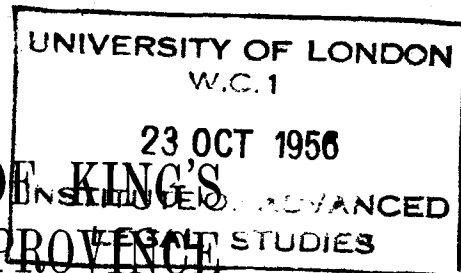


No. 94 of 1936.

In the Privy Council.



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

44663

BETWEEN :

ST. FRANCIS HYDRO ELECTRIC COMPANY LIMITED
 and Others

(Plaintiffs) *Appellants*

AND

HIS MAJESTY THE KING and SOUTHERN CANADA
 POWER COMPANY LIMITED

(Defendants) *Respondents*.

Case

for RESPONDENT SOUTHERN CANADA POWER COMPANY
 LIMITED.

1. This is an appeal from a judgment of the Court of King's Bench (Appeal Side) for the Province of Quebec (Hall, Galipeault and Walsh, JJ.; Sir Mathias Tellier, C. J. and Bernier, J. dissenting) confirming a judgment of the Superior Court (Prévost, J), which maintained in part against the Southern Canada Power Company Limited, but otherwise dismissed as to that Defendant and dismissed in toto as to His Majesty

RECORD.
 Vol. 4,
 p. 61.
 Vol. 2,
 p. 164.

RESPONDENT'S CASE.
 SOUTHERN CANADA POWER CO. LTD.

RECORD.

the King, a Petition of Right against His Majesty and an action against the other Defendant (consolidated) wherein it was claimed that certain parts of the bed of the river St. Francis leased by the Quebec Government to the other Defendant and certain riparian lands claimed to be owned by the other Defendant were the property of Appellants.

Vol. 2,
p. 171, l. 25, et seq.

2. The action was maintained as to the riparian lands (a question with which His Majesty was not concerned and which is not in issue on this appeal) but it was dismissed as regards the bed of the river St. Francis which is the only question raised on this appeal and in which both Respondents are interested. 10

Vol. 1,
p. 5, l. 4 to 39.

3. Plaintiffs-Petitioners claimed the bed of this river, firstly, because, as was alleged, the river was neither navigable nor floatable and, therefore, under Quebec law, its bed belonged to the riparian proprietors. The portions of this river bed that were claimed were those which, under Quebec law, would, if the river was not navigable or floatable, have belonged to the Plaintiffs' Petitioners as riparian proprietors.

4. The second reason alleged was that the riparian lands opposite these portions of the bed of the river having been granted in free and common socage the English law and not the Quebec law in respect of ownership by riparian proprietors of the bed of rivers should apply. 20 This is not a tidal river.

5. The Quebec law on this subject is contained in article 400 of the Civil Code which is as follows:—

“ 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 30 and non-floatable rivers and streams and their banks, bordering on lands alienated by the crown after the 9th of February, 1918.”

The first paragraph of this article contains a rule of the old French law which has always been the law of Quebec. It was therefore the law of Quebec when the Crown grants under which Plaintiffs hold the riparian lots, were made, to wit, between 1800 and 1816.

The second paragraph which plays no part in this case is new law enacted in 1918.

6. On the first trial, d'Auteuil, J. held that the river was neither navigable nor floatable and, therefore, maintained the Petition of Right and the suit. Vol. 1, p. 219, l. 46.

He had refused to admit evidence of a historical nature, namely, from books written long ago and generally accepted as authoritative in Quebec, as to the condition and uses of the river shortly after the original grants by the Crown were made and he based his judgment exclusively on evidence given by living witnesses. Vol. 1, p. 174, l. 19.

7. On appeal, this Judgment was reversed, by a majority consisting of Sir Mathias Tellier, C.J., Létourneau and Galipeault, JJ. and the record was referred back to the Superior Court in order to admit the historical evidence that the trial Judge had excluded. Vol. 2, p. 120.

Howard, J. dissented, being of the opinion that the Petition of Right and the suit should have been dismissed. Bernier, J. dissented, holding that this historical evidence was not admissible, that the river was not navigable and floatable and that the judgment should be confirmed. Vol. 2, p. 124, l. 12. p. 124, l. 22.

8. As the Court had expressed the opinion that the second reason alleged in support of the Petition of Right and suit, namely, that the English law and not the Quebec law should apply because the grant was in free and common socage, was not well founded, the present Appellants appealed to the Supreme Court of Canada. Vol. 2, p. 124, l. 22.

