading the wood on the wagons or trucks and unloading it in the yard.

The witnesses heard on behalf of the Suppliant have estimated the cost of carting the lumber at $1.00 per thousand feet board measure, Henri Jalbert (page 18, last line) says that that is the actual cost to him.

Nil Tremblay says that he has to pay from $1.25 to $1.50 per thousand feet for cartage from the same pier. The price paid by him is somewhat higher on account of the fact that it is hard wood (page 43, line 35). For soft

wood the price ought to be $1.00 (page 45, line 40) and that is a depression price (page 46). The same amount is given by J. W. Jacques (page 52, line 1).

Respondent's witnesses value this cartage at $0.60 (Maurice Gagnon, Xavier Barrette, Albert Dufour, Edouard Lavoie) but those witnesses admit that this figure is based on the low prices prevailing at Chicoutimi at the time of the trial as a result of the great number of unemployed in that City (Maurice Gagnon, page 86; Xavier Barrette, pages 94 and 95); Albert Dufour, page 96). This last witness admits that in order to earn money at such prices, his employees paid $3.00 per day must work as long as *sixteen hours* a day. (Page 96, lines 28).

We submit that in the case of permanent damages, such as those claimed here, the compensation should not be assessed on the basis of abnormally low prices prevailing solely on account of abnormal conditions, and that $1.00 per thousand feet has been proved to be the normal price for such cartage, though higher prices had to be paid in the years of prosperity. (Nil Tremblay, page 46, line 20).

Another item of added expense is the increased cost of the freight for the wood on account of the delay necessarily experienced in unloading the wood at the Commission's pier. It is proved without contradiction that it takes much longer to unload a boat at the Harbour Commissioners' piers than used to be required at Jalbert's quay. At the latter place, the unloading was uninterrupted and could easily be done by hand. The witnesses are unanimous in saying that a boat could easily be unloaded there in a day while it cannot take less than two days at the Commission's pier. It is obvious that this delay means a higher cost for transporting the wood, because the boat will make fewer trips in the same time.

A disinterested witness, Henri Godin, says that he charged 75 cts. more thousand feet board measure for bringing wood to the Harbour Commission's pier than to Jalbert's quay, solely on account of the difference in the time required for unloading. This is fully in accordance with the statement made by other witnesses that it took one more day, because Godin says that unloading at Jalbert's quay he could make two trips a week, therefore an extra day would increase the expense by one third of the price of $2.25 which is 75 cts.

Some witnesses heard on behalf of Respondent have said that they did not charge more for bringing wood to the Harbour Commission's pier than to Jalbert's quay. Since it is not disputed that the wood could be unloaded more quickly and with less labor at Jalbert's quay and the unloading is part of the boatman's obligations, it is hard to believe that boatmen would not, at least in normal times, take this difference into account.

Furthermore, one of these witnesses, Charles Savard, went to Jalbert's quay but once; and the other, George Boudreau, admits that except at Jalbert's quay, or with the aid of a conveyor, it takes more than a day to unload a boat. We submit that the added cost of bringing the wood to the Commission's pier has been proved, and that it means an extra 75 cts per thousand feet.

Another item is the extra labour required at the Commission's pier. It is established conclusively that at Jalbert's quay but one man was required to

receive the wood; at the Commission's pier two men are needed because the wood is hauled in bundles and two men are required for pulling the bundles to the pier with ropes. A mechanic is also required for operating the derrick. Two men at $3.00 per day for two days make $12.00, a mechanic at $5.50 per day $11.00, making a total of $23.00 as against $3.00 for one man one day at Jalbert's quay.

This means $20.00 more for unloading 50,000 feet of wood, which is an average boat load. That would be 40 cts per thousand feet, but other items of expense must be added, such as gas and oil for the motor operating the derrick, the depreciation of that machinery which cost $500.00, the Workmen's Compensation assessments on the wages of the men at an increased rate on account of the greater risk involved by the use of machinery, delays due to breakdowns, etc., so that the figure of 50 cts. per thousand feet given by J. W. Jacques appears quite reasonable—This is practically not contradicted by Respondent's witnesses.

Then there are other items of increased expense which are more diffcult to estimate such as the increase in the cost of supervision on account of the fact that the wood is no longer unloaded right in the lumber yard but some considerable distance away, at a public wharf where there is naturally a much greater risk of theft and other damage. There is also the obligation of moving away the lumber as soon as received whereas at his own quay Jalbert could let it stand as long as needed in order to have piling done in spare time. The fact that Jalbert now has to pay at the Commission's wharves $0.12 per thouand feet for top wharfage must also be taken into account. Adding all those items together we come pretty close to the figure given by J. W. Jacques (page 51, line 25.) of $2.90 per thousand feet for the increase in the cost of transporting and handling the wood at the Commission's wharf over the cost of transporing and receiving it at Jalbert's quay, and another important element of damage has still been orverlooked, that is: the fact that Jalbert is now placed in an inferior competitive position.

As explained by J. W. Jacques (Page 53, line 10) the natural advantages of the site were the basis of Jalbert's business. He could receive wood at lower cost than any other competitor at Chicoutimi, so that he was enabled to undersell the others and increase his volume of business. By slightly underselling the others, he could make a substantial profit when the others would be operating at a loss. That strong competitive position is the great commercial advantage Jalbert has been deprived of by Respondent's works. It is also proved that Jalbert suffers a loss of $350. on account of interference with the drainage of his lot. (McConville, page 58, line 10.)

We submit that the amount claimed as compensation for the loss of access is a moderate amount under the circumstances. At the legal rate of 5%, the sum of $25,000.00 claimed in the petition of right corresponds to an annual sum of but $1,250.00. This is only $1.25 per thousand feet on a turnover of a million feet, $1.56 on a turnover of 800,000 and not quite $2.10 per thousand feet on a turnover of 600,000. We submit that even adopting on some points, the figures given by Respondent's witnesses, one cannot be justified in assessing the compensation on a lesser basis, and that on this item Suppliant should be allowed the full amount claimed.

Perhaps we should say a few words of the contention put forward on behalf of Respondent that Jalbert could minimize the damages by hauling the wood in trucks instead of bringing it by boats. Rodolphe Joron is the witness who suggested that. He said that he thought the wood could be hauled by trucks for one half of the sum stated by Jacques to be the cost of bringing it by water, namely $5.15 per thousand feet, this being $2.25 for the freight, and $2.90 for the other expenses. But ,Joron (page 117, lines 25 and following) does not even know how far is the place from which the wood is to be hauled. He has been told (and does not appear to consider this information very reliable) that it is three miles below St. Fulgence. He knows nothing of the condition of the road. In fact, he does not even know whether there is a road, and his estimate is based on the gratuitous assumption that there is a good road for motor trucks.

His evidence is contradicted by the Suppliant who is familiar with the conditions and says that hauling by trucks would be much more expensive than by boats (page 62, line 40), and that the distance is much longer than Joron thought it to be, because there are ten miles from St. Fulgence to L'Anse à Pelletier instead of three (Jalbert, p. 187, line 47; Joron, page 117, line 40).

There remains to be considered on this first point the amount of damages for the value of the quay. It is not denied that this structure has been rendered useless as such by the works complained of, and the evidence leaves no doubt that this heavy crib filled with rock was in good condition. Euclide Perron, (a civil engineer) values it as $3,000. (p.47) without taking into account the cost of the fill. J. W. Jacques, Land Surveyor, values it at from $4000. to $4500. (page 52). The deduction of the cost of the fill appears to be a reasonable allowance for whatever usefulness the structure still retains as piling ground and we submit that the sum of $3000. should be allowed to the respondent as compensation on that item.

SECOND POINT

The value of the land taken

In the Petition of Right Jalbert claims compensation for an area of 16250 square feet. Respondent's witness, Surveyor Joron, states the area taken by the Respondent to be 14000 feet. (Page 116) We shall use this figure as the basis of this claim on this appeal.

Naturally it is somewhat difficult to put a valuation on a property of that kind. Nevertheless there can be no doubt that it was a valuable asset for Jalbert. His lumber yard is in the densely populated portion of the town of Chicoutimi, on its main commercial thoroughfare, nearly in the center of the town. There is a public school on one side and on the other a number of large buildings. Therefore, he cannot expand laterally, except at an enormous cost. This area gave him room for substantial expansion, at the only expense of building a quay and filling the space between the old quay and the new one.

J. W. Jacques who has had a very wide experience as valuator in connection with expropriation cases and is specially familiar with land values

in the region (page 50), has valued this property at from $0.50 to $1.00 per square foot. (Page 52, lines 30-49) Appellant has claimed $0.50 per square foot. No witnesses heard on behalf of the Respondent have suggested any value. All that they have proved is that the land was valued for municipal purposes at $0.20 and had recently, on account of the general depression prevailing at the time of the trial, been reduced to $0.12. Municipal valuations, we submit, are not a fair basis for assessing compensation.

Respondent's witnesses have also stressed the fact that filling this area would be an expensive proposition.—They have given a figure of $0.80 per square foot. We think this contention is best answered by saying that the old quay is valued at but $3,000.00, and that while the one which would have had to be built to make use of the area taken would have been more expensive, there should not be such a tremendous difference between the amount allowed to Jalbert for the quay which he is being deprived of, and the cost of the quay which might have been built on the area taken by the Respondent.

We respectfully submit that the Suppliant should be allowed $7,000.00 as compensation for the land taken, that is 14000 feet at $0.50.

CONCLUSION

WHEREFORE Suppliant Appellant prays that the appeal herein be maintained and that it be declared that Respondent must pay him $35,000. with interest on $10,000. from the 25th of June, 1929, and on $25,000. from the 24th December, 1932, and costs in both Courts.

Quebec, January 14th, 1936.

ST-LAURENT, GAGNÉ, DEVLIN & TASCHEREAU,

Attorneys for Suppliant-Appellant.

No. 3

INTERVENANT-APPELLANT'S FACTUM

This is an appeal from a judgment of the Exchequer Court of Canada, Angers J., dated the 12th June, 1935, dismissing the Petition of Right of Henri Jalbert and the Intervention of the Attorney General for the Province of Quebec, with costs.

PROCEEDINGS

The proceedings in this case were initiated by a Petition of Right by the Suppliant-Appellant, Henri Jalbert, in which he alleges in substance:

In the Supreme Court.

No 3
Intervenant Appellant's Factum. (Continued.)

1. That he 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 July, 1907.

2. 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.

3. That His Majesty in right of the Dominion of Canada, acting through his mandatories the Chicoutimi Harbour Commissioners, has taken possession of the major part of his 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.

4. Accordingly Jalbert claims $8,125.00 for the land taken, $10,000.00 for the quay and $25,000.00 for loss of the access to the river.

In his defence the Respondent admits having taken possession of the major part of the beach lot, and having filled in the river in front of Jalbert's property and pleads in substance:

1. That the Letters Patent granting the beach lot are invalid because the land granted was at the time of Confederation part of a public harbour.

2. That the quay was built in contravention to the Navigable Waters Protection Act. (This point was abandoned at the trial, Case page 69).

3. That Jalbert's lot of land was not bounded to the river Saguenay;

4. That Jalbert suffered no damages on account of being deprived from the access to the river, because he could use the Harbour Commission's Piers for his trade.

The Attorney General of the Province of Quebec intervened in the case in order to support the validity of the Letters Patent for the beach lot, alleging that at the time of Confederation those lands were not part of a public harbour.

In his notes the learned trial Judge, after reviewing the authorities on the question, finds that in 1867 there was a public harbour at Chicoutimi and without further discussing the questions raised, concludes that the Petition of Right and the Intervention should both he dismissed with costs.

GROUNDS OF APPEAL

Leaving aside the question of damages for loss of access to the river, with which the Intervenant is not concerned, it is respectfully submitted that the judgment of the learned trial Judge is ill founded:

1. Because it is not proved that at the time of Confederation there was a public harbour at Chicoutimi.

2. Because it is not proved that the land in question was at the time of Confederation used by the public as part of a public harbour as will appear from a summary of the evidence of record in the case.

FACTS

Before summarizing the depositions of witnesses heard in this case, it appears desirable to explain in a general way the configuration of the waterfront at Chicoutimi by reference to the maps and photographs filed as exhibits.

The Town of Chicoutimi is built on the South side of the River Saguenay at the point where the River Chicoutimi empties into it. At this juncture a deep bay is formed which is known as Le Bassin. This is clearly shown on the aerial photograph filed as exhibit D-9, (Album page 4).

Approximately half a mile downstream, the River aux Rats, a very much smaller stream, empties into the Saguenay River. The outlet can be seen on the aerial photograph D-8 in the foreground. Then a mile and one third further 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 which we have just mentioned were likely to appeal as landing places to those who first came to Chicoutimi by water.

The evidence shows that in the early days practically the only industry in the region was the lumber business. The area was forested with beautiful pines which were felled, sawn and exported. The Messrs. Price had been the first to start this business and they had established themselves at the Basin which was a natural harbour for small craft. The plan of the Town made by Surveyor Ballantyne in 1854 shows their mill and wharf next to the trading post of the Hudson Bay Company.

The evidence leaves no doubt that this wharf was the private property of the Messrs Price and in no way accessible to the public. That this was well understood is apparent from the deposition of Respondent's own witnesses. When Joseph Blackburn is asked whether there were any quays at Chicoutimi around 1867 he answers "No" (page 150 line 20) clearly meaning there were no public wharves.

It appears that one Johnny Guay had established himself at the mouth of the Rivière aux Rats; it would seem that he was an important merchant and brought his goods on schooners from Quebec. In order to land his wares, he had built a quay at the mouth of the Rivière aux Rats, which is still visible on exhibit D-8, with a barge lying alongside. It will be noted that on account of the low tide there is practically no water in the river and the barge is high and dry. This quay was also private property and the public did not have access to it, though some witnesses have said that Johnny Guay was of an accommodating disposition and at times did allow schooners belonging to others to load and unload at his quay.

There was also another quay at Rivière du Moulin some mile and a third below, which was also private property having belonged to one Pitre McLeod, who sold it to the Messrs. Price.

It is proved practically beyond contradiction that these three quays were before Confederation the only places where small boats could dock and load or unload merchandise at Chicoutimi. This is the evidence of Respondent's own witnesses. (See Charles Lemieux page 159, line 35).

There is no evidence of any use for purposes of navigation of the foreshore of the river at Jalbert's place before Confederation. On the contrary the site appears to have been at that time naturally unsuitable as a landing place.

In the Supreme Court.

No 3
Intervenant Appellant's Factum. (Continued.)

FIRST POINT

It is not proved that there was a public harbour at Chicoutimi before Confederation.

It does not appear necessary to review at great length the decisions in which the meaning of the words "Public harbour" in the British North America Act has been expounded. The authorities are quite fully reviewed in the notes of the learned trial judge.

Practically the whole doctrine concerning the meaning of those words is summarized in Lord Dunedin's judgment in the case of Attorney General for the Dominion of Canada vs Ritchie Contracting & Supply Company (1919, A.C. 999):

> "Public harbour" 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".

The learned trial Judge appears to have laid great stress on the decision of this Court in the case of the King vs Attorney General of Ontario and Forrest, (1934, S.C.R. 133), in which it was decided that Goderich Harbour was a public harbour at the time of Confederation, but that nevertheless the Island called Ship Island therein situated was not part of that harbour at that time. It had been proved in that case that five years before Confederation the Crown had granted to the Buffalo Railway Company a lease of a large area at that place, subject to the obligation of establishing and maintaining a safe entrance into the inner harbour and of maintaining wharves and piers in good repair, fit and proper for the same landing of passengers and for the discharge of vessels and steamers and the landing and warehousing of goods and passengers which *were to be available to the public* on payment of reasonable wharfage dues. It was accordingly held that under such circumstances Goderich Harbour was a public harbour.

It is respectfully submitted that the principles stated in that case support Intervenant's contention and not Respondent's contention. The *ratio decidenti* in the case of Goderich Harbour is the fact that the wharves which the Buffalo Railway Company was bound to erect were *public wharves*, that is wharves accessible to the public; this in the opinion of the majority of the Court, put the harbour into the class of public harbours.

In the present case the situation is exactly the opposite. No public user of the site before Confederation has been proved. The only places which were shown to have been used for harbour purposes are privately owned quays which were not accessible to the public. The only use of the foreshore of the River Saguenay proved to have been made by the public is the kind of use which takes place anywhere along any river or stream in which a canoe or a rowboat can be navigated. People who came to Chicoutimi by means of such conveyances landed wherever convenient. That is certainly not the kind of user which makes a place a public harbour. Apart from that, it is proved practically beyond contradiction, that the only landing places used were the

three privately owned quays which we have already mentioned. As far as anchoring ships is concerned all that is proved is that they did anchor in midstream wherever convenient, as would be expected to take place anywhere in a navigable river. But one or two witnesses mentioned as an isolated occurrence a schooner having landed goods once between the Basin and the Rivière aux Rats, near Meron Tremblay's place, that is near what is shown on the plan as Sainte Anne Avenue.

It is, therefore, submitted that it has not been proved conclusively by the Respondent that there was a public harbour at Chicoutimi before Confederation. It is admitted that there was at that time no Government wharf. Of course, it is true that the existence of a Government wharf or of any other public works is not necessary to establish the existence of a public harbour, but it is respectfully submitted that the fact is not immaterial as the learned Judge says (page 260, line 20). There may be a public harbour in spite of the fact that no public moneys have been expended and no public works erected for purposes of navigation, but in the absence of such public works, it must be shown that the harbour had actually been used as such *by the public*. In the case of Goderich Harbour it has been decided that such use was proved by the existence of a wharf built under the conditions of a lease granted by the Government which made this wharf available to the public; but in this case the situation is entirely different. What commercial navigation took place was carried on at privately owned quays which were not available to the public and were not in fact used by the public as such, as will appear from a review of the depositions of witnesses heard on this point.

The first witness is Eugene Caron (page 124). He says that every year brigs came to load wood which Mr. Price exported. In the early days these brigs anchored in the Basin, later on at Rivière du Moulin and still later on at Pointe des Roches. That is apparently where they anchored at the time of Confederation (page 135). The wood was loaded from Mr. Price's quay on barges which carried from 700 to 1000 planks and brought them to the ships anchored in the river. These quays were not deep water piers, they were nothing else than a part of the shore of the river protected with wood slabs which held back the ground. (page 131).

The witness remembers having seen a ship loaded with cattle, anchored at Rivière du Moulin, which was unloaded by having the cattle swim to the shore. He also says that Johnny Guay loaded wood on his schooners at his quay at Rivière aux Rats. The witness further states that once he saw a schooner beached near Meron Tremblay's place and unloaded there, (about midway between Le Bassin and Rivière aux Rats). Apart from that single occurence, the witness never saw any ship loaded and unloaded except at the Price and Guay quays or at Rivière du Moulin.

The second witness is Timothy Harvey. He speaks of small boats loaded and unloaded at the Price and Guay quays and of schooners which loaded and unloaded in all the small bays on the Saguenay (page 142) and occasionally came to Chicoutimi. He does not remember exactly where they went. This witness says that he saw at one time thirteen sails on the Saguenay, at Chicoutimi. It is not clear however whether it is before or after Confederation, because almost immediately after making that statement he mentions the

Government wharf which was not built until 1874 (page 141). His recollections do not seem very reliable.

Philéas Lavoie has also seen small sailing boats, loaded and unloaded at the Price and Guay quays and at Rivière du Moulin. He mentions the fact that people used to come to Chicoutimi by canoes or rowboats, landing wherever convenient. Later on, persons were ferried across the Saguenay in a rowboat which landed at the foot of Sainte Anne Avenue (Meron Tremblay's) (page 149).

The next witness is Joseph Blackburn. He says there was no wharf at Chicoutimi in 1864. Of course, there were the Price and Guay quays where schooners docked. This witness has never seen boats near Meron Tremblay's place (page 151), nor any ship in Le Bassin (page 155). This seems to strengthen the conclusion that at the time of Confederation large sailing boats did not come farther upstream then Rivière du Moulin; only flat bottom sailing boats or schooners went higher up.

Charles Lemieux says that he also has never seen any boat loading or unloading at Meron Tremblay's place. The site was not suitable. He says that some wintered there, but no other witnesses mention this fact. On the contrary, Joseph Tremblay "Boise" who resided fifteen years (1855 to 1870) on the shore of the Saguenay, a short distance below Rivière aux Rats, says that no boat ever wintered there (page 194, line 10). The witness must be mistaken because owing to the strong current the place is manifestly very unsuitable for that purpose. As do the other witnesses, he says, that boats loaded and unloaded only at the three quays which have been often referred to.

He explains that usually large sailing ships did not go higher up that Rivière du Moulin. They were loaded from small flat bottom sailing boats which later on were towed by a stream tug. This tug as well as the small boats belonged to Mr. Price.

Ulysse Duchêne says that Mr. Price had quays alongside of his mill at Le Bassin which were used for piling his wood. He has also seen Johnny Guay's quay but never saw any boats loaded or unloaded there. The ships on which Mr. Price's wood was loaded were anchored a little below Rivière du Moulin and loaded from small sailing boats. The witness has never seen any boat being built at Chicoutimi.

Pitre McLeod remembers that at Le Bassin flat bottom sailing boats were used to load wood from the Price quay and transfer their cargo to ships anchored at Rivière du Moulin. The witness has seen boats or schooners landing near Meron Tremblay's place (Ste. Anne Avenue) but that is after Confederation because in cross examination (page 164) the witness says he was working at that time, and he was born in 1854 or 1855 and started working at fourteen.

Ludger Petit is the last witness heard in behalf of Respondent on that point. To his knowledge, knees and elbows for ship building were always loaded on the other side of the river, never at Chicoutimi. The ships which carried wood to Europe never went above Rivière du Moulin and were always loaded there or at Pointe des Roches from flat bottom boats. He came to Chicoutimi in 1862 on a schooner which belonged to Johnny Guay and unloaded at his quay. This witness mentions the fact that the Bassin used to

be deeper until filled in, as a consequence of the rupture of the dam on the river Chicoutimi. He first stated that this had happened a great many years ago, but in cross examination he had to admit that this happened around 1900.

At the time of Confederation the land where Jalbert's property is situated was vacant from Rivière aux Rats to the Bassin. It was rough, uneven and swampy land. (Page 177).

Joseph Tremblay "Boise" 85 years old, was the only witness heard for the Intervenant on that question. He also states that from the Basin to the Rivière aux Rats all the land was vacant, it was covered with brush, stumps and rather swampy (page 192). There were no ships loaded or unloaded except at the Price wharf, Guay's quay and at Rivière du Moulin. The ships taking wood to Europe were anchored in midstream at Rivière du Moulin and loaded from flat bottom barges.

It will be seen that the witnesses pretty well agree and that all their evidence comes to this: The Messrs. Price had a mill and quay in the Basin, they loaded their wood on flat bottom barges, which took it to ships anchored at Rivière du Moulin or Pointe des Roches. One Johnny Guay had built a small quay at Rivière aux Rats where he loaded and unloaded schooners and occasionally allowed other shooners to load and unload.

The documents filed add very little to this. Taking them in chronological order they are:

1. Exhibit D-7. This is an extract of Canada Directory for 1857-1858, published by John Lovell. The learned trial Judge has decided that Intervenant's objection to this document was well founded, because it was anonymous. In any event, the only trade mentioned is the lumber business.

