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There has been a great deal of conflict in federal systems between the central and peripheral governments pertaining to jurisdiction over offshore lands. The central focus of this struggle has been control over offshore energy resources. This conflict occurred between the federal and provincial governments in Canada. One of the major battles in the Canadian controversy involved the federal government and the provincial government of Newfoundland.[1]

Newfoundland claimed jurisdiction over its territorial sea and continental shelf. The offshore lands claimed by Newfoundland comprised 700,000 square miles, an area five times larger than its land mass. Newfoundland estimated that its continental shelf contained forty trillion cubic feet of natural gas and three and a half billion barrels of oil.[2]

Newfoundland was very concerned with the development of its offshore energy resources. Newfoundland, seeking to avoid social and economic disruptions, wanted development to occur at a pace and in a manner that would benefit the province. Newfoundland hoped that offshore energy development would provide a stimulus for economic development which would enable the province to contribute to the Canadian confederation.[3] The federal government, however, opposed Newfoundland's assertion of jurisdiction.

When negotiations failed to resolve the controversy, litigation involving questions of British Commonwealth law, Canadian constitutional law, and international law ensued. The Newfoundland Court of Appeal held that Newfoundland had jurisdiction over the submerged lands beneath its territorial sea.[4] The Supreme Court of Canada, as well

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[1] This conflict has also occurred in the United States, Fitzgerald, *The Tidelands Controversy Revisited*, 19 ENVTL L. REV. 209 (1988), and in Australia, New South Wales v. Commonwealth 8 A.L.R. 1 (1975).

[2] DEP'T OF MINES & ENERGY, NEWFOUNDLAND AND LABRADOR, HERITAGE OF THE SEA. . .OUR CASE ON OFFSHORE MINERAL RIGHTS 2 (1982) [hereinafter HERITAGE OF THE SEA].

[3] *Id.* at 6-10.

[4] Reference Re Mineral and Other Natural Resources of the Continental Shelf, 145 D.L.R.3d 9, 20-36, 41 (1983).

as the Newfoundland Court of Appeal,[5] found that Newfoundland did not possess jurisdiction over the continental shelf.[6]

This article will demonstrate that the Canadian Supreme Court's decision was erroneous. Newfoundland achieved dominion status under the Balfour Declaration in 1926. As a dominion, Newfoundland inherited the rights which the Crown claimed for the province, including rights in the territorial sea. Newfoundland exercised jurisdiction over the territorial sea before and after attaining dominion status. Newfoundland did not surrender any property rights to the Commission government which ruled Newfoundland between 1934 and 1949. Even if Newfoundland had relinquished such rights, Term 7 of the Terms of Union restored Newfoundland's Constitution as it had existed prior to Commission government in 1934. Term 7 granted Newfoundland any property rights that were recognized up to the time of confederation. Prior to confederation, continental shelf rights emerged as a principle of customary international law. Term 37 of the Terms of Union allowed Newfoundland to retain "all lands, mines, minerals, and royalties belonging to Newfoundland at the date of Union." When Newfoundland confederated with Canada in 1949, Newfoundland retained rights over the territorial sea and the continental shelf.

I. THE NEWFOUNDLAND OFFSHORE REFERENCE

Offshore petroleum development in Canada first occurred under provincial authority off the coast of Prince Edward Island in 1943. The province of British Columbia began issuing permits for offshore energy exploration in 1949. Federal licensing of offshore operations began in 1960, two years after the signing of the Convention on the Continental Shelf. The federal regulations declared provincial permits invalid and instructed holders of provincial permits to apply for federal licenses.[7] The provinces did not accede to the usurpation of provincial authority. In 1960, Nova Scotia required Socony Mobile of Canada to obtain provincial permits for offshore energy development on over one million acres off the shore of Sable Island. In 1963, Nova Scotia informed Shell Oil that the province did not recognize federal jurisdiction over offshore energy development.[8] Negotiations between the federal and provincial governments proved futile.

The federal government sought to resolve the conflict by referring

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[5] *Id.* at 36-41.

[6] Reference Re the Seabed and Subsoil of the Continental Shelf Offshore Newfoundland, 5 D.L.R.4th 385, 419 (1984).

[7] Gault, *Jurisdiction over the Petroleum Resources of the Canadian Continental Shelf: The Emerging Picture*, 23 ALTA. L. REV. 75, 80 (1985).

[8] Treby, *The Role of the Political Idiom in Jurisdictional Conflicts Over Offshore Oil and Gas*, 5 J. MAR. L. & COM. 281, 292 (1974).

the jurisdictional question to the Supreme Court of Canada. The Supreme Court of Canada was a general court of appeals which provided for the better administration of the laws of Canada. The Supreme Court of Canada could issue advisory opinions and consider questions of law and fact that were relevant to the Canadian constitution and had been referred to it by the Governor in Council.[9] On April 26, 1965, the Governor-in-Council, by an order of Council, asked the Supreme Court of Canada to determine whether the submerged lands beneath the territorial sea were the property of British Columbia or Canada and whether British Columbia or Canada had the right to explore and exploit the seabed and subsoil of the continental shelf.[10]

While awaiting the decision, the federal and provincial governments were active. Each of the maritime provinces - New Brunswick, Newfoundland, Nova Scotia, and Prince Edward Island-issued exploratory permits for offshore energy resources. British Columbia annexed an area of the seabed which was equal to one-half of its land mass. The federal government continued to issue exploration permits under the federal regulations. By the summer of 1967, federal exploration permits were issued for over two hundred and eighteen million offshore acres. The double licensing requirement was very expensive for the energy companies which, out of caution, complied with both provincial and federal regulations.[11]

In November 1967, the Supreme Court of Canada rendered its decision in *Reference Offshore Mineral Rights of British Columbia*.[12] The Supreme Court of Canada rejected British Columbia's claim of jurisdiction over the territorial sea and the continental shelf.[13] The Court, relying on the rationale of *The Queen v. Keyn*,[14] held that the provincial boundary ended at the low water mark.[15] The provincial boundary could have been extended by Parliament, but was not. Since the territorial sea was outside of British Columbia, the province lacked jurisdiction over the area. After British Columbia confederated with Canada in 1871, the Crown's rights in the territorial sea which were claimed for British Columbia became Crown rights held for Canada.[16] The Crown's rights

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[9] Rubin, *The Nature, Use and Effect of Reference Cases in Canadian Constitutional Law*, 6 MCGILL L. J. 168 (1960); Russel, *The Jurisdiction of the Supreme Court of Canada*, 6 OSGOODE HALL L.J. 1, 10-11 (1968).

[10] Reference re Ownership of Off-Shore Mineral Rights of British Columbia, 1967 S.C.R. 792, 65 D.L.R.2d 353 (1968).

[11] Head, *The Canadian Offshore Minerals Reference: The Application of International Law to a Federal Constitution*, 18 U. TORONTO L. J. 131, 134 (1968).

[12] 1967 S.C.R. 792, 65 D.L.R.2d 353.

[13] *Id.*

[14] 2 Ex. D. 63 (1876).

[15] 1967 S.C.R. at 817, 65 D.L.R.2d at 376.

[16] 1967 S.C.R. at 815 65 D.L.R.2d at 373.

were transferred to Canada upon independence which occurred between 1919 and 1931.[17] Furthermore, the Court determined that since continental shelf rights were sovereign rights, not property rights, Canada was entitled to such rights.[18]

Canadian interest in offshore energy development diminished after the British Columbia Offshore Reference. In 1972 the federal government declared a moratorium on offshore development off the coast of British Columbia for environmental protection.[19] In 1976 the British Columbia Court of Appeal in *Reference re Ownership of the Bed of the Strait of Georgia and Related Areas*[20] found that the province held title to the seabed and subsoil which lies between Vancouver Island and mainland British Columbia. The Court distinguished the Georgia Strait Reference from the British Columbia Offshore Reference on the grounds that the British Columbia Offshore Reference only dealt with sovereign rights over the territorial sea and continental shelf, not jurisdiction over the lands beneath inland waters.[21] The federal government appealed the decision to the Canadian Supreme Court, which upheld the appellate court's decision.[22]

The conflict over offshore energy resources was also underway in the Atlantic provinces. At a federal-provincial conference in 1964, the four Atlantic provinces established their maritime boundaries.[23] The federal government asserted that the British Columbia Offshore Reference had resolved the Atlantic provinces claims, but the federal government was willing to negotiate with the Atlantic provinces concerning offshore management and revenue sharing.[24]

In 1977, a Memorandum of Understanding (MOU) was reached between the federal government and the maritime provinces of New Brunswick, Nova Scotia, and Prince Edward Island.[25] The MOU was designed

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[17] *Id.* at 374-75, 1967 S.C.R. at 815-16.

[18] 1967 S.C.R. at 817-21, 65 D.L.R.2d at 376-80.

[19] Gault, *supra* note 7, at 81.

[20] 1 B.C.L.R. 97 (1976) [hereinafter Georgia Strait Reference].

[21] *Id.* at 103-04.

[22] Attorney General of Canada v. Attorney General of British Columbia, 4 W.W.R. 289 (1984).

[23] Gault, *supra* note 7, at 81.

[24] *Id.*

[25] The MOU provided for the establishment of a Mineral Offshore Resource Board which was comprised of six members: three federal and one from each province. The offshore area was divided into two areas by a line drawn at least five kilometers seaward of the low water mark. Areas landward of the line were to be administered by the province or the Board if so designated. The provinces would receive all of the revenues derived from this area. The area seaward of the line was to be administered by the Board. The federal government would receive twenty-five percent of the revenues. The remaining seventy-five percent of the revenues would be divided among the provinces according to their boundaries and subject to a regional revenue sharing pool which was established by the agreement. Nova Scotia would receive all of the revenues derived from development off Sable

to be the beginning of a more comprehensive agreement. Nova Scotia withdrew from the agreement when Premier Buchanan came to power.[26] Nova Scotia's decision to withdraw was encouraged by the federal Conservative government, which was in power in 1979-80. Conservative Prime Minister Clarke expressed his intent to place the administration of offshore energy development in the hands of the provinces, which would receive all of the revenues derived from production. The Conservatives, however, soon lost power. Their Liberal successors did not support provincial jurisdiction, but advocated cooperation and revenue sharing.[27]

In March 1982, Canada and Nova Scotia concluded an agreement providing for joint management and revenue sharing.[28] Both parties were satisfied with the agreement. The agreement gave the federal government some leverage to persuade Newfoundland to seek a political solution to the conflict. The federal government was less confident in its legal claims against Newfoundland than in those against Nova Scotia.[29] From the provincial perspective, Nova Scotia feared a negative judicial decision. The province needed economic activity to counter a recession. Nova Scotia was also worried that if Newfoundland's offshore energy resources were developed first, all of the energy industry's attention would be directed at Newfoundland at the expense of Nova Scotia's natural gas production.[30]

Island. Gault, *Recent Developments in the Federal-Provincial Dispute Concerning Jurisdiction Over Offshore Petroleum Resources*, 21 ALTA. L. REV. 97, 104-05 (1983).

[26] *Id.* at 106.

Nova Scotia was critical of the agreement for several reasons. First, Nova Scotia was unsatisfied with the 75/25% split. Nova Scotia asserted that when federal income tax was factored in, the resulting division would be one third provincial and two thirds federal with the federal government retaining effective control over regulation and administration. Second, Nova Scotia was critical of having only one member on the Board when 95% of the resources were off its shore. Finally, Nova Scotia was doubtful that the federal government would honor the most favored province clause.

[27] Gault, *supra* note 7, at 83.

[28] The federal government was granted jurisdiction over offshore energy development. Nova Scotia agreed to accept the federal licensing system (COGA), the federal legal regime for management (OGPCA), and the federal administration system (COGLA). The Federal Minister of Energy, Mines, and Resources would develop offshore regulations. The province received a percentage of the federal governments 25% interest under COGA, 50% of the Crown's share of the natural gas, and 25% of the Crown's share of oil reserves. The province was guaranteed sufficient quantities of oil and gas from the scotian shelf to cover its present and future needs. The province was to receive other revenues until it achieved the status of a "have" province, at which time these revenues would be distributed as revenue sharing. Furthermore, if the federal government entered into a more favorable agreement with any other province, Nova Scotia had the right to substitute that agreement for the present agreement. Gault, *supra* note 25, at 106-08.

[29] Doucet, *Canadian-Nova Scotia Offshore Agreement: One Year Later*, 22 ALTA. L. REV. 132, 133 (1984). *See also*, MacDonald & Thompson, *The Atlantic Accord: The Politics of Compromise*, 24 ALTA. L. REV. 61 (1985).

[30] Doucet, *supra* note 29; MacDonald & Thompson, *supra* note 29.

Newfoundland had withdrawn from the federal-provincial negotiations early in the process to pursue an independent path. On October 24, 1977, Newfoundland enacted offshore regulations which provided for: 1) preference for Newfoundland labor, goods, and services; 2) compulsory training, research, and development programs in the province; 3) the landing in the province of any oil and gas produced offshore; 4) minimum expenditures within the province; 5) preference for local refining, processing, and consumption of oil and gas; and 6) provincial control over the rate of development.[31] On March 1, 1978, Newfoundland's Minister of Mines and Energy announced the issuance of the first permit to Shell Resources Limited under the new regulations.[32] Other permits soon followed.[33]

Negotiations between the federal government and Newfoundland continued. Newfoundland proposed that the revenues derived from offshore energy development should be allocated in such a manner that Newfoundland could achieve a level of economic maturity and independence which was comparable to Alberta, Ontario, or British Columbia. Newfoundland suggested that the management of offshore areas should be entrusted to a joint agency, be operated under regulations agreed to by the parties, and be administered by an executive body comprised of three federal and two provincial appointees (with a jointly appointed chair). Each government would retain a degree of exclusive control, but each would be required to justify unilateral action based upon joint criteria.[34] The federal government was amenable to provincial participation and revenue sharing, but would not relinquish control over offshore development.[35]

The negotiations between the federal government and Newfoundland became strained in 1982 as a result of the litigation in *Re Seafarers' Int'l Union of Can. v. Crosbie Offshore Services Ltd.*[36] This case arose when the Canadian Labor Relations Board (CLRB) refused to consider an application by Seafarers' International Union to be certified as the bargaining agent for some of the workers employed by Crosbie, an offshore supply vessel.[37] The CLRB determined that it lacked jurisdiction because the Newfoundland Labour Relations Board was considering applications by other unions concerning the certification of the same work-

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31 Harrison, *Natural Resources and the Constitution: Some Recent Developments and Their Implications for the Future Regulation of the Resource Industries*, 18 ALTA L. REV. 1, 15 (1980).

32 *Id.* at 16.

33 *Id.*

34 Gault, *supra* note 25, at 110.

35 *Id.*

36 135 D.L.R.3d 485 (F.C.A. 1982).

37 *Id.* at 486.

ers.[38] When the issue came before the Federal Court, the Attorney General of Canada intervened on behalf of the Union.[39] The Attorney General of Canada asserted that the controversy should be resolved in favor of the CLRB because the federal government had jurisdiction over all aspects of offshore energy operations, including offshore oil and gas exploration and development.[40] The Attorney General of Newfoundland intervened on behalf of Crosbie, alleging that, since Crosbie's actions were local, Newfoundland had jurisdiction over the question.[41] Furthermore, the issue of jurisdiction over offshore energy resources was irrelevant to the question presented.[42]

The Federal Court held that the CLRB's decision was incorrect because Crosbie's activities were subject to federal jurisdiction with respect to shipping. The Court avoided the jurisdictional issue regarding offshore energy resources because it was not germane to the case.[43] Nevertheless, the federal government's attempt to broaden the dispute[44] angered Newfoundland because it demonstrated bad faith in the negotiations. Newfoundland recognized that the question of jurisdiction over offshore energy resources would have to be resolved by the courts. On February 28, 1982, the Lt. Governor of Newfoundland requested the Newfoundland Court of Appeal to determine whether the federal or provincial government had jurisdiction over offshore energy resources.[45] On May 19, 1982, the federal government responded by asking the Canadian Supreme Court to decide whether the federal or provincial government had jurisdiction over the Hibernia oil field which was located one hundred and seventy miles east south-east off St. John's, Newfoundland.[46]

The Newfoundland Court of Appeal recognized that the British Columbia Offshore Reference was controlling, but found that the constitutional, historical, and legal changes from 1871 to 1949 produced different

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38 *Id.*

39 *Id.*

40 *Id.* at 487.

41 *Id.*

42 Gault, *supra* note 25, at 111.

43 *Id.*

44 *Id.*

45 The following question was presented:

> Do the lands, mines, minerals, royalties or other rights, including the right to explore and exploit and the right to legislate, with respect to the mineral and other natural resources of the seabed and subsoil from the ordinary low-water mark of the Province of Newfoundland to the seaward limit of the continental shelf or any part thereof belong or otherwise appertain to the Province of Newfoundland?

145 D.L.R.3d at 9.

46 The federal government restricted the court's inquiry to the Hibernia oil field because offshore development was stalled as a result of the jurisdictional dispute. Gault, *supra* note 25, at 111.

conclusions regarding Newfoundland.[47] The Newfoundland Court of Appeal determined that Newfoundland achieved dominion status under the Statute of Westminster in 1931.[48] Newfoundland, as a sovereign state, exercised jurisdiction over its territorial sea.[49] The Commission government which ruled Newfoundland from 1934 through 1949 did not revoke Newfoundland's sovereignty. Newfoundland was not reduced to colonial status, nor were its rights over the territorial sea affected.[50] The Terms of Union did not restrict Newfoundland's jurisdiction to land territory.[51] Consequently, Newfoundland had jurisdiction over the submerged lands beneath its territorial sea.[52]

The Newfoundland Court of Appeal found that continental shelf rights were recognized by international law in 1949 and Newfoundland, as a sovereign state, could have acquired such rights.[53] International law did not, however, establish such rights for municipal purposes. The Court held that such rights had to be asserted.[54] Since Newfoundland never claimed rights over the continental shelf, it did not have jurisdiction over continental shelf resources.[55]

The Supreme Court of Canada's decision followed the Newfoundland Court of Appeal's decision. Because of the question posed, the Supreme Court of Canada did not address the issue of jurisdiction over the territorial sea.[56] The Supreme Court of Canada arrived at the same conclusion as the Newfoundland Court of Appeal regarding the continental shelf, but for different reasons. The Supreme Court of Canada found that Newfoundland had achieved sovereign status as a dominion.[57] Newfoundland, however, surrendered all attributes of sovereignty and returned to its former colonial status during the Commission government.[58] During this time, Newfoundland was incapable of acquiring continental shelf rights. Any continental shelf rights acquired by the Commission government were held by the Crown in right of Great Brit-

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47 145 D.L.R.3d at 14-20.

48 *Id.* at 24-29.

49 *Id.* at 29-31.

50 *Id.* at 31-34.

51 *Id.* at 34-36.

