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John McEvoy*

Atlantic Canada: The
Constitutional
Offshore Regime

Does not the worst evil for a state arise from anything that tends to rend it asunder and destroy its unity, while nothing does it more good than whatever tends to bind it together and make it one? There is not.

Plato, *The Republic*
Book V, Ch. X.

While it is a truism that people shape resources, it is equally true that resources shape people. This is so not only in terms of the individual but also of his society. Resources are the foundation of economic development — upon them turn such diverse questions as where a population will settle and the level of education required of that population for the harvesting of the resource. The regions of Canada are not diversified as much by strict cultural populations as with the resources which have shaped the regional populations.

To date, the Atlantic provinces have seemingly been by-passed from the mainstream of Canadian economic development. However, in the eastern provinces there presently exists the possibility of a resource bonanza in the form of offshore oil and gas development. The ramifications to the peoples of these provinces are immense. Accordingly, it is crucial if they are to benefit fully in any economic renewal that the regional governments, with necessarily regional interests, have the greatest say in that offshore development.

The constitutional issue of offshore ownership has already been litigated with respect to the Pacific Offshore¹ and now the question of the Atlantic offshore, more particularly that of Newfoundland, is before the Supreme Court of Canada on a Reference by the Governor-General in Council,² and has also been referred to the Newfoundland Court of Appeal by the Lieutenant-Governor in

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1. *Re Offshore Mineral Rights of British Columbia*, [1967] S.C.R. 792 and *Re Strait of Georgia* (1976), 1 B.C.L.R. 97 (C.A.) heard on appeal by the Supreme Court of Canada 26-28 October 1982, judgment not yet delivered.

2. Heard in February 1983, judgment not yet delivered.

Council.³ It is therefore a propitious moment to pause and review the offshore constitutional regime applicable to the eastern provinces, especially Newfoundland.

I. *R. v. Keyn*

1. *The Foundation*

The starting point in any discussion of offshore mineral ownership and jurisdiction in the Canadian context must relate to the controversial 1876 decision of the Court for Crown Cases Reserved, *R. v. Keyn*.⁴ Ferdinand Keyn, a German national, was the commander of the German steamer *Franconia* which, during the course of its seventh voyage from Hamburg to St. Thomas in the now Virgin Islands, ran into and sank the British steamer *Strathclyde* at a point within two and one-half miles from the Dover beach, resulting in the death of one Jessie Dorcas Young. Keyn was indicted for manslaughter and in the course of his defence, counsel questioned the jurisdiction of the Central Criminal Court to try the accused. Though convicted at trial, this objection was upheld by a bare majority of the 13 judges delivering opinions in the appeal to the Court for Crown Cases Reserved.⁵

Before examining the judgments of the Court, it may be worthwhile to note that varying interpretations have been placed on the majority holding of a lack of jurisdiction. D. P. O'Connell has stated categorically two divergent *ratios*. Writing in 1958, he stated:

The famous *Franconia* case, *R. v. Keyn*, decided that British Crown land terminates with the low-water mark and that British legislatures exercise over the territorial sea no more than limited jurisdiction not amounting to actual 'possession' or 'occupation' of the area so as to include it within the national boundary.⁶

R. v. Keyn . . . clearly decided . . . that the territory of England ends at the low-water mark and that the jurisdiction of the

3. *Re Offshore Mineral Rights of Newfoundland*, slip judgment, 17 February 1983 (C.A.).

4. *R. v. Keyn* (1876), 2 Ex. D. 63. The following analysis is rather detailed because of the significance of the case and the absence of such analysis by other commentators.

5. Cockburn C.J.; Kelly C.B.; Bramwell J.A.; Lush and Field JJ.; Sir R. Phillimore and Pollock B. (Lord Coleridge C.J.; Brett and Amphlett JJ.A.; Grove, Denman and Lindley JJ.; dissenting) (Archibald J. died prior to judgment).

6. D.P. O'Connell, *Problems of Australian Coastal Jurisdiction* (1958), 34 B.Y.I.L. 199, 201.

Admiral which begins at that point did not, historically, embrace foreign nationals.⁷

However, writing in 1971, O'Connell gave a much more limited view of *Keyn*:

The case called for no more than a decision on the jurisdiction of the courts, as historically determined, and this point was intrinsically unconnected with the question of the extent of the Crown's domain.⁸

There is, therefore, ground for argument that the true *ratio decidendi* in *R. 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 a majority of the Court thought they were deciding more.⁹

What in fact was the *ratio* of the *R. v. Keyn*? As O'Connell has pointed out, by his two views expressed thirteen years apart, there can be a wide and a narrow construction.

As all the judges in *Keyn* recognized the common law courts of Oyer and Terminer dealt with the administration of criminal law in the body of a county, while the jurisdiction of the Admiral had been declared by statute, 13 Rich. 2, c.5 (1389) to be such that "the admirals and their deputies shall not meddle from henceforth of anything done within the realm, but only of a thing done upon the sea." Subsequently, by 15 Rich. 2, c.3 (1391), it was further

Declared, ordained and established, that of all manner of contracts, pleas, and quarrels, and all other things rising within the bodies of the counties, as well by land as by water, and also of wreck of the sea, the admiral's Court shall have no manner of cognizance, power, nor jurisdiction; but all such manner of contracts, pleas and quarrels, and all other things rising within the bodies of counties, as well by land as by water, as afore, and also wreck of the sea, shall be tried, determined, discussed and remedied by the laws of the land, and not before nor by the admiral nor his lieutenant in anywise, nevertheless, of the death of a man, and of a maihem done in great ships, being and hovering in the main stream of great rivers, only beneath the bridges of the same rivers nigh to the sea, and in none other places of the same rivers, the admiral shall have cognizance.

7. *Ibid.*, 209.

8. D.P. O'Connell, *The Juridical Nature of the Territorial Sea* (1971), 45 B.Y.I.L. 303, 331.

9. *Ibid.*, 377.

It is important to note that in order to sustain the conviction, it was necessary to find jurisdiction in the Admiral. It was not sufficient to merely find that the offence had been committed within British territory; for in that event, the Central Criminal Court, being territorially limited in its common law jurisdiction to the City of London and adjoining parishes in the counties of Essex, Kent and Surrey would still have been without jurisdiction. The key to sustaining the conviction was that it be found to have been entered pursuant to the Admiralty jurisdiction of the Central Criminal Court. The incident giving rise to the indictment having occurred on the high seas and therefore beyond the low-water mark being the extent of the county, all judges recognized that the common law courts lacked jurisdiction.¹⁰

What was the criminal jurisdiction of the Admiral? Historically, except for piracy, it was limited to offences committed on British ships; each vessel being an extension of British territory.¹¹ It was on this basis that Denman J. supported the conviction, being of the view that the offence of manslaughter was to be treated as having been committed on the British steamer rammed by the *Franconia*.¹² If the incident had occurred beyond the extent of the territorial sea, it is clear that the conclusion of Denman J. (concurring in by Lord Coleridge C. J. but with doubt¹³) would have been crucial. However, it was the existence of the concept of the territorial sea in international law and the juridical incidents thereby arising which were of significance in deciding the question of jurisdiction. In examining this concept, various members of the Court grappled with the important relationship between international and municipal law.

As noted by Cockburn C.J., the term “realm” was capable of and had been used in two distinct meanings (a) “as in the statute of Richard II, to mean the land of England, and the internal sea within it . . . (b) whatever the sovereignty of the Crown of England extended, or was supposed to extend, over.”¹⁴ Thus, one could have rationally accepted that the Admiral was not to meddle within the land territory or “realm” of England, being the domain of the

10. Accordingly, the word “realm” in 13 Rich. 2, c. 5 and “counties” in 15 Rich. 2, c. 3 were synonyms.

11. *Supra*, note 4, 105 (per Denman J.), 169 (per Cockburn C.J.).

12. *Id.*, 105.

13. *Id.*, 152.

14. *Id.*, 197.

common law courts, and still recognize that the “realm” or sovereignty of England extended beyond that land territory into the littoral sea. This latter extension could be of two kinds: (a) merely jurisdictional or (b) proprietary in nature equivalent to that over the land territory. Whether there was such an extension of British territory or “realm” depended on the further concept of reception of international law by municipal law.

2) *The Minority Opinion*

Delivering what may be properly considered the main judgment of the minority, Brett J.A. considered that international law, being promulgated by the consent of nations,¹⁵ was automatically received and enforced as part of the municipal law of England.¹⁶ Notwithstanding that the views of various publicists exposed a marked difference of opinion as to the characteristics of the territorial sea in international law, Brett J.A. accepted a consensus on the reality of the littoral state’s relationship to its territorial sea and that particulars as to the extent of that reality could be furnished by accepting lowest common denominators. Thus the canon shot or three mile rule provided the geographic limit of the territorial sea notwithstanding varying expressions of learned publicists expounding a greater extent.¹⁷ However, as to the juridical nature of the three mile zone, Brett J.A. rejected any theory of neutrality or limited rights in the territorial sea, in favour of the view that:

the open sea within three miles of the coast is 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. . .

If so, that three miles are its territorial waters, subject to its rights of property, dominion, and sovereignty. Those are all the rights, and the same rights which a nation has, or can have, over its land territory.¹⁸

Having thus concluded that the doctrine of the territorial sea was received in English municipal law and the nature of that doctrine, the next step for Brett J.A. was to determine if English criminal law was applicable in the zone or in the alternative, if there existed a legal hiatus. This issue was easily resolved by observing that

15. *Id.*, 131.

16. *Id.*, 130 quoting Lord Mansfield in *Triquet v. Bath* (1764), 3 Burr. 1478, 97 E.R. 936 (K.B.).

17. *Id.*, 142.

18. *Id.*, 143.

“whether . . . written or unwritten, if such law be promulgated in general terms, [it] must, of necessity, apply to the whole territory of such state.”¹⁹ It is interesting to note that one of the authorities cited in illustration of this proposition,²⁰ as applicable specifically to the territorial sea, concerned the *Merchant Shipping Act*, legislation which by its very nature applied to the off-shore waters of the state as a matter of particular legislative jurisdiction, rather than as a general legislative enactment for the land territory of the state.

These holdings by themselves were not sufficient to sustain the conviction of Keyn for manslaughter. It remained to find that the jurisdiction of the Admiral was such as to include a foreigner travelling on a foreign ship within the territorial sea; a proposition contrary to its generally recognized extent.

Although the statutes of Richard II restricted the Admiral from meddling within the realm or territory of a county, in no way was the Admiral expressly restricted beyond a county. *Ipsa facto*, concluded Brett J.A., the jurisdiction of the Admiral was a residual jurisdiction encompassing the territory of the realm not within a county.²¹ Accordingly, the Admiral would have had jurisdiction to try Keyn for an offence, contrary to the general criminal law of England, if such offence occurred within three miles of low-water mark; the successor Central Criminal Court, likewise.

In this reasoning concurred three other members of the Court: Denman and Grove J.J. and Lord Coleridge C.J. Denman J. did so specifically, while Grove J. followed a similar reasoning process in a separate judgment. Concluding that international law, per a review of publicists, recognized a territorial sea within the absolute dominion of the littoral state, Grove J. also concluded, as had Brett J.A., that no special legislation was strictly necessary to extend the criminal law:

The criminality of and punishment for such offence is a part of the common law of the realm, not originated by statutory legislation. If the locality where the offence is committed is within the realm, a statute is unnecessary, if not, it is *ultra vires*.²²

19. *Id.*, 144.

20. *Id.*, 138; *General Iron Screw Colliery Co. v. Schurmanns* (1860), 1 J. & H. 180, 70 E.R. 712 (Ch.).

21. *Supra*, note 4, 145-46.

22. *Id.*, 115.

Lord Coleridge C.J., in a brief concurring judgment, premised his conclusion on the reasoning that “English Courts may give effect, as part of English law”²³ without the necessity of an Act of Parliament,²⁴ to principles of international law, extending the realm into the territorial sea. Although expressly assenting “without qualification” to the judgment of Brett J.A., Lord Coleridge C.J. did not use expressions signifying state proprietary ownership in the territorial sea. Rather, he was satisfied that it had been shown that “some portion of the coast waters of a country is considered for *some purposes* to belong to the country the coasts of which they wash.”²⁵

The judgment of Lindley J. does not deal specifically with the question of property rights in the territorial sea,²⁶ but rather was limited to the jurisdictional issue. Accepting that international law recognized littoral state dominion over adjoining seas, Lindley J. construed the general wording of two statutes, 28 Hen 8, c. 15 and 39 Geo. 3, c.37, both concerned with criminal jurisdiction, as extending municipal criminal law to that area.²⁷

Amphlett J.A., in a brief and unremarkable judgment, contented himself with the assertion that “The assumption by the legislature and in judicial decisions that the three mile zone is English territory . . . is in accordance with and fully warranted by international law.”²⁸ From the absence of appropriate discussion in his judgment, it may be assumed that he concurred with Brett J.A. and Lord Coleridge C.J. that an Act of Parliament was not necessary for the reception of international law and, from his phrasing, that he would have viewed the territorial sea as being included within the proprietary rights of the littoral state.

3) *The Majority Opinion*

Cockburn C.J., in a lengthy judgment concurred in by Pollock B. and Field J., delivered the main reasoning of the majority. The starting point in his reasoning involved an examination of the division of curial authority between the common law courts, as

23. *Id.*, 154.

24. *Id.*, 152.

25. *Id.*, 153 (emphasis added).

26. *Id.*, 86.

27. *Id.*, 96.

28. *Id.*, 121-22.

restricted to the body of a county, and the jurisdiction of the Admiral on the high seas. To maintain the conviction of Keyn, the jurisdiction of the Admiral must have been such as to have included both the nature and locality of the offence. Cockburn C.J. reviewed the historical division of jurisdiction between the Admiral and the common law courts, stating:

From the earliest period of our legal history, the cognizance of offences committed on the high seas had been left to the jurisdiction of the admiral. And the reason is obvious. By the old common law of England, every offence was triable in the county only in which it had been committed, as from that county alone the "pais", as it was termed — in other words, the jurors by whom the fact was to be ascertained — could come. But only so much of the land of the outer coast as was uncovered by the sea was held to be within the body of the adjoining county. If an offence was committed in a bay, gulf or estuary, *inter fauces terrae*, the common law could deal with it, because the parts of the sea so circumstanced were held to be within the body of the adjacent county or counties; but, along the coast, on the external sea, the jurisdiction of the common law extended no further than to low-water mark. But, as from the time when ships began to navigate the sea, offences would be committed on it which required to be repressed and punished, while the common law jurisdiction and procedure was inapplicable to such offences, as not having been committed within the boundary of any county, the authority of the Crown in the administration of justice in respect of such crimes was left to the admiral, as exercising the authority of the sovereign upon the seas.²⁹

The exact delineation of jurisdiction between the courts had been declared by the statutes 13 Rich. 2, c.5 and 15 Rich. 2, c.3 (as discussed *supra*) and observed Cockburn C.J.,

Upon this footing the criminal law has remained ever since. Whatever of the sea lies within the body of a county is within the jurisdiction of the common law. Whatever does not, belonged formerly to that of the Admiralty and now belongs to the courts to which the jurisdiction of the admiral has been transferred by statute . . .³⁰

What, in terms of the nationality or flag of the vessel, was the specific jurisdiction of the Admiral? It was limited "except in the case of piracy, which, as the pirate was considered the *communis hostis* of mankind, was triable anywhere. . ."³¹ to offences in

29. *Id.*, 162.