2. Exhibit D-5. This document has also been rejected by the trial Judge. It is a Petition made in 1860 requesting the construction of a wharf either at Chicoutimi or at St. Alphonse. (now Bagotville).

3. Exhibit D-25. This is an extract of the Customs Establishment Book of the Port of Quebec, showing that there was a Customs officer at Chicoutimi.

4. Exhibit D-6. This is a book by Arthur Buies entitled "The Saguenay". The author described the Town and the large lumber business carried on by Mr. Price. The author says that it is only in 1874 that a Steamship Line to Chicoutimi regularly operated and in 1875 that the Government built a public wharf.

5. Exhibit D-24. This is an extract from the report of the Minister of Public Works of Canada for the years 1867-1882 in which is reproduced a statement supplied by La Compagnie de Navigation à Vapeur du St-Laurent of the number of trips made by its boats to various points in the River Saguenay.

It is submitted that this document should not have been received as evidence in favor of the Respondent, because it is a report made by his own servants based on unverified information. Furthermore, it ought to have been possible to make better and more complete evidence from the records of the Company which were not proved to be unavailable.

The learned trial Judge appears to have very largely relied upon that document in his finding that Chicoutimi was a public harbour in 1867 (page 256). He says that the figures given in those statements show the continuous progression of the harbour of Chicoutimi before Confederation.

It is respectfully submitted that this is a very erroneous inference because the document *is not a statement of the number of trips made by the steamships to Chicoutimi*, but according to the covering letter of the Company's Secretary (page 215) a statement of the number of trips, etc., to the *various ports of the River Saguenay*. No doubt Chicoutimi is specially referred to in the title of the statements, but these statements were made in 1883 and since 1874 Chicoutimi had become the terminus of the line. Nothing shows that the steam boats went there before that year.

One of Respondent's witnesses, Ludger Petit (page 179 see also page 169) has said that, around 1865, the steam boats went to St. Alphonse (now Bagotville) more than ten miles below Chicoutimi. If the steamships had been going to Chicoutimi before the Government wharf was built, the fact could have been remembered by some of the many aged witnesses heard and they would have known where they had docked. Furthermore, it is stated in Buies' book Exhibit D-6, that the Steamship Company established a regular line to Chicoutimi in 1874 and that a wharf to accommodate them was built in 1875. As we shall see some other documents show that this is not strictly accurate; the wharf was at least partially erected in 1874 and its building and the establishment of the Steamship Line have no doubt been contemporaneous.

In this same Exhibit there is also a report in which is mentioned a log slide built at the outlet of Lake St. John to facilitate the driving of wood. It is respectfully submitted that the building of this log slide, some twenty miles above Chicoutimi, has no bearing on the question.

Exhibit I-1, which is a part of the same report, shows that at the time of Confederation there was no public wharf at Chicoutimi.

We also find in that report (page 214) that the Government wharf at Chicoutimi was first started in 1873 by the Steamship Company which in 1874 handed it over to the Federal Government who completed it. This shows that the building of the wharf and the establishment of the Steamship Line were contemporaneous and that Buies is slightly mistaken when he says that the wharf was used in 1874 though uncompleted and was finished in 1875. Nothing justifies the assumption that the steamboats went to Chicoutimi before the wharf was built.

It is, therefore, submitted that there has been no evidence of there having been a public harbour at Chicoutimi before Confederation. All that has been proved is that there has been an extensive trade carried on by the Messrs. Price who had built, for their own use, near their mill at Le Bassin a slab quay from which they loaded wood in flat bottom barges which transferred it in midstream to sailing ships stationed at Rivière du Moulin or at Pointe des Roches; and that one Johnny Guay had built for his own use, a very small quay at the outlet of Rivière aux Rats at which he loaded and unloaded schooners. Both these quays were private property, none of them was accessible to the public and there was no public landing place for ships used as such by the public and there is no evidence that steampships ever went to Chicoutimi or anywhere nearer than St. Alphonse (now Bagotville) before the construction of the Government's wharf in 1874.

Such being the case, it is submitted that it has not been proved that at the time of Confederation, Chicoutimi was a public harbour that is, as stated

in the well known decisions cited by the learned trial Judge, a place to which on the relevant date the public had access as a harbour and which it had actually used for that purpose.

It needs hardly be repeated here that the British North America Act in vesting public harbours into the Federal Government intended only to divide between the Federal and Provincial Governments public properties and left entirely unaffected individual properties and that the Respondent had the onus of proving the public use as a harbour before Confederation.

The fact that a Customs officer had been appointed does not, it is submitted change the situation. There are Customs officers appointed in a number of places which are not public harbours.

SECOND POINT

The learned trial Judge in his notes, after having found that there was a public harbour at Chicoutimi at the time of Confederation, immediately concludes that the Petition of Right and the Intervention should be dismissed.

It is respectfully submitted that, assuming the existence of a public harbour had been proved, there remained to be ascertained the extent of that harbour. In other words, in order to succeed on the question raised in the Intervention, the Respondent had to prove not only that there was a public harbour, but that the foreshore of the River Saguenay at the place under discussion was at the relevant date a part of that harbour, that is that at that date it was public property used as a harbour by the public as such. That is the basis on which the Goderich Harbour case was decided by this Court in 1934. Though it was found that Goderich Harbour was a public harbour at the date of Confederation, it was decided that Ship Island was not proved to have been part of it, the Court applying the principles laid down by the Privy Council in the case of Attorney General for the Dominion of Canada and Attorneys General for the Provinces of Ontario, Quebec and Nova Scotia (1898, A.C. 700, at page 711) and quoted by the trial Judge:

> "Their Lorships are of opinion that it does not follow that, because the foreshore on the margin of a harbour is Crown property, it necessarily forms part of the harbour. It may or may not do so, according to circumstances. If, for example, it had actualiy been used for harbour purposes, such as anchoring ships or landing goods, it would, no doubt, form part of the harbour; but there are other cases in which in their Lordships' opinion, it would be equally clear that it did not form part of it."

It is respectfully submitted that in this case it appears that the foreshore at the site of Jalbert's quay was not at the time of Confederation part of a harbour.

There is no evidence whatever of any public use or in fact of any use whatever of the foreshore at the spot in question for purposes of navigation. The witnesses are unanimous in saying that the land was rough, uneven, swampy, covered with brush and stumps, clearly waste lands not used by anyone. (Boise Tremblay, page 192, line 30, Eugène Caron, page 132.) The

In the Supreme Court.

No 3 Intervenant Appellant's Factum. (Continued.)

evidence leaves no doubt that the place was not fit for loading and unloading boats before the works made by Jalbert's predecessor in title and himself.

The learned trial Judge says in his notes (page 265, lines 36-40) that the evidence shows that boats occasionally landed at the shore which was steep, specially in front of the place where the Cathedral Chuch is presently erected, in order to unload their cargoes and he refers to witnesses Blackburn, Caron, Lemieux and McLeod. This is not stricly accurate because the witnesses do not speak of loaded boats landed there but only of canoes and rowboats in which people came by water to Chicoutimi from the other side of the river. In any event, the photo exhibit D-8 shows that this spot is the site of the Government wharf which is plainly seen on that photograph right in front of church. It is quite a long way from Jalbert's wharf as is very apparent on that photograph.

It is, therefore, submitted that it has not been proved that the land at the place under discussion was at the time of Confederation part of a public harbour and that consequently it never passed to the Federal Government, so that the Letters Patent granting the same are valid.

CONCLUSION

WHEREFORE Intervenant prays that the judgment appealed from be quashed and that his Intervention be maintained with costs in both Courts.

Quebec, January 8th, 1936.

CHARLES LANCTOT.
LOUIS-S. ST-LAURENT.

No. 4

RESPONDENT'S FACTUM ON THE APPEAL OF THE INTERVENANT

THE PLEADINGS

In the Supreme Court.

No 4 Respondent's Factum on the Appeal of the Intervenant.

By his petition of right Suppliant, appellant, claims from His Majesty the King, in His Right of the Dominion of Canada, the sum of $43,125.

The Suppliant, appellant, alleges that he is proprietor of a beach-lot on the Saguenay River, granted by Letters Patent of the Province of Quebec in 1907, (case page 231), and of two lots serving as lumber yard and fronting on the Saguenay River.

He claims that the Chicoutimi Harbour Commission, acting as administrator or trustee for the Crown, has taken the greater portion of his beach-lot for the erection of wharves, piers and filling according to plans and estimates approved by His Majesty, and he asks for that item the sum of $8,125.

He also claims that the above works by the Chicoutimi Harbour Commission and filling have rendered useless a wharf which he had built on the beach-lot and he asks on that score the sum of $10,000. He asks a further sum of $25,000. for loss of his right of access to the Saguenay River, making a total of $43,125.

His Majesty the King, in right of the Dominion of Canada, had pleaded in brief :

(*a*) That that portion of the Saguenay River and foreshore in dispute, where the works of the Chicoutimi Harbour Commission were erected, etc., was vested in the Dominion of Canada, as forming part of a public harbour, at the date of 1867.

(*b*) By denying the allegations of the petition to the effect that suppliant's property was bordering on the Saguenay River and that he had right of access to the Saguenay River.

(*c*) That suppliant could use the new wharves built by the Chicoutimi Harbour Commission, and consequently, did not suffer damages even if his property (lumber yard) enjoyed right of access to the Saguenay River, which was denied.

(*d*) That according to the Railway Act, Rev. Sta. 1927; Chap. 170; Sec. 221, which applied, any damage that might have been suffered by the suppliant was compensated by the plus value given to his property by the works in question of the Chicoutimi Harbour Commission.

(*e*) That at all events, the claim of the suppliant was grossly exaggerated, given the amount of lumber handled yearly by the suppliant, and the amount representing the capitalized cost of same.

(*f*) That suppliant did not obtain authorization to build his wharf in conformity with the Act for the Protection of Navigable waters, Rev. Sta. 1927; chap. 140, and that such wharf constituted an unauthorized work of which the Minister of Marine could ask the demolition, and that suppliant could not claim compensation for such demolition or removal. (We will have to advert more particularly to that branch of the pleading further on in this factum, page , in view of a certain declaration of the Respondent's attorney at the hearing, and which is to be found at page 69 of the Case).

(*g*) And finally Respondent asked that the Petition be dismissed as unfounded in fact and in law.

(*h*) The Attorney General for the Province of Quebec, at that stage, intervened in the case to support the validity of the Letters Patent granted by the Province of Quebec for the above beach-lot. The Intervenant alleged that the beach-lot belonged to the Province of Quebec, that the Letters Patent were consequently legal, valid and operative, and he asked that the plea of Respondent to the effect that it formed part of a public harbour, be dismissed with costs, etc. (Case, pages 8 and 9).

(*i*) The Respondent met that Intervention by an answer by which it reiterated the grounds set up in his plea to Suppliant's petition, and by the denial of the allegations of the Intervention, and concluded that it be dismissed, as unfounded in fact and in law, with costs. (Case, page 10).

By the judgment of the Exchequer Court presided over by Mr. Justice

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Angers and dated June 12, 1935, the Petition and Intervention were dismissed with costs.

The Court, after a lengthy inquest which took place at Chicoutimi, held that that portion of the Saguenay River and foreshore, where the wharves were built, etc., by the Chicoutimi Harbour Commission, formed a constituent part of a public harbour at the date of the Confederation and was vested in the Dominion of Canada, and that the Petition and Intervention were unfounded and should be dismissed with costs.

The reasons for judgment are to be found at pages 240 to 268 of the Case, and the formal judgment at page 268. The learned trial judge after reviewing correctly, in our humble opinion, the judgments and law on this matter, and hearing a great number of witnesses, and taking cognizance of the documentary evidence filed, came to the conclusion that, as a question of fact, that portion of the Saguenay River and of foreshore in dispute, formed an integral part of a public harbour as it stood in the year 1867.

Appeal was taken from this judgment by the Suppliant, and also by the Attorney General of the Province of Quebec.

We submit that the judgment appealed from is well founded and should be confirmed with costs.

ARGUMENT

We will deal in this factum with the question of property of the Saguenay River and its foreshore, or in other words, whether that part of the Saguenay River and foreshore in dispute, was or was not a public harbour at the relevant date, which is a question common to both the appeal of the Suppliant and the appeal of the Intervenant, the Attorney General of Quebec.

There is also another point, which is common to this appeal and to that of the Suppliant, which may be stated as follows: the Government of the Province of Quebec, even assuming, for the purpose of discussion, that the beach-lot or foreshore in question belonged to it, could not and did not convey the ownership of the beach-lot in dispute, with respect to anything concerning navigation and specially the right to build a wharf thereon; but as this question appears to apply more particularly to the appeal of the Suppliant. We contend ourselves with stating the proposition for the intelligence of the case, and we ask this Honourable Court to refer to our argument on that point in the Suppliant's appeal.

We will take up in this factum the following points which, we think, together with the proposition above stated, cover all the questions involved in the appeal of the Intervenant.

1st—What constitutes a public harbour in the light of the decisions rendered on that matter.

2nd—An examination of the particular, facts and circumstances with reference to the Chicoutimi Harbour and its limits established in this case by the evidence: a) oral evidence, and b) documentary evidence; showing that the Chicoutimi Harbour was a public harbour since and before 1867 and that it included the foreshore in dispute.

3rd—We will show more particularly that the beach-lot or foreshore in dispute forms a constituent part of the Chicoutimi Harbour.

1.—*What constitutes a public harbour in the light of the decisions rendered in that matter—*

Section 108 of the B. N. A. A. enacts that "the public works and property "of each province enumerated in the 3rd schedule to this Act shall be the "property of Canada".

The third schedule reads thus:

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

"1. Canals, with lands and water power connected therewith.

"2. Public harbours.

"3. Lighthouses and piers, and Sable Island.

"4. Steamboats, dredges and public vessels.

"5. Rivers and lake improvements.

"6. Railways and railway stocks, mortgages, and other debts due by railway companies.

"7. Military roads.

"8. Custom houses, post offices, and all other public buildings, except such as the Government of Canada appropriate for the use of the Provincial Legislatures and Governments.

"9. Property transferred by the Imperial Government, and known as Ordinance Property.

"10. Armouries, drill sheds, military clothing, and munitions of war, and land set apart for general public purposes."

This case revolves mainly on the question, "what constitutes a public harbour?" Several decisions of the highest court of Canada and of the Privy Council have been rendered on that subject. We will refer to them briefly. No definition in the abstract has been attempted by the Courts of the words "public harbours" though some aspects have been outlined throwing light on the import of the above words. It remains, however, a question of fact to be determined according to the general principles and data set up by the courts, and to the particular circumstances of a given harbour. Two extreme points appear to be settled.

First—On one hand it is not necessary that public funds should have been used to improve a harbour to have it considered as a public harbour. (Holman v. Green, 6 S. C. R., 707; Fisheries Case, 1898 A. C., p. 700).

Second—On the other hand it is not sufficient that a place be naturally fit or potentially so, to be a harbour, but it must have been publicly used as such before 1867. (Dominion of Canada v. Ritchie Contracting & Supply Company, 52 R. C. S., p. 78; 1919 A. C., 999).

The question narrowed down by these two limitations remains to be determined whether a given harbour was or was not a public harbour at the relevant date, taking these words "public harbours" in their ordinary sense and meaning. These words, as has been several times decided, do not have any technical meaning and must be understood in their natural sense, and they must receive a fair and liberal interpretation. (See remarks of C. J. Duff, in the case of Attorney General of Ontario v. Forrest, 1934, Can. S. C. R., p. 133 and p. 138).

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Given these premises we think we can safely state that a public harbour may be classed as a place where the public has, by common user, recourse for the anchoring of ships or for navigation and trade.

Common user for anchoring of ships, or for loading and unloading of goods are some of the specific features, which appear to have been profounded, not exclusively, but by way of illustration, by all our courts and the Privy council in the decisions quoted above and hereafter. In re Holman v. Greene (6 R. C. S., page 707, at page 716). Mr. Justice Strong uses the following words: "The harbour of which the public have the common right of usage, and which in that sense at least, is a public harbour."

In the Fisheries Case, 1898 A. C., p. 700 at page 712,

Lord Herschell employs the following language: "If, for example, it had "actually been used for harbour purposes such as anchoring ships or landing "goods, it would no doubt form part of the harbour."

In re Attorney General of British Columbia v. Canadian Pacific Railway. (1906, A. C., p. 204), Sir Arthur Wilson used the same language. "...And evidence was given bearing upon it (this is whether it was a public harbour "or not) directed to show that before 1871, when British Columbia joined "the Dominion, the foreshore at the point to which the action relates, was "used for harbour purposes, such as the landing of goods and the like. That "evidence was somewhat scanty, but it was perhaps as good as could reason- "ably be expected with respect to a time so far back, and a time when the "harbour was in so early a stage of its commercial development. The evidence "satisfied the learned trial judge, and the Full Court agreed with him. Their "lordships see no reason to dissent from the conclusion thus arrived at. And "on this ground, if there were no other, the power of the Dominion Parliament "to legislate for this foreshore would be clearly established."

In re Dominion of Canada v. Ritchie Contracting & Supply Company, (1919), A. C., p. 1000, Lord Dunedin at page 1003: "Public harbour 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 King v. Bradburn (14 Exchequer C. R., p. 419), Sir Walter Cassels, — then Mr. Justice Cassels: — "Would depend to a great extent on the question "of fact as to whether the particular harbour in question had been actually "used for harbour purposes such as anchoring ships or landing goods etc." The judgment was affirmed by the Supreme Court sub nomine The King v. Kelly, which was similar and joined with that case. The decision of the Supreme Court is unreported.

In re Maxwell v. His Majesty the King, Cassels, J., 17 Exch. C. R., p. 97, the judgment is in the same sense. Held: "Bedford Basin being a public "harbour at the time of Confederation and a property of the Province of "Nova Scotia passed to the Dominion by virtue of the provisions of the British "North America Act, a subsequent provincial grant of a water lot is thereon "void and confers no title."

In the case of King v. Attorney General of Ontario and Forest, (1934, Can. S. C. R., p. 133), Mr. Chief Justice Duff states at page 136: "Goderich "Harbour was, on the 1st of July, 1867, a harbour to which the public had the

"right to resort and did resort for commercial purposes, and it would appear, "therefore, that it satisfied the criteria laid down in Attorney General for Ca- "nada v. Ritchie Contracting & Supply Co. (1919) A.C. 999". And Mr. Justice Rinfret, at page 145, states: "It appears that Goderich Harbour was not "only capable of being used but that it was actually in use as a harbour in the "commercial sense."

— 2 —

Applying the above test to the harbour in question, we submit that the evidence given in the present case, both oral and documentary, shows that the harbour in question, i. e. the Chicoutimi harbour, was a public harbour and comprised as a constituent part the foreshore in dispute.

We wish first to summarize and give a general purview of the different facts established in this case and which are stated at length in the judgment appealed from at pages 253 to 267.

1. Chicoutimi, opposite which lies the harbour in question was founded in the 40th. There was trade, business, and transportation going on quite extensively from the beginning.

2. Chicoutimi at that time had no railroad, as almost the rest of the country, and relied as far as we can see by the evidence, exclusively on transportation by water.

3. Chicoutimi is at the head of the navigation of the Saguenay River, which has a length of about 75 miles from its mouth at Tadoussac, and is navigable throughout till Chicoutimi or thereabout.

4. As a natural sequence, to the foundation of the village of Chicoutimi and the developing of the region ships came to Chicoutimi or were to be found there and used commonly and commercially, all that part of the river opposite Chicoutimi and foreshore and its vicinity for the purpose of landing and loading and unloading goods, especially lumber. The evidence also shows that there were three wharves one at the Mill River, a second one the wharf of Johnny Guay,—at Rat River, and the other,—the wharf of the Prices,—at the Basin; and there was at that time a good number of navigators at Chicoutimi.

Such facts appear to us to be clearly established by the evidence which was given and which was fully analysed by the learned trial judge, and his conclusions appear to be absolutely well founded. We wish to refer this Honorable Court to the evidence of six or seven old inhabitants of Chicoutimi who gave evidence showing that Chicoutimi was a public harbour at or before 1867, according to their own actual observations, and who located the limits of the harbour from La Rivière du Moulin shown on Plan D-1, D-10, D-15, D-23 (Album, pages 11, 3, 14, 13), at the east end, to the Basin, on the west side, which Basin is shown on Plan D-1, D-2 and D-16 (Album, p. 11, 12, 17), and also at D-9 and D-10 (Album, p. 4, 3). They established that there were three wharves, one at La Rivière du Moulin, another one higher up the river Saguenay at Rat River about three hundred feet from the property of the Suppliant, which river is shown on Plan D-1, D-2, D-16 (Album, p. 11, 12, 17). And a third wharf higher up again the river Saguenay and situate at the Basin, D-1, D-9, D-16 (Album, p. 11, 4, 17).

a) ORAL EVIDENCE

We wish to refer this Court to the evidence of the following witnesses.

Eugène Caron, rentier, of the city of Quebec, 85 years old, and who was born at Rivière du Moulin. His evidence is reported at Case pp. 124 to 136. We venture to translate the analysis of his evidence made by the learned trial judge (case p. 261 & 262).

Eugène Caron declares that in 1859 his father was working for the Prices and that they had a saw-mill and a wharf at the Chicoutimi Basin (this Basin which is constantly refered to by the majority of the witnesses is shown on divers plans, particularly those filed as exhibits D-1, D-2 and D-16 (Albums, pages 11, 12, 17). It can be seen also on the photograph filed as Exhibit D-10 (Album, page 3). See also Exhibit D-9 (Album, page 4), where it is shown more clearly. The wharves at the Basin according to the witness, were over a quarter of a mile long. The Prices had ships of a capacity varying from 700 to 1,000 boards. These ships loaded the boards at the Basin wharf and transported them to the vessels anchored in front of the Basin or lower. These vessels came for the most part from England and Norway.

Answering a question relating to the spot where these vessels were lying, the witness testifies as follows (Case, p. 126, line 30):

> "I remember one instance at least, that there were three anchored at the Basin. Later on there were others. We had loaded two opposite the property of Mr. Price at Rivière du Moulin. There were not Empresses at that time. There came a time when the ships could not come to Chicoutimi and we loaded them at La Pointe des Roches. Besides the Prices, there was at that time in Chicoutimi one named Johnny Guay who made lumber and who had a wharf at the eastern point of Rat River (This river appears on the plans D-1, D-2, D-16 (Album, page 11, 12 and 17). Guay was selling three-inch lumber to the Prices and he shipped the planks to Quebec."

Caron says that Guay had a contract with Price; it is perhaps preferable to quote him verbatim on that subject (Case, page 128, line 14):

> A.—Mr. Guay had a contract with Mr. Price and father culled the wood. I came with father myself to learn the trade. We used to gather 2,000 or 3,000 boards and Mr. Price sent his boat to get them.
>
> Q.—You loaded the wood in the ships of Mr. Price at the warf of Johnny Guay, and you unloaded them into the sailing ships?
>
> A.—Yes.
>
> Q.—Where were these sailing ships?
>
> A.—At Rivière du Moulin, and later on at the shallows (battures) at Point des Roches.

Witness says that there were three wharves at that time, that of Rivière du Moulin, that of Johnny Guay, and that of the Prices at the Basin.

