New Brunswick and Offshore Mineral Rights

Frank J. McKenna†

Part 1: The Legal Basis of New Brunswick's Claim

On April 26, 1965, the Governor in Council terminated years of inconclusive bargaining by submitting to the Supreme Court of Canada a detailed reference[1] on the question of ownership on offshore minerals[2].

> 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 of 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[3] of Canada or British Columbia?
>
> (b) Has Canada or British Columbia the right to explore and exploit the said lands?
>
> (c) Has Canada or British Columbia legislative jurisdiction in relation to the said lands?
>
> 2. In respect of the mineral and other natural resources of the sea bed and subsoil beyond that part of the territorial sea of Canada referred to in Question 1, to a depth of 200 metres or, beyond that limit, to where the 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?

Although the principal litigants were British Columbia and the federal government, all provincial governments had a "special interest" in the result and four made submissions buttressing the British Columbia argument.

---

† Second Year Law Student, The University of New Brunswick

1. As provided for in the Supreme Court Act, R.S.C. 1970, c. S-19 s. 55 (1) (d).
2. Order in Council, P.C. 1965 - 750, April 26, 1965.
3. Technically, the correct term should be "the beneficial interest in property". For a detailed discussion of this concept, reference should be made to the factum of the Province of New Brunswick, p. 5.
4. *Reference Re Ownership of Offshore Mineral Rights (1968)* 65 D.L.R. (2d) 353 at pp. 380-81.

The Supreme Court delivered its opinion on November 7, 1967 and the federal position prevailed on both questions.[4] Despite this seemingly conclusive disposition of the issue, other Canadian jurisdictions, including New Brunswick, have continued to exert their claim without visible reticence.[5]

It is submitted that the pivotal question[6] in the British Columbia Reference was whether the territory in question fell within the umbrella of British Columbia's boundaries prior to the admission of that province to the Canadian federation in 1871. In the court's own words:

> . . . But it leaves untouched the problem that we have to face - whether the territorial sea was within the boundary of the Province of British Columbia at the time of Confederation.[7]

Implicit in the court's reasoning throughout was the proposition that if the Province of British Columbia could establish pre-1871 jurisdiction over the disputed locus a legitimate legal claim might exist.[8]

In effect, the entire *ratio decidendi* of the British Columbia reference was confined to bringing the area in dispute under federal jurisdiction on the assumption that British Columbia had failed to demonstrate a credible historical claim. If this reasoning is legitimate, *ex hypothesi,* the door has been left open for New Brunswick and other Canadian provinces to exert legal claims based on their respective historical backgrounds.[9]

To present a completely comprehensive assessment of New Brunswick's rights with respect to off-shore mineral resources, four distinct, compartmentalized areas will be discussed, each of which has its own unique historical background.

---

5. See for example *the Halifax Chronicle Herald,* Editorial, October 6, 1971.

6. See for example Neil Kaplan, *Legal Issues of the Offshore Mineral Rights Dispute in Canada* (1968), 14 McGill Law Journal 475 at p. 492 and G. V. La Forest, *Natural Resources and Public Property,* (1969), p. 100.

7. (1968), 65 D.L.R. (2d) 353 at p. 360.

8. Id., at p. 367.

9. For example in a letter from the Deputy Attorney General of Nova Scotia to the author dated July 10, 1972. Nova Scotia's legal case was described as premised upon historicial arguments: . . . the Supreme Court found that the Province of British Columbia had no ownership or property right in the territorial sea at the time it entered into Confederation and had not acquired any ownership or property right at the time of the reference. The historical situation was quite different in the case of the Province of Nova Scotia . . .

A. *The solum between the ordinary*[10] *high water mark and the low water mark.*

To a province that boasts the highest tides in the world, this *locus in quo* is by no means inconsiderable. In a preconfederation case[11], Carter C. J. characterized "beach" or "shoal dry at low water" as seashore and applied Lord Hale's theory that ownership was vested in the King. *A fortiori,* by virtue of Section 109 of the British North America Act[12], this property held by the King, in right of colony, became property held by the King in right of Province. The property interest may be alienated by the Legislature, but to do so requires an explicit conveyance.[13] A summary perusal of coastline abutting mineral leases granted in New Brunswick prior to Confederation reveals no such instances.[14] Furthermore, New Brunswick has a number of statutes expressly reserving property rights in minerals.[15]

In summary, the crown in right of province has ownership in the solum between ordinary high water and low water, unless expressly conveyed, and even when such alienation has taken place, specific minerals have been reserved.

B. *Inland waters.*

Inland waters have been variously defined as "those parts of the sea which are neither high seas nor territorial waters but lie to the inland side of the base line from which the territorial sea is measured,[16] and, "a State's ports and harbours, bays and gulfs, land locked seas, lakes, straits and rivers".[17]

It should be noted that the category "inland waters" includes considerably more than landlocked waters. Its significance in the context of offshore minerals is derived from the fact that it subsumes a number of specific waters adjacent to the New Brunswick coast. These "adjacent inland waters" include several bodies of water included in New Brunswick's boundaries at Confedera-

