REMEMBERING *MAINE*: OFFSHORE FEDERALISM IN THE UNITED STATES AND CANADA

GEORGE S. SWAN*

This article concerning the jurisdictional status of marginal sea exploitation in the United States and Canada examines the leading relevant judicial opinions in each of those countries. The prospect for future jurisdictional controversies in Canada over the marginal sea is explored, and the potential for a generally satisfactory resolution of such controversies is briefly outlined through discussion of marginal sea politico-legal strategies that have been relied upon in the United States and Australia. Finally, it is suggested that the danger of international clashes over exploitation of the marginal sea areas may arguably make more persuasive a vigorous federal government role in the marginal sea arena.

I. THE UNITED STATES AND HER MARGINAL SEA

In *United States v. Maine*,[1] the most prominent of the Offshore Rights Cases[2] decided on March 17, 1975, the United States Supreme Court upheld the rights of the federal government in the Atlantic seabed lying more than three geographical miles seaward from the normal low-water mark and from the outer limits of the inland waters on the coast. This federal right operates to the exclusion of the thirteen Atlantic coast states concerned.

The *Maine* controversy arose during April, 1969, when the United States requested leave to file a complaint against the thirteen[3] Atlantic coast states.[4] The Court granted leave two months

* LL.M. candidate, University of Toronto Faculty of Law; B.A., Ohio State University, J.D., University of Notre Dame; Member, Ohio Bar.

1. 420 U.S. 515 (1975).

2. United States v. Maine, 420 U.S. 515 (1975); United States v. Florida, 420 U.S. 531 (1975); United States v. Louisiana, 420 U.S. 529 (1975).

3. Those states include: Maine, New Hampshire, Massachusetts, Rhode Island, New York, New Jersey, Delaware, Maryland, Virginia, North Carolina, South Carolina, Georgia, and Florida. As the Supreme Court noted: "The State of Connecticut was not made a defendant, apparently because that State borders on Long Island Sound, which is considered inland waters, rather than open sea." United States v. Maine, 420 U.S. 515, 517 n.1 (1975).

4. *Id.* at 517.

later.[5] The federal government's complaint alleged that the United States was entitled to exercise sovereignty over both the seabed and subsoil underlying the Atlantic Ocean more than three miles seaward from the coast to the exclusion of each coastal state.[6]

Twelve of the original thirteen defendants answered by denying federal proprietary rights in the seabed beyond the three-mile marginal sea.[7] Each of these states claimed to itself as successor in title to certain grantees of the British Crown (and in the instance of New York, the Crown of Holland) exclusive dominion and control over the contested seabed. The defendants delivered to the Court-appointed special master voluminous documentary evidence supporting their claims that they had acquired dominion over the offshore seabed prior to adoption of the U.S. Constitution, and that they had never relinquished dominion to the United States.[8] Rhode Island, North Carolina and Georgia each submitted additional special defenses applicable only to themselves which were dismissed by the Court in a footnote.[9]

Before the special master, the United States relied upon the Court's decisions in the Tidelands Cases, *United States v. California*,[10] *United States v. Louisiana*,[11] and *United States v. Texas*,[12] while the states asserted that the Tidelands Cases precedents should be overruled as having been erroneously decided.[13] The Supreme Court, delivering judgment for the United States, determined that *California*, *Louisiana*, and *Texas* controlled the issues before it in *Maine*.[14] Discussion of *Maine* observed early and correctly that

5. United States v. Maine, 395 U.S. 955 (1969).

6. United States v. Maine, 420 U.S. 515, 517 (1975).

7. The U.S.-Florida controversy was severed from the primary case. United States v. Maine, 403 U.S. 949 (1971). Florida's argument against the federal claim differed from that of the other east coast states. *See* United States v. Maine, 420 U.S. 515, 517 n.3 (1975). Florida's contentions were adjudicated, however, in a decision reached simultaneously with the *Maine* opinion. *See* United States v. Florida, 420 U.S. 515, 528 (1975).

8. United States v. Maine, 420 U.S. 515, 518 (1975).

9. *Id.* n.4.

10. 332 U.S. 19 (1947).

11. 339 U.S. 699 (1950).

12. 339 U.S. 707 (1950).

13. United States v. Maine, 420 U.S. 515, 517-18 (1975).

14. *Id.* at 518-19. Other nations have explicit marginal sea constitutional provisions:

> In the Nation is vested the direct ownership of all natural resources of the continental shelf and the submarine shelf of the islands; of all minerals or substances, which in veins, ledges, masses or ore pockets, form deposits of a nature distinct from the components of the earth it-

the "key precedent"[15] thereto was *California*. Some examination of that 1947 precedent is, therefore, appropriate.

The *California* suit was brought against that state by the U.S. Attorney General and Solicitor General, who invoked the original jurisdiction of the Supreme Court.[16] The complaint alleged that the federal government enjoyed exclusive and paramount rights in and powers over the Pacific seabed (including offshore petroleum deposits) extending three nautical miles from the California coast and outside of that state's inland waters.[17]

California answered in relevant part that it held ownership in an offshore belt reaching three English miles[18] for its coastal low-water mark as being within her original state boundaries. California added that the thirteen original states had acquired from the English Crown title to all lands within their boundaries under navigable waters, including a three-mile belt of adjacent seas, and that since California was admitted to statehood on a footing equal with that of the original states, she at that time was vested with title to all such lands.[19]

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self, such as the minerals from which industrial metals and metalloids are extracted; deposits of precious stones, rock-salt and the deposits of salt formed by sea water; products derived from the decomposition of rocks, when subterranean works are required for their extraction; mineral or organic deposits of materials susceptible of utilization as fertilizers; solid mineral fuels; petroleum and all solid, liquid, and gaseous hydrocarbons; and the space above the national territory to the extent and within the terms fixed by international law.

In the Nation is likewise vested the ownership of the waters of the territorial seas, within the limits and terms fixed by international law; . . . .

CONSTITUTION OF MEXICO art. 27, paras. 4, 5 (1917).

The islands, keys and reefs of the adjacent seas which belong to the national territory, the continental shelf, the submarine shelf of the islands, keys and reefs, the inland marine waters, and the space above the national territory shall depend directly on the Government of the Federation, with the exception of those islands over which the States have up to the present exercised jurisdiction.

Id. art. 48.

15. Young, *Supreme Court Report: Federal Government Owns Atlantic Shore Seabed*, 61 A.B.A.J. 625, 628 (1975).

16. United States v. California, 332 U.S. 19, 22 (1947).

17. *Id.* at 22-23.

18. The federal complaint encompassed a region extending three nautical miles from shore; California alleged its boundary reached three English miles. Because one nautical mile equals 1.15 English miles, a difference arose of .45 of an English mile between the boundary of the federal claim and that of the state claim. *Id.* at 23 n.1. California pointed out that its original (1849) constitution included the three English mile claim prior to admission to the Union. *Id.* at 29.

19. *Id.* at 23.