Passing on to another subject, the attorney for respondent asked the witness if he noticed that the sailing ships (goélettes ou des bateaux) landed

on the beach near the place where one named Meron Tremblay resided and elucidates from him the following information (Case, page 128, line 40):

A.—I remember once the ship (goélette) was there and Meron Tremblay could not find any body to unload it. At that time there were no automobiles. We had to walk, and he was obliged to send for the farmers to unload. He asked me to send little boys to go for the Harvey to unload the ship (goélette).

Q.—Where was that ship?

A.—At the sand-bank at high tide, opposite the street.

Q.—Opposite St. Anne Street?

A.—I do not know the name of the street; but it was where the bridge was built. It was where stood the St. Anne ferry.

Caron remembers that at that time there was stationed at Chicoutimi a custom officer, the first whom he remembers was one named Mackenzie. It is, no doubt, the once whose name is mentioned as subcollector of customs in Exhibit D-25. Here is what Caron says on that topic (Case, p. 129, line 10):

A.—I was young then but I remember that there was one Mr. Mackenzie who resided at Laterrière. He had a small boy and girl who went to school and boarded here. When a boat came from Europe he used to come and clear the vessel.

Q.—What do you mean, "clear the vessel"?

A.—The sailing vessels who loaded goods for Europe.

It is brought out by the evidence of Caron that he had resided at the Basis from the age of ten till he was at least sixteen or seventeen, that is, since 1859 till 1865 or 1866. Most of the facts on which he gives evidence occured when he was between twelve and sixteen years of age.

To the quotations given by the learned trial judge we wish to add the following:

CARON, Examination in Chief, case, p. 127, line 40 s, page 128 head of page:

Q.—Where was Johnny Guay's wharf?

A.—At the eastern point of Rat River.

Q.—He made lumber?

A.—Yes.

Q.—To whom did he sell it?

A.—The three inch lumber, he sold it to Mr. Price and the plank he (Guay) shipped it to Quebec.

Q.—Did Johnny Guay have vessels?

A.—Yes, he had schooners.

Q.—How many?

A.—He had one surely who was called the "La Martin"....and he had another called the "Destrick".

CARON, Examination in Chief, page 128, line 30:

Q.—Opposite the property of Mr. Johnny Guay. Did you see sailing ships (voiliers)?

A.—Yes, sailing vessels from Europe. Many were loaded there, but I noticed three were loading at the same time.

Q.—Was this at the Basin?
A.—Yes. And all were moored one in rear of the other.
Q.—There were three wharves at that time, that of Riviere du Moulin, that of Johnny Guay and that of Price at the Basin?
A.—Yes.

The evidence of Timothy Harvey, of Philias Lavoie,of JosephBlackburn, of Ulysse Duchaine, of Pitre McLeod, and of Ludger Petit is along the same lines.

TIMOTHY HARVEY, age 92. His evidence is reported at page 139 to 144. We quote from page 140, line 40 (translation):

Q.—The vessels of which you spoke, and which came to Chicoutimi, where did they come from?
A.—They came from the Old Countries.
Q.—They came from Europe?
A.—I do not know.
Q.—When they arrived at Chicoutimi, where did they go?
A.—They came here, opposite Rat River, at Rivière du Moulin and at the Bassin. I have seen as many as thirteen (13) small sailing ships.
Q.—There were as many as thirteen (13) vessels? At which place were there as many as thirteen vessels?
A.—At the Basin and at La Rivière du Moulin, in two groups.

At page 142 (head of the page), Mr. Harvey names one Lavoie, and one Levesque and one Pagé who were navigators; and one Meron Tremblay, and also one Johnny Guay, page 141.

PHILEAS LAVOIE, aged 95, Case, page 141 to 149; at page 146, line 20, after speaking of the three wharves already mentioned by the other witnesses, he testified as follows, line 20:

Q.—Mr. Lavoie did the ships come to these wharves?
A.—Yes, certainly, ships came.
Q.—What kind of ships came to the Basin?
A.—They were sailing ships; they were one-masted and others were two-masted.
Q.—Of these ships of one mast or two mast, did some come to the Basin?
A.—. ...
Q.—Did some of these ships come to the Basin?
A.—Yes, they all came to their load lumber that was on the wharves.

Case page 147, line 30:

Q.—Now people from St. Anne and St. Fulgence and of the place called "Des Terres Rompues" who came to Chicoutimi how did they come there?
A.—They came "en voiture d'eau", (row boats).
Q.—Where did they land, when they came here?
A.—Whereever it suited them.

Q.—Alongside the beach?
A.—Alongside the beach or at the wharf, or anywhere.

JOSEPH BLACKBURN, aged 82 (Case, page 150, to 155), Page 150, line 30.

Q.—Do you remember if ships (goélettes) used to come to the wharf of Johnny Guay.
A.—Yes, ships; his ships went there. You see, he had two and they came often to the wharf.
Q.—Did other ships than his, go to the wharf?
A.—Ah, yes, yes.
Q.—Did ships (goélettes) come to the Basin?
A.—Yes, ships and goelettes.
Q.—What kind of ships went there?
A.—Ships that came to get boards.

Page 150, line 20:

Q.—Now, these people from St. Anne or St. Fulgence, how did they come to Chicoutimi?
A.—Where they could, alongside the beach, anywhere. Some came to Johnny Guay's wharf; the others came alongside the shore.

Page 152, line 40 and page 153. Cross-questioned:

Q.—Was the house of your grandfather Pitre Blackburn far from the church?
A.—Beside the church. It almost touched the sacristy.
Q.—Near the church was there a place by which the water could be reached. — a path?
A.—There would have been room enough but there was no road; the road was between Dr. Martin's house and the house of my grandfather. Alongside the sacristy and the house there was no road.
Q.—By the road which existed between the house of Dr. Martin and the house of your grandfather, could one reach the waterside?
A.—Yes, there was a road; my grandfather' outbuildings were below that road and he used to pass alongside the house.
Q.—When you were thirteen or fourteen years old, people came when it suited them and landed at the "crans" (rocks), which existed at the place where the government wharf was afterwards built.
A.—Yes.
Q.—It was a natural place to land?
A. Yes, but they were all afraid.
Q. Because of the current?
A.—Yes, there was a strong current at the ebbing tide; one had to hasten to leave.

Page 154, line 30:

Q.—If I understand well, places where people went to the river-side were at the Basin?
A.—Yes.
Q.—At the Point?

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A.—Yes.
Q.—At Johnny Guay's?
A.—Yes.
Q.—At Riviere du Moulin?
A.—Yes.
Q.—And near the Church?
A.—Yes.
Q.—Where the government wharf was built?
A.—Yes.

ULYSSE DUCHESNE, aged 87. (Case, page 161 to 163) (He remembers that there were three wharves, as testified by the other witnesses, but does not remember anything else of consequence.)

PITRE MCLEOD, aged 79 (Case, page 163 to 169).
Page 164, line 30:

Q.—What kind of ships, or vessels, or goelettes (schooners) came to the Basin?
A.—Flat-bottom boats: sailings ships.
Q.—To your knowledge did many come?
A.—Yes, a good number.
Q.—What kind of ships went to Johnny Guay's?
A.—Any kind of ship entered at high tide, and goelettes (schooners) entered also. I have seen some there.

Page 166, line 40. Cross-questioned:

Q.—You were asked if you had seen ships or schooners aground not far from Meron Tremblay's place?
A.—Yes, I have seen some.
Q.—At what season did you see them?
A.—I did not notice.
Q.—Were the ships wintering there?
A.—Sometimes wintering, but I have even seen some unloading.
Q.—Where?
A.—At the ferry.
Q.—Approaching the bank and unloading directly?
A.—They went on the beach and they unloaded with horses.
Q.—They went there with carts at low tide?
A.—Yes, and they unloaded cord-wood. I did not see it often, but I have seen it.

LUDGER PETIT (Page 169 to 180), aged 84.
Page 170, line 10:

Q.—How did you come the first time to Chicoutimi?
A.—By ship.
Q. Where did you land?
A.—At Johnny Guay's wharf.
Q.—You came by boat from Quebec?
A.—Yes, on a boat belonging to the Price Company.

Page 172. Bottom of the page, and head of page 173.

Q.—Have you known at that time when you were twelve, thirteen or fourteen years old, navigators at Chicoutimi?

A.—Yes.

Q.—Could you name some?

A.—Yes. The Captain who brought us on the schooner of Johnny Guay was Captain Eusebe Levesque. Then there was a schooner that belonged to Messrs. Collard of Murray Bay, partners of Mr. Johnny Guay; and Mr. Louis Guay was Captain on board that schooner.

Q.—Did you know others?

A.—One Mr. Gagnon.

Q.—For whom did he navigate?

A.—For himself.

Q.—He was owner?

A.—Yes, owner of a schooner, and he navigated his schooner.

Page 175, line 44, and p. 176.

Q.—How did they proceed to send boards from the Basin to the vessels?

A.—By open flat-bottom boats.

Q.—How many boards could these boats carry?

A.—I do not know; there were medium size and larger.

Q.—These boats were not like the one that brought you from Quebec?

A.—Yes, the boat that brought me from Quebec was decked; it was covered.

Q.—There was a cabin?

A.—Yes, whereas the others had only a small cabin in the rear but it was an open boat.

Q.—These boats had only one mast?

A.—Yes.

Page 180. Re-examined. Line 10.

Q.—You have spoken of vessels which stopped at La Rivière du Moulin; must I understand that you call vessels "bâtiments" vessels that trafficked between Europe and Chicoutimi?

A.—Yes, a "bateau" (ship) has only one mast; a geollette (schooner) has two masts, and a brick (brig) has three masts. The boats with three masts we call bricks, and I never saw such going beyond La Rivière du Moulin.

Q.—It was these bricks that trafficked between Chicoutimi and Europe.

A.—Yes.

Now we should add a few words with reference to the wharves in question, that is, the wharf at Rivière du Moulin and at Rat River and at the Basin, to answer the argument put forward by the appellant, based on the private character of these wharves. It is true that these wharves were built by individuals and firms in advance of works undertaken by the Government. But these wharves, one of which at least, that of Johnny Guay, was used com-

monly by the public, did not prevent Chicoutimi Harbour from being a public harbour, commercially and publicly used as such, as shown by the evidence made in this case; but, by the facilities and accommodations they gave for trade and navigation purposes, they helped to give the Chicoutimi Harbour its character of public harbour. Further, the proprietors of these wharves never pretended to have any right on the harbour and its foreshore, nor did they act as a private corporation having its wharves and collecting dues. It has also been settled that it is not necessary that public funds should have been expended on a harbour to have it considered as a public harbour, and the third schedule (Sect. 108 B. N. A.) mentions, as vested in the Dominion of Canada, not only "provincial public works" but also "provincial property".

Now if we recapitulate all this evidence we submit that Chicoutimi was founded in the 40th, that there was extensive trade, specially in lumber going on there, that ships in great number came to Chicoutimi and landed at from Rivière du Moulin to the Basin, and even on the shore; that the center of activity was around the locality where the property and the foreshore in dispute lie; i. e. near the church, that navigation was going on quite extensively; that Chicoutimi was at the head of navigation of the Saguenay River; that there was existing in 1867 and before, a public harbour as delimitated above, publicly and commercially used as such, and the conclusions and facts as ascertained by the learned Trial Judge are well founded.

b) DOCUMENTARY EVIDENCE

The conclusions of the learned Trial Judge are also based on documentary evidence which we will analyze briefly. That documentary evidence consists of A) an Admiralty Chart of the River Saguenay 1830, B) Plan of the proposed town of Chicoutimi, C) Public acts relating to Chicoutimi, D) Customs Establishment Book, Port of Quebec 1865, E) General Report of the Minister of Public Works for Canada 1867-1882, F) Petition from the Municipal Council of Hebertville to the Governor General 1860, G) a book on Le Saguenay by Arthur Buies, 1880; H) Report of the Engineer of the Public Works Department with reference to the slides booms and dams of the Saguenay River (1882).

a) ADMIRALTY CHART OF SAGUENAY RIVER MADE IN 1830.

There were soundings and survey made by Captain Bayfield in 1830, of the Saguenay River, and a re-survey by Commissioner Orlebar in 1860. They are filed as Exhibit D-26 (Album page 10). That chart, taken by itself, is not a strong proof, but it should not be ignored, as said by the learned Trial Judge. It is the whole proof that should be looked to, and all the elements of proof, more or less important, must be taken into consideration. Such a chart establishes that at an early date the British Admiralty considered it necessary to have a survey made of the Saguenay River, and Chicoutimi a trading post.

b) PLAN OF THE PROPOSED TOWN OF CHICOUTIMI, 1845.

That Plan was made by D. S. Ballantyne, Land Surveyor, in 1845. It is filed as Exhibit D-1 (Album page 11). This Plan indicates the mill and the wharf of the Prices at the Basin, of which it was so often question in the evidence, and also Rat River. It also bears out the relative importance of Chicoutimi at that date.

c) ACTS PASSED DURING THE UNION RELATING TO CHICOUTIMI

8 Victoria, Chap. 40, amended by 9 Victoria, Chap. 15. These two Statutes brought some changes to the Municipal Law in force with regard to the administration of municipal affairs in the Saguenay region, Chicoutimi, etc. 26 Vict. Chap. 54 (1863). This is an Act to amend the revised Municipal Act of Lower Canada, and to erect the Village of Chicoutimi as a separate municipality, such Act to take place the 1st July of the same year, 1863. Section 2 gives the limits of the municipality which are those of the present Town of Chicoutimi. They exclude La Rivière du Moulin but include the Basin as appears by Section 6. We might add to this the Letters Patent granted by the Province of Canada 27th October 1859, of a lot to Alice Brown, in the village of Chicoutimi, which is described as shown on the Ballantyne Plan, and which lot is now owned, or part of it, by the Suppliant.—(Exhibit D-3—Case, page 199). It instances the importance given at that time by the authorities to Chicoutimi.

d) CUSTOMS' ESTABLISHMENT BOOK, PORT OF QUEBEC, 1865.

An extract of the Customs' Establishment Book, Port of Quebec from 1865 to 1900 was filed as Exhibit D-25, (Case, page 205). That report, has, we submit, an important bearing on the case. It shows that in 1861 one Mr. McKenzie, (which fact is also mentioned by Caron already quoted) was appointed as sub-collector of the Customs dues at Chicoutimi port or out-port. This is apparently the same Mr. McKenzie to whom Caron refers in his evidence when he says (at page 129, line 10) "When a vessel arrived in Chicoutimi he used to come and clear the vessel". This would well indicate that, starting from the 25th May 1861, that Chicoutimi was not only a harbour but a port or out-port, functioning regularly as such, and publicly known and officially recognized.

e) GENERAL REPORT OF THE MINISTER OF PUBLIC WORKS, 1867-1882.

This report is filed as Exhibit D-24, Case, page 215. This Report reproduces a list giving the number of trips, and names, by the St. Lawrence Steam Navigation Company to the Secretary of the Public Works Department, of the steam vessels which have plied to the Port of Chicoutimi and other places on

the Saguenay River from 1840 to 1867. We quote starting from the year 1860, (page 215).

"Tableau indiquant le nombre de voyages, le tonnage et les équipages des "bateaux à vapeur qui ont fréquenté le Port de Chicoutimi et d'autres endroits "sur la rivière Saguenay depuis 1840 jusqu'à 1867 inclusivement:

Année	Nombre de voyages	Tonnage	Equipage	Bateaux à vapeur
1860	15	2,145	225	Saguenay
1861	19	5,320	570	Magnet
1862	19	5,320	570	do
1863	19	5,320	570	do
1864	21	5,880	630	do
1865	21	5,880	630	do
1866	31	8,505	930	do et Champion
1867	54	27,706	2,085	do et Union

That Report does not take into account sailing ships. These Reports show the importance of Chicoutimi with reference to navigation and trade, and the progressive increase in the number of trips and tonnage of vessels.

f) PETITION FROM THE MUNICIPAL COUNCIL OF HEBERVILLE, TO THE GOVERNOR GENERAL, 1860.

This Petition was filed as Exhibit D-5, Case page 202. The learned Trial Judge found that it should not be received in evidence, beacause its origin is not proved. We respectfully submit that it is an official document. Specially if we look at the endorsement, on the back of the writing which made proof prima facie. It is not perhaps of great importance but it shows that the population considered it necessary as early as 1860, to have a wharf built by the government either at St. Alphonse or at Chicoutimi, to facilitate transportation in the county of Chicoutimi.

g) BOOK ON "LE SAGUENAY" BY ARTHUR BUIES, 1880.

Extracts of that book are filed as Exhibit D-6 Case (pages 206-210). Mr. Buies, who was also a journalist and a chronicler, in writing his book "Le Saguenay" et La Vallée du Lac St. Jean" has done the work of an historian and geographer. He gives an accurate and detailed description of the beginnings of Chicoutimi, of the establishment of mills, of the navigation going on the Saguenay River, and the situation of the harbour page 142, line 23 and 24. He refers, in one or two passages, in express words, to "the port of Chicoutimi". The work of Mr. Buies if of great value because his statements are accurate and exact, and correspond to the evidence made aliunde as signalled by the learned Trial Judge. That historical proof was properly admitted by the learned Trial Judge, according to a long line of decisions and authorities which are quoted in the Judgment appealed from Case page 258. The last decision we know on that question is the judgment of the Court of Appeal, Quebec,

3rd March 1934, unreported in the case of King vs St. Francis Hydro Electrical Co. which came, under another point before before the Supreme Court (1934 R. C. S. p. 566).

h) REPORT OF THE ENGINEER OF THE PUBLIC WORKS DEPARTMENT WITH REFERENCE TO THE SLIDES BOOMS AND DAMS OF THE SAGUENAY RIVER, 1882.

This was filed as Exhibit D-24 (case, page 217), together with the Report indicating number of ships, etc., quoted above. That Report shows that the above works were undertaken to facilitate the floating of lumber from the Lake St. John by the river Little Decharge, to the Saguenay River. The Report shows that they were begun in 1856, and that from the year 1856 to the 30th June 1867 they cost $44,872.79. That Report contains the following remarks. "These works were erected to bring down the lumber of the Lake St. John to the Saguenay River, where it was loaded at Chicoutimi or Ha Ha Bay for Europe.

We submit that both by the oral and documentary evidence analyzed above, the conclusions of, and findings of the learned Trial Judge are amply justified.

— 3 —

LIMITS OF THE CHICOUTIMI HARBOUR

Now given the existence of a public harbour at Chicoutimi, if we advert more particularly to the question of its limits we submit that the evidence given in this case, and which we have quoted above, shows that the foreshore in dispute was a constituent part of the Chicoutimi harbour at the relevant date. In the Case of King v. the Attorney General of Ontario and Forrest, 1934, S. C. R., page 133, Mr. Justice Rinfret prefaces his opinion by the following remarks: (at page 145)

"Given a public harbour at Goderich, in 1867, there remains to find out "what territory fell within it and, further, whether Ship Island, if within the "ambit of the harbour, formed a part of it. (Attorney General for Canada v. "Ritchie Contracting & Supply Co. 1919 A.C. 999 at 1003 and 1004). This "must depend upon the circumstances of the particular case and, in accor- "dance with the rulings of the Judicial Committee in the Fisheries case (Attor- "ney General for Canada v. Attorney General for Ontario, etc., 1898 A. C. "700 at 712), and in Attorney General for British Columbia v. Canadian Pacific "Railway, (1906) A.C., 204 at 209, that question must be tried as a question "of fact."

It is sometimes difficult to determine the exact extent and limits and particularly where the sea or rivers ends and the harbour proper starts, of a public harbour covering a large and open body of water without particular marks or bounds. We should think that ordinarily speaking, that the locality opposite a city, town or settlement where ships come, indifferently to anchor, or to load, would be within the limits and ambit of the harbour. But here the limits of the

harbour are marked by what we may call three strategical points. Coming up the river from Tadoussac at the junction of the St. Lawrence, and proceeding toward Chicoutimi, the first point where the ships stopped was at Riviere du Moulin where one McLeod, who was succeeded by the Prices, built a saw-mill, and where there was a wharf. Apparently the bigger boats, sometimes described as brigs or three masters, did not proceed further. Proceeding further up, the Saguenay River there was another place where the ships came and loaded, that is, at Rat River, which is about a mile and a half at most from La Riviere du Moulin. (Joron, Case page 122, line 30). Rat River is about three hundred feet from the place where is located the foreshore in dispute and where Suppliant has built his wharf. (Joron, case p. 114, head of page). It should be noted that this is also around the locality where stands the church and was apparently the most important and active centre of Chicoutimi, and not far distant from Meron's property and the St. Anne Ferry and the Basin. Going up further on the river there was another place called "the Bassin" already referred to, and where the Prices built a sawmill and wharf and where a great number of ships loaded lumber to be transferred to vessels destined for the old country. The Basin is shown on the aerial photograph D-9, (Album, page 4) and on the Official Cadastral Plan D-2 (Album, p. 12) and on the Plan of the Town of Chicoutimi by Balantyne Exhibit -1 (Album, p. 11). From Rat River or the foreshore in dispute, to the Basin, there was a distance of about half a mile at most, (Joron, Case page 113, line 40). From the property of Suppliant and Meron Tremblay's property there was a distance of about five hundred feet (500 feet). It existed where now is the St. Anne Ferry shown on plan D-21, (Album, page 15).

We repeat the distances from Riviere du Moulin to the Basin: there was a distance of 9,200 feet or less than two miles (Joron, Case, p. 114, line 10 and p. 122, line 15), and from Riviere du Moulin to Rat River at most a mile and a half or exactly of 7,100 feet (same evidence), and from Rat River, or the foreshore in dispute, to the Basin half a mile or exactly 2,150 feet. (Joron, Case, p. 113, line 40).

Due to erosion the width of the River Saguenay has been increased, and the high water limit has been extended about from One hundred and fifteen to one hundred twenty feet (115 to 120 ft), since 1845 to 1881 (See evidence of Joron — case page 121, line 30), and from 1882, date of the cadastral plan to 1907 date of the Letters Pattent, between 15 feet at one side and 38 feet at the other. During thirty five years, that is, since 1845 to 1880, there was an erosion of 120 feet. That would give approximately over three feet a year, and, following the same proportion for the years 1845 to 1867, date of the Confederation, there was nearly 70 feet erosion and the erosion would have consequently completely coveted Street No. 1, which was 40 feet wide. That erosion has continued since but apparently at a slower pace. The erosion can also be seen by a comparison of the Balantyne Plan 1845, Exh. D-1. Album, page 11, with the Cadastral Plan of the Town of Chicoutimi, Exhibit D-2 (Album, p. 12). The cadastral plan of 1882 does not show Street number one because it had disappeared due to the erosion. According to the law of acretion, that part reclaimed by the water, comprised between high water mark and low water

mark has reverted to the Crown, in this case the Federal Crown, because the foreshore formed part of the public harbour vested in the Dominion of Canada.

Halsbury 1st Edit. vol. 28, on Waters & Waters Course, Nos 658-662, p. 262 & 263. See also King vs Bradburn 14 Ex. C. R. p. 97.

It was held in Chicoutimi Pulp Co. vs Price P. C. 1909. 9 appeals canadian law reports p. 359) This case is also reported at 19 K. B. (Quebec), page 227 — that.

"Any part of land granted by the Crown for a town site, that becomes unfit or useless for the purposes of the grant (v. g. by submersion) reverts to the Crown."