30. *Id.*, 168.

31. *Id.*, 168-69.

respect of English ships. Consequently, unless the further Crown arguments were upheld, the conclusion was inescapable that the Central Criminal Court had acted in excess of its jurisdiction in trying and convicting Keyn, the commander of a German vessel. It was necessary, therefore, that Cockburn C.J. examine the issue of the nature and applicability of the doctrine of the territorial sea.

Commencing this stage of his analysis, Cockburn C.J. made it very clear that in his view the assertion of the doctrine of the territorial sea did not invoke any vestige of the ancient theory of the "narrow seas", described by Sir Leoline Jenkins in the reign of Charles II, as "this authority and jurisdiction of the King to preserve the public peace and to maintain the freedom and security of navigation all the world over. . . ."³² This rejection of any relationship between the concepts of the territorial sea and the narrow seas was critical since the latter doctrine, as expressed by such eminent authorities as Coke and Hale, included within its scope the assertion that the "bed of the sea is part of the realm of England, part of the territorial possession of the Crown".³³ However, tied to a doctrine dismissed by Cockburn C.J. as "at all times unfounded [and] long since abandoned"³⁴, the historical claim to the seabed was also rejected.³⁵ Shorn of any historical pretensions, the doctrine of the territorial sea had to be justified, if at all, as a received proposition of international law.

From an extensive survey of the writings of publicists, in relation to the concept, Cockburn C.J. concluded that notwithstanding that there was no doubt of the general acceptance in principle that the territorial sea should be treated as belonging to the littoral state,

It [was] equally clear that, in the practical application of the rule, in respect of the particular of distance, as also in the still more essential particular of the character and degree of sovereignty and dominion to be exercised, great difference of opinion and uncertainty have prevailed and still continue to exist.³⁶

In contradistinction to the argument of Brett J.A., Cockburn C.J. was unwilling to recognize a doctrine of the territorial sea based on the lowest common denominators among publicists. In his view, fundamental differences between publicists regarding the extent of

32. *Id.*, 174.

33. *Id.*, 195.

34. *Id.*, 175.

35. *Id.*, 195.

36. *Id.*, 191.

the zone as to three miles or the range of canon shot, absolute or limited sovereignty, jurisdiction and property rights tended to negate the very existence of the doctrine. Absent unanimity of particulars, he was unwilling to accede to more than the view that at most, by the

concurrence of other nations, such a state may deal with these waters as subject to its legislation. But it wholly fails to show that, in the absence of such legislation the ordinary law of the local state will extend over the waters in question. . . .³⁷

It is obviously one thing to say that the legislature of a nation may, from the common assent of other nations, have acquired the full right to legislate over a part of that which was before high sea, and as such common to all the world; another and a very different thing to say that the law of the local state becomes thereby at once, without anything more, applicable to foreigners within such part, or that, independently of legislation, the Courts of the local state can *proprio vigore* so apply it. The one position does not follow from the other; and it is essential to keep the two things; the power of Parliament to legislate, and the authority of our Courts, without such legislation, to apply the criminal law where it could not have been applied before, altogether distinct. . . .³⁸

Had Parliament exercised this jurisdiction?

Cockburn C.J. concluded, from an analysis of existing legislation, that it had not, stating “there has been no assertion of legislative authorization in the general application of the penal law to foreigners within the three mile zone. The legislature has omitted to adopt the alleged sovereignty over the littoral sea, to the extent of making our penal law applicable. . . .”³⁹ Aside from general legislation relating to the British mercantile trade and restricted to British ships, the legislation proffered by the Crown, as supporting an exercise of specific jurisdiction over the territorial sea, was found to have been merely an exercise of every nation’s “right to secure itself from injury”, per Marshall C.J. in *Church v. Hubbard*,⁴⁰ in the sense of legislation “confined to the maintenance of neutral rights and obligations, the prevention of breaches of the revenue and

37. *Id.*, 193; see also, 203.

38. *Id.*, 207.

39. *Id.*, 219.

40. 2 Cranch (U.S.) 234.

fishery laws, and under particular circumstances, to cases of collision.”⁴¹

It was for Parliament to legislatively recognize the doctrine of the territorial sea, and not for the courts in what Cockburn C.J., in an obvious reference to the minority of the Court, considered an unconstitutional violation of fundamental principles to so strain and misapply judicial authority to overcome the jurisdictional lacuna.⁴²

Accordingly, the *Cornwall Mining* case,⁴³ relied upon by both Amphlett J.A. and Lord Coleridge C.J. for the proposition that Parliament had in consequence of the arbitration declared Crown ownership in the littoral zone, was restricted to its factual context by Cockburn C.J.: “There was a bill for the settlement of the question as to the right to particular mines and minerals between the Crown and the Duchy, a measure in which both the royal personages particularly concerned and their respective advisors concurred, and in which no other person whatever was interested.”⁴⁴ It had been a private dispute resolved on the basis that the mines below low-water mark were not within the Duchy of Cornwall, so as to vest in the Prince of Wales as Duke.

Cockburn C.J. further dissented from the view of Denman J. that the offence had been committed aboard a British ship.

In the result, the conviction of Keyn entered by the Central Criminal Court, in the purported exercise of a jurisdiction not historically competent to the Admiral, was, per Cockburn C.J., a nullity.

Lush J. did not deliver the separate judgment he had prepared owing to full agreement with Cockburn C.J. He did state as a conclusion, however, that

although, as between nation and nation, these waters are British territory, as being under the exclusive dominion of Great Britain, in judicial language they are out of the realm [the limit of the common law], and any exercise of criminal jurisdiction over a foreign ship in these waters must in my judgment be authorized by an Act of Parliament.⁴⁵

41. *Supra*, note 4, 214. Of particular significance is the reference to “so-called ‘hovering Acts’ and Acts relating to the Customs” (*Ibid.*, 215) as examples of such jurisdiction.

42. *Id.*, 231.

43. *Cornwall Submarine Mines Act, 1858*, 21-22 Vict., c. 109 (U.K.).

44. *Supra*, note 1, 201.

45. *Id.*, 239.

Sir R. Phillimore, concurred in by Kelly C.B., noted, in commencing his judgment, “a total absence of precedents since the reign of Edward III, if indeed any existed then, to support the doctrine that the realm of England extend[ed] beyond the limits of counties.”⁴⁶ Absent jurisdiction by common law or legislation to try Keyn, Phillimore J. asked rhetorically: by what law did such jurisdiction arise?⁴⁷ The Crown had argued international law. Analysis of the opinions of publicists led Phillimore J. to the conclusion that each state had been recognized as possessing *dominium* over “a maritime extension of frontier to the distance of three miles from low-water mark . . . [for the attainment of] the defence and security of the adjacent state.”⁴⁸ However, such “*dominium*” would not allow the state the “same rights of jurisdiction and property which appertain to it in respect to its land and its ports.”⁴⁹ It is to be noted that while Phillimore J. employed the word “*dominium*” at this point, in his judgment he had earlier phrased the following question and answer:

Is a state entitled to any extension of dominium beyond low-water mark? . . .

The answer may be given without doubt or hesitation, namely, that a state is entitled to a certain extension of territory, in a certain sense of that word, beyond low-water mark.⁵⁰

Phillimore J., it is submitted, directed his analysis to jurisdictional and not proprietary interests, notwithstanding the use of the word “*dominium*” which normally ascribes the latter.

Accepting that common law jurisdiction ended at low-water mark, the legal regime imposed over the territorial sea must therefore have been statutory in nature. Phillimore J. echoed somewhat the views of Brett J.A. in observing, though to a contrary result, that if that zone was within the territory of England there would have been no need of specific legislation dealing with offshore naval relations, since those involved would already have been subject to the existing law of the land.⁵¹ Rather, it was the very existence of such offshore legislation that confirmed the necessity of Parliamentary intervention to achieve any extension of criminal law

46. *Id.*, 67.

47. *Id.*, 68.

48. *Id.*, 81.

49. *Id.*

50. *Id.*, 71.

51. *Id.*, 83.

to the offshore zone. Phillimore J. also rejected the minority view that the offence had been committed aboard a British ship so as to ground admiralty jurisdiction on that basis.

Bramwell J.A. contented himself with a brief statement to the effect that the jurisdiction of the Admiral extended only to British ships on the high seas and therefore did not cover the offence in question arising on a foreign vessel on the high seas.⁵²

4) *A Summary*

By a bare majority, 7-6, the Court for Crown Cases Reserved determined that in the year 1876 the Jurisdiction of the Admiral did not extend to offences committed aboard foreign ships on the high seas even where the locality was within the three mile offshore zone from low-water mark. Four members of the Court, Grove and Denman J.J., Amphlett and Brett J.J., explicitly recognized this zone as being within the territory or realm of the state for all purposes of sovereignty and proprietorship. That alone would not have settled the jurisdictional issue since the Central Criminal Court was territorially restricted to the City of London and adjacent parishes in the counties of Essex, Kent and Surrey in the exercise of its common law criminal jurisdiction⁵³ — which territory did not include the region of Dover nor its adjacent offshore zone. It was therefore necessary, in order to sustain the conviction, to hold additionally that the historical jurisdiction of the Admiral was a residual one, from which had been excepted by statute offences occasioned above low-water mark, thereby leaving within that residual jurisdiction, offshore territory within the realm.

Eight members of the Court, Lord Coleridge C.J., Cockburn C.J., Kelly C.B., Sir R. Phillimore and Pollock B., and Lindley, Field and Lush J.J., recognized that a littoral state, by the consent of nations, i.e. international law, had or might have had the capacity to exercise at least some rights in relation to the territorial sea. Lord Coleridge C.J. and Lindley J. held that as a universally recognized proposition of international law, such was automatically received as part of the municipal law enforceable by English courts. The other six members of the Court either rejected the contention that there existed a universal doctrine on the territorial sea, owing to the differences of opinion among publicists, and/or that such a

52. *Id.*, 149-50.

53. 4 & 5 Wm. 4, c. 36, s. 2 (U.K.) (1834).

proposition if universally recognized, was not received law without the legislative sanction of Parliament, which was not found to have been expressed.

It is on the distinction between a dualist and monistic doctrine regarding the relationship between international and municipal law, that Lauterpacht, the editor of *Oppenheim's International Law* (7th ed.)⁵⁴ refers to the *Keyn* decision. He cites "the dicta of some judges in The *Franconia* case in 1876"⁵⁵ as reversing his general principle that "all such rules of customary International Law as are either universally recognized or have at any rate received the assent of this country are *per se* part of the law of the land."⁵⁶ But, was it not crucial to the majority in *Keyn* that no such universal rule relating to the territorial sea existed, so as to be received law, or that if it did exist, it merely allowed the coastal state to extend its legislative control for certain purposes and the issue was precisely whether or not the state had done so? In other words, a capacity might have been recognized but the exercise of rights pursuant to that capacity was another matter.

Following judgment in *Keyn*, The United Kingdom Parliament in 1878 statutorily reversed the result of the majority opinion by, in effect adopting that opinion⁵⁷ and expressly extended the jurisdiction of the Admiral to "an offence committed by a person, whether he is or is not a subject of Her Majesty, on the open sea within the territorial waters of Her Majesty's dominions"⁵⁸ "Territorial Waters" was defined as⁵⁹

such part of the sea adjacent of 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

54. Vol. 1 (London: Longmans, Green & Co., 1948), 37-38.

55. *Id.*, 38.

56. *Id.*, 37.

57. *contra: R. v. Dudley & Stephens* (1884), 14 Q.B.D. 273, 281 "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. . .", per Lord Coleridge C.J. (Grove and Denman JJ., Pollock and Huddleston BB.) Contrast with: *Harris v. Franconia* (1877), 2 C.P.D. 173, 46 L.J.Q.B. 363; *Blackpool Pier Co. v. Flyde Union* (1877), 36 L.T. 251, 46 L.J.M.C. 189.

58. *Territorial Waters Jurisdiction Act*, 1878, 41 & 42 Victs., c. 73, s. 2 (U.K.).

59. *Id.*, s. 7.

measured from low-water mark shall be deemed to be open sea within the territorial waters of Her Majesty's dominions.

It is perhaps significant that the draftsman of the preamble to this *Territorial Waters Jurisdiction Act, 1878*, though declaring the "rightful" *ab initio* jurisdiction of Her Majesty over the adjacent open seas, adopted the phrasing of Phillimore J.,⁶⁰ one of the majority in *Keyn*, by expressly qualifying the nature of such jurisdiction "as is necessary for the defence and security of such dominions".⁶¹ The nature of this jurisdiction as recognized by international law, per Phillimore J., was not equivalent to that over land territory. Finally, it should be noted, (a) that this *Act* applied not only to the United Kingdom proper, but to all the then Empire and (b) that there was no assertion of a proprietary interest in the coastal zone.

II. *B.C. Offshore Reference*

Jumping in time ninety-one years, one comes to the most crucial decision relating to offshore jurisdiction in the Canadian context, the 1967 joint opinion of the Supreme Court of Canada in *Reference Re: Offshore Mineral Rights of British Columbia*.⁶² Two years prior to judgment, the Governor-General in Council had referred to the Court two questions:

1. In respect of the lands, including the mineral and other natural resources, of the sea bed and subsoil seaward from the ordinary low-water mark on the coast of the mainland and the several islands of British Columbia, outside the harbours, bays, estuaries and other similar inland waters, to the outer limit of the territorial sea of Canada, as defined in the Territorial Sea and Fishing Zones Act, Statutes of Canada 1964, Chapter 22, as between Canada and British Columbia,

(a) Are the said lands the property of Canada or British Columbia?

(b) Has Canada or British Columbia the right to explore and exploit the said lands?

(c) Has Canada or British Columbia legislative jurisdiction in relation to the said lands?

2. In respect of the mineral and other natural resources of the sea bed and subsoil beyond that part of the territorial sea of Canada

60. *Supra*, note 4, 81.

61. *Supra*, note 58, preamble.

62. [1967] S.C.R. 792.

63. *Id.*, 796.

referred to in Question 1, to a depth of 200 metres or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the mineral and other natural resources of the said areas, as between Canada and British Columbia,

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

(b) Has Canada or British Columbia legislative jurisdiction in relation to the said mineral and other natural resources?⁶³

It is to be noted that though question 1(a) is framed in terms of “property” in the territorial sea, the second question merely refers to the exercise of state rights under the 1958 Geneva Convention on the Continental Shelf.⁶⁴ On first impression, it might appear that the Court in response to question 1(a) dealt with ‘property’ in the common law proprietary sense, since it merely concluded on this point: “The sovereign state which has the property in the bed of the territorial sea adjacent to British Columbia is Canada.”⁶⁵ Indeed this is the view of some commentators.⁶⁶ However, the Court observed that Canada, one of the parties-litigant, did not ascribe to the word “property” such a meaning, but rather argued that the word “means rights recognized by international law as described in the Geneva Convention of 1958”.⁶⁷ It is submitted that this more restricted meaning is the sense utilized by the Court in declaring the property of the territorial sea to be in Canada.

By its Terms of Union with Canada in 1871, the *Constitution Act, 1867*,⁶⁸ was made applicable to British Columbia as if it “had been one of the Provinces originally united by the said Act”, subject of course to the express provisions of the Terms.⁶⁹ Therefore, by virtue of s.109 of that *Act*, British Columbia enjoyed confirmed ownership to “All lands, mines, minerals and royalties belonging” to the province as of the date of Union.⁷⁰ It being further undisputed that the limits or territorial extent of the province had not been altered following Union,⁷¹ the clear issue before the Court was

64. Reproduced, *Ibid.*, 819.

65. *Id.*, 816.