This appeal was quashed for lack of jurisdiction on the ground that the judgment was interlocutory and not final and that this opinion was not *res judicata*, the Supreme Court having jurisdiction only in case of final judgments.

The case was then tried before Prévost, J.; historical evidence was admitted. What followed has been previously stated.

9. D'Auteuil, J., in his main Considerant, found as follows: (translation)

“ Considering that it appears from the proof that the St. Francis River is neither navigable nor floatable otherwise than for loose logs upstream from Rapids called Cascade Rapids, that if a few rafts descended the Spicer Rapids it was in the nature of an attempt in the very short season of high waters, and these attempts, repeated three times during other spring times, demonstrated that upstream from the Cascade Rapids and notably in the Spicer Rapids, the River is not capable of bearing rafts.” Vol. 1, p. 219, l. 47.

It is to be noted that d'Auteuil, J., although he rejected historical evidence when tendered makes no reference to this fact in his judgment.

RECORD.

Vol. 2,
p. 121, l. 17.

10. The Court of King's Bench on the first appeal says in the formal judgment in effect that, although the present Appellants had *prima facie* established their titles, it did not result from the stipulation regarding free and common soccage therein contained that one could apply any other rule of law than that of our Civil Code; that historical evidence had been wrongly rejected by d'Auteuil, J. and the present Respondents should be permitted to offer, as evidence at a new trial, the historical works of Bouchette, and any other evidence of the same nature which the trial Judge might consider useful in the case, the whole subject, however, to the right of the present Appellants to rebut the same. 10

Vol. 2,
p. 123, l. 4.

11. Sir Mathias Tellier, C.J., found that historical evidence was legally admissible and could be produced, but it was a matter for the trial Judge to appreciate the value of such evidence when rendering judgment. He cited several authorities in support of his finding and concludes by saying how far such historical proof might be favourable to the pretensions of the present Respondents, one cannot say, because it was not of record, and under the circumstances he considered it wise to order a re-hearing so that the present Respondents might produce the proof which they had been prevented from producing, and at the same time the present Appellants might rebut it if they saw fit. 20

Vol. 2,
p. 124, l. 12.

12. Howard, J. dissenting merely stated:—

“ I would maintain the appeal with costs and dismiss the Respondents' Petition of Right with costs.”

Vol. 2,
p. 124, l. 21.

13. Bernier, J., dissenting in the opposite sense, after reviewing the pleadings states that the petitioners had raised two points—first, that the St. Francis River, in front of their property, was not a navigable or floatable River, and second, that even if the River is navigable and floatable, the express terms of the petitioners' titles give to them the proprietary rights of half the bed of the stream.

Vol. 2,
p. 126, l. 19.Vol. 2,
p. 126, l. 43.
Vol. 2,
p. 137, l. 28.

14. Dealing with the first point, the learned Judge says it is a question of fact and on the evidence then in the record comes to the conclusion that this was not at the material point a navigable or floatable river. 30

Vol. 2,
p. 139, l. 30.

In referring to historical evidence, he states that although Bouchette was a surveyor, it was not in that quality he wrote his book in 1815, but simply as a historian, and Bouchette does not refer to the sources from which he gained his knowledge. If, however, in finding that the St. Francis River was navigable he referred to official public documents or surveyors' minutes on which a Court could rely, it would be different, but he found that such was not the case and consequently it would be rash to admit historical evidence when the historian does not 40

make reference to public, official documents. For the above reasons, Bernier, J. was in favour of confirming the judgment of the Superior Court and dismissing the appeal.

RECORD.
Vol. 2,
p. 140, l. 30.

15. Létourneau, J. comes to the conclusion that the wording of the present Appellants' grants, which were made in the early part of the nineteenth century, must be interpreted according to French law and must be considered in the light of Article 400 of the Civil Code. He then deals with the question of floatability and regards it as a question of fact.

Vol. 2,
p. 141, l. 20.

Vol. 2,
p. 144, l. 4.

10 He reviews at length the evidence given by various witnesses and concludes by agreeing with the trial Judge as to the floatability of the St. Francis because the evidence of record was insufficient to establish that character of legal floatability which would make the bed of the River belong to the Crown. In view of the insufficiency of evidence, the learned Judge considers himself bound to consider the historical proof which was rejected by the trial Judge and comes to the conclusion that such evidence was pertinent and should be admitted.

