Privy Council Appeal No. 34 of 1937

The King - - - - - - - - *Appellant*

v.

Henri Jalbert and another - - - - - *Respondents*

The Attorney General of Quebec - - - - *Appellant*

v.

The King and another - - - - - *Respondents*

Consolidated Appeals

FROM

THE SUPREME COURT OF CANADA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 17TH JANUARY, 1938.

Present at the Hearing:

LORD ATKIN.
LORD THANKERTON.
LORD RUSSELL OF KILLOWEN.
LORD WRIGHT.
LORD MAUGHAM.

[*Delivered by* LORD WRIGHT.]

This appeal concerns a small plot of foreshore at Chicoutimi on the Saguenay River in the Province of Quebec. The respondent Jalbert is a timber merchant in the City of Chicoutimi who some years before 1907 acquired a plot of land of about 150 feet in width, fronting the river and going back to the Rue Racine in the City. He was accordingly a riparian proprietor with a right of access to the river. In 1907 he was granted by the Province of Quebec title to the piece of foreshore or beach lot in front of his land, where he was carrying on his timber business. He built on the beach lot a jetty which was most convenient for boats to come to and unload timber on to his property, as the planks could be unloaded by hand and received by hand into his yard. His complaint was that the Crown, acting through its statutory agent the Chicoutimi Harbour Commission, had without expropriation proceedings unlawfully taken possession of his beach lot and deprived him of access to the river. This was done for purposes of certain harbour improvements which involved among other things the filling up of the greater portion of the beach lot in connection with a scheme of constructing new

quays carried further out in the river. The respondent Jalbert filed a petition of right in the Exchequer Court of Canada against the appellant, claiming damages. The defence pleaded was a denial of the respondent's title to the beach lot, on the ground that the Letters Patent were invalid since the title to the beach lot was vested in the Dominion under section 108 and the Third Schedule to the British North America Act, 1867, the beach lot being part of a public harbour existing at confederation at Chicoutimi.

The respondent, the Attorney-General for the Province of Quebec, intervened as *garant* or warrantor of the respondent Jalbert's title, alleging that the beach lot did not in 1867 form any part of a public harbour. In the Exchequer Court the plea of the Dominion was upheld and the action and intervention were dismissed. In the Supreme Court of Canada on appeal the claim was upheld, the judgment of the Exchequer Court was set aside and judgment was entered for the respondent Jalbert, a new trial being ordered for the ascertainment of damages unless within a given time the appellant took expropriation proceedings. The question of damages has not been raised on this appeal. With respect to the intervention, no order was made by the Supreme Court, which circumstance has led to a cross-appeal by the Attorney-General for Quebec, which will be dealt with later.

The Saguenay is a navigable river flowing in a course practically west and east into the St. Lawrence. Chicoutimi is almost at the head of the navigation and about 75 miles from the junction of the Saguenay with the St. Lawrence. The question to be determined is whether the beach lot came within the terms of section 108 of the British North America Act. That section enacts that " the public works and property of each province enumerated in the Third Schedule to the Act " should be the property of Canada. The relevant words of the Schedule are " Provincial public works and property to be the property of Canada . . . 2. Public harbours." The material date for the decision of the question in this case is the date of confederation, that is, 1867. As the property in the foreshore and in particular this portion was Crown property and thus *primâ facie* belonged to the Province, the onus was on the appellant to show that it had passed to the Dominion under the Act. A great deal of evidence, oral and documentary, was led on this topic in the Exchequer Court.

In 1830 Chicoutimi was described in an Admiralty chart as a trading post of the Hudson Bay Company. It was also situated in a region rich in timber and became a centre of timber export, mainly, if not entirely, started and carried on by a Mr. Price, who in the 1850's and 1860's owned two wharves on the river. The upper one was at a creek called Le Bassin where the Chicoutimi River flowed into the Saguenay. The other wharf was about 2 miles lower down at the mouth of the Rivière du Moulin. There was also about $\frac{1}{2}$ mile below Le Bassin a third wharf owned by one Johnny Guay, who used it for his business as a general

