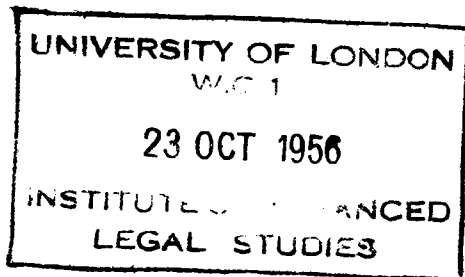


37,1937



R

APPELLANT'S CASE.

In the Privy Council.

No. 94 of 1936.

11361

ON APPEAL FROM THE COURT OF KING'S BENCH OF THE PROVINCE OF QUEBEC (IN APPEAL).

BETWEEN

ST. FRANCIS HYDRO ELECTRIC COMPANY, LIMITED, a body politic and corporate, having its Head Office in the City of Montreal, and ERNEST H. VIPOND and HERBERT S. VIPOND, Advocates, of the City of Montreal, and EDMOND ROUSSEAU, Notary, of the City of Montreal

(Petitioners in the Superior Court), Appellants,

AND

HIS MOST EXCELLENT MAJESTY THE KING and SOUTHERN CANADA POWER COMPANY, LIMITED, a body corporate and politic, having its Head Office in the City of Montreal,

(Respondents in the Superior Court), Respondents.

CASE FOR THE APPELLANTS.

1. This is an appeal from a majority judgment of the Court of King's Bench for the Province of Quebec, Appeal Side, dated the 29th of May, 1936, confirming a judgment of the Superior Court for the District of Quebec, dated the 25th of March, 1935, whereby the Appellants' action, in which they asserted rights of ownership in the bed of the St. Francis River opposite their riparian property in the Parish of St. Zepherin de Courval and in the townships of Wendover and Grantham, at a point called Spicer Rapids, some twenty-five miles up the River from the St. Lawrence, was dismissed.

Record.
Vol. 4, p. 61.
Vol. 2, p. 164.
Vol. 1, p. 2.

2. The St. Francis River is a tributary of the St. Lawrence River on the south shore thereof and empties therein at the head of Lake St. Peter about half-way between Montreal and Three Rivers. It has its source in Lake St. Francis in the County of Beauce and flows in a south-westerly

Vol. 3, p. 268.

Record. direction through the Counties of Wolfe and Compton to the Town of Lennoxville, and at that point it turns almost at right angles and flows in a general north-westerly direction through the City of Sherbrooke and the Counties of Richmond, Drummondville and Yamaska. Its length from Lake Aylmer, which is a few miles south of Lake St. Francis, to its mouth, is 137 miles ; its drop in that distance is some 800 feet and there is a drop of about 55 feet opposite Appellants' riparian lands.

R.S.Q. 1935. Chap. 46, s. 5
8, Geo. V., Chap. 68, s. 1.
Vol. 3, pp. 327, 268 and 269.
Vol. 3, p. 335.
Vol. 3, p. 338.

3. Since 1918, anyone wishing to establish power developments in the Province of Quebec which may affect Crown properties or properties of other individuals, is required to submit his plans for approval to the Provincial Government, and in 1927, the St. Francis Hydro Electric Company, Limited, submitted plans for the development of some 40,000 electric H.P. at this site, and in 1929, plans for a rival development by the Southern Canada Power Company, Limited, were submitted for approval and were afterwards approved by Order in Council of the 15th of February, 1930.

Vol. 3, p. 248.
Vol. 3, p. 344,
l. 30.

4. In point of fact, the Provincial Government had purported to lease this stretch of the bed of the St. Francis River to the Southern Canada Power Company, Limited, on the 3rd of August, 1917, for a period of 75 years to be computed from the 29th of November, 1912, as property belonging to the Crown and for this reason had refused to approve Appellants' plans. 20

Vol. 1, p. 2.
Vol. 1, p. 7,
l. 17.
Vol. 1, p. 6,
l. 23.

5. While the application of the Southern Canada Power Company, Limited, was pending, in January, 1930, the Appellants filed a Petition of Right and having obtained a Fiat, instituted an action against the Crown and against the Southern Canada Power Company, Limited, asserting their ownership of the riparian property and of the riverbed opposite it, and praying for a declaration that the lease of the 3rd August, 1917, was null and void and inoperative as regards that part of the bed and banks of the St. Francis River opposite and adjoining their property.

