THE MEANING OF "PUBLIC HARBOURS" IN THE THIRD SCHEDULE TO THE BRITISH NORTH AMERICA ACT, 1867*

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I. *Introduction.*

Section 108 of the British North America Act, 1867, transfers to the Dominion certain properties listed in the third schedule to that Act. The section applies not only to the original provinces of New Brunswick, Nova Scotia, Quebec and Ontario but, by virtue of terms in the orders in council admitting British Columbia[1] and Prince Edward Island[2] to the Union, to those provinces as well. The Prairie provinces have their own provisions regarding the transfer of resources.[3] So has Newfoundland, but since paragraph (h) of term 33 of its Terms of Union with Canada[4] transfers its public harbours to the Dominion, the subject matter of this article is relevant to it. It may also be useful in interpreting paragraph 11 of the agreement between British Columbia and Canada re-transferring the Railway Belt to that province which reserves the beds and foreshores of harbours theretofore established in the belt to the Dominion.[5]

Of the items in the third schedule to the British North America Act, 1867, item 2, "Public Harbours" has come up before the courts more than any other. Oddly enough, it arises more often

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[1] Order of Her Majesty in Council Admitting British Columbia into the Union, Schedule, term 10, R.S.C., 1952, vol. VI, p. 135, at p. 139.

[2] Order of Her Majesty in Council Admitting Prince Edward Island into the Union, Schedule, *ibid.*, p. 147, at p. 151.

[3] See the Resources Agreements with those provinces in the Schedule to the British North America Act, 1930, 21 Geo. V, c. 26 (Imp.).

[4] Validated by the British North America Act, 1949, 22 Geo. V, c. 4 (Imp.).

[5] See the Schedule to the British North America Act, 1930, *supra*, footnote 3.

in actions between private individuals than in actions between the Crown and private individuals. This usually occurs in cases where the plaintiff's action depends on a title derived from the provincial Crown and the defendant pleads that title is vested in the Crown in right of the Federal Government by virtue of section 108 of the British North America Act.

It is by no means easy to describe with precision what constitutes a public harbour, and, indeed, the Privy Council has repeatedly warned that it is neither convenient nor desirable to attempt an exact definition.[6] But as Duff J. pointed out in *Attorney-General of Canada* v. *Ritchie Contracting and Supply Co.*[7] one must have formed some idea of the attributes of public harbours before entering into a consideration of whether or not a given body of water is a public harbour.

II. *The Nature of a Harbour.*

The first problem to determine is the nature of a harbour, whether public or private. Some judges have cited the definition of Coulson and Forbes,[8] which derives from Hale's *De Portibus Maris*,[9] that a harbour is synonymous with a haven and is nothing more than "a place naturally or artificially made for the safe riding of ships".[10] The test, according to this, is not whether an inlet or arm of the sea is used for commercial purposes, but whether it is capable of sheltering ships from the violence of the sea. But the definition given in Stroud's[11] and derived from Esher M.R.'s judgment in *R.* v. *Hannam*[12] which stresses commercial use has been preferred.[13] It reads:

> A harbour, in its ordinary sense, is a place to shelter ships from the violence of the sea, and where ships are brought for commercial purposes to load and unload goods. The quays are a necessary part of a harbour.

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[6] See, *inter alia*, *Attorney-General of Canada* v. *Attorney-General of Ontario*, [1898] A.C. 700; *R.* v. *Jalbert*, [1938] 1 D.L.R. 721.

[7] (1915), 52 S.C.R. 78, at p. 103.

[8] The Law of Waters (6th ed., 1952), p. 83.

[9] Ch. 2.

[10] See *per* Tuck J. in *Nash* v. *Newton* (1891), 30 N.B.R. 610; Macdonald J. at the trial in *Attorney-General of Canada* v. *Ritchie Contracting and Supply Co.* (1914), 20 B.C.R. 333 makes use of the definition but prefers the one discussed *infra*.

[11] Stroud, Judicial Dictionary (3rd ed., 1952), vol. 2, p. 849.

[12] (1886), 2 T.L.R. 234.

[13] See Macdonald J. in *Attorney-General of Canada* v. *Ritchie Contracting and Supply Co.*, *supra*, footnote 10, and Duff J. in the same case in the Supreme Court of Canada, *supra*, footnote 7, at p. 103. See also *R.* v. *Jalbert*, *supra*, footnote 6, where the Privy Council expressed the view that Hale's definition was of little help. The definition is also used in *Nash* v. *Newton*, *supra*, footnote 10.

We need not tarry over this possible conflict because the term "public harbour" has been held to connote public commercial user,[14] and we need concern ourselves for the moment solely with the degree of shelter that a body of water must afford to warrant its being called a harbour. Certainly it is not sufficient that an arm of the sea or a portion of a river may afford shelter in certain states of the wind, for any part of the shore may afford shelter from storms blowing off the land.[15] Thus, in *McDonald* v. *Lake Simcoe Ice and Cold Storage Co.*,[16] the Ontario Court of Appeal had to consider whether a small bay on Lake Simcoe, roughly semi-circular or semi-elliptical in form, about 308 yards wide at the mouth and 132 yards across at the centre, was a public harbour. The bay was equipped with a few private wharves and afforded protection to ships in certain directions of the wind, but when the wind was in another direction it afforded no shelter; on the contrary there was very great danger of a ship running ashore and, once in, great difficulty in getting out. The court could not declare this a public harbour, unless, as MacLellan J.A. put it, it was prepared to hold that every little indentation of the shore of the sea or of the inland lakes is a public harbour within the meaning of the British North America Act.[17] Similarly, stretches of open river front where some protection might be afforded in certain directions of the wind by private wharves were considered not to constitute harbours in *Perry* v. *Clergue*,[18] and in *R.* v. *Jalbert*[19] the Privy Council, while not expressly deciding the question, appeared to be of the same opinion. At the same time a bay does not require to be land locked to be a natural harbour, and it is evident that no harbour provides absolute safety from the winds and sea at all velocities of the wind, from all quarters, and at all stages of the tide, and what may "be safe anchorage for one ship might mean disaster to another".[20] It is a question of degree.[21] The dividing line between what is and what is not a harbour is not easy to define, but the remarks of Irving

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[14] See *infra*.