66. e.g. R.J. Harrison, *Jurisdiction Over the Canadian Offshore: A Sea of Confusion* (1979) 17 Osgoode Hall. L.J. 469, 480-81.

67. *Id.*, 800.

68. 30 & 31 Vict., c. 3 (U.K.).

69. R.S.C. 1970, Appendix II, no. 10, paragraph 10.

70. Subject to the express transfers by s. 108 of the *Act* of public works and property.

71. Pursuant to the *Constitution Act, 1871*, 34 & 35 Vict., c. 28, s. 3.

whether or not the offshore zones were within the boundary or territory of British Columbia in 1871.

The Court divided its consideration of the offshore zones into separate treatment of the territorial sea and the continental shelf.

The major stumbling block to a finding that the territorial sea was within the limits of British Columbia in 1871 was the existent definition of the provincial boundaries as framed by the Imperial constitutive legislation. Each of these statutes⁷² defined the western boundary of the then colony as “the Pacific Ocean”. Strictly interpreting this boundary limit, the Court could have rested its opinion on the finding that, disregarding waters *inter fauces terrae*, the low-water mark of the Pacific Ocean along the British Columbia coast being the western extent of the province, thereby excluded the territorial sea from its “property” and “jurisdiction”.⁷³ However, the Court did not so expressly conclude, preferring instead to ground its decision on the juridical concept of the territorial sea as expressed in the majority reasoning of the Court for Crown Cases Reserved in *R. v. Keyn*.⁷⁴ Of that case, the Court stated:

The English Criminal Courts would have had jurisdiction if the act had occurred within the body of a county of England. The question whether the territorial sea was within the body of a county was, therefore, directly in issue. If it had been within the body of the county, the Court of Oyer and Terminer would have had jurisdiction. The majority decision of the court was that the territory of England ends at low-water mark. There was, therefore, no jurisdiction in the Court of Oyer and Terminer. The court also held that the case did not fall within the historical jurisdiction of the Lord High Admiral. That court would have had jurisdiction if the accused had been a British national. The jurisdiction of the Admiral, which begins at low-water mark, did not extend to foreign nationals on foreign ships.⁷⁵

As discussed above, even if the offence had been held to have occurred within the body of a county, by the finding that the territorial sea was within said body, the Central Criminal Court would not have had jurisdiction to try Keyn. The Supreme Court’s

72. *Government of British Columbia Act*, 21 & 22 Vict., c. 99, s. 1 (U.K.) (1858); *British Columbia Boundaries Act*, 26 & 27 Vict., c. 83, s. 3 (U.K.) (1863); *Union of British Columbia and Vancouver Island Act*, 29 & 30 Vict., c. 67, ss. 7, 8 (U.K.) (1866); R.S.B.C. 1979, Appendix B.

73. The Legislature of a province being limited by the *Constitution Act, 1867*, *supra*, note 68, section 92, to the exercise of its jurisdiction “in [the] province”.

74. *Supra*, note 4.

75. *Supra*, note 62, 804.

statement as to the directness of the issue concerning the territorial sea is therefore suspect.

Of the eleven separate reasons for judgment delivered in *Keyn*, the Court referred to and reproduced only that of Lush J. which was to the effect that only by an Act of Parliament could the realm or territory of the state be extended into the sea beyond its municipal limits, notwithstanding that a zone had been “appropriated [by international law] to the adjacent State to deal with . . . as the State may deem expedient for its own interests”.⁷⁶ The subsequent enactment of the *Territorial Waters Jurisdiction Act, 1878*, did not, in the Court’s opinion, “purport to deal with the juridical character of British territorial waters and the sea-bed beneath them”⁷⁷ but rather “did no more than deal with what was regarded as a gap in the Admiral’s jurisdiction.”⁷⁸ The Court then concluded that this Imperial legislation, which was expressly operative in all British colonies (so as to include British Columbia) was conclusive evidence that the solum of the territorial sea was not within the limits of the province. The Court pondered the question of what law would have been applicable in 1879 to an offence “committed within one marine league of the coast of British Columbia.”⁷⁹ By reasoning that the applicable criminal law would have been that of England and not Canada, the Court categorically stated that the legislation was “inconsistent with any theory that in 1878 the Province of British Columbia possessed as part of its territory the solum of the territorial sea.”⁸⁰ That this statement is not necessarily the proper conclusion to be drawn is rather self-evident when one takes into consideration the effect of the *Colonial Laws Validity Act, 1865*⁸¹ which would have imposed the jurisdictional result, due to the repugnancy between the colonial criminal law and the “Act of Parliament extending to the colony.”⁸²

By way of further confirmation, the Court then compared two early Canadian statutes,⁸³ both of which referred to the offshore

76. *Id.*, 804.

77. *Id.*, 805.

78. *Id.*

79. *Id.*

80. *Id.*

81. 28 & 29 Vict., c. 63 (U.K.).

82. *Id.*, s. 2. See also, *New South Wales v. The Commonwealth* (1975), 135 C.L.R. 337, 436-37 (per Stephen J.); Harrison, *supra*, note 66, 487.

83. *The Customs Act, 1867*, 31 Vict., c. 6, s. 83 and *An Act Respecting Fishing by Foreign Vessels*, 31 Vict., c. 61, s. 1 (1868) (Can.) discussed *Supra*, note 62, 806.

zones as “British waters”, with a 1928 amendment to the *Customs Act*⁸⁴ which altered the phrasing to read, “territorial waters of Canada” and defined that zones as:

The waters forming part of the territory of the Dominion of Canada and the waters adjacent to the Dominion within three marine miles there-of, in the case of any vessel, and within twelve miles thereof, in the case of any vessel registered in Canada.⁸⁵

The Court did not comment upon the obvious distinction drawn in this definition between water within the territory of Canada and the offshore zone. One would have thought that if Canada had considered the three marine mile zone within its territory, the legislation would have so reflected the juridical fact. Perhaps the Court considered that such a point, in confirmation of *R. v. Keyn*, had already been made by earlier references to two opinions of the Judicial Committee of the Privy Council, *Attorney-General for British Columbia v. Attorney-General for Canada*⁸⁶ and *Attorney-General for Canada v. Attorney-General for Quebec*.⁸⁷

In the former case, Viscount Haldane had stated:

In the argument before their Lordships much was said as to an alleged proprietary title in the Province to the shore around its coast within a marine league . . . Their Lordships feel themselves relieved from expressing any opinion on the question whether the Crown has a right of property in the bed of the sea below low-water mark to what is known as the three-mile limit, . . . They desire, however, to point out that the three-mile limit is something very different from the narrow seas limit discussed by the older authorities such as Selden and Hale, a principle which may safely be said to be now obsolete. The doctrine of the zone comprised in the former limit owes its origin to comparatively modern authorities on public international law. Its meaning is still in controversy. . . . Until the Powers have adequately discussed and agreed on the meaning of the doctrine at a conference, it is not desirable that any municipal tribunal should pronounce on it⁸⁸

In the latter, Viscount Haldane seemingly reaffirmed the uncertain state of the territorial sea doctrine, in the following passage, also quoted by the Supreme Court:

84. S.C. 1928, c. 16.

85. *Id.*, s. 207.

86. [1914] A.C. 153 (P.C.).

87. [1921] 1 A.C. 413 (P.C.).

88. *Supra*, note 86, 174.

The Chief Justice, following their Lordships' view, expressed in the British Columbia case, declined to answer so much of any of the questions raised as related to the three-mile limit. As to this their Lordships agree with him. It 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. If their Lordships thought it proper to entertain such a question they would have directed the Home Government to be notified, inasmuch as the point is one which affects the Empire as a whole.⁸⁹

The rejection of the doctrine of the territorial sea by *Keyn* in 1876 and the statements of the Judicial Committee alluding to its uncertain and controversial status in 1914 and 1921 were sufficient for the Court to conclude, that in 1871, the limits of British Columbia did not extend into the territorial sea. The Court specifically affirmed the proposition that such an extension could have been occasioned during the colonial period, but had not, in fact, occurred.

The Court illustrated this latter proposition by reference to *The Direct United States Cable Company v. The Anglo-American Telegraph Company*⁹⁰ and *R. v. Burt*.⁹¹ In the former case, the Privy Council upheld a Newfoundland Supreme Court injunction prohibiting the appellant from using its cable within Conception Bay, on the basis that by unquestioned Imperial legislation⁹² exclusive dominion had been asserted over the Bay, and that subsequently⁹³ "the Imperial Legislature conferred upon the Legislature of Newfoundland the right to legislate with regard to Conception Bay as part of the territory of Newfoundland. This is the ratio of the case . . ."⁹⁴ In *R. v. Burt*, the seizure of a smuggling vessel in the Bay of Fundy, one and three-quarters miles from the coast, was held to have taken place within New Brunswick on the basis of the territorial definition contained in the Royal Instructions, issued pursuant to the Order in Council establishing the Province, which described the southern boundary as a "line in the centre of the Bay of Fundy from the River Saint Croix aforesaid to the mouth of the Musquat (Missiquash) River."⁹⁵ In both decisions, the body

89. *Supra*, note 87, 431.

90. (1877), 2 App. Cas. 394 (P.C.).

91. (1932), 5 M.P.R. 112 (N.B.S.C.A.D.).

92. 59 Geo. 3, c. 38 (U.K.).

93. 35-36 Vict., c. 45 (U.K.).

94. *Supra*, note 62, 809.

95. R.S.N.B. 1973, App. III.

of water in question had been claimed as historic inland waters which, if accepted, would have included the subject bays within the respective provinces without Imperial legislation.

The territorial sea not having been found to be within the limits of British Columbia, it remained for the Court to positively establish the legitimacy of Canada's claim to "property" and jurisdictional rights.

Rights at international law in adjacent territorial seas accrue to the sovereign state as the recognized actor in that field of law. Thus, it was to the United Kingdom that any rights attached in relation to its coastal colonies the world over. Having acquired the status of a sovereign state "in the period between its separate signature of the Treaty of Versailles in 1919 and the Statute of Westminster, 1931",⁹⁶ it was therefore to Canada that such rights attached in succession to the United Kingdom. "Property rights" in the territorial sea, defined as the rights recognized by international law and described in the Geneva Convention of 1958⁹⁷ were therefore held by the Court to be vested in Canada.

Legislative jurisdiction was held also to be vested in Canada under the general "Peace, Order and Good Government" power, in the absence of any specific enumerated head of such subject matter in the distribution of powers under the *Constitution Act, 1867*. Such jurisdiction was of a permanent character since the explicit subject matter is "of concern to Canada as a whole and [goes] beyond local or provincial interests."⁹⁸

There then followed the three sentences described by one commentator as "so shocking in their impact, so far-reaching in their consequences and so totally out of keeping with the tone of the opinion to that point that one can only assume that the Court was not cognizant of what it was saying"⁹⁹:

Moreover, the rights in the territorial sea arise by international law and depend upon recognition by other sovereign states. Legislative jurisdiction in relation to the lands in question belongs to Canada which is a sovereign state recognized by

96. *Supra*, note 62, 810.

97. *Id.*, 800.

98. *Id.*, 817. per national concern test of *Attorney General for Ontario v. Canada Temperance Federation*, [1946] A.C. 193 (P.C.); N. Caplan, "Legal Issues of the Offshore Mineral Rights Dispute in Canada" (1968), 14 McGill L.J. 475, 491.

99. I.L. Head, *The Canadian Offshore Mineral Reference* (1968), 18 U. of T.L.J. 131, 147.

international law and thus able to enter into arrangements with other states respecting the rights in the territorial sea.

Canada is a signatory to the Convention on the Territorial Sea and Contiguous Zone and may become a party to other international treaties and conventions affecting rights in the territorial sea.¹⁰⁰

In context, within the answer to the questions concerning the territorial sea, these sentences might be dismissed as *obiter*, as a mere expression by the Court of apparent satisfaction with the consistency of the result arrived at with the realities of international relations. These words cannot be so dismissed in relation to the Court's answer to the question concerning the continental shelf.

If the territorial sea was not within the limits of British Columbia in 1871, *a fortiori* the continental shelf, was the terse conclusion of the Court in relation to that matter. Logically, one would not want to have found the continental shelf to have been within the limits of British Columbia in 1871 while at the same time concluding that the territorial sea was not. Moreover, the Court gave as a second explicit reason "why British Columbia lacks the right to explore and exploit and lacks legislative jurisdiction: . . .

(2) Canada is the sovereign state which will be recognized by international law as having the rights stated in the Convention of 1958, and it is Canada, not the Province of British Columbia, that will have to answer the claims of other members of the international community for breach of the obligations and responsibilities imposed by the Convention."¹⁰¹

If this second rationale is given independent vitality, it could be construed as a repudiation of the *Labour Conventions*¹⁰² doctrine on treaty implementation jurisdiction in the Canadian federal context. By that doctrine, treaty making authority, as an executive act, is vested in the federal government while the implementation of such international agreements falls within the normal distribution of legislative subject matters provided by the *Constitution Act, 1867*. It would indeed be "shocking" for the Court to have intended the reversal of such an accepted constitutional principle without greater analysis. It would result in the federal level of the Canadian state being able "merely by making promises to foreign countries [to] clothe itself with legislative authority inconsistent with the

100. *Supra*, note 62, 817.

101. *Id.*, 821.

102. *Attorney General for Canada v. Attorney General for Ontario*, [1937] A.C. 326 (P.C.).

constitution which gave it birth”¹⁰³ If accepted, the conclusion would have been inescapable that even if the Court had determined that the territorial sea and continental shelf had been within the territorial limits of the province, legislative jurisdiction would have been held to rest with Parliament.¹⁰⁴

I. L. Head¹⁰⁵ has attributed to the Court an apparent confusion of meaning, or at least an inconsistency, in the use of the word “Canada”, as at one time describing the federal juristic unit, and at another, the internationally recognized sovereign state. It is to an apparent lack of appreciation of the distinction between the two meanings that Head attributes the Court’s error. That Canada, the national state, is recognized in international law as having rights in relation to the territorial sea and continental shelf, it is argued, does not necessarily mean that Canada, the federal juristic unit, is the appropriate level of jurisdiction within the confines of domestic constitutional law. That is a separate question for the determination of such domestic law.¹⁰⁶

It is submitted, however, that to ascribe to the Court such an error is to disregard the context of the statements. The particular zones in issue had each been determined as being beyond the limits of the province and therefore beyond its legitimate legislative jurisdiction. The statements should not be given independent vitality, but rather read in concert with their context, so as merely to reinforce the existent conclusion of federal rights and jurisdiction.

The result arrived at by the Supreme Court of Canada is consistent with that achieved in two other federal states enjoying a common law heritage — the United States and Australia.

III. *The United States: Tidelands Cases and Maine*

Prior to 1937, the federal United States did not actively assert claims to the territorial sea independent of those of individual coastal states.¹⁰⁷ The offshore legal regime “Up to that time was that the littoral states, with some exceptions, claimed ownership of the bed of the sea out to three miles; and they exercised jurisdiction

103. *Id.*, 352 per Lord Atkin.

104. H.A. Hubbard, “Constitutional Law” *International Law: Ownership of and Jurisdiction over Offshore Mineral Rights* (1968), 2 *Ott. L.R.* 212, 215.