The United States contended that the thirteen original colonies did not own the marginal belt and that the federal government had never bestowed any rights in the contested area upon the states, but rather, had retained them incident to national sovereignty.[20] In adjudicating this controversy the Court found evidence unnecessary; the legal issues were resolved following extensive legal analysis by counsel for both parties.[21]

The Court denied that the thirteen original colonies separately acquired ownership to either the three-mile belt or its subsoil, even if by their revolution they had acquired elements of the sovereignty of the English Crown.[22] The Court found no substantial historical support for the idea that the colonists desired or claimed any right to isolate the seabed for private ownership and use in extraction of wealth.[23] Only after American nationhood did U.S. statesmen require dominion over a definite marginal zone to protect neutrality.[24] By 1947, it was settled that the national political agencies claimed and exercised wide dominion and control over the three-mile marginal belt. This assertion of national dominion was found to be binding on the Court.[25]

Of major significance to the 1975 *Maine* holding was the attention paid in *California* to the federal defense/foreign relations capacity. As the Court in *California* bluntly declared: "[n]ot only has acquisition, as it were, of the three-mile belt been accomplished by the National Government, but protection and control of it has been and is a function of national external sovereignty."[26]

So critical did the Supreme Court find the national external sovereignty factor that it felt its assessment bore elaboration:

> The three-mile rule is but a recognition of the necessity that a government next to the sea must be able to protect itself from dangers incident to its location. It must have powers

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20. *Id.* at 31.

21. The Court stated:

> The legal issues thus raised have been exhaustively presented by counsel for the parties, both by brief and oral argument. Neither has suggested any necessity for the introduction of evidence, and we perceive no such necessity at this stage of the case.

Id. at 24. The Court also alluded to the "able briefs" supplying a "wealth of material." *Id.* at 31.

22. *Id.* at 31.

23. *Id.* at 32-33.

24. *Id.* at 33.

25. *Id.* at 33-34.

26. *Id.* at 34.

> of dominion and regulation in the interest of its revenues, its health, and the security of its people from wars waged on or too near its coasts. And insofar as the nation asserts its rights under international law, whatever of value may be discovered in the seas next to its shores and within its protective belt, will most naturally be appropriated for its use. But whatever any nation does in the open sea, which detracts from its common usefulness to nations, or which another nation may charge detracts from it, is a question for consideration among nations as such, and not their separate governmental units. What this Government does, or even what the states do, anywhere in the ocean, is a subject upon which the nation may enter into and assume treaty or similar international obligations.[27]

To this the Court added an observation which yet may prove prophetic in the petroleum-thirsty world of the late 1970's:[28] "The very oil about which the state and nation here contend might well become the subject of international dispute and settlement."[29]

The Court concluded that a state of the United States is not equipped within the American constitutional framework with either the authority or the facilities to exercise the duties concomitant with the dominion sought by California.[30] Even a state's authorization to exercise a local police power in the portion of the marginal belt within its declared boundaries does not detract from the paramount federal rights in and power over that area.[31] The ocean, even within the three-mile coastal belt, is of vital national consequence to the national imperatives to live peacefully in the family of nations and engage in international commerce. The Court realized that inasmuch as peace and world commerce are

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27. *Id.* at 35 (footnote omitted) (citing United States v. Belmont, 301 U.S. 324, 331-32 (1937)).

28. "The question of who owned the bed of the sea only became of great potential importance at the beginning of this century when oil was discovered there." *Id.* at 38.

29. *Id.* at 35. But appreciatively apprehend the entirely reasonable *caveat* of Mr. Justice Frankfurter:

> The fact that these oil deposits in the open sea may be vital to the national security, and important elements in the conduct of our foreign affairs, is no more relevant than is the existence of uranium deposits, wherever they may be, in determining questions of trespass to the land of which they form a part. This is not a situation where an exercise of national power is actively and presently interfered with.

Id. at 44 (Frankfurter, J., dissenting).

30. *Id.* at 35-36.

31. *Id.* at 36.

paramount responsibilities of the United States, not of the American states, wars, if they come, must be waged by the nation.[32]

Within the body of the *Maine* opinion the Court cited only two cases in addition to *California*.[33] These were the aforementioned Tidelands Cases opinions in the *Texas* and the 1950 *Louisiana* cases.

The 1950 *Louisiana* opinion adjudicated a controversy originally brought before the Supreme Court by the U.S. Attorney General and Solicitor General against Louisiana,[34] and arising out of a 1938 Louisiana statute[35] which proclaimed that state's southern boundary to be twenty-seven marine miles from the shoreline. The complaint alleged that the United States possessed paramount rights in, and full dominion over the Gulf of Mexico seabed lying up to twenty-seven marine miles off the Louisiana coast.[36] It further alleged that Louisiana, in claiming property rights adverse to the United States in the disputed seabed, had made leases for the extraction of gas and petroleum therefrom.[37]

Louisiana's answer conceded that the federal government enjoyed paramount rights in and dominion over the contested stretch of Gulf seabed to the extent of all governmental powers existing under the Constitution, laws and treaties of the U.S. Yet Louisiana insisted that, inasmuch as Congress had adopted no law proclaiming federal authority to authorize the exploitation of the Gulf seabed, no conflicting claims of governmental power existed. She therefore averred that there actually was no justiciable controversy between the parties.[38]

The Supreme Court nevertheless decided the question underlying the case. It explicitly stated that *California* was the controlling precedent, and held for the United States.[39] The Court perceived no material difference in the pre- and post-admission history of Louisiana to strengthen her claim over that of California.[40] The Court felt the actual question at issue was not the

32. *Id.* at 35 (Citing Chy Lung v. Freeman, 92 U.S. 275, 279 (1875)).

33. The *Maine* opinion does cite further non-*Maine* cases in a footnote. *See* United States v. Maine, 420 U.S. 515, 528 n.9 (1975).

34. United States v. Loiusiana, 339 U.S. 699, 700 (1950).

35. 6 Dart, La. Gen. Stats. §§ 9311.1-9311.4 (1939).

36. United States v. Louisiana, 339 U.S. 699, 701 (1950).

37. *Id.*

38. *Id.* at 702.

39. *Id.* at 704.

40. *Id.* at 705.

power of a state to use the seabed or to regulate its use in the absence of a contrary federal policy, but the power of a state to deny the paramount authority which the United States sought to assert.[41]

Federal authority over the marginal seabed, as the Court reiterated in the 1950 *Louisiana* opinion, hinges on the federal defense/foreign relations capacity:

> The marginal sea is a national, not a state concern. National interests, national responsibilities, national concerns are involved. The problems of commerce, national defense, relations with other powers, war and peace focus there. National rights must therefore be paramount in that area.[42]

Nor could the difference in offshore area claimed by Louisiana from that claimed by California salvage a more favorable judgment for the Gulf Coast state. As the Court inexorably continued:

> If, as we held in California's case, the three-mile belt is in the domain of the Nation rather than that of the separate States, it follows *a fortiori* that the ocean beyond that limit also is. The ocean seaward of the marginal belt is perhaps even more directly related to the national defense, the conduct of foreign affairs, and world commerce than is the marginal sea. Certainly it is not less so. So far as the issues presented here are concerned, Louisiana's enlargement of her boundary emphasizes the strength of the claim of the United States to this part of the ocean and the resources of the soil under that area, including oil.[43]

This statement makes clear the import attached by the Court to world commerce and foreign affairs.