[15] *McDonald* v. *Lake Simcoe Ice and Cold Storage Co.* (1899), 26 O.A.R. 411 rev'd on other grounds (1903), 31 S.C.R. 130; *Perry* v. *Clergue* (1905), 5 O.L.R. 357; *Pickels* v. *R.* (1912), 14 Ex. C.R. 379; *Attorney-General of Canada* v. *Ritchie Contracting and Supply Co.*, in the British Columbia Court of Appeal, *supra*, footnote 10, and *per* Duff J. in the Supreme Court of Canada, *supra*, footnote 7; *R.* v. *Jalbert*, *supra*, footnote 6.

[16] *Ibid.* [17] *Ibid.*, at p. 422. [18] *Supra*, footnote 15.

[19] *Supra*, footnote 6; see also in the Supreme Court of Canada, [1937] 2 D.L.R. 291.

[20] See *Attorney-General of Canada* v. *Ritchie Contracting and Supply Co.*, *supra*, footnote 10, *per* Macdonald J., at p. 342.

[21] See *ibid.*, *per* Macdonald J., at p. 342 and Martin J.A., at pp. 344-345.

J.A. respecting English Bay in *Attorney-General of Canada* v. *Ritchie Contracting and Supply Co.*[22] are helpful. English Bay, within the limits called in question in the action, appears to be three miles wide at its entrance, with that breadth for nearly its entire length to the eastward, a distance of four miles. Here is what Irving J.A. said about it:

> The facts established beyond question are that English Bay has many of the requisites of a good harbour, *viz.*: protection from wave and wind from many directions; good holding ground with plenty of depth, and freedom from rocks and shoals. Yet, in my opinion, it is not a harbour. The width of its mouth, having regard to its area, prevents its falling within the definition of harbour. I would describe it as a roadstead.[23]

The decision was later upheld by the Privy Council.[24]

III. *Characteristics of a Public Harbour.*

Assuming the existence of a harbour, what attributes characterize it as a public harbour within the meaning of the British North America Act? Certainly mere user by the public is not enough; it must have been public property of the province. Thus St. John harbour, which was granted to the City of Saint John in its charter of 1784, remained vested in the city after Confederation.[25] On the other hand, a harbour is not a public harbour merely because it belonged to the province at union.[26] This contention was first advanced in *R.* v. *Bradburn*[27] where it was argued that the term "public harbour" had been used to distinguish such harbours from privately owned harbours. But the argument was rejected because the heading of the third schedule makes it clear that it deals only with provincially owned property, and there must have been some reason for adding the word "public".

What "public" was meant to describe first came up in the case of *Holman* v. *Green*[28] in the Supreme Court of Canada. There it was argued that to constitute a public harbour, public money must have been expended in constructing or improving it, but Ritchie C.J. and Strong J. rejected the contention and were later upheld

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[22] *Ibid.*

[23] *Ibid.*, at p. 349.

[24] *Attorney-General of Canada* v. *Ritchie Contracting and Supply Co.*, [1919] A.C. 999.

[25] *R.* v. *St. John Gas Light Co.* (1895), 4 Ex. C.R. 326. It was later granted to the Dominion.

[26] *Attorney-General of Canada* v. *Ritchie Contracting and Supply Co.*, *supra*, footnote 24; *R.* v. *Bradburn* (1913), 14 Ex. C.R. 419, aff'd by the Supreme Court of Canada (unreported: see *Maxwell* v. *R.* (1917), 17 Ex. C.R. 97, at p. 99).

[27] *Ibid.*

[28] (1881), 6 S.C.R. 707.

by the Privy Council in the *Fisheries* case.[29] Both these judges also agreed that the words should be construed in their full grammatical sense, and Strong J. stated that it simply meant "harbours which the public have a right to use".[30] The *Fisheries* case goes into more detail. In examining the question whether the foreshore of a harbour should be considered part of a public harbour, their Lordships stated that if "it had actually been used for harbour purposes, such as anchoring ships or landing goods, it would, no doubt, form part of the harbour".[31] While the remarks of the Privy Council were directed solely at the foreshore, in the later case of *Attorney-General of Canada* v. *Ritchie Contracting and Supply Co.*[32] Duff C.J. took the view that the reference to loading and unloading applied to the solum as well and that these activities were not to be looked upon as a test but as illustrations of the types of user required to be shown to establish that a harbour was a public harbour. From this analysis it would appear that a public harbour is one that the public had a right to use, and did use, as a public harbour. The point was thus made by Lord Dunedin in *Attorney-General of Canada* v. *Ritchie Contracting and Supply Co.*:[33]

> . . . the extreme view . . . 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, has been argued by the appellants in this case and rightly, as their Lordships think, rejected by all the learned judges in the courts below. Potentiality is not sufficient; the harbour must be, so to speak, 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.