105. *Supra*, note 99, 155.

106. *Id.*, 134; Hubbard, *supra*, note 104, 214; Caplan, *supra*, note 98, 492.

107. R.E. Hardwicke, et al, *The Constitution and the Continental Shelf* (1948), 26 *Texas L.R.* 398, 400.

and control over such submerged areas in various ways.”¹⁰⁸ However, in that year the figurative gauntlet was thrown down by a bill introduced in the Senate “declaring . . . ‘all submerged lands lying under the high seas off the coast of the continental United States between the low-water marks and the three-mile limit’ part of the public domain”¹⁰⁹ of the federal United States. This and subsequent similar efforts failed to receive Congressional sanction “due to the overwhelming opposition of the state governments and the private oil interests.”¹¹⁰

In limbo during the prosecution of the war effort, the dispute was revitalized in 1945 with the issuance of the Truman Proclamation of 28 September, whereby the President declared that “the Government of the United States regards the natural resources of the subsoil and sea bed 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.”¹¹¹ This Proclamation was for external consumption only since, concurrently, an Executive Order was issued expressly declaring that:

“Neither this order nor the aforesaid Proclamation shall be deemed to affect the determination by legislation or judicial decree of any issues between the United States and the several states relating to the ownership and control of the subsoil and sea bed of the continental shelf within or outside the three-mile limit.”¹¹²

It is to be noted that notwithstanding the generally accepted understanding of the term “continental shelf” as excluding within its ambit the territorial sea, and that though with such meaning the Proclamation would not have forced the issue of the territorial seas with the coastal states, the Executive order referred to the shelf “within or outside the three-mile limit”, thus opposing the coastal state claims directly.

108. *Id.*, 400-401.

109. *Id.*

110. J.K. Delay, Jr., *Comment: Constitutional Law — Relation of Federal and State Governments — Title of United States to Tidelands* (1951), 50 Mich. L.R. 114; L.R. Kuhn, *Comment: Constitutional Law — Proprietary Rights of State and Federal Governments in Land Under the Sea within the Three-Mile Limit* (1948), 5 Wash. and Lee L.R. 85, 86.

111. Executive Proclamation No. 2667, September 28, 1945, 10 Fed. Reg. 12303 (1945) (reproduced, *supra*, note 62, 818-19).

112. Executive Order No. 9633, September 28, 1945, 10 Fed. Reg. 12305 (1945); quoted in Hardwicke, *supra*, note 107, 404.

The following month, invoking the original jurisdiction of the Supreme Court, the United States commenced an action against the State of California bringing into litigation directly the issue of title in the three-mile territorial sea adjacent to that state.¹¹³ Meanwhile in the Congress, a Resolution disclaiming in favour of the coastal states all interests of the United States in the lands beneath the three-mile territorial sea, while retaining all rights to the continental shelf, was introduced and eventually approved. President Truman exercised his veto power in relation to this Resolution, however, and was not overridden by Congress.¹¹⁴ The Supreme Court delivered its opinion in *United States v. California*¹¹⁵ sustaining federal rights in June, 1947. Mr. Justice Black, for the majority, observed that the question of proprietary rights in the territorial seabed historically gained significance upon the discovery of oil in the early 1900's off the California coast. Consequently, that state, as had others, issued licences, permits and leases in the offshore zone thereby "pointedly rais[ing] this state-federal conflict"¹¹⁶

California had defended its claim to ownership primarily¹¹⁷ on the bases that "its original Constitution, adopted in 1849 before that state was admitted to the Union, included within the state's boundary the water area extending three English miles from the shore",¹¹⁸ which limits had been ratified upon Union, and by an assertion that admission having been granted "on an equal footing, with the original states in all respects whatever",¹¹⁹ the state limits included the territorial sea if indeed those states possessed it. Did, in fact and law, the original thirteen states have property rights in their adjacent territorial seas? The first basis argued by California for answering in the affirmative necessitated merely an extension of the rule of state ownership of the bed of inland waters,¹²⁰ a step declined by the Court. The second, required historical analysis of

113. Hardwicke, *supra*, note 107, 403.

114. *Id.*, 404; Kuhn, *supra*, note 110, 86.

115. 67 S. Ct. 1658 (1947).

116. *Id.*, 1668.

117. The State also pleaded adverse possession, laches, estoppel and *res judicata*.

118. *Supra*, note 115, 1664.

119. *Id.*

120. *Pollard's Lessee v. Hagan*, 44 U.S. 212 (1844): "the original states owned in trust for their people the navigable tidewaters between high and low water mark within each state's boundaries, and the soil under them, as an inseparable attribute of state sovereignty." (quote *supra*, note 115, 1664).

the concept of the territorial sea at Independence in 1776. However, without such analysis of authority, Black J. was content to express the bare conclusion that:

From all the wealth of material supplied . . . we cannot say that the thirteen original colonies separately acquired ownership to the three mile belt or the soil under it . . .

At the time this country won its independence from England there was no settled international custom or understanding among nations that each nation owned a three-mile water belt along its borders . . . [such an] idea . . . was but a nebulous suggestion.¹²¹

Implicitly, even if the Court had been willing to accept the 1849 Constitutional provision as to boundaries, the “equal footing” provision would have had the effect of depriving California of its offshore zone.

Rather than individual states, declared Black J., it had been the nation as a whole which had historically asserted vis a vis other sovereign states “national dominion over a definite marginal zone to protect our neutrality.”¹²² This national assertion in relation to the territorial sea as a buffer zone with other sovereign states was, in the opinion of Black J., binding upon the Court, notwithstanding recognition that *R. v. Keyn* had expressed “considerable doubt in England (as late as 1876) about its scope and even its existence.”¹²³ Accordingly, it was the federal nation which had acquired rights in the territorial sea. Legislative jurisdiction, it was held, followed naturally as “a function of national external sovereignty”¹²⁴ over this geographic area “of vital consequence to the nation in its desire to engage in commerce and to live in peace with the world.”¹²⁵

The Court, per the majority opinion, granted the United States the relief requested, namely injunctive relief and a declaration of rights in the following form:

The United States of America is now, and has been at all times pertinent hereto, possessed of paramount rights in, and full dominion and power over, the lands, minerals and other things underlying the Pacific Ocean lying seaward of the ordinary low-water mark on the coast of California, and outside of the

121. *Supra*, note 115, 1665.

122. *Id.*

123. *Id.*, 1666.

124. *Id.*

125. *Id.*, 1667.

inland waters, extending seaward three nautical miles and bounded on the north and south, respectively, by the northern and southern boundaries of the State of California. The State of California has no title thereto or property interest therein.¹²⁶

Similarity between the conclusions of the Supreme Court of Canada in the *British Columbia Offshore* reference and the United States Supreme Court in *California* should be evident. In both there was negation of property rights in the state or province, but no positive assertion of property rights in the federation, merely a declaration of “paramount rights”. The significance of such a declaration as granted by the majority in *California* was commented upon by Frankfurter J., in his dissenting opinion in that case:¹²⁷

An injunction against trespassers normally presupposes property rights. The Court, however, grants the prayer but does not do so by finding that the United States has proprietary interests in the area . . . The Court finds trespass against the United States on the basis of what it calls the ‘national dominion’ by the United States over this area.

In a later opinion,¹²⁸ Frankfurter J. placed particular emphasis upon the fact that the Court in issuing its decree, struck out the proprietary claim proposed for inclusion in the draft order submitted by the United States.

Fortified by this success, the federal Attorney-General instituted additional original actions before the Supreme Court against the states of Louisiana and Texas, judgments in which were handed down simultaneously in June, 1950.¹²⁹

In *United States v. Louisiana*, the defendant state admitted federal legislative paramount rights “to the extent of all governmental powers existing under the Constitution, laws and treaties of the United States”¹³⁰ but claimed that, in the absence of Congressional legislation asserting federal rights in the offshore seabed, it was legitimate for the state to control the exploration and production of resources, in what was claimed as state property. In a 6 to 1 decision, the Court briefly relied upon its judgment in *California* as determining that Louisiana enjoyed neither property nor legislative rights in the territorial sea. Douglas J., for the majority, reformulated the *ratio* of the latter case as follows:

126. 68 S. Ct. 20, 21.

127. *Supra*, note 115, 1669-70.

128. *United States v. Louisiana*, 70 S. Ct. 914, 917-18 (1950).

129. *Id.*; *United States v. Texas*, 70 S. Ct. 918 (1950).

130. *Supra*, note 128, 915.

The marginal sea is a national, not a state concern. National interests, national responsibilities, national concerns are involved. The problems of commerce, national defence, relations with other powers, war and peace focus there. National rights must therefore be paramount in that area.¹³¹

*United States v. Texas*¹³² provided a slight twist in the argument favouring the state's position. Texas had entered the Union as a sovereign Republic enjoying both property rights and jurisdiction [*dominium* and *imperium*] in her territorial sea, defined to a limit of three leagues from the coast. At Union, it was argued, Texas had merely transferred "her powers of sovereignty — her *imperium* — over the marginal sea to the federation"¹³³ and had retained the property interest or *dominium* therein. Douglas J., delivering a 4 to 3 majority judgment, was willing to assume the correctness of the argument as to the rights of Texas prior to Union, but held as decisive the "equal footing" clause respecting the post-Union rights of the state.¹³⁴ To be placed on an "equal footing", in light of *California* and *Louisiana*, meant that at union Texas must, of necessity, have been stripped of any rights it may have enjoyed previously over its territorial sea. Alternatively, Douglas J., dealt directly with the argument raised by Texas and attempted in *Louisiana* — but not specifically addressed by the Court in that action — that though the federation may indeed enjoy legislative jurisdiction, state proprietary interests remained intact. Jurisdictional rights in the territorial sea having developed in the arena of international relations among sovereign actors, Douglas J. refuted the state's logic by anchoring or subsuming property rights to political rights: "[O]nce low-water mark is passed the international domain is reached. Property rights must then be so subordinated to political rights as in substance to coalesce and unite in the national sovereignty."¹³⁵

It is interesting to note in respect of these so-called "tidelands" cases¹³⁶ the absence of any positive statement of federal proprietary interests in the orthodox sense. The closest the Court came was in

131. *Id.*, 916.

132. *Texas, supra*, note 129.

133. *Id.*, 921.

134. Delay (*supra*, note 110, 120) writing in 1951 noted that the "equal footing" clause had not been argued before the Court and felt that its application to the state may have been historically erroneous in relation to Texas' Terms of Union.

135. *Supra*, note 129, 924.

136. c.f. Delay, *supra*, note 110, 122.

the *Texas* decision, in stating that 'property interests are so subordinated to the rights of sovereignty as to follow sovereignty.'¹³⁷

Twenty-five years later, in 1975, the Supreme Court was once again faced with the offshore issue though on this occasion, it could not fall back on the "equal footing" clause since the defendants before the Court were the thirteen Atlantic coastal states — Maine, New Hampshire, Massachusetts, Rhode Island, New York, New Jersey, Delaware, Maryland, Virginia, North Carolina, South Carolina, Georgia and Florida — among which were eleven of the original states.¹³⁸ In this situation, the defendant States invited the Court to overrule the earlier *California*, *Louisiana* and *Texas* decision as erroneous in denying the original states' claims to offshore ownership prior to Union. In a unanimous judgment delivered by White J. the Court made it clear that even if it was conceded, which it was not, that the original states did enjoy property rights in the offshore zone prior to Union, such conclusion was "not dispositive."¹³⁹ The alternative basis of decision expounded in the earlier cases, in relation to external sovereign powers, was held by the Court to govern the issue:

Whatever interest the States might have had immediately prior to statehood . . . as a matter of 'purely legal principle . . . the Constitution . . . allotted to the federal government jurisdiction over foreign commerce, foreign affairs and national defence' . . . [I]t necessarily follows, as a matter of constitutional law, that as attributes of these external sovereign powers the federal government has paramount rights in the marginal sea.¹⁴⁰

IV. *Australia*

In 1974 each of the six States of Australia instituted an action against the Commonwealth seeking a declaration of constitutional

137. *Supra*, note 129, 924.

138. *United States v. Maine*, 95 S.Ct. 1155 (1975). Litigation centered on the continental shelf in contradistinction to the territorial sea since by the *Submerged Lands Act, 1953* (67 Stat. 29, 43 U.S.C. #1301), Congress had quit-claimed to coastal states the adjacent seabed within three miles of the shore. Texas had received its historic three marine leagues.

Connecticut was not made a defendant in *Maine* since its coastal frontage comprises Long Island Sound which is considered inland waters. *Maine*, 95 S. Ct. 1155, 1156 footnote 1. See also *United States v. Alaska*, 95 S. Ct. 2240 (1975) where the state's claim to Cook Inlet as a historic bay was rejected by the Supreme Court on the insufficiency of the evidence.

139. *Maine, supra*, note 138, 1159.

140. *Id.*, 1159.

invalidity against the federal *Seas and Submerged Lands Act*,¹⁴¹ the key provisions of which are as follows:

6. It is by this Act declared and enacted that the sovereignty in respect of the territorial sea, and in respect of the airspace over it and in respect of its bed and subsoil, is vested in and exercisable by the Crown in right of the Commonwealth.

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

Appended to the *Act* as schedules were the *Convention on the Territorial Sea and the Contiguous Zone* and the *Convention on the Continental Shelf*. This federal initiative ended the co-operative-federalism compromise of the “mirrored” legislative offshore regimes, by which the Commonwealth and the States enacted identical legislative schemes in order to avoid direct litigation over the jurisdictional issue.¹⁴²

The High Court, in *New South Wales v. The Commonwealth*,¹⁴³ delivered judgment in 1975 upholding the validity of the federal legislation as an *intra vires* exercise of the Commonwealth’s legislative jurisdiction over “external affairs”¹⁴⁴ and rejecting State claims to proprietary and jurisdictional rights in the territorial sea, by a majority, and in the continental shelf, unanimously, by holding that the then colonies did not include such areas within their limits at Union, in 1901. The two dissentient members of the Court (Gibbs and Stephen J.J.) would have recognized state boundaries as including the limits of the territorial sea and therefore restricted the federal legislation to that extent.

In three of the majority opinions, Barwick C.J., McTiernan and Mason J.J., the juridical nature of the territorial sea was held to have been determined by the Court for Crown Cases Reserved in *R. v. Keyn*. Of the other two members of the majority, one, Jacobs J., restricted the *ratio* of the *Keyn* decision to the issue of the jurisdiction of the Admiral, while the other, Murphy J., merely

141. 1973 Cth. no. 161.

142. See, A.R. Thompson, “Australia’s Offshore Petroleum Common Code” (1968), 3 U.B.C.L.R. 1; R.D. Lambe, “The Offshore Petroleum Agreement and Legislation” (1967), 41 Aust. L.J. 453.

143. (1975), 135 C.L.R. 337 (H.C.).

144. *Commonwealth of Australia Constitution Act*, 63 & 64 Vict., c. 12, s. 51 (xxix) (U.K.) (1901).

referred, in a seemingly approving manner, to the decision but rested his opinion on other grounds. Both dissentient members of the Court, Gibbs and Stephen J.J., rejected *Keyn* as an aberration in its time from the mainstream of legal thought.