The *Texas* case was a companion to the 1950 *Louisiana* opinion; the federal government's complaint was materially identical to that filed against Louisiana.[44] In 1941, Texas had attempted to extend her border to a line in the Gulf twenty-four marine miles beyond the three-mile limit, and in 1947, she had attempted to move her border to the outer edge of the continental shelf.[45] The federal government claimed paramount rights in and dominion

41. *Id.* at 704.

42. *Id.* The Court continued immediately thereafter: "That is the rationale of *United States v. California.*" *Id.*

43. *Id.* at 705-06.

44. United States v. Texas, 339 U.S. 707, 709 (1950).

45. *Id.* at 720.

over this seabed to the outer edge of the continental shelf.[46] As an affirmative defense, Texas asserted that as an independent nation, the Republic of Texas had exclusive control and jurisdiction over the Gulf seabed within three marine leagues from shore. Texas futher contended that this claim had been acquiesced in by the United States and other major nations, and that Texas had retained her exclusive jurisdiction and control following statehood.[47]

The Supreme Court assumed that as an independent republic, Texas indeed had enjoyed ownership of and full sovereignty over the marginal sea and seabed.[48] But the offshore seabed authority which Texas might then have exercised was relinquished, the Court held, upon admission to the Union.[49] The rationale here, again, was the post-admission federal defense/foreign relations capacity:

> The United States then took her [Texas'] place as respects foreign commerce, the waging of war, the making of treaties, defense of the shores, and the like. In external affairs the United States became the sole and exclusive spokesman for the Nation. We hold that as an incident to the transfer of that sovereignty any claim that Texas may have had to the marginal sea was relinquished to the United States.[50]

Moreover, the Court stated that: "[i]f the property, whatever it may be, lies seaward of low-water mark its use, disposition, management, and control involve national interests and national responsibilities. That is the source of national rights in it."[51]

The Supreme Court, in assuming that the Republic of Texas enjoyed ownership of, and full sovereignty over the marginal sea and seabed, made as favorable an assumption as is likely to be made on behalf of other jurisdictions under the American flag,

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46. *Id.* at 709.

47. *Id.* at 711.

48. *Id.* at 717.

49. *Id.* at 718.

50. *Id.* at 718. The Court continued: "We stated the reasons for this in *United States v. California* . . . ." *Id.*

51. *Id.* at 719. The Court continued: "Such is the rationale of the *California* decision, which we have applied to Louisiana's case." *Id.* But see the completely plausible dissent of Mr. Justice Reed, in which Mr. Justice Minton joined:

> The needs of defense and foreign affairs alone cannot transfer ownership of an ocean bed from a state to the Federal Government any more than they could transfer iron ore under uplands from state to federal ownership. National responsibility is no greater in respect to the marginal sea than it is toward every other particle of American territory.

Id. at 723 (Reed, J., dissenting).

such as Puerto Rico. Under the rule in *Texas*, it is implausible that Puerto Rico could prevail with a similar offshore claim. The relinquishment of claims on the Texas marginal sea was incidental to the transfer of her sovereignty to the United States. The Court specified that the transfer saw the U.S. take Texas' place with respect to foreign commerce, the waging of war, and defense of the shores. It is exactly as to such federal defense/foreign relations capacities that the United States has long since taken the place of Spain for Puerto Rico.

II. CANADA AND HER MARGINAL SEA

The leading Canadian opinion concerning the offshore seabed is *Re: Offshore Mineral Rights of British Columbia.*[52] The questions disputed therein were referred to the Supreme Court of Canada by the Governor-in-Council.[53] That Court's responses to the questions so referred are not binding, even upon the Governor-in-Council,[54] the Court's function in this regard being similar to the advisory opinion functions of the International Court of Justice.[55] This exercise of the Canadian Supreme Court contrasts with the policy of the U.S. Supreme Court.[56]

The Governor-in-Council first inquired as to the seabed and subsoil seaward from the low-water mark on the British Columbia coast, excluding inland water areas and extending to the outer limit of the Canadian territorial sea. He asked: (a) whether such lands were the property of Canada or British Columbia; (b) whether Canada or British Columbia had the right to explore and exploit

52. [1967] Can. S. Ct. 792. Prior to this case there had been no authoritative adjudication of the limits of territorial jurisdiction or ownership in a province relative to the Dominion concerning the seabeds of offshore waters. A. ABEL, CANADIAN CONSTITUTIONAL LAW 530 (4th ed. 1973).

53. *Re*: Offshore Mineral Rights of British Columbia, [1967] Can. S. Ct. 792, 796.

54. Head, *The Canadian Offshore Minerals Reference*, 18 U. TORONTO L.J. 131 (1968) [hereinafter cited as Head]. *But see* G. LAFOREST, NATIONAL RESOURCES AND PUBLIC PROPERTY UNDER THE CANADIAN CONSTITUTION 100 (1969) [hereinafter cited as LAFOREST]:

> The reference *Re: Offshore Minerals Rights of British Columbia*, of course, judicially settles the competing claims of the Dominion and British Columbia towards the territorial waters adjacent to the province.

In the *British Columbia* case, Mr. LaForest represented the Attorney General of New Brunswick. *Re*: Offshore Mineral Rights of British Columbia. [1967] Can. S. Ct. 792, 795.

55. *See* Head, note 54 *supra.*

56. *Id.* at 132.

such lands; and, (c) whether Canada or British Columbia had legislative jurisdiction relative to them (these are styled the "territorial sea" questions).[57] He also asked, relative to the seabed and subsoil resources beyond the Canadian territorial sea, as between Canada and British Columbia: (a) has Canada or British Columbia the right to exploit said resources? and, (b) has Canada or British Columbia legislative jurisdiction relative to said resources? (these are styled the "continental shelf" questions).[58]

The Attorney General of Canada proposed that all of these questions should be answered "Canada." British Columbia argued that it possessed sole legislative jurisdiction and exclusive proprietary rights in the disputed areas and enjoyed sole rights to the exploitation thereof. All of the Canadian provinces except Quebec, Manitoba, Saskatchewan and Alberta were represented on the reference, and argument was heard from their counsel; all supported British Columbia. The entry into the case by these provinces was appropriate, since eight of the ten Canadian provinces have saltwater frontage.[59]

The Court prefaced its discussion of the territorial sea and continental shelf questions with an historical outline of the status of British Columbia since before 1849.[60] Its historical survey concluded that: (1) all pre-Confederation unalienated lands (including minerals) in British Columbia had belonged to the Crown in right of the colony of British Columbia, and, (2) such lands even after union with Canada remained vested in the Crown in right of the Province of British Columbia.[61] Yet the Court conceded this left untouched the question of whether the territorial sea was within the boundaries of British Columbia at time of Confederation. British Columbia posited that the Province of British Columbia, at the time of her entry into the Union in 1871, included the territorial sea. Canada contrariwise asserted that in 1871, land below the low-water mark was regarded as outside the realm at common law, and that following union it did not become part of the province.[62]

57. *Re*: Offshore Mineral Rights of British Columbia, [1967] Can. S. Ct. 792, 796.