Several points must now be made about what is meant by "use for harbour purposes". In the first place it may on occasion be difficult to say whether a use by the public may be described as one for harbour purposes. In *R.* v. *Attorney-General of Ontario and Forrest*,[34] Duff C.J. left open the question whether the use of a harbour by fishermen for wintering boats would be evidence that

[29] *Attorney-General of Canada* v. *Attorney-General of Ontario*, *supra*, footnote 6, at p. 711.

[30] *Holman* v. *Green*, *supra*, footnote 28, at p. 716.

[31] *Attorney-General of Canada* v. *Attorney-General of Ontario*, *supra*, footnote 6, at p. 712.

[32] *Supra*, footnote 7, at pp. 105-106; see also *R.* v. *Attorney-General of Ontario and Forrest*, [1934] S.C.R. 133.

[33] *Supra*, footnote 24, at pp. 1003-1004.

[34] *Supra*, footnote 32.

it was part of a public harbour. Secondly, while most judges have not been explicit on the point, Duff C.J. and Rand J. have made it clear that the use by the public means use for commercial purposes as distinguished from purposes of navigation only.[35] But mere commercial enterprise in relation to private wharves does not appear to be sufficient; public connotes governmental activity. In *R.* v. *Jalbert*,[36] the Privy Council considered whether Chicoutimi had been a public harbour in 1867. What was claimed to have been a harbour was a stretch of river two miles in length, at each end of which was a private wharf with another private wharf situated in between. A good many coasting and ocean going vessels came there to load and unload timber, small coastal steamers occasionally stopped to pick up passengers, the stream was publicly used by ships to anchor and lie in, and generally there was a considerable trade having regard to the time and place. But the Privy Council, though it studiously refrained from deciding the question, expressed great doubt that Chicoutimi was a harbour in 1867, since there were no public wharves and consequently no public right of access until 1873. Still, a harbour may, in certain circumstances be public though operated by a private individual. This can be seen from *R.* v. *Attorney-General of Ontario and Forrest*.[37] There the Province of Ontario had, before Confederation, leased certain lands to an individual largely in consideration of his improving the harbour, Goderich Harbour, in the River Maitland. The lessee did improve the harbour and it was capable of use, and was actually used as a harbour in the commercial sense before Confederation; tolls were charged by the lessee but they were fixed by the Crown. Rinfret J. (giving the judgment of all the judges except Duff C.J.) held that the harbour having been constructed with the encouragement of the Crown on land to which it held at least the reversion was a public harbour. Duff C.J. left the question open, because, before section 108 can apply, a harbour must have been part of the public works or property of the province at the Union, and in view of the fact that a private person held a lease of the land, he preferred to reserve this question.

While use of a publicly owned harbour by the public at Union

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[35] *Attorney-General of Canada* v. *Ritchie Contracting and Supply Co.*, *supra*, footnote 7, *per* Duff J.; *R.* v. *Attorney-General of Ontario and Forrest*, *ibid.*, *per* Duff C.J.; *Attorney-General of Canada* v. *Higbie*, [1945] S.C.R. 385, *per* Rand J. See also Clement, Canadian Constitution (3rd ed., 1916), p. 612.

[36] *Supra*, footnote 6; see also *McDonald* v. *Lake Simcoe Ice and Cold Storage Co.*, *supra*, footnote 15; *Perry* v. *Clergue*, *supra*, footnote 15.

[37] *Supra*, footnote 32; see also *Nash* v. *Newton*, *supra*, footnote 10.

is the most common test for determining whether a harbour is a public harbour within section 108, it is not the only one. Duff J. in *Attorney-General of Canada* v. *Ritchie Contracting and Supply Co.*[38] mentioned two other situations that would tend to show that a harbour was a public harbour. One was evidence of recognition by competent public authority that the locality in controversy was a harbour in a commercial sense. He pointed out that a British Columbia ordinance in force at the Union in 1871 provided for proclamations of ports, inland places and waters as public harbours. If a harbour had been proclaimed under this ordinance it would have had great weight in showing the harbour was a public harbour; conversely if some harbours were proclaimed thereunder and others were not, it would be strong evidence that those not proclaimed were not public harbours. In fact there was no evidence that a proclamation had ever been issued under the ordinance. Duff J.'s view is supported by *Rickey* v. *City of Toronto*[39] where it was held that no evidence of Toronto harbour's use by the public was necessary because it had been designated by a pre-Confederation statute as a public harbour.

Another circumstance that Duff J. in the *Ritchie* case considered of importance in determining whether a harbour was a public harbour is whether or not there had been expenditure of public money in connection with it. This may be exemplified by *Nash* v. *Newton.*[40] There a small fresh water lake called Dark Harbour was until 1846 separated from the Bay of Fundy by a sea wall consisting of boulders and sand. Sea water percolated to the lake and its waters were brackish and raised and lowered with the tide. Largely at the expense of the provincial government, which was authorized by special statutes, the adjoining owner dug a channel through the sea wall and thereafter the tide ebbed and flowed in Dark Harbour, fish came in and the harbour was used for both shelter and commercial purposes by the adjoining owner. It seems doubtful from the *Jalbert*[41] case that had this been a natural harbour, the commercial user by the owner in the course of his business would have sufficed to make the harbour a public harbour. But the Supreme Court of New Brunswick had no difficulty in deciding that under the circumstances Dark Harbour was a public harbour and passed to the Dominion under section 108. Further support

[38] *Supra*, footnote 7.

[39] (1914), 30 O.L.R. 523. The statute in question is (1834), 5 Wm. 4, c. 23 (U.C.).

[40] *Supra*, footnote 10.

[41] *Supra*, footnote 6; see also *McDonald* v. *Lake Simcoe Ice and Cold Storage Co.*, *supra*, footnote 15; *Perry* v. *Clergue*, *supra*, footnote 15.

may be found in Fournier J.'s judgment in *Holman* v. *Green*;[42] in holding that Summerside harbour was a public harbour, he relied in part upon the fact (as he thought) that public moneys had been expended in developing it.