Relying in great measure upon the process of reasoning he had employed in the earlier case of *Bonser v. LaMacchia*,¹⁴⁵ Barwick C.J. viewed the issue as to the extent of colonial boundaries at the 1901 Union as determined by the nature of colonization and the concomitant establishment of governmental institutions. Colonization he defined as having involved no alienation of property or rights *per se* but rather “the placing under delegated government defined areas of land.”¹⁴⁶ The question in issue, therefore, was not directed to whatever were the residual claims of right in the United Kingdom but whether the territorial sea and/or continental shelf had been included within the defined limits of the then colonies.¹⁴⁷ The colonists having brought with them the common law, the territorial extent of the colony and the jurisdiction of the common law were, on the authority of *R. v. Keyn*, co-extensive to the low-water mark: “Thus, property and power over the territorial seas could not have come by the common law.”¹⁴⁸ Barwick C.J. turned his attention to the transfer of the casual and territorial revenues which had occurred upon responsible government. A brief review of the legislative history of relevant Imperial legislation in relation to “wastelands” led Barwick C.J. to state two negative propositions. The first, that the terms of the legislation were such as to include only onshore land (which result alone would have left open the question of Imperial rights to the offshore) thus negating not only the proposition that the territorial sea was within the limits of the colony but also that such areas were within the “waste lands” of the Crown. Secondly, the existence of such onshore legislation demonstrated that at no earlier time had offshore rights been granted the colony since, in his view, “to have given proprietary or legislative rights over part of the sea and seabed whilst denying any right or power in the disposal of the land would have been absurd.”¹⁴⁹ There being no further Imperial legislation concerning the limits of the colonies,

145. (1970), 122 C.L.R. 177 (H.C.).

146. *Supra*, note 143, 368.

147. *Id.*, 368.

148. *Id.*, 369.

149. *Id.*, 370.

they accordingly remained static at the low-water mark until 1901 and so entered the federation.

In seeking to establish positive Commonwealth rights, Barwick C.J. commenced this stage of his analysis with the proposition that any rights in the territorial sea, which developed at international law over time, accrued to the United Kingdom not only in relation to her own limits but also relative to her far-flung, dependent territories.¹⁵⁰ In his view, this guiding principle was the sense in which the *Territorial Waters Jurisdiction Act, 1878* “was conceived and enacted.”¹⁵¹ These rights, attaching as incidents to “independant national status”, “in due time passed to Australia as the nation state.”¹⁵² Accordingly, only upon secession from the federation, would a then-sovereign state acquire its own marginal seas.¹⁵³

Alternatively, Barwick C.J. was prepared to deny state offshore rights even upon the assumption that the states had enjoyed both proprietary and jurisdictional rights in the offshore zone during the colonial period. Finding support in the *California, Texas, Louisiana* and *Maine* decisions of the United States Supreme Court and the *British Columbia* decision of the Supreme Court of Canada, Barwick C.J. held that:

A consequence of creation of the Commonwealth under the Constitution . . . was, in my opinion, to vest in the Commonwealth any proprietary rights and legislative powers which the colonies might have had in or in relation to the territorial sea, seabed and airspace and continental shelf and incline. Proprietary rights and legislative powers in these matters of international concern would then coalesce and unite in the nation.¹⁵⁴

This result conforms, in my opinion, to an essential feature of a federation, namely, that it is the nation and not the integers of the federation which must have the power to protect and control as a national function the area of the marginal seas . . .¹⁵⁵

This particular reasoning also attracted the support of Murphy J.¹⁵⁶

150. *Id.*, 362.

151. *Id.*

152. *Id.*, 366.

153. *Id.*

154. *Id.*, 373.

155. *Id.*, 374.

156. *Id.*, 505.

Another of the majority, Jacobs J. did not concede it as “strictly necessary to decide in *R. 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.”¹⁵⁷ Obviously, by accepting the premise that the common law did not extend below low-water mark, Jacobs J. had to offer an alternative basis for the exercise of rights over the marginal zones independent of the common law. His alternative was the royal prerogative being transferred, upon the attainment of responsible government, to the King in Right of the particular colony, as opposed to remaining exercisable in Right of the United Kingdom. Rights in the marginal zones being in essence an assertion of sovereignty, the answer was clear that no such transfer had taken place respecting the pre-Union colonies. However, notwithstanding that individual states had not acquired such rights, the Commonwealth, as an evolved independent nation had acquired that royal prerogative at some point following World War I. In this reasoning, Jacobs J. mirrored Barwick C.J.

Unfortunately, Gibbs J., in a dissenting opinion, in referring to judicial authorities for the proposition that at common law there existed crown seabed ownership, did not distinguish between those dealing with inland waters and those not. Rather, he relied for such a broad statement of principle upon the very cases distinguished on that basis by Cockburn C.J. in *Keyn* and by the Supreme Court of Canada in *British Columbia Offshore*. Gibbs J. further categorically rejected the conclusions of Cockburn C.J. by asserting “that if the rule as to the Crown’s ownership of the seabed was originally based on the doctrine that the Crown had sovereignty over the narrow seas, it survived the demise of that doctrine, and the three-mile limit came to be the limit of the Crown’s property.”¹⁵⁸ To find that the territorial sea had been within the limits of a colony at Union, Gibbs J. accepted alternatively either that the “waste lands” legislation was phrased widely enough to have included the marginal seabed in the transfers,¹⁵⁹ or, notwithstanding the assumption that the letters patent creating the colonies had not expressly included the territorial sea, that upon the grant of responsible government the Crown in Right of the Colony did enjoy such prerogative rights.¹⁶⁰ This

157. *Id.*, 492.

158. *Id.*, 397.

159. *Id.*, 404.

160. *Id.*, 406.

second alternative basis was accepted by the other dissentient member of the Court, Stephen J.¹⁶¹

One very important argument in favour of state offshore jurisdictional and proprietary rights, advanced in *New South Wales* and alluded to in the *British Columbia Offshore* reference, remains to be considered — the significance of seemingly extra-territorial colonial legislation regulating aspects of the offshore. It was a fundamental constitutional premise that colonial legislatures were jurisdictionally incompetent beyond their territorial limits until, at least, the *Statue of Westminster, 1931*¹⁶² removed that incapacity. How then could colonial legislation regulating, for instance, the offshore fishery be upheld as constitutionally valid unless the offshore zone was within the limits of the colony?

This argument was advanced and dealt with authoritatively in the brief judgment of the Privy Council delivered by Lord MacMillan in *Croft v. Dunphy*.¹⁶³ In 1929, pursuant to federal customs legislation, the Canadian registered vessel of the respondent, which had been found “hovering” 11½ miles off the coast of Nova Scotia, was seized with its cargo of rum by customs authorities. Before the Supreme Court of Canada,¹⁶⁴ it had been held by a majority that the subject legislation was *ultra vires* as being extra-territorial in effect. However, Lord MacMillan reviewed the historical content of the customs legislation of the United Kingdom and noted similar provisions having extra-territorial effect, strictly so-called. Consequently, in his Lordship’s view, when the Imperial Parliament by the *Constitution Act, 1867* empowered the federal Parliament to legislate in relation to customs, it must have been intended to confer as complete a jurisdiction as

necessary to render anti-smuggling legislation effective. In these circumstances it is difficult to conceive that the Imperial Parliament . . . should have withheld . . . the power to enact provisions similar in scope to those which had long been an integral part of Imperial customs legislation and which presumably were regarded as necessary to its efficacy.¹⁶⁵

161. *Id.*, 440.

162. 22 Geo. 5, c. 4, s. 3 (U.K.).

163. [1933] A.C. 156 (P.C.) (N.S.).

164. [1931] S.C.R. 531.

165. *Supra*, note 163, 166-67.

Though in context dealing with customs legislation, the reasoning of Lord MacMillan in *Croft v. Dunphy* can not be restricted solely to that subject but, as noted in the judgment, relates also to the exercise of jurisdiction pursuant to the general power for “peace, order and good government and any other enumerated subject matter.”¹⁶⁶

In *New South Wales*, all majority members of the Court who considered this argument accepted that apparently extra-territorial legislation enacted by colonial legislatures, possessing as they did power to legislate for the “peace, order and good government” of the colony, was justifiable on the basis of *Croft v. Dunphy*, as a valid exercise of the power.¹⁶⁷ Gibbs J., in dissent, however, would not have so rationalized all such colonial legislation. Accepting that control of navigation, regulation of fishing, grant of oyster leases, customs and various related matters could be so rationalized, Gibbs J. could not, however, logically apply the doctrine of extra-territorial incompetence and justify a licensing requirement for foreigners fishing within the territorial sea, an illustration for which he does not cite legislation.¹⁶⁸

Continental Shelf

In *British Columbia Offshore*, the Supreme Court of Canada having denied the province’s claim to the territorial sea perfunctorily rejected its claim to the shelf stating, “as with the territorial sea, so with the continental shelf.”¹⁶⁹ The Court did, however, note that as late as 1939, it had been stated by Lord Asquith that continental shelf rights did “not exist as a legal doctrine.”¹⁷⁰ In *New South Wales* the issues relating to rights in the shelf received similar cursory treatment by the majority.¹⁷¹ However, Gibbs J., in dissent, examined in greater detail the doctrine of the continental shelf. The states had based their contentions on the following passage from the judgment of the International Court of Justice in the *North Seas Continental Shelf Cases*:

166. *Id.*, 163.

167. *Supra*, note 143, 468-69 per Mason J.; 495 per Jacobs J.; cf. 371 per Barwick C.J. See also *Bonser v. LaMacchia*, *supra*, note 145, 186 per Barwick C.J.; 207 per Kitto J.; 225 per Windeyer J.

168. *Supra*, note 143, 404-05.

169. *Supra*, note 62, 821.

170. *Abu Dhabi Arbitration* (1952), 1 Int. & Comp. L.Q. 247 quoted *supra*, note 143, 817.

171. *E.G. supra*, note 143, 472 per Mason J.

the rights of the coastal State in respect of the area of the continental shelf that constitutes a natural prolongation of its land territory into and under the sea exist *ipso facto* and *ab initio*, by virtue of its sovereignty over the land and as an extension of it in an exercise of sovereign rights for the purpose of exploring the seabed and exploiting its natural resources. In short, there is here an inherent right . . . its existence can be declared (and many states have done this) but does not need to be constituted. Furthermore, the right does not depend on its being exercised.¹⁷²

While recognizing the appeal of this *ipso facto*, *ab initio* argument, Gibbs J. rejected its applicability in a municipal forum. While such doctrine

may or may not be correct as a matter of legal theory . . . the rights now recognized represent the response of international law to modern developments of science and technology . . . In this matter the arguments of history are stronger than those of logic . . . When those rights were recognized by international law the Commonwealth was the international person entitled to assert them and did so.¹⁷³

Once again, it is to be noted that the opinions delivered in *New South Wales* do not particularly assert federal proprietary interests in the territorial sea and seabed, or shelf but rather “sovereignty” in relation to the former and “sovereign rights” to the latter.¹⁷⁴

V. Newfoundland

In a *per curiam* judgment delivered 17 February 1983, the Newfoundland Court of Appeal in *Reference Re: Offshore Mineral Rights of Newfoundland*,¹⁷⁵ certified in answer to the questions submitted by the Lieutenant-Governor in Council that the seabed and subsoil of the territorial sea were vested in and belong to the province, but that the more significant rights to the continental shelf do not. In arriving at these conclusions, currently under review by the Supreme Court of Canada, the Court enunciated a series of fundamental propositions pertaining to the capacity and status of pre-Confederation Newfoundland, the nature of the *Statute of*

172. I.C.J. Reports 1969, 3 at para 19.

173. *Supra*, note 143, 416; *see also*, 457 per Stephen J. “Into this vacuum stepped the Commonwealth”.

174. *per Seas and Submerged Lands Act, 1973, supra*, note 137, ss. 6, 11; Convention on the Territorial Sea and the Continuous Zone, articles 1, 2; Convention on the Continental Shelf, article 1.

175. *Supra*, note 3.

Westminster, 1931, and the constitutional effects of Commission of Government and Union with Canada. It is these propositions leading to what is submitted is an erroneous conclusion with respect to the territorial sea that the following analysis will seek to critically evaluate.

(1) *Geographic Limits*

Newfoundland entered the Canadian federation “immediately before the expiration of the thirty-first day of March, 1949”¹⁷⁶ As with other post-1867 provinces, the *Constitution Act, 1867*, as amended, was made applicable to Newfoundland, subject to the paramountcy of the actual Terms of Union.¹⁷⁷ Accordingly, s.109 of that *Act*, by which “All Lands, Mines, Minerals and Royalties belonging to . . .” the province at the date of Union are confirmed in provincial ownership, would have been applicable to Newfoundland except for Term 37 which, for present purposes, expressly reproduced s.109 *mutatis mutandis*. Therefore, while constitutionally s.109 does not extend to Newfoundland, that province is in the same position with respect to its “Lands, Mines, Minerals and Royalties” as the original provinces. Therefore, if at the date of Union the territorial sea, continental shelf or both “belonged” to Newfoundland, they would so belong today. In contradistinction to the American constitutional decisions discussed, there is no equivalent “equal footing” clause in the Canadian context which could be invoked by Courts to justify a reduction in the territorial extent of Newfoundland, in forced conformity or equality with sister provinces.¹⁷⁸

What were the territorial limits of Newfoundland in 1949?

Term 2 defined the limits of the province as follows:

The Province of Newfoundland shall comprise the same territory as at the date of Union, that is to say, the island of Newfoundland and the islands adjacent thereto, the Coast of Labrador as delimited in the report delivered by the Judicial Committee of His Majesty’s Privy Council on the first day of March, 1927, and approved by His Majesty in His Privy Council on the

176. Terms of Union, para. 50, R.S.C. 1970, Appendix 11, No. 30; R.S.N. 1970, Appendix, No. 5.

177. *Id.*, para. 3.

178. This point was argued by Counsel for the Attorney-General for Canada but rejected by the Newfoundland Court of Appeal, *supra*, note 3, slip judgment p. 51.

twenty-second day of March, 1927, and the islands adjacent to the said Coast of Labrador.¹⁷⁹

Letters Patent issued in 1867 had constituted a Governor “in and over Our Island of Newfoundland, and the islands adjacent, and all the coast of Labrador . . . and all the islands adjacent”¹⁸⁰ Are such descriptions sufficient to include the territorial sea and continental shelf? Stephen J. in *New South Wales* regarded the actual wording of colonial boundaries as immaterial. In his view, having rejected *R. v. Keyn* as an authority, sovereignty of the seas and seabed naturally accrued to the coastal colony by virtue of the land mass, regardless of the metes and bounds description.¹⁸¹ On the other hand Barwick C.J.¹⁸² and Jacobs J.¹⁸³ in that case, and the Supreme Court of Canada in the *British Columbia Offshore Reference* (the stated boundary of British Columbia being the “Pacific Ocean”), having accepted the authority of *Keyn*, would consequently deny any offshore interest to Newfoundland solely on the basis of the limits defined.

This latter view is the approach mirrored by the Newfoundland Court of Appeal. The Supreme Court, in the *British Columbia Offshore Reference*, having expressly accepted the majority reasoning of *Keyn* and rejected the minority reasoning in *New South Wales*, the principle of *stare decisis* foreclosed serious questioning of the point by the Court of Appeal. The Court acknowledged, as a starting point in its analysis, that as of 1871 (the date of British Columbia Confederation) the geographic limits of a colony were fixed at low water mark and that the boundary descriptions contained in the Letters Patent of the province referred to definite areas of land and did not include the territorial sea.¹⁸⁴

(2) *Status and Capacity*

Term of Union 7 is headed “Provincial Constitution” and is as follows:

179. *Id.*, para. 2.