Vol. 2,
pp. 148 to 153.

Vol. 2,
p. 153, l. 38.

Vol. 2,
p. 159, l. 4.

16. Galipeault, J. states that he maintains the appeal with costs and reverses the final judgment of the Superior Court, as well as the decisions rendered at trial, refusing historical evidence, and declares such proof admissible in law subject to the right of the tribunal to appreciate its force and value.

Vol. 2,
p. 163.

17. On the re-hearing in the Superior Court, Prévost, J., the presiding judge, states in the formal judgment, that on his appreciation of the verbal evidence, the proof shows that in the fifteen miles stretch from Pierreville to the head of the Spicer Rapids there are three considerable Rapids, namely, Blanc or Dumoulin, Cascades and Spicer Rapids, which have the effect of raising the level of the River from 20 feet to 210 feet above sea level, and that during the last forty or fifty years, rafts successfully descended this part of the River, a few of them traversing the three Rapids but a far greater number having traversed Cascades and the Rapids Blanc, and if more rafts had not descended the Spicer Rapids it was not because its navigation was more difficult than the other two, but rather because there was little wood left to cut in the neighbouring territory and upstream from Drummondville; that floating of rafts could be effected in the Rapids during the eight to fifteen days of high water during the spring caused by the melting of snow, and that during the last forty years, it was so rarely done, it was no longer a matter of practical interest.

Vol. 2,
p. 169, l. 6 et seq.

40 18. He refers to the documentary and historical proof, and states that it establishes that from the beginning of the nineteenth century,

until 1870, the St. Francis River was navigable and floatable; that navigation was carried out with a lot of difficulty by reason of the numerous falls which existed in its course, the last of which was found at Drummondville, six miles upstream from Spicer Rapids; that in 1831, the Government set aside an appropriation of £3,000 to improve navigation on the St. Francis River, and that at that time the normal level of the waters was little or not affected at all by deforestation and not at all by the many dams which were since erected on its course, and that the water level was sufficiently high to permit the floating of rafts and boats in the Rapids during all the spring season. 10

Vol. 2,
p. 169, l. 38.

19. He states that by reconciling the diverse evidence, the result is that at least from Lake St. Peter up to the first falls, Lord's Falls (at Drummondville) which is six miles upstream from Spicer Rapids, the St. Francis River was navigable and floatable in rafts at the time the petitioners were granted their concession and that if it has since lost these characters, the change cannot affect the proprietary rights of the parties nor take away from the Crown the bed and banks of the River. As a result, Prévost, J., in so far as the bed and banks of the St. Francis River are concerned, dismissed the petitioners' action and their conclusions with respect to the nullity of the leases between the two present respondents. 20

He also disposes adversely to Appellants of their argument based on the fact that their grants were in free and common soccage.

Vol. 2,
p. 177, l. 21, et. seq.

20. In his notes, Prévost, J. deals in more detail with the reasons given in his judgment and concludes by stating that deforestation and the erection of dams, which took place in later years, could not but have a profound effect upon the flow of the River, and the proof sufficiently establishes the floatability of the St. Francis River at least to a point six miles above Spicer Rapids, and, therefore, the bed and banks of the River at that portion of its course, are the property of the Crown. 30

Vol. 4,
p. 64, l. 30.

21. On the appeal from the judgment of Mr. Justice Prévost, Sir Mathias Tellier, C.J., dissenting, states that but for historical evidence, the latter judge would not have rendered a judgment different from that of d'Auteuil, J. He then reviews the historical evidence submitted and concludes that it does not imply that the River was considered navigable in the sense which is given today to that word, and that there is a presumption that the River is not navigable or floatable except by loose logs, otherwise the Government would not have allowed dams to be built across it.

Vol. 4,
p. 66, l. 20.

22. He concludes that the River is neither navigable or floatable and that its bed and banks belong to riparian owners and, for this reason only, he would allow the appeal. 40

23. Bernier, J., also dissenting, who, it will be seen, dissented on the first appeal, again dissented, finding on the evidence that navigation could not take place on the River in a useful and practical manner and that Prévost, J. recognized that it was only during eight to fifteen days in spring that the waters were sufficient to float rafts. He states that the amount of water in spring varies with the amount of snow that falls in the winter and that this is always uncertain and that the ice melts sometimes in March, sometimes in April.

RECORD,
Vol. 4,
p. 69, l. 12.