The foregoing gives the general tests for determining whether a harbour is a public harbour. The next matter to consider is the time at which these tests are to be applied. Does the term "public harbour" apply to (1) any public harbour whether created before or after Confederation, or (2) only to those in existence at Confederation? At one time a few judges accepted the former view. In *Attorney-General of British Columbia* v. *Canadian Pacific Railway Co.*,[43] Hunter C.J.B.C. expressed the view that jurisdiction over public harbours is latent, and attaches to any inlet or harbour as soon as it becomes a public harbour, and is not confined to such public harbours as existed at the time of Union. But the impracticability of this view is evident from the remarks of Duff J. in *Attorney-General of Canada* v. *Ritchie Contracting and Supply Co.*[44] in the Supreme Court of Canada. He pointed out that if this construction were adopted in connection with public harbours, it would have to be applied to other items in the third schedule including railways, and it could hardly have been contemplated that the roadbed of a railway built by a province after Confederation should pass to the Dominion as soon as it was completed. This view was accepted by the Privy Council on appeal,[45] so that it is now settled that the harbours that passed to the Dominion under section 108 were those that fell within the description of public harbours on the day the particular province entered Confederation.

From what has been said, section 108 does not appear to have been intended to apply to obscure harbours, but rather to those publicly known or officially recognized by the provinces at Union. For one of the important reasons for vesting public harbours in the Dominion was that, being charged with exclusive jurisdiction over such matters as navigation and shipping, sea coast and inland fisheries, lighthouses and buoys, it was no doubt expected that it would assume the burden of conservancy of harbours and of maintaining navigation and harbour works.[46] It is also interesting to

[42] *Supra*, footnote 28.

[43] (1904), 11 B.C.R. 289, at p. 296; see also *Kennelly* v. *Dominion Coal Co.* (1903-1904), 36 N.S.R. 495.

[44] *Supra*, footnote 7.

[45] *Supra*, footnote 24; see also *Western Counties Ry. Co.* v. *Windsor and Annapolis Ry. Co.* (1882), 7 A.C. 178.

[46] See *per* Duff C.J. in *R.* v. *Attorney-General of Ontario and Forrest*, *supra*, footnote 32; and McPhillips J.A. in *Attorney-General of Canada* v. *Ritchie Contracting and Supply Co.*, *supra*, footnote 10.

note that when the words "public harbours" were used in other British statutes passed about the same time as the British North America Act, it meant harbours that were going concerns, not any natural harbour capable of being used as a harbour.[47] Among the harbours that have been held to be public harbours within the third schedule are those of Summerside,[48] Sydney,[49] Halifax,[50] Montreal,[51] Toronto,[52] Vancouver,[53] Quebec,[54] St. Margaret's Bay, Nova Scotia,[55] and Dark Harbour, Grand Manan, New Brunswick.[56] Among others not transferred by section 108 is St. John.[57] The status of Chicoutimi[58] and Annapolis[59] harbours is doubtful.

Finally it may be mentioned that Lefroy[60] has suggested that the word "public" might have been intended to indicate harbours which had been so declared by the Crown in exercise of its prerogative right to establish ports and grant port franchises, but as Clements[61] points out there is little in the cases to support this view and it is very doubtful if there were or could be any such ports in Canada at Confederation.

IV. *Nature of Dominion Interest.*

Having examined the characteristics of public harbours, we must now look into the nature of the interest that passed to the Dominion. Was it a mere franchise, or was it a proprietary right? The point came up in the first case on public harbours after Confederation, *Holman* v. *Green.*[62] Holman had been granted a part of the

[47] See *per* McPhillips J.A. in *Attorney-General of Canada* v. *Ritchie Contracting and Supply Co.*, *ibid.*, at p. 359.

[48] *Holman* v. *Green*, *supra*, footnote 28.

[49] *Kennelly* v. *Dominion Coal Co.*, *supra*, footnote 43.

[50] *Maxwell* v. *R.*, *supra*, footnote 26; *Sisters of Charity* v. *R.* (1919), 18 Ex. C.R. 385.

[51] *Montreal* v. *Montreal Harbour Comm.*, [1926] A.C. 299.

[52] *Rickey* v. *City of Toronto*, *supra*, footnote 39.

[53] *Attorney-General of British Columbia* v. *Canadian Pacific Railway Co.*, [1906] A.C. 204; *Attorney-General of Canada* v. *Ritchie Contracting and Supply Co.*, *supra*, footnote 24; *Attorney-General of Canada* v. *Higbie*, *supra*, footnote 35.

[54] *Samson* v. *R.* (1888), 2 Ex. C.R. 30; *Power* v. *R.* (1918), 56 S.C.R. 499.

[55] *Fader* v. *Smith* (1885), 18 N.S.R. 433; *Sword* v. *Sydney Coal Co.* (1891), 23 N.S.R. 214, 21 S.C.R. 152; *Young* v. *Harnish* (1904), 37 N.S.R. 213.

[56] *Nash* v. *Newton*, *supra*, footnote 10.

[57] *R.* v. *St. John Gas Light Co.*, *supra*, footnote 25; the harbour was later transferred to the Dominion.

[58] *R.* v. *Jalbert*, *supra*, footnote 6.

[59] *Pickels* v. *R.*, *supra*, footnote 15.

[60] Lefroy, Canada's Federal System (1913), p. 691; see also *Nash* v. *Newton*, *supra*, footnote 10.