58. *Id.*

59. Head *supra* note 54 at 132. Professor Head added: "Only Alberta and Saskatchewan are landlocked." *Id.*

60. *Re*: Offshore Mineral Rights of British Columbia, [1967] Can. S. Ct. 792, 797-800.

61. *Id.* at 800.

62. *Id.*

The Court confessed that the British North America Act of 1867[63] was of no utility in disposing of the *British Columbia* problem.[64] While to be sure the British North America Act of 1871 provides for the realignment of provincial boundaries,[65] the court apprehended that there has never been any alteration of the borders of British Columbia under that Act, and that no other alteration method exists.[66] The Court, therefore, concluded that British Columbia bore the burden of demonstrating that in 1871 the territorial sea in fact was a part of British Columbia.[67]

The Supreme Court found of great significance,[68] in ascertaining the claim of British Columbia in 1871 to the territorial sea, the decision in *Regina v. Keyn*,[69] rendered by the English Court of Crown Cases in 1876. In *Keyn*, the commander of a foreign ship was indicted before the Central Criminal Court for manslaughter stemming from the loss of life on a British ship sunk by the commander's ship within three miles of Dover. The accused was a German national whose ship was on a voyage other than to England; his ship at the time of collision was only passing through English territorial waters.[70] A plea of jurisdiction was set up by the accused, who said that because the offense was committed outside the United Kingdom aboard a foreign ship, by a foreigner, the offense was not within the English Criminal Court's jurisdiction.[71]

The question whether the country embraced the territorial sea was directly at issue in *Keyn*. The Canadian Supreme Court in discussing the case recognized that the *Keyn* offense would have been within the jurisdiction of the English Criminal Courts had the

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63. British North America Act of 1867, 30 & 31 Vict., c.3.

64. *Re*: Offshore Mineral Rights of British Columbia, [1967] Can. S. Ct. 792, 801.

65. *See* British North America Act of 1871, 34 & 35 Vict., 28 § 2.

66. *Re*: Offshore Mineral Rights of British Columbia, [1967] Can. S. Ct. 792, 801.

67. *Id.*

68. "The Court decided that the *Keyn* case correctly stated the law." LAFOREST, *supra* note 54, at 98.

69. 2 Ex. D. 63 (1876).

70. *Re*: Offshore Mineral Rights of British Columbia, [1967] Can. S. Ct. 792, 803. The caution rightly has been put forth: "*R. v. Keyn* is a complicated case; without some knowledge of the facts it is a hopeless labyrinth." Head, *supra* note 54, at 140.

71. *Re*: Offshore Mineral Rights of British Columbia, [1967] Can. S. Ct. 792, 803-04.

incident occurred within an English county.[72] The Court of Crown Cases Reserved held that English territory ended at low-water mark, and, therefore, that no jurisdiction obtained in the English Criminal Courts.[73] The Court of Crown Cases Reserved added that the *Keyn* controversy also failed to fall within the historical jurisdiction of the Lord High Admiral, since the Admiral's jurisdiction, which begins at low-water mark, did not extend to foreign nationals on foreign ships.[74]

Due to the outcome in *Keyn*, the British Parliment enacted the Territorial Waters Jurisdiction Act of 1878,[75] which declared that every offense committed on the open sea within a single marine league of the coast of any part of Her Majesty's Dominions was encompassed within the jurisdiction of the Admiral.[76] The Supreme Court of Canada noted that the Act simply dealt with what then was perceived to be a gap in the Admiral's jurisdiction. It did not enlarge the English realm and never purported to relate to the juridical nature of British territorial waters of their seabeds: "We have to take it, therefore, that even after the enactment of the Territorial Waters Jurisdiction Act the majority opinion in *Reg. v. Keyn* that the territory of England ends at low-water mark was undisturbed."[77]

The Supreme Court was quite specific in articulating its reason for devoting such attention to the history revolving about the *Keyn* issue:

> The application of the Act of 1878 is relevant to the problem under consideration here. The Admiral's jurisdiction was made to extend to all offences committed on the open sea within one marine league of the coast of any part of Her Majesty's Dominions. The term "offence" was defined in the Act as "any act of such a nature that it would, if committed within the body of an English county, be punishable on indictment according to the law of England at the time being in force." What would have happened in 1879 if an offence had been committed within one marine league of the coast of British Columbia? Had the case come up in a British

72. *Id.* at 804.
73. *Id.*
74. *Id.*
75. Territorial Waters Jurisdiction Act of 1878, 41 & 42 Vict., c. 73.
76. *Re*: Offshore Mineral Rights of British Columbia, [1967] Can. S. Ct. 792, 805.
77. *Id.*

> Columbia court, the applicable law would not have been the criminal law of Canada, but the law of England for the time being in force. If the territory of British Columbia had extended one marine league from low-water mark, the offence would have occurred within Canada and Canadian criminal law ought to have been applicable, but by the express terms of the Territorial Waters Jurisdiction Act it was the law of England that applied. The legislation is inconsistent with any theory that in 1878 the Province of British Columbia possessed as part of its territory the solum of the territorial sea.[78]

The Court was explicit in attaching great weight to the historical grounding of the legal claims made in 1967 by British Columbia.[79]

Given its reliance on the teaching of *Keyn*, it is little wonder that the Supreme Court wrote that it was of the opinion that the territorial sea lay outside the limits of the Colony of British Columbia in 1871 and did not become part of British Columbia following union with Canada. It was also of the opinion that British Columbia did not acquire jurisdiction over the territorial sea following union with Canada.[80] But disposition of the British Columbia territorial sea claim was not sufficient to establish a case for the federal government[81] because nothing in the British North America Act transfers to the federal government the submarine resources of the territorial sea.[82]

The Supreme Court recognized that Canada today is in her own right a sovereign state,[83] as section 3 of the Statute of Westminster clearly empowers the Dominion Parliament to impose laws having extra-territorial operation.[84] At this point in its discussion of conflicting federal-provincial territorial sea claims, the Canadian

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78. *Id.*

79. There was no historical record evidencing a different rule for British Columbia, so that the colony ended at low-water mark at the date of union, and nothing had been done since union to change the situation. Accordingly, the territorial sea and its underlying resources did not belong to British Columbia.

LAFOREST, *supra* note 54, at 98.

80. *Re*: Offshore Mineral Rights of British Columbia, [1967] Can. S. Ct. 792, 814.

81. LAFOREST, *supra* note 54, at 98.

82. *Id.*

83. The Court stated:

> There can be no doubt now that Canada has become a sovereign state. Its sovereignty was acquired in the period between its separate signature of the Treaty of Versailles in 1919 and the Statute of Westminster, 1931, 22 Geo. V., c. 4.

Re: Offshore Mineral Rights of British Columbia, [1967] Can. S. Ct. 792, 816.

