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No. 34 of 1937

3, 1938

*St-Laurent called*

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**Dominion of Canada**

**In the Supreme Court of Canada**

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**HENRI JALBERT, Suppliant and THE ATTORNEY GENERAL  
for the Province of Quebec, Intervenant,**

*Appellants,*

VS

**THE KING,**

*Respondent.*

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**INTERVENANT-APPELLANT'S FACTUM**

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**IN APPEAL FROM A JUDGMENT OF THE EXCHEQUER  
COURT OF CANADA (ANGERS J.), DATED  
JUNE 12th, 1935.**

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**CHARLES LANCTOT, K. C.,**  
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18 Rideau Street, Ottawa,  
*Agents.*

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Questions principales.

No. 34 of 1937

Le mot Harbour.

éléments compris dans la définition { récente ?

Listes dans lesquelles le Conseil Privé intervient  
dra. sur les faits. Butwick p. 271. *Interacts.*

Questions incidentes.

Autour de la version française A. B. N.

UNIVERSITY OF LONDON  
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LEGAL STUDIES

45158

# IN THE SUPREME COURT OF CANADA

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**HENRI JALBERT, Suppliant and THE ATTORNEY GENERAL  
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*Appellants,*

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**THE KING,**

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## INTERVENANT-APPELLANT'S FACTUM

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30 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:

40 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.
- 10 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 20 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 be dismissed with costs.

### GROUNDS OF APPEAL

30 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

40 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 down is the outlet of Rivière du Moulin, a much more important water course.

The tides are pretty high at Chicoutimi and while the current is not very strong at the flow, it is very rapid at the ebb. Therefore, the river outlets which we have just mentioned were likely to appeal as landing places to those who first came to Chicoutimi by water.

10 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.

20 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.

30 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 time 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.

40 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.

## 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.

10 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.G. 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".

20 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 safe landing of passengers and for the discharge of vessels and steamers and the landing  
30 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.

40 It is respectfully submitted that the principles stated in that case support Intervenant's contention and not Respondent's contention. The *ratio decidendi* 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 navi-

gated. 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  
 10 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  
 20 260, 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  
 30 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  
 40 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 occurrence, 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 than 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 steam 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 schooners 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 Establish-

ment 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  
10 is slightly mistaken when he says that the wharf was built in 1875. The truth is no doubt 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  
20 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 steamships 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  
30 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.

40 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 Confede-

ration, 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 Lordships 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 actually 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 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 Church is presently erected, in order to unload their cargoes and he refers to witnesses Blackburn, Caron, Lemieux and McLeod. This is not strictly 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 the 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

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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

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