[61] Clements, *op. cit.*, footnote 35, p. 609.

[62] *Supra*, footnote 28; see also *Attorney-General of Canada* v. *Keefer* (1889), 1 B.C.R. (pt. 2) 368.

foreshore of Summerside harbour under Letters Patent issued under the Great Seal of Prince Edward Island in 1877, three years after its entry into Confederation. At the time of the action Green was in possession of the land and had erected a wharf thereon. Holman brought an action of ejectment to recover possession of the land. Green, *inter alia*, raised the point that Summerside was a public harbour belonging to the Government of Canada by virtue of section 108 of the British North America Act, and consequently that Holman had acquired no title under the Letters Patent. Green denied that section 108 had this effect and, even if it did, he averred, the Dominion acquired only a franchise, not a proprietary interest. The Supreme Court of Canada, however, held that the harbour had become vested in a proprietary sense in Canada by virtue of section 108. As Strong J. put it, there would have been no point in granting a mere franchise by section 108 because the Dominion might have assumed this jurisdiction under its legislative power over navigation and shipping. In any case the Dominion could not properly perform the duty of conservancy without owning the bed. It could, however, perform this duty without owning the underlying minerals, but Strong and Fournier JJ. clearly thought these also belonged to the Dominion. The only case in which the point has been specifically raised is *Attorney-General of British Columbia* v. *Esquimalt and Nanaimo Railway*[62A] before the Supreme Court of British Columbia. Only Martin J.A. found it necessary to deal with the point and he too found in favour of Dominion ownership. However in view of the attitude of the Supreme Court of Canada to harbour works in the later case of *R.* v. *Attorney-General of Ontario and Forrest*[62B] discussed below, the matter cannot be regarded as settled. Especially is this so since the courts have recognized that the purpose of transferring public harbours to the Dominion was to assist in the performance of its functions in relation to navigation and kindred powers.[62C]

Holman v. *Green* also indicates that the Dominion's interest in a public harbour is not limited to ordinary property rights but includes prerogative rights as well. Strong J. stated that the harbours in the widest sense of the word were transferred by section 108, "including all proprietary as well as prerogative rights",[63] and Fournier J. agreed that after the transfer of the harbours, the provinces ceased to have any interest in them.[64] These statements

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[62A] (1899), 7 B.C.R. 221.
[62B] *Supra*, footnote 32.
[62C] *Supra*, footnote 46.
[63] *Supra*, footnote 28, at p. 719.
[64] *Ibid.*, pp. 721-722.

are, however, somewhat weakened by the *Precious Metals*[65] case. There it was decided that the transfer by British Columbia to the Dominion of "public lands" in the Railway Belt did not include the precious metals because the right to such metals was a royalty; that is, they belonged to the Crown by prerogative right, and were not incident to land. From this case it can plausibly be argued that while base metals may pass as part of the harbour, this is not necessarily so of precious metals and other royalties. However it should not be forgotten that in interpreting "public lands" in the *Precious Metals* case the Privy Council treated it as an exception to section 109 of the British North America Act, 1867, which transfers "Lands, Mines, Minerals, and Royalties" to the provinces.

A few cases have arisen where the Crown in right of the province did not at Confederation own the fee simple to a harbour but merely some type of reversionary interest. In *Samson* v. *R.*[66] the Crown as represented by the Dominion authorities expropriated a water-lot at Levis in the harbour of Quebec, and the owner claimed compensation. His title was based on a pre-Confederation Crown grant by the Lieutenant-Governor of Quebec which contained a provision that upon giving the grantee twelve months' notice, and paying a reasonable sum for improvements, the Crown might resume possession of the lot for the purpose of public improvement. It was held that the property being situate in a public harbour, the power would be exercisable by the Crown represented by the Dominion. Since, however, the Crown had not exercised the power but had proceeded by expropriation, it had to pay the fair value of the land at the time of expropriation, but this fair value must be determined by the nature of the title. The case was subsequently followed by the Supreme Court of Canada in *Power* v. *R.*[67] A related situation arose in *R.* v. *Attorney-General of Ontario and Forrest*[68] where the Crown had leased harbour property. The majority of the Supreme Court of Canada were of the opinion that the reversion belonged to the Crown in right of Canada, but Duff C.J. reserved the question.

V. *Extent of Harbour: the Foreshore.*

In *Holman* v. *Green*,[69] the Supreme Court of Canada held that the foreshore of a public harbour, that is, the land between high and low water marks, was comprised in and formed part of the harbour,

[65] *Attorney-General of British Columbia* v. *Attorney-General of Canada* (1889), 14 A.C. 295.
[66] *Supra*, footnote 54. [67] *Ibid.*
[68] *Supra*, footnote 32.
[69] *Supra*, footnote 28.

and so was transferred to the Dominion by section 108. This opinion, however, was disapproved by the Privy Council in the *Fisheries*[70] case. Their Lordships stated that it did not follow that because the foreshore on the margin of a harbour was Crown property, it necessarily formed part of the harbour. It would depend on the circumstances. If, for example, the foreshore had actually been used for harbour purposes, such as anchoring ships or loading goods, it would form part of the harbour. But there were other cases in which it would be equally clear that it did not form part of the harbour. What falls within the description "public harbour" cannot be answered in the abstract, but must depend upon the circumstances of each particular harbour.

