Privy Council Appeal No. 160 *of* 1915.

The Attorney-General for the Dominion of Canada and others - *Appellants*

v.

The Ritchie Contracting and Supply Company, Limited, and others - *Respondents*

FROM

THE SUPREME COURT OF CANADA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 31ST JULY, 1919.

Present at the Hearing:
VISCOUNT HALDANE.
LORD BUCKMASTER.
LORD DUNEDIN.

[*Delivered by* LORD DUNEDIN.]

The respondents, the Ritchie Contracting and Supply Company, were, with the license of the Government of British Columbia, whose Attorney-General is the second respondent, removing sand from a bank on the foreshore of the sea known as Spanish Bank, situated at the entrance to English Bay. English Bay is the bay which forms the outer approach to Burrard Inlet, which leads to the city of Vancouver. The appellants, the Attorney-General for the Dominion of Canada and the Vancouver Harbour Commissioners, brought this action to restrain the respondents from removing the sand. The main ground on which the action was based was that English Bay was a public harbour and Spanish Bank a part thereof; that in virtue of section 108 of the British North America Act the *solum* of the bank belonged to the Dominion; and that the operations of the respondents thereon were consequently unauthorised and illegal. There was a second and subsidiary ground of action which will be more particularly specified hereafter.

The case was tried before Macdonald, J., who decided against the appellants and dismissed the action. Appeal being taken to

the Court of Appeal of British Columbia, that judgment was affirmed unanimously by five judges. Appeal again being taken to the Supreme Court of Canada, the judgment was again affirmed unanimously by six judges. The appellants have, therefore, a most formidable weight of judicial opinion against them; but on appeal to this Board they contended that, although all the judges were against them, the grounds of judgment of various of the learned judges were different, and that the unanimity was more apparent than real. There are cases where opinions which agree in result yet differ so in substance as to be incapable, so to speak, of living together. On the other hand, if a plaintiff to obtain the relief he asks must prove affirmatively two or more propositions, it follows that a learned judge who bases his opinion on the fact that, in his view, the plaintiff has failed to prove Proposition A is not necessarily in conflict with another learned judge who bases his judgment on a failure to prove Propositions B or C. Their Lordships think that on examination the present case will be found to fall within this second category.

The first proposition which the appellants are bound to prove is that English Bay is a public harbour, for English Bay is admittedly situate within the province of British Columbia, and, in virtue of section 109 of the British North America Act, which necessarily speaks as at the date of the admission of British Columbia to the Union, viz., in 1871, belongs to the Province, unless it can be shown to be transferred by some other section to the Dominion. The only section appealed to is section 108, with its concomitant schedule No. 3, one item whereof is "Public Harbours."

It may be as well first to see how the decided cases which may be thought to deal with the question stand. There are many cases referred to in the opinions of the learned Judges in the Courts below where the subject has been more or less approached, but their Lordships think it necessary to refer to only two. They are *Holman* v. *Green*, decided in the Supreme Court of Canada (6 S.C.R., p. 707), and the first Fisheries case before this Board (1898 A.C., p. 700). *Holman* v. *Green* had to do with Summerside Harbour. In that case it was contended that the term "public harbours" only extended to such harbours as had had public money expended on them and could not include natural harbours. That contention was repelled, but some expressions were used which would lead to the conclusion that each and every piece of land within the ambit of the harbour over which the tide flowed was transferred in property. Accordingly, when this Board came to deal with the subject in the Fisheries case, they said as follows :—

"It appears to have been thought by the Supreme Court in the case of Holman and Green that if more than the public works connected with the harbour passed under that word, and if it included any part of the bed of the sea, it followed that the foreshore between the high and low water mark, being also Crown property, likewise passed to the Dominion. Their Lordships are of opinion that it does not follow that because the foreshore on the margin of a harbour is Crown property, it necessarily forms part of the

harbour; it may or may not do so according to circumstances. If, for example, it had actually been used for harbour purposes, such as anchoring ships or landing goods, it would no doubt form part of the harbour, but there are other cases in which, in their Lordships' opinion, it would be equally clear that it did not form part of it."

