Newfoundland's Continental Shelf: The Jurisdictional Issue

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The matter of jurisdiction over the minerals of Newfoundland's continental shelf area raises an intriguing combination of constitutional and international law issues. Newfoundland's unique historical position gives rise to some novel legal questions, the responses to which demand precise formulation of concepts which have not heretofore been definitively articulated.

An examination of decisions in Canada, Australia and the United States reveals that what is ostensibly a highly technical legal issue may be resolved on the basis of political considerations. While the conclusion that the matter is inherently political is inevitable, the legal issues are nevertheless challenging and worthy of exposition.

Une multitude de points de droit constitutionnel et international découlent de la question relative à la compétence au sujet des minéraux du plateau continental au large de Terre-Neuve. De plus, la situation historique particulière de Terre-Neuve conduit à la création de nouveaux problèmes juridiques. Et ceux-ci exigent la formulation précise de concepts qui, jusqu'à présent, n'ont pas eu à être définis explicitement.

Tout ceci nous mène à une étude des décisions au Canada, en Australie et aux Etats-Unis. Etude qui d'ailleurs nous fait découvrir que ce qui, à première vue, semble être une question hautement juridique et technique, peut en somme se résoudre à partir de considérations politiques. Et bien qu'il s'avère que le problème soit essentiellement politique, les divers aspects juridiques qui s'en dégagent sont du plus grand intérêt et méritent qu'on s'y attarde . . .

INTRODUCTION

The potential mineral wealth of the continental shelf off Newfoundland may rival that of Britain's North Sea. Official estimates of the extent of petroleum resources in the Hibernia area of the Grand Banks predict it is capable of producing ten billion barrels of oil and at least 15 trillion cubic feet of natural gas.[1] This is a resource which, even

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[1]"Dispute Over Offshore Jurisdiction Will Affect Hibernia Development", *Evening Telegram* (St. John's), 28 Aug. 1980, *per* R H. Carlyle, Senior Vice-President of Gulf Oil Resources.

at current world prices, promises enormous revenues to the government which exercises jurisdiction over the area. In addition to the revenue potential, the government which exercises jurisdiction will be able to control the rate and manner of exploitation to coincide with its social, environmental and economic policies. Evidently then, this issue is one of the most consequential legal questions to ever arise in Canada.

In addition to being of great consequence, the issue is complex, raising an uncommon combination of constitutional and international questions of law. In respect of the latter, an adjudication would have to determine whether or not the concept of coastal state jurisdiction over the resources of the continental shelf could be said to be customary at international law prior to Newfoundland's entry into Confederation on March 31, 1949. If that was found to be the case, the next issue to be resolved would be whether or not Newfoundland had the requisite degree of external sovereignty to succeed to such jurisdiction even if it was a customary principle of international law. On the other hand, if such jurisdiction became a reality after Confederation, there would have to be a determination as to which level of government in the Canadian federation is entitled to exercise it.

The intriguing aspect of this problem is that because of Newfoundland's unique historical position, an adjudication would have to articulate some theoretical concepts which have thus far been shrouded in ambiguity. A determination would require an analysis of the relationship between Great Britain and its Dominions, in particular Newfoundland, to decide at what, if any, point in time the Dominion could be said to be sovereign. Similarly, in the area of international law, the analysis of the crystallization of customary principles of law has been largely academic and theoretical. In this case a court would be faced with a precise time period and specific indicia upon which to base its conclusion. The articulation of "threshold" tests for these concepts presents a formidable challenge to an eventual judicial resolution.

THE OFFSHORE LEGAL REGIME

The extent of coastal state jurisdiction in offshore areas[2] was first standardized by the Geneva Conference on the Law of the Sea which adjourned April 28, 1958. Two of the four conventions which emerged from that conference are of particular interest respecting jurisdiction over offshore minerals; the *Convention on the Territorial Sea and the Contiguous Zone,*[3] and the *Convention on the Continental Shelf.*[4] The former

[2]In this part, the legal regimes of both the continental shelf and the territorial sea will be discussed as a familiarity with the latter is necessary to appreciate the former. Where the jurisdictional issue is concerned the two regimes raise distinct and complex legal issues, particularly in historical terms, and the discussion here will be restricted to the jurisdictional question respecting the continental shelf.

[3]U.N. Doc. A/CONF. 13/L.52. For text see: (1958) 52 *Amer. J. Intl. Law* 834.

[4]U.N. Doc. A/CONF. 13/L.55. For text see: (1958) 52 *Amer. J. Intl. Law* 858.

states simply that the sovereignty of a state extends to the territorial sea, to its superjacent airspace, and to the seabed and subsoil.[5] The breadth of the territorial sea is not defined in the *Convention* but the combined territorial sea and contiguous zone may not extend beyond twelve miles from the baselines.[6] The nature of the jurisdiction over the resources of the adjacent seabed is implicit in the word "sovereignty"; whether it can be understood to mean "ownership" is open to some debate.[7] At the very least it means the right to explore, exploit and dispose of the minerals of the territorial seabed.

As for the continental shelf, the coastal state exercises sovereign rights for the purpose of exploring it and exploiting its natural resources.[8] The 1958 *Convention* defined the shelf as the seabed "outside the area of the territorial sea, to a depth of 200 metres or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said waters".[9]

Since 1973, multilateral negotiations have been taking place to create a new law of the sea and are expected to conclude in a new treaty to be adopted at Caracas in 1981.[10] The provisions respecting offshore mineral jurisdiction are not expected to be altered from those in the present *Informal Text.*[11] The provisions for the territorial sea have not been significantly altered since the 1958 *Convention,* the breadth still being limited to 12 nautical miles.[12] The rights of the coastal state over the continental shelf also remain the same, *viz.* sovereign rights for the purpose of exploring and exploiting its natural resources.[13] The outward extent of the shelf is more strictly defined than in the 1958 *Convention,* being at least 200 nautical miles and where the continental margin extends beyond that, to the outer edge of the margin.[14]

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[5]*Convention on the Territorial Sea and Contiguous Zone,* art. 1.

[6]*Ibid.*, art. 24. In Canada the outer limit of our territorial sea was established at three nautical miles from the baselines in the *Territorial Sea and Fishing Zones Act,* S.C. 1964-65, c. 22. In 1970, this was extended to twelve miles by *An Act to Amend the Territorial Sea and Fishing Zones Act,* S.C. 1969-70, c. 68.

[7]See Harrison, Rowland J., "Jurisdiction Over the Canadian Offshore: A Sea of Confusion", (1979) 17 *Osgoode Hall L.J.* 469, at 480-86.

[8]*Convention on the Continental Shelf,* art. 2.

[9]*Ibid.*, art 1.

[10]"Canada Makes Gains on Offshore Control", *Evening Telegram* (St. John's), 5 Sept. 1980, p. 1. *per* Alan Beesley, Chief Canadian Negotiator at Law of the Sea Conference.

[11]Informal Composite Negotiating Text/Revision 3, U.N. Doc. A/CONF. 62/WP.10/Rev. 3, 27 August 1980.

[12]*Ibid.*, art. 3.

[13]*Ibid.*, art. 77.

[14]*Ibid.*, art. 96. In cases where the margin extends beyond 200 nautical miles, there are formulae established by which the coastal state can fix the outer limit.

An interesting innovation of the new regime which has implications for the Newfoundland development is a provision for contributions to an international fund to be made from the proceeds of exploitation of non-living resources at points beyond 200 nautical miles.[15] The contribution may rise to seven per cent[16] of the value or volume of production and is designed to provide for the needs of developing landlocked states. Subject to this qualification, the coastal state has exclusive sovereign rights over the natural resources of the continental shelf.

THE EMERGENCE OF THE DOCTRINE OF THE CONTINENTAL SHELF

Jurisdiction of the littoral state over the resources of the adjacent continental shelf is a relatively new concept in international law. A creature of technological and scientific advancement, it was unknown to international lawyers as recently as forty years ago. In addressing the historical development of the doctrine of the continental shelf, particular attention will be paid to the period prior to March 31, 1949 when the Dominion of Newfoundland entered into Confederation.[17] Prior to this date, neither Newfoundland nor Canada had issued any express declaration of jurisdiction over the shelf area. Thus, the issue with respect to the emergence of the doctrine of the Continental Shelf is whether it had crystallized as a customary principle of international law prior to the above "critical date". If the concept had achieved such status by that date, the jurisdiction would accrue to the littoral state automatically by virtue of its sovereign status[18] as a nation.

The earliest instrument purporting to lay a sovereign claim to submarine resources appears to be a 1942 bilateral treaty between Great Britain and Venezuela respecting certain marine areas in the Gulf of Paria.[19] While the instrument does not refer to the continental shelf by that name, it acknowledges certain rights in the Gulf between the Island of Trinidad and the coast of Venezuela.

The first express assertion of a sovereign claim to the shelf was made by the United States on September 28, 1945, when the U.S.

[15]The continental margin off Newfoundland extends to approximately 400 miles from the coast in the Flemish Cap area. The Hibernia site is within the 200 mile limit.

[16]*Informal Composite Negotiating Text*, Art. 82. No contribution is made with respect to production for the first five years. In the sixth year, one per cent is payable and the rate shall increase by one per cent for each subsequent year until the twelfth year and shall remain at seven per cent thereafter.

[17]*British North America Act, 1949*, 12 & 13 Geo. VI, c. 22 (U.K.).

[18]The issue of whether or not Newfoundland had sufficient sovereign status to succeed to such rights at international law, if they did exist, will be discussed at pp. 90-99, *infra*.