---

10. It was established by Lord Hale in *De Jure Maris* that the ordinary, as opposed to extraordinary tide level, should be the measuring mark. This measure seems to have enjoyed widespread acceptance.
11. *Doe d. Fry v Hill* (1853), 7 N.B.R. 587
12. 30-31 Vict. (1867), c. 3.
13. *Lee v Arthurs* (1919), 46 N.B.R. 482 at p. 488.
14. Documents of the New Brunswick Archives.
15. See for example Mining Act R.S.N.B. 1952, c. 146, s.8 (3 & 4) as amended by S.N.B. 1954, c. 60, s.4, and, An Act Respecting the Ownership of Minerals, S.N.B. 1953, c. 10, s. 2.
16. O'Connell, *International Law* 2nd ed. (1970) (vol. I) p. 483.
17. Higgins, *The International Law of the Sea,* 5th Rev. ed. (1962), p. 158.

tion and a number of waters not clearly defined within provincial boundaries but over which New Brunswick has exercised prescriptive jurisdiction. A combination of New Brunswick history and the Canadian constitution give this province a strong legal claim with respect to a large body of territory falling within this category.

A brief constitutional survey reveals that by virtue of section 117 and 109, limited only by the expressly scheduled enumeration to section 108, inland waters held by the Crown in right of colony at confederation were held by Crown in right of province after Confederation[18]

> 117 The several provinces shall retain all their respective Public Property not otherwise disposed of in this Act, subject to the right of Canada to assume any lands or Public Property for Fortifications or for the Defense of the Country.
>
> 109 All Lands, Mines, Minerals, and Royalities belonging to the Several Provinces of Canada, Nova Scotia, and New Brunswick at the Union, and all Sums then due or payable for such Lands, Mines, Minerals, or Royalties, shall belong to the Several Provinces of Ontario, Quebec, Nova Scotia, and New Brunswick in which the same are situate or arise, subject to any trusts existing in respect thereof, and to any Interest other than that of the Province in the same.
>
> 108 The public works and Property of each Province enumerated in the Third Schedule to this Act, shall be the Property of Canada.
>
> *Third Schedule*
>
> 2. Public Harbours.

These constitutional provisions need be marshalled only with respect to a particular category of inland waters - those adjacent to the coast. The remaining inland waters, those landlocked, are clearly within the jurisdiction of New Brunswick by virtue of Section 7 of the British North America Act, *majus continet minus.*

> The provinces of Nova Scotia and New Brunswick shall have the same limits as at the passing of this act.[19]

The fact that the solum of inland waters was the property of the Crown in right of province was conclusively demonstrated in *Re Provincial Fisheries*[20] and that this property right extended to the bed of adjacent waters *intra fauces terrae* was established by Duff J. in *Capital City Canning Company* v *Anglo Packing Company.*

---

18. 30-31 Vict (1867), c. 3.

19. Ibid.

20. (1895), 26 S.C.R. 444.

It was not disputed and I assume for the purpose of this application that this site is *intra fauces terrae*. The bed of the sea in such places is part of the territorial possessions of the Crown and — except in the case of public harbour, within the disposition of the Provincial Legislature. . .[21]

New Brunswick was formally created on June 18, 1784, when Letters Patent were issued containing the following description:

The tract of Country bounded by the Gulph of St. Lawrence on the East, the Province of Quebec on the North; the Territories of the United States on the West, and the Bay of Fundy on the South; should be erected into a Government under the Name of New Brunswick.[22]

Subsequently, in 1786, a more elaborate description was expressed in the Royal Commission to Sir Thomas Carleton:

Our Province of New Brunswick 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 boundary as far as the Western Extremity of the Bay des Chaleurs to the Eastward by the said Bay and the Gulph of Saint Lawrence to the Bay called Bay Verte to the South by a line in the center 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.[23]

A final revision, significant to the issue in question took place in 1871, when by Imperial Statute the Northern boundary of New Brunswick was conclusively settled:

Thence down the centre of the stream of the Restigouche to its mouth in the Bay of Chaleurs; and thence through the middle of that Bay to the Gulf of St. Lawrence; the islands in the said Rivers Mistouche and Restigouche to the mouth of the latter river at Dalhousie being given to New Brunswick.[24]

Two decisions, one of the New Brunswick Supreme Court and one of the Supreme Court of Canada established that bodies of water, expressly included within the provincial boundaries previously described, were subject to provincial jurisdiction. The former decision, *R* v *Burt*,[25] was concerned with the Bay of Fundy while the latter, *Mowat* v *Mcfee*,[26] dealt with the Bay of Chaleurs.

21. (1905), 11 B.C.R. 333 at p 339.
22. R.S.N.B. 1952, Appendix, Vol. 4, p. 5.
23. Collections of the New Brunswick Historical Society, No. 6, 394.
24. 44-45 Vict. (1851), c. 3.
25. (1932), 5 M.P.R. 112.
26. (1880), 5 S.C.R. 17.