180. R.S.N. 1970, Appendix No. 1. The 1610 Crown Charter was framed in terms of “seas and islands lying within ten leagues of any part of the sea coast” per Report of Albert B. Maris, Special Master at 48, *United States v. Maine supra*, note 134, cited in J.T. Ippolito, “Newfoundland and the Continental Shelf: From Cod to Oil and Gas” (1976), 15 *Colum. J. Transnat’l L.* 138, 144.

181. *Supra*, note 143, 441.

182. *Id.*, 369-70.

183. *Id.*, 484.

184. *Supra*, note 3, slip judgment pp. 18, 28.

The Constitution of Newfoundland as it existed immediately prior to the sixteenth day of February, 1934, is revived at the date of Union and shall, subject to these Terms and the [Constitution] Acts, 1867 to 1946, continue as the Constitution of the Province of Newfoundland from and after the date of Union, until altered under the authority of the said Acts.¹⁸⁵

What is the constitutional significance of this Term? Did Newfoundland enter the Canadian federation as a reconstituted, though momentary sovereign Dominion as the reference to its constitution of 1934 might seemingly indicate?

Explaining this provision in the House of Commons, then Prime Minister Louis St. Laurent 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.¹⁸⁶

In the dawn of the nuclear age, it was perhaps quite natural and attractive to mentally envisage Newfoundland momentarily throwing off the shackles of the Commission of Government which had existed from 1934 to 1949 and grasping the mantle of sovereign status before entering into the Union with Canada. If accepted, it must be recognized that along with sovereign status adhere the attributes of sovereignty — more particularly, the rights of the international actor in relation to the territorial sea and continental shelf.

Canada, the Supreme Court had indicated,¹⁸⁷ became a sovereign state at some nebulous point in time between 1919 and the *Statute of Westminster, 1931*. In the *British Columbia Offshore* reference, the Court noted particularly the evolution from federal legislative reference to “British Waters” in 1868 to “territorial waters of Canada” in 1928.¹⁸⁸ Undeniably, in the view of one

185. *Supra*, note 176.

186. Debates, House of Commons, Sess. 1944, Vol. 1, 364 (emphasis added).

187. *Supra*, note 62, 816.

188. *Id.*, 806.

commentator,¹⁸⁹ any recognition of sovereignty in respect of Canada prior to 1931 must be of equal application to the then sister Dominion of Newfoundland.

Recognizing that sovereignty was evolved in the various "Dominions", it is necessary to define terms to determine if Newfoundland could have been sovereign notwithstanding non-adoption of the Statute of Westminster, 1931. In *Duff Development Co. v. Government of Kelantan*,¹⁹⁰ Viscount Finley, referring to the status of the respondent, stated:

It is obvious that for sovereignty there must be a certain amount of independence, but it is not in the least necessary that for sovereignty there should be complete independence. It is quite consistent with sovereignty that the sovereign may in certain respects be dependent upon another power; the control, for instance, of foreign affairs may be completely in the hands of a protecting Power, and there may be agreements or treaties which limit the powers of the sovereign even in internal affairs without entailing a loss of the position of a sovereign Power.¹⁹¹

The circumstances before the court which the appellant contended negated the sovereign status of Kelantan were that the foreign relations of that country were conducted through the United Kingdom and that internal affairs were regulated upon the advice of a British advisor. The House of Lords held that the formal acknowledgment of sovereignty by the Secretary of State was conclusive. There is, in relating this case as a precedent for Newfoundland, an obvious distinction in that Kelantan was an independent sovereign nation in all senses prior to British involvement, whereas Newfoundland had no prior independent existence beyond that evolved from the United Kingdom. With that *caveat* in mind, the statement of Viscount Finlay does go far in supporting sovereignty in Newfoundland, through a very liberal construction of that term, notwithstanding non-adoption of the *Statute of Westminster, 1931*.

Assuming such a proposition to be correct, what is its significance in municipal as opposed to international law? Conceding that the *Statute of Westminster, 1931* was declaratory in this respect, it remains that it was merely declaratory of the

189. C. Martin, *Newfoundland's Case on Offshore Minerals: A Brief Outline* (1975), 7 Ott. L.R. 34, 38.

190. [1924] A.C. 797.

191. *Id.*, 814.

international status of the countries involved. In municipal constitutional law, the *Statute of Westminster, 1931* must be considered constitutive. This characterization is borne out of the obvious distinction between the pre- and post-1931 attempts by the Canadian Parliament to abolish appeals to the Judicial Committee of the Privy Council. The pre-1931 legislation was reviewed and invalidated by the Privy Council in *Nadan v. The King*.¹⁹² On the determination that there existed a conflict with existing Imperial legislation, the Canadian legislation in issue was held to be void pursuant to the *Colonial Laws Validity Act, 1865*.¹⁹³ The legislation was also held invalid because of its purported extra-territorial effect. These two alternative incapacities having been cured by the *Statute of Westminster, 1931*, the post-1931 Canadian legislation was upheld in *British Coal Corp. v. The King*.¹⁹⁴ It would, accordingly, be counter to these authorities to assert that the *Statute of Westminster, 1931*, was merely declaratory for municipal constitutional purposes.

If constitutive, what effect did the *Statute of Westminster, 1931* have on Newfoundland? Section 10 of that *Act* specifically withheld application of anything but essentially the preamble and definition section in respect of Newfoundland “unless . . . adopted by the Parliament of the Dominion”. Newfoundland at no time having adopted the *Act*, accordingly, acquired neither exemption from the *Colonial Laws Validity Act, 1865*¹⁹⁵ nor extra-territorial legislative jurisdiction.¹⁹⁶ Explicitly, however, by virtue of the definition section, Newfoundland was recognized as an equal Dominion with Canada, Australia, New Zealand, South Africa and the Irish Free State for the purposes of the *Act*. To none of these “Dominions” did the *Act* expressly transfer sovereignty or sovereign rights, but rather some of the attributes of sovereignty in a municipal constitutional sense.

Assuming, in the alternative, that the *Statute of Westminster, 1931* was merely declaratory of a pre-existing international capacity, it must be conceded that, as with Canada, Newfoundland enjoyed sovereign status and the attributes thereof prior to 1931.

192. [1926] A.C. 482.

193. 28 & 29 Vict. c. 63 (U.K.).

194. [1935] A.C. 500 (P.C.); see, *Attorney General for Ontario v. Attorney General for Canada* (Privy Council Appeals Case), [1947] A.C. 127 (P.C.).

195. Pursuant to s. 2 of the Act, *supra*, note 162.

196. *Id.*, s. 3.

This conclusion must necessarily result since, as the Newfoundland Legislature enjoyed full legislative jurisdiction to make laws for “the public peace, welfare and good government”¹⁹⁷ of the Colony, there existed no fundamental distinction between the relative capacities of Canada and Newfoundland during the pre-1931 period.

This latter view is the approach adopted by the Newfoundland Court of Appeal. The *Statute of Westminster, 1931* in their view, was not constitutive but merely declaratory of the “established position” of the Dominions, per the preamble to the *Act*, and “adjusted the legal forms to comply with the established principles of autonomy and equality.”¹⁹⁸ Consequently, nonadoption by Newfoundland was irrelevant to its status and capacity as a sovereign Dominion. The Court further cites the decision of the Australian High Court in *R. v. Burgess ex parte Henry*,¹⁹⁹ a case dealing with the constitutional jurisdiction of the federal Parliament to enact legislation implementing the 1919 *Aerial Navigation Convention*, to buttress its position. In that case, Evatt and McTiernan J.J., in a joint concurring opinion stated:

The fundamental declaration of 1926 dealing with the status both of Great Britain and the self-governing Dominions included the assertion that they were ‘equal in status, in no way subordinate one to another in any respect of their domestic or external affairs’. (Cnd. 2768, sec. 11). It would be a complete derogation from such status if this court were to hold that the Commonwealth was not competent to assume the obligations imposed, and to accept the rights conferred, by the Convention of 1919. . .²⁰⁰

It is to be noted, however, that “Commonwealth” is not a reference to Australia as a sovereign Dominion but rather to the federal juristic Unit. The issue before the Court centered not on sovereignty, but on the legislative jurisdiction of the federal Parliament in relation to “external affairs”. The legislation in issue was upheld as a valid exercise of the “external affairs” jurisdiction of Parliament and the cited quote refers to the federal executive’s authority as a signatory to the international Convention. Consequently, the value of the precedent notwithstanding its context of

197. *Supra*, note 180, art. 5.

198. *Supra*, note 3, slip judgment p. 31.

199. (1936). 55 C.L.R. 608.

200. *Id.*, pp. 683-84.

non-adoption of the *Statute of Westminster, 1931* by Australia, is considerably weakened.

(3) *Commission of Government:*

Unfortunate economic conditions forced the drastic measure of suspension of the Legislature of Newfoundland and the Letters Patent Constituting the Government of Newfoundland, and their substitution by a Commission of Government in 1934.²⁰¹ What was the status of Newfoundland in international law during the period of Commission of Government 1934-49? There are naturally two opposing views: (a) sovereignty reverted to the United Kingdom due to the loss of the attributes of an independent nation²⁰² and (b) in conformity with *Duff Development Co.* and accepted by the Newfoundland Court of Appeal, Commission of Government did not involve an alteration in the *de jure* status of Newfoundland as a sovereign state, but rather merely a change in internal administration.²⁰³ If the former view is correct, Term 7 takes on an exaggerated significance if it can be concluded that pursuant to that provision, Newfoundland reacquired the attributes of a sovereign status so as to have entered into Union with Canada enjoying its territorial sea, the continental shelf or both within its territorial limits.

Did in fact, as Prime Minister St. Laurent asserted, Term 7 revive “an instant before union becomes effective” the pre-1934 Constitution of Newfoundland? And if so, to what extent? This magic moment can only have existed for Newfoundland to have reacquired sovereign status, if it can be shown that the Terms themselves allowed some momentary lapse during which this occurred, or that it was deemed to have occurred by necessary intendment.

201. *Address of Newfoundland*, S.N. 1933 (2nd Sess.). *Newfoundland Act*, 24 & 25 Geo. 5, c. 2 (1933) (U.K.); Letters Patent in S.N. 1933 (2nd Sess.).

202. “The true position in law. . . after the 1933 statute had been passed was that the United Kingdom Parliament enjoyed complete sovereignty, unfettered sovereignty, over Newfoundland and that Newfoundland, although in name a Dominion, was in fact a Colony “per the Attorney General, 462 Parl. Deb., H.C. (5th Ser.) 1265, 1266 (1949), quoted in Ippolito, note 174, 160; C. Douglas, “Conflicting Claims to Oil and Natural Gas Resources off the Eastern Coast of Canada” (1980), 18 Alta. L.R. 54, 65.

203. See also Martin, *supra*, note 189, 40; Ippolito, *supra*, note 180, 156; N.J. Inions, “Newfoundland Offshore Claims” (1981), 19 Alta. L.R. 461, 467.

Term 7 provides for a revival of the pre-1934 Constitution “at the date of Union”.²⁰⁴ This latter phrase is defined in Term 1 to mean “On, from and after the coming into force of these Terms”, which in turn is established by Term 50 to be “immediately before the expiration of the thirty-first day of March, 1949”. On a strict construction of these provisions, the revival of the constitution “at the date of Union” occurred simultaneously with the coming into force of the Terms. There was no magic moment contrary to conventional wisdom.²⁰⁵

Putting aside such mystical inquiries, does the construction of Term 7 alone necessarily involve a revival of sovereign status? Cabot Martin, writing in support of Newfoundland’s claim to the offshore resources, would construe the Term as reviving the complete constitutional framework of the pre-1934 Dominion.²⁰⁶ J.T. Ippolito takes a different approach arguing that the Term serves “only to specify which legal document was to serve as the Constitution of the new Province.”²⁰⁷ Undoubtedly, if the wording of the Term had ended after merely reviving the pre-1934 Constitution, Cabot Martin would have a very strong argument, in fact perhaps unassailable. However, the Term does not so conclude but proceeds to provide that, subject to the “Terms and the [Constitution] Acts, 1867 to 1946 . . . [such revived constitution shall] . . . continue as the Constitution of the Province of Newfoundland. . . .”²⁰⁸ It is obvious that Newfoundland could not simultaneously enjoy both the Constitution of its Dominion status and that of its new status as a Canadian province. Term 7 should not be so interpreted. Rather, in context, it is the internal constitutional framework which was intended to be revived for the purpose of re-establishing the Newfoundland parliamentary system of government.²⁰⁹ It is this latter view which was adopted by the Newfoundland Court of Appeal, which stated: “The effect of [Term 7] was to restore Responsible Government to Newfoundland, but as a Province of Canada. The plenary powers previously exercisable by Newfoundland as a unitary State were divided between the

204. *Supra*, note 176 (emphasis added).

205. *Contra*, Martin, *supra*, note 189, 41.

206. *Id.*, 40 (*de jure* status never having been lost).

207. Ippolito, *supra*, note 180, 161.

208. Term 7, *supra*, note 176.

209. This would seem to be supported by Term 14.

constituent parts of the federation by the [Constitution] Act 1867.’’²¹⁰

If Commission of Government involved a revocation of sovereignty and such was not revived by the Terms of Union, Newfoundland did not enter the Canadian federation as a sovereign state and could not have enjoyed the attributes of sovereignty, at least as regards the continental shelf since that doctrine did not develop until subsequent to Commission of Government.²¹¹ Newfoundland would be left to argue, as did the states unsuccessfully in *New South Wales*, on the basis of rights *ipso facto* and *ab initio* per the *North Sea Continental Shelf Cases* decision.²¹² Before a municipal tribunal where a real conflict exists as to the very existence of rights in one jurisdiction as opposed to another, it is very doubtful that this doctrinal proposition, stated in the context of an arbitration involving no dispute as to the existence of such rights but merely the geographic limits between neighboring states, would be accepted and applied. Rather, such a tribunal would, as did the High Court of *New South Wales*, recognize that such rights in the continental shelf are of modern origin. As to the territorial sea, it being generally accepted as a doctrine prior to 1934, Newfoundland could successfully establish its capacity as a sovereign state to have acquired such rights as recognized by international law.²¹³ Argued before the Court of Appeal, the *ipso facto, ab initio* argument was rejected as a ‘‘rationalization of rights over the continental shelf recognized by international law. It cannot be taken as declaratory of rights under the municipal law of a State at any given time.’’²¹⁴ Additionally, the Court interpreted *ipso facto* and *ab initio* as referring not to the dawn of geophysical time but rather ‘‘when these areas became the object of active interest of states.’’²¹⁵ This view was held to be ‘‘the most logical and is in accord with British practice at the time.’’²¹⁶

If Newfoundland did not lose its sovereignty upon Commission of Government, or Term 7 resurrected that sovereign status immediately prior to Union, or the *ipso facto, ab initio* argument is

210. *Supra*, note 3, slip judgment p. 50.

211. *Abu Dhabi Arbitration, supra*, note 170.

212. *Supra*, note 172.

213. Martin, *supra*, note 189, 38.

214. *Supra*, note 3, slip judgment p. 65.

215. *Id.*, p. 64.