84. *Id.*

Supreme Court's opinion begins to resemble those opinions of the U.S. Supreme Court on the offshore seabed by alluding to the role of the federal government as international actor.

The Canadian Supreme Court's opinion recognizes that the Dominion has full constitutional capacity to assume new territories and new jurisdictional rights as may be available under international law. The Court understands "that Canada is recognized in international law as having sovereignty over a territorial sea three nautical miles wide. It is part of the territory of Canada."[85]

The Supreme Court answered the three territorial sea questions in favor of Canada. It noted:

> 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.[86]

But did these answers leave unresolved the Continental Shelf questions?

The premises of British Columbia's claim to the continental shelf were effectively negated by the Supreme Court's conclusion that she had no right to the territorial sea.[87] In so doing, the Court looked to the 1958 Geneva Convention on the Continental Shelf[88] which defines those rights that may be exercised toward exploring and exploiting the continental shelf's natural resources by a coastal state.[89] That Convention expresses the current state of interna-

85. *Id.*

86. *Id.* at 817. "The Court's opinion can be seen as a clear pronouncement on the unique ability of Canada to acquire rights available under international law." Note, *Legal Issues of the Offshore Mineral Rights Dispute in Canada*, 14 MCGILL L.J. 475, 492 (1968) [hereinafter cited as *Legal Issues*].

87. "The foundation for the argument was completely removed when the Supreme Court held that the province of British Columbia ended at low-water mark." LAFOREST, *supra* note 54, at 106.

88. Convention on the Continental Shelf, *done at Geneva*, April 29, 1958, [1964] 15 U.S.T. 471, T.I.A.S. No. 5578.

89. *Re*: Offshore Mineral Rights of British Columbia, [1967] Can. S. Ct. 792, 819.

tional law on the matter,[90] permitting a coastal state to exploit its offshore submarine area to a depth of 200 meters or beyond, where the water depth remains conducive to exploiting natural resources.[91] The Court held:

> There are two reasons why British Columbia lacks the right to explore and exploit and lacks legislative jurisdiction:
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> (1) The continental shelf is outside the boundaries of British Columbia, and
>
> (2) Canada is the sovereign state which will be recognized by international law as having the right 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.[92]

Only to the continental shelf questions did the Court attach great weight to the nature of the nation-state as international actor. Even here, the decision was premised on the territorial sea answers, which on their face had been premised not upon policy, but legal history.

Scholarly analysis of the Canadian Reference has pointed out that the policy considerations weighed so seriously in the American Tidelands Cases were also applicable in the Canadian dispute:[93] "At stake was the federal government's sovereign prerogative to conduct foreign policy, and the capacity of the provinces unilaterally to extend their boundaries seaward."[94] Yet the Supreme Court of Canada made no statement even faintly resembling the strong pro-federal language of the United States Supreme Court in *California, Texas* and the 1950 *Louisiana* opinion, looking to the federal defense/foreign relations capacity.[95] Another commentator goes so far as to say:

> The Federal argument for jurisdiction over offshore resources was so firmly based on the contention that the lands in ques-

90. *Id.* at 820.

91. LAFOREST, *supra* note 54, at 105.

92. *Re*: Offshore Mineral Rights of British Columbia, [1967] Can. S. Ct. 792, 821. "In the face of this judgment it would seem difficult for any province to mount a successful historical argument in favour of ownership of the resources of the continental shelf." LAFOREST, *supra* note 54, at 106.

93. Head, *supra* note 54, at 150.

94. *Id.* at 156-57.

95. *Id.* at 150.

tion were beyond the boundaries of British Columbia that it "bypassed" seeking a pronouncement on an anomalous aspect of the constitution, *viz*; the hindrance to Canada's ability to participate fully in the international community caused by a judicial pronouncement depriving it, in the name of provincial rights, of the legislative ability to implement treaties.[96]

III. CANADA'S MARGINAL SEA DISPUTE

It is extremely probable that further litigation of the state-federal/provincial-federal seabed issue will occur in either or both the United States and Canada. There is certainly no necessary reason at law for further litigation to fail to transpire. As the U.S. Supreme Court admitted in its *Maine* opinion: "[o]f course, the defendant States were not parties to *United States v. California* or to the [other earlier] relevant decisions and they are not precluded by res judicata from litigating the issues decided by those cases."[97] And as has been seen, the Canadian Reference determination, being only an advisory opinion, strictly speaking is not binding even on British Columbia.[98]

Whether provincial-federal disputes regarding the offshore seabed will be settled before the Canadian Supreme Court or elsewhere remains moot. Former Canadian Prime Minister, Lester B. Pearson, had promised in 1965 that if the Supreme Court found for the federal government, then Ottawa would negotiate "equitable arrangements"[99] with the coastal provinces. In Canada, in contrast to the United States, federal-provincial conflicts are settled only rarely by reference to the Supreme Court. Instead the controversies are usually resolved via negotiation.[100] Professor Edwin R. Black reportedly has suggested that the American state governments prefer impartial judicial outcomes to bargaining between political unequals as a consequence of being relatively much weaker than their provincial counterparts *vis-à-vis* the federal gov-

96. *Legal Issues, supra* note 86, at 487.

97. United States v. Maine, 420 U.S. 515, 527 (1975).

98. Logan, *Parting the Waters—Canadian Style*, GEOGRAPHICAL APPROACHES TO CANADIAN PROBLEMS 199 (R. Gentilcore, ed. 1971) [hereinafter cited as Logan]. "First, because it was a reference, the opinion of the Court was advisory only, and therefore is not a precedent binding in the technical sense." Beauchamp, Crommelin & Thompson, *Jurisdictional Problems in Canada's Offshore*, 11 ALBERTA L. REV. 341, 450 (1973) [hereinafter cited as Beauchamp].

99. Logan, *supra* note 98, at 199.

100. *Id.* at 207 n.7.

ernment. Additionally, the typical Canadian politician sees his constitution as so outdated as to be irrelevant to contemporary problem-solving.[101]

In fact, the provinces initially sought a political outcome to the offshore seabed controversy which has raged since the early 1960's.[102] For a period, the federal government seemed almost in agreement that negotiation, not litigation, was its best course.[103] Only upon consultation with its legal advisors did the Ottawa Cabinet resolve that a persuasive legal test must precede political negotiations,[104] and it was for the sake of simplicity that the reference dealt only with British Columbia.[105]

In 1967, following the Canadian Offshore Minerals Reference, the Prime Minister intimated in the House of Commons that a political settlement was being considered.[106] In 1968, the federal government moved from the legal arena to the political by publishing proposals to solve the offshore rights conflict.[107]

Ottawa thereby proposed a series of "mineral resource administration lines" off the Atlantic and Pacific coasts and in Hudson Bay, Hudson Strait and James Bay (but not in the Arctic).[108] To the landward side of these lines, the provinces would have total control over seabed resources and all revenues derived therefrom; on the seaward side, the federal government would administer the resources, but would equally divide the resulting income with the provinces. The provincial portion of the monies from the federally controlled shelf area would be paid into a national pool for distribution among the provinces.[109]

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101. *Id.*

102. Head, *supra* note 54, at 132.

103. *Id.*

104. *Id.* at 132-33.