Vol. 1, p. 8,
l. 32.
Vol. 2, p. 171,
l. 25.

6. The Southern Canada Power Company, Limited, contested some of the Appellants' titles to their riparian property but its contestation thereof was dismissed and is no longer in issue. 30

7. Both Respondents asserted that the river was navigable and floatable and denied that the riparian ownership could import any rights in or to the bed of the River beyond highwater mark.

8. The Appellants' contention was and is :—

(A) that the St. Francis River opposite their properties was neither navigable nor floatable ;

(B) that even if this river was navigable and floatable, their titles none the less gave them the ownership of the portion claimed without prejudice to such rights of navigation as the public might enjoy ; 40

(c) that even if this river had ever been navigable it had long ceased to be such and at the time of the alleged lease to the Southern Canada Power Company, Limited, the Appellants had the exclusive right to utilise it for power purposes under the provisions of Chapter 51 of the Revised Statutes of Lower Canada.

Record.

9. At the first Trial before Mr. Justice D'Auteuil (now deceased) it was shown and found by him that as far back as the memory of living men could run, the river had not been and could not be used for practical purposes of navigation or floatation of logs in rafts. This Trial Judge had, however, refused to allow the Respondents to produce as historical evidence writings having to do with earlier periods and the Respondents appealed from this judgment to the Court of King's Bench, where, without deciding the merits of the case, the Trial Judge's ruling excluding this historical evidence was reversed and the case remitted to the Superior Court so that it might be received.

Vol. 1, p. 219,
l. 45.

Vol. 2, p. 174.

Vol. 2, p. 121,
ll. 28 and seq.

10. The second hearing was had before Mr. Justice Prevost, who admitted the so-called historical evidence, and held this evidence established that at the time the riparian lots were originally granted by the Crown to private owners in 1800-1816, there actually was some navigation on the river which made it a dependency of the Crown under the terms of Article 400 of the Civil Code. This Article 400 of the Civil Code is as follows :—

Vol. 2, p. 169,
l. 22.

“ 400. Roads and public ways maintained by the state, navigable and floatable rivers and streams and their banks, the sea-shore, lands reclaimed from the sea, ports, harbours and roadsteads, and generally all those portions of territory which do not constitute private property, are considered as being dependencies of the crown domain.

“ The same rule applies to all lakes and to all non-navigable and non-floatable rivers and streams and their banks, bordering on lands alienated by the crown after the 9th of February, 1918. (8. Geo. V. c. 72.—N. 538.—C. 421, 424, 427, 589, 2213.)

11. The Appellants appealed to the Court of King's Bench where their appeal was heard by a Court composed of Sir Mathias Tellier C.J., and Bernier, Hall, Walsh, Galipeault JJ.

Vol. 4, p. 61.

12. It appears to have been unanimously found on the appeal that the only possible evidence of navigability was the so-called historical evidence.

13. The Chief Justice and Bernier J., held that this evidence did not establish that there had ever been such navigation on the river as would make it an inalienable dependency of the Crown.

Vol. 4, pp.
62-66.
Vol. 4, pp.
67-77.

Hall, Walsh and Galipeault JJ. were of a contrary opinion, Walsh J. even holding that there must be conclusive evidence of non-navigability in order that riparian rights may extend *usque ad medium filium aquae*.

Vol. 4, pp.
77-81.

Record. 14. The Chief Justice did not deal with the other grounds urged by the Appellants. Bernier J. did so and accepted their views. The other three Judges rejected them.

15. As to the effect of the historical evidence the Appellants rely on what was said with respect thereto by the Chief Justice and by Bernier J.

R. S. Can. 1927 cap. 140, s. 4. 16. The Navigable Waters Protection Act, R. S. Can. 1927, Cap. 140, s. 4. is as follows :—

“ 4. No work shall be built or placed in, upon, over, under, through
“ or across any navigable water unless the site thereof has been approved
“ by the Governor in Council, nor unless such work is built, placed and 10
“ maintained in accordance with plans and regulations approved or
“ made by the Governor in Council.