52 *Id.* at 41.

53 *Id.* at 40.

54 *Id.* at 40-41.

55 *Id.*

56 Gault, *supra* note 25 at 111. The question posed to the court was:

In respect of the mineral and other natural resources of the seabed and subsoil of the continental shelf, in the area offshore Newfoundland. . .has Canada or Newfoundland (1) the right to explore and exploit the said mineral and other natural resources, and (2) legislative jurisdiction to make laws in relation to the exploration and exploitation of the said mineral and other natural resources?

57 5 D.L.R.4th at 401-03.

58 *Id.* at 403-06.

ain.[59] Even if Newfoundland had acquired continental shelf rights, it would have forfeited such rights, which were an attribute of external sovereignty, upon confederation with Canada.[60] Under the Terms of Union, Newfoundland's jurisdiction was restricted to areas within provincial boundaries.[61]

The Supreme Court of Canada also determined that continental shelf rights were not recognized by international law in 1949.[62] Such rights did not receive international recognition until the Convention on the Continental Shelf in 1958.[63] At that time, rights over the continental shelf accrued to Canada as the external sovereign.[64] Furthermore, the International Court of Justice decision in the North Sea Continental Shelf Cases held that continental shelf rights existed *ipso facto* and *ab initio* only after the signing of the Continental Shelf Convention in 1958.[65]

II. NEWFOUNDLAND'S DOMINION STATUS

The Supreme Court of Canada examined Newfoundland's status as a colony, dominion and province to determine Newfoundland's rights under British Commonwealth law, Canadian constitutional law and international law. The Supreme Court of Canada correctly decided that Newfoundland possessed sufficient external sovereignty between the Balfour Declaration in 1926 and Commission government in 1934 to claim existing offshore rights.[66]

Newfoundland was discovered by John Cabot in 1497. In 1583, England acquired Newfoundland and governed it by Royal prerogative.[67] In 1610, the Crown Charter granted Newfoundland ownership over the "sea and islands lying within ten leagues of any part of the coast."[68] In 1729, the first governor of Newfoundland was appointed with "extensive but defined powers [over] a definite area of land."[69] Beginning in 1791, Newfoundland had its own judicial system which exercised jurisdiction over "crimes and misdemeanors committed on the Banks of Newfoundland or arm of the seas or islands to which Ships or

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59 *Id.* at 406.
60 *Id.* at 407.
61 *Id.* at 409-10.
62 *Id.* at 410-11.
63 *Id.* at 411.
64 *Id.* at 417-18.
65 *Id.* at 417-19.
66 *Id.* at 401-03.
67 145 D.L.R.3d at 24.
68 *Id.*
69 *Id.*

Vessels depart from Newfoundland for carrying on fisheries."[70] The Newfoundland Supreme Court was established in 1824 and the Newfoundland legislature was formed in 1833.[71] In 1844, Newfoundland was entitled to the beneficial uses and proceeds from public lands. By 1855, Newfoundland had a responsible government which exercised jurisdiction over its territorial sea for various purposes, such as customs and fishing. Even though Newfoundland was a self-governing colony, Newfoundland did not possess external sovereignty. Newfoundland relied on Great Britain to conduct its foreign relations and international affairs.[72]

In the early twentieth century, the British Empire began to evolve into the British Commonwealth, which was recognized as a community of free nations or dominions united under a common sovereign. The growing independence of the Commonwealth nations was recognized in Imperial Conferences in 1923, 1926 and 1930.[73] The Balfour Declaration, which was announced at the Imperial Conference in 1926, declared the Commonwealth nations to be "autonomous communities within the British Empire, equal in status, in no way subordinate one to another 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."[74]

Another significant convention which was recognized by the Imperial Conference in 1926 asserted that the Governor of Newfoundland

> . . .is the representative of the Crown, holding in all essential respects the same position in relation to the administration of public affairs in the Dominion as is held by His Majesty the King in Great Britain, and that he is not the representative or agent of His Majesty's Government in Great Britain or of any Department of that Government.[75]

The Balfour Declaration established Newfoundland's dominion status.[76] The Balfour Declaration recognized the autonomy and equality of the dominions which had responsibility for their domestic and foreign affairs. The relationship between the dominions and Great Britain was described by Sir Cecil Hurst as follows:

> The equality in status is not inconsistent with the continued existence of legal rights now vested in the Parliament of Great Britain, or in the ministers of the crown in Great Britain which are not vested in the

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[70] *Id.*

[71] *Id.*

[72] *See generally*, HERITAGE OF THE SEA, *supra* note 2; 145 D.L.R.3d at 24-25; Factum of the Attorney General of Newfoundland, at 10-12; 5 D.L.R.4th at 385.

[73] 145 D.L.R.3d at 25.

[74] *Id.*

[75] *Id.*

[76] W. GILMORE, NEWFOUNDLAND AND DOMINION STATUS: THE EXTERNAL AFFAIRS COMPETENCE AND INTERNATIONAL LAW STATUS OF NEWFOUNDLAND, 1855-1934 206-227 (1988).

> dominion parliaments or ministers, provided that those rights are only exercised in respect of any dominion in accordance with the wishes of the parliament or the people or the government of the dominion concerned.[77]

The Statute of Westminster in 1931 formally acknowledged the sovereignty of the dominions and adjusted the legal forms to reflect existing principles of autonomy and equality.[78] The preamble stated "that the British Commonwealth is a free association of members united by a [common] allegiance to the Crown."[79] Section 1 enumerated Newfoundland among the British dominions. Section 2 stated that the Colonial Law Validity Act was not applicable to the dominions and dominion laws would not be void for repugnance with the Act. Section 3 granted dominions the authority to enact laws with extraterritorial application. Section 4 provided that no future law of Great Britain would apply to a dominion without is express approval. Sections 5 and 6 declared that certain laws of Great Britain were no longer applicable to dominion nations. Section 10, which was inserted at the request of the affected dominions, stated that sections 2 through 6 would not apply to Australia, Newfoundland and New Zealand.[80] These dominions could later adopt these sections which would "be retroactive to any date to and including the date of enactment of the *Statute of Westminster*, 1931."[81]

The Statute of Westminster was declarative, not constitutive, of Newfoundland's sovereign status.[82] Even though certain sections of the Statute were not applicable to Newfoundland, the preamble recognized "the established constitutional position" of the dominions. The High Court of Australia held that the "established position" of the dominions was "recognized rather than created by the Statute of Westminster."[83] The Supreme Court of Canada implicitly accepted this position in the British Columbia Offshore Reference by declaring that Canada had attained sovereignty between 1919 and 1931.[84]

From 1926 through 1934, Newfoundland possessed the same degree of sovereignty as other dominions,[85] but was the least internation-

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77 *Id.* at 217.

78 145 D.L.R.3d at 26.

79 *Id.*

80 *Id.*

81 *Id.*

82 GILMORE, supra note 76, at 206-17; *see also* Kovach, *An Assessment of the Merits of Newfoundland's Claim to Offshore Resources*, 23 CHITTY'S L.J. 18, 19 (1975).

83 Regina v. Burgess, Exp. Henry (1936), 55 C.L.R. 608 (H.C. of A.), *per* Latham C.J., at 635, *cited in* 145 D.L.R.3d at 28.

84 British Columbia Offshore Reference, *supra* note 10, 1967 S.C.R. 792, 816, 65 D.L.R.353, 375 (1967).

85 145 D.L.R.3d at 9, 26, 28. Lauterpacht described the status of dominions during this period:

ally active dominion.[86] Despite its eligibility, Newfoundland did not join the League of Nations.[87] Newfoundland allowed Great Britain to conduct its foreign policy.[88] Nevertheless, the Newfoundland Court of Appeal recognized that

> Newfoundland had the constitutional capacity to assume full responsibility for its external relations, free from external control, had it desired to do so. The only practical effect of Newfoundland's voluntarily relinquishing to His Majesty's Government in Great Britain the right to conduct her foreign affairs was that His Majesty's Government provided the appropriate diplomatic channel. Newfoundland's consent had to be obtained before anything could be done in her name. In short, before the introduction of the Commission of Government in 1934, Newfoundland had the same degree of sovereignty as that enjoyed by the Dominion of Canada and the Common-

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> Though not States, they were subjects of international law. This attribution of international rights and duties to States which are not fully sovereign entities was not a novel development. Thus the heads and governments of British protectorates and protected States have been treated as entitled to the jurisdictional immunities which international law concedes to sovereign States. In general, protected States, though deprived of full international capacity, have been regarded as international persons - as subjects of international law.

Lauterpacht, *The Subjects of the Law of Nations*, 63 L.Q.R. 438, 445-46 (1947).

[86] 145 D.L.R.3d at 26.

[87] Sir Cecil Hurst, legal advisor to the Foreign Office and later a Judge on the Permanent Court of International Justice, stated that:

> Newfoundland is admitted to membership in the periodical meetings of the Imperial Conference in London on precisely the same footing as Canada or South Africa; she enjoys the same measure of autonomy; she is mistress of her own destinies to the same extent as they are; yet she has never been admitted as a member of the League of Nations. I do not know that she even aspires to that somewhat burdensome recognition of the full measure of freedom which she enjoys. If Newfoundland looks to the mother country to a greater extent than do some of the other dominions for the conduct of her relations with foreign powers, it is only because she chooses that path for herself; not because she is forced or bound to do so.

Id. at 27.

[88] Responding to an inquiry regarding the status of Newfoundland and the conduct of its external relations, the Dominions Office in 1929 stated:

> In the case of Newfoundland the practical application of this formula, in so far as it concerns external affairs, is affected by two general considerations which do not arise in the case of any other Dominion. The first and more important of these considerations is that. . .His Majesty's Government in Newfoundland have voluntarily decided to leave the conduct of the greater part of their external affairs in the hands of His Majesty's Government in the United Kingdom. The second consideration is that Newfoundland, alone of the Dominions, is not a separate member of the League of Nations. In consequence the representation of her interests in League matters falls to His Majesty's Government in the United Kingdom but she is fully consulted whenever those interests are likely to be affected. . .(This consideration also affects to some. extent the form of treaties applying to Newfoundland).

Id. at 27.

wealth of Australia.[89]

III. COMMISSION GOVERNMENT

The Supreme Court of Canada held that the Commission government, which ruled Newfoundland from 1934 through 1949, was granted sole authority over Newfoundland's internal and external affairs. Since Newfoundland's government was suspended, Newfoundland was reduced to its former colonial status. Any offshore rights that were acquired during this period were held by the Crown in right of Great Britain.[90] The Supreme Court of Canada was mistaken. Newfoundland did not relinquish its sovereignty during this period, thus Newfoundland was entitled to any rights that were acquired under international law.[91]

In 1932-33, Newfoundland's economy collapsed because Newfoundland was unable to meet the interest charged on its public debt.[92] In February 1933, the Amulree Commission was appointed to investigate and recommend solutions to the crisis.[93] In October 1933, the Amulree Commission issued its report which recommended that Great Britain "assume financial responsibility for Newfoundland, that Newfoundland's Constitution be suspended, and that the conduct of its affairs be vested in the Governor, advised by an appointed commission."[94]

The British Parliament, at the request of Newfoundland's Parliament, enacted the Newfoundland Act of 1933 to implement the Amulree Commission's recommendations.[95] Newfoundland's patent letters of 1876 and 1905, which embodied Newfoundland's Constitution, were suspended. A new patent letter, establishing the Commission, was issued in 1934.[96] The Commission consisted of a governor and six commissioners, all of whom were appointed by Great Britain.[97] The Commission exercised all executive and legislative functions for Newfoundland and was under the supervision of the United Kingdom Dominions Office.[98] The Commission government was to remain in effect on the understanding that "as soon as the Island's difficulties are overcome and the country is again self-supporting, responsible government, on request from the people of Newfoundland, would be restored."[99] From a constitutional per-

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89 *Id.* at 28.
90 5 D.L.R.4th at 406.
91 *Id.*
92 145 D.L.R.3d at 31.
93 *Id.*
94 *Id.*
95 *Id.*
96 *Id.*
97 *Id.*
98 *Id.*
99 *Id.*

spective, Great Britain and the Commission were "the trustees for future government in Newfoundland."[100]

During the Commission government, Great Britain, with few exceptions, respected the constitutional concerns which were embodied in the Statute of Westminster.[101] Great Britain consulted with Newfoundland before entering into international agreements which affected Newfoundland.[102] In 1948, the Commonwealth Relations Office, the successor to the Dominions Office, stated that if the International North West Atlantic Fisheries Convention was signed prior to Union," the Newfoundland representative might sign separately "for his Majesty's Government in the United Kingdom and the Government of Newfoundland in respect of Newfoundland."[103]

Other nations continued to recognize Newfoundland's sovereignty during this period.[104] Prior to the promulgation of the Truman Proclamation, which declared U.S. jurisdiction over the continental shelf, the United States consulted with those "governments whose interests may be concerned and whose concurrence is desirable, namely, Canada, Newfoundland, Mexico, U.S.S.R., Great Britain, and Cuba."[105] In addition, Canada maintained a High Commissioner in St. John's from 1941 through 1949 and concluded a number of bilateral treaties with Newfoundland during this period.[106]

Even though Newfoundland's government was suspended, Newfoundland was not reduced to the status of a colony.[107] International law does not favor a relinquishment of sovereignty, but recognizes that a nation only surrenders those powers which it voluntarily transfers.[108] In *Duff Development Co., Ltd. v. Government Kelantan*, the Privy Council sustained the ruler of Kelantan's claim to sovereign immunity, despite Kelantan's relinquishment of its authority over foreign affairs and internal administration to Great Britain.[109] The Board held that a state may by treaty bargain away some of its authority, yet still maintain its sover-

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[100] *Id.* at 32.

[101] *Id.*

[102] *Id.* at 33.

[103] Factum of the Attorney General of Canada 58 (Oct. 25, 1982).

[104] 145 D.L.R.3d at 32.

[105] *Id.*

[106] *Id.*

[107] *Id.*

[108] Martin, *Newfoundland's Case on Offshore Minerals: A Brief Outline*, 70 OTTAWA L. REV. 34, 41 (1975). *See also* LAUTERPACHT, OPPENHEIM'S INTERNATIONAL LAW 192 (8th ed. 1967); Case Concerning Rights of Nationals of the United States of America in Morocco (Fr. v. U.S.), 1952 I.C.J. 176 (Aug. 27, 1952); Mighell v. Sultan of Johore 1 Q.B. 149 (1894).

[109] A.C. 797 (1924).

eignty.[110] From 1934 through 1949, Newfoundland retained its sovereignty, even though it surrendered some of its authority to Great Britain. The Newfoundland Court of Appeal recognized that

> in our view, neither the voluntary surrender of power for a terminable period of time, nor the change in the nature of its government from a democratic to an autocratic or *quasi*-dictatorial form, destroyed Newfoundland's *de jure* sovereignty as a coastal State. Thus, rights in the submarine areas contiguous to their coasts accorded coastal States by international law during the period in question were also available to Newfoundland as a coastal State.[111]

IV. TERM 7

The Supreme Court of Canada held that Term 7 of the Terms of Union simply revived Newfoundland's Constitution to establish internal self-government for the province, not to restore Newfoundland's former dominion status.[112] The Court was mistaken. Term 7 revived Newfoundland's Constitution as a dominion and established responsible government for Newfoundland as a province of Canada. Term 7 restored any rights which Newfoundland may have relinquished during the Commission government and allowed Newfoundland to benefit from any developments under international law which occurred prior to confederation.

Under the Newfoundland Act of 1933, self-government was to be restored once Newfoundland achieved self-sufficiency.[113] Newfoundland's economy was revived as a result of World War II. In February 1946, plans were announced for a National Convention "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."[114]

The Convention recommended two options for the referendum: 1) responsible government as it existed prior to 1934, and (2) Commission government. Great Britain intervened and included a third option in the referendum, confederation with Canada.

On July 7, 1948, after two referendums, the confederation option prevailed over the responsible government option by a vote of 78,383 to

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110 *Id.*; *see also*, Ippolito, *Newfoundland and the Continental Shelf: From Cod to Oil and Gas*, 15 COLUM. J. TRANSNAT'L L. 138, 156 n. 116 (1976).

111 145 D.L.R.3d at 32.

112 5 D.L.R.4th at 406-07.

113 Newfoundland Act, 1933, 24 Geo. 5, ch. 2, § 6, sched. 1.

114 MacLauchlan, *Newfoundland's Continental Shelf: The Jurisdictional Issue*, 30 U.N.B. L.J. 91, 102 (1981)(*quoting An Act Relating to a National Convention*, no. 16 of 1946 (Nfld)).

71,334.[115]

The legal steps by which the confederation was accomplished failed to recognize Newfoundland's dominion status. The Canadian Parliament, following the Statute of Westminster, approved the proposed Terms of Union and made a request to the King that the proposed bill of confederation be placed before the Imperial Parliament. Formal action by the Canadian Parliament was necessary because section 146 of the British North America Act, which provided for the confederation of Canada and Newfoundland, was inapplicable. Under section 146, both the Newfoundland and Canadian legislatures had to approve confederation, then seek the approval of the Privy Council. Since Newfoundland's legislature had been suspended in 1934 and had not reconvened, an act of Parliament was necessary to realize the union.[116]

Opponents of confederation argued that the process of achieving confederation was unconstitutional. Six members of the pre-1934 Newfoundland Parliament brought suit challenging confederation. They alleged that 1) the Commission was required to restore responsible government as soon as Newfoundland was self-supporting; 2) the Commission had no power to place the confederation option on the referendum; 3) the Commission was incapable of satisfying section 146 which required the Newfoundland and Canadian Parliaments to request confederation; and 4) the Imperial Parliament could not confederate Newfoundland and Canada without the express request of the Newfoundland Parliament.[117]

The trial court rendered its decision in *Currie v. MacDonald* on December 13, 1948.[118] The court held that since Newfoundland had not signed the Statute of Westminster, the Imperial Parliament could act for Newfoundland. Under the Commission government, Newfoundland was returned to its former colonial status. The Commission had discretion to determine when responsible government would be restored to Newfoundland. Further, the Imperial Parliament had the authority to confederate Newfoundland with Canada.[119] The decision was appealed to the Newfoundland Court of Appeal which sustained the trial court's decision on January 22, 1949.[120] Following the unsuccessful judicial challenge, the Imperial Parliament approved the Terms of Union and Newfoundland became the tenth province of Canada on March 31, 1949.

Although the confederation process disregarded the legal formalities which Newfoundland's dominion status warranted, Term 7 of the

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115 *Id.* at 102-03.

116 Ippolito, *supra* note 110, at 159.

117 McLauchlan *supra* note 114, at 104.

118 *Id.* at 103-05 n.71 (*citing* Currie v. McDonald No. 436 of 1948, Nfld. S.C.).