[19]Treaty Series, No. 10 (1942), Cmnd. 6400.

asserted; ". . . the continental shelf may be regarded as an extension of the land-mass of the coastal nation and thus naturally appurtenant to it. . ."[20] Furthermore the claim, popularly known as the Truman Proclamation, asserted that the United States regards the natural resources of the shelf as "appertaining to the United States, subject to its jurisdiction and control."[21] This proclamation was followed by similar claims by a number of other states, mainly Latin-American. The states which had made such express declarations by 1949 were: Mexico (1945),[22] Argentina (1946),[23] Chile (1947),[24] Peru (1947),[25] Costa Rica (1948), Nicaragua (1948), Guatemala (1948), Panama (1946), Bahamas (1948), and Jamaica (1948).[26] Some of these claims closely followed the model of the Truman Proclamation while others went so far as to claim the superjacent waters and the marine resources therein. Common to all was an assertion of jurisdiction over the seabed resources of the continental shelf.

It is not immediately clear whether or not the concept of coastal state jurisdiction had emerged as a customary principle of international law by 1949. Sir Hersch Lauterpacht, writing in 1950, asserted that the right of appropriation had become "part of international law by custom initiated by the leading maritime powers and acquiesced in by the generality of states."[27] He was obviously impressed by the fact that two of the major maritime powers, Great Britain and the United States, had been early participants in the jurisdictional claims. Britain, while not having made an express claim to her own shelf area, had made claims on behalf of the Bahamas, Jamaica, and (by 1950) a number of Sheikdoms and Protectorates in the Middle East.[28] Lauterpacht argued that these two major maritime powers, traditional adherents of the concept of "freedom of the seas", had adopted the practice; Josef L. Kunz, however, used the same analysis to argue that no such custom had crystallized. He pointed out that "[a]bout fifteen states have applied it;

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[20]*Proclamation By the President with Respect to the Natural Resources of the Subsoil and Sea Bed of the Continental Shelf*, September 28, 1945, (1946) 40 Amer. J. Intl. Law Suppl. 45-46.

[21]*Ibid.*, at 46.

[22]See generally: Young, Richard, "The Legal Status of Submarine Areas Beneath the High Seas", (1951) 45 *Amer. J. Intl. Law* 225; Mouton, M. W., "The Continental Shelf", (1954) 85 *Rec. des Cours* 347.

[23]*Declaration Proclaiming Sovereignty Over the Epicontinental Sea and the Continental Shelf*, October 9, 1946, (1947) 41 Amer. J. Intl. Law Suppl. 11.

[24]*Declaration by the President of the Republic of Chile, Regarding Chilean Territorial Claims*, June 1947, (1948) 2 Intl. Law Quart. 135.

[25]*Peruvian Decree Regarding National Sovereignty and Jurisdiction Over the Continental and Insular Shelf*, (1948) 2 Intl. Law Quart. 137.

[26]The Bahamian and Jamaican claims were asserted by British Orders in Council, Statutory Instruments, 1948, Nos. 2514, 2574.

[27]Lauterpacht, H., "Sovereignty Over Submarine Areas", (1950) 27 *Brit. Y.B. Intl. Law* 376, at 431.

[28]*Ibid.*, at 381.

but many important states, such as the United Kingdom, as far as the mother country is concerned, France, Italy, Spain, West Germany, the Scandanavian states, Japan, the Soviet Union, have not done so."[29]

M. W. Mouton, after reviewing the diverse claims of states up to 1954, concluded: ". . . the Declarations are not declaratory of existing law nor do the Decrees express a rule of existing law. Here again the contrary has been asserted in the Declarations as well as by authors, without any vestige of proof however."[30]

Lord Asquith of Bishopstone, in a 1952 arbitral decision, reviewed the relevant materials and concluded:

> I am of the opinion that there are in this field so many ragged ends and unfilled blanks, so much that is merely tentative and exploratory, that in no form can the doctrine claim as yet to have assumed hitherto the hard lineaments or the definitive status of an established rule of international law.[31]

In 1951, the International Law Commission directed itself to consolidating and articulating a legal regime for the continental shelf. This work culminated in 1958 in the *Geneva Convention on the Continental Shelf*.[32] The first three articles of this Convention, which outline the basic concept of littoral state jurisdiction over the resource of the shelf, were deliberated in 1969 by the International Court of Justice when it was confronted with a dispute between Denmark, West Germany, and the Netherlands.[33] The noncommittal manner in which the International Court of Justice described the status of the continental shelf regime in its judgment is an excellent illustration of the ambiguity of the problem. Addressing the issue of the customary nature of the jurisdiction, the court stated; "[t]hese three articles . . . were then regarded as reflecting, or as crystallizing, received or at least emergent rules of customary international law relative to the continental shelf."[34] If the court was so inscrutable in its analysis of the regime as of 1958, our ability to analyze its precise status as of March 31, 1949, is even more dubious. It is clear from the evidence that sometime prior to 1958 the doctrine of coastal state sovereignty over the resources of the continental shelf emerged or crystallized as a customary rule of international law. What is not clear, and yet is crucial to a determination of the Newfoundland issue, is whether such a principle could be said to have crystallized prior to

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[29]Kunz, Josef L., "Continental Shelf and International Law: Confusion and Abuse", (1950) 50 *Amer. J. Intl. Law* 828, at 830, n. 16.

[30]M. W. Mouton, *supra*, footnote 22, at 425.

[31]*Abu Dhabi Arbitration* (1952), 1 Intl. Comp. Law Quart. 247, at 256.

[32]*Supra*, footnote 4.

[33]*North Sea Continental Shelf Cases*, [1969] Intl. Ct. Just. 3.

[34]*Ibid.*, at 39.

March 31, 1949. Given the divergence of opinion, one has to question the validity of deciding so consequential an issue on such an ambiguous point of law.

It has been argued[35] that it is possible to avert such an analysis by adopting a statement from the decision in the *Continental Shelf* cases which characterizes the jurisdiction as an inherent right of states which exists *ipso facto* and *ab initio.* The court stated that it entertained "no doubt" that:

> . . . the rights of the coastal state in respect of the area of continental shelf that constitutes a natural prolongation of its land territory into and under the sea exist *ipso facto* and *ab initio,* by virtue of its sovereignty over the land, and as an extension of it in an exercise of sovereign rights for the purpose of exploring the seabed and exploiting its natural resources. In short, there is here an inherent right. . . . Its existence can be declared (and many states have done this) but does not need to be constituted.[36]

Such a view, it is said, is consistent with the proclamations of the various states asserting their rights; they purport to be declaratory, not constitutive. If this view is correct, it would dispense with the necessity of analyzing the historical emergence of the doctrine. The difficulty with this point of view is that it appears to ignore the basic concept of making international law by custom: no rights exist *ab initio.* For a principle to become customary international law it must first have become an established practice and secondly must be acknowledged by *opinio juris.*[37] One of the most succinct statements of these prerequisites is found in the decision of the International Court of Justice in the *Continental Shelf* cases:

> Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, *i.e.,* the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis.*[38]

Until these two factors are evidenced, no custom is said to exist. Thus it is a contradiction in terms to say that a customary principle of international law exists *ab initio* if, by that, we mean it has always existed.

The Australian states advanced the *ab initio* argument before the High Court of Australia in *New South Wales and Others* v. *Commonwealth;* Gibbs J. responded as follows:

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[35]Martin, Cabot, "Newfoundland's Case on Offshore Minerals: A Brief Outline", (1975) 7 *Ottawa Law Rev.* 34, at 39. Also *New South Wales and Others* v. *Commonwealth* (1975), 8 Aust. Law Rep. 1, at 49; 50 Aust. Law J. Rep. 218, at 243 (Aust. H.C.). Hereinafter all citations will be to Aust. Law Rep.

[36]*North Sea Continental Shelf Cases, supra,* footnote 33, at 22.

[37]See: Kipelmanas, Lazare, "Custom as a Means of the Creation of International Law", (1937) 18 *brit. Y.B. Intl. Law* 127.

[38]*North Sea Continental Shelf Cases, supra,* footnote 33, at 44.

> To say the rights of coastal States in respect of the continental shelf existed from the beginning of time may or may not be correct as a matter of legal theory. In fact, however, the rights now recognized represent the response of international law to modern developments of science and technology. . . . Those rights, if theoretically inherent in the sovereignty of coastal States, were in fact the result of the operation of a new legal principle.[39]

The response of Gibbs J. to the argument is that, while it may be theoretically correct to speak of a right being "inherent" once it has become customary, all customary rights must have a genesis at some point. That the International Court also recognizes the need for such a genesis before a right can be said to exist *ab initio* is apparent at paragraph 47 of its judgment where it reviews the origins and development of coastal state jurisdictions:

> A review of the genesis and development of the equidistance method of delimitation can only serve to confirm the foregoing conclusion. Such a review may appropriately start with the instrument, generally known as the "Truman Proclamation", issued by the Government of the United States on 28 September 1945. Although this instrument was not the first or only one to have appeared, it has in the opinion of the Court a special status. Previously, various theories as to the nature and extent of the rights relative to or exercisable over the continental shelf had been advanced by jurists, publicists and technicians. The Truman Proclamation however, soon came to be regarded as the starting point of the positive law on the subject.[40]

In this passage it is evident that the court only recognizes "inherent" rights once they can be said to be customary principles of law. For example, while it is correct to say that the Federal Republic of Germany had an "inherent" right to jurisdiction over the continental shelf in 1969, it does not follow that such rights have always been inherent. It is not possible then, and this is clear in the judgment in the *North Sea Continental Shelf Cases,* to avoid an historical analysis to determine whether the necessary state practice and *opinio juris* have been evidenced to constitute a customary principle of law.