The decision has given rise to no end of difficulty. For the effect is that not only must it be proved as a fact that the harbour was used as a public harbour at the time of Union; it must further be established as a fact that the piece of foreshore in question was used for harbour purposes. This can be illustrated by *Montreal* v. *Montreal Harbour Commissioners*[71] where the Privy Council held that only that part of Montreal harbour as it existed in 1867 vested in the Dominion under section 108, the rest of the bed and foreshore remaining vested in the Crown in right of the province, and though a Dominion statute extending the harbour was valid, it was not effective to enlarge the property rights of the Dominion or enable it to take the land without compensation. As is evident from the case a finding that a portion of the foreshore was part of a public harbour at Confederation does not mean that every part of the foreshore was transferred to the Dominion; it is necessary to prove that each particular piece that comes into question has been so used.[72] As it has been put, a portion of the foreshore may have been within the ambit of a public harbour, but that is not sufficient; it must have been used for harbour purposes.[73] It is true that Duff C.J. in *R.* v. *Attorney-General of Ontario and Forrest*[74] and Rand J. in *Attorney-General of Canada* v. *Higbie*[75] have in-

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[70] *Attorney-General of Canada* v. *Attorney-General of Ontario*, *supra*, footnote 6; see also *Attorney-General of Canada* v. *Ritchie Contracting and Supply Co.*, *supra*, footnote 24.

[71] *Supra*, footnote 51; see also *R.* v. *Jalbert*, *supra*, footnote 6; *Attorney-General of Canada* v. *Higbie*, *supra*, footnote 35.

[72] *Ibid. Cf.* the approach in *Kennelly* v. *Dominion Coal Co.*, *supra*, footnote 43, which must no longer be considered as authority on this point: see *Pickels* v. *R.*, *supra*, footnote 15, and *Attorney-General of Canada* v. *Ritchie Contracting and Supply Co.*, *supra*, footnote 10, *per* Martin J.A., at p. 352.

[73] *R.* v. *Jalbert*, *supra*, footnote 6. [74] *Supra*, footnote 32.

[75] *Attorney-General of Canada* v. *Higbie*, *supra*, footnote 35.

dicated that this rule should be broadly construed, but this does not materially simplify the matter.

The onus of proof that a harbour is a public harbour within section 108, and that a part of the foreshore of a public harbour forms part of the harbour is on the person who alleges it.[76] Since this demands proof of facts existing before the province in question entered Confederation, it is obvious that obtaining evidence for these purposes is no easy matter. Witnesses are usually out of the question and such evidence is used as plans, photographs, pilot's books and charts, to say nothing of descriptions contained in books.[77] In *Attorney-General of Canada* v. *Higbie*,[78] for example, use was made of descriptions contained in "A Voyage of Discovery to the North Pacific Ocean and Round the World" by Captain Vancouver. Questions might well arise regarding the admissibility of such evidence, though in the *Higbie* case they were regarded as admissible as being the best available[79] and because no objection to their production had been made at the trial. Similarly, in *Attorney-General of British Columbia* v. *Canadian Pacific Railway Co.*,[80] the Privy Council accepted somewhat "scanty" evidence as establishing that a portion of Vancouver harbour was a public harbour at the time of British Columbia's union with Canada. As their Lordships put it, "it was perhaps as good as could reasonably 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".[81] This statement was made in 1906; it is obvious that the difficulty of producing the required evidence nowadays would be vastly increased.

Once it has been determined that a particular portion of the foreshore of a public harbour formed part of a harbour, will that finding be binding in subsequent litigation between persons who were not parties to the original action? The point arose in *Attorney-General of Canada* v. *Higbie*.[82] There it was argued that a portion of the foreshore of Burrard Inlet was part of Vancouver harbour and reliance was placed on Duff J.'s finding in *Attorney-General of British Columbia* v. *Canadian Pacific Railway Co.*[83] that the whole area between the First and Second Narrows (within which the land in question in the *Higbie* case was situate) was a public harbour. Rinfret C.J. and Taschereau J. held that Duff J.'s

[76] *Ibid.*; *R.* v. *Jalbert*, *supra*, footnote 6.
[77] *Ibid.*
[78] *Ibid.*
[79] Citing *R.* v. *Ship "Emma"*, [1936] S.C.R. 256.
[80] *Supra*, footnote 53.
[81] *Ibid.*, at pp. 209-210.
[82] *Supra*, footnote 35.
[83] *Supra*, footnote 43.

decision of fact should be held to be definitely settled as against the whole world.[84] But Kerwin and Hudson JJ. left the question open. They pointed out that even if such a finding were acceptable in a subsequent action, it would only apply to the particular area in reference to which the finding was made. Though Duff J.'s judgment stated that the whole of the vast area between the First and Second Narrows was a public harbour, this was unnecessary to the decision and his finding should be limited to the actual locality in question in the case before him.[85]

The unsatisfactory state of the law is evident from the following quotation from the judgment of Rand J. in the *Higbie* case:

> Disregarding any question of the nature or extent of ownership below low water mark, logically it would be necessary to traverse the whole shore bordering on such a body of water as Burrard Inlet and to establish in fact for each segment the required use. Precise limits or boundaries from such a use are out of the question. Unless characterized in its practical application by broad considerations of convenience, as undoubtedly the decisions mentioned contemplate, this rule might work out a patchwork of ownership both inconvenient and embarrassing.
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> . . . And with the property in a public harbour below low water mark generally in the Dominion, the Provincial and Dominion ownership of sections of foreshore, isolated from upland, with occasional private ownership annexed to upland, presents a mosaic which I will not further complicate by suggesting a possible parcelling of ownership of the harbour bed itself.[86]

VI. *Extent of Harbour: the Bed.*

Few questions have yet arisen regarding the ownership of the bed of public harbours, but with the advance of technology, mining developments may raise difficulties. It would appear from the passage just quoted that Rand J. was unwilling to parcel out the harbour bed itself, but would hold that it belonged to the Dominion without requiring proof that the particular part of the bed was used for harbour purposes at Union. While they do not expressly deal with the point, *Samson* v. *R.*[87] and *Power* v. *R.*[88] (the latter, in the Supreme Court of Canada) are only explicable on this hypothesis. There, it will be remembered, the courts held that reservations, in Crown grants of water lots within the ambit of a public

[84] See also the dissenting judgment of McPhillips J.A. in *Hadden* v. *Corp. of North Vancouver* (1922), 30 B.C.R. 497.