Despite the seemingly conclusive boundary delimitation and the *R* v *Burt* decision, the exact status of the Bay of Fundy is still in doubt.[27]

A respected source, Gerard La Forest, makes extensive claims with respect to the adjacent inland waters of the provinces at Confederation; these claims are based upon historical prescription and universal international law rights.[28]

Hovering statutes passed by all three Maritime provinces[29] provide some support for La Forest's theory that all bays[30] in the Maritimes are "historic territorial". New Brunswick's legislation authorized customs and excise officers to board any ship within three miles of the coast or within any port or bay. This legislation was subsequently affirmed by British Order In Council.[31]

Furthermore, by convention in 1818[32] and by a statute passed in 1819[33], to give effect to the convention, Great Britain exerted a pre-emptive claim to fishing within three miles of the "coasts, bays, creeks or harbours". As stated by the Privy Council, "No stronger assertion of exclusive Dominion over the bay could well be framed."[34]

At common law, a bay was considered territorial if one side could be seen from the other with the naked eye.[35] In International Law, as a minimum criteria, a bay of not more than six miles[36] in width was considered an inland water.[37]

---

27. The status of the Bay of Fundy and the implications of the *R* v *Burt* decision are discussed in detail under the Territorial Waters section.
28. La Forest, *Natural Resources and Public Property under the Canadian Constitution*, 1969, p. 90. See also La Forest, *Canadian Inland Waters*, C.Y.I.L. [1963], 149 at p. 159.
29. 6 Wm. IV, c. 8.; 6 Vict., c. 14; 16 Vict., c. 69.
30. 16 Vict., c. 39. See also an example of an exercise of jurisdiction with respect to fishing, "Of the Sea and River Fisheries", R.S.N.B. 1854, c. 101.
31. Proceedings in the *North Atlantic Fisheries Arbitration* — Appendix to the case for Great Britain.
32. Treaties and Conventions between the United States and other Powers (1889), p. 415.
33. An Act respecting Fishing by Foreign Vessels, 31 Vict. (1819), c. 61.
34. *Direct United States Cable Co. v. Anglo American Telegraph Co.* [1867-77] 2 App. Cas. 394 at p. 421.
35. Lord Hale, *De Jure Maris*, C.4.
36. Colombos, *op. cit.* p. 164 "This rule is subject to the exception that on historic or prescriptive grounds, or for reasons based on the special characteristics of a bay, the territorial state is entitled to claim a wider belt of marginal water . . .
37. Lauterpacht ed., *Oppenheim's International Law,* Vol. 1 "Peace", 7th ed., 1948 p. 458.

In recent years Canada has been exerting a claim that the Gulf of Saint Lawrence is an inland sea.[38] It is doubtful, however, that if such a claim received recognition under International Law it would result in a valid proprietary interest for the adjoining provinces.[39]

Similarly, bays of between six and twenty-four miles would probably be considered as waters accruing "to Canada from its political activities as a sovereign state and the prerogative power over external relations" although an argument on behalf of the provinces might be advanced that the twenty-four mile limit is merely clarification of a disputed rule.[40]

C. Territorial Sea.

The territorial sea has been succinctly described as a "belt of sea adjacent to the coast".[41] The breadth of this belt is subject to the discretion of each individual state but clearly an implicit sanction is present in the requirement for general acceptance. At a minimum, a three-mile limit[42] is recognized by Canada.[43]

However, for purposes of New Brunswick's argument, it is more important to determine whether *Great Britain* claimed a territorial sea in right of the colony of New Brunswick prior to Confederation. Establishing that such a contiguous belt was claimed by Great Britain for domestic purposes would provide a convincing *prima facie* argument but its absence need not be fatal to New Brunswick's case. It is possible that a territorial sea was not recognized for domestic purposes yet was claimed prescriptively or by express declaration for any of the colonial possesions.[44]

---

38. LaForest, *Canadian Inland Waters* [1963], C.Y.I.L. 149 at p. 170.

39. LaForest, *Natural Resources and Public Property under the Canadian Constitution,* (1969), at p. 90.

40. *Ibid.*

41. Convention on the Territorial Sea and the Contiguous Zone, Article I, U.N. Doc. A, Conf. 13, L 52. For more detailed definitions see O'Connell, p. 524; Colombos, p. 78 and Lauterpacht, p. 442.

42. Three nautical miles not three statute miles.

43. For example, *inter alia see R. v. The Schooner John J. Fallen* (1916), 55 S.C.R. 348, and for executive recognition see Canada's statement to the International Law Commission, reproduced in Canada and the United Nations, 1956-57.

44. Otherwise the British Columbia reference would have been confined to the common law situation in Great Britain and its careful appraisal of British Columbia history would have been redundant.

Strong support for New Brunswick's claim to proprietary rights in the territorial sea may be found in the concluding words of the Royal Commission to Sir Thomas Carleton, including within the boundaries of the province, "all the rights, Members and Appurtenances whatsoever thereunto belonging."[45] Territorial seas have been considered as falling within the general categorization of appurtenances in several cases.[46]

A second authority for New Brunswick's claim to proprietary rights in the territorial sea is the existence of a number of pre-confederation statutes, some of which were directly approved by the British Government. These statutes establish that New Brunswick's boundaries, at least jurisdictionally, prior to Confederation, included a territorial sea. For example, in an 1854 interpretation statute:

> "County" shall include City and County; and wherever any County or Parish shall be bounded by any Sea, Bay, Gulf or River, it shall extend into such Sea, Bay, Gulf or River, to the boundary of the Province, or of the adjoining County, running out the sidelines thereof in the same manner as if it were land.[47]

As previously noted, a statute passed in 1819 gave effect to a convention signed in 1818 by Great Britain and the United States in which Great Britain claimed complete control of fisheries within three miles of harbours, bays, creeks or coasts. This "staking out" of jurisdiction, it could be argued, established that Great Britain considered the territorial sea as a concomitant of her Atlantic colonies and *a fortiori* included the same in the grant of territory to the respective provinces.