“ 2. The provisions of this section shall not apply to small wharves
“ or groynes or other bank or beach protection works, or boat-houses,
“ if in the opinion of the Minister of Public Works

“ (A) they do not interfere with navigation, and

“ (B) do not cost more than one thousand dollars.”

This Act was originally passed in 1883 as 46 Vict. (Can.) Chap. 43.

The above cited text is that enacted in 1918 by 8-9 Geo. V. (Can.) chapter 23, section 2. 20

Vol. 1, pp. 41, 48, 80, 81. Vol. 3, p. 341. 17. There are several dams across and bridges over this river, and it is in evidence that it was never felt necessary to obtain authority for these works under the above cited Act.

18. The present contest is between two parties neither of whom wish to have the river treated as an inalienable dependency of the Crown, but both of whom claim to have a good title from the Crown, empowering them to erect for their own private uses structures which would be another absolute barrier to navigation in vessels or rafts.

The Appellants rely on the reasoning of Lord Moulton in *Maclaren v. The Attorney-General for Quebec* [1914], A.C. 258. 30

19. There have been decisions in the Province of Quebec that the bed of all navigable or floatable streams belong to the Crown except if granted in express terms to a subject. These decisions go back to the holdings of the special Seigniorial Court, but it is submitted that these holdings are binding only as to questions arising in seigniories. Elsewhere they only avail as *autorités de raison*.

20. A careful examination of the judgments pronounced by the members of this Special Court and of the authorities relied upon by them shows that it is only the rivers which were capable of substantial and permanent

navigation which were excluded from the seigniorial grants unless they were expressly mentioned therein, and that they were thus excluded because they were looked upon as inalienable and were so excluded only to the extent that they were necessary to the public ; that as to those with respect to which it was inconceivable that the public might cease to use them, the question of private ownership could not arise ; that on the other hand, as to those with respect to which it was conceivable that the public might cease to use them for navigation purposes, it was recognised that the beds thereof followed the grant of the shores and that the grantee obtained an underlying
10 title, and upon the extinguishment of the public right of user, became vested with full beneficial interest. The situation was very similar to that with respect to Indian lands in a Canadian Province dealt with by this Board in *St. Catharine's Milling Company's* case, 14 App. Cas. 46, and *Ontario Mining v. Seybold* [1903], A.C. 73.

Record.

21. Revised Statutes of Quebec, 1926, chapter 45, sec. 3 is as follows :—

“ 3. It has always been lawful, before the 16th of March, 1916,
“ whatever may have been the system of Government in force, for the
“ authority which has had the control and administration of public
“ lands in the territory now forming the Province of Quebec, or any
20 “ part thereof, to alienate or lease to such extent as was deemed advis-
“ able, the beds and banks of navigable rivers and lakes, the bed of the
“ sea, the sea-shore and lands, reclaimed from the sea, comprised within
“ the said territory and forming part of the public domain.

“ From and after the 16th of March, 1916, every alienation or lease
“ of one or more of the properties mentioned in the foregoing paragraph
“ may be effected solely with the express authorization of the Lieutenant-
“ Governor in Council, and on such conditions and under such restrictions
“ as he may determine.—R. S. (1909) 1524a ; 6 Geo. V. c. 17, s. 1.”

22. Even if the St. Francis River was susceptible of some navigation
30 at the beginning of the nineteenth century, the original grants to the Appellants' predecessors in title conveyed to them the bed thereof and subject to the right of user of the river for the purposes of such navigation.

23. The Appellants' lot 82 was originally part of lot 16 ; lot 83 was part of lot 17 ; lots 85 and 86 were parts of lot 19 of the third range of the township of Wendover. Their lot No. 55 of St. Zepherin de Courval was part of lot 23 of the first range of the township of Grantham. Their lots Nos. 653 and 654 of St. Zepherin de Courval were originally part of this Courval seigniori.

Vol. 3, p. 274,
last sheet.

24. This seigniori had been granted to S. Cressé on the 25th of September, 1654, as “ a parcel of land of two leagues in breadth by three leagues in
40 “ depth lying and situate in rear of the depth of the seigniori commonly
“ called Baie St. Antoine or du Fèvre on the border of Lake St. Peter.” It had been granted “ as a fief and seigniori with superior, mean and inferior
“ justice and with fishing, hunting and trading rights within the whole area
“ of the said grant.”