216. *Id.*

accepted, Newfoundland may have some basis for its position that both the territorial sea and the continental shelf were, and are, within its territory and jurisdiction. At this juncture, debate obviously centers on analysis as to the point in time at which the doctrine of the continental shelf became recognized in international law. Commentators²¹⁷ have already entered this debate with careful analysis of the bilateral division of the shelf zone in the Gulf of Paria by the United Kingdom and Venezuela in 1942, the Trueman Proclamation of 1945, Lord Asquith's conclusions in the *Abu Dhabi Arbitration* of 1952,²¹⁸ the 1958 Geneva Convention on the Continental Shelf, the *ipso facto* and *ab initio* argument of the North Sea *Continental Shelf Cases*, and the actual assertions by various states of continental shelf rights.²¹⁹

All of this careful analysis is made irrelevant if Newfoundland either did not assert territorial ownership of the offshore zones, or such rights, as recognized by international law, are not such as to import ownership of territory, in a sense such that the offshore zones can be said to "belong" to Newfoundland, in accordance with Term 37, as "lands, mines, minerals and royalties". The first alternative, it is submitted, requires a review of Newfoundland's statutory instruments to determine whether or not that province, *qua* colony or Dominion, asserted such rights in the offshore zone as inconsistent with any other explanation but that Newfoundland asserted ownership of the *solum* of the contiguous seabed. Having framed the issue so narrowly, it must be noted that it is at this critical juncture that the severest differences arise with the judgment of the Newfoundland Court of Appeal. That Court illustrated, as an exercise of dominion over the seabed and subsoil of the territorial sea, five instances of Newfoundland legislation: (a) the *Air*

217. Harrison, *supra*, note 66, 491-93; Martin, *supra*, note 189, 35-43; Ippolito, *supra*, note 180, 147-152; Inions, *supra*, note 203, 470-74; G.S. Swan, *The Newfoundland Offshore Claims: Interface of Constitutional Federalism and International Law* (1976), 22 McGill L.J. 541, 560-63; H.W. MacLaughlin, *Newfoundland's Continental Shelf: The Jurisdictional Issue* (1981), 30 U.N.B.L.J. 91, 94-98.

218. *Supra*, note 170, 256 "I am of the opinion that there are in this field so many ragged ends and unfilled blanks, so much that is merely tentative and exploratory, that in no form can the doctrine claim as yet to have assumed hitherto the hard lineaments or the definitive status of an established rule of international law".

219. Mexico, 1945; Argentina and Panama, 1946; Chile and Peru, 1947; Costa Rica, Nicaragua, Guatemala, Bahamas and Jamaica, 1948 — MacLaughlin, *supra*, note 217, 95.

Navigation Act, 1929,²²⁰ (b) the 1916 consolidated *Customs Act*²²¹ as amended, (c) the *Customs Act, 1933*,²²² (d) the *Customs and Excise Act 1938*,²²³ and (e) the *Crown Lands Act, 1930*.²²⁴ However, the Court was satisfied to assert provincial dominion without the benefit of critical examination.²²⁵

Noting that the Supreme Court of Canada in the *British Columbia Offshore* reference regarded federal governing legislation as inconsistent with provincial possession of the *solum* of the territorial sea,²²⁶ one commentator concluded that, conversely, provincial hovering legislation “would help to establish that a colony may have possessed as part of its territory the *solum* of the territorial sea”.²²⁷ That the Legislature of Newfoundland had enacted hovering legislation is undeniable.²²⁸ Nor can it be denied that the legislature also promulgated specific rules regulating the taking of lobster²²⁹ and for the cultivation of oysters, for which latter purpose, the Governor in Council might “issue leases or free grants of any coves, creeks, parts of the coast, lakes, rivers, or banks of this colony”.²³⁰ As well, the *Customs Act* of 1933 described the adjacent marginal sea not as previously,²³¹ as “British waters”, but as the “territorial waters of Newfoundland”.²³² Bearing in mind that the present argument centers on the extra-territorial incompetence of the pre-1931 Legislature, all of this legislation can be justified on the basis of the legislative competence to make laws for the “public peace, welfare and good government” of the colony. As held in *Croft v. Dunphy*,²³³ the colonial legislature had full

220. S.N. 1929, c. 15.

221. C.S.N. 1916, c. 22 as amended.

222. S.N. 1933, c. 57.

223. S.N. 1938, c. 9.

224. S.N. 1930, c. 15.

225. *Supra*, note 3, slip judgment pp. 39-42.

226. *Supra*, note 62, 806.

227. Swan, *supra*, note 217, 550.

228. *Foreign Fishing Vessels Act*, 56 Vict., c. 6 (1893); 5 Edw. 7, c. 4 (1905); 6 Edw. 7, c. 1 (1906) (Nfld.). See Swan, *supra*, note 217, 549-50; Ippolito, *supra*, note 180, 145-56; G.V. LaForest, *Natural Resources and Public Property Under the Canadian Constitution* (Toronto: University of Toronto Press, 1969), 101-02.

229. *Lobster Industry and Cod-fishing Rules*, 53 Vict., s. 8 (1890) (Nfld.); cited in, Ippolito, *supra*, note 180, 146.

230. *Propagation and Protection of Oysters Act*, C.S.N. 1892, c. 128, s. 1; C.S.N. 1916, c. 165, s. 1.

231. *Foreign Fishing Vessels Act*, *supra*, note 228.

232. *Supra*, note 163.

233. *Supra*, note 163.

jurisdiction in relation to the normal subject matters conferred upon it, hence customs and fishery legislation. The legislation cited by the Court of Appeal, it must be remembered, is specific purpose legislation providing in the case of customs legislation a definition of territorial waters *for purposes of the customs*. The relevance of the aerial navigation legislation to an assertion of dominion, respecting the seabed and subsoil of the territorial sea, is severely weakened when the purpose and wording of the legislation controlling air traffic in the air zone above the land mass and territorial sea is considered.

Nor do the provisions of the *Crown Lands Act*,²³⁴ allowing application for licences and leases at a location “covered by the sea or public tidal waters”, and the 1907 grant of seabed “one hundred feet in width under the straits of Belle Isle for the construction of a tunnel between Newfoundland and Labrador”,²³⁵ involve a general claim or assertion in relation to the territorial sea or shelf. Rather, each is referable to the accepted doctrine of ownership of the seabed, even *extra fauces terrae*, by actual physical appropriation such as mining.²³⁶

The conclusion is therefore open to be drawn that Newfoundland did not positively assert rights in relation to the territorial sea or continental shelf.

Assuming, in the alternative and as concluded by the Court of Appeal, that Newfoundland did assert such rights as recognized at international law or, that during that magic moment prior to Union, if it existed, Newfoundland gained the attributes of sovereignty in relation to the territorial sea and shelf (as then understood), are those rights such as to import ownership so as to be reserved by Term 37 as “lands, mines, minerals and royalties” belonging to the province?²³⁷

It is at this point that the Newfoundland Court of Appeal utilizes basic interpretative doctrines in support of the provincial position. Seizing upon a difference in wording between Term of Union 37 and s.109 of the *Constitution Act, 1867*, both of which confirm provincial ownership of “lands, mines and minerals” but vary in

234. S.N. 1903, c. 6, s. 49; S.N. 1930, c. 15, ss. 168, 170.

235. *Atlantic Steam Service Act*, S.N. 1907, c. 15 (Nfld.); Ippolito, *supra*, note 180, 146.

236. Head, *supra*, note 99, 149.

237. See, A.J. Kovach, “An Assessment of the Merits of Newfoundland’s Claim to Offshore Mineral Resources: (1975), 23 Chitty’s L.J. 18.

that the former omits the phrase “in which the same are situate”, the Court states:

The significant difference between Term 37 and Section 109 is the omission of any language from Term 37 confining the resources reserved to Newfoundland to those found within its boundaries as defined in Term 2. The presumption is that words are not omitted, when they have been used in a corresponding clause in an earlier statute, without a reason. To give effect to Term 37, then it must be construed as a variation of Section 109. . . having the effect of reserving to the Province of Newfoundland all proprietary rights both within and outside the land mass described in Term 2.²³⁸

The logic of this conclusion, it is submitted, should not be readily accepted. On a plain reading of the two provisions, the obvious office of the wording differential is to territorially limit ownership within the confines of provincial boundaries due to the multiple provinces involved in s.109 as opposed to the single province in Term 37. Of significance, however, is the Court’s acknowledgment that it is “proprietary” rights which were reserved to the province. Again, what is the sense of “proprietary rights” which “belong” to the province?

The 1958 *Geneva Convention on the Territorial Sea and Contiguous Zone* extended the sovereignty of the coastal state into the belt of the sea, the airspace above and the seabed below.²³⁹ The 1958 *Geneva Convention on the Continental Shelf* defined the rights of coastal states as “sovereign rights for the purpose of exploring it and exploiting its natural resources”.²⁴⁰ At the moment of Union, therefore, Newfoundland enjoyed presumably “sovereignty” and “sovereign rights” in the offshore zones. It is indisputable that neither the Legislature nor the Commission of Government positively asserted such rights prior to Union by domestic legislation.

One may well argue, as does one commentator,²⁴¹ that sovereignty at international law may now be equivalent to ownership in the common law sense. Consistently with this view, another commentator referred to the nature of rights over a defined territory exercised by a state as territorial sovereignty:

238. *Supra*, note 3, slip judgment pp. 54-55.

239. Articles 1, 2.

240. Article 2.1.

241. O’Connell, *supra*, note 6, 215.

At the basis of international law lies the notion that a state occupies a definite part of the surface of the earth, within which it normally exercises, subject to the limitations imposed by international law, jurisdiction over persons and things to the exclusion of jurisdiction of other states . . . Territorial sovereignty bears an obvious resemblance to ownership in private law . . .²⁴²

However, that may be accepted in the realm of international law, it is another matter in the realm of municipal constitutional law where the fundamental question, as to which level of the federal state exercises sovereignty in relation to the offshore, will be determined.

In concert with the United States Supreme Court in the “tidelands” cases and with Barwick C.J. and Murphy J. in *New South Wales*, it is open to conclude that at Union, the sovereign rights relating to the offshore zones were transferred to the new sovereign state, Canada. It is indisputable, as the Supreme Court of Canada similarly observed in the *British Columbia Offshore* reference, that the limits of Newfoundland could have been extended by the United Kingdom Parliament, but were not; Newfoundland could have legislated ownership, in the common law sense, over the offshore zones prior to Union, but it did not. Having remained in the realm of international law and accruing to international actors, sovereign states, rights in the offshore zones adjacent to Newfoundland were transferred to Canada just as other attributes of sovereignty were transferred to Canada at Union.

The conclusion is inescapable that Newfoundland, regardless of whether or not it enjoyed rights at international law over its adjacent offshore zones prior to Union, does not now have, nor has it since Union, included within its limits the territorial sea and continental shelf, nor rights recognized at international law in relation thereto. Those rights are vested in Canada. One need only emphasize again that in *British Columbia Offshore*, *New South Wales* and the American “tidelands” decisions, property rights, as found to be vested in the federal state, were not defined in terms of common law ownership but as rights recognized at international law.

Finally, one commentator, writing in 1976, who concluded his examination of these legal issues in favour of Newfoundland, noted that:²⁴³

242. J.L. Brierly, *The Law of Nations* (6th Ed.) (Oxford: Waldock, 1963), 162, 63; quoted in I.L. Head, “The Legal Clamour Over Canadian Off-Shore Minerals” (1966-67), 5 *Alta. L.R.* 312, 315.

243. Swan, *supra*, note 217, 567.

The foreseeability prior to Newfoundland's entry into Confederation in 1949 of a 1979 offshore claim of Newfoundland was very real, not only as to the territorial sea but even as to the continental shelf.

If that view is correct, one may well wonder, hopefully without impertinence, why the territorial description in Term 2 included no reference to any offshore zones but rather delineated the territory of Newfoundland in relation to surface land masses exclusively.

VI. *The Maritime Provinces*

New Brunswick and Nova Scotia entered the Canadian federation as original provinces in 1867; Prince Edward Island joined subsequently in 1873. On the authority of *R. v. Keyn*, having been decided in 1876, if accepted for the proposition that the territory of the United Kingdom ended at low-water mark, there can be no assertion of territorial sea ownership in these provinces; *a fortiori* in relation to claims to the continental shelf which was unknown as a doctrine in 1867-73.

Accordingly, the territorial limits of the Maritime provinces extend into the offshore zones only if so extended by their respective constitutive instruments, or subsequent Imperial or Canadian legislation of which there is none relevant. Colonial legislation relating to customs and the fishery can be dismissed as referable to the legitimate exercise of specific legislative jurisdiction per *Croft v. Dunphy*.²⁴⁴

The Royal Commission issued in 1784 to Thomas Carleton, as Governor, set forth the boundaries of the new province of New Brunswick as follows:²⁴⁵

bounded on the westward by the mouth of the River Saint Croix, by the said river to its source, and by a line drawn due north from thence to the southern boundary of Our Province of Quebec, to the northward by the said Bay and the Gulf of St. Lawrence to the Bay call Bay Verte, to the south by a line in the centre of the Bay of Fundy from the River Saint Croix, aforesaid, to the mouth of the Musquat River, by the said river to its source and from thence by a due east line across the isthmus into the Bay Verte to join the eastern line above described, including all islands within six leagues of the coast, with all the rights, members and appurtenances whatsoever thereunto belonging.

244. *Supra*, note 163.

245. Can. Sess. Papers 1883, no. 70, 47.

The boundaries of Nova Scotia were described in the Royal Commission issued in 1846 as follows:²⁴⁶

bounded on the westward by a line drawn from Cape Sable across the entrance to the centre of the Bay of Fundy; on the northward by a line drawn along the centre of the said Bay to the mouth of the Musquat River by the said river to its source, and from thence by a due East line across the Isthmus into the Bay of Verte; on the Eastward by the said Bay of Verte and the Gulf of St. Lawrence to the Cape or Promontory called Cape Breton in the island of that name, including the said Island, and also including all Islands within six Leagues of the Coast, and on the Southward by the Atlantic Ocean from the said Cape to Cape Sable aforesaid, including the Island of that name, and all other Islands within forty leagues of the Coast, with all the rights, members and appurtenances whatsoever thereunto belonging.

Prince Edward Island, the then Island of Saint John, was described as “our island of Saint John, and Territories adjacent thereto in America, and which now are or which heretofore have been dependent thereupon . . .”²⁴⁷

Both New Brunswick and Nova Scotia having been described in terms of definite land masses (except as to the Bay of Fundy which was considered inland waters) with the addition of “all rights, members and appurtenances” and Prince Edward Island having been described in respect of the definite land mass of the Island proper with the addition of “Territories adjacent thereto . . .”, are such as to include the territorial sea and continental shelf within the limits of these provinces respectively? If one were to accept the premise that the offshore zones are mere appurtenances of the coastal state,²⁴⁸ then there is scope for solid argument.

Alternatively, the territorial sea and continental shelf doctrines being unknown concept in 1784, it is doubtful that a court would willingly conclude that the residual reference to “appurtenances” included such areas. This was, in essence, the holding of Jacobs, J. in *New South Wales*. Referring to the boundary description of Queensland, expressed in part “together with all and every the adjacent islands, their members and appurtenances in the Pacific Ocean”,²⁴⁹ Jacobs, J. stated:

246. LaForest, *supra*, note 228, 86.

247. *Supra*, note 245, 2; LaForest, *supra*, note 228, 87.

248. LaForest, *supra*, note 228, 101; E.C. Foley, *Nova Scotia's Case for Coastal and Offshore Resources* (1981), 13 Ott. L.R. 281, 289.

249. *Supra*, note 143, 484.