The issue, therefore, remains at what precise point in time did the concept acquire the status of a customary principle of international law; was it or was it not customary as of March 31, 1949? In light of the exacting standards required to establish such a "crystallization", the view of this author is that the balance of opinion is not in Newfoundland's favour.

NEWFOUNDLAND'S HISTORICAL POSITION

Newfoundland's unique status immediately prior to entering Confederation raises the question of whether or not it had the requisite degree of sovereignty to succeed to jurisdiction over the continental

[39]*New South Wales* v. *Commonwealth, supra,* footnote 35, at 49.

[40]*Supra,* footnote 33, at 34-5.

shelf even if such jurisdiction can be said to have been customary at international law by that time.

From 1934 to Confederation, Newfoundland was governed by a Commission of Government during which period its pre-1934 constitution was suspended. In order to determine whether or not Newfoundland, at any time prior to Confederation was sufficiently sovereign to claim jurisdictional rights, a court would have to deal with the concept of state sovereignty in more precise terms than we have yet seen. An adjudication would involve a formulation of the threshold point at which a state achieves full sovereignty and would also require an analysis of the Imperial relationship between Britain and Newfoundland.

For purposes of analyzing Newfoundland's sovereign status it is appropriate to deal with its history in three stages: the period prior to February 16, 1934; the period of Commission of Government, 1934-49; and the precise moment prior to Confederation on March 31, 1949.

Pre-1934

The period leading up to the *Statute of Westminster*[41] of 1931 is one marked by emerging sovereign status for the members of the British Commonwealth. Commentators have been reluctant to designate any exact point in time at which the Dominions became full-fledged members of the international community.[42] The Supreme Court of Canada has concluded that Canadian sovereignty was acquired in the period between the *Treaty of Versailles,* 1919 and the *Statute of Westminster* in 1931. The reluctance of the Supreme Court to be more precise on the occasion of the *B.C. Offshore Reference*[43] is indicative of the ambiguity of such analysis.

The status of Newfoundland during the period when Canada acquired its sovereignty is even more difficult to determine. Newfoundland was not a member of the League of Nations and in discussions as to the right of Dominion Parliaments to legislate extra-territorially, which flowed from the Imperial Conference of 1926, had made it clear that it did not seek the same privileges as other Dominion Governments.[44] At its own request, Newfoundland, along with Australia and New Zealand, was exempted from the application of key provisions of the *Statute of Westminster.*[45] Among the provisions which

[41]*Statute of Westminster,* 22 Geo. V, c. 4 (U.K.).

[42]See Wheare, K. C., *The Statute of Westminster and Dominion Status* (5th ed. 1953).

[43]*Reference: Re Ownership of Offshore Mineral Rights,* [1967] S.C.R. 792, at 816; 65 D.L.R. (2d) 353, at 375.

[44]Chadwick, St. J., *Newfoundland, Island Into Province* (1967), at 172.

[45]*Supra,* footnote 41, art. 10.

Newfoundland declined to have applied to it was a suspension[46] of the *Colonial Laws Validity Act;*[47] full power to make laws having extra-territorial operation;[48] and the extinguishment of the power of the Imperial Parliament to make laws extending to Newfoundland, except where Newfoundland consented.[49] Those provisions of the *Statute of Westminster* which applied to Newfoundland, New Zealand and Australia simply enumerated them as being among the "Dominions"[50] and relieved them of the appellation "Colony".[51] The exemption of these three Dominions, by their own choice, from the provisions of the *Statute of Westminster* may not be conclusive on the issue of their sovereign status. Whereas Newfoundland was exempted from article 4, respecting the application of Imperial laws, it was clearly included in the preamble which states *inter alia:* "[a]nd whereas it is in accord with the established constitutional position that no law hereafer made by the Parliament of the United Kingdom shall extend to any of the said Dominions as part of the law of that Dominion otherwise than at the request and with the consent of that Dominion." This statement of the "established constitutional position" would appear to counter any implication to be drawn from the fact that Newfoundland, New Zealand and Australia were exempted from the operation of articles 2 and 4. As for article 3, the power to make laws having extra-territorial operation, there is some debate as to whether the *Statute of Westminster* was constitutive in that regard, the most convincing contrary indication being the judgment of the Privy Council in *Croft* v. *Dunphy,*[52] where Canadian "hovering" legislation to enforce customs laws was upheld in spite of the fact that the conviction in question pre-dated the *Statute of Westminster.* It is argued[53] that the *Statute* was declaratory as opposed to being constitutive

[46]*Ibid.*, art. 2.

[47]28 & 29 Vict., c. 63 (U.K.).

[48]*Statute of Westminster, supra,* footnote 41, art. 3.

[49]*Ibid.*, art. 4.

[50]*Ibid.*, art. 1.

[51]*Ibid.*, art. 11.

[52][1933] A.C. 156, at 163, *per* Lord MacMillan.

> But while the Imperial Parliament may be conceded to possess such powers of legislation under international law and usage, the respondent contends that the Parliament of Canada has no such powers. It is not contested that under the British North America Act the Dominion legislature has full power to enact customs laws for Canada, but it is maintained that it is debarred from introducing into such legislation any provisions designed to operate beyond its shores or at any rate beyond a marine league from the coast.
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> In their Lordship's opinion the Parliament of Canada is not under any such disability. Once it is found that a particular topic of legislation is among those upon which the Dominion Parliament may competently legislate as being for the peace, order and good government of Canada or as being one of the specific subjects enumerated in s. 91 of the British North America Act, their Lordships see no reason to restrict the permitted scope of such legislation by any other consideration than is applicable to the legislation of a fully Sovereign State.

[53]Martin, Cabot, *supra,* footnote 35, at 39.

of sovereign status. This is impliedly the view of the Supreme Court of Canada in the *B.C. Offshore Minerals Reference* where it is stated that Canada achieved its sovereign status between the *Treaty of Versailles* and the *Statute of Westminster.*[54] There are some *dicta* supportive of this view in a judgment of Latham C.J. in the High Court of Australia:

> It is perhaps also not out of place to mention that the preamble of the *Statute of Westminster* 1931 (22 Geo. V. c. 4) refers to a certain constitutional position as "established," namely, the facts that the Crown is the symbol of the free association of the members of the British Commonwealth of Nations, that they are united by common allegiance to the Crown and that laws thereafter made by the Parliament of the United Kingdom should not extend to any part of the Dominions as part of the law of that Dominion otherwise than at the request and with the consent of that Dominion. This "established position" is *recognized rather than created by the Statute of Westminster.*[55]

The language of the Balfour Declaration of 1926 would appear to support the view that some degree of sovereignty had already been achieved by the members of the Commonwealth in 1926.

> They are autonomous Communities within the British Empire, equal in status, in no way subordinate one to the other in any aspect of their domestic or external affairs, though united by a common allegiance to the Crown, and freely associated as members of the British Commonwealth of Nations.[56]

The validity of treating the issue in terms of an interpretation of the preamble of the Balfour Declaration is open to question as, in the words of K. C. Wheare; "[i]t had all the advantages of flexibility and ambiguity, and all the disadvantages."[57] It does, however, indicate that all of the participants, including Newfoundland, were possessed of the fundamental element of Dominion status — equality.

Whatever may be said about the application to Newfoundland of particular provisions of the *Statute of Westminster* she was, at the very least, an autonomous, self-governing community within the British Empire. The Prime Minster of Newfoundland being a full participant at the post-war Imperial conferences along with the leaders of the other Dominions is indicative of its status as a Dominion. The elected government of Newfoundland was clearly sovereign domestically and, insofar as its external sovereignty was concerned, Newfoundland did not operate under any "constitutional" handicaps which did not also apply to the other Dominions.

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[54]*Supra*, footnote 43, at 816 (S.C.R.), 375 (D.L.R.).

[55]*R.* v. *Burgess: Ex Parte Henry* (1936), 55 Commonw. Law Rep. 608, at 635 (Aust. H.C.) (Emphasis added).

[56]Report of the Inter-Imperial Relations Committee, Imperial Conference, Summary of Proceedings, 1926, Cmnd. 2768, 13-30, at 14.

[57]*Supra*, footnote 42, at 28.

Perhaps the most effective way to illustrate Newfoundland's status prior to 1934 is to ask which government, Newfoundland or British, would have been entitled to jurisdiction over the continental shelf if such jurisdiction had crystallized as a principle of international law prior to February 16, 1934. In the opinion of this author, jurisdiction would lie in the sovereign government of the coastal state, *viz.* the government of Newfoundland.

Commission Government, 1934-49

Whatever may be said of Newfoundland's sovereignty prior to its financial difficulties in the 1930's, it is clear that any such status, whether domestic or international, was suspended during the period of Commission Government. By 1933, the public debt had become so onerous that a Royal Commission recommended the temporary suspension of responsible government while the United Kingdom assumed general responsibility for the finances of the Island.[58] At the request of the Newfoundland Legislature[59] the British Parliament passed the *Newfoundland Act,* 1933.[60] Letters Patent[61] issued pursuant to the Act abolished the bicameral legislature and established a Crown-appointed Commission of Government which consisted of a governor and six commissioners, three from Newfoundland and three from Great Britain. Under the Letters Patent the Commission was to make laws for the "peace, welfare, and good government" of Newfoundland.