It appears by the evidence of the witnesses already quoted above that particularly the ships came indifferently at any spot between Rat River and the Basin, and even on the foreshore to load or unload, or to land or anchor or go aground. All that section of the river was used commonly and commercially as a harbour by the traders and navigators, and according to their needs and circumstances. With regard to the foreshore in particular, it is established by the evidence of Blackburn (Case page 150 & 152), Caron (Case page 128, line 40), McLeold (Case page 14, line 40) that ships came on the foreshore to unload goods specially opposite Meron place and where is now the church. It consequently fell under the test given by our Courts and the Privy Council by way of illustration. It is also established that all the people living opposite Chicoutimi, and who had to come to Chicoutimi, came with their small boats (row boats) anywhere alongside the foreshore between Rat River and the Basin, according as it suited them.—Which shows that the foreshore in question was not only ex jure and nature public domain but also in fact publicly used as such.

In the case of Holman v. Green (6 R. C. S. page 707), it was held that the bed of the foreshore in the harbour of Sunnyside belonged to the Crown as represented by the Dominion of Canada.

In the Fisheries Case, (1898), A. C. 700) no disapproval was expressed of the decision of the Supreme Court in re Holman v. Green, neither in the reasons, nor in the formal judgment, but Lord Herschell, somewhat limited the general proposition laid down by the Supreme Court to the effect that the foreshore bordering a harbour formed part of it and passed de jure to the Federal Crown and belonged to the Dominion. Lord Herschell expressed the view that such a foreshore might or might not form part of the harbour according to circumstances, and that it would depend, for example, if it had been used or not for anchoring ships or landing goods. We can conceive cases where a foreshore could be distinguished from the harbour proper and considered separately and distinctly, for instance, if by the indentation of the coast or due to some other geographical conditions, only a definite and particular place is used as a harbour, or when public works wharves and piers are erected in a definite and particular location, then it might be that the foreshore lying outside the ambit of a harbour so delimited and used would not form a constituent part of it. On the other hand, we claim that a foreshore when it is within the ordinary ambit of a port or harbour, opposite a city, town or village, and where both the river and the foreshore which form an undivided whole, have been used publicly no such distinction as outlined above and which

possibly Lord Herschell had in mind, can obtain. It is inconceivable that the Federal Government to be, would have claimed the property of the harbours without claiming at the same time the foreshore of the harbours, without which in ordinary circumstances a harbour is absolutely unworkable and useless.

"Public harbours", it is self-evident are connoted with navigation. These words must also be read in connection precisely with the nature of the distribution of powers, and the attribution of assets to the Dominion and the provinces respectivley.—Express powers over navigation which is a question of national scope have been given to the Federal Government by the British North America Act. The transfer of the public harbours to the Federal Government is a natural sequence. Such a power to regulate and look after navigation would appear meaningless and unpraticable if it had not been accompanied by the vesting of the property in the public harbours which are essential elements for any navigation purpose and scheme. While the academic question may come to one's mind why the navigable waters were not also and for the same purpose vested in the Federal Government, if can be surmised that the power of regulation and control over the latter would not necessarily call for, the vesting of property therein, while with regards to public harbours themselves and their particular destination & requirements, it was essential that they be handed over to the Federal Government in full ownership, without which navigation could not be looked after, and without which almost constant negotiations and exchange of money from the Federal Exchequer to the provincial would have been necessary. Hence the provisions of the British North America Act. (Section 108 & Third Schedule).

How can a harbour exist without a connecting link between the harbour proper and the land? If a foreshore is used for loading goods like in the present case it is one of the instances where the foreshore is a constituent part of the harbour but not the only one. No improvements, no communication with land, no protection work no improvement of a harbour can be conceived nor realized if the foreshore immediately connected with the harbour does not form part of it and is not vested with it.

The foreshore, that is, that part of the river extending from the high water mark to low water mark has always been considered, in the case, of a navigable river, to be Crown property, whether it is federal or provincial. A foreshore is the necessary accessory of a harbour, especially so at the date of 1867, when the Empresses and big vessesls were unknown and people resorted to sailing ships, barges (bateaux et goelettes) which came ashore with the high tide and remained grounded at low tide to float again at high tide.

This is what the witnesses already quoted stated when they gave evidence.

These witnesses stated that the ships came to Johnny Guay wharf and aground on the foreshore particularly opposite the location where now stands the church, to unload their cargo.

—— 5 ——

There remains a further question which is common to the Intervenant and and to the Suppliant. We claim assuming for discussion purposes that the foreshore in dispute did not from part of the Chicoutimi Harbour, it could not

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Respondent's Factum on the Appeal of the Intervenant. (Continued.)

be granted and was not granted in ownership to the Suppliant by the Intervenant, with respect to anything concerning navigation, etc., and that the Letters Patent are for that additional reason, null, void and inoperative.

We content outself with stating the proposition for the intelligence of the case. We think, however, as already mentioned, that that question is more appropriately taken in our factum on the appeal of Suppliant, where we discuss the question of property of the foreshore or beach lot and his right to build a wharf thereon and his right to recover damages. We think that the Intervention is limited to the question whether the foreshore in dispute was Provincial or Federal property. We will not, consequently dwell upon that particular question, and we refer this Honorable Court to our factum on this point upon the appeal of Suppliant, as embodied here.

We therefore conclude that the Chicoutimi Harbour was a public harbour and that it comprises as a constituent part the beach-lot or foreshore in dispute and that it was vested in the Dominion of Canada, and that, consequently, the Letters Patent granted by the Province of Quebec, the Intervenant Appellant, are null, void and inoperative; and, 2nd, that the Government of the Province of Quebec, even assuming, for discussion sake, that it was owner of the beach-lot in question, did not and could not convey the ownership of same to the Suppliant with respect to anything concerning navigation and the right to build a wharf thereon, and for all these reasons, that the appeal of Intervenant should be dismissed with costs.

M.-L. BEAULIEU,
Solicitor for Respondent.

LOUIS-A. POULIOT, K.C.,
Counsel for Respondent.

No. 5

RESPONDENT'S FACTUM ON THE APPEAL OF THE SUPPLIANT

THE PLEADINGS

In the Supreme Court

No 5
Respondent's Factum on the Appeal of the Suppliant.

By his petition of right Suppliant, one of the appellants, claims from His Majesty the King, in His Right of the Dominion of Canada, the sum of $43,125. for damages resulting, according to Suppliant's contention, from the construction of wharves, piers and filling by the Chicoutimi Harbour Commission, acting as administrator or trustee for the Crown under the terms and provisions of its incorporating Act—16-17 Geo. V, Chap. 6 (1926).

The Suppliant alleges that he is proprietor of a beach-lot on the Saguenay River, granted by Letters Patent of the Province of Quebec in 1907 (case page 231) and of two lots serving as lumber yard and fronting on the Saguenay

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Respondent's Factum on the Appeal of the Suppliant. (Continued.)

River. He claims that the Chicoutimi Harbour Commission has taken the greater portion of his beach-lot for the above works: and he asks for that item the sum of $8,125.

He also claims that the works and filling done by the Chicoutimi Harbour Commission for the improvement of the harbour, have rendered useless a wharf which he had built on the beach lot and he asks on that score the sum of $10,000. He asks a further sum of $25,000. for loss of his right of access to the Saguenay River, making a total of $43,125.

His Majesty the King, in his right of the Dominion of Canada, has pleaded in brief,

a) That the portion of the Saguenay River, and foreshore in dispute, where the works of the Chicoutimi Harbour Commission were erected, etc., was vested in the Dominion of Canada, as forming part of a public harbour, at the date of 1867.

b) By denying the allegations of the petition to the effect that suppliant's property was bordering on the Saguenay River and that suppliant has right of access to the Saguenay River.

c) That suppliant could use the new wharves built by the Chicoutimi Harbour Commission, and, consequently, did not suffer damage even if his property (lumber yard) enjoyed right of access to the Saguenay River, which was denied.

d) That according to the Railway Act, Rev. Sta. 1927; Chap. 170; Sec. 221, which applied, any damage that might have been suffered by the suppliant was compensated by the plus value given to his property by the works in question of the Chicoutimi Harbour Commission.

e) That at all events, the claim of the suppliant was grossly exaggerated, given the amount of lumber handled yearly by the suppliant, and the amount representing the capitalized cost of same.

f) That suppliant did not obtain authorization to build his wharf in conformity with the Act for the Protection of Navigable waters, Rev. sta. 1927; chap. 140, and that such wharf constituted an unauthorized work of which the Minister of Marine could ask the demolition, and that suppliant could not claim compensation for such demolition or removal. (We will have to advert more particularly to that branch of the pleading further on in this factum page . . ., in view of a certain declaration of the Respondent's attorney at the hearing, and which is to be found at page 69 of the Case).

g) And finally Respondent asked that the Petition be dismissed as unfounded in fact and in law.

The Attorney General for the Province of Quebec intervened in the Proceedings to support the validity of the Letters Patent granted by the Province of Quebec for the Beach Lot in dispute, which intervention was contested by the Respondent, as set up more in detail in the Factum on the appeal of the Intervenant.

The learned Trial Judge, after reviewing, correctly in our opinion, the authorities as to what fall under the words "Public Harbours", vested in the Dominion of Canada, and hearing a great number of witnesses, and taking cognizance of the documentary evidence filed in the Case, and appreciating rightly, in our view, all the facts and circumstances, came to the conclusion

that the Chicoutimi Harbour, including as a constituent part the foreshore in dispute was a Public Harbour within the meaning of Section 108 of the British North America Act before the 1st. July 1867 and was vested in the Dominion of Canada; that the locus a quo formed an integral part of the harbour of Chicoutimi, and, therefore belonged to Respondent since the date of the Confederation, and that the Petition was consequently unfounded and should be dismissed with costs against the Petitioner. That the Intervention was likewise for the same reasons unfounded and should be dismissed with costs against Intervenant.

We submit that the judgment appealed from is well founded and should be confirmed with costs.

ARGUMENT

We wish to submit, in support of the judgment appealed from, the following propositions which we think cover all the questions involved in this Appeal.

Some of the questions which come up in the Appeal of Suppliant are common both to the Appeal of Suppliant and to the appeal of the Intervenant; others are restricted to the present Appeal. As to the former, we will confine ourselves to stating, for the intelligence of the case, the propositions common to both appeals and which we discuss in the appeal of the Intervenant, reserving to argue in this Appeal the questions that apply particularly to it.

1st—The Locus a quo forms part of a public harbour vested in the Dominion Government, and the Letters Patent granted thereon to the Suppliant by the Provincial Government were, consequently, null and void and inoperative.

2nd—That even if the foreshore or beach-lot in dispute belonged to the Provincial Government, it could not and did not convey full ownership with regard to anything concerning navigation and more particularly the right to build a wharf, and that the Letters Patent are, in that respect, for that additional reason null, void and inoperative.

3rd—The access de facto of the Suppliant to the River, throught he wharf built on the foreshore, did not constitute right of access nor did the Suppliant suffer any illegal disturbance thereof and Suppliant has at all events no legal ground for recovering damages.

4th — That even if the Suppliant had right of access to the river, his recourse was limited to the loss to his property, but he could not recover for any loss of his business, to which alone his evidence was confined, and that no damage has been proven that is recoverable in law.

5th — That the damages claimed are, at all events, grossly exaggerated.

1st. *The Locus a quo forms part of a public harbour vested in the Dominion Government, and the Letters Patent granted to the suppliant by the Provincial Government were, consequently, null, void and inoperative.*

The Chicoutimi harbour was a public harbour since and before 1867, date of the Confederation, and it comprised as a constituent part the locality in dispute and was vested in the Dominion of Canada, and the Letters Patent invoked by the Suppliant are, consequently, null, void and inoperative. This

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question is common to this Appeal and to the Appeal of the Intervenant, and as we have dealt with it in our Factum on the appeal of the latter, we need not repeat our argument here on that point, and we ask this Honorable Court to refer to it, as embodied here.

2nd. *That even if the foreshore or beach-lot in dispute belonged to the Provincial Government, it could not and did not convey full ownership to the Suppliant, especially with regard to anything concerning navigation, and more particularly to the right of building a wharf thereon; and that the Letters Patent are in that respect, and for that additional reson null, void and inoperative.*

We claim, assuming for the purposes of discussion, that the foreshore in dispute did not form part of the Chicoutimi Harbour, it could not be and was not granted in ownership to the Suppliant by the Intervenant, and that the Letters Patent are for that additional reason, null, void and inoperative. It may be claimed that the bed of the navigable waters and the foreshore of same, excepting the case of the public harbours belong to the provinces, but whether provincial or federal property, it is all Crown property. Moreover such navigable waters and foreshore are according to English law, and also to French law and to the law of the Province of Quebec, not only Crown property but public property, inalienable or extra commercium. Civil Code, art. 399, 400 and 1486.

C. C. 399.—

"Property belongs either to the crown, or to municipalities or "other corporations, or to individuals.

"That of the first kind is governed by public or administrative "law.

"That of the second is subject, in certain respect as to its admi-"nistration, its acquisition and its alienation to certain rules and for-"malities which are peculiar to it.

"As to individuals, they have the free disposal of the things "belonging to them, under the modifications established by law."

C. C. 400.—

"Roads and public ways maintained by the state,navigable "floatable rivers, and streams and their banks, the sea-shore, lands "reclaimed from the sea, ports, harbors and road-steads and generally "all those portions of territory which do not constitute private property, are considered as being dependencies of the Crown domain

C. C. 1486.—

"Every thing may be sold which is not excluded from being an object of commerce by its nature or destination or by "special provision of law."

Such articles of the Civil Code give expression to common and natural law obtaining in every county (See *Leamy v. The King*, 54 Can. S. C. R., page 143). The pronouncements of the Supreme Court and the Privy Council in the divers cases that were brought before them never went further generally, save in the case of *Attorney General of Canada* v. *Attorney General of Quebec*, 1921 A. C., p. 413, which is entirely favorable to Respondent, in this case, than to state in the abstract that the beds of the navigable waters except in the case of public harbours, belonged to the Crown in the right of the Provinces, without

defining what such particular ownership implied and to what limitations it might be subject.

There might arise a question as to whether a Local Legislature could by express and appropriate legislation convey the ownership of the bed of navigable waters. We do not think that the Provincial Governments, under a Confederation, have unlimited powers in this respect, in view of the sharing of powers and assets between the Dominion and the Provinces and the attribution of the control and power over navigation to the Federal Government. The matter is not res integra (*Attorney General of Canada* v. *Attorney General of Quebec*, 1921 A. C., p. 413).

Truly there was a law that was passed in 1916 (6 Geo. V, c. 17, Quebec) inserting the following in the Revised Statutes as section 1524a thereof (now Rev. Statutes of Quebec, 1925 c. 46, s. 3).

"... Whatever may have been the system of Government "in force, the authority which in the past has had the control and "administration of public lands in the territory now forming the Province of "Quebec or any part thereof, has always had the power to alienate "or lease, to such extent as was deemed advisable, the beds and "banks of navigable rivers and lakes, the bed of the sea, the seashore "and lands reclaimed from the sea, comprised within the said territory forming part of the public domain."

But at the same time such Act must be read together with the above provisions of the Civil Code which we have quoted and which have always remained in force. It is also limited by the provisions contained in Section 7349 of the Revised Statutes (1909) of the Province of Quebec, paragraphs 1 and 2, which section is a reproduction of 4 Ed. VII: Chap. 14: Sec. 4 (Quebec)— (now Rev. Sta. Quebec, 1925, chap. 264, sect. 3.)

Section 7349.—

1. "Except in the discharge of any duty imposed by law, no "person shall enter upon or pass over the land or beach land belonging "to any person or corporation without permission of the owner or "his representative, under penalty of a fine of not less than one "nor more than six dollars.

2. "It shall be lawful, nevertheless, to make use of any river "or water-course, lake, pond, ditch, drain or stream, in which or "to the maintenance of which one or more persons are interested or "bound, and the banks thereof, for the conveyance of all kinds of "lumber, and for the passage of all boats, ferries and canoes, subject "to the charge of repairing, as soon as possible, all damages resulting "from the exercise of such right, and all fences, drains or ditches "damaged."

The late Mr. Bouffard, who was for a long time an officer in law of the Forest and Land Department, Quebec, and Professor of Dominial Legislation at Laval University, in his treatise on "Domain" seems to doubt the power of the Legislature of the Province of Quebec to alienate the bed of navigable waters and the foreshore of the sea, and expresses the opinion that according to the whole scheme of the laws of the Province of Quebec and the judgments of our Courts, that private rights cannot supersede the rights of the public.

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We quote from M. Bouffard work p. 81 (Translation):

"Had the Legislature of the Province of Quebec the right to enact (6 Geo. V, Chap. 17) now Section 1524-A of the Revised Statutes of Quebec 1909) a law allowing the alienating of the bed of navigable waters and the foreshore of the sea"?

In the Fisheries Case and the controversies between the Federal and Provincial Government, the Supreme Court and the Privy Council have held that the bed of the rivers in the Province which had not been alienated before Confederation, belonged to the Province, except the bed of the public harbours which belong to the Dominion.

If the bed of the rivers in the Province belonged to the Provinces, it follows that the Legislature of the Province can legislate on that subject. It is what it has done by the Act 6 Geo. V; Chap. 17, Section 1, now Section 1524-A of the Revised Statutes, Quebec (1909). That Act should perhaps have made reservations with reference to public rights of user of these rivers, notwithstanding private rights conveyed, but it results from the whole scheme of our legislation and the jurisprudence of our courts that private rights did not supersede the rights of the public.

We have an express provision in paragraph a of Section 7349 of the Revised Statutes 1909 (quoted above) which maintains the public rights of user of these rivers for navigation and for the floating of lumber.

There is further the care taken by the Executive, when grant is made of certain rights on navigable waters, to make the required reservations to leave intact the rights of the public.

There is, besides, the Féderal authorities who in virtue of Chap. 115 of the Revised Statutes 1906, and Amendments, have the control and regulation of navigable waters, and who can prevent erection of works which may be an hindrance to navigation and to the rights of the public.

In a word, one could conclude that the exercise of the rights granted on the navigable rivers to individuals or companies, cannot be acted upon except by giving to the rivers their common destination for the purposes of navigation and of the public.

According to us, the proprietors of the bed of navigable rivers, in virtue of a grant made regularly, are like "nu-propriétaires", "naked proprietors" and they at the same time enjoy the beneficial rights. They have a reversionary or eventual and potential title, which would become absolute if the bed of the river happened to become dry through the change of the river's course.

3rd. *That the asserted right of access to the River Saguenay and its alleged disturbance did not exist, and Suppliant has at all events no right to claim damages.*

Suppliant by his Petition of Right asserts that he is owner of a beach lot granted by the Government of the Province of Quebec by Letters Patent in 1907, and that by the works undertaken by the Chicoutimi Harbour for the improvement of the Chicoutimi Harbour, and particularly by the filling, a wharf which he had built on the said beach lot has been rendered useless and he claims on that score damages to the amount of Ten Thousand Dollars ($10,000.).

He also claims damages, to the amount of Twenty-five Thousand Dollars ($25,000.), for loss of right of access to the Saguenay River.

He also claims Eight Thousand, One hundred and twenty five Dollars ($8,125.), for the value of that part of the beach lot which was used, that is, sixteen thousand, two hundred and fifty (16,250) square feet, in the carrying on of the works in question, and the filling, which extended to within a few feet of the wharf.

All that the Suppliant has tried to show is that he built a wharf on the beach lot of foreshore in dispute, which had become useless, and that his access to the River by this wharf was obstructed; and that he was obliged to have recourse to the wharves of Chicoutimi Harbour Commission, at a greater expense, and that he has suffered, in consequence, loss in his business of twenty-five thousand dollars ($25,000.)

We quote from the evidence of the Suppliant Jalbert, examination in chief, case page 15, line 20, (translation):—

A.—The Harbour Commission has built wharves.

Q.—The Government?

A.—Yes. The Government has built wharves opposite my property, they have filled that with earth they have taken away the beach lots which I possessed, and the access to my wharves.

We first claim that there is nothing which has been shown thereby, of a right of access to the Saguenay River belonging to Suppliant, assuming that the beach lot was Dominion property to which Suppliant had no title. We do not deny the right in certain cases of a riparian owner to obtain compensation if disturbed in his enjoyment, but we say that in the present case there was no right of access nor disturbance for which the Suppliant could recover damages. If Suppliant has asserted and proved right of access from his own property, then if the other conditions were existent there might be a right of recovery.

Suppliant has built the wharf in question on the beach lot of foreshore in dispute—allegations one and two of the petition of right—case, page 2 and page 3, line 16—Protest by the Suppliant exhibit R-2 (case, p. 236, line 40)—Joron case, p. 114, line 30 et seq. and McConville plan exhibit R-12 (album, p. 16) and Joron plan D-16 (album, p. 17).

We would add, to avoid any possible mistake, that the wharf shown on the plan of the beach lot prepared by Mr. Tremblay (Album, p. 9) for the issue of the Letters Patent, 1907, is the wharf that had been built by the Suppliant's vendor, Mr. Elie Tremblay, opposite his property and sold by him to Jalbert together with his land (Exhibit R-3)—case page 225—and that wharf is not the wharf built by suppliant and of which it is question in the present case.

As Appellant has built a wharf on property belonging to the Respondent, on what principle and for what reason can he claim damage if it had been rendered useless and cannot be resorted to any more, by works undertaken by the Government on its own property? Such a distinction as we are making now between the case of a riparian proprietor, and the case of a man enjoying access to the river through work built outside of his property, is borne out, we submit, by the remarks we found in the Judgment of the Privy Council in *North Shore Railway Co. v. Pion* which was delivered by Lord Selborne, (1889 14 Law Reports, p. 612).

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Respondent's Factum on the Appeal of the Suppliant. (Continued.)

Lord Selborne proceeding to state the case that was brought before the Board for decision, says at page 617:

"With that exception—(an opening in the embankment)—they cut off all "access to the water from the respondents land, which before those works were "executed, was always accessible for boats at high water along its whole "frontage."

and at pages 620 and 621:

"The reasons assigned by Chief Justice Dorion in the Court of Queen's "Bench, for the judgment of that Court, were not addressed to any distinction "in principle between riparian rights on the banks of navigable or tidal rivers, "and on those of non-navigable rivers, but they treated the complaint as if it "turned upon a claim to use, not the plaintiff's riparian land, but the beach "or foreshore belonging to the Crown, for access to the river. If this had been "so, and if the plaintiff's land had been at all times divided from the river by a "dry beach or foreshore in the nature of a public highway, open to all the "Queen's subjects, the same question might have arisen here, which was con- "sidered and determined in England in the case of the Metropolitan Board of Works v. McCarthy (7 English and Irish Appeals, p. 243). But that is not the "state of facts with which their Lordships have to deal. The greve, or,forshore "is not mentioned in the plaintiff's declaration, which alleges an obstruction "of the plaintiff's access to "the river St-Charles" and the construction of a "quai, about 15 feet high, completely shutting off the plaintiffs' access to the "said river"; and that the plaintiffs' access from their property to the said "river" had been rendered impossible. The fact being established by the evi- "dence, that the plaintiffs' bank was always accessible with boats at high "water, what was said in Lyon v. Fishmongers Company (1 App. C. 683), is "equally applicable here:—"It is true that the bank of a tidal river, of which "the foreshore is left bare at low water, is not always in contact with the "flow of the stream; but is it in such contact, for a great part of every day, in "the ordinary and regular course of nature, which is an amply sufficient foun- "dation for a natural riparian right."