Perhaps a more conclusive example of jurisdiction in the territorial sea was an 1853 statute enacted by the Legislative Assembly of the colony of New Brunswick which stated, *inter alia,*

> Officers of the Provincial Treasury, and any other person duly appointed by the Lieutenant Governor in Council for that purpose, may go on board any vessel or boat within any harbour in this Province, or hovering within *three marine miles* of any of the coasts or harbours thereof, and stay on board so long as she may remain within such place or distance.[48]

This, so called, "hovering" statute, received the direct approval of British Orders in Council.[49]

---

45. Collections of the New Brunswick Historical Society, *op. cit.*, p. 394.
46. *The Ship "North" v. R.* (1906), 37 S.C.R. 385 at p. 401; *The Grisbadarna Arbitration* (1916), Scott Hague Reports 121, at 127; *Anglo-Norwegian Fisheries Case* (1951), I.C.J. Rep. 112, at p. 128. As described in footnotes of La Forest, *Natural Resources and Public Property,* (1969) p. 101.
47. R.S.N.B. 1854, c. 161 s. 6.
48. S.N.B. 1853, c. 69.
49. Proceedings in the North Atlantic Fisheries Arbitration pp. 962-963.

In 1854 a statute was passed providing that:

> The Governor in Council may make regulations for the management and protection of the fisheries on the sea coast, or around any island of the said coast between low water mark and *three marine miles* . . .[50]

Beyond the aforementioned statutes, ample Canadian case law exists which is generally supportive of a provincial claim. A particularly strong representation of this sentiment was expressed by Hoyle J. in *Anglo-American Telegraph Company v Direct United States Cable Company,*[51] later quoted with approval in *Rhodes v Fairweather*[52] and *Queen v. Delephine.*[53]

> I hold that the territorial jurisdiction of the sovereign extends to three miles outside of a line drawn from headland of the bay . . . and that, subject to the royal instructions and the Queen's power of dissent, the Acts of the local legislature have full effect and operation to the full extent of that territorial jurisdiction.

A seminal authority for the provincial claim is the *Provincial Fisheries Reference* decision where it was held that:

> The beds of public harbours not granted before confederation are the property of the Dominion of Canada. The beds of all other waters not so granted belong to the respective provinces in which they are situate, without any distinction between the various classes of waters.[54]

This case was subsequently referred to the Privy Council and that body neither endorsed nor dissented from the specific answer of the Supreme Court.[55] Similarly, in *Re Quebec Fisheries,*[56] three of four majority judges felt that the territorial sea belonged to the provinces but the Privy Council, as in *British Columbia Fisheries,* refused to answer the narrow question of who owned the property rights.[57]

Strong support for the provincial view can be found in *dicta* by Currie J. (dissenting) in *Re. Dominion Coal Company Limited and County of Cape Breton*[58] in which he states:

---

50. R.S.N.B. 1854, c. 101.
51. (1875], 6 Nfld. L.R. 28 at p. 33.
52. (1888) 7 Nfld. L.R. 321.
53. (1889), 7 Nfld. L.R. 378.
54. (1895), 26 S.C.R. 444, quoting from the headnote. The real significance of the answer can only be understood in relation to the questions asked. Included, *inter alia,* was the question of who owned the bed of "waters directly and immediately connected with the seacoast and waters not so connected".
55. *A-G of Canada v A-G of Ontario.* [1898] A. C. 700.
56. (1917) 35 D.L.R. 1. Q.K.B.
57. *A-G of Canada v. A-G of Quebec,* [1921] 1 A.C., 413.
58. (1963), 40 D.L.R. (2d) 593 at p. 620.

> Prior to Confederation, Nova Scotia exercised jurisdiction over an area of territorial waters three miles in width measured from its coasts, bays and rivers . . .

The strongest authority for New Brunswick's particular claim is the decision per Baxter C. J. in *R v Burt*,[59] subsequently followed in *Filion v. New Brunswick International Paper Company*.[60] In *R v. Burt* the question, *inter alia,* was whether the accused fell within New Brunswick jurisdiction. He had been apprehended on shipboard in the Bay of Fundy, one and three-quarter miles from land. It is submitted that the patently clear language of Baxter C. J., in this case was not done justice by the Supreme Court of Canada in the *British Columbia reference.*

In referring to the *R* v *Burt* decision, the Supreme Court of Canada stated "As in the *Conception Bay* case, this case did not involve a delegation by the British Crown of its rights in the territorial sea".[61] It is difficult, taking these remarks in context, to clearly understand the court's reasoning. It might be saying that New Brunswick's jurisdiction in the Bay of Fundy is not an authority for territorial sea dominium rights because (a) the Bay of Fundy is an inland water as established by boundary,[62] or (b) New Brunswick has rights in the Bay of Fundy only for purposes of "criminal" jurisdiction.[63] With respect, it is submitted that the express wording of Baxter C. J. in *R v. Burt* precludes either interpretation. He states:

> On the grounds, therefore, both of property and jurisdiction, there can be no doubt that the Province of New Brunswick included the territory within which the offence is alleged to have been committed.[64]

The correct position, it is submitted, is that stated by La Forest, who, in effect, points out the dual nature of Baxter's judgement.

