

Crown, and it was no doubt considered advisable, if not actually necessary, to transfer the jurisdiction, executive and legislative, over public harbours to the Dominion, as ancillary to the proper exercise of its powers relating to shipping and navigation. The jurisdiction, in my opinion, 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 the Union."

In the principal case it was perhaps not really necessary to decide the point, because Fitzpatrick, C.J., and Anglin, J., distinctly, and Idington, J., and Brodeur, J., apparently, hold that English Bay, the *locus* in question, was not a harbour in 1871, when British Columbia came into the Union, and is not a harbour now. Duff, J., however, holds that, though not a harbour in 1871, it is a harbour now. But whether actually necessary to decide the point or not, Davies, and Duff, J.J., hold decidedly, and Anglin, J., strongly inclines to the view, that sec. 108, schedule 3, does not apply to harbours which have only come into use as such after the Union.

If "Public Harbours" were the only provincial property which sec. 108 referred to, more might be said for the opposite contention. For, as the Privy Council pointed out in the *St. Catherines Milling & Lumber Co. Case* (1888), 14 App. Cas. at p. 56, in construing such enactments in the B.N.A. Act, it must always be kept in view that, where public land, with its incidents, is described as the "property of," or as "belonging to" the Dominion or a province, these expressions merely import that the right to its beneficial user, or to its proceeds, has been appropriated to the Dominion, or the province, as the case may be, and is subject to the control of its legislature, the land itself being vested in the Crown. See also the *Fisheries Case*, [1898] A.C. 700 at 709-711. It might then have been contended, not unreasonably, if "public harbours" stood alone, that, inasmuch as "navigation and shipping" had been placed under the exclusive jurisdiction of the Dominion parliament, the proper construction of sec. 108 was that whenever a place became a public harbour, even after Confederation, it should automatically cease to be under provincial administration, and pass under Dominion administration. But Duff, J., seems to give the *coup de grâce* to such a contention when he points out that sec. 108, besides "public harbours," includes "railways," "piers" and "public vessels," and says: "It could hardly have been within the contemplation of the Act that the roadbed of a provincial government railway, for example, constructed after Confederation, should pass to the Dominion as soon as it should be a completed railway, or that a ship acquired for provincial government purposes should forthwith become the property of the Dominion. One can hardly distinguish between such subjects (which, if existing at the date of the Act, would, of course, fall within the third schedule), and a pier, or an artificial harbour constructed as a provincial government work."

But let no one suppose that this convicts the B.N.A. Act of a *casus omissus*. For just as in *Atty.-Gen. of B.C. v. Can. Pac. R. Co.*, [1906]