The judgment of the Privy Council in the Pion case, as can be seen by the above remarks is predicated on the assumption that the asserted right of access and the damages sought to be recovered are not based on any title to the foreshore, which is different from the present case.

There is, further, another essential difference in that case of *Pion* v. *North Shore Railway Co.*, 14 Can. S. C. R., pages 677 at 682. One of the important points raised in the appeal, as can be seen by the remarks of Fournier J., was whether the North Shore Railway Co. was authorized to build the wharf, which had shut out Pion of his access to the river without paying compensation for damage caused.

The case of *King v. Maxwell*, 17 Ex. C. R., p. 97, is absolutely particular. In this case, it was held that the beach lot belonged to the Dominion of Canada and that the Letters Patent granted thereon to the Suppliant were void. However, compensation was granted to Suppliant for the wharf and right of access which the Suppliant enjoyed through the right of way on the site

occupied by the expropriating railway. But, in that case, Suppliant alleged an alternative title which is mentioned in the judgment as follows:

"A further claim is put forward, namely, that even if his title to the "water lot is void, he had title to the wharf and a right of way over the railway "to reach the wharf."

which does not exist in the present case.

Further, an amount was offered for the wharf recognizing thus, in principle, the right of recovery.

As a question of fact, the judgment is a "cas d'espèce", as appears by the summary of the judgment.

Held: "Upon the facts established in evidence, there was no dispute that "the suppliant was entitled to compensation for the expropriation of the "wharf and for the deprivation of the right of way to and from the wharf "over the railway tracks. *Held*, that under the circumstances of the case, the "Suppliant was entitled to compensation for such expropriation and for the "deprivation of the right of way; but the loss of business not attributable to "the taking of the wharf, or the loss of profits in connection with a business "in anticipation but not actually embarked on, were not elements of compensation."

The facilities he had and which he has lost, were on account of a wharf built on the foreshore belonging to the Government, without any right or title and consequently the Suppliant cannot claim the title of a riparian owner in that respect, nor recover any damage if the wharf, or rather its utility, is gone.

We submit, consequently, that the first condition necessary for the right to recover, ie the existence of a right of access, does not obtain here. We submit that the Suppliant did not have any right of access for the further and additional reason that his property was not bordering on a non navigable river. C. C. 503 — Laurent, vol. VII, no. 264; Planiol v. Ripert, vol. 3, no. 503. Now, even assuming for discussion's sake that there was right of access, we claim that in this case there is no actionable wrong. What is exactly the situation assuming that we are right in our contention that the locality in dispute is vested in the Dominion? Works were done by the owner, the Dominion of Canada, on its own property and according to its powers and duties. The right of access enjoyed by a riparian owner, either directly or indirectly, is subject to the rights of navigation. There is no disturbance of the right of access if navigation, to which it is subservient, is not improperrly interfered with. Neither at common law nor under any Compensation Act damage can be recovered unless the injury complained of is actionable. A proprietor, and more particularly the Crown, has the right to build on his own property any work he deems fit, especially so if the exercise of his rights of property does not go beyond normal. In this case the improvement of the harbour, which was Dominion property, was the only natural and reasonable exercise of its ownership rights.

The right of access of any riparian owner, as we have already said, is subordinate to the rights of navigation, and also to the way they should be enjoyed which is a subject falling under the authority of the Federal Crown, both as

owner and as having control and power over navigation. A riparian owner bordering on a public harbour has only a limited right of access to the harbour, and subject to the modifications and changes brought by the proper authorities. We do not known of any case where it would have been decided otherwise. Whenever a compensation was awarded for disturbance of right of access it was granted against bodies or corporations who had expropriated or taken possession of lots that they had acquired, or erected works injuriously affecting other property without authority, or with the authority to construct the work subject to paying compensation. In the case of Montreal City and Montreal Harbour Commissioners and Tétrault (1926 A. C. page 299) Tétrault who was a riparian owner, was granted damages for disturbance of his right of access to the river St. Lawrence through the construction of works for the improvement of the Montreal Harbour made by the Montreal Harbour Commission, but it was there distinctly found that that portion of the River St. Lawrence opposite the Tétrault property, and to which the limits of the Montreal Harbour had been extended by an Act subsequent to 1867, did not form part of the Montreal Harbour as it stood in 1867, and was not vested in the Dominion Government. It is clear that that case is absolutely different from the present one, and that a recovery could not be obtained by a riparian owner in any case for damages resulting from works done in a public harbour; otherwise the discussion that took place as to whether it was vested in the Dominion or in the Provincial Government who had intervened, would have been absolutely unnecessary.

The other cases we have found where compensation was granted for encroachment on the right of access was against a corporation empowered to use Crown domain for the purpose of improvement of the river, but subject to paying compensation. Perhaps we should add that in the present case the access to the river is not taken away but changed, and again changed by the authorities who have power to do so. We therefore conclude for these reasons that there was no right of access encorached upon, nor right to recover damages.

This also applies to the claim of Ten Thousand Dollars ($10,000) made by the Suppliant for his wharf which has been rendered useless, and this quite independantly of the Act for the Protection of Navigable Waters (Revised Statutes Canada 1927, Chap. 140). This Act relates to work erected anywhere in navigable waters, without authorization, and which is or might turn out to be a hindrance to navigation. But when a work is erected on property belonging to the Crown, the Crown as such, and as owner has no liability nor responsibility towards any one who has so built on Crown land without title.

The only title invoked by the Suppliant is, as we have seen, the Letters Patent granted by the Provincial Government, which Letters Patent, as we have shown, are null and void because the foreshore belongs to the Dominion Government, and for the further reason that the Letters Patent themselves did not authorize Suppliant to build a wharf and to infringe upon anything concerning navigation.

4th. *That even if Suppliant had right of access to the river, his recourse was limited to the loss of his property and he could not recover for any loss in his*

business, to which his evidence was confined, and that no damage has been proven that is recoverable in law.

Even assuming for purposes of discussion that the Suppliant's property enjoyed right of access, and that he had a right to recover for its disturbance, we claim that the damages he sought to prove are not recoverable in law. All the damages that the Suppliant sought to prove and on which bear his evidence and that of his witnesses, relate to a loss in his business. Not one iota of proof is brought to establish the diminution in the value of his property as a result of the works of the Chicoutimi Harbour Commission. The only point that he tried to make by himself and his witnesses is a loss in his business, which he and his witnesses set up as follows:—

They claim that as the wharf of Suppliant was lower than the wharves of the Chicoutimi Harbour he would have to pay extra cost for receiving and handling his lumber at the latter wharves, and that it would take longer time to unload, and that he would also incur extra cost for transportation of his lumber to his lumber yard.

Mr. Jacques who was heard as principal witness for the Suppliant, estimates the damage suffered under the head of "loss of right of access" in the following way.—He assumed that the Suppliant, was handling One million Feet (1,000,000 ft.) of lumber yearly in his business (Jacques, examination in chief, case, page 51 and 52),—and that on account of the fact that he cannot use his wharf which was lower, and nearer his lumber yard, he will be obliged by using the wharves of the Harbour Commission, to incur extra cost for handling and transporting his lumber, which he details as follows: One Dollar Ten ($1.10) per thousand feet (1000 ft.) for extra cost of handling lumber due to the delays. He explained that item in the following way (page 51, line 30).

He says that with the use of his wharf Suppliant could make three trips to carry his lumber instead of two within the same time and with the same expense, by being obliged to go to the Harbour Commission wharves, which difference, through the delays incurred, increased the cost of his lumber Fifty per cent (50%) or Seventy-two and a half per cent (72½%). He adds to this, thirty cents (30c.) per thousand feet (1000 ft.) for extra number of men required to unload the lumber at the wharves of the Chicoutimi Harbour Commission; and another Dollar ($1.00) per thousand feet (1000 ft.) for transportation from these wharves to the lumber yard of Suppliant, making a total of Two Dollars and Forty cents ($2.40) per thousand feet, or the sum of Two Thousand Nine hundred Dollars ($2,900.) per year, which capitalized at Seven per cent (7%) makes the sum of Forty Thousand Dollars ($40,000.) Jacques (Case No. 52, line 10).

All the other witnesses that were heard, including Suppliant himself, limited their evidence to the same kind of damage. Evidence of the Suppliant Jalbert case pages 11 to 28 and p. 59 to 60 particularly case page 19, line 30 and page 20. At page 59, bottom of page and page 60, from which we quote (Translation):

> Q.—Could you state the loss you suffer due to all these facts, what did they occasion to you?
>
> A.—It is a loss of One Thousand dollars yearly.

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Q.—For the boat?

A.—Yes.

Q.—And as to the remainder of your enterprise, your kind of business?

A.—Naturally they have completely disorganized my business as established.—What could it be worth in the future..... It is a little difficult to establish but naturally I had great hopes.—The loss of my wharf is worth more than half my business in the future.

This clearly relates only to loss in the lumber business of the Suppliant, Respondent. This is not a legal basis for compensation.

A business, including the lumber business of Suppliant, might be affected by many causes, and is absolutely contingent, and it was proven in the case that quite independently of the erection of the works complained of, the Suppliant's business had ceased to be profitable, due to the crisis affecting particularly the lumber trade, that is, starting from the year 1929 (See evidence of Jalbert, re-examined, Case, page 62, line 30).

It has been settled by a long line of decisions that the damage recoverable is not the loss to any business but the depreciation in the value of any land injuriously affected, or deprived of his right of access.

Pion v. North Shore Railway Co., 14 A. C., page 612;

His Majesty the King v. Richards, 14 Ex. C. R. page 365, where it was held that:

"In assessing compensation for real property expropriated by the Crown, primarily only such damages may be allowed as are referable to the land itself and not such as purely and simply affect the person or business of the owner; but where the whole of the owner's property upon which he has been carrying on business is taken and the property has a special value for the purposes of his business, then its special value as a business site becomes an element in the market value of the land and must be considered in assessing the value.

(p. 373) — "The damages for loss of business purely and simply are too remote and depend on the commercial ability and industry of the individual, and are not an element inherent to the land."

The King v. Governor and Co. of Adventurers of England, 17 Ex. C. R., p. 441.

"The basis or starting point for the valuation of water lots expropriated by the Crown for the purpose of wharf improvements may be had from a municipal assessment of the property, taking into consideration the higher assessable value of the land owing to its location and the advantage afforded to the owners as a result of the improvements."

The King v. R. A. Brenton & al, 18 Ex. C. R., p. 138.

"Water lots in the outskirts of Halifax.

"Held that in the absence of any sales of similar property in the neighborhood from which the value of the property could be ascertained, a valuation of seven and half cents per square foot was a fair basis of compensation, adding thereto a 10% allowance for the compulsory taking; that the owners were also entitled to damages for the depreciation of property not expropriated occasioned by the loss of access to the water front for locating and bathing

purposes, and of a right of way they enjoyed over a railway, as a result of the expropriation".

Dussault v. The King, 1929 Ex. C. R., p. 8.

"Held that the production value of land, or the value of the land to its owner based on the income he is able to derive from its use, is not the measure of compensation, for land expropriated, and is not material, except in so far as it throws light upon the market value. "Value in use" is to be repudiated as a test."

P. 11, 4th paragraph :

"If the owner of a property uses it himself for commercial purposes, the amount of his profits from the business conducted upon the property depends so much upon the capital employed and the fortune, skill and good management with which the business is conducted, that it furnishes no test of the value of the property."

In the case of Automatic Register Systems v. Canadian National Railway, 1933, Exchequer, page 152, Mr. Justice Angers, held: That the damage or loss must be to the property itself.

That personal injury, inconvenience, injury to trade or business are no grounds for compensation. That the damage must be occasioned by the construction of public work, not by its usage.

In Renaud v. Canadian National Railway Co. 1933, Ex. C. R. page 230, Angers, Judge, held: "That the damages recoverable for injurious affection are such as are attributable to the construction of the public work and not such as would flow from its operation, and only to the extent to which such injurious affectation depreciates said land and makes it less valuable.

"That no damage can be recovered for personal inconvenience or loss of trade, nor damages which the owner of the land suffers in common with the public generally."

In these two cases Mr. Justice Angers makes an extensive review of the jurisprudence relating to expropriations.

We submit, consequently, that there is absolutely no legal basis for the claim of Suppliant for pretended loss of right of access to the Saguenay River.

We might say a word or two about the Act for the Protection of Navigable Waters (Revised Statutes 1927, Chap. 140). It is true that during the course of the trial the Attorney for Respondents declared (page 69 of the case) that he did not intend, — (We reproduce the exact words:)—

"I must declare that we do not intend to proceed on paragraph 17 of our Plea concerning the question of navigable waters, that is with respect to the Act which allowed us to confiscate without paying compensation".

This was not a renunciation to the benefit of the Act but only a declaration on the course he intended to follow in the conduct of the inquest and that he would not proceed to prove any facts relating to that paragraph of his pleading. The point was raised by the pleadings, and it remains a question of law to be determined by the Courts.

We think the effect of that Act is that any unauthorized work, that is an hindrance to navigation is a nuisance. If need there be I think Respondent should have the benefit of that Act, but we thing it is not necessary, as already stated to have recourse to it because that Act was only required for the pur-

pose of preventing works on navigable waters not belonging to the Federal Crown. For the others, that is, especially for the public harbours. The Crown title and rights of ownership are sufficient.

5th. *That the damages claimed are, at all events, grossly exaggerated.*

Let us take separately the different items of the claim of Suppliant.

A)—Ten Thousand Dollars ($10,000.) for the wharf built by Suppliant.

The wharf in question was built in 1909 or 1910. It is an ordinary crib filled with stones and rough lumber, having a frontage of 155 ft with two lateral wings of 60 ft. (Jalbert, Case p. 13, line 40), and Perron (Case p. 47, line 30). No evidence was brought of the cost incurred by Suppliant to built it. Jacques, land surveyor and appraiser, heard as an expert witness on expropriation matters on behalf of suppliant, appellant, values the wharf at about $4,000 to $5,000, the amount he figures it would cost to build it. Jacques, (Exa. in chief, Case p. 52, line 10).

On the other hand, Mr. Euclide Perron, civil engineer, heard on behalf of the appellant, values the cost of the construction of a wharf like that of Mr. Jalbert to about $3,000. (Perron, examination in chief, Case page 47, line 20). He bases his valuation on the price of $2.50 a cubic yard for the cribs, embanking and the stones, and that is besides the cost of filling in the rear of the wharf. Though it was constanly repaired and is claimed by the Suppliant to be as good as new, it is an old wharf and it has still some value as wood.

B) Beach Lot: Suppliant claims on that score Eight Thousand, One hundred and Twenty-five Dollars ($8,125.). Sixteen Thousand and One hundred and twenty-five (16,125 ft) feet would have been used by the Harbour Commission for the improvement of the harbour and filling. The beach lot has only a nominal value outside of the wharf, and no proof was adduced that it served for any purpose save for the wharf. It was not put to valuation by the Municipal Council. The valuation given by the secretary, for the valuation roll, of Twelve Cents (12 cts) a foot applies to the land bordering on the beach lot and not to the beach lot itself. Ouellet, (Case page 92, head of page). The amount paid by Suppliant to obtain Letters Patent for the beach lot was Forty Dollars ($40.00). The only value that was given to the beach lot was by Jacques, and he concedes implicitly that the beach lot has no value, and could only be utilized for an extension of the lumber yard by having the beach lot filled up and levelled. (Jacques, Case, page 52, line 30).

There is not one scintilla of proof that Mr. Jalbert has ever intended to extend his lumber yard, and even so, it is highly improbable that he would ever think of going to the expense of filling a beach lot and make it level so as to serve as an extension to his lumber yard.

It was proven by Mr. Lavoie, Civil Engineer, (Evidence, Case pages 123, line 40 and 124, line 25), Gohier C. F. (Case, p. 137, line 40), that it would cost 0.80 cts per square foot to fill that beach lot. We think the estimate put up for the beach lot is absolutely exaggerated and unfounded in law.

The King v. Coleman, 1926, (Ex. C. R., page 121).

Held that: "the owner of property is not entitled to claim as an element "of its market value at the time of expropriation, some prospective value of the "property remote in its character and only realizable upon the expenditure of "enormous sums of money."

C)—Privation of right of access.

The Suppliant claims on that score $25,000.

That figure seems highly fanciful. The suppliant had a rather extensive lumber business, but on account of the crisis, and without any question of the erection of wharves and piers by the Chicoutimi Harbour Commission, such business has ceased to become profitable, as we have shown already. His profits on which he estimates his loss by being deprived of his wharf are very problemetical and contingent, as we have said already.

We have already seen, when discussing the basis of the damages, that Suppliant had endeavoured to establish that it would cost so much more per thousand feet to carry, unload and handle his lumber and transport it to his lumber yard. Besides the illegality of the ground of the damages sought to be recovered, the figures given for such extra cost are considerably in excess of those mentioned by the Respondent's witnesses.

There should be also taken into account, to offset damage to suppliant's property, the plus value given to it by the works of the Respondent in virtue of the Railway Act.—Rev. Statutes, 1927, c. 170, section 221,—which applies according to the Chicoutimi Harbour Act, 16-17 Geo. V, c. 6, section 7.—

As we claim that Suppliant has not established his title nor proven recoverable damages, we think we do not need to press that point further.

We conclude, in brief that the beach lot or foreshore in dispute—formed a constituent part of a public harbour vested in the Respondent the Dominion of Canada, that the letters patent granted to the Suppliant, appellant thereon, by the Government of the Province of Quebec were null, void and inoperative, —2nd That ever, assuming for the purposes of discussion that the beach lot in dispute belonged to the Province of Quebec it could not and did not convey the ownership of same to suppliant with respect to anything concerning navigation and the right to build a wharf thereon—3rd That the Suppliant has not proven any right of access nor disturbance thereof—4th That the damages he sought to establish were confined to loss in his business which is not a legal ground for recovery, and that for all these reasons the appeal of Suppliant should be dismissed with costs.

M. L. BEAULIEU,
Solicitor for Respondent,

LOUIS A. POULIOT, K. C.,
Counsel for Respondent.

No. 6

PRONOUNCEMENT OF THE COURT ON THE QUESTIONS OF RIGHT AND REASONS OF THE COURT DELIVERED BY Mr. JUSTICE DAVIS

In the Supreme Court.

No 6
Pronouncement of the Court on the questions of right and reasons of the Court delivered by Mr. Justice Davis.

Present: The Chief Justice and Rinfret, Cannon, Crocket, Davis, Kerwin and Hudson.

For the information of the parties, we now announce our conclusion on the questions of right involved in this appeal before continuing the hearing of the argument on the question of damages.

The reasons of the judgment of the Court were given by Davis, J.

Henri Jalbert, of the Town of Chicoutimi, in the Province of Quebec, claimed by petition of right against the King in the right of the Dominion of Canada, the sum of $43,125 alleging that he is the owner of a beach lot at Chicoutimi on the Saguenay River granted to him by Letters Patent of the Province of Quebec dated June 16th, 1907, and that he is the owner of other land of approximately 150 feet in width fronting on the Saguenay River and adjoining the beach lot at the rear thereof; that His Majesty in right of the Dominion of Canada, acting through the Chicoutimi Harbour Commission incorporated by 16-17 Geo. V (1926), chap. 6, has taken possession of the greater portion of the beach lot, has demolished the appellant's private wharf thereon used by him in connection with his lumbering business, and has erected on the beach lot a part of public wharves and that the Commission has, by the erection of such works upon the said beach lot, destroyed the right of access to the river from the adjoining land lot. The respondent admits having taken possession of the greater portion of the beach lot where the works of the Chicoutimi Harbour Commission have been erected but claims, in so far as the beach lot is concerned, that this was part of the foreshore within an area that constituted a public harbour before July 1st, 1867 and therefore became Crown land, in right of the Dominion of Canada, by virtue of sec. 108 of the British North America Act, and that the Province of Quebec had no right to convey the land in 1907 to the appellant, and, in so far as the land is concerned, the respondent claimed that such land did not in fact border on the Saguenay River and that the appellant had no legal right of access therefrom to the Saguenay River but in any event that the appellant could use the new wharves built by the Chicoutimi Harbour Commission in front of the said land and that, in the alternative, the appellant consequently did not suffer any damages even if his land lot enjoyed a right of access to the river, which was denied, and further, that any damage that might have been suffered by the appellant in respect of the land lot was compensated by the increased value of such land due to the advantages afforded by the public works of the Chicoutimi Harbour Commission in front of the land. The respondent further alleged that the appellant had not obtained authorization

from the Dominion Government to build the private wharf he had built on the beach lot as required by the provisions of the Navigable Waters' Protection Act, R. S. C. 1927, ch. 140, and that the appellant's private wharf upon the beach lot constituted an unauthorized work which the Minister of Marine and Fisheries under the Act could require to be removed or destroyed without compensation, and that in any event the claims of the appellant were grossly exaggerated.

The Attorney General for the Province of Quebec intervened in the case to support the validity of the Letters Patent granted by the Province of Quebec in respect of the beach lot and alleged that the beach lot had become the property of the King, in right of the Province of Quebec, at Confederation, that the Letters Patent granted to the appellant in 1907 were consequently legal, valid and operative and denied the plea of the respondent to the effect that the beach lot formed part of a public harbour at Confederation.

The action by petition of right was tried in the Exchequer Court of Canada by Mr. Justice Angers who dismissed the petition and intervention with costs, holding that the portion of the Saguenay River and foreshore where the beach lot is located formed a constituent part of a public harbour at the date of Confederation and became vested in the King in right of the Dominion of Canada. From that judgment the appellant appeals to this Court and the Attorney General of the Province of Quebec intervenes in support thereof.

The appeal raises again the important and difficult question as to what in point of fact is to be regarded as a "public harbour" within sec. 108 and the third schedule of the British North America Act. The beach lot is entirely on the foreshore between high and low water marks. In the early stages of the argument we stated that we would not hear or consider the matter of damages until we had disposed of the legal questions as to whether or not the appellant had acquired title to the beach lot by virtue of the Letters Patent granted to him by the Province of Quebec and as to whether or not the appellant had any right of access from the land lot to the river that had been interfered with by the works of the Chicoutimi Harbour Commission.

The Saguenay River has a length of about seventy-five miles from its mouth at Tadoussac on the St. Lawrence River. It is a tidal and navigable river and at Chicoutimi is about half a mile in width. Chicoutimi was an early settlement and trading post located at the head of navigation on the river and as early as 1857 was an active trading centre with a population of about 1,000. It is plain upon the evidence that before Confederation there was considerable lumbering business carried on at that point and extensive trade and transportation by water. Ships and schooners came up and down the Saguenay River, some of the ocean vessels sailing to and from Europe. Chicoutimi became a place where ships came for the purpose of loading and unloading goods, especially lumber which was the principal industry, and there being no railroads, the entire trade of the community was carried on by water transportation. There is no necessity to review the evidence in detail as to the commercial user of the Saguenay River up as far as Chicoutimi long before Confederation. That fact is clearly established. What we are mostly concerned about in this appeal is whether or not there was at the

In the Supreme Court.

No 6

Pronouncement of the Court on the questions of right and reasons of the Court delivered by Mr. Justice Davis. (Continued)

specific location of what is now the appellant's land a harbour within the meaning of that word as found in the third schedule of the British North America Act. Unless the particular land was within the area of what was in fact a harbour before Confederation, there is no necessity for us to go farther to ascertain what is precisely involved in the words "public harbours" in the third schedule of the British North America Act in relation to section 108 of the Act which provided that

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

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. Lord Dunedin in delivering the judgment in the Judicial Committee in Attorney General for the Dominion of Canada v. Ritchie Contracting and Supply Company, 1919, A. C. 993, said, at p. 1004:

> " 'Public harbour' 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."