119 *Id.*

120 *Id.*

Terms of Union restored Newfoundland to its pre-1934 dominion status prior to confederation.[121] This was clearly set forth in the language of Term 7 which states that

> [t]he Constitution of Newfoundland *as it existed immediately prior to the 16th day of February, 1934*, is *revived at the date of Union* and shall, subject to these terms and the British North America Acts, 1867 and 1946, continue as the Constitution of the Province of Newfoundland from and after the date of Union, until altered under the authority of said Acts.[122]

Newfoundland's negotiators in 1948 realized that if Newfoundland went directly from Commission government to a Canadian province, constitutional questions might arise which could threaten the rights which Newfoundland had achieved as a dominion. Newfoundland's negotiators insisted on the inclusion of Term 7 which expressly revived Newfoundland's Constitution prior to the time of union.[123] The importance of Term 7 was explained on February 8, 1949 by Prime Minister Louis St. Laurent who stated

> the delegation from Newfoundland and its law officers insisted that they did not want the Province of Newfoundland to get a new constitution out of the Union. They wanted to be in the position of the Provinces of Nova Scotia and New Brunswick, which had constitutions before Union and retained all the powers of their constitutions, except those given to the central authority. It was for that reason that the dean of the law school was insistent upon having the constitution revived an instant before Union becomes effective. It will be revived only because there will have been enacted an act by the United Kingdom agreeing to this.[124]

There were also equitable considerations regarding Newfoundland's retention of its dominion rights. During the referendum campaign in 1948, leading proponents of confederation, with the implicit approval of Canada, asserted that the revival of Newfoundland's pre-Commission constitution was unnecessary because Newfoundland would retain all of its former rights as a dominion. Newfoundland's retention of its dominion rights became a condition precedent to its approval of the confederation option. Otherwise, Newfoundland's approval of the confederation option was accomplished by misrepresentation.[125]

The Newfoundland Court of Appeal recognized that Term 7 restored responsible government to Newfoundland, . . .as a province of

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121 *Id.* at 106-07; Martin, *supra* note 108, at 41.

122 McLauchlan, *supra* note 114, at 106 (emphasis added).

123 Martin, *supra* note 108, at 41.

124 *Id.* at 42.

125 *Id.*; Inions, *Newfoundland Offshore Claims*, 19 ALTA L. REV. 461, 468 (1981).

Canada."[126] The powers retained by Newfoundland were governed by the British North America Act of 1867. Consequently, it was necessary to "look to that Act and the Terms of Union incorporated therein to determine Newfoundland's present rights and legislative jurisdiction."[127]

V. TERM 37

The Supreme Court of Canada held that, according to the Terms of Union and the British North America Act, the property retained by Newfoundland after confederation was restricted to provincial boundaries.[128] Term 37 of the Terms of Union[129] and section 109 of the British North American Act[130] were similar in that they granted "lands, mines, minerals, and royalties" to the provinces, but there was a subtle difference in the language. Section 109 of the British North America Act restricted Crown grants to the provinces "in which the same are situate or arise." Term 37 did not contain such a restriction. The Supreme Court of Canada decided that the difference in the language between the two sections was purely grammatical. The Court determined that the restriction in section 109 was necessary because three former provinces became four provinces.[131] The property rights referred to in section 109 were public property rights which were held by the Crown in right of the province and were restricted to provincial boundaries. The provinces could only hold property outside of their boundaries in the legal capacity of a private citizen. Since Term 37 was only concerned with property rights, it could not encompass the continental shelf. Jurisdiction over the continental shelf was not a property right, but an attribute of external sovereignty which could not be held by the province. Even if Newfoundland possessed external sovereignty in 1949, external sovereign rights

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126 145 D.L.R.3d at 34.

127 *Id.*

128 5 D.L.R.4th at 385.

129 Term 37 states:

> 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.

Id. at 408.

130 Section 109 states:

> 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.

Id.

131 *Id.* at 408-10.

passed to Canada upon confederation.[132]

The Supreme Court of Canada was mistaken for several reasons. First, the Court's restriction of the property owned by Newfoundland to that within provincial boundaries was contrary to the wording of Term 37 which states that Newfoundland retained "all lands, mines, minerals, and royalties belonging to Newfoundland." The Supreme Court of Canada read a condition into Term 37 which was absent. The difference in the language between Term 37 and section 109 was significant. If Term 37 was the same as section 109, Term 37 would be superfluous because Term 3 already incorporated section 109 into the Terms of Union.[133] The Supreme Court of Canada should have followed the presumption that "words are not omitted, when they have been used in a corresponding clause in an earlier statute, without a reason."[134] Since there was a difference in the language, the Supreme Court of Canada should have distinguished the two provisions. The Newfoundland Court of Appeal found that Term 37 "reserve[d] to the Province of Newfoundland all proprietary rights both within and outside the land mass described in Term 2."[135]

Second, the Supreme Court of Canada's characterization of continental shelf rights as external sovereign rights was irrelevant. There was no question that the federal government was the external sovereign of Canada, but this did not create federal jurisdiction over offshore lands. If the principle that external sovereignty established property rights was followed to its logical extreme, the federal government would have property rights over all of Canada. The jurisdiction over Newfoundland's offshore lands was governed by the British North American Act, 1867 and the Terms of Union.[136]

The federal government had no general property rights which were derived from its legislative and executive authority.[137] The federal government could only expropriate provincial property to accomplish a fed-

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132 *Id.* at 407

133 Term 3 states:

> The British North America Acts, 1867 to 1946, shall apply to the Province of Newfoundland in the same way, and to the like extent as they apply to the provinces heretofore comprised in Canada, as if the Province of Newfoundland had been one of the provinces originally united, except in so far as varied by these Terms and except as such provisions as are in terms made or by reasonable intendment may be held to be specially applicable to or only to affect one or more and not all of the provinces originally united.

Id. at 407.

134 145 D.L.R.3d at 36.

135 *Id.*

136 *Id.* at 34.

137 *Id.* at 44-45; 5 D.L.R.4th at 385 145 D.L.R.3d at 37-38.

eral legislative purpose.[138] The federal government had no paramount interest over offshore lands which justified federal property rights. The federal government could meet its domestic and international obligations without possessing property rights over offshore resources.

The federal government's ability to negotiate treaties did not establish federal property rights. Such a principle would be directly contrary to the Labour Conventions case which held that the federal executive had the sole power to negotiate treaties on behalf of Canada.[139] Treaties, however, did not become incorporated into the law of Canada until they were adopted and implemented by the appropriate legislature which was determined by the nature of the subject matter. When the subject matter was within the jurisdiction of the province, the province had to implement the treaty before it became binding on Canada. Similarly, if the issue fell within federal jurisdiction, the appropriate legislature was the Canadian Parliament.[140]

In the British Columbia Offshore Reference, the Supreme Court of Canada ignored the distinction between treaty-making and treaty-implementation. The Supreme Court of Canada held that since the federal government could sign the treaties regarding the territorial sea, the federal government had jurisdiction over the territorial sea off British Columbia.[141] Ivan Head pointed out that the Court erred on this matter

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[138] In Reference Re Tax on Exported National Gas, June 23, 1982, at pp. 10-11, the Canadian Supreme Court stated:

> The full definition of expropriation or appropriation powers is beyond the scope of these reasons. One has to bear in mind, however, in dealing with the arrogation of property rights by federal authority in the exercise of some other right, that, whatever the terminology may be, it is only such part of the property right and such extent of the taking of that right, as may be tied inherently and of necessity to the exercise of the authority in question by the federal level of government that the constitution will permit. Thus the Government of Canada may not take or authorize the taking of property of the province beyond the property absolutely essential to the Dominion undertaking. Mineral rights, for example, would not be involved in appropriation of the site of the federal work. This is so both because that part of the beneficial ownership of the province is not required by the fulfillment of the federal undertaking; and, because the federal government may not take over a source of revenue for its benefit in the course of establishing, under an express legislative heading, a federal project or undertaking.

Id. at 44.

[139] Attorney General Canada v. Attorney General Ontario, A.C. 326 (1937).

[140] Arvay, *Newfoundland Claim to Offshore Mineral Resources: An Overview of the Legal Issues*, 5 CAN. PUB. POL'Y 32, 39-40 (1979).

[141] 1967 S.C.R. 792 at 817, 65 D.L.R.2d 353 at 376. In the British Columbia Offshore Reference, the Canadian Supreme Court stated that:

> the rights in the territorial sea arise by international law and depend on recognition by other sovereign states. Legislative jurisdiction in relation to the lands in question belong to Canada which is a sovereign states recognized by international law and thus able to enter into arrangements with other states respecting the rights in the territorial sea.

Id.

because "it failed to appreciate that 'the Crown in right of Canada' vis-a-vis other nation states in the international community is a different legal entity from 'the Crown in right of Canada' vis-a-vis the provinces in the federal community."[142] Since the Court's statement on this matter contravened the Labour Conventions case, Head concluded that the Canadian Supreme Court "could surely not have intended this result"[143]

External sovereignty was also the basis of the United States Supreme Court's decision in the tidelands controversy.[144] In the first battle of the United States conflict which involved jurisdiction over the submerged lands off the coast of California, the United States Supreme Court held that the federal government's sovereign interests in navigation, national defense, international affairs and commerce established federal paramount rights over offshore lands beyond the low water mark.[145] An important aspect of these paramount rights was dominion over the energy resources located therein.[146]

The Supreme Court decision was wrong historically and confused dominion and imperium.[147] Dominion refers to ownership, while imperium refers to control.[148] The federal government did have predominant sovereign interests in offshore lands, such as those enumerated, but these rights could not be construed as claim of ownership. The Court had never held that the power to regulate constituted a grant of title.[149] If the Court had established such a principle, the federal government could claim title to all U.S. land. In addition, the Court had never held that U.S. rights under international law served as the basis of property rights between the federal and state governments.[150] The United States Supreme Court, like the Supreme Court of Canada, confused property rights, which are determined by domestic law, and sovereignty, which is governed by international law.

Third, Newfoundland did not enter confederation on the "same footing" as other provinces with respect to its natural resources.[151] The Canadian Constitution recognized that the provinces were unique in many respects, including the ownership of natural resources. For exam-

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142 Head, *supra* note 11, at 155.

143 *Id.* at 156.

144 Fitzgerald, *supra* note 1.

145 United States v. California, 332 U.S. 19 (1947).

146 *Id.* at 29-41.

147 *Id.* at 43-46 (Frankfurter, J., dissenting).

148 *Id.* at 43-45 (Frankfurter, J. dissenting).

149 *See* United States v. Bevans, 16 U.S. (3 Wheat.) 336, 388 (1918); *see also*, Corfield v. Coryell, 6 F. Cas. 546, 551 (E.D. Pa. 1823) (No. 3230).

150 Skiriotes v. Florida, 313 U.S. 69, 72-73 (1941); United States v. Chandler-Dunbar Water Power Co., 209 U.S. 447 (1908); Johnson & Graham's Lessee v. McIntosh, 21 U.S. (8 Wheat.) 543, 572 (1823).

151 145 D.L.R.3d at 34.

ple, Alberta, Saskatchewan, and Manitoba were Canadian provinces for many years before gaining control over their natural resources which had been held by Canada. When these provinces attained control over their resources in 1930, the separate agreements provided that the provinces were to be placed in the same position as the original provinces. This was accomplished by transferring to the provinces only those resources within the provinces.[152] If this had been the intent of the Newfoundland Terms of Union, it could have easily been accomplished.

Canadian negotiators in 1947 were advised by the Deputy Minister of Justice that if section 109 was to apply to Newfoundland, this had to be expressly stated.[153] Canada had originally included language in the Terms of Union with Newfoundland that was similar to that included in the Prairie Provinces Agreements. On October 19, 1947, the Canadian Cabinet approved the "Proposed Arrangements of the Entry of Newfoundland into the Confederation" which provided that Newfoundland held rights over its natural resources "on the same basis as the other provinces."[154] These conditions were forwarded to the Governor of Newfoundland, but this specific provision was deleted when the representatives met after the referendum to settle the final terms of confederation.[155]

Newfoundland was not required to surrender control over its offshore resources to be on an equal footing with the other provinces when it entered confederation.[156] Equality of treatment between the provinces was not required under Term 3 of the Terms of the Union which made the British North America Acts of 1867 through 1946 applicable to Newfoundland unless "such provisions as are in terms are made or by reasonable intendment may be held to be specifically applicable to or only to affect one or more and not all the provinces originally united."[157] Furthermore, the historical analysis by the Supreme Court of Canada in the British Columbia Offshore Reference indicated that other provinces with different historic claims to offshore areas may be on a different footing.[158]

Newfoundland was the only Canadian province to enter confederation as a dominion. Newfoundland's status was similar to that of the Republic of Texas when it joined the United States in 1845. From 1836 through 1845, Texas had been an independent republic with a three

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[152] *Id.*

[153] *Id.* at 35, (referring to Letter from F.P. Varcoe, Q.C., Deputy Minister of Justice to P.A. Bridle, Acting Canadian High Commissioner to Newfoundland, July 5, 1947).

[154] *Id.*

[155] *Id.*

[156] 145 D.L.R.3d at 34-36.

[157] *Id.* at 35; *see also* 5 D.L.R.4th at 407 (quoting Term 3).

[158] Factum of the Att'y Gen. of Nova Scotia, *supra* note 137, at 46-47; 145 D.L.R.3d at 20.

marine league territorial sea. In 1950, in *United States v. Texas*, the United States Supreme Court rejected Texas' claim that when it entered the Union, it only surrendered its imperium, not its dominion over its offshore lands.[159] The Court offered a novel interpretation of the equal footing clause.[160] The Court acknowledged Texas imperium and dominion over its offshore lands as a sovereign nation, but determined that Texas relinquished its authority over offshore lands to the federal government due to overriding concerns of national defense and international affairs.[161] The Court held that the equal footing clause precluded the extension of state sovereignty into the "domain of political and sovereign power of the United States from which the other States have been excluded."[162] Property rights had to be subordinated to political rights.[163]

The United States Supreme Court was incorrect. When Texas was admitted into the Union, it surrendered its imperium, not its dominion, over offshore lands. This was manifested in the annexation agreement in which Texas granted the United States only limited property for national defense and reserved for itself all "vacant and unappropriated lands lying within its limits."[164] Furthermore, the equal footing clause, which was not included in the Texas annexation agreement, did not require Texas to cede its property to the federal government.[165] The equal footing clause addressed political and sovereign rights, not economic and property rights.[166] This was the first case in which the equal footing clause was interpreted to deprive a state of "property that it had theretofore owned."[167] The United States Supreme Court, like the Canadian Supreme Court, erred by requiring the newly admitted state to relinquish its jurisdiction over offshore areas to be on an equal footing with the other states.

The United States soon abandoned the equal footing approach. In 1953 the Submerged Lands Act[168] was enacted which granted the coastal

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159 339 U.S. 707, *modified*, 340 U.S. 907 (1950).

160 *Id.* at 717. The equal footing clause appears in the Northwest Ordinance which dealt with the admission of new states into the Union after independence. Article 5 of the Ordinance states, "Whenever any of the said states shall have sixty-thousand free inhabitants, herein, such state shall be admitted by its delegates into the Congress of the United States, on an equal footing with the original states, in all respects whatsoever. . . ." The equal footing clause appears in every enabling statute admitting states into the Union except Texas. Comment, *The Tidelands Oil Controversy*, 10 DE PAUL. L. REV. 116, 119 (1960).

161 339 U.S. at 717-20.

162 *Id.* at 719-20 (*quoting* Pollard's Lessee v. Hagan, 3 How. 212, 228-29 (1845)).

163 *Id.* at 717-20.

164 *Id.* at 722 (Reed, J., dissenting).

165 Illig, *Offshore Lands and Paramount Rights*, 14 U. PITT. L. REV. 10, 15-21 (1952).

166 339 U.S. at 722.

167 *Id.*

168 43 U.S.C. §§ 1301-1356 (1988).

states jurisdiction over lands three miles or three marine leagues offshore.[169] The Supreme Court upheld the Act, stating that its prior decisions had never asserted federal ownership over offshore submerged lands, but only paramount rights over such lands.[170] These paramount rights were equivalent to a property right which Congress could legitimately relinquish. Such a grant did not interfere with the U.S. sovereign interests. Furthermore, Congress could grant property to some coastal states without awarding the same amount to all coastal states.[171]

The Court determined that jurisdiction over offshore lands was a domestic dispute over the congressional disposition of property. Congress could establish different boundaries for different coastal states because the equal footing clause referred only to political and sovereign rights, not to property rights. Most importantly, the Court recognized that dominion and imperium could be separated; thus, property rights did not flow from sovereignty. This recognition implicitly repudiated the paramount rights rationale relied upon by the United States Supreme Court in the previous cases.[172]

Fourth, the Supreme Court of Canada's decision that continental shelf rights were not property rights confused property rights under common law and constitutional law. Term 37 of the Terms of Union referred to "property of" and "belonging to" Newfoundland. These terms were not to be interpreted under the common law, but under constitutional law to designate the beneficial use, control, management, and disposition of property, subject to overriding national concerns.[173] In *St. Catherine's Milling and Lumber Company v. The Queen*, the Privy Council stated that

> in construing these enactments (British North America Acts), it must always be kept in view that wherever public land with its incidents is described as 'the property of' or as 'belonging to' the Dominion or a Province, these expressions merely import that the right to its beneficial uses or its proceeds, has been appropriated to the Dominion or the Province, as the case may be, and is subject to the control of its legislature, the land itself being vested in the Crown.[174]

Prior to the British North America Act of 1867, all property was held by the Crown either in right of the province, or in right of Great Britain. Great Britain's right over offshore submerged lands was based

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169 43 U.S.C. § 1312 (1988).

170 Alabama v. Texas, 347 U.S. 272, 274-76 (1954) (Reed, J., concurring).

171 *Id.*

172 Case Comment, *Inability of Complainant States to Test the Validity of an Act Ceding Proprietary Rights in Submerged Lands to Coastal States: Alabama v. Texas*, 34 B.U.L. REV. 504, 507 (1954).

173 145 D.L.R.3d at 18.

174 14 A.C. 46, 56 (P.C. 1888) (Ont.).

on the "Crown's right to explore and exploit the great waste of the sea."[175] This was a prerogative right of the Crown.[176] Upon confederation in 1867, Crown proprietary prerogative rights were, for the most part, granted to the provinces.[177] Canada was given broad law-making authority, but limited ownership of property. Canada only received title to the property which was transferred by sections 107 and 108 or by paragraph 9 of the Third Schedule. The provinces retained "all lands, mines, minerals and royalties" under section 109 and all undisposed of property under section 117.[178]

Term 3 of the Terms of Union made the British North America Acts applicable to Newfoundland. The Terms of Union only transferred limited property to Canada, Newfoundland retained all of its unappropriated property under Term 35.[179] Newfoundland also retained "all lands, mines, minerals, and royalties" under Term 37. There was no implied transfer of property from Newfoundland to Canada on the basis of the nature of the Union, national defense, or international relations. Terms 35 and 37 affirmed Newfoundland's property rights as they existed prior to confederation. Under the Terms of Union, Newfoundland acquired all of the property which had been held by the Crown in right of the province. It is necessary to examine the rights claimed by the Crown and recognized by international law[180] over the territorial sea and the continental shelf to determine the offshore property, in a constitutional sense, over which Newfoundland retained jurisdiction after confederation.