It is clear from the Resolution of the Newfoundland legislature that the action was only to be a "suspension" in that the Commission was to continue "until such time as the Island may become self-supporting again."[62] With the prosperity of the Second World War, the economy of the Island revived and in February 1946, plans were announced for a National Convention of Newfoundlanders "to make recommendations to His Majesty's Government in the United Kingdom as to possible forms of future government to be put before the people at a national referendum."[63] The Commission completed its deliberations by January, 1948, recommending to the British government that a referendum be held, placing two options on the ballot: (1) Responsible government as it had existed prior to 1934 and (2) Commission of Government.[64] It is an

[58]Newfoundland Royal Commission, 1933, *Report.* See Plumptre, A.F.W., "The Amulree Report (1933): A Review", (1937) 3 *Can. J. Econ. Pol. Sci.* 58.

[59]Address Presented to His Majesty by the Legislative Council and the House of Assembly of Newfoundland, in 24 Geo. V, c. 2, First Schedule (U.K.).

[60]24 Geo. V, c. 2 (U.K.).

[61]*Royal Letters Patent,* Jan. 30, 1934, in 23 & 24 Geo. V (2d. Sess.), (Nfld.).

[62]*Supra,* footnote 59.

[63]*An Act Relating to a National Convention,* no. 16 of 1946 (Nfld.).

[64]Signed Recommendations of the Newfoundland National Convention.

ironic measure of Newfoundland's sovereign status during Commission of Government that the ballot presented to the voters in the referendum included a third option — Confederation with Canada.[65] This alternative was added to the ballot by the Commission in spite of the fact that it had been rejected by twenty-nine votes to sixteen in the National Convention.[66] It is difficult to imagine a more poignant reminder that, during the period of Commission Government, Newfoundland was not a sovereign state.

Two referenda were required to ultimately settle the issue; Confederation won a majority in the referendum of July 22, 1948, receiving 78,323 votes as compared with 71,334 votes for Responsible Government.[67] Following negotiation of the final terms of union, the Canadian Parliament passed *An Act to Approve the Terms of Union of Newfoundland with Canada*[68] and adopted an Address to His Majesty[69] requesting that Parliament amend the *British North America Act*. By March 23, the *British North America Act, 1949*[70] had been passed by the British Parliament and March 31, 1949, was proclaimed as the date on which the act of union would take effect. Technically speaking Newfoundland's entry into Confederation had been approved by six British-appointed Commissioners and a British-appointed Governor, the only legislation required being an act of the British Parliament.[71] This, in itself, is blunt testimony to Newfoundland's lack of sovereign status between 1934 and 1949. If it were not for a clarification of Newfoundland's constitutional status before its entry into Confederation, any claim it might assert to jurisdiction which arose during the period of Commission of Government would be specious, to say the least.

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[65]*An Act to Provide for Ascertaining at a Referendum the Wish of the People as to the Future Form of Government of Newfoundland,* no. 9 of 1948, Art. 2 (Nfld.).

[66]See Chadwick, St. J., *supra,* footnote 44, at 201.

[67]See Mayo, H. B., "Newfoundland's Entry into the Dominion," (1949) 15 *Can. J. Econ. Pol. Sci.* 505. In the first referendum of June 3, 1948 the voting was as follows:

		Votes Cast	Per Cent
1.	Commission of Government for five years	22, 311	14.32
2.	Confederation with Canada	64,066	41.13
3.	Responsible Government as it existed in 1933	69,400	44.55

Total votes as per cent of the electorate 88.36%

[68]13 Geo. VI, c. 1 (Can.).

[69]For text, see Chadwick, St. J., *supra,* footnote 44, at 217.

[70]12 & 13 Geo. VI, c. 22 (U.K.).

[71]In *Currie et al.* v. *MacDonald et al.* (No. 436 of 1948, Nfld. S.C.) (unreported) six members of the pre-1934 Newfoundland Parliament contested the constitutionality of the Confederation procedure, seeking declarations and an injunction against the Governor and the six members of the Commission of Government. Basically the contentions of the plaintiffs were:

— That the Commission had a legal duty to restore Responsible Government as soon as the Island was self-supporting.

— That the Commission had no power to add "Confederation" to the ballot in the Referendum.

— That s. 146 of the *B.N.A. Act*, 1867, which provided for Newfoundland to be admitted upon an Address to the British Parliament from both the Canadian and Newfoundland Parliaments, was the only appropriate means to effect Confederation and that the Commission did not have the power to make such an address.

— That, under the constitutional law of the Commonwealth, the Imperial Parliament had no power to make a law providing for the Confederation of Newfoundland and Canada except at the request of a parliament elected by the people of Newfoundland.

The case was heard in the trial division by Dunfield J. on December 6, 1948, and judgment given December 13.

Dunfield J. found against the plaintiffs on the ground that the pleadings disclosed no reasonable cause of action, striking out the whole Statement of Claim as the action was vexatious or frivolous. He went into the contentions of the plaintiffs at some length however, "because it deals with matters in which the public is interested or concerned." Among his observations:

On the Status of the Plaintiffs:

> I know of no precedent for a case where ordinary citizens take legal proceedings against their legislature in respect of its legislative Acts, nor has any been cited by Counsel; but the ordinary principle in a case of complaint of excess of authority against a public body is that those complaining must show themselves to be as individuals peculiarly injured over and above citizens generally. But the plaintiffs do not show that; on the contrary they proceed simply as citizens. It appears to me that they have no right to proceed, or to set themselves up as representing any part of the public. The protection of the public generally is a matter for governmental authority, and specifically for the Attorney General. (at 8)

On the Status of the Defendants:

> In so far as the defendants are the Legislature, with full powers, as clearly decided, they cannot be sued; you cannot sue a legislature, nor tell it what acts it may or may not pass. And it is not a legal person, like a company. (at 11)

On Imperial Constitutional Law:

> This purports to be a constitutional case, and we cannot deal with it in a rarefied atmosphere of theory, apart from the facts. Constitutional law, in non-Federal British countries, like the so-called International law, is for the most part not law at all, but a system of customs and conventions which the Courts do not enforce; and it deals with the distribution of that ultimate reality, power, which is above both Courts and nations. If I may put it somewhat metaphorically, Leviathan can be bound only with ropes of steel, and the attempt to bind him with gossamer webs of words lacks reality. (at 2)
>
> But the British Empire is a unitary state, with one Supreme Legislature, the King, Lords and Commons, and no written Constitution; New Zealand is unitary; Newfoundland is a subordinate unitary and many other Overseas territories; and in these cases the supremacy of the Legislature is the central principle of the law. The Imperial Parliament is supreme in the Empire, subject to the observation that in the cases of Canada, and some other Dominions, it has by the Statute of Westminster abdicated the right to legislate for them without their consent. Other unitary legislatures in the Empire are still subject to the overruling power of the Imperial Parliament, which could abolish anything from Magna Carta downwards. What is called Constitutional law under that system is a mass of conventions and customs, which are not law. For example, the obligation on a government to resign when defeated in its Parliament is an obligatory custom; not a law. No Court could enforce it, though failure to resign would eventually and indirectly bring about collisions with the law. In British unitary constitutions no Court can overrule the Legislature. (at 17-18)

> And further, Parliament can make any law whatsoever binding on us or on anybody else in the Empire. Certain Dominions have adopted the Statute of Westminster, and Parliament will not legislate for them without their consent. But Newfoundland has not adopted it. (at 6-7)

On Newfoundland's Status Under Commission of Government:

> To my mind nothing can be clearer than that all this reduces the Island to the status of a pure Crown Colony, wherein the Crown's Governor, with his nominated Council, is the ruler without any assistance from the people. Parliament says nothing about any limitation on the Crown's powers; it retires from the field for the time being. And it seems to be perfectly clear that the Crown is the judge of when, if at all, representative institutions are to be restored. For no one, save Parliament, can force it. (at 10B)

On the Import of s. 146 of *B.N.A. Act:*

> But what is Section 146 of the British North America Act? It is a section put in in 1867 or thereabouts by the Canadian and British draftsmen, with which Newfoundland representatives may or may not have had anything to do. At that time it was contemplated that Newfoundland was going to join with the other North American Colonies in forming the new Dominion; and a quick and easy way of entry was accordingly provided. But that was merely a matter of convenience. There is nothing binding about it today. There can be nothing to prevent the same power which provided that way from providing another way convenient to the circumstances of the present day. Section 146 was meant to facilitate, not to exclude. (at 14)
>
> To put it another way; what difference would it make if it were decided that an Address was necessary under Section 146 and that the Governor and Commission could not pass that Address? Parliament, knowing the result of the Referendum and negotiations, could act without an Address, and alter Section 146 accordingly. (at 16)

On Confederation:

> These things are overriding Acts of State, done by paramount power which is the sole judge of its own actions, and done with the assent of a majority of our own people. (at 16)

The decision of Dunfield J. was appealed to the Newfoundland Court of Appeal where judgment was rendered January 22, 1949. The Court of Appeal unanimously upheld the decision of the trial judge. Interestingly, one of the three judges on the appeal was Dunfield J. who, not surprisingly, found: "I have little to add to what I said in my original judgment."