The witnesses for the respondent located the limits of the harbour at Chicoutimi, as they termed it, as being from La Rivière du Moulin to the Basin, a distance of approximately two miles along the river shore. These witnesses gave evidence, and it is not in fact disputed, that there were three wharves along the river between these points; one at La Rivière du Moulin, another one farther up the river at Rat River, and a third still farther up the river at the Basin. Several maps and plans were put in at the trial but Plan 13 is a very good indication of the Saguenay River, its width and meanderings, between La Rivière du Moulin and the Basin.

Plan 11 shews the town of Chicoutimi as surveyed in 1845 by Ballantyne and the town site as then surveyed includes the area surrounding Rat River and the Basin. The appellant's land lot is part of Lots 3 and 22 on the said plan, approximately 300 feet from the Rat River. Now in the stretch of the river from Rivière du Moulin to the Basin, the distance between Rivière du Moulin and Rat River is about a mile and a half, and the distance between Rat River and the Basin is somewhat less than half a mile. It is plain on the

evidence that big ships, that is, three-masters, did not procede further up the Saguenay River than La Rivière du Moulin but that smaller ships and schooners did go up as far as Rat River and the Basin, anchoring out in the river. At the junction of Rat River with the Saguenay was situated in early days the business of a general merchant, Johnny Guay, often referred to in the evidence, who had a sawmill and wharf and carried on a general merchant's business at that point. In the Basin were located the wharves of the family of Price, who were pioneers in the lumbering business in that part of the Province of Quebec. There were admittedly no public works or undetakings by the province along this stretch of the river, before Confederation. Now having regard to the natural formation of the river in this vicinity, can we say there was a single harbour—from La Rivière du Moulin up to the Basin (a distance of some two miles) including the localities at the mouth of La Rivière 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.

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 which transferred the public works and property of each province in public harbours to the Crown in the right of the Dominion, 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.

There remains, apart from the ascertainment of damages, the question whether there was a right of access from the land lot, at the rear of the beach lot, to the River Saguenay and whether that right of access has been interfered with. 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. It is contended by the respondent that even if that is so, the appellant has now a right of access to the river across the public wharves erected in front of the property by the Chicoutimi Harbour Commission and has really suffered no damages in respect of interference, and, in any event, that the appellant's land had been increased in value by the advantages afforded by the new wharves of the Harbour Commission fronting on this land. All those matters, however, are matters to be considered in ascertaining the amount of damages.

The Court has for these reasons come to the conclusion that the appeal should be allowed but the learned trial judge unfortunately did not ascertain the damages, no doubt because of his conclusion that the suppliant was not entitled as a matter of law to any damages. Instead of sending the case back for the assessment of damages, the hearing of the appeal on the question of damages will be continued at the October Sittings of the Court.

No. 7

SUPPLIANT-APPELLANT'S SUPPLEMENTARY FACTUM ON THE QUESTION OF DAMAGES

In the Supreme Court

No 7 Suppliant-Appellant's Supplementary Factum on the question of damages.

We submit that the evidence made by the Suppliant which established the special advantages inherent to the property through its special adaptability for the industry which existed thereon before Suppliant bought the property, and which he continued to carry on for nearly thirty years, constitutes evidence of damages to the property under paragraph *b* of section 19 of the Exchequer Court Act.

The very favourable situation of this property made it possible to bring wood to it by water and to immediately unload it in the lumber yard,—with very little expense.

We submit that we have proved the value of these special advantages and special adaptability by establishing the amount of expenditure which the owner was saved thereby.

We beg to refer this Court to Dominion Law Annotations, Revised, 1911-1928, Volume I under the heading of Expropriation II (pages 1033 and following) where most of the decisions on this point are reported.

Page 1033.—Rex v. Courtney, 27 D. L. R., 247:

> "Held, that the Court, in determining the amount of compensation, was not called upon to decide whether the license to sell was an interest in land and value the same separately, but that the proper principle to follow was to compensate the defendant for the value of the premises to him and the loss of his business as a whole."

Page 1034.—"In Dodge v. King, 38, S. C. R. 155,

Idington J., said:—The marketprice of lands taken ought to be the prima facie basis of valuation in awarding compensation for land expropriated. The compensation for land used for a special purpose by the owner, must usually have added to the usual market price of such land a reasonable allowance measured by possibly the value of such use, and at all events the value thereof to the using owner, and the damage done to his business carried on therein, or thereon, by reason of his being turned out of possession.

. . . . . .

"Special adaptability: The prospective or potential value which the land may have or its special adaptability for some particular use or purpose arising from their character, size, situation, etc., are to be treated as part of and as an element to be taken into account in fixing the "market value" or "value to the owner".

"R. v. Turnbull, 33, S. C. R., 677, 8, Ex. C. R. 163; R. v. Moncton Land, 1 D.L.R. 279, 13 Ex. C. R. 521; R. v. Manuel, 25 D. L. R. 626, 15 Ex. C. R.

381; R. v. Wilson, 22 D. L. R. 585, 15 Ex. C. R., 283; Raymond v. King, 29, D. L. R. 574, 16 Ex. C. R. 1 (varied in 49 D. L. R. 689, 59, S. C. R. 682); R. v. Que. Gas, 42 D. L. R. 61, 17 Ex. C. R. 386; aff. 49, D. L. R. 692, 59, S. C. R. 677; R. v. Carrieres de Beauport, 17 Ex. C. R., 414; R. V. Lynch, 19 Ex. C. R. 198; R. v. Murray, 56, D. L. R. 66, 20 Ex. C. R. 107; R. v. Davis— 18 Ex.C.R. 72; Belanger v. King, 52 D. L. R. 469, 10 Ex. C. R. 423; Re N. B. Power Com'n, supra; R. v. Coleman, (1926) Ex. C. R. 121.

SHAWINIGAN WATER & POWER COMPANY vs GAGNON 1931, C. L. R. page 510.

Honourable Juge Rinfret, page 521:

"Il est admis que, sur ce point, les législations anglaise et canadienne sont semblables en substance. La proposition nous paraît désormais solidement établie en Angleterre: L'arbitre, en décidant de l'indemnité à payer, peut avoir égard, non seulement à la valeur de la partie du terrain qui est expropriée, mais également au préjudice qui sera éprouvé par le propriétaire sur toute la balance de son terrain."

CRIPPS — Law of Compensation — Seventh Edition — (Page 220) "WHERE LANDS INJURED ARE HELD WITH LAND TAKEN.

When lands have been, or are required to be, purchased or taken, and compensation is claimed for injury to lands held therewith, the owner is entitled to compensation for damage to be sustained by him by reason of the severing of the lands taken from his other lands, or otherwise injuriously affecting such lands by the exercise of the powers of the Lands Clauses Act, 1845, or the special Act or any Act incorporated therewith."

(Page 223) "The third principle — that compensation is only given to the extent that the value of property as property, in its then state and condition, and independently of its particular use, is depreciated — has only a modified application even if it applies at all, when compensation is claimed for injury done to lands held with lands taken. Where the damage complained of has arisen from acts done on the lands taken, the measure of compensation for damage done to lands held therewith is the full consequential loss which the owner has sustained by reason of the severing of the lands taken from the other lands of such owner, or otherwise injuriously affecting such other lands by the exercise of statutory powers."

(Page 214) "In considering the cases under this head, it is essential to note clearly the form in which the claim is made, since it does not follow that, because the claim as made is not maintainable, no valid claim framed on a proper basis could have been sustained. Thus compensation can be claimed when a diversion of traffic depreciates the market value of premises for all purposes, although evidence of actual loss of trade or of the decreased number of years' purchase should not be admitted."

We beg to call the Court's attention to the fact that not only did the Crown not object to this evidence, but in its defence all its evidence was made on the same basis, the Crown having merely endeavoured to contradict the evidence given by our witnesses.

In the Supreme Court

No 7
Suppliant-Appellant's Supplementary Factum on the question of damages. (Continued.)

We, therefore, most respectfully submit that the evidence made by the Suppliant is such as to enable this Court to allow him a fair compensation for the damages which his property, such as utilized by him, has suffered through loss of the right of access to the river, which damages we briefly summarize as follows:

The evidence shows that Suppliant handled one million feet of lumber by water every year which came from the limits by boat directly to his lumber-yard when unloaded on his wharf.—By being deprived of access to the river, which was a natural advantage of the property, additional expenses are incurred in the exploitation thereof as follows:

a)	Carting from Government wharf to Suppliant's lumber yard (Suppliant's evidence proves .75c to $1.00 per 1000 f.b.m.; respondent's figures .50c to .60c) Say 1,000,000 f.b.m. at .60c	$ 600.00
b)	Extra cost of freight on the river owing to longer time ship is required on account of difficulties of unloading at Government wharf where unloading can be done only during high tide, while at Suppliant's wharf it was possible to unload even during low tide because the boats were beached (evidence proves from .75c to $1.12 per 1000 f.b.m.) Say 1,000,000 f.b.m. at .75c	750.00
c)	Additional cost of handling because more men and machinery are required to unload at Government wharf (evidence proves .50c per 1000 f.b.m.) Say 1,000,000 f.b.m. at .50c	500.00
d)	Additional expenses for top wharfage, increase in workmen's compensation costs due to use of machinery, cost of supervising and handling wood immediately to clear wharves, which expenses were not incurred at Jalbert's private wharf and yard (Evidence proves a proximate figure of .60c per 1000 f.b.m.) say 1,000,000 f.b.m. at .15c. .	150.00
		$ 2000.00

Thus apart from the beach lot, which on account of the special advantages it gave Suppliant, is valued by Suppliant's witnesses at $7000.00, and the wharf which was rendered useless and is valued at $3000.00, Suppliant's property is burdened with an additional annual expenditure of $2000.00.

Should the Court find that the evidence adduced by us is insufficient and that it cannot legally justify awarding compensation for the loss of the right of access to the River, we submit that this Court should, in its discretion, order that the record be returned to the Exchequer Court in order to allow us to make additional evidence.

We submit, moreover, that as this Court has adjudicated on the merits of the case by holding that the judgment of the Exchequer Court, which dis-

In the Supreme Court

No 7 Suppliant-Appellant's Supplementary Factum on the question of damages. (Continued.)

missed the intervention and the petition of right, is to be quashed, the costs of the appeal should be assessed against the Respondent as the Privy Council did in the case of Sisters of Charity of Rockingham vs the King, Law Reports, A. C. 1922, Volume 2, 315.

Quebec, December 5th, 1936.

ST. LAURENT, GAGNE, DEVLIN & TASCHEREAU,
Attorneys for Suppliant-Appellant.

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No. 8

SUPPLEMENTARY RESPONDENT'S FACTUM ON THE APPEAL OF THE SUPPLIANT

20

In the Supreme Court.

No 8 Supplementary Respondent's factum on the Appeal of the Suppliant.

We will first discuss questions of law in connection with the right of loss of access and loss of beach lot and wharf for which suppliant claims compensation.

2ndly: The legal basis of damages recoverable, if any, and

3rly: We will discuss under the reserve of our objections on legal grounds the figures with respect to the damage sought to be recovered. We should perhaps here add that we will discuss the question of damages, under reserve of course, only on the basis that the foreshore in dispute did not form part of a public harbour and did not, consequently belong to the Federal Government,
30 as by the conclusions or opinion expressed by this Honorable Court on the 27th May 1936, we are precluded from discussing the question on any other basis.

First: Loss of Right of Access and Beach lot.

The right of access to the Saguenay River in this case may be considered under two aspects: lst Access from the land to the river independently of any rights on the beach lot and, secondly, access from the land through the beach lot on which rights are asserted by the Suppliant, and as forming together only one property.

We assume, for discussion purposes, that the fact that the land of Sup-
40 pliant was riparian land, entitled him to claim compensation if his right was taken away or interfered with. We note, however in passing that though the land may be considered as riparian land on account of lateral contact only with the high water, and not vertical, in the first case the right is of less value in practice than in the second. Such distinction appears to us quite natural and is borne out by the remarks made in the case of Lyon v. Fishmongers 1876, 1 Ap. Cas. p. 662, specially page 683.

But even if in theory Suppliant could claim compensation for loss of access from his land as a riparian owner, in this particular case he never utilized his

land proper alone for such access, nor proved that he could use it in practice to any advantage nor did he claim anything for the loss of such right nor did he give any scintilla of evidence of damage for having been deprived of such a right; and then, the Court is not called upon to pronounce on it. This is not only a technical objection, but goes to the merits because the right of Suppliant as owner of riparian land, with lateral contact, and his right as riparian owner and owner at the same time of the beach lot in connection with the former, are two rights absolutely different, both in law and as regards its value. Any compensation for loss of right of access can only be based in this case on the rights of Suppliant on the beach lot and the wharf built thereon, without which the right of access from the land itself had no practical value, nor at least any proven value. In this case it is not deprivation of the ordinary right of access which is "ex jure naturae", but a right of access connected with and on a beach lot. We think we should make at the outset that distinction clear, which is an essential one for the disposition of this case and which cannot, we submit, be disputed, that any damage claimed in this case by the Suppliant is based on his right as proprietor of the beach lot and not of the land alone, and the damages he sought to prove relate only to it and its use, and not to the land itself alone or his right as a riparian owner.

In other words, the right of a riparian owner is predicated upon nature. The right advanced by the Suppliant is predicated on the title from the provincial government.

Lyon v. Fismongers, 1876 A. Cas. p. 652 at page 683.

Per Lord Shelborne:—"With respect to the ownership of the bed of the "river, this cannot be the natural foundation of riparian rights, properly "so called because the word riparian is relative to the bank and not the "bed of the stream; and the connection, when it exists, of property on the "bank with property in the bed of the stream depends, not upon nature, "but on grant or presumption of law."

It remains therefore to examine the title, ie the grant by the Province of Quebec, on which Suppliant bases his claim.

We submit that Suppliant is not entitled to any compensation if he has been deprived of access or supplementary access through his title as proprietor of the beach lot if such title was not full and complete, but was precisely subject to the rights of the Federal Government, the present Respondent, which is exactly the present case. We claim that the Province of Quebec, even assuming that the forsehore belonged to it, could not and did not confer absolute title. This point we have already taken in our Factum, pages 44 to 46 inclusive, to which we refer this Honourable Court.

We wish to add this further: The law passed in 1916 (6 Geo. V, chap. 17, Quebec) which we have quoted in our Factum, page 45 purporting to assert the right in the past, as well as in the future of course, of the Province of Quebec, to alienate or lease the bed and banks of navigable rivers, etc. adds the following words:

"To such extend as was deemed advisable".

Now if we refer to the grant made to Jalbert of the beach lot in question, by Letters Patent of July 16th 1907 (Case page 231 and 232), it is made without

warranty and not only subject to the ordinary reservation for public roads but subject to the following reservation (Case page 232, line 10):

"Cet octroi étant aussi dans tous les cas sujet aux lois et règlements "concernant les terres publiques, les mines et les pêcheries dans cette Pro- "vince et aussi à toutes les lois fédérales concernant le commerce et la "navigation."

Which may be translated thus:

"This grant being also in every case subject to the laws and regula- "tions concerning public lands, mines and fisheries in this province, and "also to all federal laws concerning trade and navigation."

This can only mean that the title of Suppliant, specially if we take into account that it was granted on the foreshore of a public harbour, as there is no doubt that it was so in 1907 even assuming that it was not the case in 1867, is a very limited one and subject to be nullified or modified through the operation of any federal law concerning trade and navigation, which empowers the Crown in the right of the Dominion of Canada to improve a navigable river, construct jetties and wharves and make fillings. If any one would have had right to ask for compensation it was not the Suppliant, on account of the above reservation in the title. The building of the wharf, with the advantage derived therefrom and the purchase of the beach lot, was carried on by the Suppliant at his risk and peril, and in the event of the contingency which has occurred, ie of the improvement of the harbour he cannot recover.

We think the following decision is in point,—

Bird v. Eastern Rail. 1865 (19 C.B.N.S. 268; 34 L.J.C.P. 366—, where it was held:

"If promoters construct works, and their character is such that they "could have been constructed by the granter of a right of sporting, con- "sistently with the terms of its grant, the grantee is not subject to a loss "which but for statutory powers would have been actionable, and cannot "maintain a claim for compensation."

We conclude, therefore, that even assuming that the beach lot belonged to the Provincial Government, the grantee did not acquire by the terms of the grant itself any right to oppose the construction and works undertaken by the Crown, and to recover damages resulting therefrom.

2.—LEGAL BASIS OF DAMAGES RECOVERABLE, IF ANY.

We claim that the damages which the Suppliant has sought to establish are not recoverable in law, that is, he cannot recover for loss of profit in his business due to extra cost in handling lumber. We have taken up that point in our factum, page ~~12~~ 59 to ~~15~~ 53 incl. in which we have stated the reason which occured to us why the claim was inadmissible and to which we refer this Honorable Court.

The authorities which he quotes in his supplementary factum do not warrant his proposition.

The first case he cites, Rex v. Courtney, was a particular one. It was a case of an expropriation of a store with license to sell liquors, and it was impos-

In the Supreme Court.

No 8
Supplementary Respondent's factum on the Appeal of the Suppliant. (Continued)

sible to separate the two and profits deriving from the store with the attached license.

The case Dodge v. King, 38 Can., S.C.R. 155, does not favor the contention of Suppliant. It was there held: "That there was no user of land, nor any special circumstances to make it worth more than the market value which was established by the price for which it was sold shortly before expropriation".

That part of the remarks of Mr. Justice Idington which are quoted, where he speaks of the allowance for loss of business is clearly obiter only. This is to be gathered further by the remarks of the same judge in the case of C.P.R. v. Albin, 59 Can., S.C.R., at page 154, where he expressed anew the opinion that the plaintiff was entitled to be compensated "for the damage done to his business carried therein", but the majority of the judges held a contrary view.

The head note in that case of C.P.R. v. Albin, 59 Can. S.C.R., 151, is somewhat misleading. The judgment did not go the length of allowing compensation for loss of business as such, but to take it into account in assessing the value of the land, when land is taken, and not when it is only injuriously affected.

The above limitation is clearly marked by Mr. Justice Anglin, at pages 160 and 161.

> *Per Anglin, C. J.*:—"In the former case loss of good-will and loss of "business is so far as they enhance the value of the land to the owner, "including all that forms part of it in the eyes of the law, may be taken "into consideration in estimating the compensation."

Exactly the same principle was upheld in the case of Kendal v. The King, 14 Exch. p. 71, confirmed by the Supreme Court, where it was held, at page 73: "The Court is of opinion that the property in question must be assessed at its market value, in respect of the best uses to which it can be put by the owner taking into consideration any prospective capabilities and any inherent value it may have."

In the same sense: MacPherson v. The Queen, Fournier, J., 1 Ex. C.R., p. 53; Lefebvre v. The Queen 1 Ex. C.R. p. 121.

There is a marked distinction. according to a long list of cases, between a case where property is taken and the case where it is only injuriously affected. In the latter case special adaptability or value of the land to the owner cannot be taken into account. Now even assuming for discussions sake, that in this case the principle of compensation applicable is the case of a land taken, and the injurious affection of another part held therewith, and its adaptability and particular value to the Suppliant can be considered, it can be only so to establish the value of the land itself and its depreciation. No proof at all was given of the market value of the land nor of its value to the owner with its special adaptabilities.

It should also be noted that not one inch of the land was taken, that Suppliant remained in possession of same and continues to do business there. (Evidence Jalbert, case page 20, bottom of the page and page 21, line 1).

We could cite on this point very numerous decisions besides the decisions already quoted in our Factum. The *Duke of Buccleuh* v. *Metropolitan Board*,

L. R. Ex. 271; 5 L.R. 418; *Pastoral Finance Association* v. *The Minister* (1914 A.C. page 1083), especially at page 1088):—

"That which the Appellants were entitled to receive was compensa-
"tion not for the business profits or savings which they expected to make
"from the use of the land, but for the value of the land to them. No doubt
"the suitability of the land for the purpose of their special business
"affected the value of the land to them, and the prospective savings and
"additional profits which it could be shown would probably attend the use
"of the land in their business furnished material for estimating what was
"the real value of the land to them. But that is a very different thing from
"saying that they were entitled to have the capitalized value of these
"savings and additional profits added to the market value of the land
"in estimating their compensation. They were only entitled to have them
"taken into consideration so far as they might fairly be said to increase
"the value of the land. Probably the most practical form in which the
"matter can be put is that they were entitled to that which a prudent man
"in their position would have been willing to give for the land sooner than
"fail to obtain it. Now it is evident that no man would pay for land in
"addition to its market value the capitalized value of the savings and
"additional profits which he would hope to make by the use of it. He
"would no doubt reckon out these savings and additional profits as
"indicating the elements of value of the land to him, and they would guide
"him in arriving at the price which he would be willing to pay for the land,
"but certainly if he were a business man that price would not be calculated
"by adding the capitalized savings and additional profits to the market
"value."

The case *Lake Erie & Northern Railway Company* v. *Franklin Schooley and the Brantford Ice Company*, 53 C.L.R. 416, seems to be absolutely in point. In that case, an ice business premises situate on the Grand River, had been taken. A claim was made for the extra cost in harvesting the ice. It was there held:

"Where property expropriated is, owing to its location and adapta-
"bility for business, worth more to the owner than its intrinsic value, he
"is not entitled to have the capital amount representing the excess added
"to the market value of the property. His proper compensation is the
"amount which a prudent man in the position of the owner would be
"willing to pay". Brodeur J. dissenting. Judgment appealed against 34 Ont. L.R. 328) varied.

These authorities also show that it is inadmissible to capitalize, as it is done by the Suppliant in this case, the annual cost of business or extra cost of handling it each year. Even at common law and without any limitation by the Exchequer Court Act or the Expropriation or Railway Act, such damages are too contingent or remote to be taken into consideration, as we have said in our Factum, and we do not need to press the point further.

The compensation to which Petitioner would be entitled, if any had been recoverable, is governed alone by section 19 of the Exchequer Court Act, paragraphs A and B, and sections 47 and 50, which we quote hereafter though there perhaps is not any big difference with the Expropriation Act and the

Railway Act, in view of the interpretation given by the Courts to the word damages which occur in these last Acts and is not to be found in the Exchequer Court Act.

Section 19.—"The Exchequer Court shall also have exclusive original "jurisdiction to hear and determine the following matters:

a) Every claim against the Crown for damage to property taken for "any public purpose;

"*b*) Every claim against the Crown for damage to property injuriously affected by the construction of any public work."

Section 47.—"The Court in determining the amount to be paid any "claimant for any land or property taken for the purpose of any public "work, or the injury done to any land or property shall estimate the value "or amount thereof at the time the land or property was taken, or the "injury complained of was occasioned.

Section 50.—"The Court shall in determining the compensation to be "made to any person for land taken for or injuriously affected by the "construction of any public work, take into account and consideration, by "way of set off any advantage or benefit, special or general, accrued or "likely to accrue by the construction and operation of such public work to "such person in respect of any lands held by him, with the lands so taken "or injuriously affected."