VI. THE TERRITORIAL SEA

Due to the question posed in the Hibernia Reference, the Supreme Court of Canada did not address the issue of federal-provincial jurisdiction over the territorial sea. The Newfoundland Court of Appeal confronted the issue and determined that prior to the commission government "Newfoundland exercised dominion over the territorial sea and its bed and subsoil."[181] The territorial sea was "part of the territory of Newfoundland and the rights in and over the *solum* belonged to New-

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175 LA FOREST, NATURAL RESOURCES AND PUBLIC PROPERTY UNDER THE CANADIAN CONSTITUTION, 106 (1969).

176 *Id.* at 79-83, 105-106.

177 *Id.* at 105-106.

178 *Id.*; *see also*, 145 D.L.R.3d at 44.

179 Term 35 states, "Newfoundland public works and property not transferred to Canada by or under these Terms will remain the property of the Province of Newfoundland." *Id.* at 218. LA FOREST, *supra* note 175, at 218.

180 See *infra* note 336.

181 145 D.L.R.3d at 30.

foundland."[182] The Commission government did not "divest Newfoundland of any vested proprietary rights in the seabed of its maritime belt, namely, its ownership of the territorial sea, its seabed and subsoil."[183] During the Commission government, Newfoundland acquired "new rights in the submarine area contiguous to its coasts which might be available under international law."[184] Consequently, the Newfoundland Court of Appeal decided that "the sovereign rights to the bed and subsoil of the territorial waters of Newfoundland that were vested in the Crown in right of the Island of Newfoundland and its dependencies in 1949 remained vested in the Crown in right of the Province of Newfoundland after Confederation under the provisions of Term 37 of the Terms of Union."[185] The Newfoundland Court of Appeal decision was correct.[186]

A. British Recognition of the Territorial Sea

From the seventeenth century through the twentieth century, English jurists recognized that the Crown possessed jurisdiction and property rights over the sea, seabed, and subsoil.[187] There was no distinction between the Crown's imperium and dominion over offshore areas.[188] In the nineteenth century, the Crown's offshore claims became focused on the territorial sea.[189]

In the nineteenth century, Great Britain championed a three mile territorial sea. This was manifested in international agreements and do-

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[182] *Id.*

[183] *Id.* at 33.

[184] *Id.*

[185] *Id.* at 36.

[186] This decision was appealed to the Canadian Supreme Court which has not resolved the issue. *See* Herman, *The Newfoundland Offshore Mineral Rights References; An Imperfect Mingling of International and Municipal Law*, 1984 CAN. Y.B. INT'L L. 194, 202 n. 28.

[187] For a complete overview of the development of the concept of the territorial sea, see O'Connell, *The Juridical Nature of the Territorial Sea*, 45 BRIT. Y.B. INT'L L. 303 (1971).

[188] D.P. O'CONNELL, INTERNATIONAL LAW 536 (1965).

[189] The Crown's concern with the territorial sea did not constitute an abandonment of its claims to seabed and subsoil minerals beyond the territorial sea. Fulton has asserted that sedentary fisheries, as well as the mineral resources of the subsoil, were not subject to the narrow-limit rules applicable to surface waters to the reasons therefore, but rather "require special treatment." I. FULTON, THE SOVEREIGNTY OF THE SEA 612 (1911).

Such resources "have always been considered as on a different footing from fisheries for floating fish. They may be very valuable, are generally restricted in extent, and are admittedly capable of being exhausted or destroyed; and they are looked upon rather as belonging to the soil or bed of the sea than to the sea itself." *Id.* at 679.

Lauterpacht has stated that "a State may acquire, for sedentary fisheries and for other purposes, sovereignty and property in the surface of the seabed, provided that in so doing it in no way interferes with freedom of navigation and with the breeding of free-swimming fish. 1 L. OPPENHIEM, INTERNATIONAL LAW: A TREATISE 628-29 (H. Lauterpacht 8th ed. 1955)[hereinafter Lauterpacht]. *See also*, Hurst, *Whose Is the Bed of the Sea?*, 4 BRIT. Y.B. INT'L L. 34 (1923).

mestic legislation.[190] The Fisheries Convention of 1818, which settled the United States-British conflict regarding fishing rights off Newfoundland and Nova Scotia, barred U.S. fishermen from fishing three miles from the shore of the Canadian provinces.[191] In 1839, Britain and France concluded a fishing agreement which precluded each from fishing three miles from the other's shore.[192] In 1855, a U.S.-British claims commission invalidated the British seizure of the U.S. schooner *Washington* in the Bay of Fundy on the grounds that the ship was on the high seas, not within the three mile territorial sea of Nova Scotia.[193]

Domestically, in 1868, British county courts were granted Admiralty jurisdiction over maritime affairs occurring three miles from shore.[194] In 1876, Britain repealed all of its hovering legislation and established a three marine league custom zone for British vessels and British citizens and a one marine league (3 mile) custom zone for foreign vessels.[195] In the nineteenth century, British publicists advocated a three mile territorial sea.[196] Sir Robert Phillimore and Sir Edward Creasy asserted that jurisdiction over the three mile territorial sea was based on the cannon shot rule.[197] Later, British publicists, such as Sir Travis Twiss, William Edward Hall, and Thomas Joseph Lawrence accepted the three mile rule on its merits, not as a function of the cannon shot rule.[198]

In the nineteenth century, British courts also accepted the three mile territorial sea. In several early British cases, the *Twee Gebroeders* (1800) and the *Anna* (1805), the British High Court of Admiralty acknowledged the three mile territorial sea.[199] There were also statements in several mid-nineteenth century British cases which recognized a three mile territorial sea. In 1854, in *Attorney General v. Chambers*, the court dealt with the ownership of coal seams which were contiguous to the seashore.[200] Lord Cranworth stated that, "the Crown is clearly in such a case, according to all the authorities entitled to the littus maris (shore) as well as to the soil of the sea itself adjoining the coasts of England."[201]

The Merchant Shipping Act of 1854 dealt with "salvage arising in the United Kingdom and with strandings "within the limits of the

190 S. SWARTZRAUBER, THE THREE MILE LIMIT OF THE TERRITORIAL SEAS 51-88 (1972).
191 *Id.* at 61-63.
192 *Id.* at 65.
193 *Id.* at 85.
194 *Id.* at 66-67.
195 *Id.* at 70-71.
196 *Id.* at 68-70.
197 *Id.* at 68-69.
198 *Id.* at 69.
199 *Id.* at 60-61.
200 43 E.R. 486, 489 (1854); *see also*, 1967 S.C.R. at 811, 65 D.L.R.2d at 370.
201 *Id.*

United Kingdom."[202] In 1856, in *the Leda*, Dr. Lushington stated that the expression "the limits of the United Kingdom" includes waters within 3 miles of shore."[203]

In 1858, the Cornwall Submarine Maine Arbitration involved a dispute between the Crown and the Duchy of Cornwall concerning the ownership of mines within the area three miles offshore. The arbitrator held that the Duchy of Cornwall owned the mines to the low water mark, while the mines beyond the low water mark were Crown property.[204] The arbitrator found that the Crown's right to the sea bed was a "territorial right" and the seabed was "part of the Realm."[205]

In 1860, in *The General Iron Screw Collier Company*, the court dealt with the issue of whether the collision between a British and foreign ship within three miles of the coast of Great Britain was covered by the Merchant Shipping Act of 1854.[206] Sir Page Wood, stated that ". . .every country may, by the common law of nations, legitimately exercise jurisdiction over that portion of the high seas which lies within the distance of three miles from it shores."[207]

In 1861, *Gammell v. Woods and Forest Commissioners*, the court had to decide whether the Crown held exclusive rights to the salmon fishery off the coast of Scotland.[208] Lord Wensleydale stated that "it would be hardly possible to extend fishing seaward beyond the distance of three miles, which, by the acknowledged law of nations, belong to the coast of the country-that which is under the dominion of the country by being within cannon range-and so capable of being kept in perpetual possession."[209]

In 1865, in *Gann v. Whitestable Free Fishers*, the court held that the holders of a Crown grant in the seabed could not collect tolls for anchorage because their rights were subordinate to the public's right of navigation which included anchorage.[210] Ex-Lord Chancellor Chelmsford stated that, "[t]he three-mile limit depends upon a rule of international law, by which every independent state is considered to have territorial property and jurisdiction in the sea which washes their coast

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202 Merchant Shipping Act 17 & 18 Vict., ch. 104, 458-60. *See also* O'Connell, *supra* note 187, at 367.

203 S. SWARZTRAUBER, *supra* note 190, at 67.

204 1967 S.C.R. at 811, 65 D.L.R.2d at 370.

205 O. Connell, *supra* note 187, at 324; LA FORREST, *supra* note 175, at 94, 98. Hurst, *supra* note 189, at 36.

206 S. SWARZTRAUBER, *supra* note 190, at 68.

207 *Id.*

208 3 McQueen's House of Lords Reports 419 (1859); see also British Columbia Offshore Reference, *supra* note 10, 65 D.L.R.2d at 371, 1967 S.C.R. at 812.

209 65 D.L.R.2d at 812.

210 11 H.L.C. 192, 218, 11 E.R. 1305, 1316 (1865).

within an assumed distance of a cannon-shot from the shore."[211]

The British courts, following Hale's doctrine,[212] determined that the Crown held property rights in the sea, seabed, and subsoil. D.P. O'Connell noted that these cases affirmed that "all writers of the law of England agree in this, that as the King is Lord of the Sea, that follows around our coast, and also owner of all the land to which no individual has acquired the right by occupation."[213] This position was also supported by thirty of the thirty-six writers who addressed the issue of the territorial sea from 1836 through 1876.[214] Consequently, until the later part of the nineteenth century, the dominant view was that the Crown's jurisdiction over the territorial sea was based on the Crown's proprietary interests.

In 1876, in *Regina v. Keyn*, the Court of Crown Cases Reserved broke with all prior precedent by refusing to acknowledge any Crown rights, either proprietary or sovereign, in the territorial sea.[215] In this case, the German steamer, Franconia, ran into the British steamer, the Strathclyde, two and a half miles off the English shore, killing a British citizen. The captain of the Franconia, Fernindad Keyn, a German national, was convicted of manslaughter. His conviction was overturned by a vote of 7-6 in the Court of Crown Cases Reserved. The Court held that the Central Criminal Court lacked jurisdiction over offenses committed on the high seas by foreign nationals, even if the offenses were committed within three miles of the English coast.[216]

The Court first examined the nature of the common law and admiralty jurisdiction.[217] The Court found that the criminal jurisdiction of the common law courts was limited to the county, which included waters *inter fauces terra*,[218] or to the realm, which ended at the low water mark. Admiralty jurisdiction, which included offenses committed on the seas outside of the realm, had been transferred to the county courts by

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211 S. SWARZTRAUBER, *supra* note 190, at 67.

212 Hale stated that "In the sea the King of England hath a double right, viz. a right of jurisdiction which he ordinarily exerciseth by his admiral, and right of property or ownership." *Supra* note 187, at 362.

213 O'Connell *supra* note 187 at 365.

214 *Id.* at 327; *see also Daniel, Sovereignty and Ownership in the Marginal Sea and Their Relation to Problems of the Continental Shelf*, 3 BAYLOR L. REV. 241, 267-311 (1951)(summary of Available Opinions of Jurists and Publicists—1670-1950).

215 2 Ex. D. 63 (1876).

216 *Id.*

217 This decision by Chief Justice Cockburn was joined by Justices Pollock and Field. *Id.* at 159-239.

218 According to the United States Supreme Court, "waters '*inter fauces terrae*' or landward of an opening 'between the jaws of the land' could be subject to the jurisdiction of the littoral county rather than the Admiral if the jaws were close enough to satisfy a somewhat ambiguous line-of-sight test." United States v. Maine, 475 U.S. 89, 92 (1986).

statute. Since Keyn's offense occurred outside of all county boundaries, the Crown had to demonstrate admiralty jurisdiction either over the nature or location of the offense in order to legitimate the Central Court's criminal jurisdiction.[219]

The Court, examining the nature of the offense, found that admiralty jurisdiction, with the exception of piracy, was restricted to offenses committed aboard British vessels which were considered an extension of British territory. Since this crime was committed by a German national, who was aboard a German ship, Admiralty lacked jurisdiction over the type of offense.[220]

The Court, reviewing the location of the offense, rejected the position earlier espoused by English jurists that the "bed of the sea is part of the realm of England and part of the territorial possession of the Crown."[221] Since there was no historic claim over the territorial sea, the Crown's jurisdiction had to rest on received international law.[222] The Court acknowledged the emergence of the principle of the territorial sea in international law, but noted that the publicists disagreed "in the practical application of the rule, in respect of the particular distance, and also in the still more essential particular of the character and degree of sovereignty and dominion to be exercised."[223] In light of these uncertainties, the Court was unwilling to accept the lowest common denominator of the publicists regarding the territorial sea.[224] The Court determined that Britain could only exercise jurisdiction over the territorial sea through an act of Parliament.[225] Legislation pertaining to international relations, customs, fisheries, and navigation were not sufficient.[226] The Court concluded that since Parliament never formally extended the Crown's jurisdiction over the territorial sea, the Central Criminal Court lacked jurisdiction to try Keyn for his offense.[227]

The minority accepted the proposition that international law was the received law of England.[228] The minority asserted that the concept of the territorial sea in international law, which was established by the "common agreement or acquiescence of jurists," enabled nations to exercise jurisdiction three miles seaward from their low water mark. This

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219 2 Ex. D. at 161-62.

220 *Id.* at 168-69.

221 *Id.* at 195; *see also,* O'Connell, *supra* note 187, at 303-324.

222 McEvoy, *Atlantic Canada: The Constitutional Offshore Regime*, 8 DALHOUSIE L.J. 284, 292 (1984).

223 2 Ex. D. at 191.

224 McEvoy, *supra* note 222 at 292.

225 2 Ex. D. at 193, 203.

226 *Id.* at 214.

227 *Id.* at 230.

228 This is the decision by Justice Brett. *Id.* at 124-49. *See also* McEvoy *supra* note 222, at 297-98.

three mile zone was "a part of the territory of the adjacent nation, as much and as completely as if it were land a part of the territory of such nation" and constituted the nation's "territorial waters, subject to its rights of property, dominion and sovereignty."[229] English criminal law applied to the three mile zone even in the absence of a statute. Admiralty jurisdiction, which was residual in nature, encompassed national territory which was not part of the realm or the county. Since Keyn's offense occurred within three miles of the English shore, Admiralty had jurisdiction over the offense. Consequently, the Central Criminal Court, as the successor of admiralty jurisdiction, had jurisdiction to try the offense.[230]

In 1877, *Keyn* was reaffirmed in two reported cases. In the first case, *Harris v. Franconia*, which involved three of the justices who were in the minority in *Keyn*—Justices Coleridge, Grove, and Denman—the Court decided that for jurisdictional purposes the territory of England and the sovereignty of the Crown stopped at the low mark, unless extended by Parliament.[231] In the second case, *Blackwell Pier v. Fylde Union*, Justice Coleridge, joined by Justice Grove, found that a pier extending five hundred feet beyond the low water mark was outside of the realm, thus not taxable.[232] Both cases dealt with the geographical limits of the common law courts, jurisdiction, not with the Crown's ownership of such territory.

In 1878, Parliament responded to the *Keyn* decision. Judge John Bassett Moore stated that Parliament "considered it imperative to adopt legislation nullifying the decision's effect for the future besides declaring it wrong as to the past."[233] Parliament enacted the Territorial Waters Jurisdiction Act which restored the Crown's rights "as they always existed."[234] Parliament extended Admiralty jurisdiction to all offenses committed by foreigners on the territorial sea. Territorial waters were defined as being one marine league seaward from the low water mark off Great Britain and the British provinces.[235] Lord Coleridge, referring to

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229 2 Ex. D. at 143.

230 *Id.* at 145-46.

231 2 C.P.D. 173, 46 L.J.Q.B. 363 (1877).

232 36 L.T. 251, 46 L.J.M.C. 189 (1877).

233 7 MOORE'S COLLECTED PAPERS 294, *cited in* Daniel, *supra* note 214, at 282.

234 Territorial Waters Jurisdiction Act, 1878, 41 & 42 Vict., ch. 73, preamble.

235 Territorial Waters were defined as

> such a part of the sea adjacent to the coast of the United Kingdom, or the coast of some other part of Her Majesty's dominions, as is deemed by international law to be within the territorial sovereignty of Her Majesty; and for the purpose of any offence declared by this Act to be within the jurisdiction of the Admiral, any part of the open sea within one marine league of the coast measured from low-water mark shall be deemed to be open sea within the territorial waters of Her Majesty's dominions.

McEvoy, *supra* note 222, at 297-98.

the Act in *Regina v. Dudley and Stephens*, stated that "the opinion of the minority in the *Franconia* case has been since not only enacted but declared by Parliament to have been always the law."[236]

The *Keyn* case, which was an anomaly, rested on a very narrow basis. Keyn was only concerned with admiralty jurisdiction, not the property rights over offshore lands. In 1890, the United States Supreme Court in *Manchester v. Massachusetts* stated that in *Keyn* "the question was not as the extent of the dominion of Great Britain over the open sea adjacent to the coast, but only as to the extent of the existing jurisdiction of the Court of Admiralty in England over offenses committed on the open sea."[237] The United States Supreme Court proceeded to state that "we think it must be regarded as established that, as between nations, the minimum limit of the territorial jurisdiction of a nation over tidewaters is a marine league from its coast."[238]

D. P. O'Connell also found that the scope of *Keyn* was very limited.[239] O'Connell asserted that the rationale of *Keyn* was that common law jurisdiction was limited to the realm. The realm, which defined the court's jurisdiction, included county waters and the areas to the low water mark. The realm did not define the extent of the Crown's property which was more than the sum of the counties. The territorial sea was part of the Crown's lands, but not part of the realm.[240] O'Connell stated that "the true ratio decided in *Regina v. Keyn* was that the common law jurisdiction terminated at the low water mark, and that nothing more fell to be decided, although it is clear that the majority of the Court thought they were deciding more."[241]

The British courts soon abandoned the *Keyn* rationale and returned to a proprietary view of the territorial sea.[242] Between 1891 and 1916, there were statements in four cases which recognized the Crown's ownership of the seabed of the territorial sea. In 1891, in *Lord Advocate v. Clyde Navigation*, the Court of Session decided that Clyde Navigation could not dispose of dredgings in Long Loch because the Crown held title to the seabed of the loch and to the seabed three miles from the coast.[243] The Court determined that "there is no distinction in legal character between the Crown's right in the foreshore, in tidal and navigable rivers, and in the bed of the sea within three miles of the shore."[244]

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236 14 Law Reports 273, 281 (Q.B. 1884).

