

the admission of British Columbia into the Dominion of Canada, in 1871, it did not become the property of the Dominion as a "public harbour" within the meaning of s. 108 and the third schedule of the British North America Act, 1867; consequently, the Province of British Columbia retained the property in the bed and foreshore thereof and could validly grant the right of removing sand therefrom.

Per Davies, Idington and Anglin, J.J.:—Inasmuch as the proclamation, by the Dominion Government, on the 3rd of December, 1912, and the Dominion statute, c. 54 of 3 & 4 Geo. V., deal merely with the establishment of the port and the incorporation of the Vancouver Harbour Commissioners, they had not the effect of transferring English Bay from the control of the Provincial Government to that of the Dominion Government nor of giving the Dominion Government any right of property in the bed or foreshore of that bay.

Per Duff, J.:—The transfer effected by s. 108 of the British North America Act, 1867, of the subjects described in the third schedule of that Act was a transfer of property operative upon the passing of the Act and such subjects were necessarily ascertainable at the passing of the Act by the application of the descriptions to the facts then existing, and, consequently, the question of "public harbour" or no "public harbour" must be determined according to the circumstances as they were at the date of the Union.

Per Duff, J.:—The term "public harbour" implies public user as a harbour for commercial purposes as distinguished from purposes of navigation simply, or some recognition, formal or otherwise, of the locality in dispute by the proper public authority as a harbour for such purposes, but the question of "public harbour" or no "public harbour" is a question of fact depending largely upon the particular circumstances.

Per Duff, J.:—If the question of "public harbour" or no "public harbour" were to be decided according to the circumstances existing when the dispute arose, English Bay must be held to be now a "public harbour" within the meaning of item 2 of the third schedule of the British North America Act, 1867.

Judgment appealed from (20 B.C. Rep. 333) affirmed. Leave to appeal to the Privy Council granted.

Newcombe, K.C., Deputy-Minister of Justice, for appellants.
L. G. McPhillips, K.C., and *J. A. Ritchie*, for respondents.