The Suppliant does not apparently contest seriously, it seems our contention that the basis of the damages sought to be proved is inadmissible since he asks alternatively that the Court send back the record to the Exchequer Court to bring in addition evidence. No serious reason is given in support of such an unusual demand. We do not see why the Suppliant should be given another day in Court, with the additional expenses and costs attached to it. The fact that the Crown has given evidence to contradict figures given by the Suppliant's witnesses does not constitute an acquiescence in the basis of the damage sought to be recovered. It is not, we submit, a question of objection against the admissibility of evidence, but rather of argument on the merits.

There is also another objection to the claim of Suppliant which we submit is a very serious one. The damage that he would have suffered is not a damage particular to him alone, but is common to all the riparian owners alongside the Saguenay River where the works in question were made. At least, if compensation was otherwise due, it must be less, by the fact that mischief was done partly on land belonging to the Suppliant and partly on land belonging to another, as the improvement and fillings on the Saguenay River went far beyond the limits of the land and beach lot claimed by Suppliant, as appears by the photographs and plans filed. (Case-Album, page 5, 14 and 15).

Sisters of Charity of Rockingham v. *The King.* (P.C. 67 Dom. Law Rep. page 209), especially at page 216 where it was said by Lord Parmoor:—

"The problem of applying the above principles in a case where the "mischief complained of has arisen partly on lands taken, and partly on "other lands outside the property, can only be settled by a consideration "of all the circumstances in a particular case.

"Clearly in this case the appellants are entitled to a less amount of "compensation than if all the lands taken for the laying out of the shunting

"yard had belonged to them; but on the other hand, the fact that other "lands are comprised in the scheme in addition to the lands taken from the "appellants, does not deprive the appellants of their right to compensa- "tion, so long as their claim is not extended beyond mischief which arises "from the appehended legal user of the two promontories of a railway "shunting yard."

3.—*QUANTUM OF DAMAGE*

We have said in our factum that the damages claimed are, at all events, grossly exaggerated. Under reserve of the objections above stated on legal grounds, we will discuss the figures advanced by the Suppliant and submit a summary review of the evidence in addition to the remarks contained in our Factum in that respect, page ~~16~~. 54

As we have already shown, Suppliant did not establish any injury to, or depreciation of his land, but tried to establish that an account of loss in his lumber business he was suffering a damage of $25,000.00. These damages are made up of the extra cost to carry, unload and handle his lumber and transport it to his lumber yard, from the Chicoutimi Harbour Commission Wharf instead of bringing it to his own wharf, etc. (We have already said in our Factum page ~~55~~ 17): Besides the illegality of the ground of the damages sought to be recovered, the figures given for such extra costs are considerably in excess of those mentioned by the Respondent's witnesses. We think we should enter more fully into the discussion of these figures. Mr. Jacques has estimated the extra cost to $2.90 per thousand feet, making yearly the sum of $2,900.00 on a turnover of a million feet of lumber. He allows $1.10 for delays in unloading and the correspondingly reduced number of trips of the schooners weekly, thirty cents per thousand feet for the cost of supervision, etc.. and $1.00 per thousand feet for cartage from the Government wharves to Suppliants' woodyard (besides 0.50 per thousand feet for the cost of unloading). These figures do not agree with those given by Respondent's witnesses.

First:—Item for delays: In answer to this claim we wish to point to the evidence of Georges Boudreau, who testified that the same price was charged to carry lumber at any wharf, whether it be at the Suppliant's wharf or at the Government wharf. (Case page 79, line 20). And to the evidence of Charles Savard, also navigator of Chicoutimi, who testified to the same effect. (Case page 77). This would tend to show that the calculation of Mr. Jacques is based on theoretical valuation rather than on actual cost paid to the navigators.

This extra cost is also predicated on the greater height of the government wharves, compared to the Suppliant's wharf. The figures given in that respect by Suppliant's witnesses are considerably in excess to that of the witnesses heard in behalf of Respondent. Mr. Edouard Lavoie, civil engineer, who has made soundings in the Saguenay River, puts the difference in height as three feet (Case page 906, head of page); and Mr. Delisle, civil engineer corrobotates Mr. Lavoie's statement. Mr. Lavoie also testified that, according to his own observation, the Jalbert wharf was not always accessible to schooners, and that at some tides they had to wait (Case page 101). Evidence to the same

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effect is given by Charles Savard navigator who carried lumber for Suppliant (Case page 77).

We should further observe that the extra cost for delays is also very contingent, not only because it relates to a business that may change or disappear any day, but because it is connected with the use of a particular and small schooners and does not take into account the facilities afforded by the bigger wharves built by the Chicoutimi Harbour Commission, and to which larger vessels may now come. The above observation applies to the second item, that is, extra cost for unloading.

As to the second item, that is 30c per 1000 feet for extra cost of supervision it is not based on any actual data, but it is rather conjectural besides being remote.

As to the extra cost for cartage of the lumber from the government wharf to the Suppliant's mill, and for which $1.00 per 1000 feet is claimed, we think that only half or about, of that item is the actual cost. We refer this Court to the evidence of Xavier Barrette, carter, who fixes the price for the cartage of lumber to 60c per 1000 feet (case page 92) of Dufour, carter, who testified that it would cost about 60c per 1000 feet (Case page 95) and Maurice Gagnon, (Case page 84). Edouard Lavoie who sets the price at 50c per 1000 feet (Case page 101) and of Lionel Joron, Civil Engineer, who fixes the same price (Case page 116). Whatever may have been the cost of cartage in years gone by, such is the actual cost that would have to be incurred, and the only one that can be taken into consideration. Any other one could only be conjectural. Further Mr. Lionel Joran, Civil Engineer, who appears to have a great deal of experience in the lumber business, estimates that the Suppliant could carry his lumber from his limits at Anse Pelletier by trucks at a cost of $2.50 to $4.00 per 1000 feet (Case page 117), that is, at half the total cost for the carrying and handling of lumber given by the witness Jacques (Case page 118). This is contradicted, it is true, by the Suppliant. This shows how the witnesses do not agree on the actual costs and figures.

The Suppliant bases his claim on the yearly turnover of one million feet. That figure is also disputed. The Suppliant has estimated that to be his average yearly turnover. His accountant has filed a statement of the sawwood handled by the Suppliant for the years 1912, 1920, 1924, 1925, 1926, 1927, 1928 and 1929. No yearly book or statement was filed with it allowing us to check the compilation filed by the Suppliant accountant. As appears by the evidence of the accountant the amount given of 1,000,000 feet carried by water is only an estimate and as such is uncertain. Apparently this compilation was made at the time of the trial. It does not show precisely what part was carried by water, which only interests us. and what part was carried by rail, and it is admitted that part of the lumber handled by the Suppliant came by railway. The average amount of one million feet per year does not agree with the records by the Chicoutimi Harbour Commission for the year 1929 (Case page 238) which shows an amount of 551,258 feet of lumber. And for the year 1929 (Exhibit D.13, Case page 239) 580, 642 feet. And for the year 1930: 361,500 (Exhibit D.14, case same page). There is a wharfage due by the By-Law of the Chicoutimi Harbour Commission which applies to any cargoes landed in the Port (Exhibit D.22 case page 233, 234). See also evidence of Boulianne,

port warden, case p. 81 and 82. It is true that Jalbert claims that while he received the lumber at his wharf, he did not pay any wharfage dues and that all the cargoes were not declared. Evidence of his Accountant Moffett (Case page 186). This is somewhat put in issue by the employees of the Chicoutimi Harbour Commission, who testified that whether wharfage dues were payable by boats unloading at private wharves, an account was made just the same. (Boily, ass. port warden, case p. 91, line 10). It is quite possible, and even must be admitted, that the dues might not have been all collected and the cargoes coming to Suppliant's wharf might not have been all declared, but there is a big difference indeed between the two sets of figures. We think at least the exact volume of business carried yearly by water, the assumed basis, is not only contingent but also rather uncertain.

Re BEACH LOT.

We have already said in our Factum that the beach lot had only a nominal value and that its improbable and expensive utilisation as an extension to his lumber yard was inadmissible (factum p. 15 and 17). We should here add that any amount claimed for the beach lot is a duplication of what is asked for the loss of right of access.

Re WHARF.

We have discussed the figures in connection with the wharf at page 16 of our factum.

COUNTER ADVANTAGES

The claim put forward does not take into account the facilities afforded by the works undertaken by the Chicoutimi Harbour Commission to the merchants of the locality and especially of the Town of Chicoutimi, like the Suppliant Jalbert. It is hard to believe that a lumber merchant cannot be as well, if not better off now, than with the former situation. The method of doing business might be changed, but it appears to be improved and facilitated. These new facilities are graphically shown by the photograph of the new wharves, at terminals (Exhibit D.21, Album, page 15). If the Suppliant cannot engage profitably in the lumber business it would not be because he had lost the use of his wharf, but for other causes for which the Respondent is not in any way responsible.

Section 50 of the Exchequer Court, which we have quote, page 161, must be given effect to and to the words there to be found: "any advantage special or general".

Finally, to show how Suppliant's claim is exaggerated we feel it is sufficient to contrast the amount claimed with the amount of the valuation of the property by the Town of Chicoutimi. This property was valued in 1928 at $1.35 a foot for that part fronting on Racine Street, up to a depth of 100 feet; and for the remainder, that is, up to the Saguenay River, at 20 cents a foot. There was no valuation as far as we can see, of the beach lot, etc. (Evidence of Ouellet secretary for valuation roll, case p. 91). In 1933 the valuation was put down to 75 cents a foot and 12 cents a foot respectively (Idem p. 92). The beach lot

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did not form part of the Town of Chicoutimi, as appears by the cadastral plan, exhibit D.2, Album p. 12, and could not enter in the valuation roll.

The same thing can be said if we compare the amount claimed with the purchase price. The price paid by the Suppliant to Tremblay for the property in question, including mills, etc., was $3,800.00 as appears by Deed of Sale of 30th March 1906 (Exhibit R.3., Case page 225).

We conclude, therefore that the claims of Suppliant assuming for discussion's sake, that any part is recoverable in law, is highly fanciful and exaggerated.

Quebec, December 15th., 1936.

M. L. BEAULIEU,
Solicitor for Respondent.

LOUIS A. POULIOT,
Counsel for Respondent.

No. 9

APPELLANT'S REPLY TO RESPONDENT'S SUPPLEMENTARY FACTUM ON THE APPEAL OF SUPPLIANT

In the Supreme Court.

No 9
Appellants Reply to Respondent's Supplementary factum on the Appeal of Suppliant.

In reply to Respondent's argument that Suppliant's right of access was less valuable because it gave him lateral contact only with the high water, we submit that the evidence shows that this was not an inconvenience, but that it was highly advantageous to Suppliant. Vessels sailed up the Saguenay River as far as Chicoutimi with the low tide so that their docking was not thereby delayed and when the tide was low, the vessels docked at Jalbert's wharf were beached at a level which made it easy to unload them. We beg to refer this Court to page 76 lines 37 38 and following of our factum.

As to Respondent's argument that Appellant's claim is based exclusively on his rights as owner of the beach lot, we submit that this is not the case and that the beach lot and riparian land owned by Appellant constitute one whole property utilized for one sole purpose and that Appellant was deprived of part of this property. Moreover, even before Suppliant purchased this beach lot, he utilized the right of access and derived advantage therefrom. (See case page 13 evidence of Jalbert.)

In reply to Respondent's argument relating to the reservations contained in the Letters Patent granting Appellant the beach lot, as well as any reservation resulting from any law, we beg to refer this Court to the Tetreault case in which the Privy Council was called upon to consider much stricter reservations which appeared in Tetreault's title. (Page 56 of Appellant's factum.)

We know of no federal or provincial law which allows a government to remove or obstruct the right of access of a riparian owner without paying him a full and complete indemnity for the damage caused thereby.

As to the evidence on damages, we will merely refer to our factum, where the evidence made by both the Appellant and the Respondent is discussed and considered, whilst Respondent's factum only takes into account the evidence adduced on behalf of the Respondent.

We submit that the evidence shows clearly that Appellant suffers considerable damage for which he is entitled to be indemnified and we further submit that this evidence is sufficient to allow this Court to determine the amount of such indemnity. We have submitted, however, that should this Court rule that the evidence adduced by us, without any objection being made by Respondent who even endeavoured to meet this evidence in the same manner, is not sufficient in law, it will only be fair that this Court, in the exercise of its discretionery powers, do allow us to complete the evidence by ordering that the record be returned to the Exchequer Court. We consider that it would be extremely unfair to dismiss Appellant's claim merely on the above grounds.

As final argument, Respondent submits three reasons as grounds to reduce damages, i. e.: certain counter advantages, the municipal valuation and the purchase price paid when Appellant acquired the property.

On the first point we submit that Respondent has not endeavoured to make proof of any special or general advantage which might result to Jalbert from the building of the new wharves, on the contrary, all the evidence shows the damages suffered by Jalbert's business through his having to use the Government wharves instead of his own wharf.

We further submit that it stands to reason that the price which Appellant paid for the property thirty years ago, without any evidence whatsoever of the buildings thereon erected at that time, etc., can be of no assistance in helping the Court to determine the value thereof today. It is also quite clear that the municipal valuation does not take into account the exceptional advantages which this property held for the business that was carried on that site. All that Respondent has shown in that respect is that after the Government wharves were built the municipal valuation was considerably reduced.

We beg, therefore, to persist in the conclusions of our factum and supplementary factum and pray for judgment accordingly.

Quebec, December 23rd., 1936.

S-Laurent, Gagné, Devlin & Taschereau,
Attorneys for Suppliant Appellant.

No. 10

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No 10
Reasons for judgment 2nd February 1937 by Mr. Justice Davis. (Duff, Rinfret, Crocket, Kerwin and Hudson, J.J. concurring)

REASONS FOR JUDGMENT 2nd FEBRUARY 1937 BY Mr JUSTICE DAVIS

(DUFF, RINFRET, CROCKET, KERWIN and HUDSON J. J. concurring)

This appeal was argued and considered by us in two steps. We first confined the argument to the question whether the lands of the suppliant were part of a public harbour within the meaning of the schedule of the British North America Act 1867 as property that passed at Confederation to the Dominion. If that was the true position of the land, and it was the conclusion of the learned trial judge, then the suppliant might have no right to damages or compensation in respect of lands taken or injuriously affected. Having taken time to consider that branch of the case we announced our conclusion that upon the evidence it could not be found that the lands in question were at Confederation part of a public harbour within the contemplation of that term in the British North America Act. That conclusion gave recognition to the suppliant's title and made it necessary for us to continue the hearing of the appeal on the question of damages or compensation.

A difficulty at once presented itself in the fact that, in the absence of expropriation proceedings, there has been technically a trespass on the part of the Dominion in the view that we had taken of the case that the lands were not Dominion property. That the Dominion, acting through its Harbour Commission at Chicoutimi, had actually taken possession of part of the suppliant's land and had constructed substantial and permanent public works upon it and had thereby injuriously affected by severance the remaining portion of the suppliant's land is really not in dispute. On the assumption that our conclusion on the first branch of the case was correct, counsel for the Dominion and for the suppliant merely disagree upon the proper measure to be adopted in ascertaining the amount of damages or compensation. Had expropriation proceedings been taken, the rights of the parties and the procedure for determining compensation would have been found to have been covered by statutory enactment. The Chicoutimi Harbour Commissioners' Act, 1926, 16-17 Geo. V, ch. 6, provides for the appointment of commissioners by the Governor in Council who shall have jurisdiction within the limits of the Harbour of Chicoutimi, as in the Act defined, and who shall likewise have administration and control of the harbour and all harbour property. By the said statute, the commissioners may, with the approval of the Governor in Council, acquire or expropriate such real estate or personal property as they deem necessary or desirable for the development, improvement, maintenance and protection of the Harbour but all such real estate shall be acquired in the name of and vested in His Majesty. It is further provided that should the commissioners be unable to agree with the owner of lands to be acquired for any of the purposes of the Act as to the price to be paid therefor, the commissioners shall have the

right to acquire such lands without the consent of the owner, and the provisions of The Railway Act, 1919, relating to the taking of land by railway companies shall, *mutatis mutandis*, be applicable to the acquisition of such lands by the commissioners, and in any such proceeding the powers of the Board of Railway Commissioners under the Railway Act shall be exercised by the Governor in Council.

The provisions of the Railway Act, 1919, relating to the taking of land by railway companies, are now contained in the Revised Statutes of Canada 1927, ch. 170. By sec. 164 the railway company shall make "full compensation in the manner herein and in the special Act provided, to all persons interested, for all damage by them sustained by reason of the exercise" of the powers of the company. By sec. 166 the railway company shall not, except as in the Act otherwise provided, commence the construction of the railway, or any section or portion thereof, until the general location has been approved by the Board of Railway Commissioners as thereinafter provided nor until the plan, profile and book of reference have been sanctioned by and deposited with the Board and duly certified copies thereof deposited with the registrars of deeds, in accordance with the provisions of the Act. The provisions relating to expropriation commence with sec. 215 of the Act. By sec. 219, when the parties cannot agree upon the amount of compensation or damages, either party may apply in the Province of Quebec to a Judge of the Superior Court for the district or place in which the lands lie, to determine the compensation to be paid. Sec. 220 provides that such Judge shall, upon application being made to him as aforesaid, become the arbitrator for determining such compensation, and he shall proceed to ascertain such compensation in such way as he deems best and except as to the limited right of appeal given by sec. 232, his award shall be final and conclusive. Sec. 221 is what is sometimes called a betterment clause whereby the arbitrator shall take into consideration the increased value, beyond the increased value common to all lands in the locality, that will be given to any lands of the opposite party by reason of the construction of the railway, and shall set off such increased value that will attach to the said lands against the inconvenience, loss or damage that might be suffered or sustained by reason of the company taking possession of or using the said lands. Sec. 222 provides that the railway company may offer an easement in mitigation of any injury or damage caused or likely to be caused to any lands by the exercise of the company's powers.

Now had the Dominion or its statutory agent, the harbour commission, taken expropriation proceedings as provided by the Chicoutimi Harbour Commissioners' Act, the amount of compensation would under that statute by virtue of the provisions of The Railway Act have been determined by a Judge of the Superior Court of Quebec for the district in which the lands lie. The decisions upon The Railway Act have clearly established what is the proper measure of compensation within the language of the statute and applying the decisions a Judge of the Superior Court would have fixed and determined in the expropriation proceedings the full compensation to which the suppliant would have been entitled. Expropriation would have been the simple and proper course for the Dominion to have taken had it not been for the fact that the Dominion claimed ownership of the property itself.

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But the Dominion taking the view that it did that the lands in question were in fact the property of the Dominion as part of a public harbour at Confederation could not, nor could the harbour commission acting on its behalf, take expropriation proceedings without excluding the Dominion's claim that these lands were its own property and that the suppliant therefore was not entitled to compensation. When we announced our conclusion on the first branch of the case the Dominion could not then have commenced expropriation proceedings without acquiescing in that conclusion and thereby depriving itself of the right to have our judgment reviewed by the Judicial Committee if leave were given. The Dominion has not, in any case, commenced expropriation proceedings and we must therefore now deal with the petition of right as a claim for damages or compensation against the Crown for the actual taking of part of the lands of the suppliant and for the alleged injurious affection to the adjoining lands of the suppliant.

The first difficulty presented is to determine upon what basis the quantum is to be arrived at. Technically the acts of the Dominion are acts of trespass. There is no lawful authority for the actual taking possession of the lands in question. From that point of view the action in The Exchequer Court on the petition of right should be treated, if a technical rule is applied, as an action in trespass and the damages assessed as in any other action in trespass. But virtually the lands were expropriated and we think the proper course is to proceed to determine the amount of compensation to which the suppliant would have been entitled had expropriation proceedings been taken. The authorities amply justify that course.

In Parkdale v. West, 1887, 12 App. Cas., 602, no land was taken but there was interference by a railway subway with the plaintiff's enjoyment of their lands and the question at issue was whether the municipal corporation of Parkdale was liable to the plaintiffs for damage done to the premises of which the plaintiffs were owners. The effect of lowering the roadway in front of the plaintiff's property had been to deprive the plaintiffs of the access to a public street which they had previously enjoyed and to injure their property seriously. At the trial the claims of the plaintiffs were amended by setting out that the corporation of Parkdale alleged that the work was done by the railway companies under the Dominion Act, 46 Vict. c. 24 but that in fact the subway was being constructed by the corporation of Parkdale and not by the railway companies, and by claiming that if the work was done by the corporation of Parkdale under the Ontario Act, 46 Vic. c. 45, a mandamus should issue to them to compel the assessment of compensation under that Act. The railway companies were not made parties to the action. In their defences, as amended, the corporation of Parkdale relied on the ground that the work was done by the railway companies, through the corporation of Parkdale as their agents, pursuant to the requirements of the railway committee acting under the Dominion Act, 46 Vict. c. 24, and denied that they had acted under the Ontario Act, 48 Vict. c. 45. Wilson, C. J. who presided at the trial, gave judgment for the plaintiffs on the ground that the acts complained of were wrongful, not being authorized by the Order in Council. This judgment was upheld by a Divisional Court of two judges on the ground that the corporation could not act as agents for the railway companies, and

on the further ground that by proceeding under the Ontario Act the corporation of Parkdale could by taking the necessary steps have legally done the work, and that consequently "the matter could not be treated as one to all intents *ultra vires*" and that the corporation "were trespassers but within the scope of their authority". The judgment of the Divisional Court was reserved by the Court of Appeal of Ontario by a majority of three judges to one. The majority of judges held that the work was done by the railway companies under the order of the railway committee of the Privy Council of Canada and that the plaintiffs must look to the railway companies for compensation. This Court, upon further appeal reversed this last mentioned judgment and affirmed the judgment of the trial judge and of the Divisional Court. Gwynne, J. dissented, holding that the corporation of Parkdale was in fact acting under the Ontario statute and was liable thereunder to make compensation. The case was carried to the Judicial Committee and the appeal was dismissed. Lord Macnaghten in delivering the judgment of the Board said that their Lordships regretted that the railway companies had not been made parties to the action and that the litigation might have been disposed of more satisfactorily in the presence of the railway companies but that the absence of the railway companies did not relieve the corporation of Parkdale, which claimed to have acted as agent for the railways, from the obligation of showing that its principals were duly authorized to do the acts complained of. Their Lordships came to the conclusion that an order of the railway committee of the Privy Council for Canada under the 4th section of the Dominion Act of 1883 dit not of itself, and apart from the provisions of law thereby made applicable to the case of land required for the proper carrying out of the requirements of the railway committee, authorize or empower the railway company on whom the order is made to take any person's land or to interfere with any person's rights. The provisions of law at the date of the order of the railway committee "applicable to the taking of land by railway companies and its valuation and conveyance to them and compensation therefor" were to be found in the Consolidated Railway Act, 1879, and in the opinion of their Lordships those provisions included the provisions contained in that Act for compensation in respect of land injuriously affected though not actually taken. Those provisions were so intermixed with the provisions applicable to the taking of land strictly so called, that their Lordships thought they might be properly included under the head of "Provisions of Law applicable to the taking of land". It was admitted that no plan or book of reference relating to the alterations required by the railway committee had been deposited as required by the provisions of the Consolidated Railway Act, 1879, and as the provision as to the deposit of a plan or book of reference was the foundation of all steps for assessing compensation it appeared to their Lordships therefore that the railway companies had not taken the very first step required to entitle them to commence operations. Further their Lordships held that under the provisions of the Act compensation had to be paid before the land could be lawfully taken or the rights over land interfered with and that the payment of compensation, or the giving of security, was a condition precedent. Their Lordships held on these grounds that the corporation of Parkdale could

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not justify its acts by pleading the statutory authority of the railway companies. The judgment proceeds at p. 615:

> "If a person whose rights are injuriously affected is refused compensation, he may be compelled to bring an action for injunction. But even in that case the Court would probably not interfere with the construction of the works by an interlocutory injunction if the railway company acted reasonably, and were willing to put the matter in train for the assessment of compensation... As a general rule, it would only be right to grant an injunction where the company was acting in a high-handed and oppressive manner, or guilty of some other misconduct.
>
> "Their Lordships were asked by the appellants to express an opinion as to the measure of damages in case the appeal should be dismissed. It appears to their Lordships that, as the injury committed is complete and of a permanent character, the respondents are entitled to compensation to the full extent of the injury inflicted.
>
> "Their Lordships express no opinion as to the rights of the appellants to recover over again against the railway companies, either under the general law of principal and agent, or under the express provisions of their agreement with those companies. Whatever those rights may be, they are untouched by their Lordships' judgment."