105. *Id.* at 133. As Professor Head further comments:

> The governments of several of these provinces expressed the wish that the conflicting federal-provincial claims be dealt with by negotiation at a conference called for that purpose. The federal government, on the other hand, demurred, saying that negotiations could not properly proceed until the legal position of the parties had been made clear.

Head, *The Legal Clamor Over Canadian Offshore Minerals*, 5 ALBERTA L. REV. 312, 314 (1967) [hereinafter cited as *The Legal Clamor*].

106. Head, *supra* note 54, at 156.

107. Logan, *supra* note 98, at 201-03.

108. *Id.* at 203.

109. *Id.* Logan understandably added: "The federal proposals appear generous indeed, particularly considering the Supreme Court's finding that offshore minerals situated seaward of the low water mark are exclusive federal property." *Id.*

The federal position provoked mixed provincial responses. Those of the governments of British Columbia and Newfoundland were positive. Ontario's Premier at that time, John Robarts, admitted that Ontario's boundary in James Bay and Hudson Bay is the low-water mark, but insisted that because these are internal Canadian bodies of water, their offshore mineral resources accrue to the adjacent provinces of Ontario, Manitoba and Quebec.[110] However, only the federal government can alter provincial boundaries, and Ottawa declined to do so.[111]

Quebec, meanwhile, rigidly stood by her constitutional argument that the federal government had no role at all in offshore mineral resources management.[112] This argument is consistent with her refusal to appear before the Supreme Court in the advisory opinion, her premier stating that Quebec had ceased to accept the Canadian Supreme Court as a constitutional interpreter.[113] Quebec has long retained the position that it owned its offshore areas and that it should ignore both the advisory opinion and the federal negotiation offer.[114]

The stand early taken by Quebec was resolutely joined in late September, 1975, by Newfoundland. By that time, Newfoundland Premier Frank Moores bluntly proclaimed:

> We have oil, that's been proved. Every time they stick a well in the ground, it produces. The problem is getting control of it. It's our oil, but Ottawa wants it. If the Supreme Court decides against us, we will not accept the decision. We will secede from the Confederation, if necessary, and come back in on our own terms. We don't need a lot of offshore oil

110. *Id.* at 205. "To support its case, Ontario points out that its provincial boundaries coincide with Canada's international border in the Great Lakes (which, however, are nontidal)." *Id.*

111. *Id.* These three provinces attempted without success to tentatively agree on partition of the sea floor should Ottawa renounce jurisdiction.

112. *Id.*

113. Head, *supra* note 54, at 133-34.

114. Beauchamp, *supra* note 98, at 457. Perhaps the Quebec administration despaired at ever obtaining a more favorable later opinion: "If the historical-legalism of the decision renders the Court 'conservative' or 'restrained' by some standards, the same cannot be said in terms of its having handed down a rare unanimous and joint opinion. This is noteworthy when one realizes that between 1949 and 1960 the thirty-seven constitutional cases decided by the Court contained an *average* of four (dissenting or concurring) individual opinions. Thus, the 'strength' of the pro-federal opinion cannot be denied." *Legal Issues, supra* note 86, at 484-88 (footnotes omitted).

> and gas to satisfy the needs of our small population, but we want the first shot at what we have.[115]

Should the provinces accept the principle of mineral resource lines, it has been anticipated that powerful attempts could be made to push the lines further offshore so as to maximize the amount of purely provincial revenues. But the federal lines as originally designed already have circumvented several political difficulties.[116]

There are actually two components to provincial boundaries coterminous with the extent of Canadian internal waters: the closing lines drawn across certain harbors and bays, and the low-water lines that parallel the coast. Canada's Prime Minister, Pierre E. Trudeau, has pointed out the problems in ascertaining what would have been deemed a harbor or bay at the time each province entered Confederation; definitive resolution of these questions would be excessively time-consuming. Low-water lines constantly shift, and because of differing tidal regimes about Canada and the planet, no "low-water mark" definition is universally accepted. Ottawa surely hoped to skirt the precise definition of provincial limits by drawing mineral resource administration lines entirely within the federal sovereignty locations.[117]

It was also anticipated that the provinces might call for a larger percentage of the revenues generated from federally controlled areas.[118] Moreover, the federal government, as long ago as 1968, pointed out that the mode of division of the federally generated monies would be primarily a provincial problem. It was not at once clear whether provincial shares would be equal or whether they would relate to need, population, or length of coastline. It was not even clear whether the landlocked provinces of Saskatchewan and Alberta would receive a share.[119]

IV. ANALOGOUS FEDERAL SETTLEMENTS

Some equitable resolution of this problem should be feasible in Canada. Following the United States Supreme Court decisions

115. Moores, *If Necessary We Will Secede*, TIME CANADA, Sept. 29, 1975, at 13. For a recent discussion in provincial secession in Canada, *see* Matas, *Can Quebec Separate?*, 21 MCGILL L.J. 387 (1975).

116. Logan, *supra* note 98, at 205.

117. *Id.*

118. *Id.* at 206.

119. *Id.*

in the Tidelands Cases,[120] the U.S. Congress enacted the 1953 Submerged Lands Act.[121] In a step which was politically expedient for the federal government,[122] the Act transferred to the coastal states ownership of the seabed seaward to the territorial limits.[123] The Act released states from liability to account for any prior income received from state leases that had been granted in the marginal sea.[124]

The 1953 Outer Continental Shelf Lands Act declared the jurisdiction of the U.S. over the seabed and subsoil in the areas seaward of the territorial limits.[125] This proclamation has resulted in an awkward situation. The mutual offshore boundary between the U.S. and each coastal state is ambulatory because it is altered through accretion, erosion, or artificial changes,[126] and the Supreme Court holds that change of governmental seabed claims via boundary line movement results automatically in the extinction of the lease in the transferred area.[127]

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120. "These cases have come to be described, erroneously, as the 'tidelands' controversy." *The Legal Clamor, supra* note 105, at 324.

> It is of some interest, although certainly of minor importance, that the term 'tidelands' was erroneously given to the disputed submerged lands at the very commencement of the controversy. The term is of course a misnomer as applied to the offshore lands, as technically it is only that narrow strip of shore line over which the tide ebbs and flows. Through the years, however, everyone has firmly accepted the name of the offshore area as being the tidelands, and it has proven to be a convenient method of describing the disputed properties.

A. Lewis, *A Capusule History and the Present Status of the Tidelands Controversy*, 3 NATURAL RESOURCES LAW. 620 (1970) [hereinafter cited as Lewis].

121. Submerged Lands Act, 43 U.S.C. § 1301 (1970).

122. Note, 2 OTTAWA L. REV. 212, 218 (1967).

> There followed a bitter battle in Congress over the Supreme Court rulings. The ultimate result was the adoption by Congress of the Submerged Lands Act of 1953 which was said by its sponsors to 'restore' to the coastal states the offshore lands that were considered to be theirs prior to the Court's [Tidelands Cases] ruling.