Pièces et
documents
relatif à la
“ Tenure
Seigneuriale ”
p. 239.

Record.
Op. cit. p. 80.

The Seigniori at the mouth of the St. Francis had been granted by Frontenac to Sieur Crevier on the 8th of October, 1678, and the "papier terrier" of the 10th October, 1678, shows that the seigneur obtained at the same time a quarter of a league out into the St. Lawrence, and also the St. Francis River itself with its islands and islets and the fishing and hunting rights in the whole area and out a quarter of a league into the St. Lawrence.

Op. cit. p.
123.

The Seigniori next above that was granted on the 3rd August, 1683, to Laurent Philipps, together with that part of the St. Francis River and its islands and islets. It, therefore, appears that even under the French Regime that part of the St. Francis where it is clearly navigable from the St. Lawrence up to the first Falls had passed out of the Crown domain.

25. By the Treaty of Paris all the ungranted portions of the territory of New France passed from the French Crown to the English Crown.

26. Murray's Ordinance of the 17th September, 1764, established Courts of Judicature to determine cases agreeably "to Equity, having regard, nevertheless, to the Laws of England, as far as the circumstances and present situation of things will admit, until such time as proper Ordinances for the information of the people can be established by the Governor and Council, agreeable to the laws of England."

14 Geo. III.
chap. 83, s.
9.

27. This introduction of the Laws of England into New France was repealed by the Quebec Act of 1774, but it was provided as follows:—

"Provided always, that nothing in this Act contained shall extend or be construed to extend, to any lands that have been granted by His Majesty, or shall hereafter be granted by His Majesty, His Heirs and Successors, to be holden in free and common soccage."

31 Geo. III.
chap. 91, s.
43.

28. Then the Constitutional Act of 1791, section 43, provided that "in every case that lands shall be hereinafter granted within the said Province of Lower Canada and where the grantee thereof shall desire the same to be granted in free and common soccage, the same shall be so granted."

Vol. 3, p. 276,
l. 47.

29. Jersey Island (now Cadastral No. 54, was granted by letters-patent of His Majesty, George III, dated the 20th February, 1816, in free and common soccage "in like manner as lands are now holden in free and common soccage in that part of Great Britain called England."

Vol. 3, p. 281,
l. 25 & p. 284,
l. 27.

Lot 16 (now Cadastral No. 82), of range 3, Wendover, was granted by similar letters-patent dated the 26th September, 1808 ;

Vol. 3, p. 286,
l. 37 & p. 289,
l. 35.

Lots 17 and 18 (now Cadastral Nos. 83-85 and 86), were granted in the same manner on the 12th December, 1814 ;

Vol. 3, p. 296,
ll. 2, 38, p.
299, l. 15,
p. 301, l. 40,
p. 311, l. 25
& p. 318, l.
18.

Lot 23 (now Cadastral No. 55) of the first range of Grantham was granted by letters-patent dated the 14th May, 1800, which were confirmed by letters-patent of George IV. dated the 24th May, 1822.

Vol. 3, p. 299,
l. 12,

These letters-patent all contain the following clause:—

"AND WE DO moreover of Our especial Grace, certain knowledge

“ and meer motion, consent and agree, that these Our present Letters
 “ being registered and a Docket thereof made as before directed and
 “ appointed, shall be good and effectual in Law, to all intents, construc-
 “ tions and purposes whatsoever, against Us, Our Heirs and Successors,
 “ notwithstanding any misreciting, misbounding, mis-naming or other
 “ imperfection or omission of, in, or anywise concerning the above
 “ granted, or hereby mentioned or intended to be granted Lots of land
 “ and premisses or any part thereof.”

Record.

30. After protracted litigation (*Wilcox and Wilcox*, 2 Lower Canada
 10 Jurist, I), the adoption of the Imperial Statute, 6, George IV, chapter 59,
 the passing by the legislature of Lower Canada of the Statute 9, George IV,
 chapter 77, further litigation (*Stuart v. Bowman*, 3 Lower Canada Reports,
 309), there was adopted by the Legislature of the United Canadas, the Statute
 20 Victoria, chapter 45, which Mr. Justice Letourneau relied on in the first
 appeal to restrict the effect of the letters-patent and his reasons were adopted
 by Mr. Justice Hall on the second appeal.