237 139 U.S. 240, 257 (1891).

238 *Id.* at 258.

239 O'Connell, *supra* note 187, at 365-377.

240 *Id.*

241 *Id.* at 377.

242 LA FOREST, *supra* note 175, at 95.

243 19 Sess. Cas. (R.) 174, 177 (1891).

244 *Id.*

The Crown held "a proprietary right-a right which may be the subject of trespass, and which may be vindicated like other rights of property."[245]

In 1900, in *Lord Advocate v. Wemyss*, the Court of Session decided a dispute over the ownership of coal in the seabed beyond the low water mark.[246] Lord Watson stated that, "I see no reason to doubt that, by the law of Scotland, the solum underlying the waters of the ocean, whether within the narrow seas, or from the coast outward to the three-mile limit, and also the minerals beneath it, are vested in the Crown."[247]

In 1908, in *Lord Fitzhardinge v. Purcell*, the court upheld a lord's title to the foreshore of a navigable rivers, but found that the title was subject to the public's right of fishing and navigation.[248] Justice Parker, commenting on the nature of the land, stated that "[c]learly the bed of the sea, any rate for some distance, below low water mark and the beds of tidal navigable rivers are, *prima facie*, vested in the Crown."[249]

In 1916, in *Secretary of State v. Chelikani Rama Rao*, the Privy Council determined the ownership of three small islands which appeared within three miles of the coast of Madras between 1840 and 1860.[250] The Board, quoting the statements in the aforementioned cases, held that islands arising in the King's sea were the property of the King.[251] The Board, being very critical of *Keyn*, stated:

> It should not be forgotten that Regina v. Keyn had reference on its merits solely to the point as to the limits of Admiralty jurisdiction; nothing else fell to be there decided. It was marked by an extreme conflict of judicial opinion, and the judgment of the majority of the Court was rested on the ground of there having been no jurisdiction in former times in the Admiral to try offenses by foreigners on board foreign ships whether within or without the limit of 3 miles from shore.[252]

The Privy Council never formally resolved the issue of jurisdiction over the territorial sea, even though it had such an opportunity in several Canadian fisheries cases which had rejected the *Keyn* rationale.[253] The Board was reluctant to address the issue because the fishery disputes could be decided separately. In the British Columbia Fisheries Reference

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245 *Id.*

246 1900 App. Cas. 48.

247 *Id.* at 66.

248 24 T.L.R. 564 (1908).

249 *Id.* at 571.

250 32 T.L.R. 652, 652-53, (1916).

251 *Id.* at 655.

252 *Id.* at 653.

253 Attorney General of British Columbia v. Attorney General of Canada, 1914 A.C. 153 (B.C.) [hereinafter British Columbia Fisheries]; Attorney General of Canada v. Attorney General of Quebec, 1921 A.C. 413 [hereinafter Quebec Fisheries Reference].

in 1914, the Board found that the concept of the territorial sea was "still in controversy." The Board asserted that the status of the territorial sea should not be decided by a municipal tribunal, but should be determined by an international agreement.[254] In the Quebec Fisheries Reference in 1921, the Board, reiterating its position, stated "[i]t is highly inexpedient, in a controversy of a purely municipal character such as the present, to express an opinion on what is really a question of public international law."[255]

Nevertheless, the Privy Council did infer that if rights in the territorial sea were recognized the provinces would hold such rights.[256] In the Ontario Fisheries Reference in 1898, the Board determined that the provinces retained all unappropriated lands which they possessed prior to confederation.[257] The province held title to the fisheries, but they relinquished jurisdiction over the fisheries to the Dominion of Canada under section 91 of the BNA.[258] The surrender of legislative jurisdiction did not imply any transfer of property interest.[259] In the British Columbia Fisheries Reference in 1914, the Board found that title to the fisheries was based on the ownership of the solum.[260] In the Quebec Fisheries Reference in 1921, the Board held that the Dominion of Canada had the right to regulate fisheries, but it did not have any property interest in the

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254 British Columbia Fisheries, *supra* note 253, at 174.

255 Quebec Fisheries Reference, *supra* note 253, at 431.

256 Roberts, *Re Dominion Coal Col LTD: Constitutional Law-Property Rights in Solum of Canada's Territorial Sea*, 22 U. TORONTO FAC. L. REV. 203, 207-09 (1964).

257 Attorney General of Canada v. Attorney Generals of Quebec, Ontario, and Nova Scotia, 1898 A.C. 700, 67 L.J.P.C. 90. In the Quebec Fisheries Reference in 1921, Lord Haldane, referring to the 1898 Fisheries Reference, stated:

> What the Board on that occasion had to determine was, among other things, whether the. . . rivers and other waters situate within the territorial limits of a Province and not granted before confederation, belonged to the Crown in right of the Dominion or of the Province. The answer was that generally speaking, the proprietary title to these beds, excepting where expressly transferred, remained provincial.

Quebec Fisheries Reference, *supra* note 253, at 419-420.

258 Attorney General of Canada v. Attorney Generals of Quebec, Ontario, and Nova Scotia, *supra* note 257 at 712-13.

259 The Board stated that

> it must also be born, in mind that there is a broad distinction between proprietary rights and legislative jurisdiction. The fact that such jurisdiction in respect of a particular subject-matter is conferred on the Dominion Legislature, for example, affords no evidence that any proprietary rights with respect to it were transferred to the Dominion. 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 passing of that Act possessed by the provinces remain vested in them except such as are by any express enactments transferred to the Dominion of Canada.

Supra note 257, at 709-10.

260 British Columbia Fisheries Reference, *supra* note 253 at 163.

solum which belongs to the Crown in right of the province. The Board stated that "[t]he solum and the consequent proprietary title to the fishery may be vested in the Crown in right of the Province or in a private individual, and in so far as this is so, it cannot be transferred by regulation."[261] These cases demonstrated that the provinces proprietary interest in the fisheries was based on their proprietary interest in the bed of the territorial sea which was held by the Crown in right of the provinces.

Politically, Britain continued to endorse a three mile territorial sea after the Keyn decision. In 1882, Britain signed the North Sea Fisheries Convention which recognized each of the signatories exclusive fishing rights within their territorial seas.[262] In 1883, Britain enacted the Sea Fisheries Act which made it a criminal offense for foreign ships to fish within Britain's three mile territorial sea.[263] In 1893, Britain achieved a victory in the Bering Sea Arbitration which concluded that the United States had no rights over fur seals beyond its three mile territorial sea.[264] In 1905, Britain protested Uruguay's seizure of a Canadian vessel, the *Agnes G. Donohoe*, beyond Uruguay's three mile territorial sea and objected to Spain and Portugal's claims to six mile territorial seas.[265] In 1911, an international convention settled the pelagic sealing controversy which prohibited the signatories, including Britain, from hunting sea otters beyond their three mile territorial seas.[266] In 1912, the International Court of Justice settled the North Atlantic Coast Fisheries Arbitration by recognizing the United States' and Great Britain's exclusive fishing rights within their territorial seas.[267] In 1927, in the case of the *Fagerness*, a British Court of Appeals held that it lacked jurisdiction over a maritime collision which occurred more than 3 miles outside of Britain's territorial sea in the Bristol Channel.[268]

These judicial and political events caused a leading commentator, Captain Swarztrauber, to conclude that:

> It would seem that the greatest years for the three-mile limit were those from 1876 to 1926, quite coincidentally exactly half a century. The year 1876 brought Great Britain squarely in support of the three-mile limit with the passage of the Customs Consolidation Act. After that, the rule grew steadily and surely, overcoming virtually all opposition and competition. If domestic legislation, international instruments, court decisions, and the writings of publicists are a fair

261 Quebec Fisheries Reference, *supra* note 253, at 428.

262 S. SWARZTRAUBER, *supra* note 190, at 85-86.

263 *Id.* at 67.

264 *Id.* at 86-88.

265 *Id.* at 110-111.

266 *Id.* at 117-118.

267 *Id.* at 118-121.

268 *Id.* at 111-112.

measure, then by 1926, the three-mile limit was in every sense a rule of international law.[269]

The codification of international law regarding the territorial sea began in 1924 with a resolution of the League of Nations.[270] The Hague Codification Conference in 1930 recognized that coastal states possessed full sovereignty over their maritime belts which included the super adjacent air, the seabed, and the subsoil.[271] The conference did not produce a treaty because there was no agreement regarding the width of the territorial sea.[272] Nevertheless, after 1930, most nations agreed that the sea constituted part of a nation's territory under customary international law.[273] For example, in 1931, the Canadian Supreme Court, in *S.S. "May" v. the King*, held that "it is a well recognized principle, both in this country and in the United States that the jurisdiction of a nation is exclusive and absolute within its own territory, of which its territorial waters within three marine miles from shore are clearly a part as the land."[274] The concept of the territorial sea, which was a principle of customary international law, was codified in the Convention on the Territorial Sea in 1958.[275]

B. Newfoundland's Territorial Sea

In the nineteenth and twentieth centuries, Great Britain exercised jurisdiction over Newfoundland's three mile territorial sea. The Crown's rights over Newfoundland's territorial sea were held in right of the province.[276] The provincial government of Newfoundland exercised jurisdiction over its territorial sea. In 1875, the Newfoundland Supreme Court acknowledged Newfoundland's jurisdiction over its territorial sea in *Anglo-American Telegraph Company v. Direct United States Cable Company*.[277] The Court granted an injunction preventing Direct U.S. Cable from laying a cable to a buoy within Conception Bay which is on the east coast of Newfoundland. The buoy and the cable were more than three miles off the coast. The Court found that Direct U.S. Cable had violated a Newfoundland statute which granted the exclusive franchise to Anglo-American Telegraph to lay cable in Newfoundland. The Court held that Newfoundland's jurisdiction extended three miles

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269 *Id.* at 130.

270 145 D.L.R.3d at 21.

271 *Id.* at 22

272 *Id.*

273 *Id.*

274 3 D.L.R. 15, 20-21 (1931).

275 145 D.L.R.3d at 23. *See generally* Ereli, *The Submerged Lands Act and the Geneva Convention on the Territorial Sea and the Contiguous Zone*, 41 TUL. L. REV. 555 (1967).

276 145 D.L.R.3d at 24-25.

277 6 Nfld. L.R. 28 (1875).

seaward from a closing line drawn across the mouth of Conception Bay.[278] Chief Justice Hoyles, recognizing provincial jurisdiction over the territorial sea, stated that

> I hold that the territorial jurisdiction of the sovereign extends to three miles outside of a line drawn from headland to 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; that this authority and jurisdiction existed in the local government prior to the grant of representative institutions to the colony; that such grant, while it enlarged the powers, neither added to nor lessened the territorial jurisdiction of the local 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.[279]

The Newfoundland Supreme Court reaffirmed Newfoundland's jurisdiction over the territorial sea in two subsequent cases. In 1888, in *Rhodes v. Fairweather*, the Newfoundland Supreme Court invalidated a Newfoundland statute which regulated the slaughtering of seals beyond the three mile territorial sea.[280] The Court, citing *Direct U.S. Cable*, found that Newfoundland's jurisdiction only extended three miles from its coast.[281] Even Judge Pinsent, in dissent, stated that "I take it to be sound doctrine as a general proposition that the limits of colonial jurisdiction extend only three miles from the shore. . . ."[282] Following Rhodes, the Colonial Office solicited an opinion from the Law Officers regarding provincial jurisdiction over the territorial sea. The Law Officers responded that "we are of the opinion that, unless specifically authorized by Imperial legislation, it is not within the power of Colonial Legislature to legislate generally for the regulation of the fisheries outside the three miles limit."[283]

In 1889, in *Queen v. Delephine*, the Newfoundland Supreme Court dealt with a conviction for the violation of the Newfoundland Bait Act which occurred outside of the three mile territorial limit.[284] The Newfoundland Supreme Court, quoting *Direct U.S. Sales*, found that Newfoundland's jurisdiction was limited to three miles from shore.[285] Justice

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278 *Id.*

279 *Id.* at 33.

280 7 Nfld. L.R. 321 (1888).

281 *Id.* at 324-26.

282 *Id.* at 333.

283 Swan, *The Newfoundland Offshore Claims: Interface of Constitutional Federalism and International Law*, 22 McGILL L.J. 541, 552 (1976).

284 7 Nfld. L.R. 378 (1889).

285 *Id.* at 385-86.

Little stated that there was "no question as to the liability and amenability of any foreign ships for offenses committed by the crews thereof within the territorial waters of this colony. . . ."[286]

The provincial legislature continued to exercise jurisdiction over its territorial sea. In 1893, Newfoundland enacted hovering legislation which authorized provincial officials to board and examine the cargo of foreign vessels hovering within three miles of the coast.[287] In 1898, Newfoundland passed a customs act which authorized inspections within three miles of Newfoundland's coast.[288] (Both the hovering and customs acts referred to territorial waters as "British Waters"). In 1905 and 1906, Newfoundland promulgated Foreign Fishing Vessels Acts authorizing provincial officials to board and inspect foreign fishing vessels within Newfoundland's territorial sea.[289] In 1907, Newfoundland enacted the Atlantic Steam Service Act, which granted subsea rights under the Strait of Bell Isles, far beyond the three mile territorial sea, to build a futuristic railroad.[290] In 1916, Newfoundland passed the Oyster Fisheries Act which authorized the issuance of leases on the banks which were beyond the territorial sea.[291]

When Newfoundland achieved dominion status under the Balfour Declaration in 1926, Newfoundland inherited all of the rights held by the Crown for the province.[292] Newfoundland also possessed sufficient sovereignty to acquire any rights recognized by international law.[293] Newfoundland's status in 1926 was analogous to that of Canada.[294] In the British Columbia Offshore Reference in 1967, the Supreme Court of Canada held that the Territorial Waters Jurisdiction Act of 1878 constituted a British claim of jurisdiction over the territorial sea for Canada. Canada, however, only had limited jurisdiction over its territorial sea. When Canada achieved its independence between 1919 and 1931, it was entitled to all of the Crown's rights including those rights recognized by international law.[295] Consequently, in 1926, Newfoundland, like Canada, possessed jurisdiction over its territorial sea.

Imperial legislation was not necessary to legitimate Newfoundland's claim over its territorial sea.[296] In *Keyn*, the court held that provincial

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286 *Id.* at 86.

287 Swan, *supra* note 283, at 549; LA FOREST, *supra* note 175, at 101; 56 Vict., ch. 6. (Nfld.).

288 Customs Act, 61 Vict., ch. 13 (Nfld.).

289 An Act Respecting Foreign Fishing Vessels (1905) 5 Edw. VII, ch. 4, s. 1 (Nfld.); (1906) 6 Edw. VII, ch. 1 (Nfld.)

290 HERITAGE OF THE SEA, *supra* note 2, at 19.

291 Of the Propogation and Protection of Oysters, C.S.N. (1916), c. 165.

292 145 D.L.R.3d at 30.

293 *Id.* at 30-33.

294 145 D.L.R.3d at 26.

295 1967 S.C.R. at 815-17, 65 D.L.R. at 374-76.

296 Inions, *supra* note 125, 470 (1981).

jurisdiction could only be extended by a formal act of Parliament.[297] Nevertheless, by 1926, *Keyn* had been repudiated judicially and politically. Alternatively, if a formal legislative pronouncement was required, the aforementioned enactments by Newfoundland, pertaining to hovering, customs, and fishing, were the functional equivalent of a legislative declaration, especially when viewed together with the Balfour Declaration.[298]

Newfoundland continued to exercise jurisdiction over its territorial sea after 1926. In 1929, Newfoundland enacted the Air Navigation Act which regulated aerial navigation over Newfoundland and prohibited aircraft from travelling over Newfoundland's territory, which included the territorial sea.[299] In 1930, Newfoundland enacted the Crown Lands Act which provided for the licensing of offshore mining operations.[300] In 1930, Newfoundland amended its Customs Act and reaffirmed its jurisdiction over the territorial sea which was referred to as "Newfoundland Waters."[301] Newfoundland's jurisdiction over its territorial sea was again acknowledged in amendments to its Customs Act in 1933 and 1938.[302]

Dominion courts continued to ignore *Keyn* and recognize provincial jurisdiction over the territorial sea. In 1932, in *Rex v. Burt*, the New Brunswick Supreme Court upheld Captain Burt's conviction for the possession of intoxicating liquor within the province, one and three quarters miles off shore.[303] Chief Justice Baxter found that the exercise of jurisdiction over the territorial sea "is now so generally admitted in international law that I do not think that it is open to question that the legislative authority of the Province extends over that area. . . ."[304] Justice Baxter proceeded to state that "Regina v. Keyn has been put to rest so far as we are concerned by the judgment in *Secretary of State v. Chelikani Rama Rao*."[305] In 1934, the New Brunswick Supreme Court reaffirmed provincial jurisdiction over the territorial sea in *Filion v. New Brunswick International Paper Company*.[306]

Newfoundland did not surrender its rights over the territorial sea during the Commission government.[307] Great Britain continued to rec-

297 The Queen v. Keyn, 2 Ex. D. 63, 193, 203, 214, 230 (1876).

298 Inions, *supra* note 125, at 469-70.

299 145 D.L.R.3d at 28-29.

300 *Id.* at 30.

301 *Id.*

302 *Id.* at 30.

303 5 M.P.R. 112 (N.B. 1932).

304 *Id.* at 118.

305 *Id.* Justice Baxter stated that Keyn "had reference on its merits solely to the point of Admiralty jurisdiction." *Id.* at 119.

306 8 M.P.R. 89, 118-19 (N.B. 1934).

307 145 D.L.R.3d at 33.

ognize Newfoundland's rights to its natural resources.[308] When Newfoundland confederated with Canada in 1949, it retained rights over its territorial sea under Term 37 of the Terms of Union.[309]

There were several cases after confederation which resurrected the rationale of *Keyn*. In 1956, the Prince Edward Island Supreme Court followed *Keyn* in *Gavin v. the Queen*.[310] In 1963, the Nova Scotia Supreme Court in *Re Dominion Coal Company Ltd. and County of Cape Breton* also based its decision on the rationale of *Keyn*.[311] Several justices on the Nova Scotian Court engaged in the colloquium on the territorial sea.[312] Justice MacDonald, a proponent of *Keyn*, asserted that the Territorial Waters Jurisdiction Act of 1878 simply reestablished criminal jurisdiction over the territorial sea, but did not incorporate the territorial sea into the realm.[313] Justice MacDonald, citing the United States Supreme Court decisions in the tidelands controversy,[314] questioned if offshore property rights could ever be established in a federal system.[315] Justice Currie, in dissent, pointed out the weakness in Justice MacDonald's reliance on *Keyn*. Justice Currie held that *Keyn* was overruled by the Territorial Waters Jurisdiction Act of 1878 and the Chelikani decision.[316] Justice Currie found that international law allowed a coastal state to "exercise jurisdiction over its territorial waters at least up to three miles."[317]

The Supreme Court of Canada relied on *Keyn* in the British Columbia Offshore Mineral Rights Reference.[318] The Canadian Supreme Court's decision in that case was erroneous for several reasons. First, when British Columbia confederated with Canada in 1871, it did not surrender its rights over the territorial sea. British Columbia retained such rights under section 109 or 117 of the British North America Act.[319] Second, the rationale of *Keyn*, which was very narrow, was overruled by subsequent judicial decisions and political action.[320] Third, if *Keyn* were valid, Canada would not have been entitled to exercise jurisdiction over its territorial sea upon independence because the Imperial Parliament

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308 *Id.*

309 *Id.* at 36.