Lewis, *supra* note 120, at 621. The Submerged Lands Act has been held constitutional by the Supreme Court. *See* Alabama v. Texas, 347 U.S. 272 (1954).

123. *The Legal Clamor, supra* note 105, at 313. The Outer Continental Shelf Lands Act, 43 U.S.C. § 1333(a)(2) (1970) applied to the areas in question the laws of the coastal states to the extent they are consistent with federal laws and are applicable. *See* Note, *supra* note 122, at 218 n.15. *See also* Beauchamp, *supra* note 98, at 465-66.

124. United States v. Maine, 420 U.S. 515, 523-24 (1975).

125. *The Legal Clamor, supra* note 105, at 313 n.10. *See* Outer Continental Shelf Lands Act, 43 U.S.C. § 1332(a) (1970).

126. Lewis, *supra* note 120, at 630.

127. *Id.*; Justice Black stated:

> [T]he Court admits that if the United States wins, the boundary between state and federal lands will be an ambulatory one, with oil leases

In Australia, a rather complex framework was constructed bypassing the constitutional separation of powers and allowing for joint state-Commonwealth arrangements concerning offshore resources whether inside or outside territorial limits.[128] Administration of offshore activity was by the states under Commonwealth supervision, and royalties were equally divided between the adjacent state and the Commonwealth.[129]

In Australia, as in Canada, offshore exploration was of little import until the early 1960's. In 1960, a corporation acquired offshore permits from the governments of Tasmania, Victoria and South Australia, triggering an offshore jurisdiction controversy. In June, 1962, the first of several conferences was held between the State Ministers for Mines and the Commonwealth Minister for National Development to discuss offshore rights.[130] Interest in offshore oil and gas exploration had peaked by the April 17, 1964 meeting of the Commonwealth Minister for National Development and the State Ministers for Mines.[131]

In Canada, the provinces had hoped to avoid litigation of the offshore questions, but the central government had resolved otherwise. In Australia, however, both the states and Commonwealth were eager to avoid litigation,[132] and an agreement was executed

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by the State constantly subject to invalidation as erosion takes its toll on the land along the shore.

Texas Boundary Case, 394 U.S. 1, 9 (1969) (Black, J., dissenting).

128. Head, *supra* note 54, at 312-13.

129. *Id.* at 313.

130. Beauchamp, *supra* note 98, at 452. Compare developments in the Federal Republic of Germany:

> The question of the continental shelf has assumed added importance in Germany since the discovery of natural gas basins near the Netherlands coast and of oil at the mouth of the Ems River. As in Australia, the *Lander* took the initiative; starting in 1963, four coastal *Lander*, represented by a joint Authority, the Mines Office of Clausthal-Zellersfeld, have granted a concession to a German consortium, which includes at least four firms controlled by foreign interests, to prospect for and then exploit the resources of their continental shelf. However, they gave that concession only insofar as they are "empowered so to do by domestic law" as well as by international law; the International Convention on the Continental Shelf came into force in June 1964 but the federal authorities have not yet recognized, at least in theory, the validity of the concession granted by the Mines Office. Instead the federal government hastened to proclaim for itself, immediately after the coming into operation of the Convention, its "sovereign and exclusive right" to the German shelf, forbidding prospecting or development undertaken without its authority.

J. BROSSARD, LES POUVOIRS EXTERIEURS DU QUEBEC 331 (1967) (translation by Professor A. Abel, U. of Toronto).

131. Beauchamp, *supra* note 98, at 452-53.

132. *Id.* at 453.

on October 16, 1967, by the six states and by the Commonwealth.[133]

The Agreement's foremost characteristics were that the parties undertook to legislate in exactly the same terms as to all offshore gas and oil operations, and that they would not unilaterally amend the legislation thus enacted absent the concurrence of all the other parties.[134] The Australian territorial seabed and continental shelf was divided into "Adjacent Areas", one to each state and coastal territory. Commonwealth legislation pertained to all such areas, but each state's legislation applied solely to its own Adjacent Area.[135]

The Adjacent Areas' seaward boundaries as defined in the second schedule to the principal Commonwealth Act were subject to the overriding provision that the Adjacent Areas encompassed only territorial waters and areas of superadjacent waters of the continental shelf.[136] Hence, internal waters as defined under international law were excluded, and the seaward limits of the Adjacent Areas were determined via the definition under international law of the limits of national jurisdiction over the continental shelf, to the degree that such limits fall within the second schedule boundaries. These latter limits were drawn far offshore in light of the ambulatory nature of the bounds of national jurisdiction defined by the Continental Shelf Convention.[137]

A single petroleum law code was provided, administration of the common code being by a "Designated Authority" for each Adjacent Area.[138] Offshore oil and gas production revenues were also to be shared by the states and Commonwealth under the Agreement. The Commonwealth netted a four percent royalty on all production, while all remaining royalties and monies went to the state from the Adjacent Area in which the funds were raised.[139]

133. Agreement relating to the Exploration for, and the Exploitation of, the Petroleum Resources, and certain other Resources, of the Continental Shelf of Australia and of certain Territories of the Commonwealth and of other Submerged Land.

134. Beauchamp, *supra* note 98, at 453.

135. *Id.*

136. *Id.* at 453-54.

137. *Id.* at 454.

138. The Designated Authority in the case of a state was the State Minister for Mines; he served as administrator for both the Commonwealth and his state. *Id.*

139. *Id.* at 454-55.

The Agreement's preamble included the declaration that the state and Commonwealth governments were not derogating from their respective constitutional powers.[140] "The concept underlying the Agreement and the uniform legislation enacted pursuant thereto is one of cooperation, not by division of areas or nature of regime, but by concurrent action to establish a single administrative regime."[141]

Through this means, the states and Commonwealth might potentially avoid such problems as might ultimately arise from a determination by the High Court of Australia either that the state boundaries lie at low-water mark or that they lie at the Australian national three-mile limit. This question had remained undecided after the High Court's opinion in *Bonser v. La Macchia*,[142] holding that the Commonwealth's "Australian waters" means more than "territorial waters."[143]

Admittedly, some criticism of this method has been elicited. A 1971 report of a Select Committee of the Australian Senate averred that despite the advantages to the national interest which the Agreement had produced, the larger national interest was not served in leaving unresolved the extent of Commonwealth and state authority in the territorial seabed and continental shelf.[144]

V. THE IMPERATIVE FOR MARGINAL SEA CERTAINTY

There undoubtedly are pressing practical imperatives toward the promptest possible resolution of Canada's federal-provincial offshore claims. The federal government issues permits for deep water drilling for petroleum off the Canadian coasts.[145] The coastal provinces have demanded that drilling companies seek provincial permission as well.[146] For that reason, some companies attempt to protect themselves by acquiring both provincial and federal permits.[147] Complications inevitably developed as the two

140. *Id.* at 455.

141. *Id.* at 456. The authors continue: "In this respect it is the opposite approach to that adopted so far in the United States and Canada." *Id.*

142. 43 A.L.J.R. 275 (1969).