Emerson C.J. took the view that the case could be decided on the basis of standing: "Surely if ever there was a case in which action could be taken only by the Attorney-General this is one." (at 4)

As for an argument that there was an obligation upon the Commission and the Imperial government in the Schedule of the *Newfoundland Act, 1933* wherein it is stated: "It would be understood that, as soon as the Island's difficulties have been overcome and the Country is again self-supporting, responsible government, on the request of the people of Newfoundland, would be restored;" Emerson C.J. responded as follows:

> As to this so-called contract: there never was and there never could have been any such thing. Parliament cannot bind itself and it cannot bind future parliaments. It may order one thing one day and revoke its decision the next, regardless of results. The only consequences that can follow any act of parliament are political. No Court can question its authority and it cannot be enjoined by any Court in respect thereof. (at 10)

The judgment of Winter J. concurred with both the Chief Justice and Dunfield J., in respect of the *locus standi* of the plaintiffs. As for the status of the defendants, Winter J. had this to say:

> Still more striking is the case of the defendants who, putting aside altogether the joining of the Governor as a defendant, are sued in both their executive and their legislative capacities. The former would be bad enough, but I think this must be the first time on record anywhere, in the British Commonwealth at least, that anyone has sought to bring all the members of a legislature to account in a court of law for their actions in that character. (at 2)

The Effect of Term 7

On March 31, 1949, Newfoundland became Canada's tenth province. A single clause in the terms of union provided for a provincial constitution:

> PROVINCIAL CONSTITUTION
>
> 7. The Constitution of Newfoundland as it existed immediately prior to the sixteenth day of February, 1934, is revived at the date of Union and shall, subject to these terms and the British North America Acts, 1867 to 1946, continue as the Constitution of the Province of Newfoundland from and after the date of Union, until altered under the authority of the said Acts.[72]

If, as it appears, the effect of this provision was to revive the pre-1934 constitution for an instant before Newfoundland entered Confederation, that instant could be very consequential to the resolution of the offshore minerals issue. It is conceivable that, instantaneously, a backlog of appurtenances evolved at international law in the years 1934-49 would accrue to the Dominion of Newfoundland before its entry into Confederation with Canada. The view that Newfoundland entered Confederation as an independent Dominion rather than a Crown colony is consistent with it having "suspended" rather than "revoked" responsible government in 1934. Term 7 appears to confirm that independent status. It has been suggested[73] that Term 7 was included only to specify which legal document was to serve as the constitution of the new province. This is not necessarily contrary to the view of the Newfoundland government[74] as it simply contends that Term 7 is a

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As to the holding of the Referendum and Confederation . . .

> [t]he really important question, which is rather this: will even the plaintiffs contend that the matter of Confederation should not in any case have had to be submitted to, and decided upon, by the people of Newfoundland themselves? So to contend would make it possible for an elected government to force Confederation upon the people against their will, or that of a majority of them. In a matter of this sort the government acts, so at least it seems to me, solely as the agent of the people. If the plaintiffs' view is the correct one, it means that the trouble, expense and, it might fairly be said, the unpleasantness of preparing for and carrying out a general election was necessary in order to create an agent to do what the principal could himself do directly, and what in fact he has now done. The simple truth seems to me to be plain, that the peculiar constitutional status of Newfoundland in 1946 and 1948 was, for this purpose at least, a distinct advantage in that it permitted a question of such vital importance to the Newfoundland people to be referred to them directly and immediately. (at 12-13)

Having failed at trial and on appeal, the Plaintiffs sought and were granted leave to appeal to the Privy Council. The Appeal was withdrawn, however, on May 16, 1949, ostensibly because the act sought to be enjoined, Confederation, was already completed.

[72]*Schedule: Terms of Union of Newfoundland with Canada* 13 Geo. VI, c. 1 (Can.).

[73]Ippolitto, J. T., "Newfoundland and the Continental Shelf: From Cod to Oil and Gas", (1976) 15 *Columbia J. Trans. Law* 138, at 161.

[74]Martin, C., *supra*, footnote 35, at 41-2.

reinstatement of its pre-existing sovereignty, a fact which would seem to be an unavoidable corollary of the revivification of the constitution. To suggest any conclusion other than a momentary return to the pre-1934 status would appear to put Confederation itself in doubt.

The intent of Term 7 is clear. Newfoundland entered Confederation with the constitution which it enjoyed prior to 1934; that of a Dominion of the British Commonwealth with its own representative, responsible and sovereign institutions. Even though that status may have been only fictionally revived for purposes of Confederation, it is more than a technicality. It entitles Newfoundland to benefit from any new developments of international law which may have arisen up to March 31, 1949 in the same fashion as it would have benefitted therefrom prior to 1934. If Newfoundland had sufficient international sovereignty prior to February 16, 1934 to benefit from such developments as a customary right to jurisdiction in the offshore area, then the effect of Term 7 was to revive such status immediately prior to Confederation.

THE PARAMOUNT CONCERNS OF FEDERALISM

Newfoundland is in a unique position insofar as its claim to jurisdiction over the continental shelf is concerned, but it is not the first member of a federal state to attempt to assert a claim to its offshore areas. The issue of state claims to the territorial sea[75] and seabed has been extensively litigated in the United States, Australia and to a lesser extent, in Canada. These adjudications reveal some common features of federalism which do not always conform to strict legal analysis and which are not favourable to claims such as those of Newfoundland.

United States

Shortly after World War II, the offshore resources of the United States became a contentious issue and the federal government opted to resolve the matter by adjudication. The first action was that of *U.S.* v. *California*[76] where the Attorney-General of the United States sought a declaration that the federal government was "the owner in fee simple of, or possessed of paramount rights in and powers over, the lands minerals and other things of value underlying the Pacific Ocean, lying seaward of the ordinary low-water . . . mark and outside the inland waters of the State."[77] California claimed title on the basis that a three-mile belt was

[75]The discussion in this section will deal with adjudications respecting both the continental shelf and the territorial sea. The principles upon which the cases have been ultimately decided, generally in favour of the federal claim, are equally applicable to a potential claim by Newfoundland to either its continental shelf or its territorial sea.

[76](1947), 332 U.S. 19; 67 S. Ct. 1658. Hereinafter all citations are to "U.S." report.

[77]*Ibid.*, at 22.

included within the original boundaries of the state. Mr. Justice Black, delivering the opinion of the Court, was impressed by two aspects of the federal position:

> The United States here asserts rights in two capacities transcending those of a mere property owner. In one capacity it asserts the right and responsibility to exercise whatever power and dominion are necessary to protect this country against dangers to the security and tranquillity of its people incident to the fact that the United States is located immediately adjacent to the ocean. The Government also appears in its capacity as a member of the family of nations. In that capacity it is responsible for conducting United States relations with other nations. It asserts that proper exercise of these constitutional responsibilities requires that it have power, unencumbered by state commitments, always to determine what agreements will be made concerning the control and use of the marginal sea and the land under it.[78]

Mr. Justice Black went on to hold that "national interests, responsibilities, and therefore rights, are paramount."[79] He also found against California on the basis of the "equal footing" clause whereby California, as was to be the case with all subsequent entrants to the Union, was admitted in 1849 "on an equal footing with the original States in all respects whatever".[80] As for the status of the territorial sea at the time of the original union, the Supreme Court found that the idea was but "a nebulous suggestion."[81]

In 1950, the U.S. Attorney-General sought a similar declaration against Louisiana and Texas. The *Louisiana* judgment was delivered first, and Mr. Justice Douglas, speaking for the Court[82] did not devote any discussion to the historical issues. A rather brief judgment relied solely upon the paramount federal concerns.

> The marginal sea is a national, not a state concern. National interests, national responsibilities, national concerns are involved. The problems of commerce, national defense, relations with other powers, war and peace focus there. National rights must therefore be paramount in that area.
>
> That is the rationale of *United States* v. *State of California.* It is fully elaborated in the opinion of the Court in that case and does not need repetition.[83]

It is readily apparent in the short majority judgment in the *Louisiana* case that the true rationale of the decision is the Court's concern for

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[78] *Ibid.*, at 29.

[79] *Ibid.*, at 36.

[80] *Ibid.*, at 30.

[81] *Ibid.*, at 32.

[82] Justice Frankfurter, dissenting.

[83] *U.S.* v. *Louisiana* (1950), 339 U.S. 699, at 704; 70 S. Ct. 914, at 916-17.

what it considers to be paramount national rights. If this was not already clear, it became so in the decision of *U.S.* v. *Texas,*[84] handed down by the Court on the same day as the *Louisiana* decision.

The *Texas* case presented a unique historical position. While Louisiana had been forged out of territory purchased by the United States, Texas had been an independent republic prior to joining the Union in 1845. The essential elements of Texas' status at the time of Union are set out by Mr. Justice Douglas in his judgment:

> The Republic of Texas was proclaimed by a convention on March 2, 1836. The United States and other nations formally recognized it. The Congress of Texas on December 19, 1836, passed an act defining the boundaries of the Republic. The southern boundary was described as follows: "beginning at the mouth of the Sabine river, and running west along the Gulf of Mexico three leagues from land, to the mouth of the Rio Grande."[85]

Mr. Justice Douglas concluded that Texas, at the time of Union, had full sovereignty over the marginal sea as well as ownership and control of the underlying wealth and resources. He proceeded to deny its claim to actual sovereignty on the basis of the "equal footing" clause. He held that, whereas the "equal footing" clause had been applied to impliedly augment the powers of some States, the converse was also true; the "equal footing" clause could negate aspects of sovereignty expressly held by States at the time of union. The act of union apparently entailed a relinquishment of sovereignty to the federal government, particularly in the areas of national defence and international relations. It was found to be an incident of that transfer of sovereignty that Texas relinquished all rights to the marginal sea. Perhaps the real concern of the Court is revealed in a comment on the "equal footing" clause:

> The "equal footing" clause prevents extension of the sovereignty of a State into a domain of political and sovereign power of the United States from which the other States have been excluded, just as it prevents a contraction of sovereignty . . . which would produce inequality among States. For equality of States means that they are not "less or greater, or different in dignity or power".[86]

The dissent[87] from this judgment was more vigorous than in the *California* or *Louisiana* cases and Mr. Justice Reed illustrated one of the serious shortcomings in the majority position.