[85] Approving the majority decision in *Hadden* v. *Corp. of North Vancouver, ibid.*

[86] *Attorney-General of Canada* v. *Higbie, supra,* footnote 35, at pp. 430-431.

[87] *Supra,* footnote 54. [88] *Ibid.*

harbour, under which the Crown might retake the land if ever required for public improvement were held to have passed to the Federal Government. It has already been seen[89] that if the lots had formed part of the foreshore it would have been necessary to show their use as public harbours before Confederation, and this was not the case here because they were private property. In *Fader* v. *Smith*[90] the Supreme Court of Nova Scotia held in effect that a small creek or cove capable of navigation and abutting a public harbour was part of the harbour notwithstanding that it did not have the name or character of a harbour and had not been so used except in two exceptional instances which the court did not consider material. This view is also in accord with Martin J.A.'s decision in *Attorney-General of British Columbia* v. *Esquimalt and Nanaimo Ry. Co.*,[91] that minerals beneath the waters of a harbour belong to the Dominion.

In the last two cases heavy reliance was placed on *Holman* v. *Green*.[92] In that case, it will be remembered, Strong J. had stated that harbours in the widest sense of the word were transferred to the Dominion, and Fournier J. had agreed that after the transfer the provinces ceased to have any interest in them.[93] But these statements were equally applicable to the foreshore, and the Privy Council in the *Fisheries*[94] case expressly held that only the portion of the foreshore used as a public harbour before Confederation was transferred to the Dominion. Further, one judge, Macdonald C.J.A. in *Attorney-General of Canada* v. *Ritchie Contracting and Supply Co.*,[95] appears to have taken the view that the same principles applied to the bed as the foreshore. However, the inconvenience of this view is so great that judges should be slow to accept it.

Even if the beds of public harbours, including all minerals, are held to belong to the Crown in right of the Dominion, this does not solve all problems respecting ownership of underwater resources in connection with public harbours. For, as was pointed out by Macdonald C.J.A. in the *Ritchie* case,[96] "There must be some point at which the bed of the sea changes its character from sea-bed to harbour bed". Where the sea-bed belongs to the provinces,[97] drawing the line may be no easy problem. And if Macdonald

[89] See *supra*. [90] *Supra*, footnote 55. [91] *Supra*, footnote 62A.
[92] *Supra*, footnote 28; see esp. at pp. 719, 721-722.
[93] See *supra*.
[94] *Attorney-General of Canada* v. *Attorney-General of Ontario*, *supra*, footnote 6.
[95] *Attorney-General of Canada* v. *Ritchie Contracting and Supply Co.*, *supra*, footnote 10, at pp. 347-348.
[96] *Ibid.*, at p. 348.
[97] I have dealt with this question in another portion of the lectures on

C.J.A.'s view that the principles applicable to the foreshore apply to the bed is upheld, the situation would be even more complex for on that basis he considered it "conceivable that there could be several harbours within English Bay, which has an area of twelve square miles".[98] Nomenclature may be deceiving the other way. For example, in *Maxwell* v. *R.*,[99] Cassels J. pointed out that various parts of Halifax harbour were called by separate names. Finally it may be mentioned that the extent of some public harbours raises no problem because they were defined by statute before Confederation. Toronto harbour is an example.[100]

VII. *Harbour Works.*

The extent of the Dominion's rights in harbour works in existence before Confederation was discussed in *R.* v. *Attorney-General of Ontario and Forrest.*[101] The work there in question was a cribwork allegedly erected in the harbour of Goderich on Ship Island in the River Maitland to improve the resistance against the impact of ice and flood of an ice breaker placed across a branch of the river between the island and the mainland. The work could probably be regarded as a harbour work or a river improvement, either of which would be transferred to the Dominion under section 108. It was not necessary to come to any decision on the matter because it was not proved that the cribwork was ever built, but all the judges expressed views on the matter. All were agreed that the cribwork alone would be transferred under section 108, not the whole island, but there were differences of views concerning the interest that would pass in the lands on which the cribwork was erected. Rinfret J., speaking for himself and the other puisne judges, doubted whether any more than an easement on Ship Island would pass, but Duff C.J. thought title would prove to at least as much of the site and of the subsoil as might be regarded as reasonably necessary to give the Dominion free scope for the complete discharge of the responsibilities which under the British North America Act it was expected to assume touching such works.

VIII. *Agreements with Ontario and British Columbia.*

It has been seen that an exact determination of what is provincial

which this article is based and have come to the conclusion that ordinarily inland and territorial waters and the continental shelf belonging to the provinces at Union continued to belong to them.

[98] *Attorney-General of Canada* v. *Ritchie Contracting and Supply Co.*, *supra*, footnote 10, at p. 348.

[99] *Supra*, footnote 26, at p. 101.

[100] *Rickey* v. *City of Toronto*, *supra*, footnote 39.