310 3 D.L.R.2d 547 (1956).

311 40 D.L.R.2d 593 (1963).

312 Roberts, *supra* note 256, at 205-06.

313 Re Dominion Coal Company Ltd. and County of Cape Breton, 40 D.L.R.2d 630.

314 Fitzgerald, *supra* note 1.

315 40 D.L.R.2d, at 630-31.

316 *Id.* at 616-17.

317 *Id.* at 617.

318 *See generally*, British Columbia Offshore Reference, *supra* note 10.

319 5 D.L.R.4th at 408; *see also supra* notes 174-78 and accompanying text.

320 *See supra* notes 233-40 and accompanying text.

had not extended Canada's boundaries.[321] Fourth, the federal government's role as external sovereign did not expand its property rights under the British North America Act.[322] Finally, given the historical analysis in the case, the Court's decision was restricted to the submerged lands off the coast of British Columbia.[323]

The High Court of Australia also addressed *Keyn* in *New South Wales v. Commonmwealth* in 1975.[324] The Australian court upheld the Sea and Submerged Lands Act of 1973 which declared the federal government's sovereignty over the territorial sea and, for the purposes of exploration and exploitation of natural resources, over the continental shelf.[325] Several justices were critical of the *Keyn* rationale. Justice Jacobs, in the majority, rejected the holding of *Keyn* that the Crown lacked jurisdiction beyond the low water mark.[326] Justice Jacobs found that the Crown's dominion and imperium over offshore areas were not based on the common law, but were prerogative rights of the King. Such prerogative rights were recognized, but not limited, by the common law.[327] These prerogative rights were transferred to Australia when Australia achieved responsible government after World War I.[328] Justice Jacobs' rationale bolstered Newfoundland's jurisdictional claim. When Newfoundland achieved dominion status, Newfoundland became the heir to all of the Crown's prerogative rights in the same manner as Australia.[329] Two justices, in dissent, also questioned the *Keyn* decision. Justice Gibbs

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321 The Queen v. Keyn, 2 Ex. D. 63, 193, 203, 214, 230 (1876).

322 *See supra* notes 137-43 and accompanying text.

323 145 D.L.R.3d at 20; *see also* 5 D.L.R.4th at 407, and 131 A.L.R. 1.

324 135 C.L.R. 337, 345, 378, 421-36, 486 (1975).

325 *Id.* at 338; *see also* Harrison, *Jurisdiction Over the Canadian Offshore: A Sea of Confusion*, 17 OSGOODE HALL L.J. 469, 474-79 (1979).

326 Justice Jacobs, referring to Keyn, stated that:

> To describe it as a case concerned with the respective extents of jurisdiction of the common law courts and the court of Admiralty is not to diminish the importance of the decision but to emphasize its essential importance in the present context. The courts of common law had no jurisdiction because the common law did not extend to regulate the rights and obligations of persons beyond the boundaries of the counties. . .Whether or not the seas are described as outside the realm depends not on the extent of the realm but on the meaning given to the word, as I have earlier said, and in Reg. v. Keyn the question was the meaning of that word in the Statutes of Richard II. It was not strictly necessary to decide in Reg. v. Keyn whether the Crown of England owned the sea or any part thereof below low-water mark and not intra fauces terrae. The important point was that the common law did not extend there.

New South Wales, 135 C.L.R. at 491-92.

327 Justice Jacobs stated that: "[T]he royal right was a prerogative recognized by the common law and to that extent it was part of the common law but it did not have its source in that law. His rights therein were not governed by the common law and the extent thereof was not determined by that law." *Id.* at 487.

328 *Id.* at 492-93.

329 145 D.L.R.3d at 26.

stated that: "in my opinion it is apparent that the decision in Reg. v. Keyn could have been reached without deciding whether the territory of England stopped at low-water mark."[330] Justice Stephen pointed out that the British Columbia Offshore Reference did not address the view of *Keyn* set forth in the *Chelikani* case.[331] Both justices determined that the *Keyn* rationale did not negate the existence of the three mile territorial sea. Consequently, the resurrection of *Keyn* in the cases following confederation did not affect Newfoundland's rights over its territorial sea.

VII. CONTINENTAL SHELF RIGHTS

The Supreme Court of Canada held that rights in the continental shelf were not recognized as a principle of customary international law when Newfoundland confederated with Canada.[332] In 1949, different nations made different claims regarding the basis and extent of their jurisdiction over the continental shelf. Since international law was in transition, Newfoundland could not claim the rights to explore and exploit the resources of the continental shelf under international law.[333] The Supreme Court of Canada also determined that the International Court of Justice's (ICJ) decision in the North Sea Continental Shelf Cases in 1969 did not make continental shelf rights retroactive to 1949.[334] The International Court of Justice's finding that continental shelf rights exist *ipso jure* and *ab initio* referred back to 1958 when the Convention on the Continental Shelf was signed. In 1958, Canada, not Newfoundland, was entitled to the rights over the continental shelf.[335] The Supreme Court of Canada's decision was incorrect. In 1949, Newfoundland was entitled to continental shelf rights which were recognized as a principle of customary international law. The Convention on the Continental Shelf simply codified existing customary international law. The International Court of Justice's decision in the North Sea Continental Shelf Cases supported Newfoundland's claim to rights over the continental shelf. The Court recognized that continental shelf rights were a principle of customary international law until codified in the Convention on the Continental Shelf. The Court determined that since a coastal state's right over the continental shelf existed *ipso facto*, there was no necessity for any occupation or a proclamation to assert rights over this natural prolongation of national territory. Furthermore, the Court held that since continental shelf rights existed *ab initio*, they were retroactive.

330 New South Wales, 135 C.L.R. at 395-96.

331 *Id.* at 437.

332 5 D.L.R.4th at 418.

333 *Id.* at 416.

334 North Sea Continental Shelf Cases (W. Ger. v. Neth.) 1969 I.C.J. 3.

335 5 D.L.R.4th 417-19.

Consequently, Newfoundland possessed rights over its continental shelf when it confederated with Canada in 1949.

A. Customary International Law

There are four sources of international law: 1) international conventions, 2) international customs, 3) general principles of law recognized by civilized nations, and 4) judicial decisions and the teachings of the most highly qualified publicists of various nations.[336] Principles of customary international law are established by a concordant practice by a number of states, regarding an issue within the domain of international relations, over a considerable period of time, upon the belief that the practice is required by international law. There must also be general acquiescence to the practice by other states.[337] Zdenek Slouka stated that international customary law

> originates in national policies manifested in the conduct of states; and on the fact, secondly, that their growth is evolutionary. Combined, these two facts imply that the growth of customary rules is a practice through which political discretion of states gradually narrows down into progressively restrictive, unavoidable, and finally obligatory patterns.[338]

The first act recognizing jurisdiction over the continental shelf was the Treaty Relating to the Submarine Areas Off the Gulf of Paria in 1942.[339] In this treaty, Great Britain and Venezuela acknowledged each others sovereignty and control over the submerged areas in the Gulf of Paria which separated Venezuela and Trinidad. The treaty did not refer to the continental shelf specifically, nor claim any rights to the seabed resources. Following the treaty, Great Britain annexed the submerged lands off Trinidad and Tobago and claimed exclusive rights to exploit the resources on the continental shelf. Great Britain's annexation was based on the theory that the submerged lands beyond the low water mark were *res nullius* and could be appropriated by occupation.[340] The British practice did not foreshadow the development of international law regarding the continental shelf.

The development of the modern view regarding the continental shelf began with the Truman Proclamation on September 28, 1945. The United States claimed exclusive jurisdiction and control over the natural

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336 The sources of international law are set out in Article 38(1) of the Statute of the International Court of Justice. 1947-1948 U.N.Y.B. 1000, U.N. Sales No. 1949.1.13. *See also* 5 D.L.R.4th at 411 (referring to the Article 38(1) sources).

337 O'Connell, *supra* note 188, at 17.

338 Z. SLOUKA, INTERNATIONAL CUSTOM AND THE CONTINENTAL SHELF, A STUDY IN THE DYNAMICS OF CUSTOMARY RULES OF INTERNATIONAL LAW 4 (1968).

339 5 D.L.R.4th at 411-12.

340 *Id.*

resources of the seabed and subsoil of the continental shelf.[341] The Truman Proclamation asserted that coastal nation's have jurisdiction over their continental shelf resources because 1) the continental shelf was an extension of the coastal state's land mass, thus naturally appurtenant to it; 2) the cooperation of the coastal state was necessary for the utilization and conservation of offshore resources; 3) continental shelf resources were often commingled with the resources of the land territory; and 4) national defense precluded one nation from developing continental shelf resources off another nation's shore.[342] The Truman Proclamation stated

> having concern for the urgency of conserving and prudently utilizing its natural resources, the Government of the United States regards the natural resources of the subsoil and seabed of the continental shelf beneath the high seas but contiguous to the coasts of the United States as appertaining to the United States, subject to its jurisdiction and control.[343]

Following the Truman Proclamation, other nations declared jurisdiction over the continental shelf. Prior to Newfoundland's confederation with Canada in 1949, 7 nations and 2 colonies issued proclamations claiming jurisdiction over their continental shelves.[344] Several Latin American nations issued decrees which declared rights over the continental shelf and its super adjacent waters to a far greater extent than that asserted in the Truman Proclamation.[345] The United States and Great Britain protested these claims.[346]

When Newfoundland confederated with Canada in 1949, continental shelf rights were recognized as a principle of customary interna-

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341 The Truman Proclamation is set out in full in British Columbia Offshore Reference, *supra* note 10, 1967 S.C.R. at 818-19, 65 D.L.R.2d at 377; *see also* Hollick, *U.S. Oceans Policy: The Truman Proclamations*, 17 VA. J. INT'L L. 23 (1976).

342 The Truman Proclamation states that

> Whereas it is the view of the Government of the United States that the exercise of jurisdiction over the natural resources of the subsoil and seabed of the continental shelf by the contiguous nation is reasonable and just, since the effectiveness of measures to utilize or conserve these resources would be contingent upon cooperation and protection from the shore, since the continental shelf may be regarded as an extension of the land mass of the coastal nation and thus naturally appurtenant to it, since these resources frequently form a seaward extension of a pool or deposit lying within the territory, and since self-protection compels the coastal nation to keep close watch over activities off its shores which are of the nature necessary for utilization of these resources.

65 D.L.R.2d at 377.

343 5 D.L.R.4th at 412.

344 *Id.* at 412-13; *See also* Holland, *the Jurisdictional States of the Continental Shelf*, 30 TEXAS L. REV. 586, 591-94 (1952).

345 Lauterpacht, *supra* note 189, at 632 nn. 1 & 2. In 1951, the United States protested claims by El Salvador, Ecuador, and Honduras.

346 Lauterpacht, *supra* note 189, at 632 n. 4.

tional law. According to Hersch Lauterpacht, a noted international scholar and former justice on the International Court of Justice, the length of time for a practice to evolve into a principle of customary international law is irrelevant.[347] Custom is not another expression for prescription. A consistent and uniform practice can occur in a short period of time. The length of time necessary for the crystallization of custom is proportionate to the degree and intensity of the change which the custom purports to accomplish. Since the recognition of continental shelf rights did not constitute a drastic change in international law, there was no necessity for a prolonged period of time to establish such rights as a rule of customary international law.[348]

Lauterpacht also pointed out that the status of the nations instituting a change in international law is important.[349]

The recognition of continental shelf rights by the United States and Great Britain was significant because both nations, who were the leading maritime powers, were strong supporters of freedom of the seas and restrictive claims regarding the territorial sea. The United States and Great Britain's acceptance of continental shelf rights was strong evidence of the emergence of new principle of customary international law.[350]

The basis of this new principle of customary international law was geographical unity and contiguity.[351] Both of these factors corresponded to the physical reality. The continental shelf could be viewed as 1) the extension of the continental land mass, 2) the result of accretion from or accession to the coastal nation's land mass, or 3) an area of the coastal nation which was experiencing marine transgression.[352] Furthermore, the principle of contiguity as the basis of a nation's claim over offshore areas had been recognized in international law. In the *Grisbadarna* case in 1909, the Permanent Court of Arbitration held that "in conformity with the fundamental principles of the law of nations, both ancient and modern. . ., the maritime territory is an essential appurtenance of land territory."[353] Hersch Lauterpacht asserted that contiguity, which rests upon geographical unity, "provides a legal basis of utility and reasonableness which is most consistent with the technical realities of the situation, with security of the states, and with the requirement of international stability."[354] D.P. O'Connell, concurring with Lauterpacht's position, pointed out that "economic necessity. . .is the generating impulse of the

347 Lauterpacht, *Sovereignty Over Submarine Areas*, 27 BRIT. Y. B. INT'L L. 376, 393 (1950).

348 *Id.*; *see also* Holland, *supra* note 345, at 597.

349 *Id.* at 394.

350 *Id.* at 394-395.

351 *Id.* at 423.

352 *Id.* at 430-31.

353 Norway-Sweden Boundary Dispute, 4 AM. J. INT'L LAW 226, 231 (1910).

354 Lauterpacht, *supra* note 347, at 431.

(continental shelf) doctrine, and contiguity is relied on as the test for establishing the limits within which economic considerations will be permitted to operate."[355]

The modern doctrine of continental shelf rights was not based on occupation.[356] Offshore submerged lands could not be occupied in the same manner as land territory. International law had moved away from occupation as the basis of title. This was manifested in the Clipperton Arbitration in 1931[357] and the Eastern Greenland Arbitration in 1933.[358] In both cases, a proclamation of sovereignty and minimal acts over the territory were accepted as sufficient to demonstrate sovereignty.[359] Both decisions prompted von der Heydte to state, "these two cases seem to suggest that the appearance of a sovereign authority in an uninhabited region involved acquisition of that territory."[360] There was no need for a nation to issue a proclamation in order to claim continental shelf rights. Lauterpacht asserted that proclamations were not "a source of title or a means of acquiring it."[361] Continental shelf proclamations were declarative, not constitutive, of continental shelf rights. Since continental shelf rights arose by right under international law, nations could issue proclamations at their discretion.[362] Consequently, Newfoundland's failure to issue a continental shelf proclamation did not affect its rights.[363]

There was general international acquiescence to national claims over the continental shelf. According to Lauterpacht, the lack of protest "may be fairly interpreted as meaning that they accepted it as law, i.e., as being in conformity with the existing law."[364] Furthermore, the absence of a protest acted as an estoppel regarding future objections to the principle of continental shelf rights.[365] Nations had a duty to voice their objec-

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355 *Supra* note 188, at 577-78.

356 Lauterpacht, *supra* note 347, at 415-23.

357 Clipperton Arbitration, Annual Digest, 1931-32, Case No. 50; *see also* Lauterpacht, *supra* note 347, at 415-23.

358 Legal Status of Eastern Greenland (Den. v. Nor.), 1933 P.C.I.J. (Ser. A/B) No. 53, at 45-46 (Apr. 5, 1933); *see also* Lauterpacht, *supra* note 347, at 415-23.

359 Lauterpacht *supra* note 347, at 415-23.

360 O'CONNELL, *supra* note 188, at 475.

361 Lauterpacht, *supra* note 347, at 418.

362 *Id.* at 394.

363 The Newfoundland Court of Appeal reaching a contrary conclusion stated:

> The Supreme Court of Canada in the British Columbia Reference determined that international law cannot, of itself, endow a State with additional territory or rights therein. The acquisition of such rights is a matter of municipal law and must be accomplished by some constitutional act. We must, of course, accept that decision as determinative of the issue. The historical record of Newfoundland prior to Union establishes there was no such act.

145 D.L.R.3d at 40.

364 Lauterpacht, *supra* note 347, at 395.

365 *Id.* at 397. Lauterpacht has stated that:

tions if they felt the continental shelf claim violated international law. Otherwise, the nation making the claim could rely on their acquiescence and plan for the development of continental shelf resources.[366]

Canada never protested the emergence of continental shelf rights.[367] Prior to the issuance of the Truman Proclamation, the United States consulted with those governments "whose interests may be concerned and whose concurrence is desirable, namely, Canada, Newfoundland, Mexico, U.S.S.R., Great Britain, and Cuba."[368] After being consulted, neither Canada, nor Newfoundland raised any objections to the Truman Proclamation. Canada advised the United States that its silence should not be interpreted as disapproval.[369] If Canada had believed that the Truman Proclamation violated existing international law, it should have registered its protest. Canada's failure to protest precluded its claim that at the time of confederation the Crown did not hold rights in the continental shelf for the province of Newfoundland.

Within six months after confederation, thirteen additional states asserted claims over the continental shelf. In the Middle East, nine Sheikdoms issued proclamations over the continental shelf which never mentioned boundary extensions. Since these proclamations were drafted by the British Foreign Office, they indicated a change in the British position regarding the necessity of occupation to gain continental shelf rights.[370] By the end of 1950, eighteen nations had asserted claims over the continental shelf.[371]

There was a great deal of controversy regarding the status of continental shelf rights under international law. In 1950, the International Law Association issued a report which recommended that "control and jurisdiction" over the continental shelf should "vest *ipso jure* in the coastal state, or vest in the coastal state (without effective occupation being necessary) by national occupation (*e.g.* by proclamation) by that

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> Protest is a formal communication from one State to another that it objects to an act performed, or contemplated, by the latter. A protest serves the purpose of preservation of rights, or of making it known that the protesting State does not acquiesce in, and does not recognize, certain acts. A State can lodge a protest with another State against acts which have been notified to the protesting State, or which have otherwise become known. On the other hand, if a State acquires knowledge of an act which it considers internationally illegal and in violation of its rights, and nevertheless does not protest, this attitude implies a renunciation of such rights, provided that a protest would have been necessary to preserve a claim.

Lauterpacht, *supra* note 189, at 874-75.

366 *Id.*; *see also* Lauterpacht, *supra* note 347, at 397.

367 Lauterpacht, *supra* note 189.

368 145 D.L.R.3d at 32.

369 5 D.L.R. 4th at 23.