> The needs of defense and foreign affairs alone cannot transfer ownership of an ocean bed from a state to the Federal Government any more

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[84]*U.S.* v. *Texas* (1950), 339 U.S. 707, 70 S. Ct. 918. All citations are to "U.S." Report.

[85]*Ibid.*, at 713.

[86]*Ibid.*, at 719-20.

[87]Justices Frankfurter, Reid, and Mitton dissented. Justices Jackson and Clark took no part in consideration or decision of the case.

> than they could transfer iron ore under uplands from state to federal ownership. National responsibility is no greater in respect to the marginal sea than it is toward every other particle of American territory. In my view, Texas owned the marginal area by virtue of its original proprietorship; it has not been shown to my satisfaction that it lost it by the terms of the Resolution of Annexation.[88]

The position of Mr. Justice Reed is a convincing one. If Texas, recognized as an independent nation by the United States, had jurisdiction over certain offshore areas previous to its union with the United States, it ought to require an express term of union to transfer that jurisdiction to the federal government, rather than a "swinging door" approach to the "equal footing" clause. Dean Roscoe Pound wrote a scathing case comment on the *Texas* decision, adopting the view that there is no logical nor legal reason to treat the *dominium* in the same fashion as the *imperium*. Dean Pound stated: "[t]he proposition is not the common law, is not international law, and is not involved in, much less required by, the constitutional powers and responsibilities of the United States."[89] The United States Congress reacted swiftly to the decisions, enacting in 1953 the *Submerged Lands Act,*[90] extending the seaward boundaries of the states.[91]

Whatever may be the critical comment on this series of decisions, they are instructive on the Newfoundland situation in one respect; they illustrate how a federal court may be motivated by considerations for national concerns which tend to override strict legal analysis.

Australia

In 1975 all six Australian states joined to challenge Commonwealth legislation which claimed sovereign federal jurisdiction over the territorial sea, its bed and the continental shelf.[92] The *Seas and Submerged Lands Act, 1973*[93] purported to be an implementation of the 1958 Geneva *Convention on the Continental Shelf* and the *Convention on the Territorial Sea and Contiguous Zone.* The central provisions of the Act are:

> Part II — Sovereignty and Sovereign Rights
>
> *Division 1 — The Territorial Sea*
>
> 6. It is by this Act declared and enacted that the sovereignty in respect of the territorial sea, and in respect of the airspace over it and in respect of its bed and subsoil, is vested in and exercisable by the Crown in right of the Commonwealth.

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[88]*Ibid.*, at 723.

[89]Pound, R., "Critique on the Texas Tidelands Case", (1951) 3 *Baylor Law Rev.* 120, at 122.

[90]43 U.S.C.A. secs. 1301 *et seq.*

[91]The boundaries of all coastal States are extended to a point three miles seaward of the coast. In the case of Florida and Texas, the seaward boundary in the Gulf of Mexico is three leagues (approx. nine miles) from the coast.

[92]*New South Wales* v. *Commonwealth, supra,* footnote 35.

[93]No. 161 of 1973 (Com.).

Division 2 — The Continental Shelf

> 11. It is by this Act declared and enacted that the sovereign rights of Australia as a coastal State in respect of the continental shelf of Australia, for the purpose of exploring it and exploiting its natural resources, are vested in and exercisable by the Crown in right of the Commonwealth.

The Court was unanimous in holding that the Commonwealth was sovereign with respect to the continental shelf, as none of the colonies prior to 1901[94] had made any claims to such jurisdiction.

Five members of the Court[95] upheld the claim of Commonwealth sovereignty over the bed of the territorial sea. The net result of the decision is that the territory of the Australian states is delimited by the low-water mark or the outer limit of inland waters.[96]

Three of the five majority opinions[97] concluded that the historical issue of the status of the territorial sea was determined by the 1876 decision of the English Exchequer Division in *R.* v. *Keyn.*[98] Both dissenting judgments extensively canvassed the nineteenth century cases and rejected the authority of *R.* v. *Keyn,* one of them characterizing it as "erroneous".[99] Jacobs J. joined the two dissenting justices in rejecting the authority of *Keyn,*[100] upholding the Commonwealth legislation on other grounds. Given the controversial status[101] of *R.* v. *Keyn,* it is not

[94]Australian Confederation was provided for by the *Commonwealth of Australia Constitution Act,* 63 & 64 Vict., c. 12 (U.K.). The union became effective 1 January, 1901.

[95]Gibbs and Stephen JJ. dissenting.

[96]For case comments on *New south South Wales* v. *Commonwealth,* see Goldsworthy, P., (1976) 50 Aust. L.J. 175; also "Crrent Topics", (1976) 50 Aust. L.J. 153. For a discussion of the Australian issue generally, see: O'Connell, D. P., "Problems of Australian Coastal Jurisdiction", (1958) 34 *Brit. Y. B. Intl. Law* 199.

[97]*Per* Barwick C.J., at 8-13; McTiernan J. at 20-22; Mason J. at 84-90.

[98](1876), 2 Ex. D. 63.

[99]*N.S.W.* v. *Commonwealth, supra,* footnote 35, at 37, *per* Gibbs J.

[100]*Ibid.,* at 103-108.

[101]The original decision in *R.* v. *Keyn* was participated in by thirteen judges, each delivering separate judgments, the ultimate majority being 7 to 6. Keyn, a German national, was the commander of the "Franconia", a foreign ship which collided with a British fishing vessel within three miles of the low-water mark. The British vessel sank and Keyn was charged with manslaughter. The issue before the Exchequer Division was whether English courts had either criminal or admiralty jurisdiction to try the commander. With thirteen judgments covering one hundred seventy-six pages a *ratio decidendi* of the case is rather elusive as some judgments are based on common law while others are based on international developments. Two subsequent decisions (*Harris* v. *Franconia* (1877), 46 L.J.Q.B. 363 (Q.B.) and *Blackpool Pier Co.* v. *Fylde Union* (1877), 36 L.T. 251 (C.P.)) found that *Keyn* stands for the proposition that the realm of England extends only to the low-water mark.

The Privy Council, on the other hand, in *Secretary of State for India in Council* v. *Chalikari Rama Rao* (1916), 32 T.L.R. 652; 85 L.J.P.C. 222, restricted the significance of the *Keyn* decision to the issue of the limits of the Admiralty jurisdiction. Lord Shaw, speaking for the Privy Council stated: "It should not be forgotten that that case has reference on its merits solely to the point as to the limits of Admiralty jurisdiction; nothing else fell to be decided there". at 224 (L.J.P.C.); 653 (T.L.R.). See also: O'Connell, D. P., "The Federal Problem Concerning the Maritime Domain in Commonwealth Countries", (1970) 1 *J. Mar. Law & Com.* 389.

surprising that the justices in the majority relied upon alternative grounds to support their decisions.

Murphy J. did not devote any analysis to the historical aspects, relying instead upon the external affairs[102] power of the Commonwealth government. He says of the states: "[e]ven if they had become independent nations before 1901 with the sovereign rights of an international state, on federation they would have lost the territorial seas and other attributes of international personality."[103] Perhaps he reveals his true concern when he says:

> The area of the disputed submarine lands and sub-soil is millions of square kilometres. Their resources are probably worth thousands of billions of dollars. They belong to the nation not to the States. The rights over them are vested in and exercisable by the Government of Australia on behalf of all the people of Australia.[104]

In this passage Murphy J. is raising a point which, whatever its significance in getting the issue before the Court, has absolutely nothing to do with a determination as to which level of government ought to have jurisdiction. While he is the only member of the majority to be so frank one suspects that some of the others may have been motivated by similar concerns. Barwick C.J., after examining the American decisions and the decision of the Supreme Court of Canada in the *B.C. Offshore Minerals Reference,* concluded that the federal interest in offshore jurisdiction was an essential feature of a federation;

> This result conforms, in my opinion, to an essential feature of a federation, namely, that it is the nation and not the integers of the federation which must have the power to protect and control as a national function the area of the marginal seas, the sea-bed and airspace, and the continental shelf and incline. This has been decided by the Supreme Courts of the United States and of Canada. . . . .I can find no reason to differentiate in relevant respects the circumstances of this federation from those of the other great federations.[105]

Another important consideration for Barwick C.J. was the determination that: ". . . once [the] low water mark is passed the international domain is reached."[106] But such considerations are no substitute for a reasoned legal analysis of the sovereignty which the Australian states possessed at the time of union in 1901. If, at that time, they exercised jurisdiction over the waters and sea-bed of the territorial sea, no comparison with Canada or the United States could relieve them

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[102]*Commonwealth of Australia Constitution Act, supra;* footnote 96, s. 51(xxix).

[103]*N.S.W.* v. *Commonwealth, supra,* footnote 35, at 119 *per* Murphy J.

[104]*Ibid.*, at 120.

[105]*Ibid.*, at 16-17, *per* Barwick C.J.