merchant and also for some timber trade. All three were private wharves, though it is said that occasionally and as a favour Guay might allow others to use his wharf. A village began to grow at Chicoutimi about 1840, and in 1863 Chicoutimi was erected a district municipality by a statute, which in its preamble described the place as having over 125 houses and a population of over 800 persons. Vessels came to the Saguenay River to load timber and did load timber from the Price wharves. They lay in the river and were loaded from flat-bottomed craft or barges which took the timber from the wharves to the ships. As the trade grew and the vessels became bigger, a large proportion was loaded at a place about 4½ miles below Rivière du Moulin, called the Shallows. This practice became pronounced somewhere about 1866 or 1869. These vessels appear to have been largely ocean-going ships (brigs or three-masted schooners) loading for Europe or South America. In earlier days of the trade the vessels, which were smaller, lay in the stream for loading in the stretch between Le Bassin and Rivière du Moulin. These small vessels (one masters or schooners) shipped timber for Quebec and the United States and this trade seems to have gone on at all material times. There was no public wharf at Chicoutimi until the Government constructed one about the year 1873 or 1875. In 1865 there was a sub-collector of customs stationed at Chicoutimi on the establishment of the customs authorities of the port of Quebec. His duty was to clear the outgoing vessels. There is, subject to what is noted below, no evidence that any part of the foreshore over the 2 miles of the river which stretched from Le Bassin to Rivière du Moulin, apart from the three private wharves, was used for purposes of loading or unloading vessels or barges or for any purposes of navigation except that people crossing the river in small boats might land or embark at any convenient place. One witness indeed deposed that he had seen a schooner unloading at the foreshore a little below Le Bassin and another gave similar evidence, but other witnesses contradicted that evidence at least in respect of any time before confederation. It is probable that the former witnesses were in error about the date. In any case there is no evidence of general user but at most of isolated cases. As to the beach lot in question, which was about 300 feet above Guay's wharf and less than half a mile below Le Bassin, there is no evidence that it was ever made use of in any way. The land at that point and up to Le Bassin behind the foreshore was described as being at confederation rough, uneven and swampy and as being vacant land. A yearly record was put in of small steamers belonging to the Compagnie de Navigation à Vapeur du St. Laurent plying up the Saguenay as far as Chicoutimi, apparently with goods and passengers. The yearly number of these voyages gradually increased. Two such voyages were recorded in 1840, the year in which the record begins; in 1853, 15 voyages are recorded, in 1867, 54 voyages. These vessels

seem to have been at first of about 250 tons and in 1867 of about 500 tons each. Where they anchored or how they landed or embarked goods and passengers does not appear though some place or places must have been used, it seems, for these purposes. But there is no evidence of any place of public access. About the 1850's Price seems to have begun to employ tugs to tow his barges, at least when wind and tide were unfavourable.

Angers J. in the Exchequer Court found that Chicoutimi was in 1867 a public harbour and held that thereby the plea of the appellant was established. In the Supreme Court Davis J., whose judgment was concurred in by the other members of the Court, considered that it was not necessary to decide whether Chicoutimi was or was not a public harbour because he held that the real question was whether the actual beach lot or piece of foreshore was a constituent or integral part of a public harbour. He decided that there was no evidence that it was and on that ground allowed the appeal. Their Lordships agree with his decision and the reasons on which it is based.

It has been repeated more than once in the cases decided by this Board and by the Supreme Court of Canada that it is not desirable to attempt a precise or exhaustive definition of the words "public harbour" used in the Schedule to section 108. Nor indeed would such a definition seem to be possible, when the diversity of possible conditions is realised. Nor is any substantial help to be derived from such definitions or discussions as are to be found in Sir Matthew Hale's celebrated work "De Portibus Maris." But the cases actually decided under the statute embody some guiding limitations and rules and afford some illustrations which are of value in considering the present case. In *A.G. of Canada* v. *A.G. for Ontario, Quebec and Nova Scotia* [1898] A.C. 700 at p. 712, this Board rejected the view that only those parts of what might ordinarily fall within the term "harbour" on which public works had been executed became vested in the Dominion but they also rejected the view that no part of the bed of the sea within the harbour did so. On the other hand the Board denied the proposition that because the foreshore on the margin of a harbour is Crown property, it necessarily forms part of the harbour. Lord Herschell said:—

> "It may or may not 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."

In the *A.G. for British Columbia* v. *Canadian Pacific Railway* [1906] A.C. 204 at p. 209, Sir Arthur Wilson, in delivering the judgment of the Board quoted and applied the words of Lord Herschell and said that the question was a question of fact, namely, whether the foreshore at the place in question formed part of the harbour. In *A.G. for Canada* v. *Ritchie Contracting and Supply Co.* [1919] A.C. 999,

Lord Dunedin said that it was impossible to hold that every indentation of the coast to which the public have right of access and which by nature is so sheltered as to admit of a ship lying there, is a public harbour. He clearly meant that while these conditions were essential, they were not *per se* sufficient. He went on to say (p. 1,004):—

> "Potentiality is not sufficient: the harbour must, so to speak, be a going concern. "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."

In that case this Board held that English Bay, the bay forming the outer approach to Burrard Inlet, which leads to the City of Vancouver, was not a public harbour. They thus found it unnecessary to consider the question which otherwise arose whether supposing English Bay to be a public harbour, Spanish Bank, the precise *locus in quo,* though within its ambit, was a part of it. In *The King* v. *A.G. of Ontario and Forrest,* [1934] S.C.R. 133, the Supreme Court of Canada held that a small island in Gooderich Harbour did not form part of the public harbour under the Act.

It is clear from these decisions that if what is in question is a particular piece of the foreshore, the issue is not decided by determining whether the harbour is a public harbour but is decided by considering whether even if there is a public harbour within the ambit of which the piece of foreshore is, the piece of foreshore has been actually used as a place of public access for the loading or unloading of ships or similar harbour purposes at the material time. This is a question of fact, not to be concluded by general consideration, such as whether or not there are public works upon it.