370 *Id.* at 21.

371 Lauterpacht, *supra* note 347, at 381-82; *see also* Z. SLOUKA, *supra* note 338, at 56.

state."[372] The report, evidencing the dispute regarding the status of continental shelf rights, concluded that "whatever view one takes on the question whether the above mentioned state practice has, as yet crystallized into a rule of positive law, it is evident that the clarification of this question by international agreement is very desirable."[373]

In 1950, the International Law Commission (ILC), a United Nations organization which provides advice to the General Assembly for "the progressive development and codification of international law," began work on the development of continental shelf rights.[374] At the ILC meeting in 1950, J.M. Yepes of Bogota asserted that the Truman Proclamation "constitutes a veritable customary law to which the Commission should give recognition."[375] In 1951, the ILC submitted seven draft articles which reflected its view of the status of international law regarding the continental shelf.[376] The ILC did not support the position that continental shelf rights were recognized as a principle of customary international law.[377]

In 1951, Lord Asquith's decision in the Matter of an Arbitration between the Petroleum Development (Trucial Coast) Limited and His Excellency Sheik Shakhbut Bin Sultan Bin Za'id, Ruler of Abu Dhabi and its Dependencies provided some insight into the status of continental shelf rights.[378] In 1939, the Sheik of Abu Dhabi entered into an agreement with Petroleum Development Limited, a member of the Iraq Petroleum Company, granting the company the exclusive rights to develop and export oil from Abu Dhabi. In June 1949, the Trucial Sheikdoms and a number of Mideastern states declared their jurisdiction and control over "the seabed and subsoil lying beneath the high seas in the Persian Gulf contiguous to the territorial waters of Abu Dhabi and extending seaward to boundaries to be determined more precisely as the

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372 J.P.R. Reith, Rights to the Seabed and its Subsoil, ILA Digest, 87, 132, 44th Conference (1950).

373 *Id.*

374 5 D.L.R. 4th at 26.

375 Z. SLOUKA, *supra* note 338 at 20-21 (*citing* U.N. International Law Commission, *Yearbook* 1950, vol. 1, p. 218).

376 Holland, *supra* note 344, at 595.

377 The ILC stated that

> The Commission has not attempted to base on customary law the right of a coastal State to exercise control and jurisdiction for the limited purposes stated in Article 2. Though numerous proclamations have been issued over the past decade, it can hardly be said that such unilateral action has already established new customary law. It is sufficient to say that the principle of the continental shelf is based on general principles of law which serve the present day needs of the international community.

5 D.L.R. 4th at 28.

378 1 INT'L. & AND COMP. L.Q. 247 (1952); *see also* Cosford, *The Continental Shelf and the Abu Dhabi Award*, 1 MCGILL L.J. 109 (1953).

occasion arises."[379] Following the proclamation, the Sheik transferred the rights to develop and export oil from the newly acquired offshore lands to Superior Oil of California. A conflict ensued when Petroleum Development Limited asserted that the Sheik had transferred such rights to Petroleum Development in 1939. Under terms of the contract, the issue was submitted to arbitration.[380]

Lord Asquith, the arbitrator, determined that the rights which the Sheik granted in 1939 were confined to the area landward of and including the territorial sea.[381] There was no recognition of continental shelf rights in 1939. Such rights were of recent origin. Lord Asquith maintained that the draft articles of the ILC in 1951 were not declarations of existing international law, but proposals for future principles of international law. Since different nations were making diverse claims to the resources below, on, and above the continental shelf to different distances, Lord Asquith determined that continental shelf rights did not exist *ipso jure* in 1950. Lord Asquith stated 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.[382]

Lord Asquith determined that even though continental shelf rights were not yet recognized by international law, international principles supporting continental shelf rights should be developed. Such principles should rest on the doctrine of contiguity.[383]

Lord Asquith was mistaken regarding the nature of continental shelf rights in international law. D.P. O'Connell pointed out that a principle

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379 *Id.* at 255.

380 *Id.*

381 *Id.*

382 *Id.* at 256.

383 Lord Asquith stated that:

> Whether there ought to exist a rule giving effect to the doctrine in one form or another and, if so, which of its forms is another question and one which, if I had to answer it, I should answer in the affirmative. There seems to be much cogency in the arguments of those who advocate the ipso jure variant of the doctrine. In particular: 1) it is extremely desirable that someone, in what threatens to become an oil starved world, would have the right to exploit the subsoil of the submarine bed outside the territorial limit; 2) the contiguous coastal power seems to be the most appropriate and convenient agency for this purpose. It is in the best position to exercise effective control, and the alternative is teemed with disadvantages; 3) there is no reason in principle why the subsoil of the high seas should, like the high seas themselves, be incapable of being subject of exclusive rights to anyone. . .4) to treat this subsoil as res nullius, fair game for the first occupier, entails obvious and grave dangers so far as occupation is possible at all. The doctrine that occupation is vital in the case of areas res nullius has in any case worn thin since the East Greenland Arbitration and more especially since that relating to Clipperton Island.

Id. at 256.

of international law "may be vague as to extent and application, but that is not to conclude, as Lord Asquith did, that it lacks judicial character."[384] O'Connell asserted that principles of international law begin as the inchoate practices of states which are later given judicial construction.[385] According to O'Connell "when it is observed that some thirty nations have claimed their continental shelves, including the major Powers with a preponderant interest in both freedom of the seas and the protection of coastal resources, it is legitimate to assert that the continental shelf concept is one of law."[386]

The International Law Commission (ILC) continued its work on the development of continental shelf rights. In 1953, the ILC stated that "the practice itself is considered by the commission to be supported by consideration of legal principles and convenience."[387] By 1956, the ILC ceased to designate whether its proposed rules involved the progressive development (i.e. *lex ferenda*) or the codification (i.e. *lex lata*) of international law.[388] In its final report, the ILC supported international recognition of continental shelf rights.[389]

The work of the ILC pertaining to continental shelf rights culminated at the Law of the Sea Conference in Geneva in 1958. Many of the delegates attending the Conference did not view their role as involving the progressive development of international law, but the codification of existing international law.[390] At the conference, there was controversy over the status of continental shelf rights. Of the 55 delegations which participated in the debates of Committee IV regarding

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384 O'CONNELL *supra* note 188, at 577.

385 *Id.*

386 *Id.*

387 Oda, *A Reconsideration of Continental Shelf Doctrine*, 32 TULANE L. REV. 27, 30, n. 31 (referring to UN Doc. No. A/2456 at 14).

388 Goldie, *North Sea Continental Shelf Cases-A Ray of Hope for the International Court*, 16 N.Y.L.F. 327, 337-38 (1970).

389 The ILC stated that continental shelf rights were

> supported by considerations of law and of fact. In particular, once the seabed and subsoil have become an object of active interest to coastal states with a view to the exploration and exploitation of their resources, they cannot be considered res nullius, i.e. capable of being appropriated by the first occupier. It is natural that coastal States should resist any such solution. Moreover, in most cases the effective exploitation of natural resources must presuppose the existence of installation on the territory of the coastal State. Neither is it possible to disregard the geographical phenomenon whatever the term - propinquity, contiguity, geographical continuity, appurtenance or identity—used to define the relationship between the submarine areas in question and the adjacent non-submerged land. All these considerations of general utility provide a sufficient basis of the principle of sovereign rights of the coastal State as now formulated by the Commission. As already stated, that principle which is based on general principles corresponding to the present needs of the international community, is in no way incompatible with the principle of freedom of the seas.

Factum of the Attorney General of Canada, *supra* note 103, at 28.

390 *Supra* note 388, at 347-48.

continental shelf rights, 20 nations asserted that continental shelf rights were recognized by customary international law, 12 states denied the existence of such rights, and 23 states expressed no opinion on the issue.[391]

Proponents of the existence of continental shelf rights based their support on different grounds. The Yugoslav delegate asserted that continental shelf rights were established by the publication by 30 states of "unilateral declarations extending their sovereignty to submarine areas beyond the limits of the territorial sea" which "was not contested."[392] The Yugoslavian delegate "did not oppose the formal and collective recognition of what was already an established institution."[393] The delegate from the United Kingdom stated that "the rules of international law on the continental shelf were mainly the results of unilateral declarations, such as President Truman's proclamation in 1945."[394] The Australian delegation asserted that continental shelf rights were established by "custom initiated by the leading maritime powers and acquiesced in by the generality of States."[395] The Argentine representative declared that "the principle instrument affecting the continental shelf, President Truman's Proclamation 1945, and its acceptance by other States had given rise to a practice which, though based on unilateral acts, had acquired the validity of a principle of international law."[396]

The Israel delegate declared that the recognition of continental shelf rights as a principle of international customary law was supported by "the existence of a sufficient body of State practice, widespread acquiescence in that State practice, the large volume of authoritative literature and the work done by the ILC and the General Assembly on the subject. . ."[397] The Philippine delegate stated that continental shelf rights were "inherent in the sovereignty which the coastal State exercised over the adjacent land territory" and were not derived "from any specific provision of international law."[398] The Mexican delegate asserted that coastal states had exclusive control over the continental shelf because it was "an integral part of the mainland."[399]

The Conference drafted the Convention on the Continental Shelf which codified the existing customary international law.[400] The Conven-

391 Z. SLOUKA, *supra* note 338, at 91.
392 *Id.*
393 *Id.*
394 *Id.*
395 *Id.*
396 *Id.* at 91-92.
397 *Id.* at 92.
398 *Id.* at 93.
399 *Id.*
400 145 D.L.R.3d at 40.

tion declared that coastal states have exclusive rights to explore and exploit the natural resources of the continental shelf adjacent to their coasts.[401] Such rights exist *ipso jure*, by right of law, thus there is no need for a proclamation or occupation. Continental shelf rights do not affect the status of the super adjacent waters. The exploration and exploitation of the natural resources of the continental shelf must not interfere with navigation, fishing, scientific research, or the conservation of living resources. The Convention was signed by 46 states. By the summer of 1964, 22 states had ratified or acceded to the Convention.[402]

B. North Sea Continental Shelf Cases

Judicial decisions constitute an important source of international law[403] and play a significant role "in the crystallization of custom."[404] The International Court of Justice is instrumental in interpreting and establishing principles of international law. D.P. O'Connell stated that pronouncements by the International Court "form the living law and fuse with diplomatic practice to produce a rule governing the reflections of authors, the opinions of governmental legal advisers, and the decisions of other judges."[405]

The coasts of Germany, Denmark, and Norway are adjacent to the North Sea. Agreements delimiting the continental shelf in the North Sea were negotiated between Great Britain and Germany, Denmark, and Norway. These agreements were based on the equidistance principle of Article Six of the Convention on the Continental Shelf which provides that a median line be drawn, separating the countries, with all points on the line being equidistant from the shores of the opposite countries.[406]

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401 *Convention on the Continental Shelf*, 52 AM. J. INT. L. 858 (1958).

402 Z. SLOUKA, *supra* note 338, at 90.

403 *See e.g.* 5 D.L.R.4th at 385.

404 O'CONNELL *supra* note 188, at 30.

405 *Id.*

406 499 U.N.T.S. 311, 316. Art. 6 provides as follows:

1. Where the same continental shelf is adjacent to the territories of two or more States whose coasts are opposite each other, the boundary of the continental shelf appertaining to such States shall be determined by agreement between them. In the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary is the median line, every point of which is equidistant from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured.

2. Where the same continental shelf is adjacent to the territories of two adjacent States, the boundary of the continental shelf shall be determined by agreement between them. In the absence of agreement, and unless another boundary line is justified by special circumstance, the boundary shall be determined by application of the principle of equidistance from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured.

3. In delimiting the boundaries of the continental shelf, any lines which are drawn in

Denmark, Germany, and Norway, then, had to determine their lateral continental shelf boundaries. When negotiations were unsuccessful, they referred the issue to the International Court of Justice.[407]

Denmark and Norway, both signatories of the Convention on the Continental Shelf, asserted that the equidistance principle of Article Six should be utilized to establish offshore boundaries because the Convention was binding under international law.[408] West Germany, a non-signatory of the Convention, alleged that the Convention was not binding as international law and continental shelf rights were not recognized as a principle of customary international law. West Germany asserted that the continental shelf should be delimited on the basis of a "just and equitable share" which required a proportional sharing of the continental shelf based on the length of a nation's coastline or on the extent of its sea frontage.[409]

The International Court of Justice, by a vote of eleven to six, rejected both assertions.[410] The Court found that only Articles One, Two and Three, not Article Six, were binding as principles of international law. The Court stated that

> Article 12 of the Geneva Continental Shelf Convention. . .permits reservations to be made to all the articles of the Convention other than to Articles 1 to 3 inclusive—these three articles being the ones which, it is clear, were then regarded as reflecting, or as crystallizing, received or at least emergent rules of customary international law relative to the continental shelf.[411]

The Court rejected Norway's and Denmark's claims that Article Six was binding as a principle of customary international law. The Court found that since the actions of West Germany were not indicative either of an acceptance or rejection of the Convention, Germany could not be bound by the equidistance principle.[412]

The Court also rejected West Germany's "just and equitable" approach, declaring that marine boundary delimitation "is a process which

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accordance with the principles set out in paragraphs 1 and 2 of this article should be defined with reference to charts and geographical features as they exist at a particular date, and reference should be made to fixed permanent identifiable points on the land.

407 The question presented to the ICJ was: "What principles and rules of international law are applicable to the delimitation as between the Parties of the areas of the continental shelf in the North Sea which appertains to each of them beyond the partial boundary determined by the above mentioned Convention of 9 June 1965?" Nordquist, *The Legal Status of Articles 1-3 of the Continental Shelf Convention According to the North Sea Cases*, 1 CASE W. RES. J. INT'L L. 60, 63 (1970).

408 *Id.* at 64-65; *see also* Murray, *A Discussion of the World Court's North Sea Judgment*, 19 AM. U. L. REV. 470, 471 (1970).

409 Nordquist, *supra* note 407, at 64-65.

410 *Id.* at 63, n. 12.

411 *Id.* at 67-68; 1969 I.C.J. 39.

412 *Id.* at 65.

involves establishing the boundaries of an area already, in principle, appertaining to the coastal *state* and not the determination *de novo* of such an area."[413] The Court recognized that each nation's continental shelf existed by right under international law. The Court's only duty was to decide the basis for drawing the boundary lines.[414] Nevertheless, the Court did arrive at a formula which was more beneficial to West Germany. The Court asserted that delimitation of the continental shelf should be accomplished by equitable agreements which consider "all the relevant circumstances" and grants "to each Party all those parts of the continental shelf that constitute a natural prolongation of its land territory into and under the sea, without encroachment on the natural prolongation of the land territory of the other."[415]

The International Court of Justice's decision in the North Sea Continental Shelf Cases was significant to Newfoundland's claims for several reasons. First, the Court recognized that the continental shelf was the natural extension of a nation's territory. The Court stated,

> "[w]hat confers the *ipso jure* title which international law attributes to the coastal State in respect of its continental shelf, is the fact that the submarine areas concerned may be deemed to be actually part of the territory over which the coastal State already has dominion,—in the sense that, although covered with water, they are a prolongation or continuation of that territory, an extension of it under the sea."[416]

The Court legitimated the principle of contiguity. Continental shelf rights were an appurtenance which was based on the coastal state sovereignty over its land territory.[417] This principle, which was derived from the Truman Proclamation, had been advocated by many prominent scholars.[418]

Second, the International Court of Justice determined that the Convention on the Continental Shelf was declaratory, not constitutive, re-

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413 1969 I.C.J. 3, 22.

414 Herman, *supra* note 186, at 210.

415 1969 I.C.J. 3, 53.

416 *Id.* at 31.

417 Jennings, *The Limits of Continental Shelf Jurisdiction: Some Possible Implications of the North Sea Case Judgment*, 18 INT'L. & COMP. L. Q. 818, 821-25 (1969); Phrand, *Continental Shelf Redefinition*, 4 MCGILL L.J. 536, 538-540.

418 Lauterpacht has stated that:

> The direct proximity of the coastal State; the fact that the continental shelf constitutes a natural prolongation of its territory and that the mineral deposits of the shelf and of the mainland may form a common pool; the special interest of the coastal State in the exploration of the resources of the continental shelf; the circumstance, that it is geographically in the best position to do so, and its legitimate reluctance to permit other States to establish themselves, for that purpose in the direct proximity of the coast. . .substantiate the reasonableness of the claim of the coastal State to those areas.

Lauterpacht, *supra* note 189, at 633; *see also, supra* notes 351-55.

garding continental shelf rights. The Court viewed the Convention as "reflecting, or as crystallizing, received or at least emergent rules of customary international law."[419]

Several of the justices' clearly indicated that the Convention on the Continental Shelf merely codified existing principles of customary international law.[420] Justice Bustamantey Rivero found that continental shelf rights were based on the Truman Proclamation and on Articles One and Two of the Convention. The Justice stated that "certain basic concepts. . .the acceptance of which corresponds to a well-nigh universally held opinion, or the sense of which necessarily flows from the very concept of the continental shelf, are already sufficiently deeply anchored for such incorporation [into general international law] to be possible."[421]

Justice Padilla stated that "the first three articles of the Convention were intended to be broadly declaratory of existing customary international law. . . ."[422] He proceeded to declare that "[t]he right of a coastal State to its continental shelf exists independently of the express recognition thereof in the first three articles of the Convention. . . ."[423] Judge Ammoun pointed out that the recognition of continental shelf rights did not involve an extension of territorial sovereignty, but constituted the right to explore, exploit, and protect the natural resources of the continental shelf which are recognized as part of customary international law.[424]

Third, the International Court of Justice held that continental shelf rights existed *ipso facto* and *ab initio*. The Court stated

> the most fundamental of all rules relating to the continental shelf, enshrined in Article 2 of the 1958 Geneva Convention, although quite independent of it (is) 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.[425]Since continental shelf rights exist *ipso facto*, there was no need for any occupation or a proclamation to realize such rights.[426] Furthermore, since continental shelf

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419 *Supra* note 203, at 30.

420 Nordquist, *supra* note 407, at 65-71.

421 1969 I.C.J. at 58; *see also supra* note 407, at 71.

422 1969 I.C.J. at 96; *see also, supra* note 407, at 71.

423 1969 I.C.J. at 97; *see also, supra* note 407, at 71.

424 1969 I.C.J. at 118; *see also, supra* note 407, at 74.