[106]*Ibid.*, at 15.

of it. While comparisons may be instructive for academic purposes, they offer no solution to jurisdictional issues where the relevant considerations are unique historical situations and the particular terms of union. Surely the obtuse "equal footing" argument which deprived Texas of its offshore jurisdiction could not be transposed to resolve the Australian question.

It is submitted that what we are seeing in the Australian situation, as in the United States, is a reliance by national courts upon political considerations which are unnecessary to a determination of what is ostensibly a legal issue.

Canada

Canadian courts, prior to 1963, studiously avoided any comment on the proprietary interest in the sea-bed below the low water mark. The question was raised in *Attorney-General for British Columbia* v. *Attorney-General for Canada*[107] but, as that case dealt with fisheries jurisdiction the Privy Council chose not to consider the proprietary question.

> In the argument before their Lordships much was said as to an alleged proprietary title in the Province to the shore around its coast within a marine league... But their Lordships feel themselves relieved from expressing any opinion on the question whether the Crown has a right of property in the bed of the sea below the low water mark to what is known as the three-mile limit because they are of opinion that the right of the public to fish in the sea has been well established in English law for many centuries and does not depend on the assertion or maintenance of any title in the Crown to the subjacent land.[108]

Similarly the Privy Council again deferred from any discussion of the proprietary issue in *Attorney-General for Canada* v. *Attorney-General for Quebec.*[109]

In 1963, a five member bench of the Nova Scotia Court of Appeal was faced with the issue of whether a municipality could tax undertakings which extend underwater beyond the low water mark. In that case[110] it was the Municipality of the County of Cape Breton attempting to tax the mining operations of Dominion Coal Co. whose operations extended into Spanish Bay beyond the low water mark but not beyond the three-mile limit. A majority of the Court[111] held that

[107][1914] A.C. 153 (P.C.).

[108]*Ibid.*, at 174.

[109][1921] 1 A.C. 401, at 431 (P.C.).

[110]*Re: Dominion Coal Co. Ltd. and County of Cape Breton* (1963), 40 D.L.R. (2d) 593.

[111]Currie J., dissenting.

there was no authority in the municipality to tax beyond its limits. Those limits were defined in an Order in Council of 1824, hence there was no need to enter a debate as to the competence to tax submarine installations within the three-mile limit. MacDonald J. and Currie J., however, entered into the debate and arrived at differing conclusions; the latter taking much the same approach as was later taken by Stephen and Gibbs JJ. in their dissents in the *New South Wales* case. He isolated *Reg.* v. *Keyn* by examining numerous other nineteenth and twentieth century cases expressing a contrary point of view and concluded: "The subsoil in territorial waters belongs to the Provinces rather than to Canada, subject to certain reservations in the *B.N.A. Act.*"[112] MacDonald J., on the other hand, relied upon *Reg.* v. *Keyn* to determine that the boundary of the realm did not extend beyond the low water mark. An interesting comment by MacDonald J. was made in reference to the decision of the U.S. Supreme Court in *U.S.* v. *California:* "[t]he question whether property rights in territorial waters do exist is highly doubtful, and *particularly so in a Federal system.*"[113] This observation is intriguing. The proposition that property rights in the territorial sea bed, whether they exist or not as a concept of international law, might depend on whether the coastal state had a federal system of government as opposed to, say, a unitary one is a perceptive critique of the reasoning in the American decisions. Obviously the existence of a principle of international law is an issue completely independent of the political arrangements in the particular coastal state where it is being adjudicated. That MacDonald J. might have such doubts based on the American cases, however, is understandable.

In April of 1865 the federal government referred to the Supreme Court of Canada the following questions:

> 1. In respect of the lands, including the mineral and other natural resources, of the sea bed and subsoil seaward from the ordinary low-water mark on the coast of the mainland and the several islands of British Columbia, outside the harbours, bays, estuaries and other similar inland waters, to the outer limit of the territorial sea of Canada, as defined in the Territorial Sea and Fishing Zones Act, Statutes of Canada 1964, Chapter 22, as between Canada and British Columbia,
>
> (a) Are the said lands the property of Canada or British Columbia?
>
> (b) Has Canada or British Columbia the right to explore and exploit the said lands?
>
> (c) Has Canada or British Columbia legislative jurisdiction in relation to the said lands?
>
> 2. In respect of the mineral and other natural resources of the sea bed and subsoil beyond that part of the territorial sea of Canada referred to in Question 1, to a depth of 200 metres or, beyond that limit, to where the

[112] *Ibid.*, at 620, *per* Currie J.

[113] *Ibid.*, at 630, *per* MacDonald J. (emphasis added).

depth of the superjacent waters admits of the exploitation of the mineral and other natural resources of the said areas, as between Canada and British Columbia,

(a) Has Canada or British Columbia the right to explore and exploit the said mineral and other natural resources?

(b) Has Canada or British Columbia legislative jurisdiction in relation to the said mineral and other natural resources?[114]

When the issue was heard by the Supreme Court, the provinces of Ontario, Nova Scotia, New Brunswick, Prince Edward Island and Newfoundland intervened on the part of British Columbia. In the result[115] all five questions were answered "Canada".

Questions 2(a) and 2(b), those relating to jurisdiction over the continental shelf, apparently did not give the Court much cause for deliberation. After setting out the Truman Proclamation and the 1958 Geneva *Convention*, the Court, having already determined that the territorial sea was outside the boundaries of British Columbia, concluded: "There is no historical, legal or constitutional basis upon which the Province of British Columbia could claim the right to explore and exploit or claim legislative jurisdiction over the resources of the continental shelf."[116]

It was to the questions respecting the territorial sea that the Court devoted most of its judgment. The decision of the Exchequer Division in *Reg.* v. *Keyn* was heavily relied upon to support a conclusion that, at the time of Confederation in 1871; the realm of England and hence British Columbia, did not extend beyond the lower water mark. Thus the territorial sea lay outside the limits of British Columbia at the time of Confederation, providing a simple answer to the question of jurisdiction in the territorial sea or ownership of the underlying bed. The opinion of Currie J. in *Dominion Coal* was cautiously described as *obiter*. The Privy Council decision in *Secretary of State for India in Council* v. *Chelikani Rama Rao*[117] was referred to but no mention was made of Lord Shaw's delimitation of *R.* v. *Keyn*. The decision of the Newfoundland Supreme

[114]*Re: Offshore Mineral Rights of British Columbia, supra,* footnote 43, at 796 (S.C.R.), 356 (D.L.R.). For discussion of this decision see: Head, I., "The Legal Clamour over Canadian Offshore Minerals", (1967) 5 *Alta. law Rev.* 312; "The Canadian Offshore Minerals Reference", (1968) 18 *U. Toronto L.J.* 131; Caplan, N., "Legal Issues of the Offshore Mineral Rights Dispute in Canada", (1968) 14 *McGill L.J.* 475; Harrison, R., *supra,* footnote 7; and Swan, G. S., "The Newfoundland Offshore claims: Interface of Constitutional Federalism and International Law, (1976) 22 *McGill L.J.* 541.

[115]The decision was The Joint Opinion of The Court.

[116]*Ibid.*, at 821 (S.C.R.), 380 (D.L.R.).

[117]*Supra,* footnote 101.

Court in *Anglo-American Telegraph Co.* v. *Direct United States Cable Co.*[118] was considered but fastidiously circumscribed on the basis that the Privy Council[119] had upheld the judgment on the narrow ground that Conception Bay was within the boundaries of Newfoundland by historic title.[120] The Supreme Court considered some other authorities in a generally unsatisfactory fashion[121] but did not deviate from its finding, mainly on the authority of *R.* v. *Keyn,* that the territory of British Columbia ended at the low water mark at the time of Confederation.

Having reached this conclusion, the Court departed from its technical, historical approach to make brief and oblique allusions to two very broad policy justifications for federal jurisdiction: the federal power to make laws for the "peace, order and good government of Canada"; and the power over external affairs. The reference to the "peace, order and good government" power, completely unattended from the preceding analysis of the case, is styled in almost identical fashion to Viscount Simon's classic formulation of what has come to be known as the "Canada Temperance" test.[122]

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[118](1875), 6 Nfld. Law Rep. 28 (S.C.). In this case the Newfoundland government had granted one of the parties a concession on cable operations "in any part of the territory of Newfoundland." The other party had anchored a cable in Conception Bay but had not passed at any point within three miles of the low-water mark. Hoyles C.J. of the Supreme Court of Newfoundland found for the plaintiff and made the following statement with respect to territorial waters (at 33):

> I hold that the territorial jurisdiction of the sovereign extends to three miles outside of a line drawn from headland of the bay...; that the local government, being the Queen's government, representing and exercising within the limits of the Governor's commission, which contains nothing restrictive upon this point, her authority and jurisdiction is, in this respect, the same with the Imperial government...and that, subject to the royal instructions and the Queen's power of dissent, the Acts of the local legislature have full effect and operation to the full extent of that territorial jurisdiction.

This portion of the judgment of Hoyles C.J. was cited with approval in two subsequent Newfoundland decisions: *Rhodes* v. *Fairweather* (1888), 7 Nfld. Law Rep. 321 (C.A.); and *Queen* v. *Delepine* (1889), 7 Nfld. Law Rep. 378 (S.C.).

[119](1877), 2 App. Cas. 394 (P.C.). No comment was made on the dicta of Hoyles C.J. as the Privy Council based its finding on the fact that Conception Bay was Newfoundland territory by title.

[120]*Re: Offshore Mineral Rights of British Columbia, supra,* footnote 43 at 809 (S.C.R.); 368 (D.L.R.). The Court said the *Conception Bay* case "does not carry with it any general delegation by the British Crown over the territorial sea surrounding Newfoundland."