They had previously stated on the general question that it would be, they thought, extremely inconvenient that a determination should be sought of the abstract question: What falls within the description "public harbour"? They declined to attempt an exhaustive definition of the term applicable to all cases. It must depend they said to some extent, at all events, upon the circumstances of each particular harbour what forms a part of that harbour.

Their Lordships are bound to say that the expression, "What falls within the description of public harbour" used in that passage has been liable in some cases to misconstruction. In the case of *Holman* v. *Green*, the Court was dealing with a harbour which was an admitted harbour. Accordingly, the expression, "What falls within the description of public harbour," used as it was in commenting upon the case of *Holman* v. *Green*, means—given the existence of a public harbour—what territory falls within it, and does not mean what class of harbour is meant by the expression "public harbour." None the less, however, the words used as to each case depending on its own circumstances may well, as is pointed out by Macdonald, J., be also used in regard to the question of determining what is and what is not a public harbour. The extreme view one way, viz., that a public harbour only meant such a harbour and such portions of it as had been the creation of public money, was rejected, and rightly rejected, in *Holman* v. *Green*; the extreme view the other way, viz., 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. The date at which the test must be applied is the date at which the British North America Act by its becoming applicable effects a division of the assets between the Province and the Dominion. That in this case is 1871. Applying this test to English Bay, their Lordships agree on the facts with the great majority of the learned Judges below, who hold that English Bay is not a public harbour. Nor, as already pointed out, are the remaining judges of an opposite opinion. Some of them prefer to rest their decision on the view that, even supposing English Bay to be a public harbour, Spanish Bank, in accordance with the views of this Board in the Fisheries case, would be

within the ambit, but not a part of it. As their Lordships hold that English Bay is not a public harbour, it is unnecessary to consider this question, though their Lordships indicate no opinion contrary to those of the learned Judges below.

This disposes of the main point of the case ; but the appellants obtained leave to amend their original pleadings by adding this statement :—

> "The Attorney-General of Canada moreover alleges and submits that, whether English Bay within the area hereinbefore described be or be not a public harbour, the defendants, the Ritchie Contracting and Supply Company, Limited, and Purvis E. Ritchie, have not, and never had, any title, right or authority to remove the sand, gravel or other material naturally forming the bed or foreshores of the said bay, and that the Attorney-General of British Columbia has not, and never had, any right, authority or jurisdiction to authorise the removal of any part of the said bed or foreshores or interference therewith. The Attorney-General of Canada avers on the contrary that, the waters of English Bay within the limits hereinbefore described being navigable waters of the sea, it was and is the duty of the Crown, in so far as it is represented locally, to maintain the bed and foreshores of the said waters in their natural state and to prevent waste of the sea. The Attorney-General of Canada claims a declaration of this honourable Court in the terms of this paragraph and, moreover, an injunction to restrain further waste."

The appellants argued that their title to object flowed from the fact that navigation is one of the subjects entrusted to the Dominion under section 91 of the British North America Act.

It has often been pointed out that the domain of legislation is quite a different matter from proprietary rights. It may however, be assumed for the purposes of this argument that if what was being done could be shown to be a danger to navigation the right of the Dominion to make navigation laws would give a sufficient title to object. The hypothesis of the situation is that the Province is, in taking away the sand, operating *in suo*. Any restraint upon that at the instance of the other party must consist of an injunction of the *quia timet* order. But no one can obtain a *quia timet* order by merely saying "*Timeo*" ; he must aver and prove that what is going on is calculated to infringe his rights. In the present case there is no averment of a specific character, far less proof, that what is being done at Spanish Bank will affect navigation in the slightest degree. This point therefore, also fails.

Their Lordships will humbly advise His Majesty to dismiss the appeal with costs.

In the Privy Council.

THE ATTORNEY-GENERAL FOR THE DOMINION OF CANADA AND OTHERS

v.

THE RITCHIE CONTRACTING AND SUPPLY COMPANY, LIMITED, AND OTHERS.

DELIVERED BY LORD DUNEDIN.

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