> Though the Supreme Court of Canada in *Re: Offshore Mineral Rights of British Columbia* refers to the case as one dealing with inland waters, the fact is that it was based on both grounds, and indeed Chief Justice Baxter appears to have had more confidence in the holding that the area in question was within New Brunswick because it was within three miles of the coast.[65]

---

59. (1932], 5 M.P.R. 112.
60. (1934), 8 M.P.R. 89 at pp. 118-119.
61. *Reference Re Ownership of Offshore Mineral Rights* op. cit. pp. 368-369.
62. La Forest's interpretation of the court's remarks, *Natural Resources and Public Property* (1969) at p. 102.
63. Head's interpretation of the court's remarks. Ivan L. Head, *The Canadian Offshore Minerals Reference* 18 University of Toronto Law Journal, (1968), 131 at p. 143, footnote 60.
64. (1932), 5 M.P.R. 112 at p. 119.
65. La Forest, *Natural Resources and Public Property*, (1969), p. 102.

D. *The Continental Shelf.*

As defined by the Convention on the Territorial Sea and the Contiguous Zone,[66] the term "continental shelf"[67] refers to:

> (a) the seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 meters or, beyond that limit, to where the depth of the superadjacent waters admits of the exploitation of the natural resources of the said areas;
>
> (b) to the seabed and subsoil of similar submarine areas adjacent to the coasts of islands.

It is difficult, it is submitted, in the face of strongly adverse case law and academic treatises to exert a credible claim to submarine resources of the Continental Shelf.[68] Any such claim as New Brunswick might pursue in this area must, of necessity, have as its cornerstone the concluding words of the Letters of Instruction to Sir Thomas Carleton which included in the specific territorial grant "all the Rights, Members and Appurtenances."[69]

These concluding words could be of critical importance depending upon which of approximately three theories of proprietary rights in the Continental Shelf are accepted by the court.

The first theory suggests that these submarine areas are not capable of appropriation.[70] It may be quickly discarded in the face of general disapprobation, which, in International Law is the real measure of efficacy.

The second theory is that "occupation" forms the basis of the claim, the area in question being *res nullis* until occupied.[71] It may be thought, as per La Forest,[72] that examples of pre-confederation jurisdiction would satisfy this requirement, but unfortunately, the requirement as stated by Young appears to be more exacting.

---

66. 516 U.N.T.S. 206 Article I.
67. For a discussion of the definitional difficulties involved in using this term see Richard Young, *The Legal Status of Submarine Areas Beneath the High Seas*, 45 A.J.I.L., (1951), 225 at p. 227.
68. For example see: *Matter of an arbitration between the Petroleum Development (Trucial Coast) limited and his Excellency Sheikh Shakhit bin Sultan bin Za'id, Ruler of Abu Dhabi and its Dependencies*, (1952)l, 1 Int. and Camp. L.Q. 247 and Sir Humphrey Waldock *The Legal Basis of Claims to the Continental Shelf*, (1950), Trans Grotius Society, 115.
69. Collection of the N.B. Historical Society.
70. Young, *op cit., p. 229.*
71. Young, *op. cit.* p. 229 and for a fuller discussion see Lauterpacnt, *Sovereignty Over Submarine Areas* [1950] B.Y.I.L. 376 at p. 415.
72. La Forest, *Natural Resources and Public Property*, (1969), pp. 106-7.

> The familiar modern doctrine is that the occupation of land territory must be physical and effective . . .[73]

Young, however, permits of a variation in his "occupational" theory which offers New Brunswick a possible argument. Recognizing a coastal state's obvious objection to "occupation" by an outsider, he suggests that a "notional" occupation theory has been developed in which a claim could be staked out by proclamation.[74] It might be argued that the passage quoted from the Letters of Instruction would fulfill this proclamatory function.

The most promising theory from New Brunswick's point of view is the contiguous doctrine which regards the continental shelf as appurtenant to the adjacent state by an "automatic attribution of law and without any requirement of occupation, either real or fictitious".[75] The contiguous theory has two distinct strands. One suggests an "horizontal prolongation of the already occupied territory" while the other speaks in terms of a "physical unity" in which the shelf is the base on which the continent rests.[76]

It is submitted that if the contiguous theory is accepted, a strong argument could be presented that the continenal shelf off New Brunswick is, and always was, an appurtenance of the land mass, and, as such, was expressly conveyed by the Letters of Instruction.

The contiguous theory has attracted both academic and judicial support,[77] and, it could be argued, the Geneva Convention on the Continental Shelf merely gave it practical effect.

Part II. The Effect of The British Columbia Reference

Speculation as to the effect of the British Columbia decision must be briefly prefaced by a discussion of the breadth and basis of that reference. Narrowing the scope of its *ratio decidendi* is critical to New Brunswick's argument.

British Columbia joined Confederation in 1871. Her entrance had been anticipated by Section 146 of the British North America Act (1967) which provided, *inter alia,* for joint addresses setting out terms and conditions. The Terms of Union,[78] paragraph 10, extended the provisions of the British North America Act, unless otherwise stipulated, to British Columbia.

---

73. Young, *op. cit.,* p. 230.
74. Young, *op. cit,* p. 230-1.
75. Young, *op. cit,* p. 231.
76. Lauterpacht, *op. cit.* p. 424.
77. A complete discussion of its application, judically and academically, is carried in Lauterpacht, *op. cit.* p. 424-33.
78. This Imperial Order In Council may be found in R.S.B.C. 1960, Vol. v., 5223-28.

A fortiori, Section 109 of the British North America Act, 1867, became applicable to British Columbia and constituted the constitutional basis for that province's claim to offshore mineral rights.