143. *See* O'Connell, *The Commonwealth Fisheries Power and Bonser v. La Macchia*, 3 ADELAIDE L. REV. 500, 501 (1970).

144. Beauchamp, *supra* note 98, at 455.

145. *The Legal Clamor, supra* note 105, at 313.

146. *Id.* at 313-14.

147. *Id.* at 314.

governmental levels issued inconsistent permits.[148] Companies applying for both provincial and federal permits paid the fees required by each government,[149] and "[t]he result of these conflicting claims was not chaos, but it was expensive."[150] Overlapping permits simply constitute one of many practical difficulties.[151]

The great financial significance of American offshore resources exploitation has been invoked explicitly in urging prompt settlement of Canadian differences.[152] And this is little wonder. As the U.S. Supreme Court reminded during 1975 concerning the Submerged Lands Act and Outer Continental Shelf Lands Act:

> Since 1953, when this legislation was enacted, 33 lease sales have been held, in which 1,940 leases, embracing over eight million acres, have been issued. The Outer Continental Shelf, since 1953, has yielded over three billion barrels of oil, 19 trillion m.c.f. of natural gas, 13 million long tons of sulfur, and over four million long tons of salt. In 1973 alone, 1,081,000 barrels of oil and 8.9 billion cubic feet of natural gas were extracted daily from the Outer Continental Shelf.[153]

Other reasons exist to justify a speedy clarification of the situation in Canada. Should potential offshore oil and gas resources not be exploited within the near future, they may never be, and alternate power sources, such as nuclear energy, may displace them in the Canadian and global marketplaces.[154] In the short run, rapid exploitation of offshore oil, especially in the Atlantic, would help alleviate the Canadian balance of payments problems.[155]

VI. THE PRESSURES OF POLICY

The moment attached by the U.S. Supreme Court to policy considerations while weighing the federal defense/foreign relations capacity in the offshore seabed context arguably is practical, not

148. *Id.*

149. Head, *supra* note 54, at 134.

150. *Id. See also* Logan, *supra* note 98, at 203.

151. *Legal Issues, supra* note 86, at 484.

152. "To the money-starved federal and provincial governments, the financial stakes are high. In the United States, revenues derived from offshore oil production have amounted to billions of dollars." Logan, *supra* note 98, at 203.

153. United States v. Maine, 420 U.S. 515, 527-28 (1975).

154. Logan, *supra* note 98, at 203.

155. Under Canada's national oil policy, her petroleum needs east of the Ottawa Valley currently are met by imported oil. *Id.* at 203-04.

only for the U.S., but also for Canada. As late as 1973, Canada faced no less than six boundary questions with the nations of France, Denmark, and the United States.[156] Oil or potential oil was a factor in at least two of these disputes.

In 1971, the Maine-Nova Scotia boundary was found to be "one of the thorniest boundary questions at the moment because of the high oil and gas potential."[157] Canada had issued exploration permits for the disputed area, the northeast part of Georges Bank in the Gulf of Maine between Massachusetts and Nova Scotia, and the United States publicly had presented industry with notice that it recognized neither the validity of the Canadian permits nor the Canadian claim to sovereignty in that portion of the continental shelf.[158]

The Canadian-French boundary around St. Pierre and Miquelon was in recent years of "major concern."[159] In 1967, an oil exploration permit was issued by France which covered the islands and adjacent waters. In 1968, France passed a law, specifically including French territories overseas, which regulated and declared sovereign rights in exploration for, and development of natural resources on the continental shelf.[160] Canada retaliated by issuing to Mobil Oil and Gulf Oil permits which overlapped with those of the French.[161] By 1971, three different governments, Canada, France and Newfoundland, had awarded overlapping rights to different companies in the sea adjacent to the islands.[162]

Precisely how realistic a role Premier Moores' Newfoundland can ever hope to play in a transnational oil dispute is open to question. To be sure, of all the Canadian provinces, the Maritime Provinces and Newfoundland enjoy the strongest historical basis for sustaining territorial sea claims despite the *British Columbia*

156. Beauchamp, *supra* note 98, at 438.

157. *Id.* at 443.

158. *Id.* Canadian and American officials first met to discuss this regional boundary question on December 15, 1975, in Ottawa. In spite of these negotiations, the U.S. Interior Dept. on January 2, 1976, selected 206 offshore tracts in this area for environmental impact review prior to a scheduled oil drilling lease sale. This offended both Canadian and Massachusetts officials, with Canada expressing serious concern over the selection of tracts which are in a region claimed by Canada. Chris. Sci. Monitor, Jan. 16, 1976, at 9, col. 1.

159. Logan, *supra* note 98, at 206.

160. Beauchamp, *supra* note 98, at 447.

161. *Id.*

162. Logan, *supra* note 98, at 206.

decision.[163] Professor Ivan L. Head speculates that perhaps solely "Newfoundland, by reason of its brief attainment of independent status in the 1930's, may be able to establish a clearly singular constitutional, and therefore territorial history."[164] As to the continental shelf, Newfoundland (even more than Nova Scotia or New Brunswick) might have some historically workable claim.[165] Prior to Newfoundland's 1949 entry into the Confederation,[166] considerable state practice supported the doctrine of the continental shelf.[167] On the other hand, in 1951, Lord Asquith found in the *Abu Dhabi Arbitration*[168] that under international law the continental shelf doctrine was not yet accepted.[169]

Even were Newfoundland to eventually provide the Supreme Court of Canada with an otherwise convincing case for territorial sea and continental shelf claims, the policy considerations invoked by the United States Supreme Court in *Maine* and in the Tidelands Cases arguably ought to make the Court in Ottawa give the problem a closer scrutiny. Were Newfoundland free to dispose of her offshore seabeds substantially as she desired while defended by Canada, the resulting performance of Canada as international actor might indeed be awkward. The potential for problems arising is obvious.

VII. CONCLUSION

The preceding discussion has examined the most significant judicial decisions in Canada and the United States concerning the jurisdictional status of marginal sea exploitation. The potential for forthcoming jurisdictional clashes within Canada over marginal sea exploitation was examined, and the prospect for a broadly acceptable outcome of such clashes was touched upon through allusion to

163. LAFOREST, *supra* note 54, at 100-01. For a detailed discussion of these historical arguments, see *id.* at 100-03.

164. Head, *supra* note 54, at 143.

165. LAFOREST, *supra* note 54, at 107-08.

166. Evoy, *How the American Revolution Influenced Canada*, 3 LIBERTARIAN OPTION 5 (1975).

167. LAFOREST, *supra* note 54, at 107.

168. In the Matter of an Arbitration between Petroleum Development (Trucial Coast) Ltd. and the Sheikh of Abu Dhabi [reproduced in 1 INT'L & COMP. L. Q. 247 (1952)].

169. *See* Head, *supra* note 54, at 148. A Newfoundland claim to the continental shelf would face other legal difficulties as well. *See* LAFOREST, *supra* note 54, at 107.

politico-legal strategies depended upon in Australia and the United States. Finally, it was suggested that the danger of international rivalries over marginal sea area exploitation arguably renders persuasive an energetic federal government role in the marginal sea arena.