[121]See Harrison, R. J., *supra,* footnote 7, at 487 where he concludes: "The reasoning of the Supreme Court of Canada in *Re: Offshore Mineral Rights of British Columbia,* at least with respect to the territorial sea, is clearly open to challenge, particularly in its interpretation of *Keyn* and its avoidance of the contrary authority, most notably the observations of the Privy Council in *Chalikani.*"

Also the judgment of Stephen J., in *New South Wales* v. *Commonwealth, supra,* footnote 35, at 64 where he says of the Canadian decision: "The court was much influenced by its view of *Keyn's Case* but did, in my respectful opinion, misconceive the issues in that case."

[122]*Attorney General for Ontario* v. *Canada Temperance Federation,* [1946] A.C. 193, at 205 (P.C.). "In their Lordships' opinion, the true test must be found in the real subject matter of the legislation: if it is such that it goes beyond local or provincial concern or interests and must from its inherent nature be the concern of the Dominion as a whole...then it will fall within the competence of the Dominion Parliament as a matter affecting the peace, order, and good government of Canada...." *per* Viscount Simon. See Hogg, P. W., *Constitutional Law of Canada* (1977), at 257-62.

> Legislative jurisdiction with respect to such lands must, therefore, belong exclusively to Canada, for the subject matter is one not coming within the classes of subjects assigned exclusively to the legislatures of the provinces within the meaning of the initial words of s. 91 and may, therefore, properly be regarded as a matter affecting Canada generally and covered by the expression "the peace, order and good government of Canada".
>
> The mineral resources of the lands underlying the territorial sea are of concern to Canada as a whole and go beyond local or provincial concern or interests.[123]

This isolated reference to the "peace, order and good government" power without any discussion as to why offshore resources go beyond local or provincial concern is totally unsatisfactory. There is no analysis of the competing national and local interests so as to lead to the conclusion that this subject matter is one of concern to Canada as a whole to the exclusion of provincial jurisdiction. Neither is there any analysis of what is so unique about offshore natural resources to exclude them from one of the classes of subjects reserved to the provinces. To exclude provincial jurisdiction in matters where there are compelling arguments of national concern may be necessary in a federal system. To hold in favour of federal jurisdiction by a bare citation of the "peace, order and good government" power is unacceptable.

Having dealt briefly with the "national dimensions" of the subject matter, the Court alluded equally cryptically to the ability of the federal government to enter into international agreements.

> Moreover, the rights in the territorial sea arise by international law and depend upon recognition by other sovereign states. Legislative jurisdiction in relation to the lands in question belongs to Canada which is a sovereign state recognized by international law and thus able to enter into arrangements with other states respecting the rights in the territorial sea.
>
> Canada is a signatory to the *Convention on the Territorial Sea and Contiguous Zone* and may become a party to other international treaties and conventions affecting rights in the territorial sea.[124]

To say that federal government has jurisdiction because it was the one to enter into the treaties ignores the basic issue. Of course it was the federal government which entered into the international arrangements because in 1958 the federal government was the only level of government in Canada capable of undertaking such arrangements. But that does not provide a response to the question of which level of government has jurisdiction once it is recognized that *Canada*[125] has such a right at international law.

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[123] *B.C. Offshore Minerals Reference, supra,* footnote 43, at 817 (S.C.R.), 376 (D.L.R.).

[124] *Ibid.*

[125] See Ecuyer, G. L., *La Cour suprême du Canada et le Partage des Compétences 1949-78* (1978), at 298. "Le passage. . .illustre comment, dans cette affaire, la Cour Suprême a pu confondre 'Canada' et 'gouvernement fédéral'."

What these two passages reveal, especially in light of the inadequate analysis of the historical issue, is that the Supreme Court of Canada in the *B.C. Reference* was motivated by political considerations which were not acknowledged by the Court. Given the similar disposition of the courts in Australia and the United States to be swayed by "paramount national concerns"[126] and "essential feature[s] of a federation";[127] it is apparent that a province such as Newfoundland, without a watertight technical case, would run considerable risk in seeking an adjudication if similar political considerations were to prevail again in the Supreme Court of Canada.

The Effect of Term 37 of the Terms of Union

Newfoundland might argue that, even if the principle of coastal state jurisdiction became a fact after 1949, the jurisdiction would still accrue to it by virtue of the Confederation arrangements. The provision of the *Terms of Union* which is most applicable is *Term 37:*

Natural Resources.

> 37. All lands, mines, minerals, and royalties belonging to Newfoundland at the date of Union, and all sums then due or payable for such lands, mines, minerals, or royalties, shall belong to the Province of Newfoundland, subject to any trusts existing in respect thereof, and to any interest other than that of the Province in the same.[128]

There are two impediments to an argument that this provision is decisive. The word "belonging" implies ownership. The resources of the continental shelf do not *belong* to either Canada or Newfoundland. The coastal state has sovereign rights respecting the exploration and exploitation of the resources of the continental shelf but it does not *own* them. The more serious objection to reliance upon *Term 37* is the phrase "at the date of Union". The effect of these words is a direct reversion to the historical analysis: did or did not Newfoundland enjoy jurisdiction at the time of Confederation. *Term 37* therefore appears to be of little assistance in meeting the situation where it might be held that coastal state jurisdiction emerged after Confederation, unless it is possible to contend that by implication, as between the two levels of government, Newfoundland has a general jurisdiction over natural resources. At this point, however, we are getting into the realm of purely political considerations and if the Supreme Court of Canada was to adopt the same view as it did in the *B.C. Reference* with respect

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[126] *U.S.* v. *Louisiana, supra,* footnote 83, at 917, (S. Ct.) *per* Douglas J.

[127] *N.S.W.* v. *Commonwealth, supra,* footnote 35, at 16, *per* Barwick C.J.

[128] *Schedule, Terms of Union of Newfoundland with Canada, supra,* footnote 72.

to "national concerns"[129] it might not be so impressed with the logic of an argument for symmetry, *i.e.* that if provinces have jurisdiction over onshore natural resources, the same policy should apply to offshore resources.

The net effect is that *Term 37* is not of much assistance in resolving the offshore issue. If coastal state jurisdiction was customary before 1949, the jurisdiction would remain with Newfoundland in the absence of an express provision to the contrary whether or not *Term 37* is interpreted as being inapplicable due to the use of the word "belonging".[130] On the other hand, since it would have no direct bearing on developments subsequent to Confederation, the basic issue is still whether or not Newfoundland was entitled to jurisdiction over offshore resources prior to March 31, 1949.

CONCLUSIONS

— It is not likely that the concept of coastal state jurisdiction over the natural resources of the continental shelf could be said to have been customary at international law before March 31, 1949.

— If such jurisdiction is found to have been customary by that time, it is likely that Newfoundland, based on its pre-1934 Dominion status, had sufficient external sovereignty to succeed to such jurisdiction.

— Given the federalist predilection of the Supreme Court of Canada in the *B.C. Reference* and of federal courts in Australia and the United States in similar matters, it is unlikely that anything but a watertight provincial case would succeed.

What has become clear in the foregoing discussion is that the legal issues in an adjudication would be abstract and extremely technical. It is

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[129] *B.C. Offshore Minerals Reference, supra,* footnote 43, at 817 (S.C.R.), 326 (D.L.R.). The relevant provision in the B.C. situation is s. 109 of the *B.N.A. Act 1867:*

> 101. All lands, mines, minerals and royalties belonging to the several Provinces of Canada, Nova Scotia, and New Brunswick at the Union, and all sums then due or payable for such lands, mines, minerals, or royalties, shall belong to the several Provinces of Ontario, Quebec, Nova Scotia, and New Brunswick in which the same are situate or arise, subject to any trusts existing in respect thereof, and to any interest other than that of the Province in the same.

This provision applies to British Columbia by virtue of Term 10 of the *Terms of Union* of British Columbia which says that the provisions of the *B.N.A. Act 1867* shall apply to B.C. unless otherwise stated. See *Order in Council Admitting British Columbia Into the Union,* May 16, 1871 in R.S.C. 1970, App. II, No. 10.

[130] In *Attorney General for Canada* v. *Attorneys General for the Provinces of Ontario, Quebec, and Nova Scotia,* [1898] A.C. 700, the Privy Council took a very strong position against transfer of proprietary interests by implication. "There is no presumption that because legislative jurisdiction was vested in the Dominion Parliament proprietary rights were transferred to it. The Dominion of Canada was called into existence by the *British North America Act, 1867.* Whatever proprietary rights were at the time of the passing of that Act possessed by the provinces remain vested in them except such as are by any of its express enactments transferred to the Dominion of Canada." *per* Lord Herschell at 709-10. While the interest in the minerals of the continental shelf may not strictly qualify as proprietary, the analogy between proprietary rights and "sovereign rights" is a most compelling one.

doubtful whether such considerations are worthy of prevailing in deciding a matter of such consequence for the future of our country. The real considerations are political, not legal; the only satisfactory solution will be achieved by accommodation, not adjudication. Our political leaders might be well advised to take counsel from Lord Denning M.R. who, quoting Shakespeare, cautioned: ". . . we must take the current when it serves or lose our ventures."[131]

[131] *Trendtex Trading Corporation Ltd.* v. *Central Bank of Nigeria*, [1977] 1 All E.R. 881, at 891. (C.A.) *per* Lord Denning M.R., quoting from Shakespeare, *Julius Caesar*, IV, iii, 222.