10 He reviews the historical evidence and finds that no document really official has been produced on which one could rely sufficiently to say that the River in its original state was navigable or floatable, and that, therefore, the historical proof adds nothing to the record and that he persists in his opinion given on the first appeal.

Vol. 4,
pp. 70 to 73.

24. He also finds that the wording of the present appellants' title confers on them the bed and banks of the River. He also adopts an argument of the present appellants to the effect that when the lease between the respondents was passed in 1917, the River was not navigable or floatable and therefore the lease in question was illegal.

Vol. 4,
p. 76.

Vol. 4,
p. 77, l. 1 to 10.

20 25. Hall, J. in his notes states that there are two fundamental questions presented for solution, first, whether the historical evidence is sufficient to establish that in earlier years, about the beginning of the nineteenth century, the River was navigable or floatable according to the now well established jurisprudence; and, second, whether the concessions in free and common soccage had the effect of superseding the old French law which provided that the beds of navigable and floatable streams remain dependencies of the public domain.

Vol. 4,
p. 77, l. 29 to 40.

30 26. Hall, J. finds that the historical evidence establishes that the St. Francis River was floatable during the early years of the last century. He refers in detail to the historical evidence in question. As to the question of free and common soccage, he is of the opinion that the reference to these words does not override the fundamental rule stated in Article 400 C.C.

Vol. 4,
p. 78, l. 33.

27. He also concurs with the trial judge in finding that the St. Francis River is navigable and floatable, at least up to Drummondville.

Vol. 4,
p. 80, l. 8 to 18.

40 28. Walsh, J., in his notes, refers to the two main points of contention and finds that the burden of proving non-navigability and non-floatability rested with the present appellants and that to dispossess the Crown more convincing evidence than was produced was required. He finds that on the jurisprudence the present appellants' grants, though held according to the laws of England, were subject to the French law. The laws of England govern the title; the French law governs the extent

Vol. 4,
pp. 80 and 81.

of the holding. Article 400 C.C. states the law of Quebec, and for these reasons he would dismiss the appeal.

Vol. 4,
p. 81.

29. Galipeault, J. stated that he would confirm the judgment of Prévost, J. for the reasons given by that learned Judge and by his colleagues Hall and Walsh, JJ.

30. As appears from the above, this originated in a controversy between two rival contenders for the privilege to develop a water power at a certain place on this river where both rivals owned riparian lots.

31. The Quebec Government having decided, according to its policy, 10 that this power should be developed by granting to a private company a long term lease (the question of its rights to grant such a lease under the existing law is not disputed and is not material to this appeal) granted a lease to the Respondent Company. Hence the present litigation.

32. There is no denial of the obligation to compensate any riparian owner for the loss he may suffer from the development.

Then arises merely the question of the ownership of the bed of the river.

33. The Respondent Southern Canada Power Co., Ltd. submits that the judgment of the Court of King's Bench should be confirmed for, 20 among others, the following

REASONS.

1. Because the historical evidence offered by Respondents and admitted by Prévost, J. should have been admitted. The ruling of d'Auteuil, J. on that point, was erroneous.
2. Because that evidence establishes that at the time of the Crown grants of Appellants' riparian lots, and long after, this river, at that place, was navigable and floatable, and, therefore, its bed at the time of the grants remained vested in the Crown in full ownership.
3. Because this also appears from legislation and from proceedings of Committees of the Canadian Legislature reported to it and embodied in its records.
4. Because a subsequent change in conditions could not operate as a transfer of this property from His Majesty to Appellants.

5. Because the evidence of living witnesses establishes that this river is still navigable, or at least floatable, up to above the place concerning which the controversy arises.
6. Because the fact that the grants of riparian lots are made in the Province of Quebec in free and common socage does not displace the Quebec law as to ownership of the bed of rivers by riparian owners and substitute therefore the English law on the point.
7. For the other reasons given in the judgments below.

In the Privy Council.

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

BETWEEN

ST. FRANCIS HYDRO ELECTRIC COMPANY
LIMITED AND OTHERS (Plaintiffs) *Appellants*

AND

HIS MAJESTY THE KING AND SOUTHERN
CANADA POWER COMPANY LIMITED
(Defendants) *Respondents.*

Case

for RESPONDENT SOUTHERN CANADA
POWER COMPANY LIMITED.

RALSTON, KEARNEY & DUQUET,
ROYAL BANK BUILDINGS,
MONTREAL.

ALLEN & OVERY,
3, FINCH LANE,
LONDON, E.C.3.