425 North Sea Continental Shelf, Judgment, 1969 I.C.J. 3, 23 (1969).

426 The ICJ stated that:

[i]n order to exercise [an inherent right to explore and exploit seabed resources], no special

rights exist *ab initio*, such rights were retroactive.[427] D. P. O'Connell stated that "the expression *ab initio* suggests a relation back in time, perhaps geological time, for what the Court appears to mean is that no history of events can be utilized to negate any coastal state's inherent rights to the seabed, even though, when the events occurred, the continental shelf doctrine was not imagined."[428] The Newfoundland Court of Appeal, referring to O'Connell's statement, held that *ab initio* refers back either to geological time, to when sovereignty over the land mass was first established, to when the submarine areas. . .became exploitable, or to when the continental shelf became an area of active interest to a state.[429] The Newfoundland Court of Appeal determined that the time the area became the subject of interest to the state was the most logical and in accordance with British practice.[430] The Newfoundland Court of Appeal stated that "we are satisfied, then, that at the relevant date [1949], there were rights to the resources of the continental shelf under international law exercisable by coastal States, including Newfoundland."[431]

VIII. THE ATLANTIC ACCORD AND HIBERNIA AGREEMENT

Newfoundland was more successful in the political realm after the reference. On February 11, 1985, Newfoundland and Canada signed the Atlantic Accord which covered offshore oil and gas resource management and revenue sharing in the area below the low water mark to the continental shelf margin.[432] The Atlantic Accord provided for joint administration and ensured that the pace and manner of offshore development would optimize social and economic benefits for Newfoundland and Canada. The Atlantic Accord was designed to provide a stable offshore management regime for the petroleum industry which would help

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legal process has to be gone through, nor have any special legal acts to be performed. Its existence can be declared (many States have done this) but does not need to be constituted. Furthermore, the right does not depend on its being exercised. To echo the language of the Geneva Convention, it is "exclusive" in the sense that if the coastal State does not choose to explore or exploit the areas of shelf appertaining to it, that is its own affair, but no one else may do so without its express consent.

Id.

427 O'CONNELL, *supra* note 188, at 578.

428 O'Connell, *The Federal Problem Concerning Maritime Domain in Commonwealth Countries*, 1 J. MAR. L. & COM. 389, 407 (1970).

429 145 D.L.R.3d at 39.

430 *Id.*

431 *Id.*

432 The issue of jurisdiction over the territorial sea remains unresolved. Day, *Maritime Boundaries, Jurisdictional Disputes, and Offshore Hydrocarbon Exploration in Eastern Canada*, 23 J. CAN. STUDIES 60, 77-81 (1988). *See also* MacDonald and Thompson, *The Atlantic Accord: The Politics of Compromise*, 24 ALTA. L. REV. 61 (1985); R. Sinclair, *The Atlantic Accord: Joint Management of Offshore Oil and Gas Resources off Newfoundland and Labrador*, BUS. & LAW, July 1985, at 52.

Canada to achieve national energy self-sufficiency.[433]

The Atlantic Accord provided for the establishment of a Canadian-Newfoundland Offshore Petroleum Board to administer offshore energy development. The Board would consist of seven members, three appointed by the province and three by the federal government, with the chair being jointly selected. The Board would make decisions regarding the regulation and management of offshore energy activities, such as the declaration of discoveries, the granting of production licenses, the enforcement of policy compliance, the administration of good oil field practices, and the exercise of emergency powers respecting safety, spills and conservation.[434]

The Canadian Parliament and the provincial government retained authority over certain areas. The Canadian Parliament retained jurisdiction relating to Canadianization policy, legislation of general application not specifically related to oil and gas, and federal taxation.[435] The Newfoundland government retained jurisdiction over the royalty regime, provincial revenues, and applicable provincial legislation.[436] Both the federal and provincial governments had the right to review decisions of the Board regarding "fundamental decisions" which included the issuance of leases, the enforcement of compliance orders, and the choice of modes of development. If there was disagreement between the federal

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[433] The purposes of the Accord are

a) to provide for the development of oil and gas resources offshore Newfoundland for the benefit of Canada as a whole and Newfoundland and Labrador in particular;

b) to protect, preserve, and advance the attainment of national self-sufficiency and security of supply;

c) to recognize the right of Newfoundland and Labrador to be the principal beneficiary of the oil and gas resources off its shores, consistent with the requirement for a strong and united Canada;

d) to recognize the equality of both governments in the management of the resource, and ensure that the pace and manner of development optimize the social and economic benefits to Canada as a whole and to Newfoundland and Labrador in particular;

e) to provide that the Government of Newfoundland and Labrador can establish and collect resource revenues as if these resources were on land, within the province;

f) to provide for a stable and permanent arrangement for the management of offshore adjacent to Newfoundland by enacting the relevant provisions of this Accord in legislation of the Parliament of Canada and the Legislature of Newfoundland and Labrador and by providing that the Accord may only be amended by the mutual consent of both governments; and

g) to promote with the system of joint management, insofar as is appropriate, consistency with the management regimes established for other offshore areas in Canada.

Atlantic Accord, at 2.

[434] *Id.* at 3. Ministers may jointly direct the Board in writing concerning: i) fundamental decisions; ii) the public review process; iii) Canada and Newfoundland benefits; and iv) studies and the provision of policy advice. *Id.* at 10.

[435] *Id.* at 5.

[436] *Id.* at 6.

and provincial governments, the Accord provided a resolution procedure.[437]

The Accord allowed revenue sharing between Canada and Newfoundland in the same manner as that done with other provinces regarding onshore petroleum resources. Newfoundland could establish and collect revenues from offshore operations as if the resources were located on land within the province. Newfoundland would receive the proceeds from royalties, corporate income tax, sales tax, bonus payments, and rental and license fees. Newfoundland would not lose equalization payments on a dollar for dollar basis as a result of the offshore revenues. The federal government would establish a schedule of equalization offset payments.[438]

The Accord required the establishment of a development fund to defray economic and social infrastructure costs and to ensure that the province would be in a position to realize the economic benefits of offshore development. The Accord required the employment and training of Newfoundland workers, preference for local companies providing goods and services, and the establishment of a research and development program within the province. The Accord also provided for the establishment of an oil pollution and fishing compensation regime.[439]

Both Newfoundland and Canada were required to enact legislation implementing the Accord within one year. The legislation would supersede the Canadian Oil and Gas Act and the Oil and Gas Production and Conservation Act as they applied to offshore areas. Once the legislation was enacted, mutual consent would be necessary for any amendments.[440] In 1986, both the federal and provincial governments enacted legislation implementing the Accord.[441]

On July 18, 1989, Prime Minister Mulroney and Newfoundland Premier Peckford signed a "Statement of Principles" with the Hibernia consortium[442] (hereinafter referred to as project owners) to proceed with development on the Hibernia Oil Field which was expected to yield 525-650 million barrels of oil. The project owners estimated that the cost to bring the field into production would be $5.2 billion over six years, an additional $3.3 billion in development costs would be incurred post pro-

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437 *Id.* at 6-9.

438 *Id.* at 11-12.

439 *Id.* at 13-14.

440 *Id.* at 16.

441 The Canada-Newfoundland Implementation Act, at provincial level. The Canada-Newfoundland Implementation (Newfoundland) Act.

442 The Hibernia consortium is comprised of Chevron Canada Resources, Columbia Gas Development of Canada Ltd., Gulf Canada Resources Ltd., Mobil Oil of Canada, and Petro-Canada Inc. Statement of Principles Hibernia Development Project, July 1988, at 1.

duction, and operating costs would be $11.5 billion.[443]

Each of the parties to the agreement agreed to incur certain costs. The Canadian government agreed to contribute $1.04 billion in capital costs; to guarantee loans up to $1.66 billion; to provide a guarantee for a temporary financing facility to cover cost overruns and a negative project cash flow; and to apply the existing tax structure to the project.[444] The Newfoundland government agreed not to levy the provincial retail sales tax against either the pre- or post-production start up capital expenditures; to levy a four percent provincial sales tax against the project's operating costs; to provide $11 million from the Offshore Technology Transfer Fund to the project owners in recognition of their commitment to design engineering activities in Newfoundland.[445]

Both Canada and Newfoundland agreed to allocate $95 million from the Canadian-Newfoundland Offshore Development Fund for the construction of facilities for offshore operations; to allow production from the area full access to domestic and international markets; and to permit a level of production which was consistent with good reservoir management.[446] The project owners agreed to exercise due diligence and commit $1 billion to bring the field into production; to give preference to Canadians, with consideration to Newfoundlanders, regarding the provisions of goods and services and employment opportunities; to ensure that 45-50% of the primary expenditures be of Canadian-Newfoundland content; to assemble the main support frame in Newfoundland; to grant 85-90% of the project's administration and engineering design contracts to Canadian companies; to develop working arrangements with the provincial government to allocate their respective shares of salaries and wages to employees of Newfoundland; to pay Newfoundland a basic and supplementary royalty; and to provide Canada with the opportunity of a 10% net profit interest.[447] The terms of the agreement were to be monitored by the Canadian-Newfoundland Offshore Petroleum Board.[448] This agreement realized many of the goals which Newfoundland sought to achieve prior to the reference.

IX. CONCLUSION

There was a battle between the federal and provincial government of Newfoundland regarding jurisdiction over offshore lands located beneath the territorial sea and on the continental shelf. When negotiations

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443 *Id.* at 4.
444 *Id.* at 5-9.
445 *Id.* at 10.
446 *Id.* at 11.
447 *Id.* at 12-20.
448 *Id.* at 12-13.

failed to resolve the conflict, litigation ensued. The Newfoundland Court of Appeal determined that Newfoundland held jurisdiction over the lands beneath its territorial sea, but not over the continental shelf. The Supreme Court of Canada held that Newfoundland lacked jurisdiction over the continental shelf. Both courts were mistaken regarding Newfoundland's jurisdiction over the continental shelf. Newfoundland was a self-governing colony which exercised jurisdiction over its territorial sea. In 1926, Newfoundland achieved dominion status under the Balfour Declaration. As a dominion, Newfoundland continued to exercise its jurisdiction over the territorial sea.

Newfoundland did not surrender its sovereignty during the Commission government which ruled Newfoundland from 1934 through 1949. International law does not favor a relinquishment of sovereignty, but recognizes that a nation only surrenders those powers which it voluntarily transfers. Although Newfoundland lacked self-government, Great Britain and other nations continued to acknowledge Newfoundland's sovereignty. Even if Newfoundland lost its sovereign status during the Commission government, Term 7 of the Terms of Union revived Newfoundland's sovereign status as a dominion immediately prior to confederation. This entitled Newfoundland to the rights which were established under international law prior to confederation.

Term 37 of the Terms of Union granted Newfoundland "all lands, mines, minerals, and royalties belonging to Newfoundland at the date of Union." The rights granted to Newfoundland under Term 37 were not only common law property rights, but also included the Crown property over which Newfoundland had beneficial use, control, management, and disposition. This property was not restricted to Newfoundland's land territory. Newfoundland was not required to surrender any of its property to be on an equal footing with the other Canadian provinces. The federal government's role as external sovereign did not grant the federal government property rights over offshore areas. Consequently, when Newfoundland confederated with Canada in 1949, Newfoundland was entitled to all property which the Crown held in right of the province, including that recognized by international law.

At the time of confederation, the Crown recognized rights over the territorial sea. From the seventeenth to the twentieth century, the Crown claimed jurisdiction over the "great waste of the sea." In the nineteenth century, the Crown focused on the three mile territorial sea. British recognition of a three mile territorial sea was evidenced in international agreements, statutes, the writings of publicists, and judicial decisions. There was no question regarding the Crown's prerogative rights over offshore areas until *Regina v. Keyn* in 1876. The Court for the Crown Cases Reserved declared that Admiralty and the county courts lacked jurisdiction over offenses committed by foreigners three

miles offshore because this area was outside of the realm. The Court's decision in *Keyn*, which was an anomaly, only dealt with the jurisdiction of the common law courts, not the status of the territorial sea. Parliament responded to the *Keyn* decision by enacting the Territorial Waters Jurisdiction Act in 1878 which restored the Crown's rights over the territorial sea "as they had always existed."

Great Britain continued to recognize the three mile territorial sea after *Keyn*. This was manifested in international agreements, statutes, and judicial decisions. There were statements in several English cases which affirmed the Crown's proprietary interest in the territorial sea. The Privy Council's decision in *Secretary of State v. Chelikani* effectively overruled *Keyn*. Furthermore, the Privy Council, in several Canadian fisheries cases, inferred that the provinces held property rights in the seabed of the territorial sea.

Great Britain recognized Newfoundland's territorial sea. Newfoundland exercised jurisdiction over its territorial sea through fishing, hovering, and customs acts. The Newfoundland Supreme Court acknowledged Newfoundland's jurisdiction over the territorial sea. When Newfoundland achieved dominion status under the Balfour Declaration in 1926, Newfoundland became the heir to the rights held by the Crown for the province. Newfoundland possessed the same degree of sovereignty as Canada and Australia. The Canadian Supreme Court in the British Columbia Offshore Reference decided that Canada attained the Crown's offshore rights when it became an independent nation between 1919 and 1931. The High Court of Australia also determined that Australia acquired the Crown's offshore rights when it achieved independence after World War I. Since Newfoundland was in the same position as Canada and Australia, Newfoundland inherited the Crown's rights over the territorial sea when it became a dominion in 1926. Newfoundland continued to exercise jurisdiction over its territorial sea after 1926 and did not surrender such rights during the Commission government. Consequently, when Newfoundland confederated with Canada in 1949, Newfoundland retained its rights over the territorial sea under Term 37 of the Terms of Union.

Continental shelf rights were recognized as a principle of customary international law when Newfoundland confederated with Canada in 1949. Rights over the continental shelf were first asserted by the United States in the Truman Proclamation in 1945. Continental shelf rights rapidly evolved into a principle of customary international law. Since the assertion of rights over the continental shelf represented little change in existing international practice and had the support of the world's leading maritime powers, the United States and Great Britain, a long period of incubation was not required to establish such a principle of customary international law. Furthermore, the lack of protest by nations to conti-

nental shelf claims demonstrated general acceptance of the principle and served as an estoppel regarding future objections.

The International Court of Justice in the North Sea Continental Shelf Cases provided additional support for Newfoundland's claim of jurisdiction over the continental shelf. The Court held that the Convention on the Continental Shelf simply reflected existing customary international law. The Court declared that a coastal state's rights over the continental shelf existed *ipso facto* and *ab initio*. This meant that Newfoundland possessed rights over the continental shelf because the continental shelf was a natural prolongation of its land territory. Continental shelf rights were an appurtenance to Newfoundland's sovereign rights over its territory. There was no requirement of any occupation or a proclamation to assert such rights which were established under international law. Newfoundland attained rights over the continental shelf when it was a dominion. Newfoundland never surrendered these rights. Consequently, Newfoundland retained rights over the continental shelf under Term 37 of the Terms of Union.

The Supreme Court of Canada in the Newfoundland Offshore Reference made many of the same errors as the United States Supreme Court in the tidelands controversy.[449] First, both Canadian and United States Supreme Courts failed to acknowledge the sovereign status of the dominion or the states. In *United States v. Maine*, the United States Supreme Court refused to recognize the independent sovereignty of the original states which was established under the Treaty of Paris in 1783.[450] In the Newfoundland Offshore Reference, the Supreme Court of Canada incorrectly determined that Newfoundland relinquished its sovereignty during the Commission government and that Term 7 of the Terms of Union did not revive Newfoundland's rights as a dominion prior to confederation.

Second, both the Canadian and United States Supreme Courts determined that the dominion or the states had to surrender control over their offshore property too be on an equal footing with the other provinces or states. In *United States v. Texas*, the United States Supreme Court required Texas, which was an independent nation from 1836 through 1845 to cede control over its three marine league territorial sea.[451] The United States Supreme Court failed to recognize that the equal footing clause only pertained to political and sovereign rights, not to property rights.[452] In the Newfoundland Offshore Reference, the

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449 Fitzgerald, *supra* note 1.

450 *Id.* at 237-40; 420 U.S. 515 (1975).

451 Fitzgerald, supra *note* 1, at 217-18; 339 U.S. 707 (1950). The traditional three mile maritime belt is one marine league in width. Thus, three marine leagues would be approximately nine miles in territorial sea.

452 339 U.S. at 722.

Supreme Court of Canada failed to realize that there was no equal footing requirement under the Canadian Constitution. Furthermore, each province was unique with regard to control over its natural resources.

Third, both the Canadian and United States Supreme Courts failed to acknowledge that both the Canadian and United States Constitutions limited the property to be surrendered by the dominion or the states to the federal government upon the establishment of the union.[453]

Finally, both the Canadian and United States Supreme Courts erroneously determined that the federal government's role as external sovereign established federal jurisdiction over offshore lands.[454] Both Courts misconceived the relationship between international and constitutional law.

International law establishes rights between nations, such as rights over the continental shelf. Continental shelf rights are both a sovereign right and a property right. They are a sovereign right, the right to exercise legislative jurisdiction, which is granted to coastal states under international law. They are, by nature, a property right, the right to explore and exploit the resources of the area. International law does not determine the allocation of power or property rights between the federal and the provincial or state governments in federal systems like Canada and the United States. This is a question of constitutional law.[455] Both the Canadian and United States Supreme Courts failed to make this critical distinction between international and constitutional law. Both courts utilized international law to resolve questions of constitutional law. This resulted in decisions which were not justified by either international or constitutional law.

Political intervention was necessary to rectify the erroneous decisions of the Canadian and United States Supreme Courts. In Canada, the federal and provincial government of Newfoundland negotiated the Atlantic Accord which provided for joint management and revenue sharing regarding offshore energy development.[456] In the United States, the Submerged Lands Act was enacted which granted the coastal states jurisdiction over the three mile territorial sea and in some cases three marine leagues in the Gulf of Mexico.[457] The federal government was granted

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453 Fitzgerald, *supra* note 1, at 239-40.

454 *Id.* at 212-18; United States v. California, 332 U.S. 19 (1947). *See also* United States v. Maine, 420 U.S. at 523-26.

455 Head, *The Legal Clamour Over Canadian Offshore Minerals*, 5 ALTA. L. REV. 312, 315 (1967).

456 This agreement served as a model for the Nova Scotia Accord which modifies the 1982 Nova Scotia Accord and places Nova Scotia on the same footing as Newfoundland. Cullen, *Canada and Australia: A Federal Parting of the Ways*, 18 FED. L. REV. 53, 80 (1989).

457 Submerged Lands Act, 43 U.S.C. § 1301-1315 (1982 & Supp. IV 1986). Texas and Florida were awarded three marine league boundaries in the Gulf of Mexico. United States v. Louisiana, 363

jurisdiction over the continental shelf beyond the territorial sea in the Outer Continental Shelf Lands Act.[458] Through these political settlements the province of Newfoundland and the coastal states were able to achieve partial victories in their battles against the federal governments over the control of offshore energy resources.

U.S. 1, 33-66 (1960), United States v. Florida, 363 U.S. 121 (1960). *See also*, Fitzgerald, *supra* note 1, at 221.

[458] Outer Continental Shelf Lands Act, 43 U.S.C. 1331-1356 (1982 & Supp. IV 1986); *see also*, Christopher, *The Outer Continental Shelf Lands Act: Key to a New Frontier*, 6 STAN. L. REV. 23 (1953).