Vol. 2, p. 142,
l. 17.Vol. 4, p. 79.
l. 38.

31. This statute contains a declaration in the following terms :—

20 “ 12. The laws which have governed lands held in free and common
 “ soccage in Lower Canada, in matters other than alienation, descent
 “ and rights depending upon marriage, are hereby declared to have
 “ always been the same with those which governed lands held in franc-
 “ alleu roturier, except in so far only as it may have been otherwise
 “ provided by any act of the Legislature of Lower Canada, or of this
 “ Province.”

This statute was preceded by the preamble which is printed at page 35
 of Appellants' factum before the Quebec Court of Appeals, and it is submitted
 that the Act must be construed in the light of the history of the legislation
 upon the subjects with which it specially deals, as well as in the light of the
 circumstances in which it was passed.

Vol. 4, p. 35.

30 *The King v. The Sheer Water Company, Limited*, 1934 (Can.), S.C.R.
 197, at p. 205.

The Banque Canadienne Nationale v. Carette, 1931, Canada, 33, at p. 42.
 27, Halsbury, Laws of England.

32. The Appellants also rely, as showing that at the date of 3rd August,
 1917, they had exclusive rights to use the water power opposite their property,
 upon the Canadian Statute 19-20, Victoria, Chapter 104, printed at pp. 35
 and 36 of their Factum before the Court of Appeals. This was a right secured
 to them by Statute which could not be impinged upon by the action of the
 executive. It is true that this statutory right was made subject to prior
 40 authorisation by the executive by the Quebec Statute 8, George V., chapter
 68, which came into force on the 9th February, 1918, but this latter statute
 was not retroactive and could not validate a lease made by the Crown six
 months before its coming into force.

19-20 Vict.
(Can.) chap.
104.8 Geo. V.
(Que.) chap.
68.

33. The Appellants submit that the Judgment of the Court of King's Bench and the Judgment of the Trial Judge should be reversed and their action maintained for the following among other

REASONS

1. Because there is no trace in Canadian Law of any exception to the rule that the bed of a stream presumably belongs to the riparian owners except in cases where that bed is in its nature public property and therefore, such presumption of ownership cannot exist.
2. Because the right of user of rivers for purposes of navigation 10 and the carriage of timber are independent of the ownership of the bed of the river.
3. Because such use as was ever made of the St. Francis River for purposes of navigation was not such as to make it an inalienable dependency of the Crown.
4. Because the judgment of Chief Justice Sir Mathias Tellier and the Judgment of Bernier J. on that point are well founded.
5. Because the Crown always had the right to alienate the bed 20 and banks of this river.
6. Because the original grants of the properties now owned by the Appellants extend by rule of law *ad medium filium aquae*.
7. Because these grants in terms implied all that similar grants in free and common socage in that part of Great Britain called England would imply.
8. Because no subsequent legislation was intended to nor did in fact restrict the effect thereof.
9. Because the Appellants had, by statute, the exclusive right 30 to utilise the waterpowers opposite their riparian properties.
10. Because the Judgment of Bernier J. as to the effect of the grants and as to the exclusive right of the riparian owners to utilise the waterpowers opposite their property is well founded.

LOUIS S. ST. LAURENT.
RENAULT ST. LAURENT.

In the Privy Council.

No. 94 of 1936.

*On Appeal from the Court of King's Bench of the
Province of Quebec (in Appeal).*

BETWEEN

ST. FRANCIS HYDRO ELECTRIC
COMPANY, LIMITED, a body
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Head Office in the City of Montreal,
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tes, of the City of Montreal, and
EDMOND ROUSSEAU, Notary,
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Appellants,

AND

HIS MOST EXCELLENT MAJESTY
THE KING and SOUTHERN
CANADA POWER COMPANY,
LIMITED, a body corporate and
politic, having its Head Office in
the City of Montreal
(Respondents in the Superior Court),
Respondents.

CASE FOR THE APPELLANTS.

BLAKE & REDDEN,
17, Victoria Street, S.W.1.