[101] *Supra*, footnote 32.

and what is federal property in harbours may be a question of some nicety. To settle the problem in British Columbia, negotiations between the governments of that province and Canada were initiated in the early 1920's. These culminated in an agreement validated by virtually identical orders in council of Canada and British Columbia in 1924.[102] The agreement provided that the harbours of Victoria, Esquimalt, Nanaimo, Alberni, Burrard Inlet and New Westminster as described in a schedule to the agreement were and are the public harbours under section 108. It was further agreed that the ownership of all other ungranted foreshore and of all lands under water, except those within the Railway Belt, was vested in the province. However grants or transfers between one government and the other were not to be affected. It was further agreed that if other harbours were used as harbours before the passing of the orders in council, the province would consider transferring them to the Dominion and advise the Dominion of any other claims thereto. The agreement also contained a number of transitional provisions.

The effect of the agreement and orders in council has come up in several cases. In *Kapoor Sawmills Ltd.* v. *Deliko*,[103] Manson J. stated that the orders in council amounted to a conveyance of Burrard Inlet to the Dominion dating back to the original transfer. He pointed out that the validity of the agreement, which was entered into without legislative sanction, was not argued before him. The matter came up before the Supreme Court of Canada in 1945 in *Attorney-General of Canada* v. *Higbie*,[104] where it was argued that the orders in council were invalid as lacking statutory sanction. All the judges were in agreement that the orders in council were valid as an admission of a matter in dispute. Such an admission could be made by the Crown in the course of litigation and there was no reason why it should not be equally valid if made outside the course of litigation. But Rand J. indicated limits of such an admission in the following passage:

> As between the two jurisdictions, such an acknowledgment concludes the question but as to private rights different considerations arise. Ordinarily third persons would not be concerned with either Crown right in ownership or legislative jurisdiction. But the Province could not bind its own prior grantee as to his own title by such an acknowledgment: and where accrued rights are claimed not derived from the

[102] P.C. 941, of June 7th, 1924; B.C.O. in C. No. 507, of May 6th, 1924. For an account of the agreement and terms of the orders in council, see *Attorney-General of Canada* v. *Higbie*, *supra*, footnote 35, *per* Rinfret C.J.

[103] (1940), 56 B.C.R. 433.

[104] *Supra*, footnote 35.

> Province, as by prescription, the third person likewise cannot be prejudiced by provincial action of that nature.[105]

In addition to their effect as admissions, Rinfret C.J. and Taschereau J. were also of the opinion that the orders in council were valid as conveyances, but Rand J. disagreed, holding that statutory authority was required. Kerwin and Hudson JJ. preferred to leave the question open.

The agreement contains an important saving clause which provides that any foreshore or land under water which had theretofore been granted, quit claimed, leased or otherwise dealt with by the province would be confirmed by the Dominion, subject to such terms and conditions as the Dominion should see fit. The clause came up for consideration in *Nanaimo Ice & Cold Storage Co.* v. *Blyth.*[106] There the plaintiff claimed an indefeasible title to certain land under the British Columbia Registry Act. The defence, *inter alia*, alleged that the land in question was part of the foreshore at Nanaimo and passed to the Dominion. O'Halloran J.A. pointed out that while the 1924 agreement made it clear that Nanaimo harbour passed to the Dominion, this was subject to the clause just described. He held that the confirmation of title provided for therein was not confined to provincial Crown grants, but included grants made by issuing certificates of title and those made by statute. A provincial statute had approved a survey of the City of Nanaimo, which included the land in question; consequently this was confirmed by the clause. Robertson J.A. and Bird J.A. concurred, but on other grounds.

A similar agreement was entered into between Canada and Ontario on September 26th, 1961.[107] Though there had been about sixty harbours in use in Ontario in 1867, many of these were no longer suitable for development and management by the Federal Government.[108] Accordingly the agreement provides that only the twenty seven described in a schedule should be public harbours of the Dominion,[109] the others are to belong to Ontario. The Dominion is to own all ungranted lands comprised within the descrip-

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[105] *Ibid.*, at p. 436.

[106] [1946] 4 D.L.R. 524 (B.C.C.A.).

[107] S.O., 1962-1963, c. 95; Bill S-5, 1st sess., 26th Parliament, 12 Eliz. II, 1963 (Can.).

[108] See Debates of the Senate, 1963, pp. 399-401.

[109] The twenty seven are the harbours of Amherstburg, Belleville, Brockville, Chatham, Collingwood, Fort William, Gananoque, Goderich, Kincardine, Kingston, Kingsville, Leamington, Oshawa, Owen Sound, Penetanguishene, Port Arthur, Port Burwell, Port Hope, Port Stanley, Prescott, Rondeau Bay, Sarnia, Sault Ste. Marie, Southampton, Toronto, Whitby and Windsor.

tion of its harbours, including lands covered by water and the foreshores, as well as all interests in lands, except mines and minerals (including gold and silver and base metals), which are to be the property of Ontario. The agreement is not to affect title to any lands transferred by Canada or Ontario before the date of the agreement, or any lands acquired by Canada otherwise than by virtue of item 2 of the third schedule to the British North America Act. Finally a number of grants and quit-claims made by Canada and Ontario and described in schedules to the agreement are confirmed. The agreement is to take effect on approval by the Parliament of Canada and the Legislature of Ontario. It was approved by the provincial legislature on April 26th, 1963,[110] and it seems certain of getting Federal approval during the present session of Parliament, it having already been fully considered by both Houses.[111]

The agreements with British Columbia and Ontario, and particularly the latter, afford business-like solutions to many of the problems concerning the extent of public harbours and the nature of the Dominion's interest in them. It is highly desirable that similar agreements be entered into with other provinces.

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[110] *Supra*, footnote 107.

[111] See Debates of the House of Commons, Canada (1962-1963), vol. I, p. 375, vol. III, pp. 2264-2269, and *supra*, footnote 108.