The facts of the present case may now be considered. What is claimed to have been the harbour of Chicoutimi in 1867 is a long stretch of river, about 2 miles in length, at each end of which was one of the wharves owned by Price: both were private wharves used by Price for his own business. There was also the third wharf, that of Johnny Guay already referred to, but that also was a private wharf. The place was, it seems, a port in those days for fiscal purposes; it is described as a subport of the port of Quebec. But that does not mean that Chicoutimi was a "public harbour" within the meaning of the Third Schedule. There was no public wharf until at earliest 1873. There was no Harbour Authority until the Harbour Commission was established by Dominion statute in comparatively recent years, long after confederation. No doubt a good many coasting and ocean-going vessels came to Chicoutimi to load timber and lay in the river for that purpose. Guay also had two small vessels of his own which came to and went from his wharf for purposes of his business. The small coasting steamers already mentioned made their occasional or periodical visits. There was undoubtedly a maritime trade, considerable in the

circumstances of time and place. The stream was publicly used for ships to anchor and lie in to load and the area was sufficiently sheltered to be called from that point of view a harbour. It is, however, difficult to apply the term " public harbour " to the foreshore of this long stretch of sparsely populated river banks with apparently no public rights of access at least before 1873, when the first public wharf was constructed. But their Lordships bear in mind the danger of attempting to limit or define exhaustively the important words " public harbour " in this section or go beyond what is necessary for the case. They accordingly abstain from expressing any opinion on the facts whether Chicoutimi was a public harbour in 1867. They turn to the only question which is material to this appeal, namely, whether the actual spot, the beach lot, could, on any view as to the status of the harbour as a whole, be described as a public harbour, that is, a constituent or integral part of a public harbour. This is an enquiry distinct from the enquiry whether the larger area in the ambit of which the spot exists is a public harbour. Even if the two-mile stretch of river which is said to have formed Chicoutimi harbour was a public harbour, it does not follow that the term can properly be applied to every creek or indentation or to every bit of foreshore on the one bank or the other of the stream throughout the two-mile length. Their Lordships must approach the issue in reference to the specific beach lot as one of fact. The onus is on the appellant to establish his claim affirmatively, but he does not in their Lordships' judgment, produce any evidence which would justify the conclusion that the beach lot was at, or previous to, 1867 used for any purpose of loading or unloading vessels or was ever a place of public access for such purposes. Indeed the evidence as to the character of the land at that point tends strongly to the opposite effect. It is therefore impossible to hold that this beach lot was at the relevant date a constituent part of a public harbour. Their Lordships accordingly are of opinion that the appellant's contention fails and that the appeal should be dismissed.

In doing so they have not overlooked a minor but distinct point, taken but perhaps not very strenuously urged, on behalf of the appellant. This turns on a clause in the Letters Patent granting the beach lot to the respondent Jalbert which runs as follows:—

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

The appellant contended that these words constituted a reservation out of the grant as the plot of foreshore was a special property subject to special Federal jurisdiction, and that no title was granted which would avail against any exercise by the Dominion of its Federal powers in regard to commerce and navigation. Otherwise, it was said, the words of the clause are merely surplusage. Their Lordships are however unable to construe the clause as giving to the Dominion authorities power to seize the land as they did,

without legal process and under a claim of right which turns out to be unfounded.

There remains for consideration the cross-appeal of the Attorney-General of the Province of Quebec, who took an independent appeal by special leave to His Majesty in Council against that part of the order of the Supreme Court which made no order with respect to his intervention and appeal. Davis J. in his judgment, which was concurred in by the other members of the Supreme Court, in effect held that the intervention was misconceived. The intervention had indeed been admitted by the Judge of the Exchequer Court, the intervener had appeared at the trial and examined witnesses on the issue of fact relating to the beach lot, had delivered a factum on his appeal to the Supreme Court and had argued on the merits before that Court, and had in all these respects done so throughout without any objection. Mr. Monette stated that the Supreme Court arrived at this decision without the point being raised or argued. He has strenuously contended that under the Exchequer Court Act and under the general rules and orders of the Exchequer Court of Canada, the intervention was competent and proper. Their Lordships, however, see no reason to differ from the conclusion reached in the Supreme Court. The cross-appeal in their judgment should be dismissed and the order of the Supreme Court on this matter affirmed, but as the appeals have been consolidated and as the matter is between the Government of the Dominion and the Government of the Province, they think that in the special circumstances no order can conveniently, or should, be made with regard to costs.

On the main appeal they are also of opinion that the order of the Supreme Court should be affirmed and the appeal dismissed. It was a term of the special leave to appeal that the appellant should pay to the respondent Jalbert the costs of the appeals to His Majesty in Council incurred by him in any event, and this should be so ordered. There should be no order for costs in respect of the main appeal in favour of the respondent the Attorney-General for the Province of Quebec.

Their Lordships will humbly so advise His Majesty as above stated in respect of the appeal and cross-appeal.

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In the Privy Council

THE KING

v.

HENRI JALBERT AND ANOTHER

THE ATTORNEY GENERAL OF QUEBEC

v.

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DELIVERED BY LORD WRIGHT

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