Although the construction of the subway had not been lawfully undertaken, the work had actually been done, and though the municipal corporation were strictly treaspassers "but within the scope of their authority" and as the injury committed was complete and of a permanent character, the Judicial Committee held that the plaintiffs were entitled in their action against the corporation of Parkdale to compensation "to the full extent of the injury inflicted."

Then in Dominion Iron and Steel Company Ltd. v. Burt, 1917, A. C. 179, the Judicial Committee had to consider a Nova Scotia case where the appellants owned a provincial railway which crossed a highway. In pursuance of an order made by the Governor in Council under sec. 178 of the Nova Scotia Railways Act (R. S. N. S. 1900 ch. 99) the appellants altered the highway so as to pass under the railway, and thereby necessarily caused injury to the respondent's property. The appellants did not deposit a map or plan of the alteration under sec. 124 of the Act, nor did they take any steps to compensate the respondent. The respondent had brought a prior action against the City of Sydney to recover the damages which he had sustained but that action had been held not to be maintainable. (Burt v. Sydney, 50 S. C. R., 6). Then he commenced this action against the owners of the railway and it went to the Privy Council. Lord Parker, in delivering the judgment, said that the works had been carried out by the appellant company pursuant to a direction of the Governor in Council under the provisions of sec. 178 of the Nova Scotia Railways Act but that such a direction could not of itself confer on the company any power to interfere with the rights of others, though there could be no question that the appellant company had, under sec. 85 of the Act, general powers wide enough to enable them to carry out the works, Nevertheless the works, in their Lordships' opinion, had been commenced before the company had made

a new map or plan of the alteration in the highway which alteration had been designed with the object of carrying such highway under the railway and getting rid of the dangerous level crossing which had previously existed, and that if such map or plan had been deposited it could not have failed to show that the access of the respondents to the highway from their adjoining lands must necessarily be interfered with and that the alterations could not properly be commenced until compensation for such interference had been paid or tendered under sec. 159. No such compensation was, in fact, paid or tendered. Their Lordships said,

> "The result is that, in executing the works directed by the Governor in Council, the company acted illegally, not because they had not power to carry out the alterations, but because they did not trouble to observe the conditions precedent upon which alone their powers could be exercised. What they have done in Victoria Road constitutes, therefore, a nuisance in the highway, for which the respondents, who undoubtedly suffered special damage, had their common law remedy."

And their Lordships were therefore of the opinion that the respondents were entitled to damages in the action. "Indeed," their Lordships said, "the respondents might, strictly speaking, also claim a mandatory order for the restoration of Victoria Road to its former condition." It had been suggested that, inasmuch as the Act contained a betterment clause, the measure of damages in an action of nuisance is not necessarily the same as the measure of compensation payable under the Act, but their Lordships said that

> "It is, however, difficult to see how the amount of damages to which the respondents are entitled can in any event exceed the amount which would have been payable to them by way of compensation if the appellant company had proceeded lawfully. The fact that it could have proceeded lawfully and that had it done so the betterment clause of the Act would have applied is not without materiality in assessing the damage."

In that case the Judicial Committee said the Court in its discretion would be entitled to refuse to make or to postpone the making of any mandatory order. Further, though it was a matter of indifference to the respondents whether what they received in respect of any injury to their land were by way of damage or by way of compensation, that was not necessarily so with regard to the appellant company, for in the one case it might have, and in the other it might not have, some remedy over against the corporation of Sydney under the order of the Governor in Council. It was "under these circumstances" that it appeared to their Lordships that while the judgments below ought to be affirmed, any proceedings thereunder for ascertaining the amount of damage sustained by the respondents ought to be stayed so as to give the appellant company an opportunity of doing what they ought to have done in the first instance. For this purpose a reasonable interval was allowed, within which time if the company deposited a proper map or plan and proceeded with due diligence to have the compensation payable to the respondents ascertained in accordance with the provisions of the Act, the stay would

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become absolute. If within the time limited the company did not take such proceedings to ascertain the compensation, the stay would be removed.

There is no necessity to stay the proceedings in the action before us because there is no third party against whom the Crown might have some remedy by indemnity or otherwise depending upon whether the matter had been treated by way of damage or by way of compensation. In the Dominion Iron and Steel Company case, their Lordships said that it was a matter of indifference to the respondents there whether what they received in respect of an injury to their land were by way of damage or by way of compensation. This indicates clearly, I think, that so far as the quantum is concerned it will be the same in a case such as this whether it be ascertained by way of damage or by way of compensation.

The authorities therefore clearly justify us in proceeding with the ascertainment of damages on the basis of the land having been expropriated.

The jurisdiction of The Exchequer Court of Canada is ample for this purpose. That court, by ch. 34 of the Revised Statutes of Canada 1927, sec. 19, is given jurisdiction to hear and determine

(*a*) every claim against the Crown for property taken for any public puposes;

(*b*) every claim against the Crown for damage to property injuriously affected by the construction of any public work;

The parties put in at the trial all the evidence they desired to give on quantum. The learned judge of the Exchequer Court who tried the case did not assess the amount of damages or compensation because of his conclusion that the land was the property of the Dominion and we are without the benefit of his consideration of the evidence as to damage. This is unfortunate. Even though a trial judge may take, as a matter of law, a view of a case which precludes the plaintiff from recovering damages, an appellate court is entitled to have, in case it should reach a different conclusion on the question of liability, the advantage and assistance of the trial judge's views as to the weight which should be attached to the evidence of the several witnesses who appeared before him.

The facts may be stated briefly. The suppliant owned a water lot adjoining his land lot. His upland ran back to a public street in the Town of Chicoutimi. The suppliant used the entire property in the conduct of his lumber business. He had a small lumber mill upon the property and the location was especially advantageous for his business because he brought in timber from his own limits and unloaded it directly from the boats to the lumber piles on a small wharf that he had built upon the water lot. The wharf bordered on and was attached to the upland. It was not a deep water wharf; at very low tide the water receded some distance from it. But it was a convenient means specially built by the suppliant for unloading timber that was brought in by water on flat-bottomed boats. At low tide the boats were quite secure on the beach. When the boats rested on the bottom their decks remained only a few feet lower than the top of the suppliant's wharf, causing no inconvenience in the unloading. There is said to have been a minimum amount of labour and time required in the handling of the timber under the conditions that existed

before the construction of the harbour works complained of. The suppliant's lands were therefore used as a unum quid. Now when the Dominion, acting through the local harbour commission, constructed the public wharves at Chicoutimi, a portion of the water lot alone was actually taken. The suppliant's wharf was not within the area taken nor was any of the upland. The land actually taken was of course subject to the public right of navigation and probably had little value in itself to the suppliant. The suppliant asked before us for 50 cents a square foot for this land and there is some evidence that it might be worth that amount if it were filled in but that the fill might cost about as much as the land would then be worth. The value of the land actually taken has not yet been assessed. The substantial damage to the suppliant, however, obviously lies in the severance of his property and the consequent interference with his right of access to the river. The land taken was so connected with and related to the lands than are left that it is plain that the suppliant is seriously prejudiced, Lord Summer in delivering the judgment of the Judicial Committee in Holditch v. Canadian Northern Ontario Railway, (1916) I A. C. 536, said at p. 542:

> "The basis of a claim to compensation for lands injuriously affected by severance must be that the lands taken are so connected with or related to the lands left that the owner of the latter is prejudiced in his ability to use or dispose of them to advantage by reason of the severance. The bare fact that before the exercise of the compulsory power to take land he was the common owner of both parcels is insufficient, for in such a case taking some of his land does no more harm to the rest then would have been done if the land taken had belonged to his neighbour. Compensation for severance therefore turns ultimately on the circumstances of the case."

The proper construction to be put upon the provision of sec. 164 of The Railway Act 1919 as to "full compensation... to all persons interested, for all damage by them sustained by reason of the exercise of "the powers of the company is too well established by decisions to be any longer open to question. The Privy Council in Sisters of Charity of Rockingham v. The King (1922) 2 A. c. 315, gave to the words "injuriously affected by the construction of any public work" in the Exchequer Court Act, sec. 19 (*b*) the effect of the English decisions under the Railway Clauses Consolidation Act 1845 and the Land Clauses Consolidation Act, 1845. In City of Montreal v. McAnulty Realty Co. 1923 S. C. R. 273 at pp. 285–288, the present Chief Justice of this Court carefully reviewed the authorities and showed that notwithstanding the obvious differences in language between the clause in the Dominion Railway Act and the clauses of the English statutes out of which the rules developed, it was settled law that generally speaking the principles governing the right of compensation under The Railway Act were the same as those which were established in England under the Land Clauses Consolidation Act.

The City of Toronto v. Brown, (1917) Can. 55 S. C. R. 153, was a case in this Court where the owner of property was held entitled to compensation for "injurious affection" though none of his land was taken. The present Chief Justice in that case at p. 179 showed that the phrase "injuriously affected"

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used in the Railway Clauses Consolidation Act 1845 and in the Lands Clauses Consolidation Act 1845 imports something which if done without the authority of the legislature, would have given rise to a cause of action.

> "It has, moreover, been settled that since a condition of the right to compensation is that the claimant's property has been "injuriously affected", it is incumbent upon him to establish that the injury he complains of was an injury to his estate and not a mere obstruction or inconvenience to him personally or to his trade; Ricket v. Metropolitan Railway Co. 1867. L. R. 2 H. L. 175; and further that the damage complained of must be in respect of the property itself (in its existing state or otherwise) and not in respect of some particular use to which it may from time to time be put. Beckett v. Midland Railway Co. 1867, L. R. 3 C. P., 82 at 94 and 95."

In Lake Erie and Northern Railway Co. v. Schooley Can. 53 S. C. R. 416, it was held by this Court that

> "where property expropriated is, owing to its location and adaptability for business, worth more to the owner than its intrinsic value, he is not entitled to have the capital amount representing the excess added to the market value of his property. His proper compensation is the amount which a prudent man in the position of the owner would be willing to pay."

The principle applied was laid down by the Privy Council in Pastoral Finance Association v. the Minister, 1914 A. C., 1083, that the special suitability of the lands expropriated for the carrying on of business of the owner and the additional profits which the owner will derive from so carrying it on, are proper elements in assessing the compensation but the owner is not entitled to have the capitalized value of those savings and profits added to the market value of the land. Their Lordships said at p. 1088 of the report of that case:

> "That which the appellants were entitled to receive was compensation not for the business profits or savings which they expected to make from the use of the land, but for the value of the land to them. No doubt the suitability of the land for the purpose of their special business affected the value of the land to them, and the prospective savings and additional profits which it could be shewn would probably attend the use of the land in their business furnished material for estimating what was the real value of the land to them. But that is a very different thing from saying that they were entitled to have the capitalized value of these savings and additional profits added to the market value of the land in estimating their compensation. They were only entitled to have them taken into consideration so far as they might fairly be said to increase the value of the land. Probably the most practical form in which the matter can be put is that they were entitled to that which a prudent man in their position would have been willing to give for the land sooner than fail to obtain it. Now it is evident that no man would pay for land in addition to its market value the capitalized value of the savings and additional profits which he would hope to make by the

use of it. He would, no doubt, reckon out those savings and additional profits as indicating the elements of value of the land to him, and they would guide him in arriving at the price which he would be willing to pay for the land, but certainly if he were a business man that price would not be calculated by adding the capitalized savings and additional profits to the market value."

In the case before us the serious claim, as we have said, is in the interference with the conduct of the suppliant's business on his lands but in order to arrive at a fair amount of damages for the "injurious affection" it is really necessary that the Court should have some evidence of what was the fair value to the suppliant of his estate at the time of the commencement of the construction of the public work complained of and of what is the fair value of the estate he has now after the construction of the public work. The possibility of the betterment of his property is by virtue of sec. 221 of The Railway Act something, in the words of Lord Parker in The Dominion Iron and Steel case, "not without materiality in assessing the damage."

Serious difficulty presents itself to us in the review of the evidence as to damage. Counsel for both parties admit that there was no evidence given at the trial by any one as to the value of the suppliant's estate in the lands before or of the value after the construction of the public work complained of. Counsel for the suppliant admitted that the evidence in support of the claim for damages was directed solely to showing an increased cost in operating the suppliant's lumber business on the property under the changed conditions and establishing some capitalized value of the loss. Now that is plainly the wrong principle to apply in the ascertaining of the damages and the case will have to go back for a new trial on that branch of the case.

The suppliant's appeal must be allowed and the judgment appealed from set aside.

If the Chicoutimi Harbour Commission should now desire to commence expropriation proceedings, in which case the compensation will be fixed by a Judge of the Superior Court of Quebec for the district in which the lands lie in accordance with the provisions of The Railway Act, 1919, made applicable *mutatis mutandis* by the provisions of the special Act of the Chicoutimi Harbour Commissioners, and such proceedings are commenced within one month, the suppliant shall be entitled to a declaration of his rights but on account of the unsatisfactory and insufficient evidence of damage given in support of his claim he shall only be entitled to one-half of his costs here and below, together with his disbursements. If expropriation proceedings are not so taken, then judgment shall be entered declaring the rights of the suppliant and ordering a new trial in the Exchequer Court limited to the ascertainment of the damages or compensation. In the latter event, the suppliant shall be entitled to the same order as above stated as to the costs here and below but the costs of the new trial shall be in the discretion of the trial judge.

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 contro-

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versies 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 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 sec. 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.

No. 11

IN THE PRIVY COUNCIL — ORDER ALLOWING APPEAL, 8th JUNE 1937

In the Privy Council.

No 11
Order allowing Appeal.

AT THE COURT AT BUCKINGHAM PALACE

The 8th day of June, 1937

PRESENT

THE KING'S MOST EXCELLENT MAJESTY

LORD PRESIDENT
LORD CHAMBERLAIN
LORD SNELL
MR. SECRETARY ORMSBY-GORE
CAPTAIN EUAN WALLACE
SIR FRANK MACKINNON
SIR FELIX CASSEL
SIR GEORGE COURTHOPE
MR. FOOT
MR. PETHICK-LAWRENCE
SIR HUGH O'NEILL
SIR THOMAS HORRIDGE
SIR GEORGE TALBOT

WHEREAS there was this day read at the Board a Report from the Judicial Committee of the Privy Council dated the 28th day of May 1937 in the words following viz.:—

"WHEREAS by virtue of His late Majesty King Edward the Seventh's Order in Council of the 18th day of October 1909 there was referred unto this Committee a humble Petition of the Attorney General of Canada representing Your Majesty in the matter of an Appeal from the Supreme Court of Canada between the Petitioner Appellant and

Henri Jalbert Respondent and the Attorney General for the Province of Quebec acting for Your Majesty in Your right of the Province of Quebec Intervenant setting forth (amongst other matters) that the Petitioner desires to obtain special leave to appeal to Your Majesty in Council from a Judgment of the Supreme Court dated the 2nd February 1937 allowing the Respondent's Appeal and reversing the Judgment of the Exchequer Court dated the 12th June 1935 whereby the Respondent's Petition of Right was dismissed: that the case involves important questions with respect to the interpretation and application of certain provisions of the British North America Act and to the respective powers and properties of the Dominion of Canada and the Province of Quebec in relation to public harbours: that the particular harbour in question is that at Chicoutimi on the Saguenay River in the Province of Quebec: that the amount involved is $43,125 with interest: that the main question at issue is whether or not there was a public harbour at Chicoutimi Province of Quebec in 1867 which passed to the Dominion of Canada at the time the British North America Act came into force; and if so whether or not such public harbour included within its limits a beach lot (situated on the foreshore between high and low water marks) granted in 1907 by Letters Patent of the Government of the Province of Quebec to the Respondent: that a further question is that of the interpretation of the Letters Patent granting the beach lot to the Respondent 'subject to all the laws of the Dominion of Canada with respect to trade and navigation' and that of the Respondent's right to recover damages for deprivation of his access to such beach lot: that the Saguenay River is a tidal and navigable river a tributary of the St. Lawrence River and at Chicoutimi which is situate on its banks it has a width of about half a mile: that Chicoutimi was an early settlement and trading post which by 1867 had become a resort for ships for the purpose of loading and unloading goods especially timber: that the witnesses for the Petitioner defined the limits of the harbour at Chicoutimi as extending for a distance of approximately two miles along the river shore and including the Respondent's lot: that the Chicoutimi Harbour Commission was established by the Act 16-17 George V Canada 1926 Chapter 6 to administer the Federal harbour at Chicoutimi: that during the years 1929 and 1930 the Commission made extensive improvements to the harbour of Chicoutimi and for this purpose constructed new wharves sheds and embankments: that these improvements necessitated filling which filling covered the greater portion of the Respondent's beach lot claimed as his property under the Letters Patent granted by the Province of Quebec in 1907: that the Respondent in December 1932 filed a Petition of Right in which he alleged ownership of such beach lot and claimed damages in the amount of $43,125 with interest for deprivation of the beach lot for a wharf built thereon which was rendered useless by reason of the filling and for loss of right of access: that the Attorney General of Canada on behalf of Your Majesty opposed the Petition contending that the Respondent's beach lot formed part of a public

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harbour in 1867 and passed to the Government of Canada on the 1st July 1867 under the provisions of Section 108 of the British North America Act: that the Attorney General for the Province of Quebec on behalf of Your Majesty in Your right of the Province of Quebec intervened upholding the validity of the Letters Patent purporting to grant title to the Respondent's beach lot and contending that it formed part of the assets and property of the Province of Quebec at the date of the Letters Patent: that the Exchequer Court by Judgment dated the 12th June 1935 dismissed the Petition of Right and the intervention of the Attorney General for the Province of Quebec: that the Respondent and the Attorney General for the Province of Quebec Intervenant appealed to the Supreme Court: that on the 27th May 1936 the Supreme Court allowed the Respondent's Appeal and held that the Petitioner's contention that there was a public harbour at Chicoutimi and that the beach lot in question formed part of it was not well founded: that the Supreme Court then ordered a further hearing for the determination of the damages: that by the Judgment of the Supreme Court dated the 2nd February 1937 after a second hearing limited as stated above to the question of damages it was declated in part: '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': And humbly praying Your Majesty in Council to order that the Petitioner shall have special leave to appeal from the Judgment of the Supreme Court dated the 2nd February 1937 or for further or other relief:

"AND WHEREAS by virtue of the aforesaid Order in Council there was also referred unto this Committee a humble Petition of the Attorney General for the Province of Quebec in the matter of an Appeal from the said Supreme Court between the Attorney General for the Province of Quebec acting for Your Majesty in Your right of the Province of Quebec (Intervenant) Appellant and Your Majesty represented by the Attorney General of Canada and Henri Jalbert Respondents setting forth (amongst other matters) that the Petitioner desires to obtain special leave to Appeal to Your Majesty in Council the said Judgment of the Supreme Court dated the 2nd February 1937 in respect of the Appeal taken by the Petitioner from the said Judgment of the Exchequer Court dated the 12th June 1935 whereby the Petitioner's intervention in this cause was dismissed: and reciting the litigation between the Parties as set forth in the previous Petition: And humbly praying Your Majesty in Council to order that the Petitioner shall have special leave to appeal from the Judgment of the Supreme Court of the 2nd February 1937 so far as the same concerns the Petitioner's intervention or for such further or other Order as to Your Majesty in Council may appear fit:

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"THE LORDS OF THE COMMITTEE in obedience to His late Majesty's said Order in Council have taken the humble Petitions into consideration and having heard Counsel in support thereof and in opposition therto Their Lordships do this day agree humbly to report to Your Majesty as their opinion (1) that leave ought to be granted to the respective Petitioners to enter and prosecute their Appeals against the Judgment of the Supreme Court of Canada dated the 2nd day of February 1937 (2) that the costs of the Appeals to Your Majesty in Council incurred by the Respondent Henri Jalbert ought to be paid by the Petitioner Your Majesty's Attorney General of Canada in any event (3) that the Appeals ought to be consolidated and heard together upon one Printed Case on behalf of each party separately represented and (4) that the authenticated copy under seal of the Record produced upon the hearing of the Petition ought to be accepted (subject to any objection that may be taken thereto) as the Record proper to be laid before Your Majesty on the hearing of the Appeals."

HIS MAJESTY having taken the said Report into consideration was pleased by and with the advice of His Privy Council to approve thereof and to order as it is hereby ordered that the same be punctually observed obeyed and carried into execution.

Whereof the Governor-General or Officer administering the Government of the Dominion of Canada for the time being and all other persons whom it may concern are to take notice and govern themselves accordingly.

M. P. A. HANKEY.

No. 12

AGREEMENT OF PARTIES SETTLING CONTENTS OF THE RECORD OF PROCEEDINGS

In the Supreme Court.

No 12
Agreement of parties settling contents of the record of proceedings.

The parties in the present appeal hereby agree that the record of proceedings be composed of the following documents:

First volume of the Record composed of the printed Case in the Supreme Court of Canada;

Second volume of the Record composed of the following documents:

Judgment of the Supreme Cour of Canada, February, 2nd 1937;

Suppliant-Appellant's Factum in the Supreme Court of Canada;

Intervenant-Appellant's Factum in the Supreme Court of Canada;

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Agreement of parties settling contents of the record of proceedings. (Continued).

Respondent's Factum on the Appeal of the Suppliant in the Supreme Court of Canada;

Respondent's Factum on the Appeal of the Intervenant in the Supreme Court of Canada;

Pronouncement of the Supreme Court of Canada on questions of right and reasons of the Court delivered by Mr. Justice Davis, May 27th 1936;

Supplementary Suppliant's Factum on the question of damages;

Supplementary Respondent's Factum on the Appeal of the Suppliant, on the question of damages;

Appellant's Reply to the Supplementary Factum of Respondent;

Reasons of Judgment by Mr. Justice Davis ~~and~~ (the Right Honourable Sir L. P. Duff and Messrs Rinfret, Crocket, Kerwin, and Hudson, JJ., February, 2nd 1937; concurring).

Order in Council granting Special Leave to Appeal, June 8th 1937.

LOUIS-A. POULIOT,
Solicitor for the Respondent-Appellant.

ST-LAURENT, GAGNÉ, DEVLIN & TASCHEREAU,
Solicitors for the Intervenant-Appellant.

ANTONIO TALBOT,
Solicitor for the Intervenant-Appellant.