I do not think that the words “members and “appurtenances” are apt to include the open sea surrounding the islands. Once it is recognized that land between high and low-water mark is part of an island it may be that the words add little but in any case there does not appear any intention to do more than separate a part of the territory of New South Wales and so to erect a new colony.²⁵⁰

A Canadian tribunal might well conclude similarly that such descriptions relative to New Brunswick and Nova Scotia, and even “Territories adjacent” relative to Prince Edward Island, were not intended to convey or include within the limits of those provinces either the territorial sea or the continental shelf. Consequently, the rights to such zones are vested in Canada.

The legitimacy of federal claims to the offshore zones is indisputable. These zones are rightly described as “Canada Lands” in the *Canada Oil and Gas Act*²⁵¹ which *inter alia* defines that term as:

lands that belong to Her Majesty in right of Canada, or in respect of which Her Majesty in right of Canada has the right to dispose of or exploit the natural resources, situated in . . .²⁵²

the northern territories or the offshore zones. It should be noted that this definition distinguishes between the common law concept of ownership and the rights of sovereign littoral states recognized by the Geneva Conventions on the offshore zones.

Nova Scotia has also legislatively laid claim to the offshore zones contiguous to the province by virtue of the *Petroleum Resources Act*²⁵³ which provides a definition of Nova Scotia lands, in which all petroleum rights are deemed held in provincial ownership, as including:

the land mass of Nova Scotia including Sable Island, and . . . the seabed and subsoil off the shore of the land mass of Nova Scotia, the seabed and subsoil of the Continental shelf and slope and the seabed and subsoil seaward from the Continental shelf and slope to the limit of exploitability.²⁵⁴

Having accepted the legitimacy of federal offshore claims, this legislation and all assertions of legal rights in the offshore must be denied the five eastern provinces.

250. *Id.*

251. S.C. 1981, c. 81, s. 2.

252. *Id.*

253. S.N.S. 1980, c. 12.

254. *Id.*, s. 7.

VII. *Equitable Claims*

But what of equitable claims?

Adverting specifically to the equitable claims of the Atlantic Provinces, one finds that they are legion. First, the Maritime Provinces and Newfoundland geographically face the sea and cultivate that resource intensely. Historically, the economic development of the region has been closely tied to the offshore zones. It, and not the continental land mass, has been the cornerstone of existence and way of life in this region.

Second, specifically New Brunswick and Nova Scotia were induced by the visions of a beneficial share in the great commercial enterprise of the Confederation scheme, the development of the resources of the "Great North West". This was the Confederation *raison d'etre* as expounded to the Maritime people²⁵⁵ but in its execution, the smaller Maritime Provinces were effectively by-passed. The peoples of this region have not shared in the economic development of the nation in a meaningful and beneficial way.²⁵⁶

Third, onshore precedent exists favouring the five central provinces in respect of their boundary limits which should be of some equitable weight in considering offshore extension of the coastal provinces, both Atlantic and Pacific. It was Canada the nation, composed of its provincial integers, which purchased from the Hudson's Bay Company the land territory out of which was fashioned the provinces of Alberta and Saskatchewan in 1905²⁵⁷ and into which the provinces of Quebec, Ontario and Manitoba

255. e.g. Tupper, Debates, House of Assembly of Nova Scotia 1865, 211 "it is quite impossible we can ever obtain that position that Nature intended we should occupy, except through a Union of British North America, that will make Nova Scotia the great highway between two continents. . . our harbours were intended for the trade of a mighty nationality, of which Nova Scotia should be to a large extent the entrepot".

256. *Living Together: A Study of Regional Disparities* (Ec. Council of Canada, Ottawa: 1977) presents the economic realities or regional disparities in Canada and includes data illustrating the regional effects of a variation in national unemployment rates and fiscal policies and the inter-regional leakages of provincial fiscal policies. In terms of unemployment, the report notes that a 2% increase in national unemployment typically translates as an approximate increase of 3.7% in the Atlantic region, 2.6% in Quebec, 1.9% in British Columbia, 1.7% in the Prairies and 1.3% in Ontario. The economic structure of Ontario is such as to shield its populace from the ravages of unemployment with the result that the effect is roughly one-third that in the Atlantic region.

257. *The Alberta Act, 1905*, S.C. 1905, c. 3; *The Saskatchewan Act, 1905*, S.C. 1905, c. 42.

were extended in 1912.²⁵⁸ Subsequently in 1930, the mineral rights reserved to Canada in respect of the land territories of the Western Provinces were transferred to those provinces.²⁵⁹ During the currency of the latter two events, Maritime representatives in Parliament pressed claims for compensation. For example, during the session of 1907-08 when Sir Wilfred Laurier introduced a resolution pertaining to the boundary extensions of the three central provinces, a maritime Member of Parliament responded:

But I say to the government they are not acting justly to the Maritime Provinces in not giving to them some compensation to weigh against the large increase in material wealth which they are adding to the three great provinces I have named.²⁶⁰

Such views were reasserted during debate on the mineral rights transfer to the Western provinces in 1929.²⁶¹

Fourth, the fact of offshore resources should not be treated distinctly from onshore resources for constitutional or domestic purposes. Provincial ownership of offshore resources finds precedent in the ownership by Ontario of the lands covered by the Great Lakes.²⁶²

Fifth, these offshore zones have accrued to Canada because of their contiguous relationship to the coastal provinces. The fact of Canadian sovereignty as the international touchstone to the recognition of these rights is solely due to the membership of the coastal provinces in the Canadian federation.

The validity of these equitable claims may be denied by a realization that most have already been asserted in respect of demands for increased subsidies before various Commissions of Inquiry.²⁶³ However that may be true, the fact remains that the inequities which existed then continue to exist without full redress.

258. *The Quebec Boundaries Extension Act, 1912*, S.C. 1912, c. 45; *The Ontario Boundaries Extension Act*, S.C. 1912, c. 40; *The Manitoba Boundaries Extension Act, 1912*, S.C. 1912, c. 32.

259. *Constitution Act, 1930*, 20-21 Geo. 5, s. 26 (U.K.).

260. Debates, House of Commons, Canada, 1907-08, vol. 7, 12819 (per G.W. Fowler).

261. e.g. Debates, House of Commons, Canada, 1929, vol. 1, 190-211.

262. *Constitution Act, 1867*, *supra*, note 68, s. 6; *Territorial Division Act*, R.S.O. 1980, c. 497.

263. *Report of the Royal Commission on Maritime Claims* (Duncan Commission) (Ottawa: King's Printer, 1926); *Report of the Royal Commission on Financial Arrangements Between the Dominion and the Maritime Provinces* (White Commission) (Ottawa: King's Printer, 1935); *Report of the Royal Commission on Dominion-Provincial Relations* (Rowell-Sirois) (Ottawa: King's Printer, 1940).

The increased levels of subsidies are not within the planning control of the provincial governments and can be safely characterized as a form of maintenance payments. By ceding to the coastal provinces ownership of the offshore resources, Canada would open the full range of provincial legislative jurisdiction such that the provinces would be able to manage the resources to the most beneficial advantage of their indigenous populations. Just as the Western Provinces currently use such legislative and proprietary jurisdiction to ensure the development of a sound industrial base, the Atlantic provinces could ensure the local capturing of a greater measure of the linkages flowing from offshore resource development.

Debate over the last decade concerning constitutional renewal has produced divergent views on the offshore ownership issue. The 1972 Special Joint Committee on the Constitution of Canada resolved in favour of federal proprietary and legislative rights over the offshore with federal-provincial revenue sharing.²⁶⁴ The Canadian Bar Association Committee, analogizing the offshore with the pre-1930 mineral rights situation in the Western Provinces, recommended provincial ownership and legislative jurisdiction with federal objectives and obligations assured through "Parliament's powers respecting defence, navigation, seacoast fisheries, customs and other powers . . .".²⁶⁵ The Ontario Select Committee on Constitutional Reform similarly recommended provincial offshore ownership and legislative jurisdiction "subject to federal paramountcy in questions of environment, national defence and international agreements."²⁶⁶ Noting that it "will assist in redressing economic imbalances within Confederation",²⁶⁷ the Alberta government has also taken a stance favouring provincial offshore ownership. Finally, an Opposition attempt to include in the *Constitution Act, 1982* a provision implementing provincial offshore ownership was defeated by a 9-13 vote during the deliberations of the Special Joint Committee in February, 1981.²⁶⁸

264. The Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada, *Final Report* (Ottawa: 1972), 66-67.

265. The Canadian Bar Association Committee on the Constitution, *Towards a New Canada* (Montreal: Canadian Bar Foundation, 1978), 110.

266. *Report of the Select Committee on Constitutional Reform* (Toronto: Ontario Queen's Printer, 1980), 21.

267. *Harmony in Diversity: A New Federalism for Canada* (Alberta Government Position Paper, 1978), 7.

268. Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada, Issue 54, 80 (4 February, 1981).

All groups favouring provincial ownership did so in recognition of the imbalances of economic Canada and the legitimacy of the equitable claims of the coastal provinces.

The federal government has consistently taken the position that the “offshore belongs to all Canadians.”²⁶⁹ It has, however, offered to coastal provinces generous shares of offshore revenues. On 1 February 1977 the federal and Maritime governments signed a memorandum of understanding pertaining to offshore development and revenue sharing. The memorandum provided for the creation of Mineral Resources Administration lines at least five kilometres from low water mark — revenues yielded from the landward side of these lines would have accrued 100% to the adjacent province while revenues yielded from the seaward side of the line would have been shared on a 25:75 federal-adjacent provincial split with the provincial share subject to a nondefined regional revenue sharing pool.²⁷⁰ Administration and management of offshore resources was to have been through the mechanism of a joint Maritime Offshore Resources Board.²⁷¹

This memorandum, never agreed to by Newfoundland and subsequently repudiated by Nova Scotia, has recently been supplanted by a comprehensive Canada — Nova Scotia Agreement on Offshore Oil and Gas Resource Management and Revenue Sharing.²⁷² The Agreement, though expressed to be “without prejudice to and notwithstanding [the] respective legal positions”²⁷³ of the parties, is, for all practical purposes, an abandonment by Nova Scotia of legal pretensions to the offshore zones. It follows the pattern of the earlier memorandum in employing a joint Canada — Nova Scotia Offshore Oil and Gas Board in the administration and management of the resources offshore of that province, though the Canada Oil and Gas Lands Administration (COGLA) is the designated primary overseer of oil

269. *The National Energy Program* (Ottawa: Energy, Mines & Resources 1980), 42.

270. Federal-Provincial Memorandum of Understanding in Respect of the Administration and Management of Mineral Resources Offshore of the Maritime Provinces, 1 February, 1977, para. 10.

271. See, R.J. Harrison, *The Offshore Mineral Resources Agreement in the Maritime Provinces* (1978), 4 Dal. L.J. 245.

272. Canada — Nova Scotia Agreement on Offshore Oil and Gas Resource Management and Revenue Sharing, 2 March 1982, para. 3(b).

273. *Id.*, para. 1.

and gas resource activities.²⁷⁴ It is not the Board, composed of a 3-2 federal-provincial membership split, however, which has final effective say in administering or managing the offshore but rather the federal Minister of Energy, Mines and Resources to whom the Board is responsible²⁷⁵ and in whom rests the power to substitute his own decision for that of the Board or in the absence of a decision by the Board.²⁷⁶ In dissent, the management control enjoyed by Nova Scotia consists in a varying suspension power in respect of such matters as an exploration agreement, Canada benefits plan or provincial lease.²⁷⁷ The period of suspension is expressly limited to a total of 18 months.²⁷⁸ This limited provincial administrative authority cannot be characterized as entirely consistent with Nova Scotia legal offshore rights. It is to be further noted that the regulatory legislation referred to in the Agreement — the *Canada Oil and Gas Act* specifically defines the offshore zones as “Canada lands”.²⁷⁹

On the revenue side, Nova Scotia is to receive 100% of defined “offshore revenues” during each year that:

the Nova Scotia government’s per capita fiscal capacity including its share of offshore revenues, does not exceed 100% of the national average per capita fiscal capacity plus 2 percentage points for every percentage point by which Nova Scotia’s average annual employment rate exceeds the national average annual unemployment rate.²⁸⁰

In the eventuality that the provincial per capita fiscal capacity exceeds the level of 110% of the national, there is a varying schedule of revenue sharing subject to the ceiling that the provincial

274. *Id.*, para 4; see, *Canada Oil and Gas Act*, *supra*, note 231: *Oil and Gas Production and Conservation Act*, R.S.C. 1970, c. 0-4 (as amended).

275. *Supra*, note 272, para. 3(b).

276. *Id.*, para. 3(f) (subject to stipulated time and notice provisions).

277. *Id.*, para. 3(d).

278. *Id.*, para. 3(d) (v).

279. *Supra*, note 251.

280. *Supra.*, note 272, para. 15(d). “Offshore revenues” are defined as (i) the 10% basic royalty enacted by virtue of *Canada Oil and Gas Act*, *supra*, note 251, s. 40, (ii) the 40% net profit progressive incremental royalty specified in the same *Act*, (iii) revenues generated in the offshore zone by application of the provincial corporate tax, (iv) and retail sales tax, (v) and bonus payments, (vi) net rental and licence fees.

per capita fiscal capacity shall not exceed 140% of the national average.²⁸¹

The quintessential paragraph illustrating the absence of provincial offshore legal pretensions provides for provincial participation in the federal crown share in offshore interest reserved by the *Canada Oil and Gas Act*.²⁸² The agreement allows Nova Scotia to purchase, with future production revenues and at an agreed formula, up to a 50% portion of the federal crown share in a natural gas field and up to 25% in an oil field.²⁸³ One does not normally purchase or acquire an interest in respect of something one claims or asserts legal rights of ownership.

Leaving to others the assessment of the economic terms of the Agreement, it cannot be denied that this acknowledged “political settlement”, from the perspective of purely legal positions, is a satisfactory achievement for Nova Scotia especially with respect to the recognition (*de facto*) of provincial ownership and control of Sable Island resources.²⁸⁴ However, from the perspective of neighbouring provinces, it provides a somewhat less than stirring precedent. The silence of New Brunswick and Prince Edward Island at the announcement of the Agreement has surely been detrimental to their better interests since those provinces have lost any share in Nova Scotia offshore revenues due to the elimination of the regional revenue sharing pool contained in the former memorandum. For those provinces and Newfoundland, the Agreement is defective in leaving to Canada, not Nova Scotia, effective control of the development and management of offshore resources.

It is ownership alone which will guarantee to the coastal provinces the measure of constitutional jurisdiction necessary to ensure maximization of the benefits of offshore development to the local economy and populations. Whether this will evolve is unknown, but what is known is that the equities favour it.

With the question of the Newfoundland offshore currently before the Courts, perhaps a fitting conclusion to this constitutional discussion would be to note without further comment the irony of the following resolution adopted at the Quebec Conference of 1864:

281. *Id.*, para. 15(j).

282. *Supra*, note 251, s. 27.

283. *Supra*, note 272, para. 13.

284. *Id.*, para. 24.

In consideration of the surrender to the General Government by Newfoundland of all its Mines and Minerals and of all the ungranted and unoccupied Lands of the Crown, it is agreed that the sum of \$150,000 shall each year be paid to that Province by semiannual payments. . . .²⁸⁵

285. G.P. Browne, *Documents on the Confederation of British North America* (Toronto: McClelland & Stewart Ltd., 1969), 164.