The Supreme Court of Canada, after a brief historical distillation, defined the narrow question as "whether the territorial sea was within the boundary of the Province of British Columbia at the time of Confederation".[79]

To assist in resolving this question, the Supreme Court was referred to a clutch of cases and statutes having in common only their inconclusiveness on the point of issue. Canadian courts had invariably confined their decisions, refusing to decide the general question. Admittedly, there was no lack of dicta supporting either view.[80]

The authority to which the most weight became attached was *R v. Keyn*,[81] supportive of the Dominion position. This litigation arose out of a collision between the *Franconia,* of German registry, and a British ship. The collision occurred in Great Britain's territorial waters".[82] The loss of life of a British subject resulted and a jurisdictional question arose as to whether the British courts had criminal jurisdiction to try the German officer. The court divided seven to six with one judge having demised before judgment was rendered. The majority denied British courts the right to criminal jurisdiction, holding that British territory ended at the low water line.

To breach this lacuna in criminal jurisdiction, Great Britain, in 1878, passed the *Territorial Waters Jurisdiction Act,* extending the Admiralty Court's jurisdiction to include foreigners as well as British subjects.[83]

Two cases following *R v. Keyn* assisted the court in interpreting that decision.[84] In both, it was accepted that the realm of England ended at the low water line.

---

79. *Reference Re Ownership of Off-Shore Minerals,* p. 360.
80. For example, see statements of Hoyle, J. in *Anglo-American Telegraph Co., v. Direct United States Cable Co., op. cit. supra,* and MacDonald J. and Currie J. in *Re Dominion Coal Co. Ltd. and County of Cape Breton, op. cit.*
81. (1876), 2 Ex. D. 63.
82. "Territorial" is used here in the sense of *imperium* rather than *dominium.*
83. 41-42 Vict. (1878), c. 73.
84. *Harris v Owners of Franconia* [1877], 2 C.P.D. 173 and *Blackpool Pier Company v Fylde Union* [1877] 36 L.T. 251.

A plethora of other cases and statutes of both Canadian and British origin were distinguished as being of specific application and not of such scope as to constitute an authority for provincial jurisdiction.[85]

In summary, the Supreme Court found that the British Crown did not confer upon British Columbia proprietary rights in the territorial sea prior to Confederation and such rights were never received by British Columbia after Confederation as part of a boundary extension. *Ex hypothesi,* it was found that these rights were held inchoate by Great Britain in right of Canada and were assumed by the Dominion at an undetermined time between 1871 and 1967, more specifically between 1919 and 1931.[86]

The Dominion's capacity to assume jurisdiction over the territorial seas was found in several disparate constitutional principles. The Supreme Court's reasoning in this regard is of sufficient importance to be reproduced in detail.

> The sovereign State which has the property in the bed of the territorial sea adjacent to British Columbia is Canada. At no time has British Columbia, either as a Colony or a Province, had property in these lands. It is the sovereign State of Canada that has the right, as between Canada and British Columbia, to explore and exploit these lands, and Canada has exclusive legislative jurisdiction in respect of them either under s. 91 (1A) [am. 1949 (U. K.), c. 81, s. 1] of the B.N.A. Act or under the residual power in s. 91 British Columbia has no legislative jurisdiction since the lands in question are outside its boundaries. The lands under the territorial sea do not fall within any of the enumerated heads of s. 92 since they are not within the Province.
>
> Legislative jurisdiction with respect to such lands must, therefore, belong exclusively to Canada, for the subject-matter is one not coming within the classes of subjects assigned exclusively to the Legislatures of the Provinces within the meaning of the initial words of s. 91 and may, therefore, properly be regarded as a matter affecting Canada generally and covered by the expression "the peace, order, and good government of Canada."
>
> The mineral resources of the lands underlying the territorial sea are of concern to Canada as a whole and go beyond local or provincial concern or interests.
>
> Moreover, the rights in the territorial sea arise by international law and depend upon recognition by other sovereign States. Legislative jurisdiction in relation to the lands in question belongs to Canada which is a sovereign State recognized by international law and thus able to enter into arrangements with other States respecting the rights in the territorial sea.

---

85. A complete discussion of this material may be found in La Forest, *op. cit.*, pp. 92-100 and Neil Caplan, *Legal Issues of the Offshore Mineral Rights Dispute in Canada,* 14 McGill Law Journal, (1968), 475.

86. *Reference Re Ownership of Offshore Mineral Rights,* at p. 375.

Canada is a signatory to the Convention on the Territorial Sea and Contiguous Zone any may become a party to other international treaties and conventions affecting rights in the territorial sea.[87]

It is contended that, in the context of the court's reasoning throughout, it is absolutely crucial, for this decision to be properly understood, to recognize that a condition precedent to the *ratio decidendi* was the failure of the Province of British Columbia to establish that the *locus in quo* was within its confines at the time of Confederation. With the utmost respect to a commonly held contrary view,[88] it is submitted that any other interpretation would be incompatible with firmly established patterns of constitutional interpretation and would be incompatible with an underlying premise that may be discerned from a careful examination of the instant case.

In paragraph one of the quote, the Supreme Court was extremely careful to note that the locus in dispute did not fall within any of the enumerated heads of section 92 and proceeded to suggest that sections 91 (1A) or the residual power of section 91 supported the federal claim.

The first category, it might be argued, is mere spurious window dressing. Section 91 (1A) makes the public debt and property a Dominion jurisdiction. It is not of assistance in bringing offshore minerals from *outside* constitutional jurisdiction to *within* Dominion powers. It merely provides a convenient peg on which to hang the subject matter after the "working" components of the constitution have done the job of establishing jurisdiction.[89] With respect to offshore mineral rights, section 91 (1A) may be used concomitant with, but not independent of, other sources of federal power. In syllogistic terms, it could be constructed: (a) Offshore minerals are public property, (b) Public property under section 91 (1A) is under federal jurisdiction, (c) *Ergo,* offshore minerals come under federal jurisdiction.

---

87. *Ibid.* pp. 375-76.

88. See, for example, H. Albert Hubbard, *Ownership of and jurisdiction over Offshore Mineral Rights,* (1967), 2 Ottawa Law Review, (1967), Vol. 2, pp. 218-19. *Report of the Special Joint Committee on the Constitution of Canada,* p 66, which stated that "there is nothing in the result peculiar to the Province of British Columbia"; and Martha Fletcher, *Judical Review and the Division of Powers in Canada,* ed. J. Peter Meekison, Canadian Federalism: Myth of Reality, 140, at p. 151.

89. The term "working" components refer to heads such as Trade and Commerce, Property and Civil Rights, the declaratory power, and the "peace, order, and good government" clause.

Unfortunately, the logical breakdown begins with the major premise. The question of whether offshore minerals are public property is exactly the question to be determined.

The "working" component in this case is the residual power clause. It has been suggested by one authority that:

> Another noteworthy feature of this opinion is the apparent finding that Parliament has exclusive authority in relation to the offshore territories as a matter of national concern and regardless of whether the territory is within provincial boundaries.[90]

It is submitted, most respectfully, that this interpretation is categorically incorrect and its malapropos flows logically from failing to recognize the crucial importance of the condition precedent. Its inaccuracy is manifest from the precise wording of the second paragraph, *supra,* " . . . for the subject matter is one not coming within the classes of subjects assigned exclusively to the Legislature of the provinces within the meaning of the initial words of section 91 and may, therefore . . ."

Section 3 of the British North America Act, 1871, states:

> The Parliament of Canada may from time to time, with the consent of the Legislature of any Province of the said Dominion, increase, diminish, or otherwise alter the limits of such province, upon such terms and conditions as may be agreed to by the said Legislature, and may, with the like consent, make provision respecting the effect and operation of any such increase or diminution or alteration of territory in relation to any Province affected thereby.[91]

If the Dominion government were to claim offshore territories, which had been established to be within provincial boundaries, it would be a blatant or colourable contravention of section 3 which, in its requirement for provincial consent for boundary alterations, provides a precedural limitation on Federal authority that can only be abrogated by constitutional amendment.

Quite clearly the British Columbia reference employed an expansive interpretation of the residual power clause, undoubtedly following *Munro v. National Capital Commission,*[92] which in turn employed the test of which the *Canada Temperance Federation*[93] case was the harbinger.

> . . . the true test must be found in the real subject matter of the legislation: if it is such that it goes beyond local or provincial concern or interests and must from its inherent nature be the concern of the Dominion as a whole . . . then it will fall within the competence of the Dominion Parliament.

---

90. Hubbard, *op. cit.* p. 218-19.
91. 34-35 Vict c. 28, s. 3.
92. (1966), 57. D.L.R. (2d) 753.
93. *A-G of Ont. v Canada Temperance Federation* [1946] A. C. 193.

Even employing this liberal interpretation of the residuary power clause, it is submitted that the Supreme Court would be loath to establish that this repository of Dominion power could be employed to affect provincial boundaries - in the face of Section 3 of the British North America Act, requiring provincial consent. In the absence of express language stating such a proposition, a narrower construction should be applied, i.e. the condition precedent theory.

The Supreme Court also postulated that Dominion jurisdiction could be found in the treaty power.[94] In the absence of specific contextual remarks, this aspect of the court's decision is extremely difficult to evaluate. The language of the court was critically described by Professor Head as "shocking":

> ... But the Court did not stop there. It continued on for three further sentences which are 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 ... It is submitted, with respect, that the Supreme Court has erred, and it has done so because it failed to appreciate that "the Crown in right of Canada" vis-a-vis other nation-states in the international community is a different legal entity from "the Crown in right of Canada" vis-a-vis the provinces in the federal community.[95]

It seems highly unlikely that, without a wide ranging discussion, including explicit representations by the respective counsels, the court would radically deviate from the long established *Labour Convention*[96] decision.

An alternative explanation is available, similarly based upon the condition precedent theory.

> In their decision, the judges saw that they could resolve the issue without being forced to either overrule or endorse the *Labour Conventions* decision. Because, and only because the disputed areas were found to be outside the boundaries of British Columbia, no such pronouncement was needed.[97]

The purpose of this wide ranging discussion of the *ratio decidendi* was to establish that the superstructure of the courts' reasoning is only applicable where the provinces are unable to to prove their jurisdiction. If this condition precedent theory has not been established, New Brunswick's argument suffers a fatal flaw, *ab origine*.

---

94. *Reference Re Ownership of Off-Shore Minerals* p. 376. 376.

95. Head, *op. cit.* at 147 and at p. 155.

96. *A-G Canada v A-G Ontario* [1937] A.C. 326.

97. Caplan, *op. cit.*, at p. 491.

Considered in this perspective, the effect of the British Columbia decision is to weaken, but not destroy, the arguments of another province marshalling different historical references. In the shadow of the British Columbia decision, New Brunswick's claim still thrives but with perceptibly less vigour.

Part III: Conclusion

A. *Foreshore*

With respect to this locus, there can be little doubt that vis-a-vis the Dominion, New Brunswick has an unimpugned claim to whatever may lie under the solum.

B. *Inland Waters*

In similarity with the previous category, this specific item was not raised in the British Columbia reference. It was included in this study for the practical reason that it subsumes the bulk of New Brunswick's adjacent waters. The most contentious feature of this category in any legal proceeding is likely to be a precise delimitation of the territory involved.

C. *The Territorial Sea*

In contrast to the previous categories, the territorial sea is distinctly "fighting" ground. It is here that the British Columbia decision has its most debilitating effect on New Brunswick's argument. In the absence of the British Columbia reference, New Brunswick could include, as part of its argumentation, the common law position prior to 1867. It is a commonplace in learned articles on this case that the decision was not logically dictated by common law[98] and that public policy considerations underlined the court's reasoning.[99]

However, the British Columbia decision effectively determined this common law question and New Brunswick cannot rely upon arguments of British domestic jurisdiction prior to 1867.

---

98. See for example, Hubbard, *op. cit.*, p. 213. See also Charles Birt, *Who owns the Mineral Rights in Hudson's Bay*, 3 Manitoba Law Journal (1969), 41 at p. 49. Birt points out that the Territorial Waters Jurisdiction Act of 1878, passed to remedy the jurisdictional deficiency created by *R. v. Keyn*, included in its preamble a statement that . . . rightful jurisdiction of Her Majesty . . . extends and always extended over the open seas adjacent to the coasts of the United Kingdom and of all other parts of Her Majesty's Dominions . . .". He concludes at p. 51 that the Supreme Court was incorrect in its assessment of the common law position.

99. Caplan, *op. cit.*, p. 475.

In this context, the condition precedent theory is vital to New Brunswick's argument. Even here the New Brunswick case has been undermined. A spinoff effect of the British Columbia reference was to clearly impugn some of the statutes and cases upon which New Brunswick must rely to prove her claim.

The Supreme Court in the British Columbia reference seemed genuinely reluctant to find "public law consequences in private law circumstances".[100] There is no reason to anticipate a change in attitude.

D. *The Continental Shelf*

New Brunswick has a decidedly disadvantageous position with respect to this "fighting" ground. The theory most favorable to New Brunswick's claim - the contiguous theory - by its very essence should also have been applicable to British Columbia. New Brunswick's only claims to distinction are several isolated examples of prescriptive jurisdiction and a territorial grant which includes the word "appurtenances". Furthermore, a finding that the territorial sea was outside New Brunswick's boundaries would, *a priori*, apply to the Continental Shelf.

It would be trite logic to suggest that the British Columbia decision is only a reference and does not apply to New Brunswick.[101] The rare unanimity of the court gives the lie to such sophistry.[102] If, as has been argued by a number of authorities, the court's reasoning was underlined by a "practical policy" approach, there is no reason to suspect that these policy considerations have changed. Although New Brunswick's position is considerably stronger than British Columbia's position was, a truly formidable argument would have to be available to defeat what, practically speaking, amounts to a Dominion presumption.

In strictly utilitarian terms, New Brunswick's interest would probably be best served through a political settlement. The federal government is under considerable pressure to resolve the issue through a bi-lateral political arrangement. The Premier of Nova Scotia, it has been suggested, would object in the strongest possible terms if the federal government were to raise the issue before the Supreme Court of Canada. Such an attack would revive the bitter animosity of the mid-sixties. This sentiment was highlighted by Premier Lesage's threat not to recognize the Supreme

100. Head, *op. cit.*, 131 at p. 144.

101. As per Premier W.A.C. Bennett, reported in an editorial, *The Halifax Chronicle Herald*, July 1, 1972, p. 6.

102. Only ten constitutional cases decided between 1950 and 1965 have been unanimous. See Stephen R. Mitchell, *The Supreme Court of Canada since the Abolition of Appeals to the Judical Committee of the Privy Council: A Quantitative Analysis*, unpublished.

Court's offshore decision and was manifest in repeated demands for a constitutional court.[103] The leverage has been increased by joining Quebec in the loose coalition of Atlantic Provinces' Premiers, formed for the purpose of presenting a strong united stand.[104]

In the face of this concerted opposition, the Dominion government has considerably relaxed its original fifty-fifty revenue sharing proposal.

A recently mooted federal proposal calls for fifty per cent to be distributed to the province off whose coast the revenue is derived, thirty per cent to be retained by the federal government and twenty per cent to be distributed in a regional pool. Paradoxically, New Brunswick, because of its limited offshore territory, may derive a greater net benefit from a formula of this nature than from a legal decision awarding all of the offshore area to the province.

Furthermore, New Brunswick has a very large area of adjacent inland waters which clearly lie outside the provisions of the revenue sharing formula. Consequently, New Brunswick would not be required to share revenue from this source. In this context it seems obvious that the disposition most advantageous to New Brunswick would be a political settlement with a "regional pool" feature.

---

103. J. Lyon and R. Atkey, *Canadian Constitutional Law In a Modern Perspective,* (1970), p. 350.

104. Meeting of Premiers held in June 1972, as a follow up to a meeting of Mines Ministers of the five provinces held in May, 1972.